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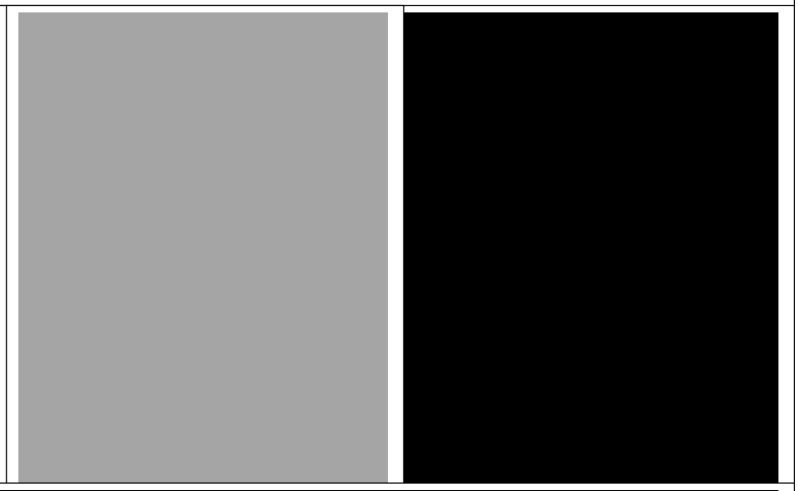
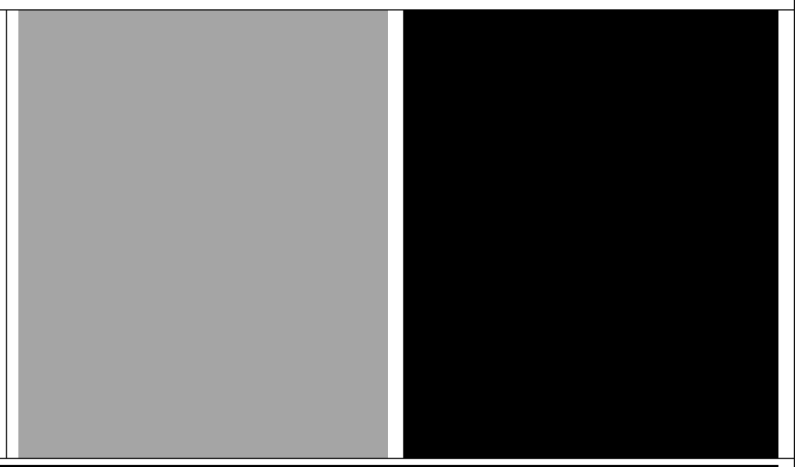
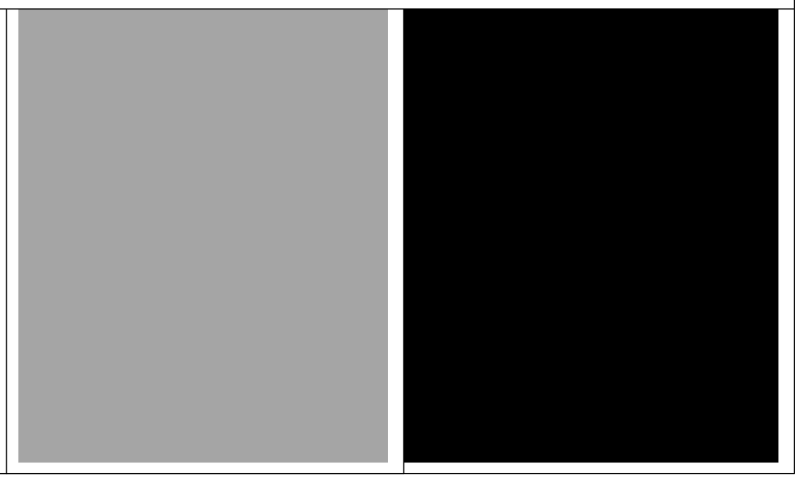


SUMMARY REPORT ON THE JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE



DEVELOPMENTAL, CAPABLE & ETHICAL STATE RESEARCH DIVISION
HUMAN SCIENCES RESEARCH COUNCIL



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PREFACE

What this compilation is and what it is not

1. This compilation is a summary of the more than 5,000 pages of reports released to both President Ramaphosa and the public over the past six months. The summary serves the purpose of providing a condensed version of the outputs of the Commission which offers an easy reference for public consumption, including politicians, business persons, academia, civil society, and the media. This summary is not a legal document; nor can it be used for legal purposes. Should there be any inconsistency between this report and the official version, the official version overrides what is contained in this report.
2. Some changes have been made in the editing and formatting of this compilation by the Human Sciences Research Council (HSRC) research team for ease of reading, making it more accessible to non-experts who are interested in a state capture narrative that has gripped the public's attention for so long. The process of summarising, simplifying and restructuring the individual reports took place over a period of about nine months with four iterations. Each researcher who worked on these documents took an oath of secrecy in front of Chief Justice Zondo and signed a confidentiality agreement.
3. Throughout the life of the Commission numerous investigators and other legal professionals and researchers made a contribution to the success of the Commission. The HSRC is proud to have been part of this momentous journey.

Brief background and context

4. The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, Including Organs of State ("the Commission") is the result of remedial action taken by the Public Protector, then Adv Thuli Madonsela, in her "State of Capture" report in terms of the Public Protector Act 23 of 1994 ("the Public Protector's report"). The power of the Public Protector to take appropriate remedial action in terms of that Act is founded upon s. 182(1)(c) of the Constitution.
5. The Public Protector's report, dated 14 October 2016, was released on 2 November 2016. Then President Mr Jacob Gedleyihlekisa Zuma ("Mr Zuma" or "former President Zuma") was directed to appoint a commission of inquiry to investigate the matters identified in the report. Failing in his attempt to have the remedial action set aside, Mr Zuma was ordered by the High Court — the Full Court of the Gauteng Division, Pretoria — on 13 December 2017 to appoint this Commission. In terms of the Court's order, the Judge who would head the Commission was to be given the power "to investigate all the issues using the record of the Public Protector's investigation and the State of Capture Report, No 6 of 2016/17 as a starting point." This order echoed the wording of paragraph 8.6 of the Public Protector's remedial action. In compliance with the Court's order, and by Proclamation No. 3 of 2018 signed on 23 January 2018 ("the Proclamation"), Mr Zuma appointed this Commission.
6. Both the Public Protector's report and the High Court judgment upholding her remedial action were foundational documents that guided the Commission in discharging its mandate. The Public Protector's report, read with the High Court judgment, thus provided the background and context within which to construe the practical meaning to be given to the concept of state capture as it appeared in the Commission's Terms of Reference (TOR).
7. The essential task of the Commission, as stated in the Proclamation, was "to investigate allegations of state capture, corruption and fraud in the Public Sector including organs of state." The TOR were likewise broad in scope, speaking of the Commission being appointed "to investigate matters of public and national interest concerning allegations of state capture, corruption and fraud." Understanding what was meant by "state capture" in the context of the Public Protector's report, the judgment and order of the High Court of 13 December 2017 and the TOR was thus central to the Commission's work.
8. As a judicial commission of inquiry, the Commission functioned on a legal and constitutional foundation. It had to make findings of fact and related issues of law. It had constantly to assess whether

facts concerning people and events were relevant to its mandate. The Commission's understanding of state capture guided it in determining how to approach the facts before it; in determining what conclusions or findings it could and should make; and in determining the resulting recommendations. While the concept of state capture was the central framing issue of concern for this Commission, neither the Public Protector's report nor the TOR defined the concept. There was also no legal definition of the concept to rely on. It was therefore necessary for the Commission to develop an appropriate definition of the term.

9. To paraphrase a submission made when the hearing of evidence before the Commission commenced: it bears emphasis that state capture is not just about corruption. It is not even just about widespread corruption. Corruption may be part of state capture but state capture is more than that. State capture, at least in theory, concerns a network of relationships, both inside and outside government, whose objective is to ensure the sustained exercise of undue influence over decision-making in government and organs of the state for private and unlawful gain. The Commission's purpose was to examine whether the evidence before it, considered altogether, indicated only a series of unrelated, ad hoc instances of corruption, or whether there had been a coordinated and deliberate project of state capture.

The Commission's Terms of Reference

10. Paragraph 1 of the TOR sets out in nine sub-paragraphs particular topics of investigation, some of them narrow and specific but others very wide in scope, on which findings and recommendations were required. In undertaking its inquiry, the Commission was expressly required to be guided by the Public Protector's State of Capture report, the Constitution, relevant legislation, policies and guidelines, as well as the order of the North Gauteng High Court of December 2017. Taking paragraph 1 of the TOR in context, it is clear that, while the nine particular topics of investigation were key ingredients in establishing whether or not state capture had occurred, they did not necessarily exhaust that inquiry. State capture is a subject in its own right with which the Commission was concerned and it was not simply subsumed under the concept of corruption, or particular instances of such conduct.

11. The following sub-paragraphs of paragraph 1 of the TOR guided the deliberations of the Commission.

    11.1 TOR 1.1 (the first part) required investigation into whether, and to what extent, there had been attempts to influence officials in any state institution by anyone through any form of inducement or gain.

    11.2 TOR 1.3 was broad in addressing the premature disclosure to the Gupta family or any other unauthorised person of appointments of any member of the National Executive, any functionary and / or office bearer; and if there was such improper disclosure, whether the President or any member of the National Executive was responsible for such conduct.

    11.3 TOR 1.4 encompassed the conduct of not only the President and National Executive but also of any public official or employee of any state-owned enterprise (SOE) in relation to the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state.

    11.4 TOR 1.5 was general in considering the nature and extent of corruption in the award of contracts and tenders by Schedule 2 public entities.

    11.5 TOR 1.9 was even more extensive in considering the nature and extent of corruption in the award of contracts and tenders by government departments, agencies and entities. Despite the expression "in particular", the second part of TOR 1.9 was just as broad in scope as the first part: whether any member of the National Executive (including the President), public official, functionary or any organ of state had influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.

12. It is clear that the TOR were concerned particularly, although not exclusively, with the conduct of executive members of the state and the nature of their relationships with private individuals, specifi-

cally the Gupta family. Since state capture was invoked expressly in the introduction to the TOR but not in any particular line item, it must follow that state capture was regarded as the overarching animating principle for the Commission when approaching the particular subjects of investigation. The Commission's mandate was not to undertake a free-floating investigation into "state capture" of every imaginable kind, but rather to apply the concept in a focused manner when evaluating evidence on the particular subject matter of the TOR.

Conclusion

13. Alongside the formal reports in the public domain, this compilation provides another layer that tries to make the volumes of work more accessible. The state capture narrative runs through these summaries, with some parts serving as 'text-book' examples of what the Commission chose to define as state capture – notably Eskom and Transnet, and others depicting a failed attempt at state capture, such as is illustrated in the National Treasury debacle.

Date: 12 December 2022

Prof Narnia Bohler-Muller
Human Sciences Research Council

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SOUTH AFRICAN AIRWAYS AND ITS ASSOCIATED COMPANIES

INTRODUCTION

1. This section of the report relates to the investigation into South African Airways SOC Limited (SAA) and its subsidiary, South African Airways Technical SOC Limited (SAAT) and South African Express (Pty) Ltd (SA Express).
2. The Commission investigated former Minister Hogan's allegations about the Mumbai route. The investigation concentrated on procurement by SAA and SAAT because, as the work of the Commission progressed, it became clear that acts of corruption and fraud within SOEs usually occurred in the procurement of goods and services.
3. The investigation also considered the general state of governance at SAA over a period of almost ten years to explore whether deficiencies in the entity's governance could have contributed to the acts of corruption and fraud that took place. It also examined whether the usual watchdog institutions and functionaries, such as the independent non-executive members of the SAA Board and the entity's auditors, performed their functions adequately.
4. It was revealed that there was a steady decline in the quality and effectiveness of the governance of SAA from 2012 onwards. This poor quality and ineffectiveness developed over the period that Ms Duduzile Myeni was the SAA Chairperson and her co-Board member, Ms Yakhe Kwinana, was SAAT Chairperson. During both their tenures, acts of corruption and fraud took place at SAA and SAAT. Committed managers, who tried to stand up to the increasingly unreasonable and unlawful demands of these Board members, were gradually removed from their positions. The auditors appointed to SAA for the 2012 to 2016 financial years failed dismally to detect any of this fraud and corruption. The internal audit function within SAA was also hopelessly ineffective in identifying or limiting these criminal acts.
5. The Commission's investigations into SAA and SAAT show that fraud and corruption took hold in these entities not only because of a wholesale failure of governance, but also because the conditions for state capture take hold when companies are depleted of responsible and accountable managers. State capture thrived in these entities because they were eventually being run, not in the interests of the people of South Africa, but in the interests of a select few who wielded power inside and outside of the entities.
6. The evidence reveals that Ms Myeni was promoted to Chairperson of the SAA Board despite being an underperforming Board member. She proceeded, through a mixture of negligence, incompetence and deliberate corrupt intent, to dismantle governance procedures at SAA, create a climate of fear and intimidation, and make a series of operational choices at SAA that saw it decline into a shambolic state.
7. From the time of her appointment as Chair, many SAA employees and government officials attempted to speak out against Ms Myeni and stop her from wreaking havoc at the SOE. However, these attempts were met with resistance at the highest level. Two successive Ministers of Finance were, despite their efforts, unable to remove her from office. In 2016, Minister Pravin Gordhan was forced to replace the entire SAA Board to "mitigate the harm" that its Chair was causing to the entity; "Ms Myeni and closely aligned members of the SAA Board, including Ms Kwinana, caused sustained damage to our national airline".
8. This section of the report firstly considers the SAA Board under Ms Cheryl Carolus from 2009 until the resignation of Ms Carolus and several of her colleagues in September 2012. It then considers the period from October 2012 when Ms Myeni was installed as the Acting Chairperson of the SAA Board. She was later appointed as Chairperson, a position she held until 2017. Over those five years, the SAA Board was slowly denuded of many of its members.

9. Matters came to a head in early 2014, when a majority of the Board members complained to the Minister of Public Enterprises (MPE) about Ms Myeni's leadership of the Board. Despite the seriousness of their concerns, Ms Myeni was not called to account for her conduct by the then Minister, Lynne Brown. In October 2014, Minister Brown retained Ms Myeni and those who supported her on the Board, including Ms Kwinana. By the end of 2015 and into 2016, when many of the acts of fraud and corruption were uncovered SAA and SAAT, the Board had been whittled down to only four non-executive members.

10. The management style and approach of both Ms Myeni and Ms Kwinana enabled acts of fraud and corruption to engulf the entities. Decision-making was driven by the benefits that would accrue to those in charge as opposed to what was in the companies' best interests. When this type of decision-making takes place in a few instances within an SOE, it may be possible to view them as isolated criminal acts. However, when it predominates and becomes the order of the day, something else is at play. State capture had taken hold because the entity had been transformed to benefit the few rather than serving the people.

11. This part of the report details how the project of state capture took hold in SAA and SAAT, and the considerable costs of this. These costs do not just lie in the millions of Rands that are lost to the taxpayer. They lie in the broken careers of people who tried to resist its stranglehold. The costs are the emotional trauma experienced when SAA managers were subjected to unlawful and invasive state security vetting. The costs are the precarious livelihoods of those who now face joblessness because these entities were driven into the ground. Finally, the costs lie in Cabinet decision-making that is motivated by the personal preferences of a President.

12. After dealing with SAA and SAAT, the section outlines the findings of a Commission investigation into allegations that high-ranking officials in the North West provincial government colluded with SA Express functionaries to syphon millions of Rands out of the provincial government's coffers to benefit themselves, their families and the ruling party.

GOVERNANCE

Function to dysfunction

The 2009 Board

13. Ms Cheryl Ann Carolus was Chair of the SAA Board from 28 September 2009 to September 2012. Ms Carolus explained that former Minister of Public Enterprises, then Ms Barbara Hogan, ensured that the Board was familiar with its role in overseeing the corporate governance of SAA and that the members adhered to "the letter and the spirit of all the pieces of legislation and practices that governed the state-owned companies and enterprises in general such as the PFMA ... and ... the newly adopted Companies Act".

14. Ms Carolus identified five key challenges that the SAA Board faced during her tenure:

    14.1 Governance failures – there were prevalent and frequent violations of the PFMA and the previous CEO was consequently suspended. The Board laid criminal charges and instituted civil actions to retrieve misappropriated money.

    14.2 Very poor levels of capitalisation, resulting in SAA being unable to keep up with competitors in terms of the aircrafts used and services offered. It lost market share and many opportunities as a result.

    14.3 SAA faced a number of criminal and civil claims for price fixing and anti-competitive behaviour.

    14.4 Management was fragmented and there were serious problems with how it behaved; there was very poor staff morale as a result.

    14.5 SAA had a weak balance sheet and was virtually bankrupt. This drastically increased the cost of financing, making expansion difficult.

15. To address these challenges, Ms Carolus explained that the first task was to appoint a competent CEO. The Board hired an international headhunting firm, and ultimately selected Ms Sizakele Mzimela, a trained banker who had spent most of her professional life at SAA and was serving as the CEO of SA Express.

The 2009 Executive

16. Ms Sizakele Petunia Mzimela was SAA GCEO from 1 April 2010 until 9 October 2012. There were various subsidiary and group companies of SAA for which she was also responsible. The CEOs of South African Travel Centre (SATC), Mango Airlines SOC Ltd ("Mango"), Air Chefs SOC Ltd ("Air Chefs") and SAAT reported to her.

17. The SAA Board then had various subcommittees. The sub-committees would make recommendations and the Board would make the ultimate decision. Below the level of CEO are the SAA General Managers.

18. Ms Mzimela testified that there were four key governance documents aside from the legislation that governed SAA. These were the Memorandum of Incorporation (MOI); the Significance and Materiality Framework; the shareholders compact; and the corporate plan. The MOI provides that the Board must have at least three and a maximum of sixteen directors. It also provides that there must be a minimum of two ex officio directors, the CEO and CFO, and that the majority of the Board must always be non-executive directors. Accordingly, there would always have to be a minimum of three non-executive directors.

19. Ms Mzimela testified that under Minister Hogan, governance at SAA was very well managed. The Minister communicated with the Board through its Chair and the CEO of SAA communicated with the DG of the DPE. All communication was formal and recorded in writing. There were monthly monitoring meetings. SAA governance enjoyed high levels of transparency, and information passed through the correct channels.

Change in shareholder

20. Ms Carolus testified that, during her tenure, the executive collaborated with DPE to design a turnaround strategy. The result was a "New Growth Strategy" (NGS) that was presented to the Board in October 2010. A key proposal in this SAA strategy was the exploration of a Mumbai route and expanding the "East-West Corridor", bringing passengers from important trading markets in Mumbai and Beijing. This strategy included the capitalisation of SAA and acquisition of a new fleet of aircraft. The NGS was presented to Minister Hogan in October 2010, and it was approved. Immediately after this, Minister Hogan was replaced with Minister Malusi Gigaba on 1 November 2010.

21. Soon thereafter, Ms Carolus described a tension developing between the Minister and the SAA Board. She explained that Minister Gigaba would publicly criticise and misrepresent the Board, which the Board felt undermined the market confidence that SAA was trying to build. The Minister would also publicly criticise the Board for being unpatriotic while commending their performance in person. Ms Mzimela testified that, in contrast to governance under Ms Hogan, under Minister Gigaba anyone in the Ministry would communicate directly with the CEO and there was no structure. This meant that issues "fell through the cracks". There was a breakdown in the division of roles in SAA.

Treasury guarantee

22. Ms Carolus testified that, in 2012, SAA was making some progress in its financial position. Between 2010 and 2012, SAA started to see small profits. Yet, because of its past performance and weak balance sheet, financial institutions were reluctant to give SAA funding. As a result, SAA required a guarantee from its shareholder to give the funders comfort and secure reduced bank interest rates by improving the risk profile of SAA. In 2012, SAA presented its capitalisation requirements to the Minister and the guarantee it needed in this regard to facilitate borrowing for a new fleet. SAA was

able to negotiate some very good deals on new available aircraft. It was therefore urgent that SAA obtain the requisite guarantees to exploit these opportunities. The guarantee was also important for SAA to ensure it was a viable going concern and was trading responsibly.

23. Ms Carolus pointed out that SAA had received a clean audit with no allegations of wrongdoing during her tenure on the Board. However, without the guarantee, the audit for that year would be qualified, because there was no certainty SAA was a going concern. In addition, the PFMA required that the financial statements be presented to DPE, among others, within five months of the end of the financial year (August 2012). SAA, therefore, could not wait for the guarantee and still comply with the PFMA requirements.

24. In addition to the PFMA annual financial statement reporting requirements, SAA was also required, under the Companies Act, to submit the financials to the AGM within six months of the end of the financial year. Waiting for the guarantee would make the annual financial statements late. The Board proposed presenting the annual financial statements at the AGM without the guarantee and therefore with qualified audited statements. The Minister, however, advised the Board that he had postponed the AGM until 25 September 2012 to secure the guarantee letter from National Treasury. Then, on the 25 September, five days before the submission deadline, the Minister advised that the meeting was no longer taking place. Ms Carolus explained that being non-compliant with the Companies Act had serious consequences for the Board members, particularly where they were directors of other major companies. She also explained that a qualified audit would have serious consequences for SAA. The Board therefore continued following up with the Minister about the AGM and the letter of guarantee. On 25 September 2012, Ms Carolus met with Minister Gigaba to ask about the letter of guarantee. He claimed he had already sent it to Ms Carolus's staff and they had "let her down". She asked him to ensure that the letter of guarantee reached her the next day.

25. At the meeting with the Minister, Ms Carolus advised him that because of the enormous risk to directors in being part of a Board that did not comply with the deadlines in the Companies Act, and because of the directors' general frustrations with Minister Gigaba's conduct, some directors had threatened to resign and she had already received one resignation letter. Ms Carolus testified that she told these directors that they had recovered SAA to the point where it had by then become a bankable proposition and they should not do it harm by resigning just a few days before their terms were due to expire. Ms Carolus explained this to the Minister, who undertook to get the letter to her the next day.

26. However, the next morning (26 September 2012) the Business Day newspaper reported on a statement released by Minister Gigaba, without any warning to the Board, indicating that the AGM was to be postponed because SAA had not finished preparing its Annual Financial Statements, which Ms Carolus said was false.

27. Ms Carolus said that, in fact, a letter and memo had been dispatched to Treasury for Minister Gordhan's attention seeking the R5 billion guarantee for going concern purposes. Minister Gordhan testified before the Commission about the process that needs to be followed when a guarantee is requested. A request goes to the Fiscal Liability Committee (FLC), which investigates and prepares a report on the request. The report is then sent to the DG and then to the Minister, who has the authority to sign the guarantee. Although the SAA Board met with Minister Gigaba and requested the guarantee in early 2012, the supporting memo sent to the FLC was dated 21 September 2012. The FLC nevertheless made a recommendation to support the request. On 26 September 2012, the DG of Treasury, Mr Lungisa Fuzile, approved the recommendation, and Minister Gordhan signed his approval the same day. It was therefore untrue that Minister Gigaba had already sent the letter of guarantee to SAA on 25 September 2012 because it did not yet exist.

28. Although Mr Gigaba was sent a rule 3.3 notice in relation to the evidence of Ms Carolus, he did not respond to it at the time of her testimony. He explained in a later affidavit to the Commission that the notice had not been brought to his attention at the time that it was sent. His responses to Ms Carolus' evidence are dealt with below.

Resignation of the Board

29. Following the Business Day report of 26 September 2012, eight of the 12 directors resigned from the SAA Board on 27 September 2012. This occurred after Ms Carolus explained to the Board at a meeting that, given Minister Gigaba's hostile and irresponsible conduct, she was going to resign as she could not trust the Minister.

30. The eight Board members issued a carefully drafted statement. They avoided making any damning statements about the Minister as this would have had catastrophic consequences for the airline and destroyed all the progress they had achieved for SAA in the financial markets during their tenure. However, the Board's relationship with Minister Gigaba began as tense and became openly hostile. The Board was faced with costly delays caused by the inaction of DPE and Minister Gigaba in failing to secure the Treasury guarantee timeously. Minister Gigaba also publicly sabotaged and maligned the Board.

The Mumbai route and the relationship between the Board and the Minister

31. Ms Carolus and Ms Mzimela both testified before the Commission about another feature of their interactions with Minister Gigaba and his special advisor, Mr Siyabonga Mahlangu. This related to SAA's Mumbai route and the efforts by Jet Airways to get SAA to close the route. According to Ms Carolus and Ms Mzimela, they were pressurised by Minister Gigaba and Mr Mahlangu to accommodate Jet Airways' requests even though it did not make commercial sense for SAA to close the route.

32. Both Mr Gigaba and Mr Mahlangu responded to these allegations in their evidence before the Commission. In Mr Mahlangu's affidavit to the Commission, he stated that he acted honestly in all dealings with SAA personnel and was not motivated by any outside interest. Mr Gigaba similarly denied placing any pressure on SAA to close the Mumbai route. He emphasised that the decision to close the route was finally taken after he had left the DPE. However, he did not dispute that he remained silent in the meetings arranged with him during which the Jet Airways representatives reprimanded Ms Mzimela for SAA's inaction in cancelling the route.

33. These two facts alone indicate that Mr Gigaba gave a level of preference to the Jet Airways representatives. It is unusual for a Minister to be willing to be delayed for two hours for a third-party representative to arrive at a meeting and then to say nothing when that representative behaves in a wholly inappropriate manner to the CEO of one of the SOEs under the Minister's portfolio. It is therefore understandable that Ms Mzimela formed the view that, because he entertained Jet Airways' representatives in this way, Mr Gigaba was communicating his support for the closure of the route.

34. As for Ms Carolus' allegations regarding Mr Gigaba's attitude to the Board and his delays in communicating the Treasury guarantee to the Board, Mr Gigaba stated in his affidavit to the Commission that he did not remember questioning the Board's capabilities or patriotism. He also denied any antagonism between him and Board members prior to their September 2012 resignation. However, this explanation does not match up with the unprecedented resignation of most of the SAA Board members days before their terms at the airline would have ended. That type of conduct is a statement. As Ms Carolus explained in her evidence, they had professional reputations to uphold. They could not accept any irregularities, unlawful conduct or even the appearance of impropriety. Compliance with the PFMA and Companies Act was a top priority for the Board.

After the resignation of the Carolus Board

35. After the SAA Board members resigned, Mr Vuyisile Kona was appointed as Acting Board Chair on 28 September 2012 and as Acting SAA CEO on 12 October 2012. Seven new non-executive Board members were also appointed, with three members of the old Board retained: Ms Myeni, Ms Kwinana and Ms Lindi Nkosi-Thomas. Because of concerns about Mr Kona acting in both positions, the Board requested the Minister to appoint another Acting Chairperson. On 7 December 2012, Minister Gigaba appointed Ms Myeni as Acting Chair. Ms Mzimela testified that she found this appointment surprising

as Ms Myeni sometimes failed to turn up for Board meetings. If she did arrive, she rarely stayed for the full duration. Her main excuse was "she now has to rush because number one has called her to a meeting".

36. Mr Kona testified that Minister Gigaba's advisor, Mr Mahlangu, played a very direct role in the affairs at SAA. He acted as the link between Mr Kona and the Minister. Mr Kona testified that he began preparing an urgent turnaround plan for SAA soon after his appointment. While busy with this, Mr Mahlangu approached him and insisted that he attend a meeting at the Gupta's house in Saxonwold. Prior to this meeting, Mr Kona had requested SAA's SCM department to issue a tender for a consultant to assist with the airline's turnaround plan and business plan. The SCM team selected Lufthansa Consulting, the cheapest of the bidders. At the Gupta meeting, Mr Kona was offered large sums of money by Mr Tony Gupta, which he refused. Mr Gupta then asked about the turnaround strategy contract and Mr Kona informed him that Lufthansa Consulting had already been awarded it. According to Mr Kona, Mr Gupta was "livid" about this.

37. Mr Kona testified that Mr Gupta even contacted the DG of Public Enterprises, Mr Tshediso Matona, to demand to know how this had happened. The DG promptly called Mr Kona to confront him about the awarding of the contract. Mr Kona testified that he received a letter a few days later from the DPE stating that it was investigating the award to Lufthansa. According to Mr Kona, the investigation revealed no irregularities and yet the DPE would not allow Mr Kona to start work with Lufthansa. Mr Kona explained that, after this, the DPE and his fellow Board members became hostile towards him, and it was clear that the DPE no longer wanted him to retain his position. Soon afterwards, Minister Gigaba told Mr Kona that, because the Board was delaying implementing the turnaround strategy, the Board must just do its own turnaround plan. Mr Kona testified that this was just a "hodge podge" set of documents for the sake of submitting something and he could not be a part of it.

38. The Board then produced legal opinions claiming that the Lufthansa contract was awarded because Mr Kona had an interest in the contract – which he denied. He contacted Minister Gigaba to try and resolve the issue. Mr Kona said that the Minister stated they could meet to discuss the matter, but this never happened. Mr Kona was ultimately suspended for reasons he says were "spurious", but which he felt was because of his refusal to cooperate with the Guptas.

39. Mr Kona testified that he approached Ms Myeni, then Acting Chair of the Board, about the meeting with the Guptas at their Saxonwold residence. He stated that Ms Myeni displayed little concern about what had transpired. He assumed Ms Myeni made some calls thereafter because he then received SMS messages from Mr Mahlangu stating that he was "compromising the mission". He was given the impression that Ms Myeni had her own agenda for how to use the Guptas to align with her own plan. By alerting her to their Saxonwold visit, Mr Kona had let her know that Mr Mahlangu and others were also trying to use these "power brokers" to advance their plans.

40. Mr Bongisizwe Mpondo, a former non-executive director of SAA appointed on 27 September 2012, provided the Commission with an affidavit. It stated that allegations of irregularities against Mr Kona came to the Board's attention around December 2012. Legal opinions were sourced which were negative towards Mr Kona, leading the Board, with the Minister's support, to suspend Mr Kona from his Acting CEO position on 11 February 2013 and remove him as a Board member on 26 February 2013. The Board and Minister appointed Mr Nico Bezuidenhout, then CEO of Mango, as the new Acting CEO.

41. Mr Siyabonga Mahlangu provided an affidavit dated 9 September 2020 to the Commission dealing with Mr Kona's allegations about his role in the meeting at the Gupta residence and thereafter. Mr Mahlangu confirmed that the meeting took place and that he was there with Mr Kona. However, he denied most other details about what transpired. He stated that he did not witness any discussion about large sums of cash or see any such wads of cash. He also said there was no discussion about the Lufthansa contract. In relation to the SMS he sent Mr Kona about "compromising the mission", Mr Mahlangu had a completely different explanation. "The mission" he was referring to related to Mr Kona's ambitions to be appointed as SAA CEO. It is not possible to determine which version of events is true.

The Board under Ms Myeni

42. This section considers the allegations made by various parties against Ms Myeni as SAA Board Chair. When Ms Myeni took office on 7 December 2012, she signed an undertaking that required that she would "observe and comply with the principles and provisions of all legislation relevant to South African Airways, the protocol on corporate governance under review and the provisions of the shareholder compact between the Board of South African Airways and the Minister of Public Enterprises," as well as "maintain and observe the highest standards of integrity and probity in the execution of my responsibilities." As illustrated below, Ms Myeni did not live up to this undertaking.

Pembroke Capital

43. Mr Mpondo's affidavit explained that, prior to the new Board appointments in 2012, SAA had concluded a deal to acquire twenty Airbus A320 narrow body aircraft. Ms Carolus explained that this was part of the strategy to capitalise SAA to allow for more regional flights and shorter distance flights to Africa and Latin America. Mr Mpondo's evidence was that the deal had been concluded but the financing had not been finalised. The Bank of China had been recommended but it pulled out of the deal. On 27 May 2013, the Board resolved to award the contract to Pembroke Capital to finance ten aircraft. The other ten would require another procurement process. At a Board meeting on 2 June 2013, the Chairperson of the Audit and Risk Committee, Ms Kwinana, raised concerns about the Pembroke transaction. However, the Board considered the matter resolved and decided not to revisit it.

44. After the 27 May 2013 resolution, an application was submitted to the Minister of Public Enterprises for approval of the Pembroke financing for the ten aircraft. However, on 20 June 2013, Ms Myeni wrote to the Minister and said that "while reference is made to ten (10) aircraft in the previous correspondence, the Board has subsequently resolved to transact on two (2) aircraft with Pembroke" (emphasis added). On 11 July 2013, Ms Myeni wrote a third letter to then Minister Gigaba claiming that the SAA Board had decided to revert to the original request for approval for the financing of ten aircraft. Mr Mpondo's affidavit explains that the Board was unaware that Ms Myeni had sent the second letter to the Minister. He said the Company Secretary circulated a memorandum to Board members to "ratify" its decision to approve the funding of two aircraft instead of ten. Mr Mpondo said this memorandum caused a "heated debate since the board had never taken such a decision." He viewed Ms Myeni's unilateral attempt to change the Board's resolution without the knowledge or approval of the Board as highly irregular.

45. Mr Mpondo's affidavit further indicated that, at a Board meeting on 22 January 2014 – which Ms Myeni did not attend – Board members raised concerns about the fact that the aircraft had not yet been delivered despite the Board voting on the decision in May 2013. This was costing SAA R2 million per month in storage fees to Airbus for not taking delivery timeously. The Board noted that a key reason for the delay was the exchange between the Chairperson and the Minister regarding Ms Myeni's attempts to change the Board's decision. At a Board meeting on 3 April 2014, which Ms Myeni again did not attend, the Board resolved that the Chair needed to account to the Board for the changes she had attempted to make to the resolution regarding the Pembroke transaction. Despite this resolution, Ms Myeni failed to account to the Board. The Board members concluded that Ms Myeni appeared to be trying to secure her own funding for the ten Airbus A320s, without involving the executive, resulting in the attempted change in the Board's funding resolution. Ms Myeni's conduct in the Pembroke transaction delayed the delivery of the aircraft, which cost SAA approximately R800m in pre-delivery payments. This led to a further cash shortfall and SAA having to increase its borrowing limits, which negatively impacted it for a long time.

46. When Ms Myeni testified before the Commission, she was asked about this transaction. It was put to her that she had lied to the Minster when she claimed that the Board had taken a decision to change the original transaction for financing of ten aircraft to only two aircraft. Ms Myeni's misrepresentation to the Minister was clear because, in a 2017 affidavit she had deposed to before the Companies and Intellectual Property Commission, she claimed that the letter she wrote to the Minister on 20 June

2013 was written on her understanding of what the Board had resolved. Ms Myeni subsequently discovered that she was mistaken and that the Board's decision had not changed. She then wrote another letter to the Minister of Public Enterprises clarifying the situation, which he accepted. But Ms Myeni had not confessed her mistake to the Minister back in 2013 when she wrote her third letter. On the contrary, her third letter claimed that the Board had taken a further decision to revert to the financing for ten aircraft. Therefore, Ms Myeni falsely represented to the Minster of Public Enterprises that the SAA Board had taken two decisions that it simply had not.

47. Fraud is the "unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another". It was put to Ms Myeni during her evidence that she had knowingly misrepresented to the Minister of Public Enterprises in 2013 that the SAA Board had resolved to change the Pembroke transaction in circumstances where she knew that they had not done so. Ms Myeni refused to answer these questions, citing her privilege against self-incrimination. She was later called back to the Commission to address some of these questions.

The privilege against self-incrimination

48. Ms Myeni's invocation of the privilege was, at times, abused during her evidence. Whenever the privilege was being abused because the question put to her was innocuous and could not reasonably result in an incriminating answer, the evidence leader recorded it as an abuse. Ms Myeni also abused the privilege in another way. In some instances, she would be asked a question, to which she would provide a lengthy answer. When the evidence leader asked a more difficult follow-up question, Ms Myeni would invoke the privilege. On each occasion the evidence leader recorded the privilege as being abused.

49. The Commission takes a dim view of a witness who conveniently invokes the privilege against self-incrimination. Ms Myeni's own testimony reflects the abuse of the privilege because she often described herself as "not comfortable" answering the questions; she said that they were showing her in a "bad light"; she said that she did not want to answer because of pending civil proceedings against her or because the NPA was investigating matters. These are not valid grounds for invoking the privilege. This was explained at the outset of Ms Myeni's evidence, yet she continued to invoke the privilege when there was no legally justifiable basis for doing so. Where she did invoke the privilege in circumstances where it could legitimately be invoked, the Commission explained that her failure to deal with these issues would mean the evidence against her was uncontested and findings could then be made based on the uncontested evidence against her. The Pembroke transaction is one such instance where the evidence against Ms Myeni is undisputed and overwhelming. Ms Myeni, as SAA Board Chairperson, lied to the Minister of Public Enterprises on two occasions when she claimed that the Board had taken two decisions that it had not taken. This caused financial loss.

50. After Ms Myeni testified, the Constitutional Court handed down judgment in the matter of Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma 2021 (5) SA 1 (CC) on 28 January 2021. The judgment dealt with the invocation of privilege against self-incrimination by witnesses who testified at the Commission. In light of this judgment, Ms Myeni was sent a copy of the submissions that the Legal Team intended to make that she had abused the privilege against self-incrimination. She was summonsed to appear before the Commission on 25 May 2021 to deal with this issue, but failed to appear. This breached the Commission's Act, so it was ruled that a charge should be laid with the police. Ms Myeni then made herself available for questioning. Since valuable time had been lost, the evidence leader proposed that Ms Myeni answer the questions by affidavit. She confirmed that she no longer objected to answering the questions, but the affidavit subsequently received from her was not comprehensive, consisting mainly of one-word answers and claims that she had no knowledge of certain matters. It was therefore of no use to the Commission and indicated that Ms Myeni was continuing her strategy of avoiding the Commission's questions.

51. It is important to emphasise that the questions put to Ms Myeni on affidavit were only about the questions where the Legal Team regarded her as having abused her privilege against self-incrimination – that is, where there was no discernible criminal offence associated with the possible answers to the

question. Ms Myeni was not simply re-asked all the questions put to her in her three days of evidence. Those questions remain unanswered. Ms Myeni's conduct when summonsed to return on 25 May 2021 is consistent with a witness who will go to great lengths to avoid being questioned.

The disclosure of Mr X's identity

52. Ms Myeni's conduct revealed a sustained disdain for the authority and processes of the Commission. During her first evidence session in November 2020, she disclosed the identity of a witness. The Commission had previously ruled that this witness' identity should not be revealed because of concerns for his and his family's safety and security. The witness, Mr X, gave evidence of a scheme from which he received money from the bank account of Ms Myeni's son, Mr Thalente Myeni.

53. According to Mr X, he had no business dealings with Mr T or his business, "Premier Attraction". Despite this, R 3.15 million was paid into Mr X's company's bank account in three tranches in late 2015 and early 2016. After receiving the money, Ms Myeni contacted Mr X and instructed him to pay the money out. Some of it was withdrawn in cash and then given to Ms Myeni or dropped off at her home. There were also two large amounts that were paid into a bank account for which Ms Myeni provided the banking details. Mr X testified that, at the time that he made the payments in accordance with Ms Myeni's instructions, he did not know who the holder of the bank account was. However, when initially questioned by the Commission's investigators, he was told that the payments were made to the Jacob Zuma Foundation.

54. The Commission traced the money Mr X received from Mr Myeni's business to a R2 million payment from VNA Consulting. VNA Consulting had been involved in a housing project in the Free State and had used some of the monies it received on that project to pay Mr Myeni's business, Premier Attraction. So, the money appears to have originated from the Free State government's coffers, been paid to VNA Consulting, then to Mr Myeni's business, then to Mr X's company's bank account, and then, on instruction by Ms Myeni, into the bank account for the Jacob Zuma Foundation. When questioned at the Commission about his involvement in this arrangement, Mr Myeni claimed that the dealings with VNA Consulting and Mr X were legitimate, despite Mr X's denial of any business relationship with him. MrT Myeni's claims that these were all legitimate business dealings cannot be accepted as correct. He was extremely vague in his testimony about the work with VNA Consulting. He was unable to provide any details of the precise work that would earn his company R2 million. He could not recall the period over which the work was to be done. Despite being summonsed by the Commission to produce documentary evidence of this business relationship, Mr Myeni could not produce a single document.

55. The Commission saw several instances of this type of alleged "business dealings" during its hearings. The absence of supporting documentation is a compelling indicator that no genuine business relationship existed.

56. Mr Myeni's version must also be assessed against that of Mr X. Mr X was a candid and frank witness. He made it clear at the end of his testimony that he did not want to be testifying before the Commission, but he realised he had no choice but to tell the full story when all the documents and records of the bank transactions were presented to him by the Commission's investigators. He also gave evidence at the Commission despite the threat this posed to his own and his family's well-being. Mr X's story is the story of someone who got caught up in what appears to be a criminal scheme. Although he was a reluctant witness, he came before the Commission to explain his conduct in a forthright manner. This was in stark contrast to Mr Myeni's evasive approach when being questioned.

57. The evidence presented at the Commission indicates that the dealings between VNA Consulting, Premier Attraction (Mr Thalente Myeni's business), Mr X's business, Ms Duduzile Myeni, and the Jacob Zuma Foundation were not arms-length business dealings. The flow of funds from the Free State to these individuals and entities needs to be further investigated to establish whether there was a corrupt relationship between any of them. Mr X did not deserve to have his identity revealed by Ms Myeni. When Ms Myeni did so during her testimony before the Commission, a criminal charge was

laid against her for obstructing the Commission in performing its functions. However, no arrest was made.

The Board evaluation by IoDSA

58. It is now necessary to return to the situation at SAA in 2014 because, as highlighted above, during early 2014 there was a material breakdown at Board level at SAA. Several directors expressed grave misgivings about Ms Myeni's leadership of the Board. Given this situation, the Institute of Directors of South Africa (IoDSA) was tasked with evaluating the SAA Board. According to Mr Mpondo, Ms Myeni insisted that Board members be interviewed for the evaluation instead of completing it electronically. The rest of the Board was unhappy with this because it would delay the preparation of the AGM pack for the 29 January 2014 meeting. The pack was delayed unduly because the evaluation report was not forthcoming. It was eventually presented in hardcopy at the AGM. The Board requested that the Chair explain why she held back the report. Mr Mpondo stated that it reflected the governance and leadership issues facing SAA at the time.

The letter of complaint and mass resignations of Board members

59. Mr Mpondo's affidavit stated that, at a SAA Board meeting on 22 January 2014, it was resolved that there were challenges with Ms Myeni's leadership of the Board. On 28 January 2014, six Board members wrote a letter to Ms Myeni regarding concerns with her leadership, copying in Minister Gigaba. The letter was signed by all Board members except Ms Kwinana, Ms Nkosi-Thomas and Dr Naithani. The letter dealt with the following issues:

    59.1 The Chair undermined the narrow body fleet financing process by Pembroke.

    59.2 The procurement process for the wide body fleet was irregular – Ms Myeni as the Board Chair appeared unaware that a RFP had been issued by SAA management, despite the requirement in SAA's MOI that Ministerial approval must be sought by the Chair before any procurement processes for a major asset.

    59.3 Losses were caused by the Chair's procrastination. First, Ms Myeni's conduct in the Pembroke transaction caused delays which cost SAA R800 million. Second, Ms Myeni refused the Board's request to convene meetings to finalise the wide-body acquisition process, resulting in SAA missing out on the delivery of fuel-efficient aircraft for the 2016/2017 year, leading to financial losses.

    59.4 The Chair initiated forensic investigations into three Board members without following the process set out in the SAA Internal Audit Charter. The Board stated: "We refuse to be managed by fear and victimization."

    59.5 The Chairperson sowed confusion in Board Committees and interfered in their operations, to the extent that the Chair claimed to be a member of all Board Committees. This compromised the Chair's impartiality.

    59.6 The Chair was responsible for various inefficiencies. These included the poor administration of the Board, causing the company financial loss; lack of planning for the 2014 AGM; the Chair's non-attendance at key meetings or failure to provide reports for the Board to consider ahead of meetings.

    59.7 The Chair disregarded Board resolutions.

60. The letter concluded: "This letter demonstrates repeat transgressions of corporate governance, undermining due process by the Board and a lack of diligence and care on the part of the Chairperson on extremely important matters. All the examples employed above are illustrative of a leadership style that potentially will expose all serving Board members to liability."

61. The signatories to the letter first attempted to meet with Ms Myeni to deal with these challenges, which the Chair rejected, so the members resorted to the letter. The Chair responded to the letter by

refusing to meet to discuss the issues. Ms Nkosi-Thomas resigned from the Board in March 2014. On 3 April 2014, the Board requested that the Company Secretary prepare an assessment of the Board's effectiveness, which was presented at a meeting on 29 May 2014. The report concluded that:

61.1 The Board was not a coherent team

61.2 The Chair failed to fulfil the mandate set out in the Board Charter of maintaining a dialogue with, and guiding, the CEO – the two did not meet

61.3 The Chair twice attempted to place a moratorium on board meetings

61.4 The Board raised serious issues of leadership that remained unresolved

61.5 One of the Board members transmitted a memorandum from the Chairperson to the AG to investigate before the Board could deliberate and investigate the issues raised. This was calculated to undermine internal processes; and

61.6 The Chairperson sent a letter directly to the Minister about the financial position of SAA without first consulting the Board.

62. The Board resolved to write to DPE to request a session between the Minister and the Board. The Board took advice that it could initiate a process, in consultation with the Minister, to invoke the provisions of section 71(3)(b) of the Companies Act to remove Ms Myeni as a director. Minister Gigaba convened a meeting to mediate between all the parties but the Chair did not arrive. Mr Gigaba was subsequently replaced by Ms Lynne Brown as Minister of Public Enterprises. In June 2014, the new Minister convened a meeting with the Board. The Board members raised all the issues outlined in their letter. After the meeting, the Minister requested that DPE officials prepare a report on SAA's leadership issues. This report, dated 30 July 2014, concluded that the Board was completely dysfunctional.

63. On 14 October 2014, the Board members received a notice of a special general meeting of the company. The notice stated that the meeting was convened to consider removing the seven Board members that signed the letter to the Minister about Ms Myeni, as well as Dr Naithani. Mr Mpondo stated he was surprised at this because there was no indication that the Minister was unhappy with the Board's performance. Given the content of the notice, it appeared that there was a predetermined outcome. Mr Mpondo decided to resign from the Board. Ms Myeni was not, however, asked to account to the Minister.

64. Ms Myeni was asked during her testimony about the Board's resignation and the contents of the letter they sent to the Minister complaining about her. She was also asked why it was that the Minister would only ask the other Board members to account for why they should not be removed and never questioned Ms Myeni. Ms Myeni invoked her privilege against self-incrimination in respect of these questions. Mr Mpondo's affidavit was also put to Ms Myeni. The affidavit described the considerable steps that the Board had taken to report Ms Myeni's deficiencies to the Minister, Ms Myeni's failure to show up at the meeting scheduled with Minister Gigaba and the DG to try to resolve the issues, and the report sent to Minister Brown about Ms Myeni. Ms Myeni again invoked her privilege against self-incrimination in response. Her failure to give any contrary version on these events means that Mr Mpondo's affidavit is uncontested. There is no reason why the Commission should not accept Mr Mpondo's version, not only because it has not been denied by Ms Myeni, but also because it is supported by two independent sources of corroboration. Both the SAA Company Secretary's report and the DPE report confirmed that the SAA Board was completely dysfunctional by 2014 and recorded serious concerns about the way Ms Myeni was discharging her functions as Chair of the Board. Despite all these concerns, in October 2014, Minister Brown retained Ms Myeni on the Board, together with Ms Kwinana and Dr Naithani. They were joined by two new Board appointments – Mr Anthony Dixon and Dr John Tambi.

65. Ms Brown provided an affidavit to the Commission dealing with the issue of Ms Myeni's retention on the SAA Board despite complaints from most Board members. Although Ms Brown was concerned with issues of corporate governance when she took over the Public Enterprises portfolio in May

2014, she stated that "the issue of Ms Myeni as an individual Board Chairperson was not a priority". She further explained that she had not been informed "about each fibre of Ms Myeni's conduct or the conduct of the other Board members". She therefore stated that she "could not take action against Ms Myeni or any other Board member in the abstract". However, later in her affidavit she acknowledged that "there was a flurry of allegations and counter allegations making it difficult to make an objective grounded determination as to exactly who [had] failed to fulfil his/her duties".

66. On the critical issue of why only the complaining Board members had been called on by the Minister to explain why they should not be removed, Ms Brown said she could not remember whether Ms Kwinana or Ms Myeni had also been given letters to explain their conduct. The records the Commission obtained from the Department do not include any such letters, and they were probably not sent. Ms Brown's answer to this key issue was unsatisfactory. Her affidavit concluded by saying that Ms Myeni and Ms Kwinana were the only remaining Board members when the others resigned, and they were retained to ensure continuity. However, this begs the question: continuity for what purpose? The account by most of the Board was that Ms Myeni had chaired a hopelessly dysfunctional board and acted improperly and in breach of her duties. That is not the type of continuity that a Minister should be looking for in an SOE. The Minister's explanation for failing to deal with or meaningfully investigate serious, fundamental concerns about the organisation's leadership is inexcusable.

67. In his affidavit to the Commission, Minister Gordhan stated that by January 2015, the SAA Board "had shrunk in size and been eroded in terms of its skills and expertise leaving only Ms Myeni, Ms Kwinana and Dr Tambi on the SAA Board. The Board was thus under-capacitated." Mr Dixon was also on the Board at that time but resigned in November 2015. This was as good as SAA having no board at all. That this situation was allowed to happen at an SOE was, to say the least, scandalous, particularly when Ministers Gigaba and Brown had been told about these challenges at SAA. The events that unfolded under this under-capacitated Board were devastating for SAA.

THE TRANSACTIONS

Airbus swap and Emirates deal

68. The Airbus swap transaction and the Emirates deal have been the subject matter of OUTA's High Court application to declare Ms Myeni a delinquent director under the Companies Act. OUTA was successful in the High Court (*Organisation Undoing Tax Abuse and Others v Myeni* [2020] ZAGPPHC 169). The High Court's judgment makes numerous findings against Ms Myeni in justifying its order to have her declared delinquent. The judgment finds that Ms Myeni failed to attend meetings, displayed negligence in her dealings as Board Chairperson, often had opaque motives for obstructing advantageous measures for SAA, was a close confidant of former President Zuma, and appeared to want to promote transformation and local development at the expense of other principles of process and good governance and SAA's welfare and continued survival.

69. With respect to the transaction with Emirates, the High Court found as follows:

    69.1 SAA had a code-sharing relationship with Emirates that generated profits of over R170 million per year. The agreement involved SAA purchasing Emirates flights at a reduced rate and selling them to customers at a profit. Conducting international flights with the heavy Airbus 340-600 aircraft was inefficient and made it hard for SAA to run these routes profitably. Securing an enhanced code-sharing arrangement with a Middle Eastern airline to increase networks was therefore a key SAA priority in 2013.

    69.2 At first, SAA had a deal with Etihad, but it was causing SAA major losses. In January 2015, Emirates approached SAA with a proposal for enhanced code-sharing. The deal was very beneficial to SAA., and SAA Management prepared a Memorandum of Understanding (MOU) and shared it with the Board. Ms Myeni got involved in the operational aspect of the deal and insisted on attending Emirates meetings, which was highly unusual. This included Ms Myeni travelling to Dubai. Management hoped to conclude the MOU at the meeting, but Ms Myeni cancelled it

last minute for unexplained reasons. This was treated as disrespectful by Emirates and Dubai officials.

69.3 There was a second opportunity for a meeting in Cape Town and Ms Myeni was personally invited to attend by the Emirates CEO. She failed to show up. SAA and Emirates executives met and a draft non-binding MOU was concluded. Ms Myeni delayed the MOU finalisation, including setting up a committee to assess the non-binding MOU and cancelling plans to conclude the MOU. The MOU was scheduled to be concluded at a formal ceremony with international media invited. Ms Myeni called the executive to say the President had instructed them not to sign the MOU. The ceremony was called off, causing national embarrassment, ruining the Emirates deal, and hampering relations with Etihad and other partners.

69.4 Ms Myeni continued to be an obstacle to the MOU conclusion – citing undisclosed concerns. Eventually, every member of the SAA team responsible for engaging with Emirates was removed or resigned. The High Court found that her reasons for frustrating and sabotaging the deal were unclear. It concluded that Ms Myeni's actions "led to irreparable harm for SAA and the country. What motivated these reckless and detrimental actions to SAA and country, we still do now know. Ms Myeni acted recklessly and broke her fiduciary duty in sabotaging this deal and the people of South Africa and SAA's employees are paying the price for her actions." There is no doubt that what happened during Ms Myeni's tenure as Board Chair contributed significantly to SAA being placed under business rescue in 2020.

70. The High Court also found the following with respect to the Airbus swap deal:

70.1 Ms Myeni tried to stop a transaction between Airbus and SAA, in terms of which SAA sought to cancel a legacy contract for the purchase of 10 Airbus A320-200s and replace it with a new deal for SAA to lease five airbuses directly from Airbus. This would have allowed SAA to escape onerous pre-delivery payments and inflated prices under the old contract. The matter was extremely urgent as SAA was liable to pay R1 billion to Airbus in 2015. Default would risk triggering other loan obligations, meaning billions of rand would be due immediately, with a knock-on effect on government debts.

70.2 The Airbus deal was very beneficial to SAA, allowing the replacement of the old fleet with more fuel-efficient, lighter aircraft in line with SAA's network and fleet plan. Treasury approved the deal. All that was required was the SAA Board's resolution to ratify the documents. This deal was a key condition to getting further guarantees from government. Ms Myeni failed to meet the deadline and did not ratify the deal. The Board then began questioning the deal. Rather than just ratifying the agreements, Ms Myeni, Ms Kwinana and Dr Tambi started engaging directly with Airbus to renegotiate the deal, which was highly irregular. The Board continued delaying the deal finalisation. Ms Myeni even wrote directly (without any consultation) to the President of Airbus to try and agree on new terms.

70.3 Ms Myeni offered no plausible explanation for her delay or her actions. Again, she cited unspecified concerns. She then appointed a transaction advisor, without any processes in place, which was unlawful. The advisor's proposal showed a lack of understanding of the transaction and inability to advise on the matter. Meanwhile, National Treasury corresponded with Ms Myeni, warning her of the danger she was putting SAA in. All senior executives who opposed Ms Myeni's plan to change the transaction were removed. She sent out an inaccurate section 54 application to the Minister of Finance (Mr Nene) regarding her amended version of the Airbus plan. The Minister declined Ms Myeni's request and instructed her to approve the Swap Transaction without delay.

70.4 On 9 December 2015, Minister Nene was fired by President Zuma and replaced by Mr D Van Rooyen, who, in turn, was replaced four days later by Mr Pravin Gordhan. When Minister Gordhan came into office, he allowed Ms Myeni one final opportunity to make her case. She failed to attend the meeting with Minister Gordhan, instead sending another section 54 application, which was rejected. During this period, Ms Kwinana resigned from the Board. Eventually Treasury intervened to save the swap.

70.5 The High Court found that "faced with all these risks, Ms Myeni's attitude seemed to be one of supine indifference" and her reasoning was "generally incomprehensible". As Board Chair she "did not show any concern for the catastrophic consequences of her actions for SAA and the country."

71. Former Minister Nene testified about a meeting in November 2015 to which he was summoned by former President Zuma, and which was also attended by Ms Myeni. Mr Nene was called to the meeting after he had shared concerns about Ms Myeni's leadership of SAA in an ANC meeting. Minister Nene testified that he complained about Ms Myeni during the meeting and said to former President Zuma that she was obstructive and the Board acted recklessly under her leadership. He recommended that she be removed from office. He emphasised that, because of Ms Myeni's conduct in the Airbus swap transaction, there was a serious threat that the airline would default on its obligations, which would have a ripple effect across the economy. Mr Nene testified that he believed his removal as Minister of Finance was linked to the views he expressed about Ms Myeni at the meeting with Mr Zuma and Ms Myeni.

72. During her evidence, Ms Myeni was asked how she persuaded the former President to keep her on as a SAA Board member and as its Chairperson. She was also asked whether her retention on the Board had to do with Minister Nene's removal as Finance Minister. Ms Myeni refused to answer and invoked her privilege against self-incrimination. When she responded to these questions on affidavit, she said she may have attended a meeting with former President Zuma at which Minister Nene was present. However, beyond that, she disputed all the Minister's evidence.

73. Ms Myeni was asked whether she requested President Zuma to call Minister Gordhan and ask him to reconsider his refusal to reverse Minister Nene's decision on the Airbus swap transaction. She refused to answer and invoked her privilege against self-incrimination. It was also put to Ms Myeni that two finance Ministers had testified that her approach to SAA was reckless. Again, she refused to answer and invoked her privilege against self-incrimination. The evidence of former Ministers Nene and Gordhan on their interactions with Ms Myeni and former President Zuma stands uncontested, apart from a self-serving denial in Ms Myeni's affidavit about Mr Nene's account of the meeting with Mr Zuma. There is no reason why the Ministers' evidence should not be accepted.

General interference by the Board in operational matters

74. Ms Mathulwane Emily Mpshe was appointed as Acting CEO in July 2015, replacing Mr Nico Bezuidenhout. She remained in that position until November 2015, when she was replaced by Mr Musa Zwane. Ms Mpshe testified that she was notified in July 2015 that Mr Bezuidenhout was returning to Mango Airlines and that Ms Myeni instructed that she be appointed as Acting CEO. Ms Mpshe testified that there were numerous instances of Board members interfering with operational matters that ought to have been the exclusive responsibility of SAA management. Non-executive directors, and particularly Ms Myeni as Chair, would get heavily involved in, and issue instructions on, the appointment or discipline of employees. Ms Mpshe explained that this was inappropriate because these instructions were contrary to SAA employment procedures and policies and because SAA was in the process of retrenching large numbers of employees. She raised these concerns to no avail.

75. The Board also took decisions that were contrary to the advice of management. When these decisions were probed during the Commission's hearings, it became clear that they were unjustified. In some instances, the decisions were so lacking in rationality that the only explanation for the Board's conduct appears to have been some ulterior purpose. These examples are dealt with below.

LSG Sky Chefs / Air Chefs

76. Ms Mpshe testified that, in 2015, an SAA subsidiary, Air Chefs, was servicing SAA lounges. However, customers were complaining about the service. The SAA lounges had stopped being competitive, so Investec partnered with SAA to revamp them. Part of the revamp involved a tender for a catering company. The contract went out to tender for an amount of R85 million over three years. Air Chefs

was among the invited bidders. Another invited bidder was LSG Sky Chefs South Africa (Pty) Ltd. Ms Msphe testified that this company was a subsidiary of Lufthansa Airlines, a German company. It was a South African registered, locally-based company employing South Africans, and had the necessary BEE credentials.

77. Dr Masimba Dahwa, the Head of Procurement at SAA in 2015, testified that a full formal procurement and evaluations process had been done for the airport lounge catering. Given that value of the contract, it fell within Ms Mpshe's authority as Acting CEO to approve it. After the procurement process was completed and LSG Sky Chefs was selected, Ms Mpshe prepared a submission to the SAA Board to notify it that there would be a new service provider after the renovated lounges opened. The submission, dated 20 August 2015, informed the Board of the following:

    77.1 The deterioration of service and product quality provided by Air Chefs at OR Tambo International Airport, leading to complaints, reputational and commercial harm to SAA, and a loss of customers to competitor lounges

    77.2 SAA management had several interactions with Air Chefs about the deteriorating quality, but there had been no improvement. SAA had no alternative but to tender for a suitable catering service, as the level and standard of service was part of the contractual obligation SAA had to Investec as part of their lounge upgrading partnership

    77.3 SAA received three responses to the bid, from (1) LSG Sky Chefs; (2) Air Chefs; and (3) Dnata-Newrest. A full, lawful procurement process was conducted. Air Chefs did not meet the minimum criteria for the tender and was excluded. Of the other tenderers, LSG Sky Chefs had the lowest price; and

    77.4 Air Chefs would lose R18 million in revenue per annum and there would be a negligible negative impact on net profit of R1.8 million per annum. Consideration was given to the implications of taking business away from Air Chefs versus retaining customers in a highly competitive market. It was noted that lounge catering represented only a small portion of services rendered by Air Chefs in relation to the total SAA account.

78. Ms Mpshe testified that, in the negotiations between SAA and LSG Sky Chefs, the parties agreed that LSG Sky Chefs would take over the Air Chefs employees and there would be no loss of employment, even though Air Chefs was not awarded the tender.

79. On 21 August 2015, Dr Dahwa sent a letter of award to LSG Sky Chefs confirming that it had been awarded the catering contract. On 1 September 2015, Ms Mpshe, Ms Myeni and Dr Dahwa attended a Parliamentary Portfolio Committee meeting where the issue of SAA awarding the tender to a "German company" was discussed at length. According to Ms Mpshe, Ms Myeni told Parliament that she had been surprised to learn that SAA had been awarding contracts to German companies. Ms Mpshe testified that when the SAA delegation left the Portfolio Committee, Ms Myeni was irate that business was being taken from a local company and given to a "foreign" company, and began berating Ms Mpshe in front of her colleagues. Ms Mpshe responded by saying that her correspondence to Ms Myeni had already addressed her concerns.

80. On 2 September 2015, Ms Myeni sent Ms Mpshe an email instructing her not to award the tender to LSG Sky Chefs. Ms Mpshe responded that the contract had already been awarded and that her submission to the Board had simply been a notification. She also clarified that LSG Sky Chefs were the legitimate successful bidders. Ms Myeni asked her why Air Chefs were excluded. After checking with Dr Dahwa, Ms Mpshe told Ms Myeni that Air Chefs was excluded because they had not submitted the full documentation needed to be eligible for the tender. On 3 September 2015, Ms Kwinana emailed Ms Mpshe stating that the award had to be cancelled; that she was "disturbed by this decision which is killing SAA subsidiary"; and that "this looks like treason and I request this to be investigated by the SIU". Thereafter, Ms Myeni emailed Ms Mpshe stating that she had to cancel the LSG Sky Chefs award, and that she had a responsibility to support a SAA subsidiary. Ms Myeni also stated that she was Board Chair of Air Chefs at the time, which Ms Mpshe believed was a conflict of interest.

81. In response, Ms Mpshe gathered all information from Dr Dahwa about the procurement process. SAA's legal department also expressed the view that LSG Sky Chefs was appointed following a lawful procurement process, and that cancellation or suspension of the award could result in legal action against SAA. The opinion was provided to the Board. Ms Mpshe prepared a comprehensive response and circulated it to all Board members on 8 September 2015. In this response, she clarified that:

    81.1 There were not going to be any job losses, which was a tender condition

    81.2 LSG Sky Chefs was a South African entity which locally sourced and produced products procured by SAA

    81.3 The lounge services only represented 4.265% of Air Chefs' total annual revenue, so the revenue loss would be negligible

    81.4 A letter of award had already been issued to LSG Sky Chefs on 21 August 2015, and it had already begun implementing operational requirements

    81.5 The tender was awarded following a Bid Adjudication Committee (*BAC*) recommendation after due process had been followed

    81.6 Cancellation of the award would result in litigation and financial exposure against SAA; and

    81.7 Air Chefs failed to meet the initial minimum threshold for evaluation in the tender and was lawfully excluded from proceeding to further stages of the evaluation.

82. Ms Mpshe met with the rest of the Board on 28 and 29 September 2015 about whether to cancel the LSG tender award. Despite the legal department's warning and extensive explanations by Ms Mpshe, the Board decided to pass a resolution to cancel the award on the basis that it had a duty to its subsidiary, Air Chefs. The resolution stated that the award to LSG Sky Chefs had to be "retracted" and the contract awarded to Air Chefs "without going through a bidding process". The LSG Sky Chefs contract was, thereafter, cancelled. Subsequently, LSG Sky Chefs sued SAA over this decision. Customers continued to note the substandard food in the lounges. The Board never concerned itself with even attempting to improve Air Chefs' services.

83. Dr Dahwa explained that he signed the cancellation letter to LSG Sky Chefs because the Board resolved that this should be done. He accepted that this was "not the right thing" to do, but he signed the letter because of the sensitive politics of the situation – i.e., it had been the subject of tense and embarrassing public questioning in Parliament and Ms Myeni was insistent that this embarrassment be addressed in this way. He did so on 6 October 2015.

84. At the meeting on 28 and 29 September 2015, Ms Myeni proposed that the Board pass a resolution reducing Ms Mpshe's delegation of authority by half – as well as the authority of all the executives. This meant that the Board would be more involved in day-to-day operations of the airline. Ms Mpshe testified that the executives were very concerned about the level of the Board's involvement in SAA operations, but they did not issue any resolution to this effect or refuse Ms Myeni's proposal. She testified that executive morale was very low because these instructions were contrary to lawful process and the implementation of the company's strategic objective. She also stated that the executives had to spend time fighting against unlawful instructions instead of implementing the approved airline strategy to deal with SAA's precarious position.

85. When Ms Kwinana testified before the Commission, she was asked for her account of the decision to withdraw the LSG Sky Chefs tender and give it to Air Chefs. She said this was one of the best decisions she made at SAA. In support of her view, she said:

    85.1 Leaving the tender with LSG Sky Chefs would have resulted in 1500 retrenchments and job losses at Air Chefs;

    85.2 Local suppliers would have also have lost their jobs to a foreign company;

    85.3 Air Chefs is a 100% subsidiary of SAA and it should be developed;

85.4 As a subsidiary Air Chefs did most of its work for SAA and it was going to lose most of that work and most of its revenue; and

85.5 Whoever had made the decision to award the tender to LSG Sky Chefs was clearly trying to sabotage SAA.

86. It was put to Ms Kwinana that all the reasons she provided had been dealt with comprehensively by Ms Mpshe in her submission to the Board. It was put to her that the Board had either ignored these factors because they were determined to cancel the bid, or they simply did not read Ms Mpshe's submissions. In response, Ms Kwinana took the position that since Air Chefs was an SAA subsidiary meant that it had to be chosen as a supplier, regardless of the cost to SAA or the harm to its reputation.

87. When Ms Mpshe's responses to all these issues were put to Ms Kwinana, she claimed, without basis, to "not trust" Ms Mpshe's submission, even suggesting it never reached the Board. Ms Kwinana began making wild, unsubstantiated allegations against Ms Mpshe, including that she joined forces with LSG Sky Chefs to sue SAA to set aside the tender. She was continuously evasive, particularly when it was put to her that SAA routinely used South African subsidiaries of foreign companies as service providers. This therefore could not have been a valid basis for withdrawing the tender or contract.

88. Ms Kwinana was also questioned about whether the decision to retract an existing tender and replace it with an award to another entity on instruction from the Board was a reportable irregularity under the Auditing Professions Act 26 of 2005. She testified that it was not a reportable irregularity to retract an existing tender that followed correct procedure, and simply award it to another bidder without following any process. She claimed it would have been a reportable irregularity if the award had remained with Sky Chefs because the tender was supposed to go to the shareholder in terms of s 54 of the PFMA. Ms Kwinana's insistence that the Board's decision to retract the tender award was not a reportable irregularity starkly contrasted with the evidence of Mr Mothibe, the PWC auditor responsible for auditing SAA in the 2016 financial year. When Mr Mothibe testified, he accepted that, had the true facts concerning the Board's decision on this matter been brought to his attention, he would have reported it to the Independent Regulatory Board for Auditors (IRBA) as a reportable irregularity.

89. Furthermore, Ms Kwinana's reference to s 54 of the PFMA is entirely incorrect as a matter of law. Even if this tender did require the shareholder or Treasury approval under this section, it was finally and officially awarded to a bidder. South African law says that an administrator cannot simply withdraw a final administrative decision because there was an irregularity in the process. It must apply to court through appropriate channels for the decision to be set aside. The decision is binding until a court sets it aside. In any event, s 54 did not apply in this case, as the servicing of the SAA lounge was not a "significant business activity". According to Ms Mpshe's submission to the Board, it amounted to around 4% of Air Chefs' business and R18 million in revenue per year (R1.8 million in profit). Although the PFMA does not define "significant", Treasury Regulation 28.3.1 provides that the Board may develop a framework of acceptance levels of significance with the Minister, known as the Significance and Materiality Framework. For the termination of a business activity, the significance levels requiring notification include the retrenchment of any employees or a loss of revenue exceeding R100 million. Neither of these applied to this transaction.

90. In any event, this was not the reason given at the time for why the Board set aside the award. Rather, it was Ms Kwinana's after-the-fact justification, presented under questioning before the Commission, which had no legal or factual basis. Ms Kwinana's conduct made no commercial sense and it put SAA at risk both reputationally and legally. During her evidence, Ms Kwinana repeatedly claimed that her conduct was lawful because the award letter had not yet been sent out when the Board took its decision to retract the award. When it was put to her that this was false and she would have known that because the legal opinion presented to the Board made it clear, she would still not accept it.

91. Ms Kwinana was a very poor witness. She continually refused to make the most basic of concessions, even when there was overwhelming evidence to show that she was wrong. This severely undermined her credibility as a witness. She showed herself willing to be dishonest under oath simply to avoid

having to account for her unlawful and irresponsible conduct. The evidence regarding the Board's conduct in the unlawful and unjustified cancellation of the LSG Sky Chefs tender was also put to Ms Myeni when she testified. She refused to answer the questions and invoked her privilege against self-incrimination. Despite invoking the privilege, she did say that outsourcing from Air Chefs to LSG Sky Chefs would be like "killing a child that was established by SAA as a subsidiary". This explanation was remarkably like Ms Kwinana's attempted justification. For the same reasons, Ms Myeni's explanation is also rejected. Ms Myeni also testified that she was entitled to ignore the advice of SAA's legal department. This attitude is deeply concerning. It shows a level of disregard for the expertise of others that calls into question Ms Myeni's fitness to hold any position on the board of a SOE.

92. Ms Myeni and Ms Kwinana displayed a wanton disregard for the best interests of SAA in their decision-making on the lounge catering contract. They acted in gross disregard of their fiduciary duties to SAA when they took this decision. Section 162 of the Companies Act empowers the shareholder of a company, amongst others, to bring an application to declare a director of a company delinquent. The SAA shareholder is the executive authority as defined under the PFMA. At the time when these decisions were taken, that was the Minister of Finance, Mr Pravin Gordhan. It was in terms of Section 162 of the Companies Act that OUTA brought its High Court application for an order declaring Ms Myeni a delinquent director. No such application was, however, instituted against Ms Kwinana. Section 162(2)(a) of the Companies Act states that these types of applications must be brought within 24 months of the person having been a director of the company. Therefore, under the current statutory regime, it is not possible for SAA's executive authority to bring such an application to court.

93. Since it often takes several years for the facts of delinquency to be uncovered, the Commission recommends amendment of the Companies Act to permit applications of this type to be brought even after two years, where good cause is shown. This would mean that in cases where the true extent of Board members' breaches of duty is only uncovered a number of years later, steps can still be taken by the executive authority of an SOE to ensure that they are declared delinquent.

False whistleblower reports

94. Ms Mpshe testified that Deloitte provided a whistleblower service to SAA. The results were reported on a platform to which Ms Kwinana, as head of the ARC, had access.

95. In 2016, Ms Mpshe received a call from a member of OUTA, Mr Wayne Duvenage, explaining that Ms Kwinana approached OUTA after she resigned from the SAA Board and told them that she would accompany Ms Myeni to internet cafes to formulate whistleblower reports and use these to victimise SAA staff members – to suspend or dismiss those that they wanted removed. Ms Mpshe said she was shocked by this because these reports were used to bring disciplinary proceedings against, among others, Mr Sylvain Bosc and Mr Bezuidenhout. According to Ms Mpshe, Mr Duvenage explained that Ms Kwinana said she decided to tell OUTA everything to avoid being targeted in their litigation to have Ms Myeni declared a delinquent director. This would have been fatal for her career as a chartered accountant with her own firm.

96. During her evidence before the Commission, Ms Kwinana was asked to confirm that Ms Myeni prepared false whistleblower reports to discipline staff she had a problem with. When Ms Kwinana disputed that she had said this to OUTA, she was shown a transcript of her meeting with OUTA on 30 August 2016. However, she still maintained that she had never said this and claimed that it was a "language issue" – which is patently absurd as the transcript is very clear. She then claimed that the transcript was wrong because it referred to being "edited" on the first page. The Commission subsequently provided the audio recording of the interview to Ms Kwinana and invited her to indicate whether she disputed the transcript which the Commission had obtained. She was warned that if no alternative transcript was provided by her, she would be taken to have accepted the correctness of the Commission's transcript. Ms Kwinana failed to provide the Commission with an alternative transcript of the interview. The Commission's transcript is therefore uncontested.

97. That Ms Kwinana said this at her interview with OUTA in August 2016 is beyond doubt. Whether

she was lying when she did so is less clear. It was put to Ms Kwinana during her evidence that it was possible she was lying about Ms Myeni preparing the false whistleblower reports to deflect attention from her own conduct. Alternatively, what she said about Ms Myeni at the time was true but, for some unknown reason, Ms Kwinana was now willing to lie under oath about that fact before the Commission. It is not possible to definitively resolve this question, but the following should be noted:

97.1 Ms Nhantsi, the interim CFO after Mr Wolf Meyer resigned from SAA in November 2015, testified before the Commission that Ms Kwinana had told her that Ms Myeni would prepare false whistleblower reports; and

97.2 When the issue of false whistleblower reports was put to Ms Myeni in her evidence, she claimed that the Commission is a refuge for tainted employees and that it just listens to false gossip. She stated that Ms Kwinana and Ms Nhantsi are friends and business partners. However, she ultimately invoked the privilege against self-incrimination when asked directly whether she had falsified the reports.

98. In the light of this evidence, and Ms Myeni's failure to contradict it, it is probable that Ms Myeni did prepare false whistleblower reports while she was SAA Board Chairperson. This type of conduct is consistent with other evidence the Commission received about how Ms Myeni treated managers and employees whom she wanted to remove from SAA.

General problems with procurement

99. Dr Dahwa was the Chief Procurement Officer (CPO) at SAA from August 2014 until his suspension on 3 December 2015. Dr Dahwa testified that there were significant problems with the procurement process when he arrived at SAA. Proper records of tender documents and contracts were not kept. One of the main audit findings around that time was that documents would simply go missing and were not available for inspection. Therefore, one of Dr Dahwa's primary goals was to implement changes to these record-keeping systems. He also stated that, when tenders were awarded, SAA would simply send out a tender award by letter without any terms and conditions or securing a signed contract. This was another issue needing "urgent attention".

100. On 13 March 2015, Dr Dahwa presented changes in SAA corporate procurement governance. He noted that there should ideally be two primary committees responsible for procurement. The first was the cross-functional or sourcing team that, at that stage, was mandated with the whole procurement process. The system therefore lacked appropriate checks and balances, and the committee lacked sufficient competencies and capacities to execute their duties properly. The second was the bid adjudication committee (BAC), which would review what the first committee had done. To separate out responsibilities, Dr Dahwa proposed a three-stage bid process: a bid specification committee would put together the bid and draft terms and conditions of the tender; then the bid evaluation committee would write recommendations to the BAC in line with supply chain management policy; and thirdly, the BAC would award the tender.

101. Dr Dahwa testified that, although he found SAA's procurement processes in disarray, he took steps to improve them. Yet, as set out below, the processes he introduced were undermined by interference from the Board's non-executive members.

Thirty percent BEE set aside

102. In 2015, SAA adopted what was referred to as "a 30% set-aside policy" in terms of which SAA would set aside 30% of its procurement spend for BEE enterprises. The Board claimed that the policy was based on statements made by former President Zuma during his 2015 State of the Nation Address (SONA). However, the former President's actual statement was that: "Government will set aside 30% of appropriate categories of state procurement for purchasing from small to medium enterprises, cooperatives as well as township and rural enterprises." This is a very different proposition. It is far more conservative and reasonable.

103. Dr Dahwa testified that the SAA Board was determined to pursue an "aggressive transformation" policy. He was happy with the goal of the policy, but not the way SAA tried to implement it. He experienced tremendous pressure from the Board to implement the 30% set-aside policy. He told the Board that the policy could not be implemented without proper PFMA amendments or Treasury guidelines, but the Board instructed him to impose it without following proper procurement processes. He said the Board would insist on 30% set-aside condition being imposed after the procurement process had already been undertaken, even though the condition was nowhere in the bid document. He said that this was irregular and unlawful.

The roadshows

104. Ms Mpshe testified before the Commission that, as part of the Board's decision to implement the 30% set-aside policy, Ms Myeni would call meetings with potential service providers about the 30% set-aside opportunity. Ms Myeni and Ms Kwinana would decide whom to invite to these meetings. This culminated in supplier development roadshows. SAA representatives would travel to different provinces sharing information with potential BEE suppliers about how to do business with SAA. They were called "supply engagement summits". They shared information about when key contracts were expiring so that the participants could prepare for the bidding process. Although these summits began as commitment-free information sessions, Dr Dawha testified that, over time, the spirit changed and it became clear to him that Ms Myeni and Ms Kwinana wanted to begin making concrete undertakings about contracts to the attendees. In fact, Ms Kwinana supplied Dr Dawha with a list of companies she wanted invited to the summit hosted in Durban.

105. It was at one of these roadshows that Ms Nontsasa Memela, the SAAT Head of Procurement, testified that she met Mr Vuyisile Ndzeku of JM Aviation (South Africa) (Pty) Ltd. As will be detailed below, JM Aviation and Mr Ndzeku were involved in several questionable dealings with many SAA and SAAT decision-makers.

106. After one of these roadshows in Durban, Ms Kwinana instructed Dr Dahwa to simply award 15% of the Swissport Services and the Engen contracts to all the companies that attended the roadshow. Dr Dawha explained to her that this was not possible because it was illegal, and it was also unclear how a contract could possibly be awarded to sixty different entities. Ms Kwinana told Dr Dahwa to establish a holding company that constituted all sixty companies and award it to that company. Dr Dahwa explained that he could not do such a thing because it was a fundamental breach of his duties as CPO. Ms Kwinana responded that she would do it herself, and she proceeded to form the company "Quintessential" to implement the set-aside policy, which involved her own personal enrichment.

Bidvest

107. Ms Mpshe testified that, apart from attempts to implement the 30% set-aside policy in new tenders, Ms Myeni and Ms Kwinana were also attempting to impose the policy on existing service providers with an SAA contract. Dr Dahwa testified that Ms Kwinana requested a list from him of all contracts that were due to expire, which she was going to use for "transformation purposes". He provided the list, which included Swissport (to the value of R1.2 billion) and Bidvest.

108. Ms Mpshe testified that Mr Meyer approached her very embarrassed because he came back from a meeting with Ms Kwinana and an aviation company, BidAir, at which Ms Kwinana told them about the set-aside policy and instructed BidAir to put aside 30% of its share of the tender for a BEE partner. BidAir was already a Level 1 BEE accredited firm, so they were confused about how this was to be practically implemented. They wrote to SAA asking about these issues and requesting advice about the firm they were supposed to partner with. Ms Mpshe testified that Mr Meyer showed her the letter but took it with him when he left. The letter dated 23 June 2015 worried Ms Mpshe because legally they were not supposed to impose this policy and this was documentary evidence that SAA representatives had attempted to do so.

109. Ms Mpshe explained that someone must have notified other parties about this because Dr Anton Al-

berts, a member of Parliament, sent a letter to the B-BBEE Commission about the matter. The Acting B-BBEE Commissioner of the Department of Trade and Industry (DTI), Ms Zodwa Ntuli, advised Ms Mpshe at a subsequent meeting that SAA had to immediately stop what it was doing with the 30% set-aside policy because it was illegal. Ms Mpshe communicated this to the Board. On 13 September 2015, Ms Ntuli sent a letter to Ms Myeni stating that the DTI had met with Ms Mpshe on 8 September 2015, during which Ms Mpshe had informed the DTI that SAA was demanding that Bidvest give 30% of its contract away to an SAA-nominated company. The letter stated categorically that the initiative was not in line with the B-BBEE Act and Codes of Good Practice. The letter asked SAA to send written confirmation by 18 September 2015 that it would not proceed to implement the 30% set-aside initiative until it had applied for and received authorisation to do so as an official deviation from the terms of the B-BBEE Act. According to Ms Mpshe's testimony, Ms Myeni's response to the letter was to say "I do not want to hear anything from that woman" [Ms Ntuli] because she dealt with the Deputy Minister instead. She asked Ms Kwinana to respond to the letter, which was prepared for Ms Mpshe to send. Ms Mpshe refused because she felt that the tone of the response was inappropriate, effectively saying that it was not for Ms Ntuli to tell SAA what do, and that transformation was a national agenda and there was nothing illegal about it.

110. On 28 September 2015, Mr Kenneth Brown, the CPO of National Treasury sent a letter to Ms Mpshe about the SAA Board resolution to set aside 30% of key procurement transactions for Black-owned businesses. He told SAA that, while Board decisions to encourage transformation in procurement were commendable, the Board should not operate outside the procurement legal framework. He stated that the resolution to set aside 30% of contracts was not supported by any procurement legal framework and "must be stopped with immediate effect". The letter requested Ms Mpshe to "advise the Board not to take procurement decisions that would bring the name of SAA and National Treasury into disrepute."

111. The DTI and Treasury were correct. The current Broad-Based Black Economic Empowerment Act 53 of 2003 and the Preferential Procurement Policy Framework Act 5 of 2000 provide for specific BEE measures in procurement (a 90/10 split in bid evaluation, for example). If a particular industry or body seeks to deviate from that, it must get special dispensation from the Minister. They cannot simply design their own BBBEE policy. This has now been confirmed by the courts (Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others [2020] and Swissport South Africa (Pty) Ltd v Airports Company South Africa SOC Limited and Others [2020]).

112. Ms Mpshe responded to the Treasury letter. She stated that while there was a proposed 30% set-aside policy to expedite BEE growth, SAA was an SOE and would seek to ensure compliance with applicable laws and regulations. Ms Kwinana also responded to Treasury on behalf of the Board. The letter asked for full details about how the Board operated outside of procurement frameworks and how its procurement decisions brought SAA and National Treasury into disrepute. This letter was curious given the clear terms of Mr Brown's letter to which this was a response.

The Swissport and Engen letters of award

113. Swissport was a long-standing ground handling service provider for SAA, and had been formally awarded the tender to provide such services. However, due to delays at SAA, the formal contract was never signed. Engen was also a long-standing service provider to SAA. It had been awarded a jet-fuel tender by SAA and the conclusion of the contract was still outstanding in 2015. Ms Kwinana saw the outstanding contracts as an opportunity to get Swissport and Engen to agree to the 30% set-aside policy.

114. Dr Dahwa testified that on 2 October 2015 he received an SMS from Ms Kwinana summoning him to the SAA Park boardroom. He complied and said Ms Kwinana asked him about progress in implementing the 30% set-aside policy. In particular, she asked him whether the set-aside policy was included in the Swissport and Engen contracts. Dr Dahwa explained that this would be unlawful and that he could not go ahead with that decision. He testified that Ms Myeni entered the boardroom and asked Ms Kwinana how far Dr Dahwa had gone in implementing the 30% set-aside strategy.

Ms Kwinana told Ms Myeni that Dr Dahwa was making excuses for not implementing it. Ms Myeni then told Dr Dahwa that she was advertising his job and refused to let him talk unless he did what she asked. She instructed him to prepare the award letters. Ms Kwinana gave him rough drafts of what the letters should say. The award letters contemplated awarding a percentage of the Swissport contract to an entity called "Jamicron (Pty) Ltd" and a percentage of the Engen jet fuel contract to "Quintessential" – the holding company Ms Kwinana formed to represent the sixty companies that attended the Durban summit.

115. Dr Dahwa tried to draft the award letters, but found himself unable to comply with this instruction, which he regarded as unlawful. He returned to the boardroom and told Ms Myeni and Ms Kwinana that his conscience would not let him sign the letters. Ms Myeni was about to sign the letter but appeared to change her mind. She instructed Dr Dahwa to go to his office and change the name of the signatory to Ms Mpshe. Dr Dahwa informed Ms Mpshe of this. She told him that, if he knew this was wrong, he should not do what they were instructing because it was unlawful. Dr Dahwa testified that he then went back to his office to pretend he was doing something, but in truth he was "being held at ransom" as Ms Myeni and Ms Kwinana were waiting for him in the boardroom. Dr Dahwa appended Ms Mpshe's name to the bottom of the letter and took it to her to sign, which she refused to do. Dr Dahwa went and told Ms Myeni that Ms Mpshe refused to sign, and Ms Myeni insisted that they all go to Ms Mpshe's office. Ms Mpshe told Ms Kwinana and Ms Myeni that she was not going to sign the letters. She also told Dr Dahwa, in front of Ms Myeni and Ms Kwinana, not to sign the letter if his conscience would not allow him to do that and it was unlawful. Ms Myeni told Ms Mpshe and Dr Dahwa that she was surprised that, as Black executives, they were not supportive of the idea. Eventually, Ms Mpshe excused herself, but before she left, she told Dr Dahwa that he should not sign and that, if he did, he would have to answer for it one day.

116. Dr Dahwa testified that he asked Ms Kwinana how he would justify appointing a pre-selected entity without going out on open tender to procure the most effective service provider for SAA. Ms Kwinana did not respond well to this, suggesting that Dr Dahwa was anti-transformation and threatening that, if he continued disobeying them, he and Ms Mpshe would "suffer" and face disciplinary consequences. He testified that Ms Kwinana and Ms Myeni continued insisting that he sign the letters. When he refused, they asked him to commit to signing by the following week. The ordeal with Ms Kwinana and Ms Myeni lasted from 10h00 to around 18h00 on a Friday. Dr Dahwa testified that, after everyone had left and it was just the three of them in Ms Mpshe's office, Ms Myeni said that the EFF would be coming to SAA on the Monday because they were concerned about transformation at SAA and they wanted to get rid of people like him. She told him that the EFF wanted to get rid of all Zimbabweans from SAA.

117. Dr Dahwa testified that, after Ms Kwinana said that he and Ms Mpshe were "going to suffer" and undergo disciplinary proceedings if they did not comply, he became emotional and asked them whether he could leave because it was around 6 or 7pm. Dr Dahwa said he eventually, under duress, undertook to sign the letters by the following week but had no intention of doing so. He never wrote or signed the letters.

118. In her testimony, Ms Mpshe confirmed Dr Dahwa's version of events that took place on 2 October 2015. She stated that he was visibly shaken and emotional. Ms Mpshe confirmed the content of draft letters to Swissport and Engen about setting aside 30% of their expenditure for companies nominated by Ms Kwinana. She advised Dr Dahwa that he had her support, and she would not sign the letters. Ms Mpshe testified that Dr Dahwa was almost in tears and told her he had never been so humiliated. Ms Myeni and Ms Kwinana had told him that he was a Zimbabwean citizen and was holding a position he would never hold in his own country and was standing in the way of transformation. Ms Mpshe testified that, when she and Dr Dahwa were together with Ms Myeni and Ms Kwinana and they tried to put their perspectives across, they were told that there was a Board resolution supporting the awards and they had to implement them. Ms Mpshe explained that the two non-executive directors often said this, and when one asked for the resolutions, it transpired that they did not exist. Instead, the resolutions would be taken later to justify what Ms Myeni and Ms Kwinana said.

119. Shortly afterwards, on 9 October 2015, Ms Kwinana wrote a letter of complaint about Dr Dahwa to Ms

Myeni. The letter made various complaints including that Dr Dahwa refused to sign the award letters because his conscience would not allow him and that he insinuated that the Board required him to do unprofessional, unethical, illegal and criminal activities. Ms Kwinana complained that she was being forced to "micromanage executives in respect of the non-implementation of our Board Resolutions." The letter concluded by accusing Dr Dahwa of attempting to derail and sabotage SAA's transformation agenda, as well as insubordination and conspiracy against the Board, leading to a recommendation "that the strongest possible action be taken against him". Dr Dahwa testified in detail as to why the allegations in the letter were unfounded and false. He also testified that he was a permanent resident and that he had implemented many pro-transformation measures, but just refused to break the law.

120. The following correspondence was subsequently exchanged:

120.1 On 29 October 2015, Ms Kwinana emailed Dr Dahwa asking him to confirm that "BEE will be able to participate" in the Swissport Ground Handling tender, "with effect from Monday, 2 November 2015". Dr Dahwa responded on 30 October 2015, saying he was preparing a detailed report about the high risk of this award being challenged because the terms and conditions SAA wished to impose on Swissport were not included in the procurement process. On 2 November 2015, Ms Kwinana wrote back to Dr Dahwa stating: "I did not ask for the risks, I asked for the implementation of board resolutions. Please let me know if you will not implement the resolutions of the Board."

120.2 On 3 November 2015, Mr Meyer wrote to Ms Kwinana. As CPO, Dr Dahwa reported to Mr Meyer as the CFO. Mr Meyer told Ms Kwinana that the CPO had a fiduciary duty to ensure that SAA procurement policies were compliant with its own SME policies as well as Public Procurement laws and regulations. He pointed out that a 15% set aside to "Quintessential Business Consulting Limited" was not included in the Board resolution. Selecting Jamicron (Pty) Ltd to work with Swissport as a BEE partner for the 30% set aside was also not in line with the Board resolution and did not follow a proper procurement process. Mr Meyer stated that the Board could not become operationally involved and give instructions that exposed the airline to non-compliance with its own policies and the law. He pointed out that SAA had received direct guidance from the Minister and DTI that the 30% set-aside policy should not be implemented. He concluded that the goal of transformation "does not justify that proper governance and SCM policies should not be followed".

120.3 On 6 November 2015, Ms Kwinana responded to Mr Meyer's letter and addressed her responses to Ms Myeni. She indicated that "the allocation of 15% to BEE was a Board decision" and that "what must happen is that the 15% must be implemented ... non-implementation of Board resolutions amounts to insubordination." The letter continued that management is responsible for implementing the Board's decision.

120.4 On 9 November 2015, Mr Meyer responded, explaining that the implementation of Board resolutions should be guided by the company's supply chain management policies. He pointed out that the summits were just information-sharing sessions and not formal procurement processes to award a contract. SAA did not have the power to form and appoint a holding company to represent 60 companies that expressed an interest in supplying jet fuel. The Board resolution also did not mention Quintessential or Jamicron.

121. As will be set out in more detail under the Swissport section below, Mr Lester Peter, who replaced Dr Dahwa as CPO after he was put through a grossly unfair disciplinary process, did take steps to comply with Ms Kwinana's demands and sent out a draft contract to Swissport imposing the 30% set-aside policy.

122. In her testimony, Ms Kwinana stated that SAA tried to implement the 30% set-aside policy but received communication from the DTI and Treasury saying that they could not do so. Ms Kwinana even conceded that the set-aside policy was not in line with SAA's SCM Policy. Ms Kwinana then claimed that after receiving the correspondence from the DTI and Treasury (28 September 2015), she no longer attempted to implement the set-aside policy. She claimed that the evidence by Dr Dahwa and Ms Mpshe about the events on 2 October 2015 was false. She claimed that she did not attend any

such meeting; that she did not threaten Dr Dahwa thereafter; and that Dr Dahwa had not communicated to her that his conscience would not allow him to sign the letters. When her version was tested, she maintained that there could not have been any meeting because no minutes were taken. But that is palpably absurd because if an unlawful and unethical meeting was taking place, it is unlikely that anyone would keep a record of it in minutes.

123. It was put to Ms Kwinana that the letter she wrote later to Ms Myeni on 12 October 2015, where she viciously condemned Dr Dahwa, confirmed Dr Dahwa's version of events because she complained that he had failed to sign award letters - award letters that Ms Kwinana testified she knew nothing about. The letter also repeated what Dr Dahwa said, namely that he had refused to write award letters because "his conscience would not allow him". But Ms Kwinana had initially denied in her evidence that she had ever been told this by Dr Dahwa. When the letter was shown to her, Ms Kwinana just said she forgot that she had written it. She was also shown the contemporaneous letter that Dr Dahwa had written to Mr Meyer where he said that he was not coming to work as he feared for his life after the threats from Ms Myeni and Ms Kwinana about the EFF. Ms Kwinana still denied that any of it took place.

124. During her evidence before the Commission, Ms Myeni was also asked about these events. She refused to answer and invoked the privilege against self-incrimination.

125. Ms Kwinana's evidence on the interaction with Dr Dahwa was dishonest. She was given numerous opportunities to come clean and accept what the contemporaneous documents revealed about the events of the 2 October 2015. However, rather than accepting responsibility for her role in the ordeal, she persisted in lying under oath. Her evidence is rejected as patently false, and the Commission finds that Ms Mpshe and Dr Dahwa's account of what transpired on 2 October 2015 is true.

126. Dr Dahwa was ultimately removed from his position as CPO in December 2015, after which Ms Mpshe was moved out of her role as Acting CEO. The 30% set-aside policy forged ahead and Swissport was eventually awarded the ground handling contract for five years from 1 April 2016, in circumstances that were irregular and unlawful. In addition, a strange BEE provision was included in this contract that benefitted JM Aviation to the tune of R 6 million. Shortly after this R 6 million came into JM Aviation's bank account, it was used to benefit Ms Kwinana personally to the amount of R4.3 million. This is dealt with in more detail below.

Set aside for veterans

127. Ms Mpshe testified that Ms Myeni instructed her to do a presentation for MK veterans. She consulted Dr Dahwa and the head of transformation, Mr Thapelo Lehasa, and created a presentation outline. This included SAA's procurement framework; opportunities for services at SAA; the requirements to be a service provider at SAA; and how SAA could assist them in getting on the service provider list so that they would be informed of tender opportunities. The meeting was attended by the Deputy Minister of Military Veterans and Defence, Mr Kebby Maphatsoe, together with Mr Des van Rooyen and some other representatives of the MK Veterans organisation.

128. After the presentation, Ms Myeni stood up and said that "these people" had "died for us" to get our freedom and all you want to do is tell them about policies and procedures. They want to know what the budget is for jet fuel per annum. Ms Mpshe responded that she did not believe it was appropriate to discuss budgets with potential service providers. Ms Myeni proceeded to say that perhaps they should set aside 30% of all vacancies at SAA for the children of MK veterans. Ms Mpshe said she made no further comments about Ms Myeni's pronouncements, but at the end of the meeting, she stated that she would arrange for Mr Lehasa and Dr Dahwa to meet with Mr van Rooyen to assist in helping them register on the supplier database.

129. On 2 December 2015 Dr Dahwa was told by the head of transformation, Mr Lehasa, that he wanted to see him urgently together with Mr Des van Rooyen, who Mr Lehasa told him was the DG for the Military Veterans Associations. Dr Dahwa initially refused to attend, but he eventually attended. At the meeting, Mr van Rooyen expressed unhappiness because Dr Dahwa was not responding to his

emails. Dr Dahwa said that he had not received them. Mr van Rooyen explained that the MKVA wanted to do business with SAA, particularly with respect to two contracts: security provision; and the Amadeus online booking system contract extension, which required a BEE partner. Dr Dahwa testified that he was not aware of any open tenders for security and the Amadeus contract extension had not yet gone out to tender. Mr van Rooyen insisted that these tenders be awarded to two companies related to MKVA.

130. Dr Dahwa testified that he was surprised that Mr van Rooyen had this information, as well as detailed content about the amount of money SAA intended to dedicate to this development endeavour. Mr Van Rooyen refused to give up their source. This concerned Dr Dahwa, as did the fact that MKVA was not requesting but instructing that the contracts be awarded to these companies. Dr Dahwa testified that the meeting ended with his refusal to help the MKVA representatives.

131. Mr van Rooyen received a rule 3.3 notice ahead of Dr Dahwa's evidence. He did not make any application in terms of rule 3.4 of the Commission's Rules. Dr Dahwa's evidence on this issue is therefore uncontested.

Dr Dahwa's removal

132. The day after the meeting with Mr van Rooyen, on 3 December 2015, Dr Dahwa was instructed to report to the SAA boardroom. On his way there, he saw Mr Musa Zwane speaking to Ms Myeni – Mr Zwane had by now replaced Ms Mpshe as Acting SAA CEO. Before reaching the boardroom, Dr Dahwa was intercepted by Ms Phumeza Nhantsi, who introduced herself as the new Acting CFO. She moved him into another venue and stated that she was instructed to place Dr Dahwa on special leave because there were matters concerning him that were being investigated. Dr Dahwa was provided with a letter outlining the basis for his suspension. The letter stipulated that Dr Dahwa was suspended with immediate effect. After reading the letter, Dr Dahwa packed up his things and left the workplace.

133. On 9 December 2015, Dr Dahwa saw on the announcement that Mr van Rooyen had been appointed Finance Minister, which made him realise that the person he had said "no" to in the previous meeting was far more powerful than he thought. He began worrying about his safety and made plans to leave immediately for Zimbabwe.

134. After this, Dr Dahwa received disciplinary charges and a disciplinary process followed. The disciplinary proceedings began on 16 March 2016. Dr Dahwa attended the first day but handed in a sick note for the second day. BMK Attorneys insisted that the proceedings continue even in Dr Dahwa's absence. After Dr Dahwa testified at the Commission, an affidavit was requested from SAA detailing what had happened during Dr Dahwa's disciplinary process. This was provided to the Commission by the head of SAA Employee Relations, Mr Lourens Erasmus. In his affidavit, Mr Erasmus explained that he was very concerned that the proceedings were continuing without Dr Dahwa present. He immediately raised concerns because he said that, unless the authenticity of the medical certificate was challenged, it would be unfair to proceed with the inquiry in his absence.

135. Mr Erasmus remained concerned that any finding against Dr Dahwa after a hearing conducted in his absence would be liable to be challenged. This would be because he had not been given an opportunity to test the evidence against him and to put his side of the case. Mr Erasmus engaged Ms Khanyisile Khanyile, an Employee Relations Specialist, to assist and give her opinion on the disciplinary proceedings continuing in Dr Dahwa's absence. She was unequivocal, saying that the entire process would be procedurally and substantively unfair if it continued. She also said that, if it continued, SAA could face claims for unfair dismissal, unfair labour practices, and civil claims.

136. Despite this, the disciplinary hearing proceeded. The chairperson found against Dr Dahwa. The ruling explains that Dr Dahwa was "charged" with various counts of dishonesty and dereliction of duty. Dr Dahwa's testimony dealt in detail with why these allegations were baseless; his lawyers also addressed this aspect in detail. The upshot of the charges was that he was insubordinate for failing to follow Ms Myeni and Ms Kwinana's irregular and unlawful instructions. As set out above, the circumstances of his removal strongly lend themselves to the conclusion that these charges were

trumped up to remove him from office. This is further supported by the treatment of Ms Mpshe (discussed later) when she was also forcibly removed. Dr Dahwa had ample reason not to carry out these instructions and it was Ms Myeni and Ms Kwinana who made promises at the roadshows when they were not in a position to do so.

137. In the light of Ms Khanyile's advice, Mr Erasmus implored Ms Nhantsi not to provide the ruling to Dr Dahwa because of all the irregularities in the process. She nonetheless did so and he was dismissed. Mr Erasmus also provided the ruling to Ms Khanyile, who expressed serious concerns about its correctness. Dr Dahwa tried conciliation, but SAA kept failing to arrive for the conciliation meetings, and so he then moved to arbitration. However, at a point, it became too draining to keep fighting and so he settled with SAA on the basis that he would be paid six months remuneration to walk away. Dr Dahwa explained that, after this, he did not receive any formal job offers for three-and-a-half years and his house in Pretoria, which he purchased when he took the SAA job, was repossessed by the bank.

Ms Mpshe's removal

138. On 13 October 2015, an Exco meeting with the Board was convened because, according to Ms Myeni, the Board was concerned with Ms Mpshe's performance as Acting CEO. This was because she was alleged to have refused to follow and implement Board instructions and was second-guessing the Board. Ms Mpshe testified that, at this meeting, Mr Zwane, the SAAT CEO at the time, said that he could not understand why a CEO would resist taking instructions from the Board. He emphasised that he worked very well with Ms Kwinana as SAAT Board Chairperson and always implemented her decisions. Ms Mpshe testified that other executive members at the meeting said that they did not have any problem with her leadership and were complimentary of her leadership style. They also stated that the company was beginning to stabilise under her leadership. Ms Mpshe insisted that she should have a right of reply. She stated that she would take instructions from the Board that were lawful and complied with approved SAA policies and procedures.

139. After this meeting, on 27 October 2015, the Chair summoned Ms Mpshe to a one-on-one meeting at the Beverly Hills Hotel in Durban. The Chair began by showering Ms Mpshe with praise, and asked why she had not applied for the permanent CEO position. She told Ms Mpshe to just send Ms Myeni her CV anyway even though the deadline had passed. Ms Mpshe refused. After this, Ms Myeni stated that the unions were dissatisfied with how Ms Mpshe was handling the SAA retrenchment process, which was nearing the final stage. Ms Mpshe testified that she was surprised to hear this because some of the unions had complimented her on the handling of the process.

140. On 13 November 2015, the Company Secretary contacted Ms Mpshe and told her that Ms Myeni had scheduled a meeting with trade unions in the afternoon. Ms Mpshe queried this because there was a structured forum where these discussions were meant to take place at which all relevant stakeholders would be present. Nevertheless, Ms Mpshe attended the meeting. Ms Myeni and Ms Kwinana were present, along with one trade union. When the meeting opened, Ms Mpshe voiced her concern at the inappropriateness of the meeting in the light of the structures that were in place for discussions with labour. Ms Myeni told her that this was Ms Myeni's meeting, so she "must shut up and listen and toe the line". Ms Mpshe then kept quiet. Ms Mpshe testified that she believed the true purpose of the meeting was to try and create some justification for terminating her employment as Acting CEO and to carry on the termination narrative from the Durban meeting that the unions had complained about her.

141. Later that day, Ms Myeni called Ms Mpshe and told her there would be a Board meeting that evening that she must attend. At the meeting, only Ms Kwinana and Dr Tambi were in attendance. Ms Myeni was not there. Ms Kwinana opened the meeting by saying that the Chair had instructed them to relieve Ms Mpshe of her position because they wanted to give other executives a chance at the position, which Ms Mpshe responded was "fair enough". Ms Mpshe asked when the decision was effective, and Ms Kwinana told her it was effective immediately. Ms Mpshe explained that it was a legal requirement to have a CEO at all times. They responded that Mr Zwane would take over her

position. Ms Mpshe then left before Ms Myeni arrived. Mr Zwane acted as the SAA CEO until there was a permanent appointment on 1 November 2017.

The appointment of Ms Nhantsi to the permanent position of CFO

142. Ms Mpshe testified that after she had been removed as Acting CEO, she went back to her position as GM: Human Resources. In this capacity, she was tasked with appointing the new SAA CFO. Ms Phumeza Nhantsi had been seconded as interim CFO in late November 2015. Ms Nhantsi testified that in 2015 she was employed as a chartered accountant at SNG – an accounting firm. She did joint audit work with Ms Kwinana's firm, Kwinana & Associates. She testified that in late 2015, Ms Kwinana approached her and asked if she wanted to be seconded to SAA. Ms Nhantsi was interested, and on 27 November 2015, she became interim CFO but was still paid by SNG because she was on secondment. There was no process followed prior to this appointment and Ms Mpshe testified that she regarded it as irregular. While Ms Nhantsi was interim CFO, a process was undertaken to find a permanent CFO. Ms Mpshe explained that, although Ms Nhantsi was among the potential candidates for the position, she did not make the shortlist. However, after the shortlisting, Mr Zwane, the then acting CEO, told the team responsible for the process that Ms Myeni had instructed that Ms Nhantsi was to be placed on the shortlist. Ms Mpshe testified that this was done, and Ms Nhantsi was appointed as permanent CFO in May 2017.

143. In mid-December 2015, Ms Mpshe was back in her position as GM: HR and she went on a month's leave. When she returned to work on 19 January 2016, she was told to attend a presentation by the SSA regarding security vetting. Thereafter, she was handed an envelope from Ms Kibuuka containing a long list of allegations of misconduct against her. This document was signed by Mr Zwane. Ms Kibuuka advised Ms Mpshe that the letter came from Mr Lester Peter who also told Ms Kibuuka to advise Ms Mpshe that she had to go on leave. Mr Peter was the SAA contract manager responsible for procurement at the time. The allegations in the letter included: failure to discipline Mr Wolf Meyer when instructed to do so (this was when Ms Mpshe had asked for a legal opinion and investigation report before taking action, which was not provided); failure to cooperate with State Security vetting operations (this was when Ms Mpshe refused to fire or move an innocent member of the treasury department who Ms Myeni had targeted and accused of failing her vetting because she had dual citizenship); allegedly adjusting Dr Dahwa's salary without following due process; and allegedly signing a contract with Airbus without the correct delegation of authority.

144. Ms Mpshe asked to meet with Mr Zwane to discuss the letter of alleged misconduct, since he had signed it. Mr Zwane was only able to meet Ms Mpshe in early February 2016. She asked Mr Zwane what the allegations were about because, as far as she was concerned, she had led an exemplary career at SAA and had never been found to have committed misconduct. Ms Mpshe testified that some of the allegations dated back to 2012. In her view, it did not make sense for these allegations to be levelled against her for the first time in 2016. According to Ms Mpshe, Mr Zwane would not look her in the eye and responded that he was just carrying out the Board's instruction.

145. Ms Mpshe's attorneys wrote a response to Mr Zwane's letter of charges. The response dealt with each individual charge and allegation and explained why Ms Mpshe's actions were justified in each case. She also explained that she believed there were ulterior motives for the suspension and the charges had no real basis. She contended that she was being punished for refusing to sign off the 30% BEE set-aside letters that Ms Kwinana and Ms Myeni wished her to sign. She heard nothing further from SAA's attorneys, ENS, until mid-April 2016, when another set of attorneys, BMK Attorneys, took over the matter. Ms Mpshe's attorney advised her that the ENS attorneys were surprised to learn that the matter was proceeding because, based on the response from Ms Mpshe, they had taken the view that there was no basis for a disciplinary process.

146. On 5 May 2016, Mr Zwane summoned Ms Mpshe to a meeting with Ms Kwinana. At the meeting, he handed her a letter which suspended her with immediate effect. Ms Mpshe told Mr Zwane that she would not acknowledge receipt of the letter as the matter was being dealt with by her attorney. Ms Mpshe therefore did not take the letter and left the room. SAA made no effort to respond to

Ms Mpshe's attorney's letter with her response to the charges until 6 August 2016. On this date, new charges were levelled against Ms Mpshe, with only two allegations remaining the same. The disciplinary process stalled, with SAA's attorney, BMK Attorneys, stating they lacked instructions.

147. Ms Mpshe was on paid suspension for 22 months. Finally, around August or September 2017, Ms Mpshe was asked to prepare representations to the Board on why her suspension should be lifted. At this stage, a new Board was in place, but Ms Myeni remained the Chair. After providing these representations on 15 September 2017, Ms Mpshe waited until February 2018 to hear anything further from the Board. The new CEO, Mr Jarana, proposed to Ms Mpshe a mutual separation. Ms Mpshe asked for the terms of this proposal, but they were not forthcoming. A few weeks later, a letter was sent that misrecorded what occurred at the meeting. Ms Mpshe's attorneys advised that they could continue to fight the action and would likely win, but SAA had deep pockets and she had already incurred almost R500 000 in legal fees. Ms Mpshe ultimately agreed to a mutual separation, receiving a settlement of 12 months' salary.

148. Ms Mpshe told the Commission that she and her family had endured "immeasurable hardship" because of SAA's conduct. Her reputation was permanently damaged, and the saga had had extremely serious consequences for her career. She said that her family had been humiliated by the ordeal.

Conclusion on disciplinary proceedings

149. The facts above tell a sorry tale of gross manipulation of disciplinary processes to remove a competent and committed CPO and the Head of HR at SAA. Both Dr Dahwa and Ms Mpshe were subjected to abuse from Ms Myeni and Ms Kwinana when they tried to resist their unlawful attempts to redirect 30% of SAA's procurement spend to pre-selected BEE entities. They were both subjected to trumped-up charges and endured drawn-out and unfair disciplinary processes, which they eventually could no longer fund. Taxpayers' money was wasted on these expensive disciplinary processes, which used external lawyers, required SAA to pay out Dr Dahwa and Ms Mpshe, and necessitated the employment (and payment) of other people to fulfil these roles while Dr Dahwa and Ms Mpshe were on paid suspension. This again shows a complete disregard by Ms Myeni and Ms Kwinana for the money of the South African public that had been entrusted to the airline.

150. It is not clear that there is any legal solution that would remedy the damage done to these two executives, and those like them who tried to stand-up to the unlawful and reckless conduct of the SAA Board in 2015 and 2016. Once Dr Dahwa and Ms Mpshe were removed, state capture truly took hold at SAA.

BNP Capital raising

151. Ms Cynthia Agnes Soraya Stimpel served for ten years as Head of Financial Risk Management at SAA and then became the Acting Group Treasurer. She testified that the SAA Board of Directors under Ms Carolus had strategic direction and worked together to achieve SAA's vision. Staff morale was quite high, and it appeared that SAA was slowly starting to improve. After Ms Carolus left the airline, Ms Stimpel noted increased Board interference in operational matters, including specific SAA contracts. Ms Stimpel testified that this deviated from the appropriate governance and oversight role that the Board was supposed to play.

152. Ms Stimpel testified that, in February 2015, SAA was in a precarious financial situation. It had a Treasury guarantee of up to R15 billion but had borrowed about R11 billion. She said that it was always short-term debt, resulting in the loans having to be rolled over when they came to maturity, which was not a simple process, as well as very high interest rates. Around this time, Ms Stimpel was appointed as Acting Group Treasurer. During this period, SAA was instructed to report to National Treasury instead of DPE. National Treasury required SAA to draw up a borrowing plan for the next three to five years indicating how it intended to manage its funds. Ms Stimpel's team, in collaboration with Mr Wolf Meyer, the CFO at this time, and National Treasury, prepared this plan and submitted it to Exco and the ARC of Board. The Board approved the plan in April 2015. It was based on the

analysis that, if SAA converted all its short-term debts to long-term ones over ten years and took full advantage of the R15 billion guarantee, this could be secured at a fixed rate and would save SAA approximately R 400 million.

Procurement in financing

153. Ms Stimpel testified that, in making funding decisions at SAA, they followed a slightly different process to ordinary procurement. They used the Financial Risk Management Policy. This required an RFP, but only to the five major banks because they were reliable and had a proven historical funding relationship. The process was conducted through the Financial Risk Committee and not through those responsible for SCM Policy. It then went to Exco, the ARC, and then the Board as opposed to the SCM Policy that required the process to go through the Cross Functional Sourcing Team, the BAC, and only then to the ARC and Board. However, Ms Stimpel explained that they did try to get the most competitive rates possible from the banks and fully analysed each bank's offer before taking a decision.

The first RFP

154. Ms Stimpel testified that, after the Board approved the borrowing plan on 22 April 2015, SAA began implementing it and went out to the market with an RFP for R15 billion for debt consolidation. However, despite approving the plan, the Board queried the RFP and its content and asked for a paper to be prepared on debt consolidation. Ms Kwinana then sent an email stating that the process had to be cancelled and that a tender process should be followed. The email queried the limited pool of funders as this would not allow new entrants to the market.

155. Ms Stimpel explained that, when dealing with such an enormous sum, they did not deviate from the institutions that were able to fund such large amounts. She said that smaller institutions did not have the capacity to do so. Ms Stimpel responded to the email and pointed out that the RFP had been sent out on the instruction of the Board's Chair. She tried to dissuade the Board from cancelling the process because of the reputational risk to SAA and the harm it would cause if they later put out another RFP. She also pointed out that the large banks had proven themselves to be reliable in treating SAA's sensitive financial information confidentially. In addressing Ms Kwinana's concern about new entrants, Ms Stimpel explained that they had received many unsolicited calls from new entrants, many of whom said they could not manage R15 billion. Ms Stimpel told Ms Kwinana that the ones who could were asked to prepare a term sheet in response to the RFP, but they had asked what a term sheet was. They were clearly not capacitated to fulfil this role. Ms Stimpel also expressed concern about how unsolicited bidders knew about the funding opportunity in circumstances where no RFP had gone out. She and Mr Meyer suspected they got the information from the Board because the executive team in SAA Treasury had been involved in borrowing activities since 2007 and knew not to disclose anything about it.

156. The Board ultimately decided to cancel the RFP. The Treasury then prepared a smaller RFP just for maturing debt that was rolling over at that time, which was R7 billion. However, the Board changed it back to a full R15 billion debt consolidation RFP. The Board required Ms Stimpel to prepare a new RFP for this full amount, and wanted the RFP to be sent to all unsolicited bidders that had previously visited SAA regarding the debt. It also wanted to approve and even add to the list of funders to whom the RFP would be sent. Ms Stimpel explained that this was the first time she had heard of an RFP first being approved by the Board and not going through normal financial procurement channels. She testified that this was unusual, even in SCM processes.

The second RFP

157. On 10 September 2015, the new RFP went to the Board for approval with a list of counterparties to whom it would be sent. It was approved and sent out. The closing date for responses was 2 October 2015, allowing SAA time to compile a spreadsheet of the bidders' term sheets so that it could compare who was offering the best terms.

158. Around October 2015, (before his resignation in November 2015), Mr Meyer called Ms Stimpel and other treasury managers into his office and explained that a potential bidder had called a meeting with him. He assumed the meeting would be to discuss how to put together the term sheet or something about lending terms. However, when he met with the bidder, Mr Jayendra Naidoo from First Self Financial Services, someone at the meeting called Mr Meyer aside and told him that he must ensure SAA gave his client the deal because "number 1" (former President Jacob Zuma) wanted this to happen. Mr Meyer responded that the decision-making was done in a team and based on a full analysis, so he could not assist with this request. Mr Meyer explained to Ms Stimpel that he was suspicious when he got to the meeting and decided to record it using a recording device in a pen.

159. Ms Stimpel explained that, in November 2015, Mr Meyer was called into a Board meeting. When he arrived, he was searched and his recording pen and laptop were confiscated by security. Ms Stimpel testified that these precautions were highly unusual. She noted that Ms Myeni called a meeting with National Treasury in February 2016, and again someone was at the door asking everyone to hand over cell phones and laptops. She found it highly unusual and suspicious that Ms Myeni knew of the recording pen and thought to confiscate it from Mr Meyer. She felt something was not right at SAA when the Board started taking these extraordinary measures. The secrecy and fear of being recorded at a meeting was very suspicious.

160. Mr Meyer told his treasury personnel that, because of negative reporting about him in the press regarding the management of certain SAA funds in Africa, he had been advised by his attorney to resign and find alternative employment. He did so and was replaced by Ms Phumeza Nhantsi as interim CFO on 27 November 2015.

161. SAA received various responses to the funding RFP. The top offer came from SeaCrest Investments. They had the best interest rate and offered the full amount required. There was an alternative offer from three major banks, which were together only willing to fund R 4.3 billion. The Treasury team was preparing a recommendation for the appointment of SeaCrest, but during their analysis they became worried that there was not enough information available on SeaCrest. They asked SAA's legal department to do a full due diligence on the company. Accordingly, in the recommendation from Treasury to the Financial Risk Committee, Ms Stimpel recorded that, although SeaCrest was the preferred bidder, a full due diligence still needed to be conducted before any decision could be taken. Her recommendation also provided for an alternative position. If Seacrest was not recommended, SAA should take the combined R 4.3 billion from the three banks as a contingency plan.

162. The due diligence was conducted because little was known about SeaCrest and its term sheet revealed that it was not going to be the direct funder. It was using two other funders, Mars Capital and Grissag (the main funder). The due diligence report reflected that SeaCrest and its investors were reluctant to provide the required information and documentation until a successful bidder was announced. This information was critical to making an informed decision. SAA was concerned about the origin and availability of the funds. However, the ultimate recommendation was that the due diligence could be finalised after awarding the tender during the contracting process. The review committee drafted an agreement which proposed that a successful due diligence would be a condition for the contract coming into being.

163. These documents were sent to Exco. The recommendation recorded that the Treasury team were uncomfortable with the results of the due diligence. While the Treasury team recommended SeaCrest as first choice, this was subject to a more thorough due diligence being a contractual condition. However, Ms Stimpel still raised with Exco that SAA could consider jettisoning SeaCrest altogether because, since 2007, SAA's practice had been to go through the big banks which were reliable and had the requisite capacity. SAA also had a close working relationship with them. The due diligence for SeaCrest raised red flags and SAA still did not know who Grissag was and how it would be sourcing its funds.

164. This same recommendation was then placed before the SAA Board. Ms Stimpel did not attend the Board meeting, at Ms Nhantsi's direction, even though she normally did attend meetings about funding or hedging together with the CFO. Ms Stimpel testified that she expected the Board would

either choose one of the recommended options, or they would reject both and ask that a fresh RFP be put out, but that is not what occurred.

Funding from the FDC

165. When Ms Stimpel finally received the Board resolution, she found it perplexing. The Board had rejected both recommendations and resolved to get funding from a third option that had not appeared in the recommendation – an entity known as the Free State Development Corporation (FDC). The resolution gave authority to the Acting CEO and interim CFO to sign any contracts to make sure the loan happened. The resolution was based on a letter sent to the Board by a "Shepard Moyo" from the FDC. Ms Stimpel was concerned because the letter had not gone through the formal RFP process, nor had it been analysed.

166. The very concerning aspect was that the resolution was for approval of the FDC loan, from a foreign bidder that did not go through any process and based on a brief letter that did not even set out the terms of the loan. The FDC letter stated that the transaction was subject to approvals under the PFMA and that terms would be negotiated later. It stated that the interest rate may be between 3 and 6%, but this was not a commitment. The letter did not mention the amount it was willing to advance or the loan tenure.

167. Ms Stimpel testified that when she asked for this letter the Board told her she did not need to see it. Ms Stimpel was shown the letter by the Commission's investigator. She testified that this letter was not sufficient for the Board to reject the recommendations of the entire process and simply choose another bidder based on vague terms. There was no information on the FDC's mandate; this was an exploratory letter and not a firm commitment. The Board clearly wanted to work with the FDC without going through approved governance processes. The FDC mandate is in fact governed by the Free State Development Corporate Act 6 of 1995, which defines and confines its power to developing enterprises within the Free State province.

168. Ms Stimpel was similarly concerned about some of the reasons given by the Board in the resolution. The resolution stated that borrowing from another SOE carried less risk and it would give SAA better treatment in the event of default. Ms Stimpel testified that this was incorrect, as the risk was worse because the two parties' risks are in the government/public bundle. This would concentrate all the risk within government. She said it was also incorrect that FDC would have treated SAA differently in the event of default, as the knock-on effects of default would be crippling to FDC, with terrible consequences for the funding of national and provincial government. Ms Stimpel testified that the Board's seemingly inexplicable decision based on the letter could be understood if one considered the Board composition in late 2015. It was only Ms Myeni, Ms Kwinana, Dr Tambi, Ms Nhantsi and Mr Zwane. Under this diminished Board, fraud and corruption progressed unabated at SAA and SAAT.

169. During the week of 7 December 2015, Ms Stimpel received instructions from Ms Nhantsi to "ratify" the decision to appoint the FDC. She refused as she was being asked to do so without even seeing the Board resolution. Ms Stimpel later received the resolution and recorded her reservations in an email dated 9 December 2015 that the process was irregular and that, if the FDC was to be considered, the RFP had to go out again with the FDC included as a bidder. Ms Stimpel therefore recommended to the Financial Risk Committee that they send the RFP to the FDC as they would with any bidder. Once the FDC responded to the RFP, the Committee would do a full comparison of the different options and decide. A member of Ms Stimpel's team sent an RFP to the FDC on 24 December 2015, but they were concerned that even this was outside of proper processes because the period for responses to the RFP expired on 2 October 2015.

170. Ms Stimpel also testified that the Board's conduct had prejudiced SAA because several loans were maturing in December 2015 and needed to be rolled over and there would be new debt. SAA needed urgent cash to meet these obligations. It would need bridging finance to do so, given that neither the consolidation nor the alternative partial loans from the banks had happened. SAA used the remaining R3 billion to which it had access under the National Treasury guarantee to meet those obligations and secured bridging finance for the period December to March 2016.

171. The legal department raised a concern about the FDC and whether a due diligence had been conducted in a letter to Ms Nhantsi, who then confirmed that it would be done. This was an inversion of the process, with a due diligence usually done before the Board decides to award the contract, not after. There was also no provision in the resolution for any conditions providing for the conducting of a due diligence process. Ms Nhantsi's response to the request for a due diligence was also curious because she instructed Treasury to send out the RFP to the IDC and PIC as well. The IDC and PIC had been among the entities to which SAA had sent the RFP previously, and had not responded because their mandate did not include funding SOEs. For that reason, Treasury did not act on this request, and it also did not appear in the Board resolution.

172. The FDC responded to the RFP with a term sheet. The startling thing about the term sheet was that it proposed a joint venture between the FDC and Grissag – the main funder in the SeaCrest offer. The Board rejected the SeaCrest offer because of insufficient due diligence and not enough information about the funder. When Treasury met and analysed the response to the RFP on 6 January 2016, they invited representatives from National Treasury as observers. The interest rate (of 4%) seemed very beneficial but the same issue of Grissag not being subject to due diligence was worrying. National Treasury explained that the FDC did not have the mandate to conclude the transaction, as it could only fund development projects in the Free State. On 6 January 2016, Ms Stimpel arranged a meeting with Ms Nhantsi and relayed this information to her. Ms Nhantsi advised them to leave the matter with her and she would speak to Mr Moyo at the FDC about it. Ms Nhantsi only came back to Ms Stimpel on 20 April 2016 and told her that the FDC was off the table for this reason.

Transaction advisor bid

173. At the end of the meeting between Ms Nhantsi and Ms Stimpel on 6 January 2016, Ms Nhantsi advised Ms Stimpel that she had received Board approval for a transaction advisor about the debt consolidation transaction. The transaction advisor would consider SAA's debt portfolio and how to restructure the balance sheet and related matters. Ms Stimpel responded that this was precisely what Treasury had done and made recommendations which had been approved. This was an internal function. Ms Nhantsi claimed that there was a need for this advisor because:

    173.1 Treasury had insufficient skills since Ms Stimpel had only been in her position for 8 months; Ms Stimpel said this was unfounded as she had been performing a similar role in the Treasury department for 10 years

    173.2 The large amount was only in the Board's authority and the Board needed external assurance from an independent source about the transaction; Ms Stimpel said that it was unjustified and irresponsible to spend unwarranted sums on another party reproducing work already performed internally; and

    173.3 Ms Nhantsi was new and had insufficient institutional knowledge; Ms Stimpel testified that she could have relied on her team that worked with the National Treasury and the legal department for this institutional knowledge.

174. Ms Nhantsi prepared recommendations for submission to the Board about why a transaction advisor was needed. Ms Stimpel reviewed each motivation and testified that these were being, or had already been, internally considered. Nonetheless, the Board approved the recommendation for the appointment of a transaction advisor "to advise regarding the R15 billion debt consolidation restructuring exercise". An RFP was issued, and the BAC prepared a document with proposed evaluation criteria. Upon reading the document, Ms Stimpel realised that the advisor was going to be tasked with sourcing the R15 billion funding – something her team had been tasked with. Ms Stimpel testified that it made no sense to get a middle person to broker this funding process when SAA had historically managed to obtain reliable funding straight from the banks. Appointing a middle person would also significantly drive-up costs for SAA. Ms Stimpel shared these views and concerns with Ms Nhantsi at various meetings and by email. Ms Nhantsi said she already had Board approval and would send it to Ms Stimpel, but what she sent her was Ms Nhantsi's recommendation for a transaction advisor, which did not mention a broker to source funding. Ms Stimpel therefore changed the BAC evaluation

document so that it excluded the sourcing of funds. The RFP that went out following Ms Stimpel's revisions only related to transaction advisory services. Seven entities responded: Deloitte & Touche, Regiments Capital, Basis Point Capital, Singer Holdings, Nasela Capital, Nedbank Limited, and BNP Capital.

175. The RFP required bidders to submit their BBBEE certificates. If they were joint ventures, a consolidated certificate was required together with the percentage income split in the JV agreement, the workload split, a financial services provider licence, and the signed agreement. The BNP Capital bid indicated a JV with "InLine Trading 10 (Pty) Ltd". Ms Stimpel testified that neither she nor Michael Kleyn, the Manager of International Cash Management in the Group Treasury at SAA, were invited to be involved in the evaluation of the bid submissions which would ordinarily have been part of their work. The BEC recommended to the BAC, who then selected BNP Capital to provide the transaction advisory services. There were, however, several shortcomings in the BNP bid. First, there was no information in the bid about its partner, InLine Trading. Second, there was no consolidated BEE certificate. Third, the price submission stated that because of the project's complexity, the fee would be 'R1 plus a fee' to SAA on the successful adoption for implementation of advice. This amount could not have been correct.

176. On 20 April 2016, the Cross Functional Sourcing Team (CFST) called a meeting with Ms Nhantsi to get an update about what was happening with the funding RFP, because the RFP was still open and they had not given any feedback to applicants. In this meeting, Ms Nhantsi told the team that FDC was "off the table" and that BNP would now be sourcing the funding. The team challenged this decision. Ms Lindsay Olitzki, the Head of Department: Financial Accounting in the treasury at SAA, stated that the scope of the procurement transaction could not be changed in that manner. Other members, including Ms Stimpel, stated that the sourcing of funds needed to go out to tender again with a new RFP for a transaction advisor who would source funding. Despite warning Ms Nhantsi at the meeting of this need, she did not appear to take any further action, and the Board passed the resolution extending the scope of the BNP transaction advisor contract to source the R15 billion, as set out below.

The increase in the BNP scope to include sourcing funds

177. The next day, on 21 April 2016, the Board decided to increase BNP's scope to include sourcing of funds. There was no process behind it. Instead of management driving the process and the initiative coming from SAA business and then motivated up to the Board for final approval, all that was served before the Board was a letter from Ms Nhantsi recommending that BNP's scope be extended. A few weeks later, on 6 May 2016, Ms Stimpel was called into Ms Nhantsi's office. Ms Nhantsi told her that, since Ms Stimpel was constantly challenging what she did, she thought that she would show Ms Stimpel the document she wanted her to sign and discuss the matter with her. Ms Nhantsi told Ms Stimpel that the Board had already approved the award to BNP of an increased scope to source funding; that she had spoken to BNP and they were prepared to source that funding; and they had given Ms Nhantsi the price. She gave Ms Stimpel a document that indicated that BNP would charge SAA 3% of R15 billion as the fee for sourcing the funds. Ms Stimpel refused to sign it. She said her job was to reduce expenses for SAA by R300 million by year-end and the only way to do that was to reduce interest rates on borrowing. This would wipe out the entire saving in one transaction. Ms Nhantsi agreed to go back to BNP and renegotiate. Ms Stimpel then went on leave, and Mr Kleyn acted in her position. She instructed him not to sign anything in her absence and asked him to get comparative pricing from the banks.

178. On 11 May 2016, the SAA Global Supply Management Unit made a request to the BAC to support confining the award of the contract for sourcing funds to just BNP Capital. It should be noted that this whole process of confinement was happening after the Board had already approved the extension of BNP's scope to source funding for SAA. This was another inversion of process. Proper procurement does not permit SOE Boards to make decisions and then try to justify them by running a process thereafter. On 13 May 2016, the BAC did make such a recommendation. It claimed the sourcing was urgent, and since the Board had been unable to source funds from its own efforts, it needed

the transaction advisor to do so. Ms Stimpel testified that the matter was not that urgent. The same problems had faced SAA for a long time. Any urgency there was had been caused by the Board's inaction and delaying since the original RFP was sent out and subsequently cancelled.

179. The BAC motivation explained that a normal success fee in the industry is two to 3% and SAA had secured a fee of 1.5%. That amounted to a total of R256 million with VAT. Ms Stimpel testified that even 1.5% was higher than banking industry norms, which normally used basis points (less than 1%) for arranging funding. Although banks could increase interest on the funding, they would not charge such a large fee.

180. While Ms Stimpel was away, Mr Kleyn signed the BAC recommendation to appoint BNP Capital to source funding, despite the instruction not to. He sent her a WhatsApp message saying he had done so because he was under pressure to sign. Ms Stimpel testified that she she sent an urgent whistleblower message to National Treasury indicating that she had received notification that a BAC document was signed to pay a client without her knowing anything about the client, and that SAA would have to pay the client R225 million (excluding VAT). She said Mr Kleyn signed the document under pressure from the interim CFO. Two days later, on 13 May 2016, the BAC approved the decision to confine sourcing funds to BNP. The BAC checklist accompanying the approval contained several requirements that had to be met, but some of the key requirements simply had "not applicable" next to them.

181. On 18 May 2016, Ms Stimpel returned from leave. She asked Mr Kleyn for his version of events. Mr Kleyn told her that he was called to the head of procurement's office, Mr Lester Peter at the time. Mr Kleyn said that Mr Peter literally "jumped up and down" and told him "you don't take responsibility here, you just sign". Mr Kleyn had then just signed the recommendation. Ms Stimpel's next step in trying to manage the situation was to get comparative prices for the sourcing of funds. She did not want word getting out in the industry about what was happening at SAA, so she sent emails to some of her colleagues at the banks and posed a "hypothetical" request for pricing. She sent the request to three banks: Standard Bank, ABSA and Rand Merchant Bank (RMB). ABSA wrote back the same day to say their fees were lower than 10 basis points (0.1%) and that there could be further participation fees for the lenders and arrangers that usually ranged between 0.25 to 0.4%, but "a deal can always be made". Ms Stimpel also received a quote from RMB for a couple of different options, including one for 0.5% and another with rates varying from 0.2 to 0.3%.

182. Ms Stimpel wrote to Ms Nhantsi on 20 May 2016. Ms Stimpel testified that the email was designed to stop the approval process from progressing further up the approval chain (Exco, TIPCO, ARC and the Board) because she could show that there were much lower quotes in the market. She provided Ms Nhantsi with a table of comparative prices that allowed a savings of R85 million. The email also warned about reputational risks to SAA because they had been seeking these funds from the banks since 2015 and now SAA was going with a transactional advisor that she could find nothing about online. She suggested that they do a full comparison break down and open the bidding to these other parties. Ms Stimpel testified that Ms Nhantsi chose not to bring these concerns to the Board's attention and instead secured Board approval by round robin resolution on 24 May 2016. At the time Ms Stimpel did not know the Board had taken this decision, so she continued trying to communicate her concerns to Ms Nhantsi via WhatsApp and email. Ms Nhantsi eventually responded to say that they needed to meet to make Ms Stimpel understand that the Board and executives ultimately make the decision, not her, and SAA had a crisis and needed money.

183. On 25 May 2016, SAA issued an award letter to BNP Capital to source the funding. It was subject to various conditions that were the essential terms of the parties' agreement and would prevail should there later be any inconsistencies. It provided that any services rendered by BNP prior to signing would be governed by SAA's general conditions of contract. This award was accepted in a letter from BNP the same day.

The cancellation fee

184. In its 25 May 2016 letter, BNP stated that it had already been engaged in work to source funding. As a result, BNP told SAA that, if SAA were to cancel the award, BNP would claim a cancellation fee of 50% of the total fee to which they were entitled. This cancellation fee would be 50% of the R2,68 million fee they claimed as transaction advisor, and then 50% of the R225 million fee on the sourcing of funds. The total cancellation fee would have been approximately R114 million. Ms Stimpel testified that cancellation fees in this type of agreement are not customary. At the time, SAA was in serious financial difficulty and so every employee was tasked with cost-saving. This type of fee could not be accommodated in such a precarious financial environment. She also testified that sending a letter demanding a cancellation fee for work already done on the same day the award was granted seemed very odd.

Conclusion of the term sheet with BNP

185. On 3 June 2016, Ms Stimpel attended a meeting between National Treasury and SAA funders. Various SAA representatives were present, including Ms Olitzki and Ms Nhantsi. This was one of the regular meetings SAA had with Treasury as its guarantor, to present financial results, progress with its turnaround strategy and financial operations, and an overview of the business. These presentations were done for each individual funder bank separately to avoid disclosure of confidential information. BNP Capital did not attend this meeting despite accepting its mandate on 25 May 2016.

186. On 8 June 2016, BNP Capital sent a letter to SAA referring to a meeting of 3 June 2016 between National Treasury, SAA and SAA's funders and recording the key points of the meeting. Ms Stimpel testified that she was surprised that BNP had this information as it was confidential and should not have been conveyed to them. The BNP letter set out in detail the costs that Grissag, BNP's preferred source of funds, had already incurred in sourcing the funding to justify the cancellation fee that BNP claimed in its 25 May 2016 letter. The letter concluded with BNP requesting SAA to sign off the term sheet indicating its preferred choice. This was a reference to the term sheet that Grissag had provided. The request stated that the response from SAA must not include a caveat that the approval of the term sheet was "non-binding". This request was apparently granted by SAA because on 6 June 2020, Ms Nhantsi signed a term sheet with Grissag. The term sheet is missing a section usually included which stipulates that the term sheet is non-binding. This had evidently been removed.

187. Ms Stimpel explained that she was very concerned that Ms Nhantsi had bound SAA to this term sheet when it had not gone through proper channels. There was a departure from historical lending from the big banks, there was no proper RFP process, a transaction advisor was unnecessarily brought in, the advisor's scope was increased without process or assessment of risk and cost, and the advisor's fee was enormous and negated savings from debt consolidation. Ms Stimpel was very concerned about the terms to which SAA was now bound under the term sheet. Not only did Grissag get a 3.5% fee, but it also got 1% payable to it on each draw down that SAA made on the funding. The final cost would therefore be unclear and onerous and did not appear to have been thought through. No risk assessments or financial impact assessments were done.

Whistleblowing

188. As a result of these serious concerns, Ms Stimpel approached her fellow treasury managers about speaking out, but they were too afraid of losing their jobs. Ms Stimpel consulted her family about the risk to her job and decided to blow the whistle about the transaction. She drafted a whistleblowing letter and asked a member of the executive, Mr Joshua du Plessis, what route she should take. He advised her not to do anything internally because it would go to the Board and she would be immediately suspended. Ms Stimpel reported her whistleblowing to National Treasury and then to OUTA.

189. On 1 July 2016, she met with OUTA, who asked her whether she could retrieve some of the BNP Capital procurement documents. On 4 July 2016, Ms Stimpel attempted to get the documents from

Mr Silas Matsaudza in the procurement department. When she could not find him, she went to his office and found the BNP documents on the floor. She took the documents and scanned them to herself but found Mr Matsaudza's office locked when she tried to return them. When she handed them back to him the next day, he was very angry and said he would report her to Ms Nhantsi and Mr Peter. She told him she had to meet with National Treasury but would return to discuss the matter. While on her way to the meeting, Ms Nhantsi phoned and told Ms Stimpel not to attend it, as Mr Matsaudza had briefed her about what had happened. Ms Nhantsi did not want Ms Stimpel to give the documents to National Treasury. Ms Stimpel testified that sharing this information with National Treasury should not have been a problem, given its role as provider of SAA's loan guarantee. There was no legitimate reason to want to exclude National Treasury. Ms Nhantsi also told Ms Stimpel that, if this were leaked to the media, she would hold her responsible. Ms Stimpel was then suspended.

190. Ms Nhantsi testified that the reason she instructed Ms Stimpel not to meet with National Treasury was not about reluctance for her to share the BNP bid documents. Instead, it was about wanting Ms Stimpel to come back and explain her conduct regarding the confidential documents. However, this explanation was inconsistent with Ms Stimpel's testimony that Ms Nhantsi refused to let her tell her side of the story after the incident. When this was put to Ms Nhantsi, she did not deny it, but said she could not remember saying that. Late in the afternoon on the same day, Ms Nhantsi called Ms Stimpel to her office and gave her a letter suspending her for taking confidential tender documents without permission from the procurement section.

191. On 6 July 2016, Ms Stimpel met with OUTA's attorneys, Webber Wentzel, and relayed the story. On 7 July 2016, Webber Wentzel sent a letter of demand to SAA to stop the BNP transaction. SAA did not respond to the letter by the stipulated deadline. Ms Stimpel worked with Webber Wentzel to prepare an application for a court interdict.

192. Unbeknown to Ms Stimpel, on 4 July 2016, Ms Nhantsi prepared a submission to the Board, which Mr Zwane approved as Acting Group CEO, recommending that a cancellation fee be approved for BNP if SAA cancelled its mandate. By this stage, the cancellation fee had been reduced from 50% of the total fee to just under R50 million and was justified based on the work BNP claimed it had already done to source funding. Ms Nhantsi's recommendation was supported by Ms Myeni only. On 7 July 2016, the Deputy Company Secretary, Madu Nyoni, wrote to the Board asking for round robin approval of the cancellation fee. Ms Myeni responded the same day approving it. There was no approval from the other Board members.

193. On 8 July 2016, Mr Mahlangu from BNP sent a letter to SAA regarding the licence that had been issued to BNP by the then Financial Services Board (FSB). The letter stated that BNP had received a letter from the FSB on 12 May 2016 indicating its intention to temporarily suspend BNP's licence for three months because, under section 10 of the Financial Advisory and Intermediary Services Act 37 of 2002, the "key individual" of the organisation had failed to complete the first level regulatory examinations. An FSB licence was part of the critical criteria for being appointed as a transaction advisor. Despite having been advised of this issue as early as May 2016, before BNP was appointed to source funds, BNP had not disclosed this problem to SAA. Instead, it waited until July to do so. The FSB (now the Financial Sector Conduct Authority (FSCA)) provided the Commission with an affidavit stating that the letter of 12 May 2016 was not an intention to suspend the licence but an actual suspension letter.

194. On 21 July 2016, Webber Wentzel launched urgent interdict proceedings to stop the BNP transaction. SAA held a press conference and indicated that it had stopped the transaction and terminated the appointment of BNP. This was before the urgent application could be heard and the order granted.

195. On 27 July 2016, Ms Stimpel received a notification of disciplinary charges against her. The charges included removing company documents; "insolence"; breaching contract of employment including confidentiality undertakings; and breaching SAA's anonymous reporting policy. Ms Stimpel testified that the tender documents were not confidential in the sense that she was not authorised to see them. She was part of Treasury and responsible for sourcing funds as a key responsibility at SAA. As to the charge of "insolence", this may have related to a WhatsApp she sent a colleague stating "the Board

continues with its unethical behaviour". Ms Stimpel denied ever breaching her employment contract. The last charge was an accusation that she did not go through SAA's internal whistleblowing process. Ms Stimpel testified that she was not obliged to use that route. It was available if employees wanted to use it.

196. Ms Stimpel testified that there were multiple postponements in the disciplinary hearing against her. Eventually, she was advised to take the case directly to the Labour Court, but the Court ruled that she had to take her case to the CCMA, which she did. She said SAA attempted to postpone each date arranged with the CCMA. After months of this, Ms Stimpel's lawyer advised that she should settle because this could continue for another year. So, Ms Stimpel relented and settled the case. The settlement included six months of salary with no benefits and Ms Stimpel took early retirement. She received only her pension from her Provident Fund and not any of the travelling benefits she was entitled to as Group Treasurer at retirement. This, together with outstanding salary up to normal retirement age, was valued at around R4 million.

197. Ms Stimpel testified that she believes she was suspended because she stood up to SAA against conduct she regarded as irregular and potentially corrupt. She also testified that if anyone challenged Board directives or instructions from senior executives, then you were immediately suspended. The charges were not given at the time but made up afterwards. She stated that, at the time of her suspension, at least four other people were suspended. Employees were instructed to sign documents and, if they refused, SAA would find a way to get the employee suspended.

198. Ms Stimpel testified that she was aware of a disciplinary hearing that took place against Ms Nhantsi and Mr Zwane in 2018 once SAA was under a new Board. She was called by SAA to testify against them regarding their conduct in respect of BNP. She agreed to do so. Ms Nhantsi and Mr Zwane were charged with their roles in facilitating the irregular transaction with BNP and the unlawful cancellation fee. The findings of the disciplinary process, given by Mr Nazeer Cassim SC on 19 June 2018, were that these employees were both guilty of gross misconduct in that they facilitated corrupt activities and theft that enriched those in control of SAA. Mr Cassim SC concluded that: "The employees have not shown any remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation. There is, in my view, no prospect on any basis for SAA or SAAT to keep these two individuals in their employment. I recommend summary dismissal." He also recommended they be reported to the regulatory authorities responsible for chartered accountants for having breached their ethical duties.

199. During her testimony at the Commission, Ms Nhantsi made various allegations against Ms Stimpel and impugned her character: She alleged Ms Stimpel bullied her, stormed into her office without appointment, and accused her of only having her role because of affirmative action. Ms Stimpel denied all these allegations. Ms Stimpel's evidence was also put to Ms Myeni. She initially claimed she did not know who Ms Stimpel was, and then invoked her privilege against self-incrimination in respect of each allegation.

Ms Nhantsi's version

200. As set out above, in November 2015, Ms Nhantsi was seconded to the position of interim SAA CFO and was permanently appointed in May 2017. She lacked experience in this type of position and appeared to have been selected by Ms Kwinana for the role without a thorough and transparent appointment process. As a chartered accountant, Ms Nhantsi testified that she understood that, as CFO, she had a fiduciary duty to act in SAA's best interests. She also understood that competitive and transparent procurement process had to be followed unless there were exceptional circumstances.

201. Ms Nhantsi testified that, soon after joining SAA, Ms Myeni gave her Mr Masotsha Mngadi's number and told her that he was an advisor, and she should contact him if she had any questions about the submissions for the swap deal. Upon making enquiries with Ms Kwinana in December 2015, she realised Mr Mngadi was a personal advisor to Ms Myeni who was not on SAA's payroll. Ms Nhantsi testified that Mr Mngadi helped her draft a letter to National Treasury about the aircraft swap deal. It was put to Ms Nhantsi that it was strange that she consulted with a third party who was not employed by SAA about SAA operations. She responded that Ms Kwinana told her that this was Ms Myeni's

"person" and Ms Myeni told her that she should ask Mr Mngadi if she had any questions about SAA, which she did. Ms Nhantsi conceded that it was strange that a third party would be helping to draft letters to National Treasury from SAA. She noted that she had only been at SAA for two weeks at that point and was not entirely sure of protocol yet.

202. Ms Nhansti testified that many years prior to her arrival at SAA, SAA ordered wide body aircraft, 10 or 20 of them, and wanted to swap them. The deal was at an advanced stage when Ms Nhantsi joined SAA. The Minister of Finance then sent an instruction to SAA to stop the transaction. Mr Mngadi knew all about the transaction because he was the one giving Mr Zwane and Ms Nhantsi the background to the deal. On 30 October 2015, Mr Mngadi wrote a letter to the SAA Board about the Airbus swap transaction. The letter detailed why leasing the aircraft would be advantageous to SAA. Ms Nhantsi testified that the letter was never shown to her. Ms Nhantsi also testified that she engaged Mr Mngadi about the BNP transaction. BNP was officially represented by Mr Pholisani Daniel Mahlangu but Ms Nhantsi said that she would often receive calls from Mr Mngadi as part of the BNP team. Ms Nhantsi provided the Commission with some of her WhatsApp messages with Mr Mngadi. They reveal that Ms Nhantsi had saved Mr Mngadi's details as "Masotsha Mngadi SAA/Nedbank". She stated she had always been aware that Mr Mngadi was associated with Nedbank. This association was important because Nedbank was also bidding to provide transaction advisory services to SAA. As a Nedbank employee, Mr Mngadi could not be associated with a competitor bidder, such as BNP Capital.

203. Ms Nhantsi testified that she had supported the Board decision to approve the funding of the R15 billion debt consolidation by the FDC because the savings on interest with that offer would have been R1.2 billion per year. However, in hindsight, she did not support her original decision. She agreed that it was not in the best interests of the company. She testified that, at the time, she was not aware that the FDC was using a foreign investor, Grissag, to fund the transaction. She said she now realised that there was a bigger scheme at play, and her present view was that there were "people who stood to benefit from the transaction using [her] to conclude the transaction". Ms Nhantsi also testified that she supported her decision to appoint BNP as transaction advisor. However, she no longer supported her initial decision to expand the scope of BNP Capital to include sourcing funds. She also testified that she never supported the decision to approve the cancellation fee to be paid to BNP.

204. Ms Nhantsi testified that on 1 December 2015, a few days after her secondment to SAA, she received a call from Mr Moyo of the FDC who asked her if SAA still needed funding. She asked him whether he had a mandate for that, and Mr Moyo told her that the FDC was in talks with a foreign investor and that the FDC Act allowed it to do the funding transaction. She asked him to put that offer in writing, which he did. Ms Nhantsi presented it to the Board on 3 December 2015. She testified that the Board considered the SeaCrest offer but was concerned about its responses to the due diligence requests, while the recommendation from the banks for R4.3 billion defeated the point of debt consolidation. She conceded that the Board never called anyone in the Legal Department to address their concerns about SeaCrest and due diligence. She did not recall anyone mentioning the draft contract before the Board, which imposed conditions on the FDC and the foreign investor, requiring all necessary documentation before a contract came into effect. This would have protected SAA.

205. Ms Nhantsi explained that during the Board meeting it appeared as though the Chair, Ms Myeni, already knew about the FDC proposal. Ms Nhantsi and Mr Zwane were mandated to urgently facilitate the transaction and do all necessary to process it because the company needed funds. Ms Nhantsi admitted that the Board did not seem concerned with following due process with FDC. She stated that the Board was doing things in reverse, by seeking to impose some kind of process after-the-fact. Ms Nhantsi testified that, because she was new she was unsure whether what they were doing was lawful. She had no reason to doubt that they knew what was supposed to be done and were acting in accordance with due process. She also admitted that the Board lacked sufficient information to make the decision because all they had was the non-committal FDC letter. Ms Nhantsi conceded that she should have raised all these issues with the Board but failed to do so.

206. Ms Nhantsi testified that, after the Board meeting, she called the treasury department to inform them of the Board's decision on FDC. She said that, during the call, Ms Stimpel "was shouting" and said this was not allowed. Ms Nhantsi ended the call with Ms Stimpel by stating that they had to comply

with the Board's resolution. They decided the best way forward was to send the template term sheet and RFP to the FDC. FDC's RFP response was submitted by 24 December 2015 and evaluated in early 2016.

207. Ms Nhantsi conceded that Ms Stimpel told her on 6 January 2016 that she had had a meeting with National Treasury during which they clearly told her that FDC did not have a mandate to advance funds to SAA. However, she went to Mr Moyo and he told her that the FDC did have this mandate in terms of section 4A(h). She testified that she ran this past Ms Ursula Fikelepi, the Head of Legal at SAA, but did not formally ask for an opinion. She was not worried at the time that she was being given advice that contradicted that of National Treasury but looking back it should have concerned her.

208. It was further put to Ms Nhantsi that one of the main reasons given by the Board for rejecting SeaCrest was that it was not satisfied there was an adequate due diligence, but it had approved the FDC proposal without any due diligence whatsoever. Ms Nhantsi accepted this fact. Ms Nhantsi explained that the reason she believed, at the time of testifying, that the transaction should not have been approved, was that Mr Moyo had mentioned to her that the FDC Board Chair was Mr Ace Magashule's sister. Ms Nhantsi said that she had not been aware of all the politics at the time, but looking back and knowing what she later learned, particularly the evidence of Mr Van der Merwe, she understood how she was used as a "scapegoat" or "a vehicle for people to enrich themselves". Mr Van der Merwe was the director of Grissag who was summonsed to give evidence at the Commission. His evidence will be dealt with below.

209. BNP was ultimately appointed as transaction advisor on 20 April 2016 and Ms Nhantsi testified that she started engaging with them two or three weeks after they received the award letter. Ms Nhantsi did not have any interactions with Mr Mahlangu in this regard, but she testified that she did interact with Mr Mngadi about the transaction and understood him to be part of the BNP team. Ms Nhantsi was asked whether she was concerned that Mr Mngadi worked at Nedbank – a competitor bidder in the process – but seemed to be a representative of BNP, another bidder. Ms Nhantsi said she remembered asking him but could not recall his answer. She admitted it appeared irregular that he was part of both companies. She even found it strange at the time because, when SAA had a meeting with Nedbank, Mr Mngadi was there as its representative, but she knew he was also acting for BNP. The irregularity goes much further because Mr Mngadi was also being consulted as if he were an internal SAA advisor to Ms Myeni and then Ms Nhantsi. In fact, Ms Nhantsi testified that she was aware Mr Mngadi was also having interactions with the Chair throughout this time, and he would have conversations with the Chair and relay these discussions to Ms Nhantsi. However, in respect of this conflict of interest, she never enquired further.

210. When it was put to Ms Nhantsi that there were several occasions during her testimony when she conceded that she should have probed further and failed to do so, she responded that it was because she was new, and took comfort from the fact that this was endorsed by Ms Myeni and so did not feel the need to take her concerns too seriously. However, she also testified that this suspicious conflict and Mr Mngadi's dubious involvement did make her ultimately review the transaction with stricter eyes and, despite great pressure from the Chair, she ultimately pushed for its cancellation.

211. The Commission also questioned her about whether her failure to push back against the Board and the Chair's say-so was because she lacked relevant experience in the position. She had only been a chartered accountant for seven or eight years at SNG and perhaps someone with corporate governance experience at an SOE or in aviation might have been better placed to deal with these pressures and challenges. Ms Nhantsi testified that she felt comfortable doing the CFO job, but when she considered everything that the SAA job ultimately entailed, including the politics, unanticipated pressures, and resistance from the Chair to the cancellation of the BNP agreement, she agreed that "her plate was too full". She also testified that perhaps she was too naïve in thinking that the Board members would act in the best interest of the company.

212. Ms Nhantsi testified that on 21 April 2016, there was a teleconference with the Board to update them on the FDC. They advised the Board that the FDC could not provide funding as it lacked a legal mandate to do so. During the discussion, Ms Myeni instructed that they must approach BNP

to source the funding for SAA. The Board passed a resolution extending BNP's scope to source the funds. Ms Nhantsi testified that she deeply regrets not raising Mr Mngadi's conflict of interest at the meeting.

213. As had become the pattern, after the Board resolution was passed, Ms Nhantsi prepared a recommendation for that very same decision. Also, after the final Board decision had been taken, she went back to the legal and procurement teams to ask how they could justify implementing the Board decision while still trying to follow proper process. They then decided that there were some exceptions in the procurement process policies. One was emergencies, and another was confined bidding, and they would use that to justify the processes they ultimately employed. Ms Nhantsi testified that SAA did not notify BNP of the decision immediately on 21 April 2016. Instead, a confined bidding process was first carried out and the Board approved the decision again on 24 May 2016 and only on 25 May 2016 did a letter go out advising BNP that it had been appointed to source funds. Ms Nhantsi testified that she signed the recommendation to extend the BNP scope to include sourcing funds upon Mr Peter's request. She was confused why she was being asked to sign this when the Board had already decided but Mr Peter assured her that she had to do so as part of a checklist, and so she "moved on" and signed. Thereafter, the BAC recommended that BNP be appointed – as opposed to merely noting that the Board had already done so.

214. Throughout her testimony, Ms Nhantsi appeared not to accept that this order of events was irregular and against good governance practices. She did not appear to comprehend the distinction between these two very different processes:

    214.1 In the initial RFP, the standard process was followed, with the Board initiating a fair and open-ended process for bids and tasking the correct bodies to follow the process. Only once the process was completed and an independent recommendation made to the Board, was the Board required to decide.

    214.2 In the subsequent processes, in which Ms Nhantsi was involved, the Board first reached a final decision on who should be appointed, and thereafter asked the SAA staff and management to reverse engineer the process by making an after-the-fact recommendation that supported what the Board had already decided. This recommendation would then make it seem as if the proposed appointment came from SAA staff instead of the Board.

215. This is a worrying state of affairs and underscores that Ms Nhantsi's experience as an accountant was insufficient for the governance knowledge required to be the CFO of a major SOE in a specialised industry. Her inexperience appears to have been exploited by the Board to advance their own agenda. It may well be that she went along with what the Board required to avoid opposing it. As the findings above show, it was very difficult for SAA management to openly disagree with the Board's demands.

216. Ms Nhantsi admitted that it was improper for the Board to expand BNP's scope without knowing: a) whether it was possible from a procurement process perspective; b) if BNP had the capacity to do so; and c) the terms for the additional services. She testified that when she received the letter of demand from Webber Wentzel on 7 July 2016 that SAA should cancel the BNP contract, she called the FSB to check if BNP was in good standing. A letter received on 8 July 2016 confirmed BNP had been suspended in May 2016. When Mr Mahlangu testified, he claimed he alerted Ms Nhantsi to the FSB licence issue as far back as 13 May 2016, but Ms Nhantsi testified that she never received the May correspondence. To support this, Ms Nhantsi referred to an email from Mr Moyo of BNP Capital dated 6 July 2016 in which he stated that they can "confirm that the funding entity has an FSB licence and is authorized under South African law to provide this financial product. See attached FSB licence". She also produced correspondence she sent to BNP on 13 July 2016 stating that having a licence was a critical criterion for the tender and confirmed SAA did not receive the alleged 13 May 2016 communication.

217. Ms Nhantsi stated that BNP had included a claim for a 50% cancellation fee in its acceptance letter of 25 May 2016. She said that her engagement with Mr Mngadi and Mr Mahlangu revealed that the fee had never been discussed with SAA management. She said this demand "came as a shock" to her. It is not clear why she would have been shocked by a demand she knew had not been agreed to

by SAA., which meant it would not have been obliged to pay BNP anything. Ms Nhantsi's shock may reflect her inexperience and ignorance. She testified that around 2 June 2016, BNP sent a term sheet with the cancellation clause in it. Mr Mngadi called and sent WhatsApp messages pressuring her to agree to it. She said Ms Myeni also pressured her to conclude the term sheet. Ms Nhantsi eventually signed the term sheet but included a handwritten note that it was not binding until the Board agreed. Ms Nhantsi contacted Ms Kwinana and told her she was being pressured to sign things outside her authority but within the Board's authority. Ms Kwinana advised her that, if she felt her integrity was compromised, she should not sign the term sheet with the cancellation clause. She therefore told Mr Mngadi that the decision fell outside her authority. Ms Nhantsi testified that she believed Ms Myeni stood to gain something from this cancellation fee. She formed this conclusion based on the pressure Ms Myeni placed on her to sign the term sheet, Mr Mngadi's frequent references to the Chair and them being part of a "team", and the confidential SAA Board information the Chair was giving to Mr Mngadi.

218. The WhatsApp messages from Mr Mngadi are dealt with below:

    218.1 On 31 May 2016, Mr Mngadi gave various reasons why he claimed BNP was justified in receiving a cancellation fee, including that costs had been incurred.

    218.2 Mr Mngadi stated that he thought Ms Nhantsi was "part of our collective team".

    218.3 On 2 June 2016, Mr Mngadi said, "my sister this letter you have sent means nothing – it is of no use to the funders, to me, to everyone". Ms Nhantsi testified that the only other person he could be referring to was the Chair, Ms Myeni. The message also stated that "we might as well have waited for you to get Board approval for the cancellation fee clause". Ms Nhantsi said this referred to the caveat she included in the term sheet that it was subject to Board agreement. In the message, Mr Mngadi stated that he thought the Board resolution was circulated the previous day. Ms Nhantsi believed Ms Myeni must have told him this. She testified about earlier messages from 23 May 2016 where Mr Mngadi appeared to know about Board resolutions.

    218.4 Mr Mngadi ramped up the pressure in later messages. On 3 June 2016, he said Ms Nhantsi must sign the term sheet on an unconditional basis by 9am that morning, failing which he said he would "inform the stakeholders". Ms Nhantsi responded that she could not sign documents beyond her mandate without Board approval, as it would compromise her career.

219. Ms Nhantsi testified that she told Ms Myeni that she would only sign the term sheet unconditionally if the cancellation fee was left out and was resolved separately. She eventually signed it on that basis. Soon thereafter, Mr Zwane was called by Ms Myeni asking what his delegation of authority was as CEO. Mr Zwane said it was R50 million. Two days later, SAA received a revised cancellation letter from BNP Capital stating that it had reduced the fee to R49.9 million. Ms Nhantsi testified that this was very suspicious because BNP had failed to explain how the original cancellation fee of R128 million was made up, and suddenly dropped its fee to below the CEO's delegation of authority. That was more than a 60% decrease. It is difficult to regard the initial fee as legitimate if BNP, without explanation, was willing to drop it so substantially.

220. Ms Nhantsi testified that she knew Ms Myeni was behind the drop in the cancellation fee. She said this was done so that the transaction did not need Board approval. However, Ms Myeni did not anticipate that Ms Nhantsi would still put the cancellation fee to the Board for approval by round-robin resolution. Ms Nhantsi then called Dr Tambi and Ms Kwinana and said that she was not comfortable with the cancellation fee, and they should not vote to approve it. At this time, the SAA Board consisted of only three non-executive directors: Ms Myeni, Ms Kwinana, and Dr Tambi. Dr Tambi abstained while Ms Kwinana and Mr Zwane rejected the resolution. Ms Myeni was the only Board member to approve it. Before the vote, Ms Myeni had called Ms Nhantsi to establish why she was asking the Board to approve something not requiring its approval. Ms Nhantsi explained this was an additional term in the transaction and had to get Board approval.

221. It was put to Ms Nhantsi that, by signing a recommendation on 4 July 2016 to the Board to approve the cancellation fee, she was endorsing the decision. She agreed and admitted that this was due to the mounting pressure from Mr Mngadi and Ms Myeni. She hoped the other Board members would

reject the recommendation. It was further put to Ms Nhantsi that abstaining was not the same as rejecting a resolution. The MOI for SAA states that the votes counted for a resolution are based on the number of votes cast, excluding abstaining votes. Ms Nhantsi was unaware of this. She thought that for the motion to pass, it needed three out of five votes and she hoped that would not be reached. Her abstention put SAA at risk that the resolution would be passed. This is further confirmation that she was given the CFO position before she was ready.

222. It is also important to note that there was an instruction issued by National Treasury aimed at combatting abuse in the SCM system. It directed all public entities to obtain prior written approval from National Treasury if any existing contract was extended above 15% of the original value. Ms Nhantsi said she was unaware of this requirement, and the Board did not seem aware of it either.

223. During her testimony, Ms Nhantsi explained that she faced three types of pressure from Ms Myeni. First, Ms Myeni told her on different occasions that no-one ever had anything on her (i.e., Ms Myeni) because she never wrote anything down. Second, Ms Ms Myeni would call her at least three times a day with the message that she was delaying things and taking unnecessary documents to the Board – she should just approve the transaction and the cancellation fee. Third, she stated that Ms Myeni required her to, for example, breach leases relating to aircraft by trying to change the insurers to Black and locally-owned or rural parties. When Ms Nhantsi raised concerns or resisted, Ms Myeni would say she could see Ms Nhantsi would not obey instructions.

224. Ms Nhantsi also testified that she was often asked to do unlawful things, and there was enormous pressure from the Board and Ms Myeni to do things without following proper process. As an example, Ms Myeni gave her a CV and said she had appointed a particular person in the procurement department, because she had a "vision from God" that the person would assist in solving SAA's problems. When the person arrived for interview, he failed dismally. When Ms Myeni was informed, Ms Nhantsi was ordered to fly to Durban, was berated, and told she did not follow Board instructions. When Ms Nhantsi then asked Ms Myeni for the Board resolution, she disapproved of the request.

225. It was put to Ms Nhantsi that she was obliged, under the Prevention and Combatting of Corrupt Activities Act, to report any knowledge or suspicion that acts of corruption, fraud or theft were taking place at SAA. Ms Nhantsi testified that she was aware of this. She accepted that she breached her obligations in this regard. She said she would perhaps have taken those steps, but it was "overtaken by events" because the Webber Wentzel letter arrived and the BNP agreement had to be cancelled. She also testified that Ms Myeni continued to pressure her with constant calls not to cancel BNP. She claimed that BNP would sue SAA despite not having a valid licence. Ms Nhantsi's priority was ensuring the cancellation took place and safeguarding SAA's assets. She testified that she did not speak out against Ms Myeni or report her because she was scared. She was scared for her life, particularly when she was in Durban. She knew that she would ultimately lose her job because of the BNP cancellation and the number of times she resisted instructions from Ms Myeni. She had also been told by Ms Kwinana that if an employee did not follow Ms Myeni's instructions, Ms Myeni would write whistleblower emails about the employee, and then approach the Chief Internal Auditor and put pressure on him to suspend or dismiss the employee.

226. Ms Nhantsi also testified that SAA employees were subjected to a vetting process. Ms Myeni informed her that a person in her department (Treasury) had "failed" the vetting, and she could not have someone in that sensitive department who had failed this process. This person was Ms Lindsey Olitzki. Ms Myeni asked Ms Nhantsi to meet with Ms Olitzki and give her two options: move to another place in the organisation or be fired. Ms Nhantsi resisted this because vetting was not part of Ms Olitzki's employment contract and there could be labour disputes. Ms Olitzki was given these options and she refused both. Ms Nhantsi and Mr Zwane decided that they should wait and take a uniform approach to all the vetting results. The next day Ms Myeni called Ms Nhantsi and asked if she had spoken to Ms Olitzki. She told Ms Myeni what she and Mr Zwane had decided. Ms Myeni was furious with her for not carrying out her instruction.

227. Ms Olitzki was said to have "failed" the vetting because she had dual citizenship. Ms Nhantsi testified that she believed this was a pretext given by Ms Myeni to get rid of Ms Olitzki. It seemed that the Chair

was attempting to place people who would serve as her "eyes and ears" in the different departments. She first attempted this with the procurement department. Ms Nhantsi said Ms Myeni wanted to replace Ms Olitzki with someone who would be her "eyes and ears" in the Treasury department. Ms Nhantsi stated that she was surprised at the vetting process because the executives involved were generally not exposed to confidential information requiring security vetting.

228. Ms Nhantsi appears to have been somewhat out of her depth in the position of CFO at SAA. She admitted to having succumbed to the pressure Ms Myeni placed on her during the BNP transactions. To Ms Nhantsi's credit, she was willing to make concessions when questioned about her conduct and accepted that the way she had behaved was inconsistent with good governance or procurement requirements. In the end, however, it was Ms Nhantsi who recommended that a cancellation fee be paid to BNP Capital for just short of R50 million. As the report details below, had this gone through, it would have amounted to an extraordinary windfall because BNP had not actually incurred any costs in sourcing funding for SAA. The level of pressure exerted on Ms Nhantsi by Mr Mngadi and Ms Myeni to advance the funding arrangements reveals an inappropriate level of interest on their part in securing that windfall for BNP Capital.

BNP Capital's evidence

229. Mr Pholisani Daniel Mahlangu is the CEO of BNP Capital. In 2016, he was responsible for the day to day running of the business and was the sole director of the company. Mr Mahlangu testified that on 9 February 2016 he was approached by Mr Mngadi. He said he would like to work with BNP to submit a joint response to SAA's Request for Information (RFI) for transaction advisory services. Mr Mngadi explained to Mr Mahlangu that he was aware of SAA's financial situation and that he had developed a solution. He told Mr Mahlangu that he was a longstanding consultant for SAA and suggested that BNP should partner with his entity, InLine Trading. Mr Mahlangu agreed to this, and the two entities began working on the response to SAA. On 13 February 2016, Mr Mngadi emailed Mr Mahlangu with amendments to the response to the RFI and told Mr Mahlangu to delete any reference to his name and InLine Trading. Mr Mahlangu testified that he understood the bid was for transaction advisory services on how to consolidate SAA's debt and to analyse the financials. He accepted that this was an entirely different mandate to one for sourcing funding.

230. During his testimony, Mr Mahlangu admitted that BNP bid as part of a joint venture with InLine Trading for the transaction advisory services. He stated that he did not provide InLine Trading's financials in the bid because they had not been prepared. In his statement to the Commission, he wrote that this was because they had not been a trading entity. However, he eventually admitted that this was an assumption he made, and that this was inconsistent with what he wrote in the bid submission - that InLine Trading had ten years of experience in the aviation sector. Mr Mahlangu admitted that BNP did not do any due diligence on InLine Trading before partnering. He said this was because of the short RFI deadline, but later admitted the RFP was only due a month later on 18 March 2016. There was time to do a check on the entity, but they chose not to. Mr Mahlangu could not satisfactorily answer why InLine Trading needed BNP as a partner, as it had the necessary experience and BEE credentials itself.

231. Mr Mahlangu testified that Mr Mngadi played a dominant role in the bidding with SAA. Mr Mngadi prepared the sourcing of funds proposal and drafted the relevant correspondence, which was sent using the BNP Capital logo and letterhead. Mr Mngadi also liaised directly with SAA. None of the SAA correspondence ever came from InLine Trading. It always came from BNP and then informally through Mr Mngadi. On 18 March 2016, Nedbank submitted its bid as a transaction advisor. Mr Mngadi featured as part of the Nedbank transaction team in the bid. Mr Mahlangu testified that he was unaware at the time that Mr Mngadi was employed by Nedbank, that Nedbank was bidding for the same award, or that Mr Mngadi was on that bidding team.

232. Mr Mahlangu could not deny any of the following shortfalls in the BNP bid submission. When it was put to him that InLine Trading was a car dealership, he testified that he was unaware of that. It was also put to him that the person Mr Mngadi insisted be the Inline Trading representative in the bid

documents, Mr Brendan King, had resigned as a director of InLine Trading prior to the bid submission. Mr Mahlangu did not know this and Mr Mngadi later told him that the CEO of InLine Trading had passed away. Mr King provided an affidavit stating that he knew Mr Mngadi as an InLine Trading customer who purchased cars from them and occasionally sent business their way. He stated that a Mr Eric Mbezi had taken over InLine Trading, but he passed away on 9 February 2016. Mr Mahlangu confirmed that, had he known all this, he would not have partnered with InLine Trading. In the BNP bid documentation, Mr Mahlangu certified that its contents were correct, and that no-one involved in the bid had a personal relationship with the bid evaluators. However, in his evidence he admitted never checking whether Mr Mngadi had such a relationship, despite knowing his SAA ties.

233. Mr Mahlangu sent a letter to Grissag, BNP's funder, on 22 April 2016. Attached to the letter was a "mandate from SAA to raise and arrange funding for and on behalf of SAA for purposes of consolidation of SAA's debt of R15 billion". However, the SAA award letter for the sourcing of funds was only received by BNP on 26 May 2016. He explained that Mr Mngadi drafted the letter and that he had not checked it carefully. He accepted that the letter was false because, in April 2016, BNP's mandate was only for transaction advisory services and not for sourcing of funds.

234. Regarding the correspondence sent to SAA regarding the justification for the cancellation fee, Mr Mahlangu testified that Mr Mngadi was responsible for sourcing these facts from Grissag. He indicated that Mr Mngadi's role was to communicate with the client and that he introduced Grissag as the funder. Mr Mahlangu said he had never had interactions with Grissag or heard of it before. BNP assumed that the information they received from Mr Mngadi about the funding was correct and coming from Grissag itself. According to Mr Mahlangu, all facts in the SAA letter about the cancellation fee came from Mr Mngadi, who claimed this was communicated to him by Grissag. Mr Mahlangu therefore conceded that he had no reason to dispute what Grissag's director, Mr van der Merwe, said before the Commission. According to Mr van der Merwe's testimony, the representations made in those letters to SAA concerning the basis for the cancellation fee were all false.

235. Mr Mahlangu clarified that, in his understanding, the cancellation fee would only have been payable if actual work had been done to justify the payment. His intention behind the letter was that they wanted to be covered by a cancellation fee in case they raised funds and SAA decided not to use them. He confirmed that the fee could only be payable if they met their mandate and raised the money, but not before. According to him, those were the only circumstances in which the cancellation fee would apply.

236. Mr Mahlangu acknowledged that having a valid FSB licence was a requirement for the tender for transaction advisory services. He confirmed that BNP did have this licence when the bid was submitted. However, on 23 March 2016, the FSB sent correspondence to BNP indicating that it intended to suspend the licence, and it was suspended on 12 May 2016. The notice of suspension stipulated that the BNP had to inform all affected clients and product suppliers about the suspension. Mr Mahlangu claimed he fulfilled this requirement by sending a letter to SAA on 13 May 2016. However, he could not provide documentation to prove it was sent to and/or received by SAA, or who sent it and to whom. The letter itself is undated. Mr Mahlangu could not deny Ms Nhantsi's evidence that she never received the notification. Mr Mahlangu said he was "surprised" that one of his staff, Mr Moyo, wrote to SAA to say they had a valid licence on 6 July 2016 when this was not the case. The email was copied to him, but he did not notice it. It was put to Mr Mahlangu that even in the later letter of 8 July 2016, in which he explained that he notified SAA of the 12 May 2016 suspension, he still misrepresented the notification as a letter of "intention to temporarily suspend" instead of an actual suspension notice. Mr Mahlangu admitted he had not correctly described the notice, but claimed he did not mean to mislead anyone.

237. Mr Mahlangu testified that the additional fee of 1% from any drawdowns, which the term sheet signed on 8 June 2016 provided for, would go to Grissag and would not be shared with BNP, because only the fundraising entity would be entitled to that share. That was his understanding, but he never spoke to Mr van der Merwe about it. He said that he was under the impression that BNP was entitled only to a success fee but not this additional "commitment fee". When he was told that Mr van der Merwe had testified that Grissag and Mr Mngadi agreed to share the fee between the two parties, he conceded it

was possible that this could have happened, but he did not know about it. Mr Mahlangu testified that he had no agreement with SAA about the success fee. He believed they were running the process through proposals and that BNP had proposed a fee of 1.25% but that, as far as he knew, SAA never came back to him about that. He was never aware of an agreement to pay a success fee of 1.5%

238. Mr Mahlangu testified that, in 2017, Mr Mngadi called and asked him to confirm in an affidavit that Mr Mngadi was not a BNP employee and did not compile the bid himself. Mr Mahlangu agreed because both points were technically true, even though Mr Mngadi provided inputs to the bid compiled by BNP. He later realised that Mr Mngadi was trying to distance himself from the transaction and pretend not to have been involved. He also stated that he did not read the whole affidavit properly before signing. He testified that Mr Mngadi asked him to sign the affidavit because the media was reporting that he was an employee of Nedbank, which had been a competing bidder.

Grissag

239. Mr Pieter Johannes Van der Merwe testified that he started Grissag in 2014/2015 with Mr Sergey Pokusaev, with the intention of funding South African public entities. Both men had worked for the Russian Federation and, before that, the Soviet Union. At the time they formed Grissag, Mr Pokusaev was retired. They registered Grissag SA (Pty) Ltd in South Africa with both as directors. Mr Van der Merwe testified that Grissag approached various governments and the FDC. They proposed that Grissag could get involved with the FDC's funding and wrote them a proposal for funding housing projects. The proposal did not come to fruition because Grissag insisted on a guarantee for any capital advanced. The FDC said that they could not get a Treasury guarantee and they had no other assets large enough to guarantee the financing.

240. Around August 2015, a representative for SeaCrest (a Mr "Rambal", represented by an attorney, Mr Leon Etzbeth) asked Mr Van der Merwe whether Grissag would be interested in funding SAA for R14 billion. That representative made it clear to Mr Van der Merwe that since Grissag had neither an FSB licence nor BEE credentials, it could not go on tender alone. He said its bid would have to be a joint venture arrangement. On 27 August 2015, the parties signed a memorandum of agreement. The agreement provided for a fixed interest rate of 4.5% per annum. Then SeaCrest would get whatever margin above that (markup) that it could negotiate with SAA. Mr Van der Merwe testified that he never checked with SeaCrest what its ultimate markup was. When he was informed it was 1.3%, bringing the total to 5.8%, he said this was much higher than international standards. He said it would normally be around 0.5% on an amount that large. This aligns with Ms Stimpel's quotes from the banks at the time.

241. Mr Van der Merwe explained that, when SeaCrest asked Grissag for proof of funds, it was not possible to do so because the international banks it worked with would only decide based on a final signed agreement, as they had to get permission from their central banks. Mr Van der Merwe testified that it would have been in order to have conditions in the agreement that the information be provided and a due diligence performed before the agreement came into effect, but he needed a finalised signed agreement for purposes of sourcing the funding.

242. Mr Van der Merwe testified that around November or December 2015, he was concerned that the SeaCrest transaction was not going anywhere. He asked FDC whether Grissag could instead fund SAA through the FDC. He testified that the FDC told him that it had an FSP (financial services provider) licence. He was not aware that there might be any other legal limitation on FDC's ability to finance SAA. Mr Van der Merwe sent the FDC a standard term sheet for R15 billion. The terms were 4% interest fixed per annum to be calculated on each draw down and then lower rates depending on different factors, down to 3%. The lower rate was achieved through negotiations with international funders, who were keen for the transaction to go through. The actual term sheet sent to SAA by Mr Moyo of FDC did not include the interest rate changes. A few weeks later, the FDC came back to Mr Van der Merwe and advised that it was not possible for one state entity to finance another. Mr Van der Merwe accepted this. He placed the date around January 2016 and confirmed it was not as late as March or April 2016. This is significant because SAA was only advised about this problem by the

FDC in April 2016. This date issue is important as the delay until April 2016 and the "sudden" FDC revelation that it could not fund SAA was used to justify the urgency of the situation and confinement to BNP on the tender for the sourcing of funding.

243. Around February or latest March 2016, Mr Van der Merwe was approached by someone who told him that BNP had been appointed to source the R15 billion for SAA. He testified that his main reason for entering a partnership with BNP was its BBBEE status and the fact that it had an FSP licence. On 22 April 2016, Mr Mahlangu from BNP sent Mr Van der Merwe an email confirming that they had been awarded the SAA contract to source the funds. Mr Mahlangu confirmed in his evidence that this had been incorrect because they were only awarded that tender in May 2016. By that stage, on 21 April 2016 (the day before), an internal decision had been taken by the SAA Board to extend BNP's mandate to include sourcing funds. But no process had yet been followed to approve that appointment. This means someone on the Board or privy to the Board's resolution must have advised BNP about the decision.

244. Mr Van der Merwe did not appreciate the difference between a transaction advisor and a funding source, and so did not realise that the letter attached to the BNP email was not a fund-sourcing award. The email from BNP asked Grissag to provide proof of funds of between R3 to R7 billion. Mr Van der Merwe responded that this was not possible up front. He required at least a signed term sheet that committed SAA to the terms and conditions and then a formal funding agreement would need to be signed. On 2 June 2016, Mr Van der Merwe noted that Ms Nhantsi provided him with a term sheet that stated it was non-binding. He testified that a non-binding term sheet was meaningless and so he could not accept it. Mr Van der Merwe also testified that on 8 June 2016 he travelled to SAA's offices and attended a meeting with Ms Nhantsi set up by BNP. She signed the term sheet before him and he then left. By that stage, Mr Van der Merwe had managed to secure an even lower rate from his funder and so the term sheet reflected 3.5% interest. However, another fee was added on top of that. This was the 1% payable to Grissag for every draw down. Mr Van der Merwe testified that this 1% was a once-off fee so it did not amount to a 1% increase in interest. It would be around 0.1% overall. So, the additional 1% figure would lead to an effective interest rate of 3.6%.

245. Mr Van der Merwe testified that he was totally unaware that BNP would be receiving an additional 1.5% on the transaction for finding the Grissag funding. He said he was shocked because BNP did not find Grissag. On the contrary, Grissag had been attempting to fund SAA and was well known as a funder in the market. It therefore could not have been a finder's fee.

246. Mr Van der Merwe testified that he had various interactions with BNP, but he did not know the names of the people he spoke to. It could have been Mr Mngadi but he could not say for certain. He also confirmed that he never saw nor was he aware of the letters exchanged between SAA and BNP about the cancellation fee. He confirmed that none of the statements made in those letters about costs already incurred or to be incurred by Grissag were true. Mr Van der Merwe stated that Grissag had not incurred any costs at that time and the funding partners listed in the letters were fabricated because Grissag did not disclose its funders to anyone. He said it was also false that Grissag was imposing a penalty or cancellation fee in dollars on BNP. He denied that Grissag had been flying around the world sourcing funding. Every fact about Grissag in those letters was inaccurate and made up. Mr Van der Merwe confirmed that, to have imposed a cancellation fee, a contract would have had to be concluded. At that point, there was no such contract - only a signed term sheet referring to a future contract.

Connection between BNP and the Myenis

247. Ms Myeni's conduct in respect of BNP becomes more explicable when the following evidence is considered. In August 2016, at an interview with OUTA, Ms Kwinana said that Ms Myeni's son, Thalente Myeni, had a close relationship with Mr Mngadi of BNP Capital. The Commission did not procure a formal transcript of this aspect of the interview, but the audio recording of the interview reveals the following.

247.1 During her interview, Ms Kwinana confirmed that Mr Thalente Myeni was "involved" in BNP

because where Mr Mngadi was, "Thalente" would be. They were either close friends or more likely associates/business partners.

247.2 Ms Kwinana also testified about several occasions where Mr Myeni had been seen with Mr Mngadi. First, there was a time when Ms Nontsasa Memela, the Head of SAAT Supply Chain Management, told Ms Kwinana she met with Ms Myeni in respect of Air France and Mr Thalente Myeni was at the meeting. When they had a second meeting with Airbus, Mr Mngadi was at SAA with Mr Thalente Myeni but Mr Myeni did not form part of the meeting. However, they arrived and left together, and were sitting together when Ms Kwinana and other attendees arrived at the meeting venue. Ms Kwinana said that she did "not trust" Mr Mngadi. When asked where else she had seen the two together, she said that they were seen in Sandton. When Ms Kwinana was pushed for further locations, she just said she knew they used to hang out.

248. During her testimony, Ms Kwinana denied having said this. However, her version can be rejected. The audio recordings clearly reveal that she did say these things to OUTA.

249. The evidence therefore appears to establish a relationship between Ms Myeni and Mr Myeni on the one hand, and Mr Mngadi on the other. The relationship between Ms Myeni and Mr Mngadi was a key feature of Ms Nhantsi's evidence before the Commission. Mr Mngadi was given an opportunity to respond to the evidence of Ms Nhantsi and Mr Mahlangu. His response is dealt with in the next section. Notably, he does not deal with his relationship with Ms Myeni, which indicates that he lacked an adequate answer to the alleged close relationship with Ms Myeni.

Mr Mngadi

250. Mr Mngadi did not testify before the Commission, but he did provide an affidavit after Ms Nhantsi and Mr Mahlangu gave evidence. He explained that he had had several interactions with SAA officials over the years because of his position at Nedbank. He said he was introduced to Ms Nhantsi by Ms Kwinana and he had agreed to assist her "informally" to deal with the challenges facing SAA regarding its debt position.

251. Mr Mngadi contended that providing informal advice to SAA was not in conflict with his position at Nedbank, because Nedbank had not submitted any proposal to SAA in response to an RFI. However, this misses the point. Nedbank had certainly tendered for the transaction advisory services at SAA. Its bid submission formed part of the documents presented during Mr Mahlangu's evidence before the Commission. Despite this, Mr Mngadi claimed that Nedbank did not participate in this tender. He provided a copy of a BAC document from February 2016, which did not list Nedbank as a bidder. The origin of this document is not disclosed in his statement. It is contradicted by the evidence already before the Commission regarding the tender for transaction advisory services, which clearly shows that Nedbank submitted a bid.

252. Mr Mngadi's affidavit also fails to engage properly with the text and tenor of his WhatsApp messages to Ms Nhantsi. Ms Nhantsi provided the Commission with the WhatsApp messages she received from Mr Mngadi while the sourcing of funds was underway at SAA. These messages reveal a level of familiarity between Mr Mngadi and Ms Myeni. They are also evidence that an increasing amount of pressure was being placed on Mr Nhantsi to ensure that the funding transaction went through. Despite this, Mr Mngadi never dealt with his relationship with Ms Myeni in his affidavit. He also did not deal with the import of his WhatsApp communication with Ms Nhantsi.

253. Mr Mngadi denied the role that Mr Mahlangu said he played in the BNP bid and subsequent interactions with SAA, but the communications to Ms Nhantsi at the time, which are not addressed in his affidavit, clearly show that Mr Mngadi was involved.

Conclusion

254. There is little doubt that, if not for the actions of Ms Stimpel, the BNP transaction would have gone ahead in one form or another. It was her unwavering commitment to proper procurement processes

that made her stand up to what was going on around her, at great personal cost to herself. Whistle-blowers like Ms Stimpel are the final defence against corruption and state capture taking hold in SOEs.

255. As will be seen in the next section, there was no-one like Ms Stimpel involved when the Boards of SAA and SAAT decided on the Swissport and AAR/JM Aviation transactions. By the time that key decisions on these transactions were made, Dr Dahwa had been removed and Ms Mpshe relieved of her Acting CEO duties. Without these people to stop them, the transactions were allowed to proceed, with benefits and kick-backs paid to key decision makers within SAA and SAAT.

Swissport

256. Swissport is an international, Swiss-based cargo and aircraft ground handling services provider founded in 1996. It has a South African-incorporated subsidiary, Swissport South Africa (Pty) Ltd. It is a level 6 BEE contributor with over 40% Black ownership. Prior to the impugned ground handling contract discussed below, Swissport had an ongoing business relationship with SAA as a ground handling service provider.

257. In February 2020, Mr Schalk Human was the Head of Department for Technical Materials at SAAT, and was responsible for procurement, logistics and inventory management. He gave evidence before the Commission and was able to testify to a chronology of events relating to SAAT tenders through the written documentation available to him, including forensic reports, minutes of meetings and other documents.

258. Mr Human testified that ground handling services involve positioning power units, towing services, tugs, loading aircraft, baggage transportation, steps and ramps. The ground handling contract was awarded by SAA. It was published in May 2011, and on 31 July 2012, the Board awarded the contract to Swissport for a five-year period. The Swissport contract was never signed or concluded but the company nevertheless provided the services to SAA. An amount of R1.139 billion was paid to Swissport during this period without a contract in place. In 2016, SAAT took the decision to conclude a contract with Swissport for a further five years, even though the original 2012 tender was only expiring in 2017 and no further procurement process was carried out. The contract value would end up being double the original tender value.

259. When the ground handling contract was concluded with Swissport in 2016, it included a condition that Swissport had to contract with a BEE company that had representation of Black women, youth, military veterans, and disabled persons, from which Swissport would purchase the equipment required for the SAA contract. Mr Peter Kohl, a former Swissport CEO, provided several affidavits. In his first affidavit, he stated that:

    259.1 Swissport successfully bid for SAA's 2012 ground handling services tender, but there was an inordinate delay in preparing the agreement because of frequent changes in SAA's management; by 2014 it appeared to him that SAA was not going to honour its tender award and conclude the Swissport contract.

    259.2 Swissport continued providing services to SAA on a month-to-month basis, but this became untenable, so it attempted to get SAA to sign a contract. SAA resisted signing and changed the tender requirements by introducing new BEE supplier conditions. Swissport was already 49% BEE-owned and had the required BBBEE contributor rating for the tender.

    259.3 SAA accounted for 70% of Swissport SA's business at the time. If Swissport lost SAA's business, it would have been liquidated. It came to Swissport's attention that SAA would award it a ground handling contract with a 30% share for BEE SMMEs. SAA suggested that Swissport use an entity called "Jamicron" as a BEE partner, but Swissport never did so. A 30% BEE SMME set aside meant that Swissport had to give 30% of the value of the contract to a BEE partner. The 30% set aside policy was said to be aimed at promoting transformation. In December 2015, Mr Lester Peter from SAA's Global Supply Management sent Swissport SA a draft contract including

the 30% set aside. Swissport responded that this was likely an illegal agreement and would not help with transformation.

259.4 On 10 February 2016, Mr Kohl, Mr Vuyisile Ndzeku, a Swissport shareholder and a shareholder and director of JM Aviation, and several other Swissport representatives met with Ms Kwinana and other SAA officials. At the meeting, Ms Kwinana insisted that Swissport sign the agreement with the 30% set aside. Swissport refused to sign that agreement. When Swissport refused to sign the agreement, SAA sent Swissport a letter which would have put an end to all business Swissport was getting from SAA. Nevertheless, the parties did not get to that point. They ended up concluding a contract in March 2016. It was a condition of the contract (clause 8.1) that Swissport would subcontract some of its services to BEE companies. Clause 8.2 required Swissport to purchase SAAT ground power units (GPUs) at market value or book value;

259.5 In terms of the agreement, SAA would select a BEE partner that Swissport had to work with. It chose JM Aviation South Africa (Pty) Ltd (JM Aviation); JM Aviation would purchase the GPUs and sell them on to Swissport. Mr Kohl said that he was not aware that Mr Ndzeku was also involved in JM Aviation.

The ground handling agreement and Jamicron

260. In 2015 and 2016, Mr Vuyisile Ndzeku was a shareholder and director of Swissport. He testified that he ceased being a Swissport director in early 2020, around the time he was scheduled to testify at the Commission. Mr Ndzeku was also a shareholder and director of JM Aviation, and held these positions since around 2015. Prior to this, he testified that he worked with JM Aviation International. Mr Jules Aires was the JM Aviation founder and a company shareholder in 2015/2016. The other shareholders of JM Aviation are Mr Ndzeku's daughters, Ms Khosi Sokhulu and Ms Natasha van Louw. Since October 2015, these four shareholders have also been JM Aviation directors. Mr Ndzeku's wife, Ms Hendricks, was also a JM Aviation employee.

261. Mr Ndzeku conceded that he did not disclose to Swissport that he was a director and shareholder of JM Aviation. He confirmed that he did not recuse himself from meetings where transactions between the two entities were discussed or voted on. He also admitted speaking regularly with Ms Kwinana on the phone during 2016, and that they discussed how to facilitate the 30% set aside for the Swissport contract to Jamicron. Mr Daluxolo Peter was a director of Jamicron at the time. Mr Ndzeku confirmed that he and Ms Kwinana had discussed Swissport's empowerment partner "many times". He testified that during their first interactions about an empowerment partner, Ms Kwinana had Mr Daluxolo Peter with her and stated that she and Ms Myeni insisted that Swissport use him as an empowerment partner. Mr Ndzeku said he had resisted this because Swissport already had empowerment credentials.

262. Mr Ndzeku testified that on 10 February 2016 he attended the meeting referred to above at SAA with Mr Peter Kohl on behalf of Swissport. Ms Kwinana and Mr Lester Peter were present for SAA. Mr Daluxolo Peter was also there. At this meeting, SAA told Swissport it wanted Swissport to set aside 30% of its revenues to an empowerment firm, and in particular to Mr Daluxolo Peter.

263. Mr Ndzeku testified that at some point in 2016, he was told by Mr Kohl that Swissport was going to pay JM Aviation R 28.5 million. Despite being a director of JM Aviation, he professed knowing nothing about a contract in terms of which this Swissport payment was to be made to JM Aviation. The Commission's investigations revealed that this payment was made in March 2016, the month before the ground handling contract between SAA and Swissport was concluded. Mr Ndzeku also testified that Mr Kohl instructed him to pay R20 million of the R28.5 million to Jamicron. Mr Ndzeku testified that Mr Kohl said that this was because Jamicron was going to be the empowerment partner in the Swissport ground handling contract.

264. Mr Daluxolo Peter provided an affidavit about the Jamicron payment. He stated that it was not Mr Kohl who instructed JM Aviation to pay Jamicron. It was instead an arrangement devised entirely by Mr Ndzeku. Mr Peter's version was that it was Mr Ndzeku who established Jamicron, installed

his daughter as a director together with Mr Peter, and then facilitated the R20 million payment to Jamicron. Mr Ndzeku then told Mr Peter what to do with that R20 million and who to pay with it. This involved withdrawing R5 million in cash over three days, and handing it to Mr Kolisi of BMK Attorneys. This was the same Mr Kolisi who was, at the time, running a disciplinary hearing against Dr Dahwa. for refusing Ms Kwinana and Ms Myeni's unlawful instruction to award the ground handling contract to Swissport. Mr Kolisi also drafted the letter used to suspend Ms Mpshe. Mr Peter stated that he took R5 million of the R20 million for himself as payment for facilitating the ground handling transaction. Mr Ndzeku then instructed him to pay R10 million to BMK Attorneys directly.

265. Mr Ndzeku denied the allegation that he masterminded the creation of Jamicron. He said he could not have done this because he did not receive payments for facilitating the transaction. This was, however, false. During his evidence, Mr Ndzeku was shown bank statements proving he received R2.5 million of the R28.5 million paid by Swissport to JM Aviation. In response he said, "Okay that's good, I'm happy, it's good if I did get some money, Swissport gave me some money", but could not explain why he received that money. The bank records also showed that a further R2.5 million of the Swissport payment to JM Aviation was paid to BMK Attorneys, with the reference "Pete". This money was used by BMK Attorneys to pay for Mr Lester Peter, the Head of Procurement of SAA, to buy two luxury sports cars the following day.

266. In preparation for Mr Ndzeku's evidence before the Commission, its investigators engaged Swissport and asked it to explain the R28.5 million paid to JM Aviation. A second affidavit furnished to the Commission by Mr Kohl claimed Swissport had entered into a service level agreement with JM Aviation to upgrade its ground support equipment (GSE) workshops. Mr Ndzeku professed to know nothing about this arrangement nor about the services allegedly rendered by JM Aviation to Swissport.

267. JM Aviation's bank account had only R1000 in it when this R 28.5 million payment from Swissport was made. Despite this, Mr Ndzeku testified that JM Aviation South Africa had engaged in various business transactions before the Swissport payment. Mr Ndzeku was then forced to admit that the previous transactions had actually been conducted through JM Aviation International. He confirmed that JM Aviation South Africa had not engaged in any transactions until Swissport's payment in March 2016.

268. After Mr Ndzeku's evidence, Swissport provided an affidavit dated 19 November 2020 in which Mr Kohl disputed Mr Ndzeku's version. He denied knowledge of Mr Ndzeku's dealings with Jamicron and denied instructing him to make the payments he did from the R28.5 million received from Swissport.

269. To establish whether there was, in fact, a genuine agreement concluded between Swissport and JM Aviation for the upgrade of Swissport's GSE or whether the payment of R28.5 was nothing more than a "facilitation" fee for securing the ground handling contract, the Commission's investigators asked Swissport to produce all documents detailing the services JM Aviation provided in relation to the GSE workshop upgrade. However, Swissport advised that it did not have a single scrap of paper verifying any aspect of the alleged contract between the parties. There was not a single email, meeting notice, invoice, slideshow, log, or design document.

270. It is extremely unlikely that a genuine agreement, in terms of which Swissport was to receive services worth R28.5 million, would have generated nothing more than handwritten notes which were subsequently thrown away. The only reasonable inference to draw from the evidence is that Swissport was in dire straits when SAA terminated its month-to-month ground handling services contract in February 2016. At the time, Swissport was not willing to accede to SAA's demand that it part with 30% of the revenue under the agreement. However, it faced liquidation in South Africa if it did not retain the SAA work. It was therefore willing to procure the services of JM Aviation and Jamicron (Mr Ndzeku and Mr Peter) to facilitate the conclusion of the SAA contract.

271. It has, unfortunately, not been possible to establish Swissport's knowledge on these matters because it declined invitations to meet with the Commission's investigators and legal team. It instead preferred to answer the Commission's enquiries as the investigation developed with affidavits produced by Mr Kohl. When the Commission asked about Mr Kohl's availability to give oral evidence, it was told that he was in the United States of America and unable to testify. Despite this limitation, the evidence that

corruption took place in this deal is supported by two undisputed facts:

271.1 Swissport's inability, despite two requests from the Commission, to provide any documentary confirmation that genuine services were provided by JM Aviation to Swissport in exchange for the R28.5 million it received a month before the ground-handling contract was concluded between it and SAA.

271.2 What JM Aviation actually did with the money. If services were genuinely to be rendered under the contract with Swissport, JM Aviation would likely have had to pay salaries and make at least some purchases to equip itself to provide the services. However, the bank statements of JM Aviation show that no such payments were made. Instead, the money came into the account and it was paid out to those connected with SAA. It was paid to Mr Daluxolo Peter, whose affidavit before the Commission confirms he was paid this money for facilitating SAA's ground handling agreement. It was paid to Mr Ndzeku who, in his own version, knew nothing about the GSE workshop upgrade with Swissport. It was also paid to Mr Kolisi, who, in turn, bought two luxury cars for Mr Lester Peter, SAA's head of procurement.

272. In light of this substantial evidence that corrupt payments were made to secure the ground handling contract with SAA, the Commission will recommend prosecutions of all those involved in these transactions.

273. In Ms Kwinana's' evidence before the Commission, she admitted she attended the Swissport meeting on 10 February 2016 that Mr Ndzeku also attended. She claimed it was a short engagement because she simply informed Swissport that SAA was going out on tender because the existing contract was irregular. However, this version of events of the meeting conflicts with notes prepared immediately after the meeting.

274. On 12 February 2016, Mr Kohl wrote an email to his fellow Swissport directors recording what was said at the meeting of 10 February 2016. He said Ms Kwinana chaired the meeting and declared that its purpose was to conclude the contract. Thereafter, Mr Lester Peter and Ms Kwinana insisted that Swissport sign the supplementary agreements that Mr Peter emailed to Swissport in December 2015. These draft agreements stipulated the 30% set aside for a BEE partner. Mr Kohl's email further recorded that they were told SAA would terminate business with Swissport if it did not sign the agreements. The email said that, apart from being illegal and outside of the provisions of South Africa's B-BBEE Act, these demands would bankrupt Swissport. Ms Kwinana testified that she could not recall this being discussed at the meeting and demanded to see minutes of the meeting. Mr Kohl's affidavit explained that Swissport had asked SAA for minutes but they were never forthcoming.

275. There was also another of Swissport's representatives at the meeting, who took independent notes of what transpired. They accord with Mr Kohl's emailed account of the meeting. When this corroboration of Mr Kohl's notes was shown to Ms Kwinana, she again claimed they were false. She testified that she also had no knowledge of the draft agreement sent to Swissport in December 2015 by Mr Lester Peter. Ms Kwinana admitted she knew Mr Daluxolo Peter from the supplier development roadshows, but could not recall if he was at the meeting of 10 February with Swissport.

276. It was put to Ms Kwinana that it was not appropriate for a non-executive Board member to attend these types of operational meetings. She simply answered that she went "to give support". This later version contradicted her earlier version to have only attended such meetings to offer "support". It also tends to corroborate the version of Mr Kohl that Ms Kwinana played a leading role in the meeting by putting pressure on Swissport to accept a 30% set aside BEE partner.

277. In fact, it was put to Ms Kwinana that there was evidence from her own emails that confirmed Swissport's claim. On 20 January 2016, she sent an email to Mr Lester Peter, which said: "yesterday I had a meeting with one of the shareholders of Swissport, Mr Vuyo Ndzeku, Mr Peter Kohl, Mr Daluxolo Peter, a BEE partner of Swissport. The purpose of the meeting was that the BEE partner was concerned about the status of the contract." Given that she had written the email herself, this claim is simply preposterous and should be rejected.

278. In an effort to probe Ms Kwinana's version of what transpired at the meeting on 10 February 2016,

she was asked why, if she went to the meeting to advise Swissport that its contract was irregular and would be put out to tender, SAA did not ultimately go out to tender thereafter. Ms Kwinana provided no satisfactory answer to this question. She said that "maybe it was because of the processes." She then claimed that, while the Board may have thought that the contract was irregular, perhaps the processes required to "regularise it" were not implementable. None of this was convincing. Ms Kwinana's testimony about the Swissport transaction was evasive and, at times, nonsensical. The evidence is overwhelming that she insisted that Swissport sign a contract to give away 30% of its revenue to an entity that SAA would select.

GPUs

279. Mr Human testified that GPUs are ground power units, or generators, that aircraft need to maintain their power supply when grounded. In 2015, SAAT purchased eight GPUs for use during SAAT's maintenance operations. The GPUs were purchased for a total of R9 193 981.20 including VAT.

280. It was a condition of the ground handling contract concluded between Swissport and SAA in March 2016 that Swissport would be required to purchase those GPUs from SAAT at market value or book value. SAAT sold the GPUs to Mr Ndzeku's company, JM Aviation, for an amount of R248 000 per unit, totalling R3 392 640. The book value of the units at the time was R7 968 117. In terms of the ground handling agreement, Swissport was then required to purchase the units from JM Aviation. The day after SAAT had agreed to sell the GPUs to JM Aviation for just more than R3 million, JM Aviation sold the very same GPUs to Swissport for more than R9 million.

281. Since the sale of the units, SAAT has, to date, spent R8.4 million in fees for leasing the very same units back from Swissport. This means that SAAT lost, in total, around R14.5 million on the transaction.

282. Mr Arson Malola Phiri, the Acting CEO of SAAT at the time of the transaction, provided the Commission with an affidavit. He explained that SAAT acquired the 12 GPUs so that they could eventually insource SAA's ground handling services to SAAT. This required licencing from ACSA. It was awarded the licence in 2012 for two years. The plan was to take over the ground handling services from Swissport.

283. Despite SAAT's decision to purchase the GPUs and commence a process of in-sourcing, SAA's Board then authorised its management to conclude a ground handling contract with Swissport on 15 March 2016, signed by Ms Nhantsi and Mr Zwane. It was a term of this agreement, as set out above, that Swissport would buy the GPUs from SAAT at their book value or market value. According to Mr Malola Phiri, this reversal of the decision to insource these services to SAAT had significant commercial and financial implications for SAAT.

284. At the time, Ms Memela was the Head of Procurement at SAAT. The SAAT Board met on 15 June 2016 to discuss the sale of the GPUs. The minutes of the meeting recorded that the Board had been asked to consider and approve the disposal of 12 GPUs "as the services they were purchased to offer had been outsourced to an external service provider, Swissport, by SAA." The minutes record that the "GPUs would be sold to Swissport at their current asset value. The Board was informed that SAA's contract with Swissport provided for Swissport to purchase the GPUs from SAAT". The Board resolved that "the disposal of SAAT's 12 ... GPUs, as a result of SAA awarding the ground handling services to an external service provider ... is hereby approved".

285. The Board resolved to sell the GPUs at the best possible price in the light of the book value. Ms Memela testified that she was tasked by the Acting CEO of SAAT, Mr Zwane, to negotiate the sale of the GPUs. She attended a meeting on 21 June 2016 with a Mr Makaleng, whose department at SAAT owned the GPUs, and Mr Stan Vosloo, who was responsible for materials management at SAAT. They were joined in the meeting by Mr Jules Aires and Ms Sokhulu of JM Aviation. They discussed the proposal that Mr Malola Phiri had made to the SAAT Board for the sale of the GPUs. Ms Memela explained that her role began with negotiating the price that JM Aviation would pay to purchase the GPUs at this meeting and ended with her and the CEO signing an invoice for the sale.

286. Mr Makaleng and Mr Vosloo provided affidavits to the Commission in which they both denied having

attended this meeting with Ms Memela. Mr Makaleng provided a copy of the meeting invite which reflected that he had not accepted the invitation. Mr Vosloo sent an email to Ms Memela after the meeting on 21 June 2016 asking her to confirm the sale price for the GPUs. In her response, Ms Memela did not question why Mr Vosloo was asking this question given that, according to her, Mr Vosloo had been at the meeting where the price was discussed. Instead, she just confirmed the sale price.

287. Ms Memela was asked what research she had done or information she had gathered before agreeing on a purchase price for the GPUs.

    287.1 She confirmed that she had not established how much they had been purchased for the year before.

    287.2 Ms Memela testified that she did consider the book value of the GPUs, which Mr Phiri had also considered relevant because he had included it in his submission to the SAAT Board on whether to sell the GPUs. The book value was contained in the asset register of SAAT, as it was in June 2016, which was provided to the Commission by Mr Human from SAAT. However, Ms Memela testified that she did not have regard to that document before negotiating with JM Aviation and spent a long time, together with her lawyer, detaining the proceedings of the Commission by challenging the authenticity and validity of the document instead of addressing the questions put to her.

    287.3 Because Ms Memela testified that she had not seen the asset register extract, she was asked about the submission that Mr Malola Phiri had made to the Board on 15 June 2016 about the book value of the GPUs to which she had previously referred in her evidence. The submission stated that each unit was purchased for R766 165.10 with a total of over R9 million; the current value of the 12 units, was R682 890.62 per unit, as per the SAAT asset register. The total in June 2016 was R4.7 million. Ms Memela then claimed that she had never seen this document either and was not aware of these amounts. This, despite the fact that Mr Makeleng, who she claimed had attended the negotiations with her, confirmed on affidavit that these values were correct, and that they came from the SAAT asset register.

    287.4 Ms Memela's attorney again detained the Commission with objections that they demanded to see the authenticated asset register before Ms Memela would answer any questions.

    287.5 Ms Memela then testified that all she had been given was the proposal from Mr Aires and the Board resolution.

    287.6 Therefore, although Ms Memela testified that she had regard to the book value of the GPUs, she could not tell the Commission what the book value actually was because she denied seeing any of the contemporaneous documents put to her.

288. Ms Memela conceded that the Board resolution required the GPUs to be sold at their asset value as at that time. It was put to her that R248 000 per unit did not accord with the current asset value. Ms Memela then pointed to a part of the minutes of the meeting of the SAAT Board of 15 June 2016, where the Board discussed the discrepancy between the purchase price of the GPUs in 2015 (R782 000) versus the depreciated asset value that Mr Phiri presented to the Board as at June 2016 (R648 000) which the Board assumed was the price at which the GPUs would be sold. The Board then debated whether to claim that shortfall from SAA because it was in terms of the SAA agreement with Swissport that SAAT was being forced to sell the GPUs.

289. Ms Memela attempted to claim that this is why she was not worried about the shortfall in the offer from JM Aviation for R248 000 because SAA would pay it. However, it is clear that Ms Memela based her claim on a portion of the minutes that had nothing to do with the price that was eventually agreed upon with JM Aviation. That portion of the minutes related to internal accounting matters between SAA and SAAT. When this was put to Ms Memela, she again went on a tangent about the fact that there was no proof that the amount given by Mr Malola Phiri was the correct asset register amount for the GPUs. Once again, Ms Memela disputed the authenticity of the asset register of SAAT. But this misses the point and is entirely evasive.

290. It was put to Ms Memela that clause 8.2 of the agreement with Swissport required that the sale would be at either book value or fair market value and yet she had done nothing to establish either one before agreeing to a price. She was evasive and gave an answer that did not make sense. Ms Memela, in any event, confirmed that the final price was not agreed at the meeting with JM Aviation on 21 June 2016, which Mr Vosloo and Mr Makaleng denied attending. She said that it was only approved thereafter. When she was asked who from SAAT determined or approved the final price, Ms Memela would not answer this straightforward question. When asked directly whether she discussed the amount with Mr Phiri before she told Mr Vosloo that this was the approved "reviewed" price and to generate an invoice, or before signing the invoice, her answer was again evasive. She said: "I do not remember. I understand [Mr Phiri] as a person who would not sign anything until he understands or until he knows that, okay here is the feedback."

291. It was further put to Ms Memela that she was the only person who was sent the revised price on 21 June 2016. She accepted this. It was further put to her that her testimony was that she did not have the authority to agree to that price. She also accepted this. But then she added: "But when it was signed by the CEO it means that I had a discussion with him". She could not recall when it was that she spoke to Mr Phiri but confirmed it would have had to have been after Ms Sokhulu had sent the revised price on 21 June 2016.

292. On 22 June 2016, Ms Memela sent a notification to Ms Sokhulu at JM Aviation that their revised offer to purchase the GPUs had been accepted. This letter stated, "your proposal for the purchase of the GPU's on behalf of Swissport was approved by the Board." It was put to Ms Memela that this was contrary to her previous testimony that she did not believe JM Aviation was acting on behalf of Swissport or would on-sell the GPUs to Swissport. After speaking in circles for a long time, Ms Memela eventually conceded that, in fact, she was aware, at the time, that JM Aviation was purchasing the GPUs on behalf of Swissport. Ms Memela conceded that she did not ask JM Aviation what price Swissport was willing to pay for the GPUs.

293. The letter of 22 June 2016 stated further, "Kindly note that the approval is based on the latest price review by yourselves." Ms Memela testified therefore that she had received Mr Phiri's approval on the price between receiving Ms Sokhulu's email on 21 June 2016 and responding with this acceptance on 22 June 2016.

294. Mr Phiri provided the Commission with an affidavit in which he denied having spoken to Ms Memela between 21 and 22 June 2016 or ever having approved the final revised price. He explained that he could not have had that discussion with her because he was in an EXCO meeting the entire day on 21 June 2016 and the email of 22 June 2016 was sent off at 5:43am and therefore the discussion could not have taken place on 22 June 2016 either. He stated that, when Ms Memela gave him the invoice to sign, he was assured that this was the best price she could negotiate and that this had been done together with Mr Vosloo and Mr Makaleng. However, as set out above, both Mr Vosloo and Mr Makaleng deny having been at that meeting. When this version was put to Ms Memela during her testimony, she persisted in her version and claimed that she had consulted Mr Phiri about the price during a break in the EXCO meeting. Mr Phiri says they had no such discussion.

295. The day after JM Aviation purchased the GPUs from SAAT, it sold them to Swissport for approximately R9.8 million. As set out below, Ms Memela's willingness to sell the GPUs to JM Aviation at an amount well below their book value and without making any effort to assess their true market value benefitted JM Aviation to the tune of R6 million.

JM Aviation and AAR

296. The Commission also heard evidence about irregularities in the tender for components services at SAAT.

297. Mr Schalk Human testified about SAAT's components tender. He explained that holding excessive stock is very expensive so companies will conclude a component contract where inventory is centralised by a service provider and the company uses the service and pays a monthly premium –

usually at an hourly rate – for the use of those components. He said that this allowed the quick provision of replacement component parts. He explained there are normally three components. The first is a base kit with core components that are placed on site so that there is quick access; then advance exchange services where the company can request a specific part to be shipped; and the third is the repair services in respect of those components.

298. Mr Human explained that, as an SOE, SAAT had to follow the procurement requirements of section 217 of the Constitution, and those in the SCM Policy of the Group. The SCM Policy provides that tenders should be advertised on the website and tender bulletin. It also allows for a fair chance to respond to a published request for proposals (RFP) that sets out the criteria. The Policy also distinguishes between those who compile the bid specifications and those who are responsible for its evaluation. The evaluation is conducted by the BAC. During 2016, SAA and SAAT also had a Cross Functional Sourcing Team (CFST) that both compiled the specifications and conducted the evaluation. However, pursuant to National Treasury Instruction 3 of 2016, this had to be a strict segregation of duties so that the people that designed the bid would be different to those who evaluated it and those who made the ultimate decision. This led to a practice where the team was divided into three different committees: the Bid Specification Committee; Bid Evaluation Committee; and Bid Adjudication Committee.

299. Prior to February 2013, Air France provided component support services to SAAT. This contract was then advertised five times, each time with a separate bid number.

300. The first tender was advertised on 16 February 2013, with a deadline of 30 March 2013. The CFST recommended that the first tender be awarded to Israel Aerospace for the Boeing Fleet and Air France for the Airbus Fleet. However, the tender was then retracted. This was to allow an integrated approach where both the logistics (transport of components) and components would be combined in one award.

Second tender

301. The second tender was advertised on 29 October 2014 with 2 December 2014 as the closing date. Bids were received. On 29 April 2015, the Board asked the CFST to stop the evaluation of the bids, and to put this process on hold for three months while they engaged with an American company, AAR Inc, on the possibility of concluding a memorandum of understanding (MOU) with that company. The Board then formally withdrew the tender on 18 June 2015. The Board passed this resolution to allow the finalisation of a strategic partnership with AAR, and allow SAAT to test the market by requesting quotations from other parties for 6 months. The purpose of this was to allow a confined bid to one party but ensure that there was economic value by testing it against the market.

302. The relationship between SAAT and AAR began in February 2015, when Ms Cheryl Jackson, who was the Vice-President: Government Affairs and Corporate Development of AAR, approached Mr Nico Bezuidenhout, the then Acting CEO of SAA, and submitted a proposal for a partnership between AAR and SAAT. Despite there being an open tender process at the time, SAAT decided to put it on hold to explore this partnership. Mr Human testified that it was generally prohibited for suppliers to have any interaction with bidders when a tender was open. This is explicitly prohibited in the SCM Policy of SAA and SAAT. Nevertheless, the proposal – which offered the same services that were subject to the open tender – was sent to Mr Zwane regarding the provisioning of components. The Board resolved thereafter to approve the "strategic partnership" between SAAT and AAR. The Board also resolved to visit the headquarters of AAR in the USA in May 2015. The Board's idea was that a collaboration agreement would be signed between SAAT and AAR which would be the basis for a later MOU. It was resolved that Mr Zwane would be authorised to sign all necessary documents to affect the collaboration agreement and that, in the meantime, the tender process would be suspended for three months to allow this process to take place. Mr Human testified that this was an unsolicited bid that was accepted without a competitive procurement process.

303. SAAT's travel records reflect that Dr Tambi, Ms Kwinana, Mr Zwane and Ms Memela visited AAR in the US from 2-8 May 2015. At this time, the second tender process was still open, and AAR was one of the bidders. Mr Human testified that SCM only allowed engagement with bidders in very

circumscribed circumstances where the suppliers would all be protected. There is nothing in the policy allowing the Board and head of procurement to engage with bidders. Ms Kwinana claimed that supplier visits were not unusual, and SAAT needed to know who they were dealing with before signing an MOU. Mr Human responded that, if this was for the evaluation of a service, CFST members might be justified in undertaking such a visit. The type of visit would be confined only to the evaluation part of the tender. The evaluation would not be performed by the SAA Board or executives.

304. The Commission's investigations also revealed that an AAR representative had met with Ms Memela to understand SAAT support requirements and needs apart from what was contained in the RFP. Mr Human testified that this type of interaction was totally inappropriate given that this was a bidder in an open tender process. This inappropriateness was confirmed by Mr Mike Kenny, SAAT General Manager for Marketing at the time. He emailed Ms Memela about an invitation from her saying he should attend a meeting with AAR. In the email, he expressed concern over discussing component support issues with a bidder when the tender process was still ongoing.

305. There was also correspondence between Ms Jackson and SAA representatives during the time that the second tender was still open that revealed she was already aware that the tender was going to be cancelled, before any Board decision had been taken on the matter. Mr Human testified that it was irregular for a bidder to be aware of an intended cancellation of a bid before it occurred, suggesting that information had been made available to a supplier outside of the normal procurement process.

306. After the tender was cancelled, an MOU for the same services included in the tender was concluded between SAAT and AAR at the Paris Air show in June 2015. The MOU provided for collaboration between AAR and SAAT in connection with the provisioning of components as part of a joint venture. The MOU was in breach of section 54 of the PFMA, which requires the Board to seek permission from National Treasury if it intends to conclude an unincorporated joint venture. The MOU contemplated such a joint venture. Mr Barry Parsons, a SAAT Board member at the time, raised concerns about this with the Board. When these were not addressed, he submitted his resignation on 24 July 2015. In the letter, he said there appeared to be some "hidden agenda" in the AAR strategic partnership with SAA that required urgent independent investigation.

Third tender

307. On 14 July 2015, SAAT issued a closed bid for a short-term tender to obtain services pertaining to components for five months. It was issued to Air France, Israel Aerospace, Pegasus, and Lufthansa. The reason for the short-term nature of the tender was to give SAAT time to conclude a final agreement with AAR. The MOU had to be converted to a final collaboration agreement. However, this tender had not been provided to AAR, and SAA received legal advice at the time that AAR's exclusion from the process could be challenged. The tender was then withdrawn.

Fourth tender

308. The same tender was then reissued, the only difference being that it included AAR. AAR submitted a bid for this tender, with Nziza Aviation as its BEE partner. SAAT awarded the tender for five months to Air France to ensure continuity of the service while it tried to finalise an agreement with AAR arising from the MOU in the meantime.

Fifth tender

309. The fifth tender was issued on 8 December 2015, with 19 January 2016 as the closing date. It was for a five-year period. Part of the critical criteria for its award included that the bidder must have sufficient experience and equipment; be financially sound; be certified by various aviation authorities; provide access to pool or exchange bases; and agree to a No Fault Rate of 20% and a Beyond Economic Repair Rate of 70%. The bid document also stated that a bidder had to indicate what value they would place on each area of development that they would be imparting to the local vendor. The document also provided for the National Industrial Participation (NIP) obligations, which requires foreign entities,

in contracts over USD 10 million, to conclude an agreement with the DTI, where 30% of the contract value had to go back to South African development.

310. AAR submitted its bid for this tender together with its new joint-venture partner, JM Aviation. The CFST was responsible for evaluating the tender. The team recommended that Lufthansa be appointed for both the Boeing and Airbus fleets. Lufthansa had offered the lowest price. The next lowest was AAR together with JM Aviation, and then Air France. On 25 April 2016, the CFST met again and decided to ask the bidders to confirm that they understood the scope correctly and to list their current customers. The CFST was concerned about "low balling", which is when a bidder underquotes and then the service is compromised due to financial constraints.

311. Ms Memela, who at the time was the Chair of the BAC, joined the CFST meeting on 25 April 2016 and emphasised the need to urgently finalise the project. Thereafter, the team decided that even though Lufthansa was the lowest price, because of the risk of low balling from other bidders, they changed their recommendation to Air France. Mr Human testified that it is not common practice for the BAC chair to attend the evaluation committee meeting as the adjudication and evaluation are supposed to be performed as separate functions, so that they serve as checks and balances on the process. On 6 May 2016, the BAC also resolved by round robin resolution that their recommendation was for Air France to be awarded the tender.

312. On 9 May 2016, the SAAT Board held a special meeting to deal with the award of the components tender. At the meeting, the Board noted that management had recommended that the tender be awarded to Air France. The Board did not accept this recommendation. Its reason was that Air France was resistant to "align itself with SAAT's development agenda". This was said to be a reference to "supply development". It also stated that "the benefits as outlined by the submission as a result of selecting Air France were not compelling enough to position the latter as the preferred bidder". The Board concluded that the concerns regarding "low balling" could be mitigated by reducing each party's obligations to writing. The Board resolved, therefore, not to follow management's recommendation and rather to award the components support services tender for both Boeing and Airbus fleets to the JV of AAR and JM Aviation for five years "subject to the mitigation of risk".

313. In his evidence, Mr Human accepted that it was the Board's role to interrogate recommendations received from BAC or the CFST. He however stated that it was unusual for the Board simply to make a decision that was entirely different to the recommended one without reverting to these bodies.

314. On 13 May 2016, a letter of award was sent out to AAR/JM Aviation. On 7 July 2016, the contract was concluded between the parties. Mr Kenny provided the Commission with an affidavit explaining that the negotiation process had been quite contentious. Ms Memela refused to give him the whole contract, which he noted was extremely unusual, and she told him that she only gave him part of the contract "to protect [him]".

315. The contract provided that, prior to the commencement date, JM/AAR would invoice SAAT for the deposit. It also provided that SAAT would pay the deposit by way of an irrevocable letter of credit from a bank and that JM/AAR would have the right to set off any SAAT invoices not paid by the due date against the deposit. If this occurred, SAAT would have to continue to replenish the deposit.

316. The Commission's investigations revealed that the way this clause was implemented was unusual. JM/AAR invoiced SAAT for the value of the deposit, amounting to USD 4.382 million (around R 60 million), and this invoice was paid in cash and not by credit letter. Mr Human testified that he was unable to find any justification for this cash payment, which would have greatly strained SAAT's cash flow and put SAAT at risk if AAR did not deliver. He also explained that, to his knowledge, there had never been any drawdowns from that deposit for outstanding invoices.

317. In 2018, SAAT conducted a review of the contract aa it was dissatisfied with various aspects of the performance, including the long turnaround times for the repair of components. Some components were out for repairs for more than 600 days; there was incorrect invoicing; the contract provided that SAAT would only be responsible for 35% of the beyond economic repair costs but was being invoiced up to 100% with an additional mark up and handling fee; AAR was charging excessive penalties

against SAAT for slow returns of components but did not itself suffer any penalty for late repair; there had been no NIP obligation benefits; the contract provided for reciprocal work to be given to SAAT to be done at its workshops but no such work had materialised. The review revealed that the total contract expenditure paid by SAAT was R1.8 billion.

318. In terms of JM Aviation's JV agreement with AAR, 5% of all revenue was to go to JM Aviation. This amounted to approximately R53 million.

319. In so far as the NIP obligations under the components' tender were concerned, a representative of the DTI furnished the Commission with an affidavit which stated that SAAT and JM Aviation both had an obligation to inform it about the conclusion of the contract within five days but had failed to do so at all.

320. Mr Human testified that Air France instituted litigation proceedings to challenge the award of the tender. However, the Court had refused to grant an urgent interim interdict and Air France did not pursue final review relief.

Ms Sambo and AAR

321. Ms Sibongile Rejoyce Sambo testified before the Commission that she was a young entrepreneur who was attempting to break into the aviation industry. In 2004, she registered a company, SRS Aviation, and tendered for various businesses in the industry. In 2009, SRS decided to diversify into providing airplane parts and jet fuel for airlines. SRS was introduced to the SAAT database and received quotations and requests to supply parts and components.

322. Ms Sambo testified that she was invited by the DTI to be part of a business delegation to Chicago, where she was introduced to AAR. In particular, she met with Ms Cheryl Jackson and suggested business opportunities with SAA's subsidiary SAAT, which provides technical services to airlines. Ms Sambo proposed that they conclude an agency agreement so that AAR would be SRS's official partner. Ms Jackson indicated that AAR did not conclude agency agreements with foreign companies unless there was a concrete deal on the table. Ms Jackson wanted more information about exactly what the opportunities were at SAAT. She did state verbally to Ms Sambo that AAR would pay SRS 8% of the value of a contract if SRS facilitated a contract between SAAT and AAR, and SRS could act as the BEE partner in the transaction.

323. Between 2013 and 2015, Ms Sambo engaged with AAR and became its bid-partner in SAAT's first and second components tenders. During this period, she introduced AAR to Mr Zwane, in his capacity as Acting CEO at SAA. It was during a meeting with Mr Zwane that Ms Sambo was introduced to Ms Memela as SAAT head of procurement. In April 2015, Ms Memela told Ms Sambo that various SAAT members would be visiting AAR in Chicago. Sometime in 2015 before the trip, Ms Memela arranged a meeting between Ms Kwinana and Ms Sambo at Ms Sambo's house. Ms Kwinana told Ms Sambo at the meeting that she intended to resign from SAAT. She wanted to know the nature of Ms Sambo's relationship with AAR. She indicated that, when she left as Chair, she "wanted to get her hands on other contracts at SAA such as ... a contract for aircraft tyres, a contract for logistics" and components. She asked Ms Sambo to introduce her to Ms Jackson, which she did. Ms Sambo testified that the meeting made her uncomfortable and she did not want to know the details of what Ms Kwinana was planning.

324. Within a few weeks of this meeting, Ms Kwinana had another meeting with Ms Sambo at the Protea Hotel. The meeting included Dr Tambi. Ms Kwinana explained to Ms Sambo that, once she left SAAT, Dr Tambi would "look after her interests at SAAT", which were the contracts she wanted to "get her hands on". Ms Kwinana then also introduced Ms Sambo to Ms Koekie Mdlulwa. She said that Ms Mdlulwa was a go-between for making deals for her. Ms Kwinana explained that as part of her interest in the components tender, she wanted Ms Mdlulwa to go and negotiate on her behalf with AAR, and that she would make sure AAR got the contract. Ms Kwinana explained that to secure the contract, AAR would have to pay her and other parties R100 million.

325. It then became clear to Ms Sambo that things had moved into "corruption mode". Ms Kwinana said to

her that Ms Sambo would not be part of the group receiving the R100 million that would be negotiated for herself and "my people inside SAAT". She explained that "her people" inside SAAT were Mr Zwane, the CEO, and Ms Memela, Head of Procurement.

326. Ms Kwinana confirmed that she had this meeting at the Protea Hotel with Ms Sambo and Dr Tambi. She claimed that it was Ms Sambo who told her that she (i.e., Ms Sambo) had been the go-between for AAR since 2011 without any remuneration and that "they" owed Ms Sambo R100 million. Ms Kwinana said that she told Ms Sambo that SAAT could not intervene in such a matter.

327. Ms Sambo testified that she never said any of those things and stated that she did not mention to Ms Kwinana her problems with AAR. It must be noted that Ms Kwinana's response to the Commission did not deal at all with Ms Sambo's evidence regarding the first meeting at Ms Sambo's residence. Ms Sambo testified that after this meeting with Ms Kwinana, she told her team at SRS about the discussion.

328. After Ms Sambo's meeting with Ms Kwinana, Ms Jackson contacted her and gave her feedback on the SAAT trip to AAR's premises and told her that AAR was planning a trip to SAAT's premises. The CEO of AAR, Mr David Storch, invited Ms Sambo to a party at the Paris Air Show on 16 June 2015. Ms Sambo testified that she declined. When the SAAT delegation returned from the Paris Air Show, AAR had concluded the MOU referred to above with SAAT.

329. In August 2015, Ms Sambo had a meeting with Ms Jackson, who was very frustrated about not managing to secure a contract with SAAT. Ms Jackson insisted on getting information from Ms Sambo to help them win the bid. Ms Sambo then contacted Ms Memela explaining that AAR was frustrated and wanted information on the bid. Ms Memela asked her to meet her to get information.

330. Ms Sambo testified that she met Ms Memela in Alberton and that she was given information on a flash disk. It contained an Excel spreadsheet of previous pricing for the components bid. The data forensic team at the Commission imaged the memory stick that Ms Sambo produced and advised that the spreadsheet was indeed created and last saved on 3 August 2015 and that the user who saved it was Ms Memela. 3 August 2015 was 16 days before AAR submitted its tender on the five-month components contract.

331. Ms Memela denied having met Ms Sambo in Alberton and giving her information with bidder identities and prices. She claimed that she did not even have access to that information as she was not on the CFST. The Commission doubts the credibility of Ms Memela's version of events and believes that Ms Memela provided Ms Sambo with confidential bid pricing information. Ms Memela's lawyer, Ms Mbanjwa, indicated that they wanted to have their own expert consider the metadata on the memory stick. However, despite being given numerous opportunities by the Commission, Ms Memela never did so. The evidence remains unchallenged. It must be considered together with the affidavit from the author of the Excel pricing document, Mr Leon Robbertse, who explained exactly how and when he created the document and confirmed that it was a document with confidential bidder information on it, created in 2015.

332. Ms Sambo then met with Ms Jackson and told her that she had the pricing information, but AAR kept refusing to pay her. She wanted to use this information as leverage to secure a retainer. Ms Jackson told Ms Sambo that she could not pay her in return for the information because that would be regarded as bribery and corruption. Ms Sambo testified that she decided not to give the information to Ms Jackson or to anyone else at AAR. Ms Sambo conceded that asking SAAT for information while there was an open bid was improper. She stated that she felt under pressure to deliver something to AAR.

333. In September 2015, Ms Jackson invited Ms Sambo to a discussion about the five-year components' services bid. When Ms Sambo went to meet Ms Jackson, she found her sitting with Mr Ndzeku. Mr Ndzeku explained that he was introduced to Ms Jackson through a mutual friend. Ms Jackson and Ms Sambo then proceeded to an arranged meeting with Ms Mdlulwa. Ms Mdlulwa stated that she was representing Ms Kwinana and her people at SAAT and that they wanted R 100 million from AAR to make sure it got the contract. Ms Sambo agreed that she would continue to be the direct liaison with

AAR. Ms Jackson told Ms Mdlulwa that she did not have the authority to agree to this arrangement and payment but she would go and speak with her principals.

334. After the final five-year components tender had been issued in December 2015, Ms Memela told Ms Sambo that Ms Kwinana wanted to meet with her again. Ms Sambo also testified that, around this time, Ms Memela had told her that AAR was at that time partnering with JM Aviation, which was Mr Ndzeku's company. The purpose of the meeting was to find out what Ms Sambo knew about Mr Ndzeku, whether he had interactions with Ms Jackson before the tender was advertised. Ms Sambo explained that it seemed from the meeting that Ms Kwinana was driving the process and was in control of who would ultimately partner with AAR. She even called Ms Jackson during the meeting to ask if they could drop Mr Ndzeku and revive the partnership with SRS. There was no conclusion to that suggestion during the telephone call in the meeting. Ms Sambo said she could not remember any further details about the meeting.

335. At some stage, Ms Memela called Ms Sambo to a meeting in Alberton where she told her that the five-year tender had been awarded to AAR (with JM Aviation). Ms Memela told Ms Sambo in the meeting that Ms Kwinana had introduced Mr Ndzeku to her and asked her to assist Mr Ndzeku in preparing the bid. She even forwarded emails to Ms Sambo showing that Ms Memela had helped JM Aviation to finalise the draft joint venture agreement and had been requested to help JM Aviation/AAR to finalise their bid documentation. These emails were presented to the Commission.

336. During her testimony, Ms Memela denied that it was inappropriate for her to have had such communication with JM Aviation while the bid was still open. She said that there was no problem with such communication because she was not on the bid evaluation committee, and it was part of her job to educate BEE companies about tender requirements. She denied that she said Ms Kwinana had asked her to help JM Aviation. She said Ms Sambo was lying because Ms Memela had refused to give her pricing and other information when she had asked previously. As the report sets out below, Ms Memela's version on this issue was not credible.

337. After the meeting and having received these documents, Ms Sambo told Ms Memela that she intended to sue her and AAR over the matter under discussion. Ms Memela told her that there were others who had helped JM Aviation to compile the bid, including Ms Princess Tshabalala, senior manager of SCM at SAAT, and Mr Zwane, the CEO of SAAT. Ms Tshabalala approached Ms Sambo later and asked her not to sue because she would lose her job. She told Ms Sambo that Ms Memela had promised her that they would get paid once AAR and JM Aviation had been awarded the tender.

338. Ms Sambo provided the Commission with WhatsApp messages sent to her by Ms Memela. One of the messages from Ms Memela stated, among other things: "All I ever did was help you. Even the info that you are using now was sent to you in good faith to help you. Even before that when you wanted price info for Cheryl. I gave that to you as I never thought you would one day plan to use it against me". The WhatsApp message also said: "I had to tell the CEO, Yakhe and Princess, because as much as you would think you are destroying me they will also get affected."

339. The WhatsApp communications between Ms Sambo and Ms Memela were also put to Ms Memela. Her lawyer, Ms Mbanjwa, objected to Ms Memela being asked any questions on the WhatsApp messages because they wished to challenge their authenticity. However, Ms Mbanjwa never did so. When questions were put to Ms Memela about the content of the WhatsApp messages, Ms Memela never actually denied that she had sent them and instead argued about what their content meant. For example, it was put to Ms Memela that the WhatsApp messages confirmed that she had given pricing information to Ms Sambo, even though Ms Memela denied doing so. In response to this, Ms Memela made the remarkable claim that any pricing information that she was referring to in the messages was in the public domain. However, it was then put to her that pricing information in the public domain could never be used against her later. Ms Memela had no adequate answer to this obvious point.

Ms Memela's response

340. Ms Memela testified that in her role as head of procurement at SAAT, she would receive a recommendation from the bid evaluation committee (part of the CFST). She would make sure that she was satisfied with it from a legal perspective and would then sign off to indicate that she supported the recommendation as head of SCM. This would then go to Exco, which was made up of the general managers of SAAT. Once Exco had confirmed that it supported the recommendation, it would then go to the BAC. The BAC would then check whether the evaluation had been done regularly and transparently. After the BAC process had been completed, the CEO would place the final recommendation before the Board. Ms Memela confirmed that in May 2015 she was the Chair of the BAC, but that she recused herself from the components tender.

341. During her testimony before the Commission, Ms Memela was asked to comment on the appropriateness of her communication with Ms Sokhulu about AAR/JM Aviation's tender documents in circumstances where the tender was still open. These emails asked for approval of the JV agreement between AAR and JM and for approval of the actual bid submission. Ms Memela did not deny having communicated with Ms Sokhulu as set out in the emails. Instead, she claimed that the communication was not in breach of the tender requirements. She also said that, because there was no email in response with track changes on the document in the Commission's possession, then there was nothing wrong with her interactions with Ms Sokhulu. However, she later testified that she probably did respond to the email later by telephone to say that the supplier development aspect of the bid was in order. It is noteworthy that the emails were not sent to Ms Memela's official SAAT email address but to a personal one.

342. It was put to Ms Memela that it was prohibited under the bid for there to be any communication between a bidder and somebody other than the project manager at SAAT. Ms Memela testified that she was aware of this prohibition. However, Ms Memela claimed that the clause was meant to refer only to those who are sitting on the bid evaluation committee. When asked to identify where in the clause or in the bid document this was set out, Ms Memela conceded it was not there. Ms Memela then changed her version and claimed that she was not aware of this prohibition at the time. She said that she did not know that there was anything wrong in what she was doing. She ultimately conceded that, had she known about the bid condition, she would have raised it with the Project Manager.

343. JM Aviation/AAR also breached the tender requirements in other ways. They failed to uphold the NIP obligations in the tender. When asked about this, Ms Memela testified that NIP was not obligatory. However, she conceded that in fact, in the tender itself, NIP obligations were imposed. However, she claimed that that was an error. She later claimed that it was because one could have either direct or indirect NIP obligations and indirect obligations could encompass supplier development.

344. It was put to Ms Memela that DTI had reviewed the tender and the AAR/JM Aviation bid in March 2019 and concluded that SAAT or JM Aviation ought to have immediately alerted DTI to the fact that the agreement had been concluded. Ms Memela's answer was evasive. It is clear from the RFP that the NIP obligation applied and either JM Aviation or SAAT was required to notify DTI of the contract. Both failed to do so.

345. In addition, the RFP provided that, if any person employed by the bidder directly or indirectly offered or gave anyone in the employ of SAAT any consideration or gift, they would be disqualified and excluded from any future bid with SAA. It was put to Ms Memela that JM Aviation had in fact made a payment to Ms Memela of R2.5 million, and that this was in breach of the tender requirement which should have excluded JM Aviation/ AAR from the tender process. Ms Memela denied this on the basis that she was not on the bid evaluation committee and so there was no possible reciprocation for the payment. She claimed that, because the R2.5 million payment to her was in respect of her mother's property, it was not a gift or gratuity. However, the policy says "any consideration".

346. Ms Memela was also questioned about the trip she had made to the US to visit AAR. Her attention was drawn to the fact that the components tender that was issued on 29 October 2014 was only retracted on 22 June 2015. This meant that the tender was still open in May 2015 when Ms Memela, together with members of the Board including Ms Kwinana, Mr Zwane and Dr Tambi, had travelled to

the US. AAR was one of the bidders in that very tender. Ms Memela was asked, in the light of her evidence that people who are involved in evaluating the bid and making decisions on it should not communicate with bidders when a bid was still open, whether she warned the Board members that they should not be communicating with AAR, let alone going on the trip. Ms Memela testified that she did not. It was put to Ms Memela that it is problematic that SAAT Board members went to visit one of the bidders while a bid was open and then subsequently retracted the bid, to the prejudice of other competing bidders, so that they could embark on a partnership with one of the bidders. Ms Memela's answer was that it was not problematic, but her reasons did not justify her answer. She kept insisting that there needed to be section 54 shareholder approval before any partnership was embarked upon. But at the time of the retraction there was no such approval, and, in any event, this should not have any impact on section 217 of the Constitution and a free and fair tender process.

347. It was also put to Ms Memela that the meeting she had with AAR on 27 May 2016 was also at a time when the tender was still open and that Mr Kenny had objected to attending the meeting for that very reason. Ms Memela claimed that Mr Kenny never objected to the meeting. She also claimed there was nothing wrong with the meeting because she was not the decision maker in respect of the tender. But then Ms Memela was shown the email from Mr Kenny setting out his reservations about the corporate governance problems associated with meeting with a bidder whilst the bid was open. Ms Memela's answer was again evasive, circuitous and made no sense.

348. Ms Memela also confirmed attending yet another meeting on 29 May 2016 with Ms Jackson when the tender was open. It was put to Ms Memela that Ms Jackson appeared to know in advance that the RFP was going to be cancelled, as she had referred to it in an email. Ms Memela was asked how Ms Jackson would have known that in advance. She answered that she did not remember.

349. Ms Memela confirmed that she attended the CFST meeting where the committee decided that even though Lufthansa was the cheapest bidder, it would not be selected because, among other things, it had outstanding NIP obligations from a previous tender. Ms Memela was asked whether anyone actually found out whether Lufthansa had complied with its NIP obligations. This was asked because the DTI provided the Commission with an affidavit that confirmed that Lufthansa had no instances of non-compliance with its NIP obligations in respect of the other contract it had with SAAT at the time. Ms Memela's response was an unsatisfactory answer and failed to deal with the real issue. Given Ms Memela's previous evidence that NIP obligations could simply be ignored by SAAT, the failure to comply with NIP obligations could never have been a valid basis on which to reject Lufthansa's bid.

350. The Board meeting of 9 May 2016 in which the tender was awarded to AAR/JM Aviation reflected that the Board rejected CFST's recommendation that the tender be awarded to Air France because it was resistant to align itself with SAAT's development agenda and the benefits were not compelling enough to position it as the preferred bidder. The Board further resolved that the concerns about JM/AAR "low balling" could be mitigated by reducing the terms in writing.

351. Ms Memela testified that she was "shocked" at this decision because normally, if the Board disagreed with CFST or the committees, the matter would get referred for reconsideration instead of the Board taking a different decision. Despite Ms Memela's evidence that she was "shocked" at the Board's decision, she attended a Board meeting on 15 June 2016, where the AAR tender was discussed. At the meeting, Ms Memela was recorded as having stated that management supported the decision to award the tender to AAR and that it was justifiable. Ms Memela's answers about her support for the contract and her involvement in it were generally evasive and made no sense. Her evidence needs to be viewed in the light of Mr Kenny's testimony that Ms Memela and Ms Koekie Constance Mbeki were responsible for the legal aspects of the contract negotiation and drafting.

352. Ms Mbeki from SAAT provided the Commission with an affidavit explaining that Ms Memela was the leader of the contract negotiations with AAR/JM Aviation. Ms Memela was once again evasive on whether this was true and what the extent of her role had been. In her affidavit, Ms Mbeki stated that Ms Memela called her and reprimanded her for raising concerns during the negotiation process that "had already been resolved" and for delaying the process. When Ms Memela was confronted with this during her testimony, she claimed that she did not remember. Ms Memela did not dispute Ms Mbeki's

version in this regard.

353. Ms Mbeki stated that one of the things she wanted included in the contract was a clause on penalties in favour of SAAT, but this was not included in the ultimate contract. The absence of a clause on penalties was highlighted in the 2019 review of the contract by SAAT. Ms Memela was asked why this clause was not included and what steps she took to ensure SAA's interests were protected in the contract. She replied that it was not her job to check the contract, and this was purely Ms Mbeki's responsibility. She confirmed that she did not even check the final contract before it was signed.

354. Ms Mbeki's evidence is that even she was not afforded the opportunity to check the contract before signing. She had scheduled a meeting on 7 July 2016 with the SAAT team members to go through the contract clause by clause as they usually did, but she was informed that the agreement had already been signed. Ms Memela testified that she knew nothing about the signing of the contract or who arranged for that to happen. There is support for Ms Mbeki's testimony that the signing of the contract was rushed and done without a proper review because there are numerous errors in the contract. Mr Malola Phiri's affidavit to the Commission also confirms that the contract was rushed for signing because Ms Kwinana was insistent that it be concluded.

355. Mr Kenny's evidence about Ms Memela refusing to give him the full contract "to protect [him]", was put to Ms Memela. Ms Memela testified that she did not remember this. Ms Memela was also asked about the implementation of clause 4.26 of the contract which required a deposit from SAAT in the form of a credit letter, but which was instead paid in cash. She was directed to correspondence where Mr Kleyn asked about the deposit that AAR was demanding and enquired whether the agreement provided instead for a bank letter as that was a standard SAA contract clause. Ms Memela responded to his enquiry by writing an email stating that they fought hard in the negotiations for a deposit clause with respect to cash to be excluded from the contract but were not successful.

356. But Ms Memela was wrong. There was no requirement in the contract for a deposit to be paid in cash. She was therefore either deliberately misleading Mr Kleyn about the provisions of the contract or grossly negligent for not in fact checking what the contract said. Ms Memela claimed that this correspondence was only in respect of what happened at the negotiations and that she still needed to check what the contract stated. This is not a plausible explanation given what she said in the actual correspondence. Furthermore, the explanation in her email about what had transpired during the negotiation of the contract with AAR is inconsistent with her claim that she was not involved in the negotiation process and that this was done by Ms Mbeki alone.

357. Ms Memela's answer is also belied by later correspondence in which AAR again queried why it had not been paid in respect of deposit invoices it issued. In response, Ms Memela again said that SAAT was obliged in terms of the contract to make payment in respect of a security deposit upfront and that this was part of the conditions precedent. She again referred to the negotiation process that resulted in SAAT agreeing to pay this deposit. This correspondence confirms that she was heavily involved in the contractual negotiations. It would appear that Ms Memela failed dismally in protecting SAAT's interests when AAR started demanding a cash payment to which it had no contractual entitlement. Indeed, Ms Memela actively supported that the payment be made.

358. The deposit payment amounted to approximately R60 million in cash. JM Aviation stood to benefit from this because it was entitled, under the JV, to receive 5% of that revenue. This is the same JM Aviation that paid Ms Memela R 2.5 million in May 2016. The inescapable conclusion from this evidence is that Ms Memela favoured AAR/JM Aviation during the components tender in at least six ways. These are that:

    358.1 She met with AAR in South Africa while the tender, in which AAR was a bidder, was still open

    358.2 She travelled to the US to meet with AAR while the tender, in which AAR was a bidder, was still open

    358.3 She entertained communications from JM Aviation about both the JV agreement it was entering into with AAR and the draft AAR/JM Aviation bid submission before the closing date for the submissions

358.4 She shared confidential pricing information with AAR while the tender was open

358.5 She put pressure on Ms Mbeki who was negotiating the contract to expedite its progress, when Ms Mbeki was attempting to secure more beneficial terms for SAA; and

358.6 She misled her colleagues in order to motivate for a cash deposit to be paid to AAR in the amount of approximately R60 million at a time when SAAT was severely cash strapped.

359. Had there been no payment that JM Aviation made to Ms Memela it might have been possible to view her conduct as a manifestation of incompetence or gross negligence. However, JM Aviation's payment of R 2.5 million to Ms Memela seems to suggest that there is corruption at play. When Ms Memela concluded her oral evidence, she requested an opportunity to make written re-examination submissions.

360. These submissions display a complete lack of candour and a singular failure to accept any responsibility for her actions. The re-examination submissions were Ms Memela's opportunity to place any remaining clarificatory evidence before the Commission. Her failure to do so attracts the inference that these documents did not, in fact, advance her case. Ms Memela's submissions conclude with a "plea for leniency" from the Commission. Yet, Ms Memela's pleas for leniency are not justified. The Commission will recommend that the NPA consider prosecuting Ms Memela for corruption.

Ms Kwinana's version

361. Ms Kwinana testified that she did not think it was inappropriate or irregular for a Board member, who would vote on a tender, to meet with a bidder whilst the tender was still open, if that Board member was not aware that there was a bid going on and this person was a bidder; or if the member was aware, it would depend on their level of involvement in the decision-making; and even if such a board member was a key decision-maker, he or she should still be able to meet and talk about issues other than the tender.

362. Ms Kwinana went so far as to say that a decision-maker would only need to disclose a conflict of interest, or avoid talking to a bidder, if they personally felt that their judgment would be impaired because of their relationship. Ms Kwinana accepted that the SAAT Board members' trip to the AAR Headquarters in the US had occurred during an open bid. She also accepted that AAR was one of the bidders. She confirmed that the SAAT delegation was flown on private jets and driven in limousines and was taken to restaurants by AAR.

363. Ms Kwinana nevertheless testified that she did not regard this as irregular because the Board could only give its final approval if it went to Chicago to see AAR's facilities. She also claimed that she did not know that there was a tender open at that stage. But the minutes of Board meetings show that this was false. She later admitted that she knew the tender was still open. She claimed that that there were so many tenders at SAAT that she would not have remembered this particular one. However, given the size of the tender, it is highly unlikely that Ms Kwinana did not know that the tender was still open when she visited the AAR headquarters.

364. Ms Kwinana denied that the restaurants, limousine rides and private jet flights were "benefits" that the Board ought not to have accepted from a bidder. Instead, she said that it was just part of their "due diligence". This explanation can be rejected on its face. The problem with this approach was highlighted by another feature of Ms Kwinana's testimony. When asked about the information on which she based her decision when she voted as Chair of the SAAT Board to award the five-year components tender to AAR, she testified that she relied on what she learnt about AAR's operations on this very trip. This was information that no other bidder was able to provide and which no other bidder could dispute because it was not disclosed to them. The trip to the United States flew in the face of a fair, transparent and competitive procurement process.

365. Ms Kwinana again claimed that if, in her opinion, the trip and benefits did not "impair [her] independence and thinking", then there was no problem. In the opinion of the Commission, her conduct shows that she is not an appropriate judge of her own impartiality and that is why the procurement

processes and SCM policies are in place at SAAT. Ms Kwinana also claimed that such a trip would not influence an outcome because procurement processes are so rigorous that it would not matter. However, in the opinion of the Commission, the decisions of the Board demonstrate that this is clearly false. There can be various safeguards in place, but if the Board makes the ultimate decision and it has allowed itself to be influenced in this way, the whole process is undermined.

366. It was put to Ms Kwinana that there are safeguards in place to ensure the independence of the non-executive Board members who ultimately vote on a tender. One of these safeguards is that it is management who should conduct any due diligence, and then make recommendations to the Board. Ms Kwinana's response was that "this has been the practice" at SAAT.

367. It was evident from Ms Kwinana's testimony that nothing about her prior interactions with AAR were of any concern to her. When Mr Parsons resigned, he raised the concern that there was something untoward going on behind the scenes in the conclusion of the MOU between SAAT and AAR. He also said:

> My other specific concern is the identification and selection of the BBBEE partners, if any, for the proposed joint venture, a process that needs to be highly transparent in a business that already has an uncompetitive cost base. The MOU received includes an implementation timetable that suggests this process may already be significantly advanced and there is no visibility of this to either the SAAT or SAA Boards or National Treasury.

Ms Kwinana's response to this was that, if Mr Parsons had concerns, he should have raised them at a Board meeting instead of just resigning and she said that she did not understand his concerns.

368. The clauses in the RFP prohibiting any communication between anyone at SAAT and bidders in the tender, save for the Project Manager, were also put to Ms Kwinana. She was then taken to Ms Memela's emails with Ms Sokhulu of JM Aviation on the eve of the awarding of the tender to AAR/JM Aviation. Despite the clear and unequivocal wording of these clauses, Ms Kwinana continued to claim that there could still be communication between SAAT officials, including head of procurement, depending on the "circumstances" and where it would be "impractical" to observe the proper procedure. This feature of Ms Kwinana's testimony reveals an approach to legal compliance directly at odds with the governing legislation. In the opinion of the Commission, many of the situations Ms Kwinana would regard as impractical are situations which most people would find practical.

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370. Finally, it was put to Ms Kwinana that clause 1.6.3 of the RFP made it clear that no exceptions or "circumstances" would justify a departure from the prohibition on communications. The clause said that: "No discussions will be entered into surrounding elimination through non-compliance in clause 1.6.1". Eventually, she admitted that "on the face of it, I would be of the view that the bidder should be eliminated". She confirmed that AAR/JM Aviation should therefore have been eliminated from the five-year bid because of this communication but was not.

371. Ms Kwinana testified that she had a professional relationship with Mr Ndzeku. She met him during the SAA roadshows for supplier development in 2015. She admitted having had many telephone calls with Mr Ndzeku where she gave him guidance about how BEE requirements at SAA were implemented. She even admitted to having various telephonic discussions with him when the AAR/JM Aviation tender was open. However, she claimed that there was nothing inappropriate about this. It was put to Ms Kwinana that she even spoke to Mr Ndzeku the day before the Board took its decision

to award the components tender to AAR and JM Aviation. Ms Kwinana claimed again that this was not irregular because they did not discuss the tender. However, based on her own concessions about Ms Memela's emails disqualifying AAR and JM Aviation as a bidder, these telephone calls would also have resulted, on Ms Kwinana's version, in JM Aviation/AAR's elimination from the bid.

372. It was put to Ms Kwinana that she was present at the meeting at which the component services contract with AAR/JM Aviation was signed. Mr Malola Phiri's affidavit to the Commission sets out in detail that Ms Kwinana and Ms Memela were present at the meeting where the contract was signed. According to Mr Phiri, Ms Memela indicated at the meeting that the agreement was on its way with a courier. When the contract was delivered, it was already signed by AAR. Ms Kwinana insisted that Mr Phiri sign it on behalf of SAAT. He asked Ms Memela and Ms Kwinana to check the document, and, on their approval, he signed it. Mr Phiri added that Ms Kwinana wanted the contract signed as a matter of urgency. He said that Ms Kwinana's behaviour at the meeting was "over the top, bordering on being aggressive".

373. As Ms Memela had done in her testimony, Ms Kwinana also denied being present when the contract was signed. Ms Kwinana claimed that the contract had already been signed when she convened a meeting with SAAT's management and that she wanted to obtain the signed version urgently because National Treasury wanted it.

374. There are no independent facts in relation to the meeting at which the component services agreement was signed to indicate which of the two versions is true. Ms Kwinana played a key decision-making role in deciding to award the tender to the joint venture of AAR and JM Aviation.

375. On 9 May 2016, the SAAT Board decided to award the component services contract to AAR/JM, and not to follow management's recommendation that it should be awarded to Air France. The Board's reasons for its decision were given as: Air France's unwillingness to align itself with supplier development; the benefits given for selecting Air France were not compelling; and concerns about AAR/JM Aviation low balling could be mitigated through contract.

376. When Ms Kwinana was asked what the Board meant when it said that Air France did not align itself with "supplier development", she did not seem to understand the term. She then went on to explain that it meant that Air France did not comply with BEE. However, SAAT's CEO's recommendation included an observation that none of the tenderers was BEE compliant and that, for that reason, they had all been ranked the same regarding BEE. This recommendation had served before the Board when the Board made its decision. When this BEE recommendation was pointed out to Ms Kwinana, she then started to give other reasons. She said that she had meant something else by supplier development – namely, that Air France did not indicate it could develop other local suppliers. When it was put to Ms Kwinana that all the bidders had committed to supplier development, and none of them had submitted a full proposal yet, she said: "There were many things that we talked about that resulted in us rejecting Air France." In the opinion of the Commission, this was an evasive answer.

377. Ms Kwinana then testified about the second reason given by the Board for rejecting Air France and this related to cost savings. However, management had raised a concern that it appeared that AAR was deliberately "low balling" with its projected costs, and it would inflate those costs over time and then claim various things were not included in the tender. Management set out their concerns as follows in the recommendation to the Board: "Sudden drastic cuts to the tender prices with a reduction of more than USD40million raised the fear of low balling to get the contract and doubts on sustainability". In the end, the price difference between Air France and AAR was fairly close, but in order to get there, AAR had to drop its prices in a dramatic fashion that raised concern. Ms Kwinana testified that, despite this serious concern being raised by management, the Board did not take any steps to check whether the contract eventually concluded in fact protected SAAT against this concern.

378. As indicated above, time has shown that the low-balling concern was real because, when Mr Human testified before the Commission in February 2020, he stated that the costing of the contract at that time, was sitting at R1.8 billion. This was well over the price of R1.25 billion that AAR/JM had put up in its bid.

379. Ms Kwinana was also questioned about Ms Sambo's allegations that she has disclosed to her that she wanted to "get her hands" on some of the contracts before she left SAA and SAAT. Ms Kwinana denied Ms Sambo's testimony on these aspects and claimed she was a "pathological liar". Ms Kwinana denied that she asked to be introduced to Ms Jackson. Ms Kwinana stated that Ms Sambo approached SAAT and complained about her relationship with AAR and that is why Ms Kwinana called a meeting with Dr Tambi, to see if there was anything SAAT could do.

380. It was put to Ms Kwinana that Ms Memela's WhatsApp communications with Ms Sambo provide independent contemporaneous support for Ms Sambo's version. In 2017, Ms Memela had sent a WhatsApp message to Ms Sambo in which she had said the following:

> And in 2015 you came to me as a friend and asked for information for the short tender which you wanted to give to you partner, but looks like you ended up not giving it to them, since you wanted money upfront, they tendered anyway with your company name . . . You guys . . . were negotiating with Cheryl where there was an agreement of what amount was going to be paid out to you guys if there was success. Unfortunately, Cheryl changed her mind, claiming it was illegal in her country to pay out bribes...

381. No explanation was proffered by Ms Kwinana for why Ms Memela, her trusted head of procurement, would have made up a story in an unguarded moment in 2017 to implicate Ms Kwinana in soliciting a bribe if it were not true.

382. In the end, however, the Commission's investigations revealed that many millions of Rands were, in fact, paid to Ms Kwinana from JM Aviation's bank account. This was after Ms Kwinana:

    382.1 Had been wined and dined by AAR in Chicago

    382.2 Had been speaking to Mr Ndzeku regularly on the phone while decisions on tenders affecting AAR and JM Aviation were being made

    382.3 Made an unjustified and unfair decision to reject management's recommendation that Air France should be awarded the tender for component services and instead gave the contract to AAR/JM.

383. In the circumstances the evidence is overwhelming that Ms Kwinana engaged in corrupt activities to benefit AAR/JM.

384. Both Ms Kwinana and Ms Memela denied that their conduct constituted corruption. They offered, in support of these denials, elaborate explanations about why the money they received from JM Aviation was not intended for their own benefit. Ms Memela's version involved Mr Ndzeku buying land in the Eastern Cape from her mother which her mother then donated to Ms Memela for the purchase of her house in Bedfordview. Ms Kwinana's version involved Mr Ndzeku investing millions of Rands in forex trading that Ms Kwinana's business, Zanospark (Pty) Ltd, just happened to be engaged in while JM Aviation was a candidate supplier to SAAT.

385. Both versions were shown to be false. It is important to note, for present purposes, that Ms Memela and Ms Kwinana were not working alone when they perpetrated their deceitful scheme. They were aided by the attorney, who represented them through-out their dealings with the Commission – Ms Mbanjwa.

386. When the evidence of their fraud was first revealed during the testimony of Mr Ndzeku, the Commission wrote to Ms Mbanjwa and invited her to provide an affidavit setting out her version of the fraud in which she had been implicated during Mr Ndzeku's evidence. Ms Mbanjwa declined to provide any affidavit. She said that she was satisfied that she was not implicated in any wrongdoing in Mr Ndzeku's evidence.

387. On Mr Ndzeku's own evidence, Ms Mbanjwa had drafted a sale agreement for the land he said he had purchased from Ms Memela's mother, which he eventually conceded had been a fraud. As an officer of the court, Ms Mbanjwa would no doubt be aware of the seriousness of an allegation of fraud made against her. Despite this, she has given no version to the Commission and so Mr Ndzeku's acceptance that the sale agreement was a fraud and was only signed in 2019 is uncontested.

The scheme to cover up the payments to Ms Kwinana and Ms Memela

Ms Memela and the sale of her mother's land

388. JM Aviation paid an amount of R 2.5 million towards the purchase of a house for Ms Memela in 2016. Ms Memela testified that it was not JM Aviation that had paid the money but, rather, Mr Ndzeku himself, although the funds may have come through JM Aviation. She explained the payment from Mr Ndzeku on the basis that her mother had sold him a plot of land in the Eastern Cape at Mpindweni. She testified that the contract of sale of the property was concluded between 2015 and 2016 and the purchase price was R2.5 million.

389. Ms Memela said that in or around February 2016, she and her mother agreed that the money should be used to purchase a property in Bedfordview. Ms Memela testified that the Bedfordview property was purchased for R 3.8 million. Once she had found the Bedfordview property, she cancelled the Cove Ridge purchase.

390. The Cove Ridge purchase agreement was concluded on 21 April 2015 between an entity called Slip Knot Investments and Ms Memela. Ms Kwinana, the Chair of SAAT, represented Slip Knot in this transaction. Ms Memela testified that it was Mbanjwa Attorneys who handled the transfer of the property. Ms Memela stated that Ms Kwinana provided her with "sisterly advice" in terms of investment and that she provided her with this property as an investment opportunity. Ms Memela testified that Mr Ndzeku paid the purchase price for her mother's property directly to Ms Mbanjwa, who was going to pay it to the transferring attorneys for the Bedfordview property. Ms Memela testified that this payment from her mother was not a loan but rather a "donation".

391. Ms Memela testified that, when she decided to purchase the Bedfordview property instead, she cancelled the Cove Ridge agreement. However, there was no cancellation clause entitling the purchaser to cancel the agreement. Once this was pointed out to Ms Memela, she testified that she had secured Ms Kwinana's agreement to cancel. The cancellation letter, dated 7 May 2016, stated that Ms Memela intended to cancel the contract and "the deposit of which will be used in the sale of the aforementioned house in Bedfordview. The monies that were paid to L Mbanjwa Incorporated in respect of this transaction should now be paid over to the seller's attorneys . . . "

392. Ms Memela testified that she had already committed to the Bedfordview property and made an offer to purchase back in February 2016. It was put to her that this meant that in February 2016, she was on the line for R3.8 million on the Bedfordview property and, at the same time, was liable to pay Slip Knot, Ms Kwinana's company, R 2.8 million for the Cove Ridge Property. Ms Memela conceded that she did not, at that stage, have R 6.6 million available to her for both property acquisitions. Ms Memela was evasive on details of the cancellation. She eventually suggested that maybe she and Ms Kwinana agreed verbally to cancel the agreement and then only cancelled formally three months later. The other suspicious aspect of the cancellation date was that it was two days after the deposit was received from JM Aviation into Ms Mbanjwa's account. The payment is reflected in the bank statements as "consulting Kwinana".

393. It was put to Ms Memela that, in Ms Sambo's affidavit to the Commission, she stated that Ms Memela had told her she had put in an offer on a house in Bedfordview but it was declined as her salary was insufficient. Ms Memela informed Ms Sambo that Ms Kwinana and Mr Zwane told her that they would make a plan for her. Ms Memela denied the statement.

394. Ms Memela confirmed that when JM Aviation made this payment of R 2.5 million on 5 May 2016, she was the Head of Procurement at SAAT. Furthermore, as at this date, the components tender that AAR/JM Aviation was ultimately awarded, was still open. The Board decided to award the tender to JM/AAR on 9 May 2016. The BAC meeting took place on 6 May 2016, the day after this payment had been made. In addition, on the date on which this payment was made, JM Aviation and SAAT, represented by Ms Memela, were still negotiating the price of the purchase of the GPUs.

395. Ms Memela claimed that there was no conflict of interest in having received this payment from JM Aviation and she stated that she was not sitting on the evaluation team and so there was no conflict. When asked whether she was familiar with the conflict of interest policy of SAAT and when she would

be required to declare a conflict, she admitted that she was not familiar with it. The policy provides at clause 7.1 that SAA employees shall not seek to use their positions to gain direct or indirect benefits for themselves or their family members. It was put to Ms Memela that the fact that she had used her position and her meeting with Mr Ndzeku to find a purchaser for her mother's property, that ended up benefiting her. Her answer was again evasive and unsatisfactory.

396. Ms Memela was then asked whether she had not breached clause 7.3.1 of the same policy, which stated that SAA employees shall refuse gifts, hospitality or other benefits that could influence their judgement or performance of obligations. Ms Memela testified that she was not the decision-maker in either the sale of the GPUs to JM Aviation or the award of the tender to AAR/JM Aviation. She said that these were Board decisions.

397. After Ms Memela had testified, Mr Ndzeku testified about the contract with Ms Memela's mother, Ms Hlohlela. Mr Ndzeku stated that he had met Ms Memela in around mid-2015 at one of the supplier development workshops. He testified that during that introduction, Ms Memela had told him about her mother's land in the Eastern Cape. He explained that, at that time, he was involved in commercial cannabis farming in Lesotho and Swaziland and he wanted to use Ms Hlohlela's property for that type of business. As evidence of his involvement in growing cannabis, Mr Ndzeku provided the Commission with an investment document from a company called Medigrow that is involved in commercial cannabis farming. He testified that this was the company he was dealing with at the time, and that he had shown Ms Hlohlela this document in 2015 when discussing the land sale

398. Mr Ndzeku testified that he met with Ms Hlohlela about the purchase at the land in Mpindweni in the Eastern Cape sometime between mid-2015 and the signing of the sale agreement in November 2015. He testified that he was taken to the land, and he was happy with it. Mr Ndzeku testified that Ms Hlohlela then instructed him to go and speak to Ms Mbanjwa about getting paperwork to confirm the sale of the land. Mr Ndzeku relied on an affidavit allegedly deposed to by Ms Hlohlela stating that Mr Ndzeku purchased her family land in Mpindweni. Mr Ndzeku provided the Commission with this affidavit. He testified that the affidavit was given to him in 2015/2016 by Ms Memela in front of Ms Mbanjwa, and he was told that it would be proof of ownership of land.

399. Mr Ndzeku testified that Ms Mbanjwa prepared the sale of land agreement. He said that he and Ms Hlohlela signed the sale agreement in respect of her property in November 2015. He said that, when he made the payment for the land to Ms Mbanjwa, he was asked to use Ms Kwinana's name as a reference. He claimed that he did not know that Ms Memela was going to use the money to purchase property. This claim by Mr Ndzeku's is false, because this fact is recorded in the sale agreement between him and Ms Hlohlela.

400. It was put to Mr Ndzeku that he could not have given Ms Memela or Ms Hlohlela the Medigrow document in 2015 because that document was only created in November 2018. He conceded that he had lied and had not given them the document in 2015. It was put to Mr Ndzeku that the Commission had received an affidavit from Medigrow's CEO who confirmed that the document could only have been given to Mr Ndzeku during a presentation to potential investors in November 2018. Therefore, he could not have been looking to purchase the land for this purpose in 2015.

401. It was further put to Mr Ndzeku that the affidavit he provided to the Commission, which purported to evidence Ms Hlohlela's rights over the land and her transfer of those rights to Mr Ndzeku, could not have been provided to him in 2015/2016 because it was on an affidavit template used by the Mount Frere Police Station from 2019. The Mount Frere Police Station provided the Commission with affidavits by some of its officers explaining that it would be impossible to have had that template in 2015 or 2016. They also explained that the policeman who was allegedly the Commissioner of Oaths of the affidavit, could not have deposed to it on that date because he was out on patrol, according to his incident book.

402. It was further put to Mr Ndzeku that the affidavit and the contract of sale could not have been signed by Ms Hlohlela because the Commission had received a report from a handwriting expert who had compared various documents that Ms Hlohlela had signed. The expert concluded that the signatures on the affidavit and the sale agreement had been forged. Finally, it was put to Mr Ndzeku that the

sale agreement could not possibly have existed in 2015 because it made provision for certain disputes under it to be referred to the President of the Legal Practice Council, and the Council did not exist in 2015. It was only established in 2018. The sale agreement was, therefore, likely to have been based on an agreement template designed after 2018 and not 2015.

403. Faced with all this evidence, Mr Ndzeku eventually conceded that the affidavit was a forgery. He also admitted that he did not sign the purchase agreement in 2015, but rather in 2019. He confirmed that it was prepared by Ms Mbanjwa and was a fraud.

404. It was put to Mr Ndzeku that there was no agreement about land in 2015 or 2016. JM Aviation paid Ms Memela as SAAT head of procurement an amount of R 2.5 million out of the R 28.5 million that was paid by Swissport to JM Aviation, in exchange for her helping JM Aviation in the GPU sale and in the AAR/JM Aviation bid. By this time, Mr Ndzeku had no answer.

405. After Mr Ndzeku had testified, Ms Memela gave evidence again. She was questioned about what had been revealed in the evidence of Mr Ndzeku regarding the veracity and authenticity of the sale agreement which, on Ms Memela's version, had been the reason for the payment of R 2.5 million to her. Despite all the concessions made by Mr Ndzeku about the sale agreement being a fraud, Ms Memela denied this and said that the agreement was valid. Ms Memela did not offer any contrary evidence by anyone.

406. Ms Memela also maintained that the affidavit allegedly deposed to by her mother was authentic. However, despite being given an opportunity to do so, Ms Memela did not engage another handwriting expert to refute the Commission's expert.

407. Ms Memela disputed Mr Ndzeku's admission that the sale agreement was signed only in 2019. She testified that, as there would be no title deed, Mr Ndzeku had insisted upon a sale agreement and the affidavit. She testified that she had, therefore, given him the affidavit some time in 2015 or 2016 and the sale agreement followed suit.

408. When it was put to Ms Memela that the template of the affidavit was dated 2019, she said that that was "an error". Quite clearly, Ms Memela was sticking to the version that had been fabricated. When Ms Memela's attention was drawn to the fact that the sale agreement that Mr Ndzeku admitted was signed in 2019 had a dispute resolution clause that appointed the President of the Legal Practice Council to select an arbitrator and yet, in 2015, the Legal Practice Council did not exist as it was only established in 2018, she could not offer any sensible answer.

409. Ms Memela maintained that she did not help Mr Ndzeku get any tender. However, it was amply demonstrated throughout Ms Memela's evidence that she played an important role in the whole procurement process. As outlined elsewhere in this report, there were multiple ways in which Ms Memela influenced the tender decision and unduly assisted JM Aviation/AAR to secure the components tender and a low price for the sale of the GPUs. It is quite clear that she engaged in acts of corruption to assist AAR/JM Aviation.

410. Apart from the very strange features of the Cove Ridge sale agreement referred to earlier there were certain other features that make it quite plain that the agreement was just a fabrication to explain the payment of money into Ms Mbanjwa's account that was then used for Ms Memela's house. This is because:

    410.1 The agreement was purportedly concluded in April 2015, but while this agreement was still in existence and the full R2,8 million obligation owing on it, Ms Memela also concluded a binding sale agreement to pay R3.8 million for the Bedfordview house in February 2016, and allegedly kept both in operation until May 2016.

    410.2 The agreement had been signed only by Ms Memela and her husband did not sign the agreement, in circumstances where Ms Memela was married in community of property, which was in breach of section 15 of the Matrimonial Property Act 88 of 1984. In response, Ms Memela claimed that she had signed various other property purchase agreements without her husband but provided no evidence to support this claim.

410.3 Ms Memela had attempted to purchase a house two months before this for R1.4 million. Her application for a mortgage bond for the purchase was declined by the bank. Despite this, two months later, she committed herself to paying R2.8 million for a property from Slip Knot Investments. Ms Memela claimed that this was because she knew her mother was selling her property in the Eastern Cape. However, that does not make sense because the alleged sale agreement with Mr Ndzeku was only ostensibly signed in November 2015, some seven months later. Furthermore, the Slip Knot sale agreement did not contain any condition that it was subject to her first securing the "sale" of her mother's property.

410.4 Ms Memela did not sign a client form under the Financial Intelligence Centre Act 38 of 2001 (FICA) for Ms Mbanjwa when the Slip Knot sale agreement was concluded. Instead, such a form was only completed a full year later in 2016. However, in terms of section 21 of FICA, client information forms are required to be provided and signed when the transaction occurs or when the business relationship begins. The date of the client take-on sheet (6 May 2016) that was ultimately signed is suspicious because it was only signed the day after JM Aviation had paid R2.5 million to Ms Mbanjwa (5 May 2016), the money which was used by Ms Memela to purchase her property in Bedfordview. This tends to indicate that the first time Ms Memela became a client of Ms Mbanjwa's was when JM Aviation had made the payment of R2.5 million into Ms Mbanjwa's account.

411. The final suspicious feature of the Slip Knot agreement was eventually put to Ms Kwinana during her evidence. When Ms Kwinana appeared before the Commission, she was asked about the domicilium that she had provided for Slip Knot Investments under the agreement. The address given was 92 President Park, Midrand. However, in 2015, Ms Kwinana had not been working out of that address for several years already. The agreement was signed in April 2015, and the new owner of the President Park property, Mr Mark Bates, provided the Commission with an affidavit that explained that his company had been in that property since 2013. Ms Kwinana offered no suitable explanation for this discrepancy.

412. The evidence presented to the Commission shows clearly that Ms Memela received payment of R 2.5 million from JM Aviation to facilitate the JM Aviation/AAR components tender and the sale of the GPUs. It also shows that Ms Memela, Ms Kwinana and Ms Mbanjwa conspired to try to hide their corrupt activities by fabricating agreements after the commission of their corrupt activities.

413. This type of conduct calls for prosecution. In addition, both Ms Memela and Ms Mbanjwa are officers of the Court. Ms Memela is an advocate and Ms Mbanjwa, an attorney. Despite this, they have participated in a fraudulent scheme to try to hide money that was paid as a kick-back to Ms Memela. The Legal Practice Council should investigate their conduct further to determine whether they deserve to remain on the roll of advocates in the case of Ms Memela and, of attorneys, in the case of Ms Mbanjwa.

Ms Kwinana's Zanospark investment company

414. As set out above in the report, JM Aviation bought the GPUs from SAAT for approximately R 3 million and then immediately sold them to Swissport for R 9 million, thus making a profit of R 6 million in one day. This same calculation was put to Ms Kwinana, and she was invited to accept that, because of SAAT's sale of the GPUs to JM Aviation, JM Aviation made R6 million. Ms Kwinana would not accept this. She resisted the conclusion that JM Aviation made an immediate profit of R6 million. She denied this on the basis that, when you buy a motor car for R200,000 and it depreciates in value, then, when you sell it, you can only get R150,000 for it. When it was pointed out to her that that may be so for motor cars but, in this case, there was no depreciation (the sale taking place the very next day and in respect of already used equipment), she still would not concede that JM Aviation made R6 million on the sale.

415. After her evidence, Ms Kwinana's lawyer, Ms Mbanjwa, provided "submissions" to the Commission in lieu of re-examining Ms Kwinana. In those submissions, Ms Mbanjwa makes the point that, in the affidavit that Mr Aires (of JM Aviation) provided to the Commission, he claimed that seven of the GPUs were taken in for repairs. She then asserted that "the cost of repairs would clearly be an add-on on

the selling price that JM Aviation would charge Swissport". Ms Mbanjwa also criticised the evidence leader for allegedly ignoring this evidence and claimed that the evidence leader had thereby "misled the public". However, a proper consideration of Mr Aires's affidavit reveals that it does not provide support for this submission. In support of the conclusion that Mr Aires' affidavit did not support Ms Mbanjwa's submission, the following can be said:

415.1 Although Mr Aires contends in paragraph 27 of his affidavit to the Commission that seven of the GPUs were sent for repairs "at JM Aviation's cost", he provides no documents that support this claim, and the claim is inconsistent with his contemporaneous emails with Swissport at the time and his emails in 2017 to Ms Memela.

415.2 Mr Kohl's affidavit makes it clear that on Thursday, 14 July 2016, Mr Aires sent an email to Swissport in which he confirmed that he had inspected the GPUs and ten of them were ready for collection. This was followed with an email on 28 July 2016 in which Mr Aires informed Swissport that the remaining three GPUs were ready for collection. By 28 July 2016, therefore, all twelve GPUs had been collected from SAAT. In an email on 2 August 2016, Mr Aires confirmed to Swissport that all the GPUs had been delivered to Swissport. In his contemporaneous correspondence, Mr Aires makes no reference to the need for these GPUs to be repaired at JM Aviation's cost after they had been collected from SAAT.

415.3 Furthermore, in 2017, Mr Aires provided an email to Ms Memela in which he set out the chronology related to the GPUs.

415.4 Annexure 65 to the Open Water report on the SAAT GPU transaction dated 19 June 2018 is an email dated 21 September 2017 that Mr Aires sent to Ms Memela. In that email, Mr Aires refers to the seven GPUs that needed to be repaired but records that they were repaired by SAAT prior to June 2016. The sale of the GPUs to JM Aviation only took place during June 2016 and so these repairs were not done by JM Aviation but by SAAT.

415.5 It appears that Mr Aires was, therefore, not being truthful in his affidavit. It is not correct that the sale price of the GPUs was to be discounted by the repair work that JM Aviation had to do on seven GPUs. That repair work was done by SAAT before they were sold to JM Aviation. In July 2016, JM Aviation inspected the GPUs and confirmed that they were ready for collection by Swissport. By 2 August 2016, all the GPUs had been delivered to Swissport.

415.6 There is no explanation but to justify a sale price of R9 million as being market-related on day 2. Without some explanation for a change in the market over a day, that type of reasoning is simply untenable. His was an attempt to defend the indefensible or to explain that which is inexplicable.

416. Of the approximately R9 million that JM Aviation received from Swissport for the GPUs, R 4.3 million was paid to Ms Kwinana. This was done through paying an entity called Zanospark (Pty) Ltd that Ms Kwinana controlled.

417. The relevant bank statements illustrate that on 24 June 2016, Swissport paid JM Aviation R9 849 600 from the proceeds of the sale of the GPUs; on 29 June 2016, R 2.5 million was paid out of the account to Ms Hendricks, who is Mr Ndzeku's wife; Ms Hendricks then paid the money to Zanospark, as well as a later payment of R600 000.

418. Zanospark was only created in February 2016 and had an opening balance of R502 at the time. Thereafter, once Ms Kwinana had left SAA, further amounts were paid to her directly from JM Aviation. Throughout this period, there was no other activity in the Zanospark bank account. This money was then paid out to Ms Kwinana's personal account. Ms Kwinana ultimately received a total of R 4.3 million from JM Aviation over the period from July 2016 to September 2016.

419. Mr Ndzeku claimed that the money that had been paid from JM Aviation to Ms Kwinana's company, Zanospark, was money that JM Aviation owed him, and he wanted to invest it with Zanospark as a forex investment company. He also stated that, although the payments were also reflected as being paid by Ms Hendricks, his wife, she was investing his money on his behalf. He claimed to have received updates on his investment, in the form of annual statements, which he would receive from

Zanospark on email. However, after Mr Ndzeku was served with a summons requiring him to produce any documents he had in this regard, he stated in an affidavit that there were no such statements.

420. It should also be noted that Mr Ndzeku was asked to report to the Commission about JM Aviation's accounting to SARS for the payment it had received from Swissport. The Swissport payment of R28.5 million had included an amount of R3.5 million for VAT, for which JM Aviation was accountable to SARS. Mr Ndzeku has also failed to report to the Commission on this matter. SARS should investigate this issue further and take such steps as it may deem appropriate in terms of the law.

421. It was also put to Mr Ndzeku that if Zanospark was trading in forex, then it would have needed to be licenced either by the SARB or as a financial services provider under the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS), but that both those institutions had advised the Commission that Zanospark had no such licences.

422. Mr Ndzeku's version that the JM Aviation payments to Zanospark was his money was inconsistent with his own evidence given earlier in the day. Earlier in the day, Mr Ndzeku had testified that he did not receive large sums of money through JM Aviation and had received payments of a maximum of R100 000 for successful deals that JM Aviation had done. Later, however, he changed his story and claimed to have been paid millions of rands that JM Aviation had owed him that he then used to invest with Ms Kwinana's entity.

423. Ms Kwinana confirmed that she established Zanospark in February 2016 with her daughter, Ms Lumka Goniwe. She explained that the payments she received first from Ms Hendricks (prior to Ms Kwinana leaving SAA) and, thereafter, from JM Aviation, were investments that she was placing for Mr Ndzeku and Ms Hendricks, and that they were two of around eight investment clients that Zanospark had.

424. If Ms Kwinana was legitimately trading on behalf of third parties as her clients, then she would (and Zanospark would), according to an affidavit from the Financial Sector Conduct Authority provided to the Commission, be required to have a licence as a financial services provider. Ms Kwinana persistently denied in her evidence that she needed a licence to do forex trading and in the submissions made by her legal representative to the Commission on her behalf, this point is raised again.

425. Of course, if Ms Kwinana were conducting the forex trading for herself, then she would need no licence because FAIS only regulates financial services that are provided to clients. The absence of a licence therefore tends to indicate that Ms Kwinana was not conducting forex trading activities for others, but for herself.

426. The way Ms Kwinana dealt with the funds in her account and the Zanospark account also indicates that she treated the money as her own and not as the investment monies of clients. For example:

    426.1 The Zanospark bank account had no activity in it until the payments from JM Aviation.

    426.2 The money was always transferred into her personal account and disappeared from there. This is not the conduct of a financial advisor who should be keeping her clients' funds separate from her own.

    426.3 Zanospark was unable to provide the Commission with any records of the investments. Despite this, Ms Kwinana claimed that she had sent out annual statements in January of each year and concluded FICA documents but just could not give them to the Commission.

    426.4 Ms Kwinana's attempts to justify why she could not produce the documents was not credible. She claimed that Zanospark has a strict confidentiality policy that prevented her from ever emailing her clients. This was contradicted by Mr Ndzeku who testified that he had received the statements via email.

    426.5 Ms Kwinana also claimed that her server had been seized in February 2020 with the result that she had none of the electronic copies of the annual statements. However, if this were a legitimate business, then it strains belief that she would not have retrieved these records from the host or at least keep back-ups somewhere.

426.6 In any event, the company that confiscated the server, Onero, told the Commission that the server was, in fact, confiscated in April 2019 – which means that the last statements from December 2019/January 2020, which Ms Kwinana claimed she had prepared for her clients, would still have been in her possession. Yet, she failed to produce these in response to the summons.

427. All these factors point clearly to the conclusion that Ms Kwinana was not investing Mr Ndzeku's money for him. The money she received from JM Aviation and Ms Hendricks was meant for her. Indeed, the evidence showed that Ms Kwinana invested the R4.3 million in a property that she purchased through a family trust. On Mr Ndzeku's own version, he was investing in forex trading to hedge against the falling Rand. It was therefore put to Ms Kwinana that, if she was in fact investing Mr Ndzeku's money, she would not have been permitted to buy property located in South Africa with the money because this would provide no "hedge against the Rand". She had no adequate answer to this proposition.

428. The evidence overwhelmingly pointed to the fact that the money Ms Kwinana received from Ms Hendricks and JM Aviation was hers to do with as she pleased. She received this money after:

428.1 She, as a SAA Board member, had approved that SAA enter into a contract with Swissport for ground handling services in terms of which JM Aviation managed to buy GPUs from SAAT and made a R6 million profit in a day; and

428.2 She, as the chair of the SAAT Board, had taken part in a decision to award unjustifiably and unfairly the components tender to the joint venture of JM Aviation and AAR.

429. As the report highlighted above, Ms Kwinana presented the Commission with re-examination submissions at the conclusion of her oral evidence. She filed the submissions on 1 December 2020. Ms Kwinana emphasised repeatedly in her submissions that the pertinent decisions on which she was called to account were taken by the Boards of SAA or SAAT. This explanation appears to have been provided to shift, or at least dilute, the blame attributable to Ms Kwinana. However, the efforts do not avail her because as a member of those Boards, she was still accountable for her own conduct. Regarding SAAT, she was the Chairperson of SAAT's Board and, therefore, that Board's leader.

430. The efforts made by Ms Kwinana in the re-examination submissions to justify her receipt of payments and the various breaches of her fiduciary and other legal obligations do not assist her. Ms Kwinana has failed to give a plausible explanation for why as SAAT Chairperson and SAA Board member it was lawful and appropriate for her to have received payments from an entity, and persons affiliated with it, that was a supplier to SAAT. The payments were, therefore, probably corrupt payments because they were made in exchange for decisions, in which Ms Kwinana was involved, that benefitted the entity that made the payments. The Commission will recommend that the NPA considers prosecuting Ms Kwinana for the offence of corruption.

Use of external service providers

431. One of the themes that has emerged in the evidence presented to the Commission is the use of external service providers when there were already ably qualified and skilled staff working within the various SOEs. This use of duplicate external service providers was often a means by which corruption was allowed to flourish within the SOEs. Attention was therefore given to this issue in the investigation into SAA.

432. Ms Kwinana testified that the staff of SAA were of a very high calibre; were well-qualified and competent. With reference to their legal personnel, she said that they were very highly qualified, and the Board would rely on them regularly.

433. Ms Kwinana testified that she knew Mr Nick Linnell and that he used to attend Board meetings and committee meetings at SAA. She said that she did not know why he was at those meetings. She testified that she assumed that Ms Myeni would know as she had invited him. Ms Kwinana testified that Mr Linnell would sometimes offer a legal opinion on a matter, or he would even make presentations. If the Board needed a quick legal opinion or some legal research, they would ask Mr Linnell to provide the legal opinion or to conduct the required research. When asked why, when SAA had

such well qualified lawyers, they needed an outsider to be there to give legal advice, Ms Kwinana could not give a meaningful answer. However, she confirmed that Mr Linnell did not actually attend those meetings in his capacity as a lawyer. However, the evidence shows that Mr Linnell was heavily involved in legal matters involving Ms Myeni as the Chair of the SAA Board. He briefed Werksmans on her behalf when she sought an opinion about the CEO, Mr Kalawe, and about the conduct of the Board.

434. Mr Linnell was paid by SAA for this work in circumstances where Ms Kwinana indicated she did not understand his purpose and that SAA had its own highly qualified in-house legal team. Mr Linnell was engaged in circumstances where no proper procurement processes were followed as they should have been under the PFMA. Given that SAA already had briefed attorneys, had in-house legal counsel, and that Mr Linnell was not actually a practising attorney in South Africa, Ms Myeni was asked what role Mr Linnell was playing and why he billed SAA for his services. She was also asked why his invoices (amounting to just under R2 million) were paid by SAA in circumstances where it appears no procurement processes had been followed. Ms Myeni was also asked why Mr Linnell was permitted to attend confidential board meetings when he was not fulfilling the role of an attorney (and therefore not subject to legal privilege) and whether she accepted that spending just under R2 million in these circumstances would amount to irregular and wasteful expenditure in breach of the PFMA.

435. Ms Myeni refused to answer these questions and invoked her privilege against self-incrimination. When she responded on affidavit to the question of Mr Linnell's attendance at Board meetings, Ms Myeni confirmed that he had attended the meetings on occasion when he was invited by the Board to do so. Had Ms Myeni in fact given this answer during her testimony, the answer would have been followed up with a series of further questions about why his attendance was required when there was a fully functional staff compliment at SAA; who, precisely, had called for him to attend; what value he had added to those Board meetings; and whether having an outsider at the meetings was not in conflict with the confidentiality that Ms Myeni was often keen to emphasise for the work of SAA's Board. Evidently, Ms Myeni elected only to answer the Commission's questions on affidavit, to avoid these obvious follow-up questions, and to only give answers that did not expose any wrongdoing. Despite repeatedly stating that she wished to be helpful to the Commission, her conduct revealed something else. Ms Myeni's entire approach to the Commission was consistent with a witness eager not to be exposed to probing questioning. Her answers on affidavit were brusque.

436. Ms Myeni was also afforded an opportunity after her oral evidence to respond to the evidence of Werksmans about the work they did for Ms Myeni in April 2014 and in terms of which they were briefed by Mr Linnell before he was appointed at SAA in any capacity. Ms Myeni provided an affidavit to the Commission in which she declined to deal with Werksmans' evidence on the basis that she could incriminate herself.

437. The evidence presented to the Commission shows that Ms Myeni used Mr Nick Linnell as a personal lawyer, at public expense and without regular procurement processes, to guide her in furthering her own personal interests. She also sought to use public funds to get legal advice on advancing her own personal interests with the SAA Board, instead of advancing the airline's interests.

BEYOND SAA

State security resources

438. The evidence presented at the Commission showed that the project of state capture was often facilitated using state resources to advance the personal interests of certain officials. Within SAA, there were two instances of irregular and unlawful employment of state security resources.

    438.1 The first instance involved vetting SAA management for security clearance. The manner in which the vetting was conducted and its scope indicates that the vetting was employed for the ulterior purpose of intimidating and harassing staff members.

    438.2 The second instance involved the security detail provided to Ms Myeni.

Illegal vetting of staff at SAA

439. Ms Nokunqoba Gloria Dlamini was employed by the State Security Agency (SSA) and based in the Pretoria Head Office as an analyst and evaluator. Her work included interpreting and analysing reports from information obtained through vetting. Ms Dlamini testified before the Commission that she received a call from the SSA about their need for a report about SAA's decision to close the route through Dakar, Senegal, because Mr Bosc decided it was not commercially viable. Ms Mpshe consulted one of SAA's legal advisors and the two of them decided she could not divulge all this information because it involved confidential information about particular SAA employees, in circumstances where the request did not come from the normal protocol – i.e., from one government department to another. This was communicated to the SSA official. Thereafter, they received a letter from the DG of the SSA, Mr Dlodlo, who instructed them to reply to the request. A further letter arrived from the Minister of State Security, Minister Mahlobo, and then one from National Treasury indicating that staff would be vetted by the SSA.

440. Ms Dlamini testified that the vetting of SAA's executives and support staff had its origins in a letter sent by the Minister of State Security to the Minister of Finance, Mr Nhlanhla Nene, on 13 October 2015. The letter stated, inter alia: "It has come to the attention of the State Security Agency that there is an urgent need for vetting and re-vetting of state-owned enterprises given sensitive information received on an ongoing basis." The letter further noted: "As per section 1 of the National Strategic Intelligence Act 39 of 1994 as amended by Act 67 of 2002 states that the National Intelligence Agency has the mandate to vet all other National, Provincial and Local Government Departments, Parastatals and their service providers." The letter concluded that the SAA Chairperson needed to provide a list of all executive management support staff.

441. Minister Mahlobo purported to be quoting from section 1 of the National Strategic Intelligence Act (NSIA). That section is a definitions section and contains no such provision. In fact, there is no such provision anywhere in the NSIA. It is not clear how Minister Mahlobo relied upon and quoted a non-existent section to justify the plan to vet SAA employees. Section 2A(1) gives SSA the mandate to vet employees of organs of state (which includes state-owned entities), but it provides as follows:

> The relevant members of the National Intelligence Structures may conduct a vetting investigation in the prescribed manner to determine the security competence of a person if such a person (a) is employed by or is an applicant to an organ of state; or (b) is rendering a service or has given notice of intention to render a service to an organ of state, which service may (i) give him or her access to classified information and intelligence in the possession of the organ of state; or (ii) give him or her access to areas designated national key points in terms of the National Key Points Act, 1980.

442. Ms Dlamini testified that her superior, General Dlodlo, explained to her that SSA would be vetting SAA because it was an SOE and vetting SOEs was part of SSA's mandate. Ms Dlamini confirmed that, in her view, just being an employee of an SOE meant that one had to be vetted. She confirmed that at no point in the vetting exercise did the team assess whether SAA employees had access to classified information.

443. On 26 November 2015, Minister Nene responded to Minister Mahlobo's letter. In his letter, Minister Nene repeated the purported (but wrong) quote from the National Strategic Intelligence Act. The letter also described two letters from Ms Myeni listing all executive management and support staff who were to be vetted. One of her letters was dated 2 November 2015 and the other 5 November 2015. The first letter named thirteen SAA executives for vetting, while the second letter listed another 118 executive managers and support staff. Ms Dlamini testified that, in her view, SAA Board members should also have been vetted as they were privy to classified information.

444. Clause 1.5 of Chapter 5 of the Minimum Information Security Standard (MISS) document states that political appointees, directors, generals, and ambassadors will not be vetted unless the President requests it or the relevant contract provides for it. However, all individuals with access to "classified information" must be subject to security vetting, from the lowest level up to Deputy DG.

445. In summary:

445.1 Section 2A (1) of the National Strategic Intelligence Act (NSIA) provides that SSA *may* vet in the prescribed manner to determine the security competence of a person or employees of organs of state, and *may* vet service providers to organs of state *if* they have access to classified information.

445.2 The MISS provides that all staff members or any other individuals who have access to classified information *must* be vetted.

445.3 Directors of the SAA Board will be service providers and must have access to classified information for SAA to be able to vet them. If they have access to such information, the MISS makes it mandatory to vet them.

446. Given that the vetting was not conducted among Board members, Ms Dlamini admitted that this would not have been compliant with MISS provisions if those Board members had had access to classified information. Although SSA's mandate to vet employees of organs of state is limited to employees with access to classified information, Ms Dlamini insisted that the meaning of the provision was that any employees of organs of state may be vetted, regardless of exposure to classified information.

447. Ms Olitzki provided an affidavit to the Commission in which she confirmed that, in the eight years she had served as the Head of SAA's Department for Financial Accounting, she had never once seen a document that could be deemed classified or top secret.

448. In Ms Dlamini's project plan, she stated that the vetting would ensure that "all classified and sensitive documents within SSA are assessed by personnel with valid security clearances". When it was put to Ms Dlamini that this goal could not be achieved if there was never an assessment of whether the vetted employees actually had access to classified or sensitive documents, she answered that their only role was to identify the risk posed by executives. This makes no sense in a context in which risk is a function of access to classified documents.

449. The project plan also stated one of its objectives as being "executive management support and buy-in". However, it was put to Ms Dlamini that she did not receive this support because she had to fly to Cape Town to meet with Ms Myeni about this issue and seven members of executive management resigned because of the vetting, and many others were unhappy about the level of personal information they had to provide to the SSA. Ms Dlamini said this did not signal a lack of buy-in and support because she never received any indication from the Acting CEO of SAA that there was a lack of support and the management employees who resigned could have resigned for any reason. She also stated that she had regular feedback meetings and would have known if there was a lack of support. However, she later admitted that she had only met with the members of the Board (who were not being vetted) and the Acting CEO, Mr Musa Zwane.

450. Ms Mpshe testified that many employees were suspicious and unhappy about the vetting process. Many were unwilling to cooperate as it was not a condition of employment. Ms Mpshe herself refused to comply because she was very suspicious of the reasons for the vetting and felt the questions were very personal and intrusive. She shared this position openly with the Acting CEO, Mr Zwane.

451. A curious feature of Ms Dlamini's reporting of the project plan for the vetting process is that she first met with the Chairperson, Ms Myeni, on 13 January 2016, and then with the Board the next day in Midrand to present the plan. Ms Dlamini claimed that the purpose of this first meeting was just to "observe protocol" – but she had to fly to Durban for this, and then fly back for the Board meeting in Midrand the next day. She explained that the purpose of the meeting was to get access to the resources she needed to conduct the vetting, like parking access, but she then admitted that it was, in fact, the Board and not Ms Myeni that could help her with obtaining that access. She therefore could not give a good reason why she had to meet alone with Ms Myeni.

452. Ms Dlamini testified that the vetting process had four stages. First, participants filled in administrative forms; second, there was fieldwork where vetting officers conducted interviews with references and any additional others; third, the participant would undergo a polygraph test; and, finally, analysis of

the data to reach final conclusions.

453. Ms Olitzki's affidavit confirmed the extensive and invasive nature of the vetting process. The questions asked in the administrative phase included health, psychiatric treatment, education, substance abuse, romantic relationships and cohabitation arrangements; the forms required employees to identify referees who had known them for 5 to 20 years; details about any travel out of the country and those of the person's spouse; bank statements; loans; income and expenditure; and income sources.

454. During the interview phase, participants were asked wide-ranging questions, some of which were very personal and private and some of which appeared to be completely irrelevant to their work. The participants also knew that the interview would be followed with a polygraph test and so they were not able to withhold information. Ms Dlamini testified that the polygraph machine is only used when vetting is being conducted at a Top-Secret level or when there is a specific need to verify the reliability of the information gathered. Ms Dlamini stated that they were vetting SAA management on a Top-Secret level. While she admitted it was "standard practice" for senior management to be vetted, she did not know whether any of them would ever actually be in receipt of Top-Secret Information. These managers were also not advised that they were entitled to refuse the polygraph test.

455. Ms Dlamini stated that during the analysis stage, the evaluator would make recommendations on whether clearance ought to be granted or declined. She acknowledged that the vetting regulations provided that an applicant had to be notified in writing of the outcome of the vetting. She stated that she complied with this regulation by giving the outcomes to the Acting CEO, Mr Zwane, but not the individuals concerned. She testified that she told Mr Zwane verbally to give the outcomes to the individuals concerned and he undertook to do so. She was surprised to learn that at least two SAA managers were not told their outcomes.

456. Ms Dlamini prepared a report on the outcome of the vetting process. She concluded that the project was successful, with 70% of executive management and support staff vetted, 85% of cases receiving clearance, and "no strikes or serious disturbances reported since the project started." Despite this statement, Ms Dlamini persisted in claiming that she knew nothing about any unhappiness or resistance to the vetting. The report also claimed that "SAA reported an improvement on their revenue (about two billion turnover) as a result of the vetting project". She testified that she obtained this information from Mr Zwane. However, she admitted that he never told her the increase was "as a result" of the vetting process. When asked what causal relationship there could have been between vetting and revenue, she could not answer.

457. Ms Dlamini also could not explain in what way the vetting project had been "successful". She finally suggested that it may have contributed to a reduction in corruption but could not provide any concrete reason for why that would be or how that occurred and confirmed that they could not even terminate the employment of people who failed to obtain clearance.

458. The evidence presented to the Commission demonstrates that:

    458.1 One hundred and eighteen employees at SAA were subjected to an invasive, intrusive, and extremely personal vetting process

    458.2 The relevant legislation provides that these employees may only be vetted to determine the likelihood of them sharing classified information

    458.3 The objective of the vetting process was to ensure that employees did not disclose classified information

    458.4 It was never determined whether any of these employees ever received classified information during their employment, and some evidence suggests that these employees were never exposed to this type of information; and

    458.5 The vetting exercise was viewed by some of the SAA management as irregular. There was general unhappiness about it, resulting in the resignation of 7 executives. It had no measurable success or positive outcome for SAA.

459. It is therefore reasonable and fair to conclude that the vetting was pointless, harmful, and unlawful. Importantly, the two Ministers involved in the process and the SSA project manager were wrong about the SAA mandate for these types of operations. These findings are important for future SAA operations because they show a worrying and misguided internal understanding of the legal framework governing vetting.

Illegal use of SSA VIP protection detail

460. In addition to using the state security resources to vet and remove non-compliant SAA staff members, Ms Myeni used state security resources for her personal protection detail and to intimidate other Board members. The use of the detail was irregular and unlawful, a waste of state resources, and promoted state capture by creating a climate of fear and lack of transparency.

461. The Commission heard extensive evidence about the irregular redeployment of state security resources for the benefit of former President Zuma. This process of redeploying state resources from their proper and legitimate scope was at the expense of the public they were required to serve.

462. Mr Y, who was employed within the State Security Agency (SSA), submitted an affidavit to the Commission without his identity being revealed. However, he never gave oral evidence because he fell ill when it was time to testify. Ms K, who worked closely with Mr Y, gave evidence confirming most of the evidence in Mr Y's affidavit.

463. Mr Y testified about the Special Operations Unit within the SSA. This unit dealt with strategic projects that were very sensitive and involved using undercover SSA operatives. Mr Y stated that, before 2012, this unit was used where the links between the SSA or government would need to remain hidden and to allow for plausible deniability of the state's involvement. This could be counter-terrorism or transnational organised crime – matters that required the covert gathering of intelligence. Mr Y explained that after 2012, undercover operatives were redeployed to act as protection detail for former President Zuma. These members would act as a parallel protection to the Presidential Protection Unit. This meant they were exposed as SSA members and could therefore no longer perform covert undercover operations.

464. To carry out this parallel protection mandate, Mr Thulani Dlomo was appointed as GM of the new Special Operations Unit (SOI). All members of the covert structure were advised that they were no longer going to be working on identified focus areas, like transnational organised crime or counter-terrorism, but would instead be doing risk assessment and security directly related to President Zuma. This redeployment took place even though some of these operatives had been trained and resources had been invested in them being placed in long-term undercover positions. The Unit was shifted from operating under the DDG responsible for domestic operations, to the DG responsible for counter-intelligence operations. The unit had an estimated 30 permanent members and a further 70-170 members who were agents acting for the Unit but working in other law enforcement agencies.

465. Mr Y described the unit as a "parallel" structure because most of their functions were already performed by other SSA units or other stakeholder departments, but they were dedicated to performing this function specifically for the former President. For example, protection of VIPs (Ministers, members of Parliament) would normally be performed by the SAPS, but there was now a SSA unit dedicated to protecting the President. Mr Y testified that while some in the unit were existing operatives, most were new recruits, largely from KwaZulu-Natal. These new recruits were given training normally reserved for full SSA members. This included training in foreign countries in counter-intelligence and VIP protection and the gathering of intelligence.

466. Mr Y testified that the group of approximately 200 agents and members were allocated to specific people who were supporters of President Zuma and who "may have been facing certain difficulties" – and who would not be eligible for protection from SAPS. One of those people was Ms Myeni, though Mr Y confirmed that the SSA could not find any formal paperwork requesting protection. Mr Y discovered that Ms Myeni enjoyed these security benefits because of the work of the High-Level Review Panel investigation into SSA matters. The Panel Report explained that the SOI unit had a

legitimate function prior to 2012, working on serious or sensitive operations of national importance, but thereafter there was "naked politicisation of intelligence".

467. The Report concluded that Mr Thulani Dlomo had been deployed by President Zuma, via the Minister of State Security, to head up the Special Operations Chief Directorate and effect the politicisation of the Unit and the SSA in general. It found that the Unit was "a law unto itself and directly served the political interest of the Executive. It also undertook intelligence operations which were clearly unconstitutional and illegal." This included deploying undercover operatives for VIP protection of various persons not entitled to this protection, including Ms Myeni. The Report found that the unit had become a parallel intelligence structure serving a faction of the ruling party, particularly the personal political interests of the sitting President. The Report concluded that this directly breached the Constitution, relevant legislation, and good government intelligence functioning. Mr Y confirmed all these findings.

468. Mr Y testified that, if an official believed their life was under threat, the normal process would be to put a request through the SSA security advisor allocated to a particular SOE or government department. This request would be channelled to the SAPS. Mr Y confirmed that no such process was followed with respect to Ms Myeni. Even though she did not lawfully qualify for protective VIP services, she nevertheless received such services from the SSA.

469. Mr Lingaraj Gary Moonsamy, the HOD: Group Security Services at SAA, provided an affidavit to the Commission that detailed the nature of the SSA security services provided to Ms Myeni. Mr Moonsamy stated that he provided Ms Myeni with the services of a close protection officer, together with three other members of the SAA security services for a period of four months. Thereafter, Ms Myeni obtained a new security detail. Mr Moonsamy did not know who appointed them or where they came from. Mr Moonsamy explained that Ms Myeni breached SAA policy by not making prior arrangements before arriving at SAA with her own security detail. Her security personnel refused to sign-in when they arrived at SAA, which also violated SAA policy. Mr Y testified that, if these security personnel had been legitimately deployed by SSA, they would have had no problem signing-in. Mr Moonsamy provided the Commission with CCTV footage of some of the personnel accompanying Ms Myeni to SAA and Mr Y positively identified one of them as Zama Ntolo, a member of the Special Operations Unit of the SSA.

470. Mr Moonsamy included in his affidavit an incident report regarding the former CFO of SAA, Mr Wolf Meyer. The report stated that Ms Myeni had instructed security personnel accompanying her to SAA to confiscate a recording device (concealed in a pen) from him. In addition, Mr Moonsamy stated that his predecessor, Mr Jona de Waal was advised by former CEO Nico Bezuidenhout and Mr Meyer, that Ms Myeni's security personnel from SSA would confiscate laptops and cell phones from people before they went into meetings, on Ms Myeni's instruction. This is confirmed in an incident report compiled by an SSA member explaining that, before the meeting started, they had to gather up all electronic equipment. Mr Y testified that it was not in the mandate of SSA members to confiscate electronic equipment.

471. Mr Eric Zamokwakhe Mtolo of the Special Operations Unit of the SSA provided the Commission with an affidavit confirming that he did accompany Ms Myeni to SAA on one occasion, as captured in the CCTV footage Mr Moonsamy gave the Commission. Mr Mtolo stated that he was summoned by Mr Dlomo, together with another member of the SSA by the name of "Gerald". Upon entering the meeting venue, he found that Ms Myeni was also there. Mr Mtolo said he had met Ms Myeni previously because he was asked to assist her in tracing the cell phone number of a person she claimed was harassing her. Mr Dlomo instructed Mr Mtolo to speed up the investigation into Ms Myeni's harassment claim and asked him to accompany Ms Myeni to SAA's offices at Airways Park and to wait outside a meeting room where Ms Myeni would be attending a meeting. Mr Mtolo and "Gerald" did as instructed. A few minutes into the meeting, Ms Myeni walked out with a recording device pen, which she placed together with several cell phones that were on the desk. Ms Myeni told Mr Mtolo that she had taken the pen from someone in the meeting and Mr Mtolo assumed the phones were similarly from members attending the meeting. Mr Mtolo was concerned that he was supposed to look after the devices, which was not his job. Mr Mtolo briefed Mr Dlomo in person about the incident. At the end of the meeting, Ms Myeni attempted to give Mr Mtolo the recording pen, but

he refused to take it. After briefing Mr Dlomo, he never involved Mr Mtolo again in any of Ms Myeni's matters.

472. There is accordingly overwhelming and corroborated evidence that Ms Myeni was unlawfully benefitting from SSA resources and enjoyed the protection of undercover operatives. This reveals how powerful Ms Myeni was and how close she was to President Zuma. The extent of Ms Myeni's proximity to former President Zuma is also reflected in her dealings with Bosasa and in relation to Eskom.

473. However, as far as SAA is concerned, it appears that Ms Myeni operated with a level of suspicion about SAA management that is not normal behaviour for a Chairperson of the Board of a public entity. Ms Myeni operated SAA under a cloud of fear, intimidation, secrecy, and paranoia, when a public entity should be operated transparently and with accountability to the South African people who fund it.

474. During her evidence before the Commission, Ms Myeni was asked about the security services she used, whether it was a lawful deployment of SSA resources, and whether she ordered the confiscation of Board members' electronic devices with the assistance of SSA officers. She refused to answer these questions and invoked the privilege against self-incrimination. She was also asked about the vetting process at SAA, the lawfulness of the process, why it was necessary in circumstances where employees were not exposed to classified information, and why Board members were excluded from the process if they were more likely than anyone to be exposed to confidential or sensitive information. It was put to Ms Myeni that Board members were likely excluded because of the highly personal and invasive nature of the questions. She was also asked about Ms Nhantsi's evidence regarding Ms Olitzki and the use of vetting results to remove employees Ms Myeni wanted removed. Ms Myeni, once again, refused to answer these questions and invoked the privilege against self-incrimination.

475. Ms Myeni's refusal to be accountable for her actions is regrettable. She clearly received favours from the SSA to which she was not lawfully entitled. She employed those resources during her time as SAA Board Chairperson for ulterior purposes.

The new board – but retention of Ms Myeni

476. Ms Kwinana resigned from the Board on 23 August 2016. She said that her reason for resigning was that Minister Gordhan had an issue with funding and wanted new Board members. The reasons stated in her letter of resignation were that National Treasury was not issuing the guarantee to SAA, which resulted in a failure to finalise the audited financial statements, and the Minister wanted to appoint a new Board so that the guarantee could be issued. Ms Kwinana testified that she could sense the Minister wanted the whole Board to resign because he did not have a good relationship with the Chair, Ms Myeni, and the Board. Despite this, Ms Myeni was retained on the new Board. According to minutes of a Cabinet meeting on 24 August 2016, Mr Gordhan motivated for the appointment of Ms Myeni as a non-executive director and Chairperson of SAA for a further two years.

477. Minister Gordhan was asked to provide an affidavit to the Commission explaining why he made this recommendation. He explained that the decision was driven primarily by former President Zuma and his insistence that Ms Myeni be retained as the Chair of SAA. He said that, as a member of the executive, he was constrained by the explicit wishes of President Zuma. He sought to mitigate the harm that would be caused by her retention with the appointment of other directors to the Board whom he considered to be people who were fit, independent, qualified, and with integrity "who would be able to constrain the adverse impact of Ms Myeni's leadership going forward". He stated: "It was clear to me that the then Head of State would not permit her removal, so I worked to surround her with competent and qualified Directors".

478. Minister Gordhan also asked that the Commission call upon the President to explain

> why there was unyielding insistence that Ms Myeni be retained as the SAA Chair for three terms, despite what is known about various decisions she took that harmed the airline's interests. Examples include the notorious Airbus transaction and her direct interference in the management of SAA to scuttle a very lucrative transaction with Emirates Airlines.

479. The Commission was not able to question Mr Zuma about this because he walked out of the Commission hearing on 19 November 2021 in breach of a summons and thereafter refused to appear before the Commission. Mr Zuma fled the Commission completely without any valid reason and without justification. He did so to avoid having to answer questions in the Commission about matters such as this. He did not want to account to the nation. He knew he was not going to have answers to many of the questions that were bound to be put to him.

480. Minister Gordhan explained that to further mitigate the harm Ms Myeni could do on the Board, he proposed to Cabinet that there be an annual review of her performance.

481. Minister Gordhan stated that, on 12 December 2014, the DPE relinquished the role of oversight of SAA and National Treasury took over that role. At that time National Treasury was led by then finance Minister, Mr Nhlanhla Nene.

482. Ms Myeni's initial three-year term on the Board would have expired before October 2015. However, she remained on the Board without any reappointment process, until Cabinet made the decision to retain her for a further year. Minister Gordhan was asked to explain how this could have occurred. Minister Gordhan's explanation did not make much sense. He stated that because the President wanted Ms Myeni retained, no further appointments could occur without his consent on this basis. However, this does not explain why she was not formally reappointed to this position when her term ended. This is particularly problematic because, under SAA's MOI, a director may only serve three terms on the Board.

483. If Ms Myeni had indeed been properly appointed for a year in 2015 until 2016, that would have been her third term in office and Cabinet could not have reappointed her in 2016. According to his affidavit, Minister Gordhan took the view that because the MOI allows for three terms of a maximum period of three years each, if the total period for which Mr Myeni served on the SAA Board was less than nine years, this was compliant with the MOI. This does not, however, appear to be the correct interpretation of the term limit. A term has a maximum of three years but if the term was not three years long, the MOI did not qualify the term limit. It remained three consecutive terms.

484. As outlined above, Ms Myeni remained as Chairperson of the SAA Board despite:

    484.1 The majority of the SAA Board raising serious concerns about her leadership in early 2014

    484.2 Former Finance Minister Nene's concerns about her lack of appreciation of the impact that the Airbus swap transaction would have on SAA finances; and

    484.3 Former Finance Minister Gordhan's concerns that she should not be retained on the Board after 2016.

485. Both former Ministers Nene and Gordhan attribute Ms Myeni's retention on the Board to the personal preference of former President Zuma. This preference appears to have been more important to the former President than the proper governance or management of SAA. By 2016, there appears to have been a consensus at Treasury that Ms Myeni was a liability to the organisation and had already caused it severe harm and financial loss. Notwithstanding these concerns, the former President insisted that Ms Myeni be retained in her position at any cost, and with complete disregard for the welfare of SAA. His Cabinet followed suit and voted to retain her beyond 2016.

Auditors

486. The Commission heard evidence from two primary witnesses on the activities of the auditors of SAA over the period set out above in which Ms Myeni was the Chair of the Board and Ms Kwinana was the Chair of the ARC.

487. The Commission also received an affidavit from Mr Simon Mantell, a chartered accountant. He detailed the engagements he had with SAA when his company, Mantelli's, bid for a dry snack tender in 2013. Mr Mantell's affidavit raised serious concerns about the auditing work that had been done at SAA by both its internal and external auditors. This issue merited further investigation by the

Commission to establish whether the role that auditors played at SAA contributed in any way to what unfolded at the airline.

488. The first witness was Mr Polani Sokombela, a business executive at the AG's office. Mr Sokombela testified that for the 2016/17 financial year, the AG took over the audit from a private audit firm, PricewaterhouseCoopers (PWC), after it had held the mandate to audit SAA for five years, together with its joint-audit partner, Nkonki Inc. Mr Sokombela testified that the state in which the AG found SAA's records and accounting practices was dismal. He also testified to some of the very serious shortcomings in PWC and Nkonki's joint audits, which may have enabled state capture, corruption, and irregularities to remain undetected at SAA for many years.

489. The second witness was Mr Pule Joseph Mothibe, the audit partner at PWC responsible for the SAA audit for the 2013/2014 to 2015/2016 financial years. His evidence clearly demonstrated that PWC's primary interest was in the financial aspect of the audit. It was evident that PWC was either not equipped to assess, or was just not particularly concerned about, the peculiar requirements and obligations attendant on a public entity and ensuring that irregularities that contravened the PFMA and other procurement legislation were carefully investigated and reported on.

490. This section of the report focuses on three main problematic aspects of the PWC joint audits with Nkonki over that five-year period:

    490.1 First, the audit appointment itself was irregular from the second year onwards

    490.2 Second, Ms Kwinana's possible conflict of interest with PWC was not discovered; and

    490.3 Third, PWC failed to devise audit procedures to detect corruption or irregular tenders in some major transactions.

Irregular award of audit

491. Mr Sokombela explained that, in 2011/2012, SAA consulted the AG regarding the appointment of PWC and Nkonki as joint auditors for the 2011/2012 financial year. The AG provided its concurrence. The request for concurrence was for a one-year appointment, but in fact PWC and Nkonki remained on as joint auditors for a period of five years, until the AG took over the audit in the 2016/2017 audit year. Despite the irregularity of the subsequent four years, SAA did consult the AG and sought a concurrence each year thereafter until 2015/2016. The AG nevertheless still granted its concurrence. Mr Sokombela explained that this was because, at the time, the AG's processes for granting concurrence were not particularly well-developed and the AG did not investigate the regularity of the process of appointment when it granted concurrence – as it does now.

492. Regarding the irregularity of the contract duration, Mr Mothibe insisted that it would be economically unviable for a firm to audit SAA for one year only, given the size and complexity of the audit. This may very well be correct because it will take time for a new audit firm to come to grips with the business of a new client. Indeed, that was Ms Kwinana's evidence as well and the sentiment was echoed by Mr Sokombela. Ms Kwinana was shown the report and recommendations from the ARC where the committee recommended the tender only go out for one year. Despite serving on that committee, she testified that this was a "very big mistake". She claimed that ARC never made that recommendation. However, her evidence on this cannot be correct in the face of the documents presented to her which recorded this as the decision. These included the ARC minutes and the recommendation report from ARC to the Board.

493. The fact of the matter is that PWC responded to an RFP for a one-year audit. This was put to Mr Mothibe and he responded that the firm would have understood the tender was for five years. However, Mr Mothibe could not adequately explain how PWC could have thought that from a clearly-defined scope of work in the RFP. He went so far as to say "the procurement process is run by South African Airways and not by PWC ... so I am not too sure I can speculate in that regard." This displays a concerning attitude from the very team that was supposed to detect irregularities in SAA procurement. Ultimately, Mr Mothibe's explanation was that PWC's impression was based

on an industry practice where auditors are appointed for five years, subject to reappointment at the company's AGM, as per the Companies Act. Given that Mr Mothibe confirmed that it was part of the audit procedure to review BAC minutes, he was asked why PWC did not pick up the BAC minutes in 2012 that raised concerns about the PWC appointment when there had been no procurement process. Mr Mothibe said that he could not speak to that as he was not in the team in 2012/2013.

494. Mr Mothibe accepted in his evidence that the PFMA required the audit service to go through proper process; that no such proper process had occurred after year one of the PWC/Nkonki audits; and that irregular expenditure is expenditure that is incurred without proper legal processes being followed. He conceded that, if he had seen that minute, he would have been concerned. However, he refused to accept that PWC's fees over the next four years would constitute irregular expenditure under the PFMA.

495. PWC and Nkonki were paid a total of R69 760 888 for the years 2013-2016. This constituted irregular expenditure, none of which was disclosed in the financial statements of those years.

Conflict of interest

496. Mr Mothibe confirmed that Ms Kwinana, the Chair of the ARC and a non-executive member of the SAA Board, was a director of the auditing firm Kwinana & Associates. PWC had bid together with Ms Kwinana in respect of three tenders in late 2014 and early 2015. One bid was successful and resulted in PWC paying Kwinana & Associates R6 187 799.90 in 2016. Mr Mothibe testified that was the policy of PWC to guard against possible conflicts of interests in these types of joint business relationships.

497. PWC had made enquiries with Ms Kwinana about the value of their joint business contracts, and whether it met the threshold. To assess whether a joint business relationship with a client or a person from a client is material and significant for purposes of conflict of interest in the auditing work PWC does for the client, PWC considers the business relationship material if it exceeds 5% of the business partners' revenue. Mr Mothibe testified that this was in line with the International Ethics Standards Board for Accounts (IESBA) Code. However, PWC departed from the IEBSA Code in this regard. Mr Mothibe was unable to point to where in the policy PWC was permitted to depart from its own materiality standard and apply that of its partner.

498. The email communications from Kwinana & Associates, per Ms Lumka Goniwe (Ms Kwinana's daughter) in 2015 stated that they expected to earn about R 4.1 million in fees on the joint bid (it later transpired the fees were in fact R 6.1 million in 2016) and that this was not significant because the firm's turnover in 2015 exceeded R 50 million. The investigations of the Commission with SARS revealed that Kwinana & Associates' tax returns showed an annual turnover in that period of only R10 567 581. Mr Mothibe testified that, if he had known this, he would have been concerned. The fees PWC paid to Kwinana & Associates in 2016 were R 6.1 million and the turnover that year was approximately R 21 million according to the tax returns. Mr Mothibe was asked whether PWC would have partnered with Kwinana & Associates had it known this, since it would have compromised PWC's independence. He confirmed that PWC would not have partnered with them.

499. Ms Kwinana was asked whether it was problematic that she was in a business relationship with PWC and did not recuse herself from the decision-making or disclose her personal interest. Ms Kwinana refused to accept that there was any problem with this. She claimed that there was no need to disclose because, while she was in business with PWC, the benefit ultimately came from their client and so was not a personal interest under the Companies Act. It was put to Ms Kwinana that her firm derived a benefit from the proceeds that flowed from the joint business relationship. She still refused to accept that this was a form of personal interest that needed to be disclosed or that would compromise independence.

500. Ms Kwinana confirmed that Kwinana & Associates were paid R 6.1 million in fees from the joint business relationship it enjoyed with PWC in respect of a tender with PRASA. She was also aware of the 10% threshold above which PWC would not enter a transaction with Kwinana & Associates as a

business partner, given that Ms Kwinana was also part of an audit client, SAA.

501. It was put to Ms Kwinana that her daughter, on behalf of Kwinana & Associates, had advised PWC that its revenue was R50 million in a year where potential fees with PWC were R4.1 million, when in fact the tax returns of Kwinana & Associates in 2015 showed revenue of approximately R10.5 million. Ms Kwinana was asked whether her daughter misstated the turnover to PWC. Ms Kwinana responded that she could not confirm this. Her unwillingness to accept that either the tax returns were incorrect or her daughter's communication to PWC was incorrect reflected her general dishonesty.

502. The Commission cannot definitively conclude from this evidence alone that there was bias or intentional wrongdoing in the initial appointment of PWC, but the Commission can conclude that the reappointments were irregular. However, this is evidence that SAA, and in particular Ms Kwinana, did not pay regard to due processes. This is consistent with her evidence regarding the AAR tender. As SAAT chair, the Chair of the SAA ARC and a non-executive member of the SAA Board, Ms Kwinana displayed a fundamental lack of appreciation of conflict-of-interest policies and processes. Avoiding conflicts of interest is one of the cornerstones of corporate governance and public accountability. It is of great concern that a professional chartered accountant would not accept this principle and would conduct herself without adherence to its requirements. Unfortunately, the Commission must conclude that either Ms Kwinana had no clue at all about contract processes or she knew but acted dishonestly. The Commission takes the view that Ms Kwinana should never again be appointed as a director of an SOE.

Inadequate audit procedures

Auditor's role and duties

503. The Auditor General is a Chapter 9 constitutional institution. It is therefore independent and accountable only to Parliament. Section 4(3) of the Public Audit Act 25 of 2004 empowers the AG to audit SAA but it is not obliged to do so. The AG will decide to do so if there is sufficient capacity. Mr Sokombela explained the legislative and policy obligations under which SAA operated with respect to internal audit controls and procedures. He testified that under the PFMA, an SOE is required to be equipped with a fully capacitated and skilled internal audit body; it is also required to ensure that it has comprehensive internal controls, or policies and procedures, to guarantee the proper functioning of the entity's financial administration. These are known as Standard Operating Procedures (SOPs) and they are designed to prevent irregularity, fraud and wastage. The procedures require checks and balances such as the segregation of duties between those procuring goods and services, and those evaluating the services. As to the role of the external auditors of a public entity like an SOE, Mr Sokombela testified that their role is to provide the independent assurance to the users of the annual report or the financial statements of the SOE. They are also required to provide assurance on applicable laws and regulations to ensure that there has been compliance with those laws. Mr Sokombela also testified that external auditors are not tasked with identifying and reporting on fraud and corruption. The aim of the audit process is to express a fair presentation of the financial statements and to identify any material findings on legislative compliance and key performance indicators in the annual report. However, the audit process could identify possible fraud which should be reported to management.

504. Section 55(2)(b) of the PFMA provides that the annual report and financial statements of a public entity must include any material losses through criminal conduct and any irregular expenditure, and fruitless and wasteful expenditure, that occurred during the financial year. Mr Mothibe confirmed that the role of the auditor in a public entity to includes identifying irregular, fruitless and wasteful expenditure. He also confirmed that part of the audit procedures designed for the SAA audit was to review Board meeting minutes and other relevant Board committees and the BAC, for example. Mr Mothibe testified that, while it is not a requirement under the formal auditing standards to review media reports as part of this process, the PWC/Nkonki team did consider media reporting "to the extent we could find" them. Indeed, in PWC's audit report in respect of the 2015 SAA Group audit, it states that "in accordance with the risk-based audit approach, we stay up to date on media reports

pertaining to SAA and to evaluate the effect thereof in the financial statements, identify risks and therefore update our audit approach on a continual basis when necessary."

Inadequate internal controls and procedures

505. The AG took over the audit of SAA for the 2016/2017 year, after the five years of PWC and Nkonki's joint audit. During the joint audit period, the audit opinion was clean and unqualified every year.

506. The AG's audit in the 2016/2017 financial year differed markedly from previous years' audit reports. The audit opinion regressed from an unqualified audit opinion with no material findings to a qualified audit opinion with findings on compliance with legislation as well as findings on performance information or predetermined objectives. In other words, it regressed from a clean to a qualified audit with significant findings.

507. This significant deviation from past opinions and findings was not simply a shift in SAA in that new financial year. As part of the audit process, the AG was responsible for confirming or reviewing the "opening balances". During that review, the AG determined that it could not rely on the previous audit of PWC and Nkonki because of a lack of supporting documentation and they could not test how the opening balances had been determined. The AG had to perform additional procedures where management was asked to prove the validity of the contents of the balance sheets. Vital documents were missing and other critical source documents were not in the audit files.

508. The AG observed very poor internal controls at SAA, including severe problems with record keeping (as Dr Dahwa also confirmed). Mr Sokombela explained that there was an incredibly weak control environment at the time. More than 40% of the positions at SAA were filled in an acting capacity. The Board was under-capacitated and it did not have any aviation experts. The key executive management positions of CEO, CFO, Chief Commercial Officer and Chief Strategy Officer were all vacant at the time, and the Chief Procurement Officer was on suspension. SAA officials also lacked appropriate competencies, particularly in preparing of financial statements and SCM.

509. Mr Sokombela testified that compliance with legislation was a critically weak area at SAA, and there were many instances of irregular, as well as fruitless and wasteful expenditure. In addition, no consequences were imposed on individuals for the multiple transgressions of proper processes.

510. Mr Sokombela also reported that the legal division and the office of the company secretary were severely under capacitated. The legal department was incapable of ensuring that tenders were awarded in accordance with process and that the contract was ultimately signed with the successful service provider. There was no way to hold suppliers accountable. Nevertheless, these suppliers were simply paid by SAA. Mr Sokombela testified that this practice must have been going on for years. SAA had a very large contract register but most of those contracts could not be located. The scale of the problem indicated that it should have been picked up by previous auditors.

511. The problems with the company secretary also presented a risk to SAA. Mr Sokombela testified that the AG noted that, despite the DTI and National Treasury notifying the Board not to take decisions in conformity with the 30% set aside policy, the Board had continued to implement that policy. The AG could not understand why the company secretary had not warned the Board against this course of action.

512. The record-keeping problem at SAA was so bad that it sometimes took three-months for SAA to comply with a request. This resulted in a significant limitation in the scope of the audit that could be performed. This was particularly so with respect to SCM and assets. A limitation of scope is a qualification the auditors make in their report.

513. The AG concluded that SAA needed intervention in various areas, including financial and performance management and governance. A lack of governance led to a lack of properly documented policies and procedures. There was no central repository of policies and the policies that were available, were outdated. These critical systemic problems should also have been apparent to any auditor in previous years.

514. Mr Sokombela explained that it was also difficult to make any findings on SAA's performance because there was no head of strategy at the business. He said that there were no reliable key performance indicators or ways of measuring whether the company had met its objectives. The Information Technology environment and infrastructure at SAA was ineffective. There was no coherent Technology Governance Framework that would allow for effective alignment of processes, projects, and structures to support its business. Importantly, the risk management processes lacked maturity and effective oversight – this included the ARC.

515. Mr Sokombela testified that it was cause for concern that a subsequent audit opinion came to such a different conclusion. This is because, while different audit firms may employ different methodologies, they should all conform to uniform audit standards. Indeed, in this case, the AG even prepared statements that corrected errors made in the previous years' financial statements. The accounting standards provide guidance about how those errors need to be corrected in the following financial statements.

516. In the 2017 annual report, SAA disclosed approximately R125 million in irregular expenditure – whereas in the 2016 financial year, only R5 million had been disclosed as irregular. Even the R125 million disclosed in 2017 was found to be an incomplete assessment which resulted in a qualified audit.

517. Mr Sokombela was asked for his opinion as to whether the condition he found SAA in for the 2016/2017 year was reconcilable with the clean audits that had been given for five successful years. Mr Sokombela said that

> if the situation at SAA before we took back the audit was the same as the situation that we found SAA to be at, then [we] would have expected then that the previous auditors have identified those findings and maybe perhaps the audit opinion should not have been clean.

518. It was evident from Mr Sokombela's evidence that the problems at SAA were "systemic". He concluded that the "culture" at SAA was "the wrong way of doing things".

519. Mr Mothibe's evidence indicated that he saw PWC's "primary role" to be to assess whether the financial statements fairly represented the entity's financial position and conformed with general accepted accounting practices. Mr Mothibe testified that one of the biggest things on their mind was whether SAA was a going concern, and they were preoccupied with this issue. So, while Mr Mothibe conceded that, when PWC audits an SOE, it is obliged to consider matters of compliance, he appeared to consider this a secondary feature of the auditor's role. He also did not regard his role in auditing a public entity as materially different to auditing a private entity. He said that "there are no additional requirements in terms of state-owned enterprises because all the standards that require you to look at applicable law and regulations cover that". He accepted that, in the case of a public enterprise, the PFMA was the relevant legislation.

520. This difference in the AG's approach compared to that of PWC/Nkonki is evident from the vastly differing assessments of irregular and fruitless and wasteful expenditure in their respective audits of SAA. In the AG's final management report in the 2016/2017 year, the AG spent some time on issues surrounding procurement and SCM at SAA. He produced a table of sample transactions and identified which of these were irregular. They found that 121 of the 140 contracts were irregular. That is a total of R6.6 billion out of R7.6 billion. Mr Sokombela explained that these irregularities included non-compliance with competitive tender processes, non-compliance with the PFMA and non-compliance with the PPPFA, including awarding contracts that were inconsistent with the terms of the tender. Mr Sokombela stated that 103 contracts (86% of the tenders, amounting to R 2.4 billion) were categorised as "irregular expenditure" and not simply non-compliance. Mr Sokombela testified that he believed that this was representative of the overall population of tenders at SAA.

521. The AG report noted that Management disclosed R40.4 million of fruitless and wasteful expenditure, and irregular expenditure of R125.9 million. This must be compared to the figure of R5.4 million for irregular expenditure and R7.3 million for fruitless and wasteful expenditure that PWC and Nkonki had reached in the 2015/2016 financial year. It was put to Mr Sokombela that if the AG's audit was correct,

then it is difficult to think that the 2015/2016 financial year would have had such low figures and that the previous auditors would not have picked up any significant irregular or wasteful expenditure. Mr Sokombela agreed. He also agreed that, in such a case, they could not have issued a clean audit. Mr Sokombela testified that he engaged repeatedly with PWC and Nkonki regarding the previous audits. He noted that his team realised while reviewing the audits that there was not much work done on the compliance and SCM areas.

522. When Mr Mothibe was asked about this during his evidence, he explained that, since the AG was an expert in SCM, procurement and contract management, "they would be doing a bit more work in that area". This explanation is not satisfactory. If private audit firms, like PWC, are not equipped or experienced enough to perform this task, then they should not be tendering for such work. The evidence that the AG has special expertise does not serve to limit or reduce PWC's obligations of an SOE. The fact of the matter is that PWC failed to perform its job to the standards required of it.

523. On 18 January 2018, after the AG had completed the SAA audit, it convened a meeting with SAA's previous auditors. The purpose of the meeting was to discuss the audit outcomes and their regression since the previous year. At this meeting, the AG warned PWC that they would want to ask about the stark discrepancy between five years of clean audits and the limited and qualified audit for 2016/2017. When this was put to Mr Mothibe, he claimed that a lot of this could be explained by the peculiar circumstances during the 2016/2017 year. PWC was ultimately comfortable that the qualifications were peculiar to that year and that the financial statements were free of material misstatements in the preceding years.

524. Mr Mothibe was asked whether PWC and Nkonki were satisfied that the SAA internal controls were adequate from 2014-2016. In response, Mr Mothibe claimed that his team did identify "diversions" from regular practice, and they notified management of these "deviations" but they had not "elevate[d] that part to the audit report as required". Mr Mothibe accepted that they should have elevated the issue to the audit report but had failed to do so. He testified that, after reviewing the work again and considering the records, "it became clear that we had erred and we should have elevated some of those items of non-compliance ... to the ... report".

525. As set out above, Mr Mothibe agreed that it was necessary to completely reperform the processes that would have been followed in the relevant tender award to audit SCM compliance at an SOE. Mr Mothibe said that "where there were challenges and there were deviations, we found them and we raised them with management and with the audit committee". During his evidence, he accepted that PWC/Nkonki had failed to elevate this issue to the audit report. Mr Mothibe was asked how it could have been that, after his team had discovered that the tender files were missing, and notified management about the issue, the matter was then not taken any further. He was asked whether he considered this a dereliction of duty. When he was pressed, he conceded that it was an "omission" of duty. Regardless of the semantics, the fact remains that PWC was not in any position to decide about SAA's compliance with legislation if it did not even have at its disposal the records that it would have needed to make this assessment. It is not adequate for auditors of SOEs to alert management and Board committees to the problems that they themselves have created and are incentivised to conceal. Mr Mothibe agreed that the audit opinion, insofar as it talks about compliance and laws and regulations, was incorrect. He attributed this to "an error in judgment" and conceded that they "should have identified those matters as material areas of non-compliance."

526. When Mr Mothibe testified at the Commission, there was a pending case of alleged professional misconduct against him and Ms Thuto Masasa before the IRBA concerning their SAA audits. By the time Mr Mothibe testified in July 2020, he had consented to the IRBA making an order against him of non-compliance for failing to identify non-compliance with legislation and internal control deficiencies for the SAA audits from 2014-2016. He conceded there was inadequate reporting on compliance and irregular expenditure. He also acknowledged that the amount stipulated for irregular expenditure must therefore have been inaccurate in the audit report.

527. The deficiencies in PWC's audits ought to have been apparent from the meetings with the AG in late 2016 and early 2017 as well as from the review of the results of the 2016/2017 audit report. It was,

therefore, put to Mr Mothibe that "the passage of events suggests ... that for two years ... PWC was content not to come clean about the errors it had made". It was also put to him that it was only when there was public disclosure through the evidence led in this Commission that "you then had another think and have made the concessions you have made."

528. During his evidence Mr Mothibe was also asked to account for some of the specific transactions that his team had failed to report as reportable irregularities during their audit of SAA. Each of these is dealt with below.

Air Chefs

529. Mr Mothibe testified that he was aware of the SAA Board decision to cancel the LSG Skychefs award and to give it to Air Chefs. He testified that after reviewing the decision, he did not think that there were any reportable irregularities. No tender process was followed in this awarding. It was a decision to insource rather than to award to an outside party. When Mr Mothibe was asked whether such a decision was lawful under the PFMA, he stated that a decision to insource does not require a tender process. It was put to Mr Mothibe that under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and administrative law, a state entity cannot run a tender process and make the administrative decision to award that contract, communicate the decision to the successful party, and then unilaterally withdraw the decision. Mr Mothibe responded that PAJA was not one of the Acts that the auditors considered.

530. It was further put to him that the legal department of SAA had warned its Board of this consequence. This warning was reflected in the Board minutes. Mr Mothibe stated that he did not recall considering those minutes, or those portions of them. If he did, it would not have been at that level of detail. Mr Mothibe conceded that reading the resolution of the Board, which stated that the tender award would be "retracted" and the "catering contract be awarded to Air Chefs without going through the bidding process", should have "sounded an alarm" to the auditors. Mr Mothibe admitted that, when reading the record of the decision in its entirety, it did raise questions of possible financial loss and exposure to SAA from retracting a tender and the other obligations the Board had.

531. In his statement to the Commission, Mr Mothibe assumed that the Board was not permitted to award the contract to Air Chefs and retract it from LSG Skychefs without any process. He said even if that assumption were correct, PWC would still not have found any reportable irregularity. This is because PWC "would have required evidence that the SAA Board took this decision with the intention of breaching a law or regulation or that it acted negligently, which evidence I did not have at the time." This is inconsistent with how Section 45 of the Auditing Professions Act 26 of 2005 defines a reportable irregularity. After some debate, Mr Mothibe eventually conceded this point, but maintained that insourcing did not require any processes and so insourcing in this manner was lawful. However, he conceded that assuming that the decision was an unlawful act, the requirements of material financial loss were met. He also conceded that the Board's decision constituted a breach of a fiduciary duty because the Board acted against SAA's internal legal advice and its decision was not based on what was in the best interests of the company. In the light of this concession, the Board's decision ought to have been reported to IRBA as a reportable irregularity. Had this taken place, management would have been required to account to its auditors for the decision.

532. The value of that type of accountability cannot be underestimated given all that we now know about what was going on at SAA towards the end of 2015. As stated above, a few days after the SAA Board had taken the decision to cancel the LSG Skychefs award, Dr Dahwa was subjected to eight hours of abuse from Ms Kwinana and Ms Myeni for refusing to sign letters of award to facilitate the unlawful 30% set aside policy.

533. In addition, Ms Mpshe, who had stood up to the Board over this very decision to cancel the LSG Skychefs award, was eventually charged with insubordination for her conduct. Had SAA's auditors just done their job and the correct attention been drawn to this unlawful decision, some of the devastating events of the next many months at SAA may well have been different.

Swissport ground handling

534. Part of the AG's findings was that the Swissport ground handling contract concluded on 14 March 2016 constituted irregular expenditure. The contract was identified as part of the AG's "specific selection" of transactions during the risk assessment phase of the audit. This was because the transaction had been in the media. One of the AG's great concerns was that the tender took four years between the closing date of the award and the date the contract was actually awarded by the Board. Then, when a further contract for five years was concluded in 2016, there was no new tender process.

535. Related to the Swissport transaction was the 30% BEE set aside policy that SAA sought to impose on Swissport. The Auditor General found as follows regarding SAA's attempts to implement the 30% set-aside policy:

> Based on the information provided to the AGSA, the practice of allocating or selecting or setting aside of 30% of the contract award to BBBEE suppliers is not in accordance with SAA's SCM Policy or any specific procurement legal framework and section 217 of the Constitution.

536. Mr Sokombela noted that the correspondence from the BEE Commissioner and the National Treasury regarding the unlawfulness of the policy was dispatched in September 2015. He also noted that a set aside policy was not a requirement or condition of the tender that Swissport was awarded. Nevertheless, the AG found a memorandum prepared by the CFO of SAA in 2016 about the selection of the BBBEE firm for the Swissport contract, in circumstances where there did not appear to be any selection process. As a result of SAA and Swissport being unable to agree on this issue, SAA terminated Swissport's service on 16 February 2016. Then an agreement was reached for a five-year contract. The AG was particularly concerned about why these discussions were conducted off record.

537. The AG also raised concerns about JM Aviation, Swissport's ultimate BEE partner, having been appointed without any selection process. There was a common director between Swissport and JM Aviation, which concerned the AG. That was Mr Ndzeku. This was a conflict of interest, and was not disclosed in the SAA records.

538. Part of the recommendations flowing from this was to investigate the selection process of JM Aviation and to disclose irregular expenditure of R 362 million arising from the AG's findings. The AG also concluded:

> ... with regards to the off the record meeting held with Swissport and management, that will not be accepted as the auditors cannot validate the discussions held because they were not recorded. This is an indicator of fraud and further investigation must be done.

539. Mr Mothibe testified that the Swissport contract did not come to the audit team's attention. When asked why the contract was not part of the transactions reviewed by the team, he testified that they were not provided with minutes of the relevant Board meeting. Swissport was a longstanding ground handling service provider with the result that the contract did not stand out. He said that the amount was high (R 1.8 billion), so it probably went through Board approvals and "obviously the expectation is that it would have gone to the Board after it had gone through the necessary approval processes within South African Airways." This answer is inadequate. The fact that the contract was of such a significant monetary value was a further reason why the auditors should have included it in the sample of transactions to be considered.

540. It was necessary to probe further with Mr Mothibe why this contract was not reviewed by PWC. Mr Mothibe testified that he agreed with Mr Sokombela's evidence that, in the audit risk assessment process, the auditor identifies contracts that raise red flags. Mr Mothibe was informed that the AG had identified this contract as one such transaction because there was litigation around it and the contract had taken four years to conclude after the award of the tender. Asked why none of these factors raised a red flag for PWC, Mr Mothibe responded again that Swissport was a long-standing service provider and it was being paid amounts consistent with previous years and so there were no red flags. This type of answer seems to indicate a frame of mind or approach to auditing that may be appropriate in detecting irregular activity in a private audit client. However, it would not be appropriate in a public entity that is obliged to regularly put out to tender their contracts in a transparent competitive process.

541. Swissport had been providing a service to SAA without a contract for three of the years that PWC was auditing SAA. Mr Mothibe testified that he was not aware that Swissport had been providing a service for a long time without a contract. He conceded that it would have been of concern to him to learn that and it would have been something he would have wanted to interrogate further.

542. Ernst & Young performed a review of SAA contracts in the second half of 2015 for the purpose of evaluating procurement and contract management at SAA and had flagged the Swissport contract as a concern. His attention was then drawn to the fact that a draft version of the report, addressed to a Mr Nick Linnell, had been provided to the SAA Board on 10 December 2015. The report considered the Swissport contract and concluded that "Swissport's contract is a month to month basis. SAA is failing to realise the costs savings as a result of delays in entering into a contract with Swissport. The delays will result in SAA overpaying for the ground handling services ... SAA has failed to realise cost savings of R92 936 578."

543. It was then pointed out to Mr Mothibe's attention that the media was already reporting on Ernst & Young's review findings at that stage. The Business Day newspaper reported on 9 December 2015 that the Ernst & Young Report found that as much as 60% of procurement could be subject to weak business controls and it appeared from the article that Business Day were in possession of the report. Mr Mothibe stated that they did not consider this article as part of their media research. Unlike for the year 2015, the audit files for 2016 did not contain any media articles at all. He was asked whether he could confirm if any media review was performed in that year. At this point, Mr Mothibe said it was not a requirement that the auditors perform a media review. He said this even though he had previously admitted that it was part of the designed evidence gathering process for the audit to review media and that it was part of IRBA's guide on reportable irregularities which he professed to follow in every audit.

544. Mr Mothibe was also directed to another media article about Swissport that his team failed to collect and consider on 17 November 2015. This was a Moneyweb article that spanned four pages and was entitled "SAA Defies National Treasury and DTI Instructions". The article set out the ways in which SAA's conduct in respect of this contract was unlawful. Mr Mothibe testified that this article did not come to their attention and, for that reason, they would not have been able to consider it. If the auditing team had implemented the media review procedure that was set out in PWC's own evidence gathering processes, and which appears in the IRBA Guide, it is likely that these articles would have come to the team's attention. Mr Mothibe was evasive in his answer to this suggestion, and he reiterated that it was not part of the official standards that they review media articles.

545. It was put to Mr Mothibe that if the minutes of the Board meeting and its resolution approving the contract had been studied by the audit team, they would have revealed that no procurement process had been followed. However, the Board resolution of 14 March 2016 read quite differently and mentioned none of these processes. If PWC had looked carefully at the resolution this should have raised concerns. In addition, in one of the Internal Audit Reports, which Mr Mothibe testified he did generally consider, the internal control committee found that the Swissport contract had been concluded irregularly as no competitive process had been followed. This report was dated 15 September 2016. Mr Mothibe confirmed that the audit report was prepared before the PWC audit was finalised on 30 September 2016. His response to this obvious "red flag" was to state that he could not recall reading that particular report.

546. The failure to have considered the Swissport contract was, to say the least, a significant oversight by SAA's auditors, if it was an oversight at all. Had SAA auditors done their work properly, then this contract would not, and could not, have escaped scrutiny. In the month before the ground handling contract was concluded with SAA, Swissport paid R 28.5 million to JM Aviation. JM Aviation then paid those funds to various officials within SAA and others who "facilitated" the agreement between Swissport and SAA.

The New Age

547. Mr Sokombela also testified that he selected the spending on The New Age newspaper at SAA as a transaction to test because, despite its relatively small value (R 1.3 million), during the risk assessment process it was identified as a risky transaction given the media attention around it. When investigating it, SAA was unable to produce any documents proving that proper processes were followed in relation to this expenditure. This TNA transaction is dealt with in detail in this report. The point for now is that, if SAA auditors had flagged TNA spending in previous audit years, this may have had an important effect on SAA's (and even other SOEs) ability to justify further spending on the TNA and its associated business breakfasts.

548. PWC and Nkonki gave clean audits to SAA for five consecutive years between 2012 and 2016. During this period, the Board was in a state of governance decline. It was also engaging in acts of corruption and fraud. None of this was, however, detected by its auditors. Instead, their audit reports each year conveyed to the public that SAA was complying with the law and that irregular expenditure was under control. PWC and Nkonki failed in their duties as a watchdog institution. Had they performed their functions properly, the shambolic state of financial and risk management in SAA would have been picked up earlier and could have been addressed. It took the intervention of the Auditor General to finally expose these deep deficiencies.

549. The findings of the AG on the parlous state of both internal control and financial and risk management at SAA alone indicates that the SAA Board had failed to comply with s 51 of the PFMA. Section 51(1)(a) of the PFMA requires the accounting authority of an SOE to ensure that it has and maintains "an effective, efficient and transparent system of financial and risk management and internal controls". In terms of s 86(2) of the PFMA, an accounting authority that wilfully or grossly negligently fails to comply with this obligation is guilty of an offence. Auditors who correctly discharge their responsibilities and call management to account for breaching their obligations under the PFMA will contribute significantly to curbing the tide of corruption and irregular conduct that engulfed some of South Africa's SOEs over several years.

550. The Commission recommends that the Auditor General's office be further capacitated so that it can audit all public entities. It clearly has the skills and understanding of governance requirements to do so. It also has the ideal level of independence. To the extent that that is not practicable, private firms must only be appointed to audit SOEs if they can demonstrate that they have the requisite skills and the requisite understanding of their obligations to the public at large when they audit an SOE. There must be a sufficient appreciation that, while the financial statements are no doubt of cardinal importance, so too are the entity's PFMA obligations.

551. Finally, during her evidence, Ms Kwinana displayed a concerning lack of understanding of the independence required of an auditor, and non-executive member of Boards of SOEs. Her evidence also revealed that either her firm misrepresented their annual turnover to PWC to secure work with it, or it misrepresented its revenue to SARS.

552. These are matters that should be further investigated both by SARS and by the South African Institute of Chartered Accountants.

SA EXPRESS

Introduction

553. SA Express is a major public entity listed under Schedule 2 to the Public Finance Management Act 1 of 1999. In May 2018, the Financial Mail newspaper published an article entitled "A case study in looting state-owned companies". It gave rise to serious questions about a number of transactions between South African Express Airways SOC Limited and the Department of Community Safety and Transport in the North West Province (the Transport Department).

554. The article alleged that high-ranking officials in the North West government had colluded with func-

tionaries at SA Express to siphon millions of Rands out of the North West government's coffers. The article also alleged that those same officials and functionaries had benefitted personally from the scheme. The allegations therefore fell squarely within the ambit of paragraphs 1.5 and 1.9 of the Commission's TORs.

555. At the time that the Commission began investigating the issue, a criminal complaint on these allegations had already been lodged with the authorities in 2016. A criminal investigation was underway and High Court litigation had been instituted. By the time that the Commission heard evidence on this issue in June 2019, the criminal process had not gained much momentum and the litigation had not advanced matters. The slow pace of the investigation is a matter of serious concern for the following reasons.

    555.1 First, the transactions involved officials from the North West Provincial Government, including the Executive Council of the Province, flouting the procurement framework in awarding SA Express a 5-year contract to provide flights to Mahikeng Airport and Pilanesberg International Airport. This contract effectively permitted the looting of funds from the North West government.

    555.2 Second, once funds from the North West Government had been secured by SA Express, it introduced certain service providers to do ground handling services at the airports without following any procurement process. Those service providers siphoned public funds to various connected individuals and organisations.

556. These allegations were serious and were substantially supported by documentary and other evidence. Despite this, the Commission investigations revealed that it had taken approximately two years for the police to obtain the relevant bank statements and there had been very little progress on the case.

557. What follows is the summary and analysis of the evidence that was given as well as the findings of the Commission regarding that evidence.

The airports and SA Express

558. In or around 2014, the North West Province was looking to develop the provincial airports of Mahikeng and Pilanesberg. The airports were identified as key strategic infrastructure assets that needed to be recapitalised and commercialised.

559. The North West Department of Tourism accordingly created an initiative to revitalise these airports and sent invitations to the North West government to attend a meeting related to the presentation of proposals by invited airlines on 26 August 2014. Ms Kuthlwano Phatudi, the CFO in the Transport Department, was invited to this meeting.

560. Six airlines were invited to submit proposals and make presentations for the provision of airline services on two routes – the Mahikeng route (Mahikeng to Johannesburg) and the Pilanesberg route (both Pilanesberg to Johannesburg and Pilanesberg to Cape Town). Only four airlines submitted proposals: SA Express; Continental Aviation Solution; Challenger Air; and SA Airlink.

561. The four airlines presented their proposals at a meeting on 26 of August 2014 at Sun City. Representatives from the Office of the Premier, the Tourism Department, the Transport Department, and Treasury attended the meeting. These departments were represented by their MECs and HODs. The Tourism Department was represented by its acting HOD, Mr Charles Ndabeni; the Transport Department was represented by its HOD, Mr Bailey Mahlakoleng; and Treasury was represented by its HOD, Mr Israel Guneni.

562. After the presentations, a memorandum was prepared and signed by the HOD of the Transport Department, Mr Mahlakoleng, and the MEC of the Transport Department, Mr Molapisi, on 11 and 15 November 2014 respectively. The memorandum was addressed to the Chairperson of the Executive Council. The EXCO comprised the Executive Council of the Province, consisting of the Premier, Mr Supra Mahumapelo, as its chairperson, and the MECs. The memorandum concerned the proposed introduction of scheduled flights for the Mahikeng and Pilanesberg Airports. It presented a business

case for establishing the airline service and provided a summary of the proposals that had been made by the four airlines.

563. Ms Phathudi was asked during her evidence if it was ordinary procedure for the Transport Department to seek approval from EXCO. She testified normally the department would go out on tender, advertise and follow the procurement process. This included the relevant bid committees (bid specification; bid evaluation; and bid adjudication), until approval was granted by the HOD. The award of tenders was the responsibility of the HOD as the Accounting Officer for the Transport Department.

564. This process was not followed in the case of the airlines. There were no supply chain management processes followed and it was not advertised. Ms Phatudi testified that she had advised the then HOD that the tender should be advertised. The HOD told her that "the collective" at the meeting at Sun City had recommended that the process go through EXCO instead, and he prepared the memorandum in line with that decision for EXCO to approve. However, EXCO did not ordinarily play any role in the appointment of service providers in the Transport Department. The procurement process explained by Ms Phatudi did not include any EXCO role in deciding the award of tenders. Despite this, the memorandum was prepared for EXCO's approval.

565. The SA Express proposal was substantially more expensive than the other proposals. In fact, it was R110 million as compared to R4.5 million. In the face of this substantial price difference, the justification for selecting SA Express over the other airlines would have had to have been compelling.

566. The memorandum concluded that SA Express met the provincial airlift strategy because it was "a state owned entity and not profit driven, while SA Airlink, Continental and Challenger Airlines will be highly dependent on government for profit making". No other compelling justification was provided in the memorandum. SA Express was recommended to be contracted for a period of five years, renewable annually.

567. When Prof Mokgoro, who had been the Acting DG in the Office of the Premier at the time, was questioned about this decision during his testimony, he conceded that the selection of SA Express "did not make sense"; that it was, in fact, "absolutely nonsensical".

568. Ms Phatudi testified that, after EXCO had been presented with the memorandum, EXCO approved the appointment of SA Express. She referred to an extract of the EXCO minutes for this decision which recorded various problems with the memorandum. For example, the minutes recorded that: "The HOD should have done a thorough analysis of all presentations received to outline what it means financially for the Province to subsidise the Mahikeng-OR Tambo route 100%, consider all options and propose the best option for consideration by EXCO."

569. Despite this, on 3 December 2014, EXCO agreed that the Department should proceed with the chosen service provider and sign the contract with SA Express. In other words, the EXCO first agreed to sign the contract and then wanted to consider a proper analysis of the presentations later. This sequencing issue was taken up in Prof Mokgoro's evidence, and he eventually conceded that this amounted to a contradiction in EXCO's reasoning.

570. Ms Phatudi testified that the appointment of SA Express was not in line with the provisions of section 217 of the Constitution. It did not follow the Transport Department's recognised procurement process. She also confirmed that she was not aware of any exceptional circumstances that would have justified not following a proper procurement process.

The contract

571. In spite of the appointment process issues identified in the preceding section, the contract was concluded with SA Express on 31 March 2015. In terms of the agreement, SA Express would provide airline services for the designated routes between OR Tambo International Airport, Cape Town International Airport, Pilanesberg Airport and Mahikeng Airport (Main Agreement).

572. The Main Agreement between the Transport Department and SA Express was drafted by the legal division of the department under the instruction of the HOD. The HOD, Mr Mahlakoleng, signed the

agreement for the department. Mr Inati Ntshanga, the then Chief Executive Officer of SA Express, signed on its behalf.

573. The Main Agreement contained the following pertinent clauses:

573.1 Effective Date: 27 March 2015 for OR Tambo, Cape Town and Pilanesberg routes and 1 May 2015 for OR Tambo and Mahikeng routes

573.2 Clause 4.1: SA Express and the Transport Department agreed that SA Express shall, with effect from Effective Date, commence the Airline Service on the Designated Route for a period of 5 (five) years calculated from the Effective Date

573.3 Clause 6.1: The Transport Department shall pay to SA Express annually, in advance, the amount stipulated in Annexure A, which amount is subject to review at the end of each year, by agreement between the Parties

573.4 Clause 7.1.4: SA Express shall, on quarterly basis, submit a written return to the Transport Department which includes details of marketing and promotion of the Airline Service done during that quarter and that contemplated for the next quarter, together with the costs and/or anticipated costs thereof

573.5 Clause 10.1: SA Express shall, with effect from the Effective Date, provide the Airline Service with CRJ 200 aircraft, including suitable replacement aircraft should the aircraft employed in providing the Airline Service be unserviceable; alternatively with an aircraft of similar size, specification and capabilities

573.6 Clause 15.1: SA Express shall, in consultation with the Transport Department, appoint a management company responsible for managing certain facilities at Pilanesberg and Mahikeng airports; and

573.7 Clause 15.3: SA Express shall enter into a Service Level Agreement with the management company, in terms of which performance of the management company will be monitored and evaluated.

574. The Main Agreement envisaged certain subsidies being paid to SA Express for operating the routes and then certain payments being due to a management company that would take care of the ground handling at the airports. Such a management company was not yet appointed at the time that the Main Agreement was concluded.

575. The subsidies payable in terms of the Main Agreement to SA Express for operating the routes were as follows:

575.1 Approximately R58 million payable in 2015

575.2 Approximately R51 million payable in 2016

575.3 Approximately R43 million payable in 2017

575.4 Approximately R40 million payable in 2018; and

575.5 Approximately R36 million payable in 2019

576. The amounts payable to the management company were as follows:

576.1 Approximately R51 million payable in 2015; and

576.2 Approximately R31 million payable each subsequent year for the period 2016-2019.

577. These two sets of amounts aggregated to R407 221 142. This meant that SA Express was to be paid more than R200 million as a subsidy and then it would procure the services of a management company that would run the airports for an additional R200 million.

578. Ms Phatudi testified that she became aware of the agreement after it had been signed, when there was a claim for payment made under the contract to the Transport Department at some point in 2015.

The first invoice

579. On 16 March 2015, Mr Mahlakoleng prepared and issued a letter to Prof Mokgoro, the Acting Director-General in the Office of the Premier at the time. The letter requested the Office of the Premier to process payment of R53 143 564 to SA Express. The letter included the invoice for the amount as well as a handwritten note on the invoice that read: "Please process this payment for R50 million, the payment agreed to with Treasury and at Exco". During her evidence, Ms Phatudi's explanation for the approach to the Office of the Premier for payment was that during March 2015, when the invoice was received, the Transport Department did not have a budget for the project. For this reason, the HOD wrote the letter to the Office of the Premier requesting it to pay on behalf of the Department.

580. This is a particularly concerning feature of the case. Not only was SA Express appointed in circumstances that flouted procurement principles and without any credible justification, but it was also clear that the procurement had not been budgeted for. The payment was made on 26 March 2015 from the Office of the Premier's budget and approved by Prof Mokgoro.

581. Prof Mokgoro was questioned about his authorisation of this payment during his evidence. Although he initially sought to justify the payment as having come from the R132 million budget that had been set aside for the MRRRP (Mahikeng Recovery Renewal and Repositioning Programme), he eventually conceded that the MRRRP funds had been earmarked for projects other than the Mahikeng airport.

582. Prof Mokgoro was also asked about a handwritten note on the invoice that had been received from SA Express. Prof Mokgoro accepted, in his testimony, that he had no idea whose handwriting was on the invoice. He also accepted that it would be unreasonable to process a payment for less than an invoiced amount unless there was some history behind the payment, but he then confessed that he could not recall why he had approved the payment of R50 million based on the handwritten note.

583. Prof Mokgoro was also taken to task during his testimony about the fact that he authorised this payment on 26 March 2015, before the contract between the parties had even been concluded. He accepted that this was irregular but then was at pains to emphasise that this was a "government-to-government" contract. He recalled that there was pressure to make the payment because the airline had begun operating but he could not give any details about when this had occurred.

584. Prof Mokgoro testified that he accepted that he had several obligations under the Public Finance Management Act 1 of 1999 because of his position. However, he was unable to provide any credible explanation for the fact that he authorised a payment of R50 million in respect of a contractual obligation that did not yet exist, for an airline subsidy to a state-owned enterprise for which there was no budget in the relevant department. It is the opinion of the Commission that Prof Mokgoro's conduct in this regard was completely unacceptable and he should not have authorised the payment.

585. This first payment was then followed by a series of others which, as the next section sets out, found their way into the pockets of state officials.

The money

A comparator?

586. The amounts to be paid to SA Express and the management company were substantial – more than R400 million. One of the problems with this type of liability for the North West Province was that, because no proper procurement process had been followed, it was not possible for the Province to know whether the amounts it had agreed to pay SA Express or the management company were market-related.

587. The Commission therefore investigated what the comparable terms had been on route subsidy agreements that SA Express had concluded in the past. It presented the evidence of Mr Phiri on this issue. He had been the GM for Regional Expansion at SA Express in 2010 to 2012. In Mr Phiri's expert opinion, the amounts that the Transport Department had agreed to pay to SA Express under the Main

Agreement were overstated and extremely excessive. It was his conclusion that the amounts paid were far out of proportion to any of SA Express's other routes.

The management company

588. Ms Babadi Tlatsana testified before the Commission about the appointment of her company, Koreneka, to do ground handling services at the Mahikeng and Pilanesberg airports.

589. Ms Tlatsana began making enquiries at SAA in 2014 and was eventually directed to Mr Brian van Wyk, the Commercial Manager at SA Express, because SA Express, and not SAA, dealt with domestic flights within South Africa. According to Ms Tlatsana, Mr van Wyk. asked her to submit a proposal to his Gmail email address. According to Ms Tlatsana, she was told to use the Gmail address, rather than an official 'saexpress' one, because Mr van Wyk said that he was often not at the office.

590. After submitting her proposal, Ms Tlatsana received a call from Mr van Wyk, who indicated that her company had been selected as the "preferred bidder", albeit that no open tender process had been followed. However, he indicated to her that she would need to ensure that two further individuals were added to her company to secure the contract with SA Express. She agreed. The two people who joined Koreneka were Ms Joyce Phiri and Mr Victor Thabeng. Ms Tlatsana subsequently established that Ms Phiri is the mother of Mr van Wyk's life partner, Mr Sipho Levy Phiri. Mr van Wyk also wanted Ms Tlatsana to appoint Mr David Kasilira as the accountant for the business. She also agreed to this appointment.

591. At that stage, Koreneka had an account with ABSA but Mr van Wyk advised Ms Tlatsana that an account should be opened with FNB. He did not give her a reason for this. When Ms Tlatsana was asked in evidence about why she had agreed to open this new bank account, she said that Mr van Wyk was assisting Koreneka to run smoothly and had taken her through the process. She trusted Mr van Wyk and thought that he wanted to help Koreneka. Ms Tlatsana then opened an FNB account in January 2015.

592. In April 2015, Mr van Wyk arranged with Ms Tlatsana to sign a contract between SA Express and Koreneka. Ms Tlatsana testified that she did not retain a copy of the contract, but broadly understood that her company would be providing ground handling services at the airports. Work began at Pilanesberg Airport on 1 May 2015 and Mahikeng Airport on 1 September 2015.

Flow of funds and the bribe

593. The payments that were made to Koreneka were set out in the evidence of Mr Timothy Ngwenya, who was the Divisional Manager of Security Management at SA Express. Mr Ngwenya, in fact, conducted a detailed investigation of these payments and the contracting between SA Express and the Department of Transport, on the one hand, and SA Express and Koreneka, on the other.

594. During his investigation, he was offered a bribe of R3 million to drop his enquiries. The circumstances around this bribe are concerning.

    594.1 Mr Ngwenya received a call from the SAA Head of Security, Mr Jason Tshabalala, who advised him that someone wanted to speak to him. In about 20 to 30 minutes after having spoken to Mr Tshabalala, Mr Ngwenya received a call from an unknown person who asked to meet with him based on a mandate he said he had received from "Luthuli House". Mr Ngwenya told the person he was not a politician and could not talk about mandates from Luthuli House. But he eventually agreed to the meeting. They met at the Intercontinental Hotel at OR Tambo International Airport.

    594.2 During the meeting, the person who had called Mr Ngwenya introduced himself as "Sipho". This person told Mr Ngwenya that he was from Luthuli House and was mandated to speak to him about the investigation he was doing in the North West and the money involved. He told Mr Ngwenya that the money in question was meant to finance political activities of the ANC. During their discussion, the person asked Mr Ngwenya to drop his investigation for R3 million. Mr Ngwenya refused.

594.3 The person then spoke about an amount of R20 million that was in the account of Koreneka, to which Mr van Wyk had been denied access. He tried to convince Mr Ngwenya to persuade Ms Tlatsana to release those funds since he had a better relationship with her. Mr Ngwenya refused to do so.

595. Mr Ngwenya's investigation established that four invoices were submitted from Koreneka to SA Express for services that were not provided for in the agreement between Koreneka and SA Express. These invoices were for R8.5 million (4 May 2015), R8.5 million (17 August 2015), R5.84 million (28 August 2015) and R8.16 million (28 August 2015). These invoices were authorised for payment by Mr van Wyk.

596. During Mr Ngwenya's investigation of these payments, he questioned Ms Tlatsana about the origin of the invoices. Ms Tlatsana indicated to him that they had been prepared by the accountant that Mr van Wyk required her to appoint for the business, Mr Kasilira.

597. After these payments had been made by SA Express to Koreneka, the invoicing and payments changed. From December 2015, Koreneka submitted invoices directly to the Transport Department and was paid by the Transport Department. Let us consider these invoices in more detail:

597.1 On 7 December 2015, Koreneka submitted an invoice to the value of R20.6 million to the Transport Department. This invoice was approved following the authorisation processes of the Transport Department. At the time (2015/16 financial year), the Transport Department had a budget to meet these costs and the Main Agreement had, by that stage, been amended to allow payment from the Transport Department directly to the management company.

597.2 In 2016, the Transport Department received a second invoice from Koreneka to the value of R15.8 million. This invoice was not paid because the Transport Department was served with a letter from the attorneys representing Ms Phiri, a purported partner in Koreneka. The Transport Department was instructed to withhold payment until the matter had been resolved between the parties.

The allegations of corruption

598. Around June 2016, Ms Tlatsana contacted Mr Ngwenya and reported to him that there were people at SA Express interfering with her company and threatened to go to the media with her allegations. Mr Ngwenya agreed to meet with her. At their first meeting, Ms Tlatsana told him how her engagements with SA Express had unfolded along the lines set out above.

599. Ms Tlatsana also explained that conflicts had started to arise between her and the individuals whom Mr van Wyk had required her to bring into the Koreneka business. As a result, Mr van Wyk had cancelled the contract with Koreneka and replaced it with an entity called Valotech Facilities Management CC (Valotech). During his investigation, Mr Ngwenya established that Valotech had been paid an amount of R15 million by the Transport Department without rendering any services. Valotech also did not provide any services to SA Express. After Valotech received this payment from the Transport Department, it was subsequently liquidated.

600. When Ms Tlatsana met with Mr Ngwenya, she provided him with several documents evidencing the invoices and payments that had been received, as well as recordings of some of the conversations that she had had with Mr van Wyk. The Commission obtained copies of the recordings and played pertinent parts from them during the evidence of Ms Tlatsana. The recordings tell a remarkable story about the grand plan behind this scheme. It is dealt with in more detail below.

600.1 Ms Tlatsana also produced a handwritten note, which she claimed had been drawn up by Mr van Wyk during one of the meetings at which she had recorded their conversation.

600.2 After receiving this information from Ms Tlatsana, Mr Ngwenya conducted a thorough investigation. He concluded that Mr van Wyk had been at the centre of the events described above . Mr Ngweyna then took steps to report him to his superiors and to advocate for his dismissal.

However, on the day that Mr Ngwenya had planned to confront Mr van Wyk with what he had uncovered in his investigation, Mr van Wyk left the building and did not come back.

601. After Valotech's liquidation, two further entities were appointed as the management company under the Main Agreement. These entities were Pilanesberg Airport Management Company (PAMCO) and Mahikeng Airport Management Company (MAMCO). The contracts appointing these two entities were signed by the then CEO, Mr Ntshanga, a few days before he left SA Express. These two entities were subsequently paid amounts of R15.8 and R15.5 million respectively. The Commission was unable to establish what, if any, work was done to justify these payments.

602. The money laundering aspects of the Koreneka-leg of the scheme were extensively investigated by the Commission. The outcome of those investigations is set out in the next section.

The money laundering

603. Ms Tlatsana testified before the Commission about the money that Koreneka had received from SA Express and the Department of Transport. The salient features of her evidence are as follows.

603.1 Koreneka would receive payments from time to time into its bank account. Generally, Ms Tlatsana would not know when payments were made into the bank account because this was being managed by the accountant, Mr Kasilira, who had been appointed on Mr van Wyk's suggestion.

603.2 Mr Kasilira would make payments out of the bank account of Koreneka from time to time. When Ms Tlatsana received a bank SMS notifying her of these payments, she would sometimes follow-up with Mr van Wyk about them and be told that they had something to do with the airports. The amounts would sometimes be as large as R2 million or R5 million but, when she made enquiries, Ms Tltasana was always told that it related to the airports.

603.3 Between May and September 2015, three payments were made from the bank account of Koreneka to the AMFS business of Ms Kalandra Viljoen. These payments totalled R9 million.

603.4 In November 2015, two payments of R4.9 million and R5 million were made to the bank account of Neo Solutions. Mr van Wyk told Ms Tlatsana that these payments related to security cameras for the airports.

603.5 At some point in 2015, Ms Tlatsana realised that her company had been "hijacked" by Mr van Wyk. She then began a process of trying to uncover the basis for these payments and the eventual destination of the funds.

603.6 Ms Tlatsana's investigations revealed that the R9.9 million that had been paid to Neo Solutions was then paid out of that company's bank account as follows:

603.6.1 R4 million paid to Batsamai Investment Holdings on 11 December 2015

603.6.2 R3 million paid to Batsamai on 22 December 2015

603.6.3 R300 000 paid to Mr van Wyk in cash on 4 January 2016

603.6.4 R1.4 million paid to Batsamai on 10 March 2016; and

603.6.5 R1.2 million paid to Batsamai on 26 March 2016

603.7 Ms Tlatsana's investigators established that Batsamai had been registered on 11 November 2014 and Mr Sipho Levy Phiri, who was Mr van Wyk's life partner, owned the company.

603.8 By the end of 2015, Ms Tlatsana had decided that she needed to get to the bottom of what was going on. Koreneka had also received a payment directly from the Transport Department of R20 million at the end of December and Mr van Wyk had been pressuring her to gain access to those funds. So, in early 2016, she set up a meeting with Mr van Wyk at which she planned to record the conversation and get him to level with her about what was going on.

603.9 During the recorded conversation, Mr van Wyk gave various explanations for the use to which the funds from Koreneka had been put. He said, for example, that the monies that had been paid to Neo Solutions were used to "take care of people". According to Ms Tlatsana, Mr van Wyk also provided an explanation of the individuals to whom monies from Koreneka had been paid by drawing these out on a note that he had with him. Ms Tlatsana retained this note after their meeting.

603.10 The note reflected that the payments had been made to Minister Lynne Brown and Minister Dipuo Peters; to the Transport MEC, Mr Molapisi, and to the Transport HOD, Mr Mahlakoleng; and to Premier Tebogo Job Mokgoro. Mr van Wyk said that the Premier had only received R5 million so far and so needed a further R5 million.

603.11 The note also indicated that the Transport CFO had received some monies. Ms Phatudi, however, denied ever receiving any such payment. The Commission was unable to find any other independent verification of the fact that Ms Phatudi received any payments from the Koreneka funds.

603.12 Former Minister of Transport, Ms Dipuo Peters, disputed the claim that she received a payment from the Koreneka monies. Former Minister Peters provided two affidavits to the Commission in which she denied having received these payments. The Commission was unable to find any further evidence corroborating receipt of these monies.

603.13 A substantial amount of the funds from Koreneka was converted into cash by Ms Kalandra Viljoen's business, AMFS. Once converted into cash, there is no way to trace where these monies ended up without eyewitness evidence.

603.14 Ms Tlatsana confirmed that she had made a payment of R1 million to the ANC regional office in the North West in early 2016. She said that Mr van Wyk had asked her to make the donation to the ANC and she had agreed to do so. Ms Tlatsana said that she felt pressurised by Mr van Wyk to make the payment.

604. During her testimony, Ms Tlatsana was unable to provide a satisfactory accounting of all the monies that her company had received out of the arrangement with Mr van Wyk and SA Express. She was requested to provide such an account after her testimony concluded but, despite many follow-up requests by the Commission after her evidence, no such account was produced.

605. It is important to highlight at this juncture that Mr van Wyk was present at the Commission's hearings on the day that Ms Tlatsana testified. Indeed, he sought to delay her testimony. When this request was refused, Mr van Wyk was invited to bring any application for leave to cross examine Ms Tlatsana. Mr van Wyk did not take up any of these opportunities to contest the evidence against him.

606. Ms Tlatsana's testimony about the flow of funds is corroborated by the detailed analysis that the Commission's investigators did of the relevant bank statements. These documents show that Mr van Wyk, and persons close to him, received monies that were drawn out of the North West government's coffers. It is therefore imperative that SAPS proceed with their investigations of these matters as swiftly as possible.

607. Ms Tlatsana also gave evidence that she had received threats and intimidation after she had revealed the details of this scheme in the High Court litigation that had been brought against her by SA Express. She testified, however, that nothing had happened in relation to her complaint even though she had made a tape recording of the threats she had received on the phone and had handed these recordings to the police.

608. The Commission directed its Legal Team and the Investigation Team to make enquires about the complaint and the attention it had received from the North West SAPS office in Mahikeng. The following was revealed: Ms Tlatsana had lodged a case of intimidation with a Warrant Officer at the Mahikeng Detective Service on 4 January 2018. The Commission was dismayed to learn that the investigator assigned to the case had effectively done nothing to pursue the case. The Provincial Office removed the investigator, and the matter was handed over to the Provincial Office under the

Provincial Organised Crime unit.

The role of Neo Solutions

609. Mr Vivien Natasen, who was the sole shareholder and director of Neo Solutions, was involved in laundering R9.9 million of the money that Koreneka received from SA Express pursuant to its unlawful dealings with the North West government.

610. Mr Natasen was also a chartered accountant. He had been a registered member of the South African Institute of Chartered Accountants (SAICA) for 22 years. Mr Natasen was aware of the Code of Professional Conduct for Chartered Accountants and confirmed that the code applied to him.

611. Mr Natasen testified as follows about the relationship between Neo Solutions, on the one hand, and Koreneka and Batsami, on the other:

    611.1 Neo Solutions did not ever render invoices to Koreneka for security cameras

    611.2 It did not ever render invoices to Koreneka for any services

    611.3 No services were ever rendered by Batsamai to Neo Solutions; and

    611.4 Neo Solutions did not ever receive any invoices from Batsamai.

612. Despite these facts, Mr Natasen explained that he had come to know Mr van Wyk in 2014, and had learnt, through his relationship with him, that he was employed at SA Express and that he was planning to leave SA Express in 2016.

613. According to Mr Natasen, in October 2015 Mr van Wyk approached him and asked if he could transfer R10 million into the bank account of Neo Solutions. Mr van Wyk said that he needed to transfer this money because he was an official of the state, employed by SA Express, and was leaving. He said to Mr Natasen that the money was "clean" and had nothing to do with SA Express or the state. Mr van Wyk also told Mr Natasen that he did not want his employer to know that he had implemented a successful business on the side "as they would be jealous" given that he was in the process of leaving SA Express. He also confirmed that he "did not want the money to hit his bank account" because SA Express did lifestyle audits from time to time.

614. Mr Natasen was taken to task during his testimony about this explanation and why it did not raise any red-flags for him. He first endeavoured to justify receiving the funds on the basis that they related to a planned farming venture that they were going to be embarking upon, but then struggled to explain why it was that Mr van Wyk then required R7 million of the money to be released to him. Mr Natasen eventually conceded that there was no reason why his company needed to hold the funds at all in respect of the proposed farming venture because it was just as easy for Mr van Wyk to hold onto the funds until the venture materialised.

615. It is the opinion of the Commission that everything about how Mr van Wyk approached Mr Natasen implied that he needed to hide the money. A reasonable person in Mr Natasen's position ought to have known that he was being asked to conceal or disguise "dirty" money. It is evident that Mr Natasen was put on notice that there was suspicious activity afoot. A reasonable accountant in his position would have enquired further about the source of the funds.

616. Mr Natasen was also questioned about the fact that his company had used the proceeds that it had received from Mr van Wyk. Section 6 of Prevention of Organised Crime Act 121 of 1998 makes it a crime for a person to use money which he knows or ought reasonably to have known forms part of the proceeds of unlawful activities. Mr Natasen conceded that the discrepancies between his companies' financial statements and bank balances reflected that the money Neo Solutions received from Koreneka had been used in his company. When he returned to give evidence in August 2019, Mr Natasen was forced to concede that Mr van Wyk's money was used in the operations of Neo Solutions.

617. When Mr Natasen was probed about why he had signed off on financial statements for his company that were clearly incorrect, he deflected and sought to blame it on his accounting team. It is clear to the Commission that Mr Natasen allowed his company to be used to conceal proceeds that the Commercial Manager of SA Express had siphoned out of the North West government's coffers.

The cash in transit leg

618. Mr van Wyk appears to have been very skilled in his ability to hide portions of the monies that were extracted from the North West government. One of his concealment methods was to engage the services of a business that styled itself as a "cash in transit" operation to convert R9 million of the money from Koreneka into cash.

619. Ms Kalandra Viljoen was the owner of that business. During her evidence before the Commission, she conceded that she did not apply adequate measures within her business to establish and verify the identity of her clients as required under the Financial Intelligence Centre Act 38 of 2001. Her failure to have adequate measures in place allowed her business to be used by Koreneka, an entity with which she had no prior dealings and whose source of funds she had made no effort to establish, to convert R9 million it had received from SA Express into cash.

620. The evidence indicates that this cash was then delivered to Mr van Wyk. This was established from the cash delivery slips that Ms Viljoen retained from these deliveries. Ms Tlatsana confirmed that all three delivery slips bore the signature of Mr van Wyk.

621. A portion of Ms Viljoen's questioning before the Commission focused on whether her "cash in transit" business was operating as a genuine cash in transit business under the FICA legislation. The point that was made to Ms Viljoen was that, ordinarily, cash in transit businesses do not receive deposits of cash into their bank accounts. They collect cash from banks and deliver them. The sheer value and volume of the deposits that Ms Viljoen's business was conducting daily tended to indicate that she was not operating a cash in transit business but was rather receiving deposits from the public as an ordinary feature of its operations. As such, it was operating the business of a bank and required a licence from the Reserve Bank to do so.

622. Greater vigilance will be required from the financial sector regulatory authorities if this type of operation is to be stopped. Ms Viljoen was clearly running a business that received millions of Rands daily and converted it into cash.

CONCLUSION

623. The Commission's Terms of Reference required it to establish the extent to which state capture, corruption and fraud was prevalent in the public sector. In particular, the TORs required the Commission to investigate, make findings and report on whether public officials or functionaries had unlawfully awarded tenders to benefit any family, individual or corporate entity (paragraph 1.4). The TORs also required the Commission to determine whether any officials or functionaries within the various SOEs had benefitted personally from acts of corruption (paragraph 1.9).

624. These key aspects of the mandate of the Commission guided the investigation undertaken into the affairs of SAA and its subsidiary SAAT, as well as SA Express.

625. The investigation endeavoured to uncover not only what had happened within SAA, but also why and how it happened. The investigation therefore had a broad scope because it was motivated by a desire to understand the weakness within the public sector that make it vulnerable to state capture, corruption, and fraud.

626. As the findings set out above show, during the tenure of Ms Myeni SAA became an entity racked by corruption and fraud. Despite this, she was retained as Chairperson well beyond the point at which she should have been removed. Two successive Finance Ministers explained to the Commission that

this was because of the personal preferences of former President Zuma. This is the antithesis of accountability.

627. The public sector must be accountable to the people of South Africa and the appointment of individuals to the Boards of SOEs must be justifiable based on their skills expertise, experience and knowledge.

628. Functionaries within SOEs must be held to the highest standards of accountability because they use public funds to manage the businesses they oversee.

629. Those responsible for governance at SAA, SAAT and SA Express displayed a wanton disregard for these standards. Rather than acting in the entities' best interests, they were motivated by their own personal gratification. This should never be allowed to occur again. In particular, the Commission makes the following recommendations for action following this report:

    629.1 The Commission has already laid a criminal complaint against Ms Myeni for her disclosure of Mr X's identity during her testimony. This matter needs to be brought to finality by the prosecution service. The evidence of Mr X also merits further detailed investigation, and possible corruption charges should be laid against all the individuals involved in the scheme to secure millions of Rands for the personal benefit of Ms Myeni and the Jacob Zuma Foundation.

    629.2 In relation to Pembroke, Ms Myeni knowingly misrepresented to the Minister of Public Enterprises that the SAA Board had taken two decisions when it had not. These misrepresentations caused financial losses to SAA. It is likely that her conduct constitutes the crime of fraud. The Commission recommends that the NPA considers, subject to further investigation as required, whether Ms Myeni should be prosecuted for fraud.

    629.3 Ms Myeni and Ms Kwinana displayed a wanton disregard for the best interests of SAA in their decision-making on the lounge catering contract (LSG Sky Chefs). They acted in gross disregard for their fiduciary duties to SAA when they took this decision. However, they both ceased being directors of SAA more than 24 months ago. Accordingly, the shareholder is not now able to bring proceedings to have them declared delinquent directors under section 162 of the Companies Act. This time bar may be amended by Parliament in order to permit applications to be brought even after a two-year period, on good cause shown. This will mean that, in cases such as this one, where the true extent of Board members' breaches of duty is only uncovered a number of years later, steps can still be taken by the executive to ensure that such directors are declared delinquent and thereby prevented from serving on the boards of companies in the future.

    629.4 SAA's conclusion of a five-year ground handling contract took place a month after Swissport had concluded a service level agreement with JM Aviation, in terms of which JM Aviation was paid R28.5 million. That money, according to Mr Dulaxolo Peter, was then used to pay millions to those who had assisted in "facilitating" the finalisation of the SAA / Swissport contract. The people who received payments from that amount of R28.5 million were: Mr Daluxolo Peter; Mr Vuyisile Ndzeku; Mr Lester Peter; and Ms Nontsasa Memela. These payments were likely to have been kick-back payments to those who had secured the conclusion of the Swissport ground handling contract with SAA or who were to be involved in its implementation. The Commission recommends that, subject to further investigation as required, the NPA should consider the prosecution of these persons.

    629.5 JM Aviation does not appear to have paid VAT to SARS on the R28.5 million received from Swissport prior to the ground handling contract being concluded with SAA. It is recommended that SARS should consider this matter further and take such steps as it may be advised to take.

    629.6 The awarding of the components tender for five years to the joint venture of AAR and JM Aviation was unlawful, irregular and unfair. AAR and JM Aviation were favoured during the process by the SAAT Head of Procurement, Ms Memela, and the Chairperson of the SAAT Board, Ms Kwinana. Both received payments from JM Aviation around the time that these decisions were taken. The payments were likely kick-back payments to these officials. It is recommended that the NPA

should seriously consider prosecuting Ms Memela and Ms Kwinana for corruption or related crimes.

629.7 The Commission's investigations revealed that Mr Ndzeku, Ms Memela, and Ms Mbanjwa conspired to try to hide the true nature of the payments made by JM Aviation to Ms Memela through Ms Mbanjwa, and that Mr Ndzeku and Ms Kwinana tried to hide the payments made by or on behalf of JM Aviation or Mr Ndzeku to Ms Kwinana's company. They did so by fabricating agreements to ensure that they appeared as though they were arms-length transactions unrelated to the decision-making that took place in SAAT at the time. This conduct probably constitutes fraud. The Commission recommends that all the participants in the fraud be prosecuted, following any investigation the NPA Authority may decide to conduct.

629.8 In addition, both Ms Memela and Ms Mbanjwa are officers of the court. Ms Memela is an advocate and Ms Mbanjwa an attorney. Despite this, they participated in a fraudulent scheme to try to hide money that was paid as a kick-back to Ms Memela. It is recommended that the Legal Practice Council should investigate whether the two should be removed from the roll of attorneys in the case Ms Mbanjwa and from the roll of advocates in the case of Ms Memela.

629.9 Furthermore, Ms Mbanjwa continued to act on behalf of Ms Memela and Ms Kwinana in circumstances where she was personally implicated in their impugned conduct. At times, Ms Memela and Ms Kwinana implicated each other. There is a clear conflict of interest in Ms Mbanjwa's representation of either of them in these proceedings, and a conflict in representing both of them. Ms Mbanjwa's independence and objectivity would have been compromised by her personal involvement. The personal involvement of a lawyer in a case in which she acts as a legal representative has been found by the courts to be an undesirable practice. Her conduct in this regard should also receive the attention of the Legal Practice Council.

629.10 It is recommended that the President must take note of the role of the State Security Agency in security vetting and take such steps as may be necessary to ensure that services of the State Security Agency are not abused in the future to serve the interests or agenda of certain individuals.

629.11 Where the Commission has uncovered criminal acts of corruption and fraud and has recommended that prosecutions take place, steps should be taken urgently by the relevant authorities to seek to recover the proceeds of these unlawful activities.

629.12 In order for the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA) to have any prospect of assisting in the fight against corruption, those who were duty-bound to report corruption but failed to do so, must also be held accountable. Section 34(2) of PRECCA makes it an offence for anyone who holds a position of authority within an entity and who knows or ought reasonably to have known that an act of corruption has been perpetrated, to fail to report the conduct. In her position as interim CFO, Ms Nhantsi held a position of authority within SAA. She therefore ought to have reported the BNP transaction and her suspicions concerning the true motives of Ms Duduzile Cynthia Myeni and Mr Masotsha Mngadi in pushing the transaction forward. Her failure to do so may constitute a crime. The Commission therefore recommends that the law enforcement agencies, including the NPA, should give the matter further consideration with a view to her possible prosecution.

629.13 The AG's office should be further capacitated so that it can audit all public entities. If this is not practicable, serious consideration should be given to appointing private firms to audit SOEs only if they can demonstrate that they have the requisite skills and the requisite understanding of their obligations to the public at large when they audit an SOE. There must be a sufficient appreciation that, not only are the financial statements of cardinal importance, the entity's PFMA obligations are also of great significance.

629.14 The South African Institute of Charted Accountants (SAICA) should investigate whether Ms Kwinana has the requisite knowledge and appreciation of her obligations as a charted accountant and whether she is suitable to continue to practice the profession of a Chartered Accountant.

The Commission believes that the answers she gave to certain questions during her evidence revealed either that she has no clue about some of the basic obligations that she should know as a charted accountant, or she knew those obligations but dishonestly pretended that she did not because it was convenient for her to do so. SAICA should be interested in investigating the matter because either explanation may mean she is not fit and proper to practise the profession of a chartered accountant. Her auditing firm's tax returns may also have significantly understated revenue (to the value of approximately R40 million) in the 2016 financial year. It is recommended that SARS should investigate this.

SA Express

629.15 The Commission's investigations into SA Express's dealings with the North West Department of Transport has revealed an elaborate scheme of corruption, designed to take money out of the State's coffers for the benefit of those with power and influence who orchestrated the scheme.

629.16 The Commission recommends that all the government and state officials, as well as private individuals, involved in this looting scheme should be brought to justice. The investigations into this issue have been ongoing since 2016, and should be brought to a swift conclusion.

629.17 The Commission recommends that charges of money laundering and the use of the proceeds of crime be brought against Mr Natasen. That SARS investigates the numerous respects in which Neo Solutions appears not to have accurately and fairly reported its income to the authorities.

629.18 The SARB should investigate whether Ms Viljoen's AMFS operation was, in fact, a cash in transit business that merely failed to comply with its FICA obligations, or unlawful operated as a bank. The current SAPS investigation should also be extended to interrogate the role of AMFS in more detail. The question that needs to be answered is whether AFMS was engaged in criminal money laundering activity.

THE NEW AGE

INTRODUCTION

1. The extent to which state funds were spent on TNA Media (Pty) Ltd (*TNA*) formed an important part of the Public Protector's Report, which have informed the Terms of Reference for this Commission. In particular, the Public Protector referred to both Eskom and SAA's contracts with TNA and required, in particular, that the TNA contracts with SAA be investigated in the second phase of the investigation. There was, however, no second phase as the Public Protector's Office had run out of funding and Adv Thuli Madonsela's term was coming to an end.
2. Therefore, this section of the report focusses on the unjustified spending at Eskom, Transnet and SAA, and the Gupta-owned media enterprise, TNA, during the period 2011 to 2017.
3. The Public Protector's *State of Capture* Report also focused on the relationship between the South African Broadcasting Commission (SABC) and TNA, as well as the allegations made by Mr Maseko regarding TNA and the Government Communication and Information System (GCIS). These aspects of the TNA story are dealt with in other sections of this report.
4. The Commission's TOR required it to investigate, make findings and report on whether there were any irregularities, undue enrichment, corruption and *undue influence in the awarding of government advertising in the New Age newspaper and other dealings with the Gupta family*.
5. During the period 2011 to 2017, TNA produced The New Age newspaper, and a television show in partnership with the SABC known as The New Age Business Briefings or Breakfasts. Government

departments and SOEs used scarce public resources to secure advertising in or sponsorships with TNA that defied logic and fell short of legal requirements.

6. The evidence pertaining to TNA serves as an example of the way in which state capture took hold in South Africa. It shows the extent of the Guptas' influence in the public sector in South Africa as well as the Guptas' strategy to replace officials that were not compliant with their looting scheme.

7. It is undeniable that numerous SOEs were used to siphon public funds to TNA and its owners. What is less clear is how this was achieved and, more importantly, how it can be avoided in the future.

8. The Commission's investigations revealed how key role players enabled the project of state capture to take hold in these entities and thrive for several years, despite enquiries by the institutions designed to protect our democracy – notably Parliament, the Public Protector and some mainstream media outlets.

9. In particular, the evidence shows that there emerged at least two categories of people within these organisations who allowed the Guptas to secure millions of Rands of public funds through:

    9.1 Firstly, a category identified as the "**facilitators**". These were compliant officials who followed the orders from the Guptas seemingly without question. They were not concerned about what the Guptas' influence would do to the welfare of their institutions. They ordered their subordinates to be complicit in the facilitation, using them to create some pretence of processes being followed. The "facilitators" used threats and intimidation to achieve this and they relied on a culture of silence and compliance from employees within the organisations.

    9.2 Secondly, a category identified as the **"followers"**. These were the subordinates to the "facilitators" who did not stand up to their superiors or speak out when there was evidence of corruption or irregularities in their organisations. These followers varied in the degree to which they resisted or complained about the orders they were given. It is evident that the project of state capture would not have thrived as it did, if these key employees had not participated in the scheme by taking irrational decisions that were not in the best interests of their organisations.

10. The evidence before the Commission shows that in order to divert public funds for private benefit, it was necessary to populate key institutions with people who were going to comply with orders. This might be because they were happy to receive some benefit – like being promoted to a high-status position. In some instances, key public figures were unwilling to comply. These were the "resistors". In those instances, the "**resistors**" were removed from their positions and replaced, or were sought to be replaced, with more "facilitators". The primary example of a resistor is Mr Themba Maseko who was unwilling to accede to the Guptas' pressure to divert spending at GCIS to TNA. After he resisted, he was replaced by Mr Mzwanele Manyi.

11. This part of the report identifies the "facilitators" and "followers" within each entity and also considers whether there were any structural differences in each of the entities that equipped them better to resist attempts at state capture and private interest influence.

12. The "**facilitators**" were:

    12.1 At Eskom, Mr Colin Matjila, the CEO, the Board of Eskom that took over in December 2014, and Mr Chose Choeu, the Divisional Executive for Corporate Affairs; and

    12.2 At Transnet, Mr Brian Molefe, the CEO, and Mr Mboniso Sigonyela, the General Manager of Transnet Group Corporate and Public Affairs responsible for advertising and sponsorships.

13. The "**followers**" were:

    13.1 At Eskom, Mr Pieter Pretorius, Head of Strategic Marketing; and

    13.2 At Transnet, Mr Joseph Jackson, the Brand and Publicity Co-ordinator Group Corporate and Public Affairs from 2006 to December 2014, and Mr Daniel Phatlane, Senior Coordinator Stakeholder Relations from 2011 to 2017.

TNA MEDIA

14. TNA was established by the Gupta family in June 2010. It launched The New Age newspaper in December 2010.

15. Former President Zuma testified before the Commission that the newspaper was his idea. He said there was a need for a different perspective in the news that would not be so "negative" and critical of the government and one that would not only cover big national news, but also province-specific coverage. He said that he suggested this to the Guptas who said they were interested in going into this business. Mr Zuma said he even came up with the name The New Age. Mr Zuma testified that he told Mr Gwede Mantashe about his discussion with the Guptas concerning this newspaper because he wanted to make sure that there was at least one official among the ANC officials who knew of his role in the establishment of the newspaper.

16. TNA conducted its business as a subsidiary of Oakbay Investments (Pty) Ltd (Oakbay), a company owned by the Gupta family and represented by Mr Atul Gupta. TNA was responsible for the print media (The New Age newspaper), while Infinity Media (Pty) Ltd focused on the 24-hour television news channel, ANN7.

17. In an affidavit filed on behalf of TNA in its liquidation proceedings, it explained that since its launch:

    revenue streams were primarily derived from a combination of commercial and public sector advertising, bulk subscriptions from national and provincial government departments and its unique property brand known as the 'TNA business briefings'. The aforementioned briefings were embarked upon in partnership with the SABC and sponsored, inter alia, by various state-owned enterprises including but not limited to Eskom and Transnet.

18. In fact, TNA's primary client base consisted of government departments and SOEs.

ESKOM

19. TNA concluded three contracts with Eskom:

    19.1 On 13 April 2012, TNA concluded its first contract with Eskom for advertising in the newspaper (for R4 million) and sponsorship of six business breakfasts (for R7 185 628.74). The contract was concluded by Mr Jacques Roux on behalf of TNA and The Media Shop as Eskom's agent.

    19.2 On 5 November 2012, TNA concluded its second contract with Eskom. This time the contract was between TNA, represented by Mr Nazeem Howa, the Media Shop and Mr Choeu, the Divisional Executive of Corporate Affairs from June 2010 until December 2018, representing Eskom. The contract was for an additional four business breakfasts/briefings in the same 2012 financial year as the previous contract, for an additional amount of R4 million.

    19.3 On 30 April 2014, TNA concluded its third and final contract with Eskom. This contract was between Eskom, represented by Mr Colin Matjila, the acting CEO and TNA, represented by Mr Howa. This contract was for 36 business breakfasts/briefings, for an amount of R43.2 million.

Beginning of the relationship between TNA and Eskom

20. On 22 March 2011, Mr Jacques Roux, from TNA, sent an email to Mr Choeu proposing a meeting to discuss Eskom advertising with TNA newspaper and setting out an "overview of the product". The email referred to a prior telephonic conversation between Mr Roux and Mr Choeu. In his response, Mr Choeu asked that a meeting be set up. He copied Mr Pretorius, Head of Strategic Marketing at Eskom. Mr Pretorius says that this was the first time he had heard of TNA.

21. Mr Pretorius explained that the staff member responsible for communications at Eskom met with Mr Roux. Mr Pretorius explained that his role in "strategic marketing" involved marketing aimed at a

specific problem or issue, such as energy saving at Eskom. This seems to have caused a delay in anything further taking place with TNA for a few months.

22. In addition, in a briefing note prepared by the Media Desk for Mr Dames, the CEO, on 10 June 2011, it was stated that the newspaper was marred in controversy. It had a mass resignation of staff because of its editorial policy and had close links to the Zuma family and the ANC. Mr Choeu admitted to knowing this information at the time. It also appears that Mr Dames would have been aware of this.

23. Mr Choeu testified that on 1 August 2011, he had a meeting with Mr Atul Gupta, Mr Dames and Mr Roux. This was a pitch about the TNA to Eskom. Mr Choeu stated that Mr Dames agreed at the meeting that he would support TNA and made a commitment to do so. Without following the usual process, Mr Dames simply committed himself to contracting with TNA on behalf of Eskom.

24. Then, in September 2011, a TNA representative, whose name Mr Pretorius could not recall, contacted the corporate marketing manager of Eskom, Mr John McArdle, who reported to Mr Pretorius. He asked Eskom to support the TNA and the Business Breakfasts/ Briefings on the SABC 2 Morning Live Show.

25. Mr McArdle arranged a meeting with the representative, together with Mr Pretorius and the General Manager for Strategic Marketing, Mr Moreme, in order to discuss the TNA proposal for advertising and Eskom's participation in the Business Breakfasts. At the meeting, the TNA representative presented a proposal about Eskom sponsoring the Business Breakfasts at a cost of R1 million per show. This was described as a breakfast to be held at a hotel in the city from which SABC 2's Morning Live Show would be broadcast. TNA sold tickets to the event and it would promote the business breakfasts through their newspaper, The New Age. The SABC also promised to promote the breakfasts.

26. Mr Pretorius testified that he declined the proposal immediately because one of the requirements for a sponsorship was that the event had to have a proven track record of success. This event had no history, no indication of circulation and no recognised brand association. He testified that he reported his views to Mr Choeu and thought the matter had been settled on that basis.

27. After this meeting, Mr Nazeem Howa, the CEO of TNA, met with Mr Choeu in his office. Mr Pretorius was invited to the meeting where the breakfast briefings were being discussed again. Mr Pretorius testified that he shared his concerns. Mr Howa then asked Mr Pretorius to leave the meeting, because they had other business to discuss, which he did.

28. During his testimony, Mr Pretorius said that when he discussed his reservations with Mr Choeu, he responded with the following: "Pieter it is an instruction. It comes from the Minister. Brian Dames had told us that you will do this." Mr Pretorius testified that he asked Mr Choeu to put this instruction in writing, but this was never done.

29. Mr Choeu denied that Mr Pretorius raised his concerns about the sponsorship deal with him. He testified that, while he did communicate to Mr Moreme and Mr Pretorius that Eskom must contract with TNA based on the outcome of the meeting with Mr Dames, Mr Pretorius never communicated any concerns about this. Mr Choeu also testified that he never told Mr Pretorius that Mr Dames instructed him to conclude the contract with TNA because this had been an instruction from the then Minister Malusi Gigaba.

30. Mr Choeu's evidence appears inconsistent. Firstly, because he conceded that he had a meeting with Mr Dames on 1 August 2011 where Mr Dames made a commitment to contract with TNA. Secondly, he had then communicated to Mr Pretorius that there would be a contract with TNA. He conceded that he told Mr Pretorius that Mr Dames had told him Eskom must contract with TNA but he denied that he had said that this was in response to concerns from Mr Pretorius about the TNA contract.

    30.1 Mr Pretorius was a frank and candid witness. He accepted responsibility for his role in the process and his role in misleading Parliament and the Public Protector about the justification for using TNA. He seemed genuinely anxious about TNA. He also did a presentation for, among others, Mr Choeu about why the TNA proposal should go through proper channels, including the Sponsorship Committee. His version is given further credence by the fact that he was excluded

from the negotiations of the third contract after he gave this presentation.

30.2 On the other hand, Mr Choeu, had, on at least two occasions, denied involvement in certain decisions (such as subscriptions to TNA and witnessing Mr Pretorius's presentation) and was then forced to admit that he was involved based on documentary evidence to the contrary. He was evasive at times and did not accept responsibility for his role in the continuing contracts with TNA. This included his role in removing the early termination clause from the TNA contract for R43.2 million. The forensic auditors and the lawyers who had evaluated the facts had found that he was the one who had removed the termination clause.

30.3 Mr Pretorius's version in this regard is more plausible and credible than Mr Choeu's version.

31. Former Minister Gigaba filed an affidavit with the Commission stating that he never gave such an instruction as it would have amounted to interference with the operations of Eskom and that was not something that he did.

32. Mr Pretorius testified that this response from Mr Gigaba was false. He explained that Mr Gigaba had interfered in Eskom's operations on many occasions. He stated that there would be no reason why Mr Dames or Mr Choeu would instruct him to enter into these contracts without an instruction from "somebody higher up".

33. On 20 March 2012, Mr Choeu emailed Mr Pretorius asking him to meet with Mr Roux "so you can close the deal on the TNA 49M Breakfasts as part of the Minister's National Campaign". Mr Pretorius explained that the 49M (the population of South Africa being around 49 million at the time) campaign was a campaign about energy saving which was aimed at higher income groups (LSM 8-10), encouraging them not to waste energy.

34. Mr Pretorius asked for a proposal to consider in advance of the meeting, which would deal with both the sponsorship of business breakfasts and advertising in the newspaper. Mr Pretorius explained that, while he still retained concerns about doing business with TNA, he was just carrying out the instruction that he had been given by Mr Choeu.

35. On 21 March 2012, Mr Mzwandile Radebe's gmail account began being copied in on emails between TNA and Eskom. Mr Radebe was the liaison between the Minister, the Department of Public Enterprises and Eskom. Mr Pretorius testified that he found this very unusual and that it was an indication to him that the instruction to work with TNA came from the top. Mr Radebe at that time was giving verbal orders to many of the SOEs and they were, according to Mr Pretorius, expected to do as he said, or he would report them to the Minister.

36. Mr Roux and Mr Pretorius then met, and Mr Roux presented a proposal for both advertising and sponsorship. Mr Pretorius asked Eskom's appointed media buying agency, The Media Shop, to come up with a more palatable proposal as Mr Roux's proposal required far too large a spend.

37. On 27 March 2012, Mr Donald Liphoko of The Media Shop sent an email to Mr Pretorius stating that Mr Moreme (referred to as "Kheepe") had impressed upon him the importance of the proposal with TNA and that Eskom had committed R10 million to the TNA, including business breakfasts and newspaper advertising. This would involve R7 million for 6 business breakfasts over the period of a year as well as advertising spend. Not long thereafter, on 13 April 2012, Eskom signed its first contract with TNA for over R10 million.

Irregular contracts

Proper procedure

38. In order to understand whether the contracts outlined above were unlawful and/or irregular, it is necessary to understand the legislative framework governing public spending and the policy processes in place at Eskom (and indeed Transnet and SAA).

39. As to the legislative scheme, the following provisions are relevant:

39.1 Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

39.2 Eskom, Transnet and SAA are classified as schedule 2 "Major Public Entities" under the PFMA.

39.3 The PFMA defines "fruitless and wasteful expenditure" as expenditure made in vain and which would have been avoided had reasonable care been exercised. It defines "irregular expenditure" as expenditure incurred in contravention of applicable legislation or as expenditure that is not in accordance with a requirement of any applicable legislation.

39.4 Section 57 of the PFMA sets out the legal obligations of an official of a public entity. It provides that an official must:

39.4.1 Ensure that the system of financial management and internal control established for that entity is carried out within the area of responsibility of that official;

39.4.2 Be responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;

39.4.3 Take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure; and

39.4.4 Comply with the provisions of the PFMA including any delegations and instructions under section 56.

40. These provisions of the PFMA will become vital in understanding and evaluating the actions of the Board, particularly in respect of the third TNA contract. The Board must ensure there are internal financial controls in Eskom, that Eskom and its officials follow any policies set out to enhance transparency, accountability and competitive processes, and importantly, to ensure that it does not permit officials to make irregular, fruitless and wasteful expenditure. Further, in instances where any official does so, the Board is required to ensure that disciplinary action is taken against such officials.

41. In addition to these responsibilities, the following provisions of the PFMA are also relevant:

41.1 Section 83(1) provides that an accounting authority for a public entity commits an act of financial misconduct if that authority wilfully or negligently fails to comply with sections 50, 51, 52, 53, 54 or 55 or makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

41.2 Section 83(2) provides that, if the authority is a board, then the members of the Board are individually and severally liable for any financial misconduct of the authority.

41.3 Section 83(3) provides that an official of a public entity to whom a power or duty is assigned in terms of section 56, commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.

41.4 Section 83(4) provides that financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member or person mentioned in (2) or (3).

41.5 Section 86(2) provides that an accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with sections 50, 51 or 55.

41.6 Regulation 33.1.1 of the Treasury Regulations provides that if an employee is alleged to have committed financial misconduct, the accounting authority of the public entity must ensure that an investigation is conducted into the matter and, if confirmed, must ensure that a disciplinary hearing is held in accordance with the relevant prescripts.

42. As to the relevant processes and policies applicable at Eskom regarding these matters, Mr Pretorius testified that, in so far as advertising was concerned, the process was as follows:

42.1 Eskom would prepare a briefing document with the particular issue that it was seeking to advertise. Eskom would then appoint a media buying agency through a transparent commercial process. The agency was responsible for designing a media buying strategy to meet Eskom's specific advertising needs as set out in the briefing document. The agency would conduct research and indicate which media tools were best designed to meet the target audience. They would prepare a media plan on which Eskom would sign off.

42.2 Mr Pretorius explained that the most important thing for Eskom to consider was "frequency" and "reach". The frequency is the number of times an advertisement would appear in a particular medium. The reach was the number and type of people that would be exposed to the advert in a particular medium. The media buying agency was tasked with researching the reach of the medium. This would involve assessing the circulation of the newspaper.

42.3 Eskom had a policy that it would only deal with accredited publications whose viewership had been audited. This meant publications whose circulation figures the Audited Bureau of Circulation (ABC) had verified. The agency would assess the circulation and the price to assess the most cost-effective options and present a strategy document for Eskom to consider and approve. Mr Pretorius explained that it would be highly unusual for Eskom to spend on a medium where no market research had been conducted or verified. While Eskom would try to support new entrants into the media market, it would do so with a small amount of support and then, once there had been some audit of the publication's circulation figures, Eskom would begin to give the publication more support.

43. Mr Pretorius testified that for sponsorship approval, the process was different. He explained it as follows:

43.1 Sponsorship is a commercial transaction between the sponsor and the sponsorship property owner to secure some benefit for the sponsor. The sponsor would determine whether to enter the agreement based on an understanding that they would get more business through the sponsorship exposure. The sponsorship deal would also need to include advertising – to "leverage" the sponsorship. Every R1 used for sponsorship, ordinarily requires R3 for the publicity surrounding it.

43.2 Policy documents created by Eskom set out the criteria for sponsorship approval and the sponsorship desk would apply this policy to any proposal. If, based on the criteria, the applicant scored more than 75%, then the request for sponsorship would go to the Sponsorship Committee for approval – provided there was a budget for it. Once the Sponsorship Committee had approved the sponsorship, Eskom's marketing team would negotiate the responsibilities and the terms of the contract with the sponsorship property owner.

43.3 According to Eskom's sponsorship policy document applicable at the time, if any proposed sponsorship was over R50 000, it had to go to the Sponsorship Committee for approval. Anything less than this amount could be approved by the relevant executive responsible for the sponsorship. The Sponsorship Committee had the power to approve sponsorship of up to R10 million but anything higher had to be approved by the Electricity Council. That is equivalent to the Board under the new dispensation.

43.4 The policy also required a return on investment. This meant that the contract of sponsorship needed various safeguards to ensure impact and results.

43.5 Mr Pretorius confirmed that it would be "very wrong" for a sponsorship to be approved without going through this process and meeting the criteria set out in the policy document. He could not recall any instances of any deviation from these processes prior to the TNA's proposals to Eskom.

Deviation from procedure

44. The first TNA contract, which was from 1 April 2012 to 31 March 2013 and covered six business breakfasts as well as advertising in TNA, was irregular:

    44.1 Mr Pretorius confirmed that while the proposal for the first contract from TNA claimed it had circulation of 100 000 people, this figure could not be verified because TNA was not registered with the ABC.

    44.2 In deciding the cost of advertising, it was important to assess both circulation and the actual readership. The ABC provided circulation figures, other measures, such as All Media and Products Study (AMPS), provided the results of behavioural studies that determine readership. TNA had neither.

    44.3 Mr Pretorius testified that there was no available budget for this expenditure at the time the contract was concluded. Mr Choeu conceded there was no budget for the TNA contract when it was concluded. The additional budget had to be sourced from the Investment and Capital Assurance Committee (ICAC) in June 2012. R6 million was approved for this purpose.

    44.4 The sponsorship never went to the Sponsorship Committee and it was not assessed according to the sponsorship criteria in Eskom's policy thereby breaching the policy requirements for sponsorship. Mr Choeu conceded that the contracts were, therefore, irregular and in breach of the sponsorship policy. He also conceded that it was not customary to go to Media Shop and stipulate that they must spend R6 million.

    44.5 He also agreed that it was very unusual for Eskom to sponsor an enterprise, in order for that enterprise to make profits. Mr Choeu testified that he began to form this negative view of TNA around the time of the Parliamentary questions about TNA and the negative media reporting. These two events meant that contracting with TNA could have reputational risks for Eskom. According to Mr Choeu, that was why Eskom did not contract with TNA for a year after the second contract (from April 2013 to May 2014).

    44.6 Mr Choeu corroborated Mr Pretorius's evidence that there was a link in the timing between Minister Gigaba appearing on the Business Breakfasts on 12 April 2012 and the conclusion of the first contract. Mr Gigaba's response to this was that it was an internal matter for Eskom if it decided to sponsor a business breakfast because he was speaking at the event. In addition, Mr Gigaba testified that there was value in the business breakfasts because they had "a large viewership" and were attended by "business people from different angles". However, as is set out below, the viewership of the SABC's Morning Live Show presented limited value to the SOEs because the briefings themselves were not focused on the SOEs. Also, there were many opportunities for the SOEs to engage with "business people" without having to pay R1 million a time to do so.

    44.7 Mr Pretorius testified that he raised his concerns about the first contract with Mr Choeu on several occasions. He said that he was concerned not only about the fact that Eskom was receiving no value from the contract but also because internal governance procedures had been flouted. Mr Pretorius testified that Mr Choeu would tell him not to make himself sick with worry about this issue because they were being forced or instructed to do this. As set out above, Mr Choeu denied this happened, but Mr Pretorius's version is more likely to be true.

45. The second contract, which was for four business breakfasts and no advertising, was for the same financial year as the first one and added four breakfasts to the existing six in 2012:

    45.1 Mr Pretorius testified that he had even greater concerns regarding the conclusion of the second contract because Parliament had started to raise queries about TNA. He explained that under the sponsorship policy, there had to be monitoring and evaluation of the success and effectiveness of a sponsorship before it could be entered into again. No such evaluation was conducted before this contract was concluded.

    45.2 The second contract was not concluded just between the Media Shop as Eskom's agent, and

TNA. This time, Eskom itself became a party. This was to ensure that TNA was paid on preferential and faster terms than usually paid by Media Shop to vendors.

45.3 Unlike the first agreement, this second agreement was tabled before the Sponsorship Committee. On 20 July 2012, only Mr Choeu and one other member approved the proposal, while eight other members rejected it. Mr Pretorius testified that he assumed the contract should nevertheless go ahead, despite the resolution, because of Mr Choeu's instructions in respect of TNA. This assumption was confirmed for Mr Pretorius, by the fact that it was Mr Choeu who signed the second contract. Mr Pretorius testified that he was asked to sign the second contract but refused to do so because there had been Parliamentary questions about TNA and its links to the Guptas, and Mr Pretorius did not want to be associated with it.

45.4 Mr Choeu accepted that the second contract was rejected by the Sponsorship Committee which gave him pause for thought. However, Mr Choeu testified and admitted that even after the Sponsorship Committee had rejected the proposal for a second contract, he signed it anyway, despite knowing that it was irregular, because of pressure from the CEO (Mr Dames) and the Minister (Mr Gigaba) to continue with the business breakfasts for the 49M campaign. Mr Choeu accepted that the second contract was irregular.

46. In between the second and third contracts, there was also an *ad hoc* TNA sponsorship that Eskom approved.

46.1 Mr Choeu testified that, even though after the conclusion of the period of the second contract (April 2013), he had resolved not to do more business or enter into another contract with TNA because of the reputational problems it caused Eskom. He nevertheless approved an ad hoc business breakfast at which Minister Gigaba would be speaking. He says he did this, despite disagreeing with the decision, because it came from the CEO's office.

46.2 Mr Choeu testified that he met regularly with Mr Dames, the CEO, who instructed him to agree to this additional ad hoc arrangement. He said he thought it would be insubordination not to do what the CEO told him to do.

47. The third contract, to sponsor 36 TNA business breakfasts/briefings for R43.2 million, was also irregular:

47.1 In April 2014, Mr Matjila was appointed as the acting CEO. There was a restructuring in the governance of Eskom and Mr Choeu was no longer a member of Exco. Instead, he was a divisional head reporting to Ms Erica Johnson, who in turn, reported to Mr Matjila.

47.2 Mr Choeu testified that Mr Matjila told Ms Johnson that he wanted Eskom to sponsor the business breakfasts for three years. Ms Johnson told Mr Choeu that she had warned Mr Matjila that the business breakfasts were not a good idea and were not good for Eskom's reputation. Mr Matjila responded that he would deal with all of those problems – he had the authority to conclude the contract and Mr Choeu and Ms Johnson should just worry about creating the correct source document for auditing purposes.

47.3 Despite Mr Choeu testifying that he was uncomfortable with the sponsorship agreement, he nevertheless proceeded to prepare a proposal endorsing it.

47.4 In this third contract, the cost per breakfast event was going to be R1.2 million. This increase had already been approved by the CEO when Mr Choeu put the proposal together. This was ultimately negotiated down to R1 million per event, provided that Eskom agreed to more events – up to 36 business breakfasts.

47.5 Mr Choeu explained that it was as though Eskom was required to comply with whatever TNA wanted it to do and that it was the CEO that created this situation. He also confirmed that a lot of the pressure that the Eskom staff felt to endorse the contract was because they could see that the Gupta family were very powerful and had connections to the then President.

47.6 Mr Choeu's proposal for the third TNA contract for R43 million contained certain "key assumptions", including that the sponsorship of the business briefings contributed to an 87% awareness of the 49M campaign. However, Mr Choeu admitted that the "study" that was conducted about consumer awareness pertained to the entire 49M campaign and not the business breakfasts. He conceded that the business breakfasts could have contributed anything between 1% and 20% - he did not know. He ultimately agreed that he should have removed this section from the proposal because it was not, in fact, possible to establish a causal link between the business briefings and awareness of the 49M campaign.

47.7 Mr Cheou acknowledged that at the time of writing this proposal he was against the TNA and the sponsorship. He also accepted that he should not have signed a document that did not reflect his views. He justified his conduct on the basis that "in Corporate that's how we do it".

47.8 But Mr Choeu did not present this to the Sponsorship Committee. Instead, the matter was dealt with directly by Mr Choeu and the acting CEO, Mr Matjila. It was never submitted to, nor approved by, the Sponsorship Committee. Therefore, this contract also failed to comply with the Eskom policy requirements for sponsorships.

47.9 The negotiations for the contract were concluded between Mr Howa and Mr Choeu. Mr Pretorius was no longer involved in the discussions around TNA.

47.10 The third contract was between Eskom and TNA directly – Media Shop was no longer involved. Mr Pretorius explained that the contract was for R43 million, which was more than the entire marketing budget of Eskom.

Mr Matjila was not authorised to sign the third contract

48. The contract was ultimately signed by Mr Matjila. Mr Choeu testified that he was aware that a sponsorship over R3 million had to be approved by Eskom's Board. There was a report compiled by Sizwe Ntsaluba Gobodo (SNG), an auditing and forensics firm, which concluded that Mr Matjila, as acting CEO, exceeded his authority in concluding the contract.

49. Law firm Ledwaba Mazwai confirmed these findings and concluded that the contract was unlawful and irregular insofar as there was no budget approved for it and Mr Matjila's delegation of authority did not cover contracts of R43 million. The Report also concluded that Mr Matjila had breached various legal obligations in signing the contract, including his fiduciary duties to Eskom, delegated duties of the accounting authority, and the duties of an official of a public entity under the PFMA.

No termination clause

50. The report also found that the agreement had been concluded without a termination clause, which was very unusual. Mr Pretorius explained that because of the volatility of the Eskom business and budget, they had to have an "enabling" contract, which allowed Eskom to exit the contract and not be bound to use advertising if it did not wish to. The report found that it was Mr Choeu who was responsible for removing that clause, to the detriment of Eskom, and that disciplinary action should be taken against him.

51. The Commission's investigations established the following:

51.1 On 24 April 2014, Mr Choeu sent a copy of the third sponsorship contract to Mr Matjila. Prior to this, the contract had been reviewed by the Eskom lawyers and certain changes had been made, one of which was in Clause 2.2 where an exit clause had been inserted. It stated, "Eskom reserves the right to withdraw its sponsorship at any time in the event of a breach by TNA Media of any of the terms of this agreement or for any other reason on 30 days written notice to TNA."

51.2 Mr Choeu testified that he advised Mr Matjila that, because the contract was in excess of R3 million, it had to be approved by the Chief Executive in consultation with Exco. Also, it had to be subject to the approved budget.

51.3 On 29 April 2014, Mr Howa wrote to Mr Choeu, and said that the draft contract was different to "the one agreed between us previously". He had a problem with the exit clause that allowed Eskom to exit the contract on notice (i.e. without breach) and stated "I am sure this is an oversight in drafting and is easily correctible. After which I would be happy to receive a corrected version."

51.4 Mr Choeu acknowledged in evidence that this was a key protection for Eskom and certainly not an "oversight" in drafting. Mr Choeu forwarded the email to the legal team, including Mr Mohamed Adam, the Senior General Manager for Legal and Compliance in Eskom, and asked them to respond. Mr Adam responded, "Choeu, you need to make a call based on commercial need. It was not an oversight. It was deliberately drafted to allow for cancellation on 30 days' notice. I would recommend retaining our wording."

51.5 Mr Choeu claimed during his testimony that after this he would have informed the CEO about this and would have responded to Mr Howa to inform him that this clause was what Eskom wanted. However, this is not supported by the correspondence. Instead, Mr Choeu responded a couple of days later, on 2 May 2014. In this email to Mr Matjila, he said that the parties had reached agreement on most clauses but TNA did not want Eskom to include the exit clauses on 30 days' notice. He then said, "[y]ou will notice that they have removed the clause from both signed versions of the contracts."

51.6 The contract itself was signed by Mr Matjila for Eskom on 30 April 2014. It was witnessed by Mr Choeu on that same date. It is clear that Mr Choeu knew about the removal of the termination clause because of Mr Adam's email to him indicating that it should be retained to protect Eskom. If Mr Matjila did know that the provision had been removed, then he knowingly acted against Eskom's best interests. In any event, both he and Mr Choeu concluded this contract with TNA for R43.2 million at a time when TNA was mired in controversy, questioned by Parliament and the Public Protector, and the contract offered Eskom no verifiable value.

52. Mr Choeu testified that he had no idea the Sizwe Ntsaluba Gobodo report made findings against him in this regard or that they made recommendations about the taking of disciplinary action against him. He confirmed that no such disciplinary action was ever taken against him.

Fruitless and wasteful expenditure

53. The business breakfasts would involve a Minister or official appearing at the breakfast. The most exposure that Eskom gained from these breakfasts was some opportunity to display its branding at the breakfast, which included hanging some banners. While Eskom would be given an opportunity to speak, this would not be on the air. Mr Pretorius testified that there would not be value to Eskom in spending money on such an event and it "did not make sense" to him.

54. Mr Pretorius explained that it was not even the Eskom logo or colours that were displayed, but, rather, the 49M logo, with different colours. Because the banners and the show provided no context for the logo, market research showed that many people thought 49M was a radio station and had no association with Eskom or energy saving.

55. In addition, the Morning Live Show was not even aimed at or watched by the target audience for the 49M campaign because those people would have already been at work at that time. Mr Pretorius therefore testified that he would not have paid R1 million for a breakfast and would have negotiated a totally different package but was "forced" to agree to this one.

56. Mr Pretorius explained that all Eskom would get for this R1 million was two tables of 10 people at the event. He said the reputation of the breakfasts and TNA was so bad that they eventually struggled to fill those seats. Eskom would pay for the costs of the event – the venue hire, décor and food. Mr Pretorius explained that the rest of the tables were sold by TNA to make money. Accordingly, the costing charged to Eskom made no sense. If the money was not going to paying the costs of the event and TNA was selling seats to make profits, where was Eskom's sponsorship money going? Eskom was, after all, spending public money. In fact, TNA was not even required to pay SABC 2 for using its time on Morning Live.

57. Mr Pretorius also explained that, if they wanted to get a message out to the public on load shedding, it would have been a matter of public interest and they could have just called a press conference for free.

58. In so far as the reach of the TNA's newspaper circulation was concerned, when TNA claimed to have a distribution of 100 000, this was simply how many copies of the newspaper it printed. TNA claimed to sell 39 000 of these and the rest were dropped off for free at various SOEs. The Media Shop determined that TNA was only reaching 0.5% of the target LSMs of the 49M campaign. They also researched, using estimates of readership (circulation figures not being available), that the cost to reach one person under TNA was R317 whereas the cost per person with Business Day, for example, is R276.47. Accordingly, the publication also did not provide value for money as compared to its competitors.

59. Mr Pretorius said that, as a marketer, he did not believe that Eskom derived any benefit from these events or the advertising and there were no verified circulation figures from which to assess such value.

60. Mr Choeu did not consider it his responsibility to worry about wasteful expenditure of public funds. He conceded that this was his concern under the first two contracts, but not the third as the CEO took over this responsibility.

61. This evidence clearly shows that there was no or negligible value for Eskom in sponsoring the TNA business breakfasts. It also shows that the advertising spend for The New Age newspaper was unjustified and its effectiveness could simply not be measured.

62. The Board of Eskom, when called to ratify the third (R43.2 million) TNA contract, at no point evaluated the commercial value of the contract. The only thing that the Board did do was to stipulate that Eskom must "extract maximum value" from the contract. However, Mr Pretorius explained that the Strategic Marketing Department, which would have been charged with this responsibility, did nothing to extract value from the contract. Mr Pamensky, member of the 2014 incoming Eskom Board that passed this resolution also admitted that the Board never followed up to make sure this happened.

Eskom Board's ratification of the third contract

"Compliant" facilitator CEOs

63. Shortly after Mr Matjila had joined Eskom as the acting CEO, he approved the third TNA contract from which the early termination protection had been deleted. A complaint about the third contract was lodged with the Audit and Risk Committee (ARC) of Eskom. As a result, an investigation was launched.

64. During the investigation, it appeared that Mr Matjila had been improperly attempting to influence and communicate with the investigation team at Sizwe Ntsaluba Gobodo (SNG). For example, he sent an email to one of the investigators asking for details about the investigation. Mr Tsotsi, Chairperson of the Eskom Board from 2011 until the end of March 2015, testified that he had no knowledge of this but it was surprising, given that Mr Matjila was the subject of the investigation. According to Mr Tsotsi, it would not have been appropriate for Mr Matjila to involve himself in an investigation in this way when he was the subject of the investigation. The reasonable inference from this conduct is that Mr Matjila felt he had something to hide.

Timeline of the ratification of the third contract – the outgoing Board

65. Mr Tsotsi explained that the third contract came to the Board's attention through a whistle-blower who approached the ARC and claimed Mr Matjila had not followed proper procedure in concluding the R43.2 million contract. Before approaching the Board, the ARC reached the conclusion that the contract was irregular and that they required a forensic audit to establish whether this was the case. SNG was appointed as the audit firm.

66. Mr Tsotsi testified that while the investigation was going on, Mr Tony Gupta called him and asked to see him at the Sahara offices in Midrand. Mr Tsotsi went to the meeting at which Mr Gupta expressed a concern about the investigation into Mr Matjila's signing of the TNA contract and wanted Mr Tsotsi to "make it go away". Mr Tsotsi testified that Mr Tony Gupta said that the investigation was impeding the conclusion of the contract. He then told Mr Gupta that he did not have the authority to stop the investigation. He testified that Mr Gupta was visibly upset and remarked that Mr Tsotsi was not interested in helping him.

67. Despite Mr Tsotsi's claim that he refused to help Mr Gupta, on 16 October 2014, Mr Tsotsi instructed the company secretary of Eskom to write to SNG instructing it not to release its report on the TNA contract until he had first spoken to SNG's chairman and CEO. Mr Tsotsi claimed that this was because Mr Matjila felt he was not getting fair treatment in this investigation. However, in the light of the request from Mr Gupta, this conduct on Mr Tsotsi's part seems suspicious, particularly because later in the year, Mr Tsotsi was one of only two members of the Board who were allowed to be part of the next Board of Eskom. If the Guptas were too unhappy with him, they would not have allowed him to go to the next Board.

68. On 29 October 2014, the Public Protector wrote to Mr Tsotsi. The letter stated that the Public Protector had read in the media that Mr Matjila had signed a R43.2 million contract with TNA. The letter stated that the Public Protector was dismayed to see the contract was concluded despite the fact that she was investigating the legality of the other two TNA contracts. This was particularly so in circumstances where the contract was concluded against internal legal advice and was in excess of the sponsorship budget. She implored Mr Tsotsi, in the interests of corporate governance, transparency and accountability, to hold the new contract in abeyance pending the release of her provisional report in respect of the first two TNA contracts at Eskom.

69. On 31 October 2014, a new Eskom CEO, Mr Tshediso Matona, was appointed. Mr Matjila reverted to serving Eskom only in the capacity of a member of the Board and resigned from the Board in December 2014.

70. In his evidence, Mr Tsotsi denied that Mr Matjila's removal had anything to do with the TNA contract or the letter from the Public Protector, but the timing indicates there may well have been some connection.

71. On 7 November 2014, the ARC sent the SNG report to the Board. The key conclusions of the SNG investigation report were that the contract was irregular because it did not fall under Mr Matjila's delegation of authority and that it was a sponsorship and not an investment. The guidelines set out for sponsorship agreements had not been followed. In addition, the report found that the early termination clause had been removed against the advice of the legal department at Eskom. The report found that Mr Choeu and Mr Matjila had been responsible for the removal of the clause.

72. On 24 November 2014, there was a Board meeting. At the meeting, the Board discussed the findings of the investigation. The auditors addressed the Board on what steps had to be taken to address the irregularity in the interim financial statements.

73. Mr Tsotsi testified that one of the recommendations from the SNG report was that Eskom should obtain a legal opinion on the disciplinary action it should take against Mr Matjila and Mr Choeu, as well as the company's position in respect of the contract. The Board therefore instructed a law firm, Ledwaba Mazwai, to provide an opinion on the legal effects of Mr Matjila's conduct in regard to the third TNA contract.

74. The next Board meeting occurred on 3 December 2014. At this meeting, the Board considered Ledwaba Mazwai's advice. The minutes of the meeting record that Mr Mazwai's report back was that if the contract was ratified there would be no irregularity; that Mr Matjila had exceeded his authority in concluding the contract; and that Mr Choeu had removed the termination clause against legal advice, but that Mr Matjila appeared not to have known about this. It is not clear whether Mr Mazwai was aware of the email from Mr Choeu to Mr Matjila of 2 May 2014 in which he alerted Mr Matjila to the termination clause's removal.

75. Mr Mazwai also indicated in his advice to the Board that disciplinary action should be taken against Mr Choeu. The minutes of the 3 December 2014 meeting reflect that the Board took the view that it was not their responsibility to take disciplinary action against Mr Choeu because he did not report to the Board and was an employee of Eskom. However, the PFMA provides that the Board was the accounting authority of Eskom and was responsible for ensuring that appropriate disciplinary action be taken where someone was engaging in irregular expenditure.

76. Mr Tsotsi confirmed that he understood that it was the Board's responsibility to take effective disciplinary action against Eskom employees who committed irregular or wasteful expenditure and that the Board was expected to do so when it discussed and deliberated upon the R43.2 million contract. Mr Tsotsi testified that the minutes do not reflect this understanding but that it was indeed what was discussed and agreed at the meeting. He said that the Board had intended for management to execute the required disciplinary process.

77. This position was confirmed by Mr Mkwanazi's testimony. Mr Mkwanazi, another outgoing member of the Eskom Board, also testified about the SNG forensic report and the conclusions it reached about Mr Matjila and Mr Choeu and their misconduct under the PFMA. He agreed that the Board had an obligation under the PFMA to take action in this regard.

78. The minutes of the meeting of 3 December 2014 reflected that "from the standpoint of the financial status of Eskom, the contract could not be regarded as a good contract". It was resolved that a special Board meeting should be convened on 8 December 2014 to "finalise this issue". On 4 December 2014, the Board received Ledwaba Mazwai's final report. The report was to the effect that the Board could ratify the contract if it represented good value for money when compared to the costs of sponsorship. Ledwaba Mazwai confirmed that they could not offer any input into whether the contract was good value for money. They said that the Board would have to make this judgement call itself.

79. On 8 December 2014, the Board had another meeting. Mr Tsotsi testified that the purpose of the meeting was to discuss the legal opinion. The Board made a note that under the National Treasury regulations, it was required to notify the Minister, National Treasury and the Auditor General of Mr Matjila's conduct. It was found that he was in wilful breach of the PFMA requirements and this conduct had to be reported. However, Mr Tsotsi testified that he did not recall this ever having happened and there were no records that this was done. He conceded that it ought to have been done.

80. The minutes also stated that the Board had to determine whether the contract was wasteful and fruitless expenditure based on whether it had commercial value. The minutes recorded that Mr Tsotsi noted that the discussions up to that point had been about irregularity and that this should be separated from the issue of fruitless and wasteful expenditure – i.e. the commercial value of the contract. He stated that "the Board had to be convinced that the contract was not a bad one." Thereafter, Ms Luthuli, who was the Chair of ARC at the time, recorded that "the handover report had to reflect that the Board had considered whether or not the contract was a bad one and had concluded that the contract was not good at this time."

81. Mr Mkwanazi, non-executive director of the Eskom Board from June 2011 to December 2014, stated that the reference to the contract being a "bad contract" in the minutes of the meeting 8 December 2014 of the Board was both that it did not have an exit clause and that Eskom was experiencing financial difficulties at the time and did not have a budget for this expense. He said that to spend R43 million on this contract would make it a "bad contract". Mr Mkwanazi also confirmed that this conclusion about it being a bad contract had to be conveyed to the new Board through the handover report. The Board also resolved at this meeting that Ledwaba Mazwai and the company secretary should prepare a summary and final resolution on the discussions and decisions around the TNA Sponsorship contract for signing by the chairperson of the Board and the ARC for inclusion in the handover report to the new Board.

82. The outgoing Board did not vote on the ratification of the contract, even though it had received the reports of SNG and Ledwaba Mazwai and had already received Mr Matjila's representations on the value of the contract and its regularity (dated 27 November 2014), prior to their final meeting on 8 December 2014. This suggests that it was not yet in a position to vote on the ratification and wanted

further information in order to do so. However, when the new Board came in, they were given no additional information and yet saw it fit to ratify the contract.

The timeline of the ratification – the incoming Board

83. There had been advertisements for new Eskom Board members in September 2014. Mr Gigaba had been Minister of Public Enterprises from 1 November 2010 to May 2014. He was succeeded by Ms Lynne Brown.

84. There was evidence presented to the Commission that Mr Tony Gupta and his associate Mr Salim Essa were close to Minister Brown and that they were involved with Minister Brown's selections of the new Board and the allocation of Board members to different Board committees. Mr Tsotsi testified that Mr Essa sent him a document stating which Board committees he had been allocated to; and then Minister Brown sent him a document setting out an identical allocation. In addition, Mr Tsotsi testified that he was summoned to Minister Brown's house briefly and instructed to make allocations as set out in the document from Mr Essa.

85. Mr Pamensky, a member of this new Board, testified that he discovered the Board position being advertised around 28 September 2014 and felt he had the appropriate skills to apply for the position. However, it transpired that he was also, at the time of applying for the position, a director of Oakbay Resources and Energy Limited – a Gupta-affiliated company. He became a director on 25 September 2014, a matter of days before the advert came out for the Eskom board position and his application for that role. Mr Pamensky testified that he became a director of Oakbay after being approached by Mr Atul Gupta. He also explained that he met Mr Tony Gupta in June 2014 at the Gupta home in Saxonwold. Then he had a follow up meeting with Mr Atul Gupta in August 2014.

86. This information, together with Minister Brown's close association with the Guptas during the selection of the new Board, raises serious questions about the Board's independence. This was the very Board that went on to approve and ratify the R43.2 million contract with TNA.

87. The new Board had its first meeting on 16 January 2015. At no point during this meeting was the ratification of the R43.2 million contract discussed, despite the fact that it had been held over from the previous year and required attention. The next Board meeting was scheduled for 16 February 2016. However, between these two dates, a round robin resolution was circulated for the Board to ratify the R43 million TNA contract.

88. Furthermore, contrary to the intentions of the previous Board, the handover report to the new Board made no mention of the findings of the previous Board regarding the financial value of the contract and it being a bad one for Eskom at the time. Mr Pamensky testified that the "outstanding issues" portion of the ARC report in the Board's handover reports, indicated to him that the irregular expenditure issue of the TNA contract had been dealt with by the previous Board and was therefore not an issue coming across for the new Board to deal with.

89. Mr Tsotsi confirmed that the minutes from the Board meetings of 24 November, 3 December and 8 December 2014 should also have formed part of the handover report but were inadvertently excluded. He conceded that, when the new Board voted on the round robin resolution regarding the TNA contract, there was important communication that the new Board should have seen about the old Board's view on the TNA contract. Mr Pamensky testified that, now having read the minutes of 3 December 2014, it was relevant that the old Board had determined it was necessary to assess whether there was value in the TNA contract. He also confirmed that, as a new member of the Board, he believed it was necessary for him to know about the minutes of the 3 and 8 December 2014 meetings and the conclusion that the contract with TNA was a "bad contract". In fact, he said the remaining directors were "duty bound" to inform the new Board of this.

90. Mr Tsotsi testified that it would have been the job of the secretariat to convey the correct handover information to the new Board. But he accepted that he and Ms Mabude were the only two non-executive directors who were retained from the old Board and therefore the only ones who would have known about the need to ensure that the correct information was given to the new Board. Mr

Tsotsi accepted that as Chair of the Board and an old Board member, he was responsible for ensuring the handover information was correct and that the Board's views at the 8 December 2014 meeting were accurately reflected.

91. The round robin resolution was circulated on 3 February 2015. The document contained a "summary of facts". Despite Mr Tsotsi having signed the document to confirm that its contents were correct, he admitted during his testimony that he did not in fact read the document and he now accepted that there were errors in it. He explained that he realised later that the document erroneously stated that Mr Choeu was no longer an employee of Eskom. Mr Tsotsi admitted that even though he realised there were errors in the document, he did not go back to the Board members after they had cast their votes to alert them to these errors. He said he was going to explain the errors at the next Board meeting of 19 March 2015 but the minutes of that meeting do not reflect that this was discussed.

92. The round robin statement was also incorrect in a number of ways as outlined below:

    92.1 It stated that the SNG report was only presented to the Board on 8 December 2014, when it was already with them on 24 November 2014.

    92.2 It stated that the parties involved in the TNA contract were "no longer within the sphere of Eskom's operations". This was not true as Mr Choeu was still an employee.

    92.3 There was also a statement that Mr Tsotsi admitted did not make any sense. This is that statement read: "The parties involved [it is not clear which parties] had divergent views on the specific aspects of the matter as such scarce resources would have to be deployed to bring these contentious matters to finality."

    92.4 It also stated: "Considering the representations made by the then Interim CEO, there exists a difference of interpretation regarding the provisions of the Company's Delegations of Authority ("DoA") that needs to be reviewed and clarified further in order to close any gaps which may be present." However, Ledwaba Mazwai had rejected Mr Matjila's interpretation of his delegation of authority. Mr Matjila's version was that the TNA contract was an investment and the delegation allowed him to conclude investment agreements to the value of the TNA contract. Ledwaba Mazwai, however, considered there to be no merit in this interpretation. Mr Matjila's interpretation was simply untenable. Therefore, for the round robin statement to have framed this as a legitimate "difference of interpretation" was misleading. Mr Tsotsi testified that he did not write this statement and he did not vet the document well enough. Had he done so, he would have phrased this point differently.

    92.5 The most egregious misrepresentation in the document is the statement that "The Board recognizes that there is value in platforms that enable Eskom to interact with the public to communicate and garner support for the work that it is doing to ensure that South Africa has sufficient energy". This directly contradicts the finding of the previous Board that this was not a good contract for Eskom and that no investigation at all had been done into the commercial value of the contract.

93. Mr Tsotsi testified that the Board had to determine whether to cancel or ratify the contract and they ultimately decided it was better to ratify it because there would be considerable financial implications for Eskom.

94. Mr Tsotsi admitted that Mr Choeu was supposed to be disciplined and this was part of the fiduciary duties of the Board. Mr Tsotsi accepted that the new Board was misled about Mr Choeu's continued employment at Eskom. However, he testified that he left the Board of Eskom at the end of March 2015 and so did not know what the Board did in this regard. His failure to ensure that this took place was a dereliction of duty. Leaving the organisation is no excuse. It ought to have been part of the round robin resolution or resolved shortly thereafter.

95. Mr Tsotsi also confirmed that Eskom never even attempted to renegotiate the contract with TNA.

The breached obligations of the Board

96. The number of inaccuracies in the round robin resolution; the fact that the round robin resolution was used instead of a proper Board meeting, when there was a new Board and the outgoing Board had seen it fit to meet several times regarding the TNA issue; the fact that Mr Tsotsi – upon realising how many mistakes and omissions were in the round robin resolution – does not appear to have ever corrected them with the incoming Board; together with his interactions with the Guptas and his actions in respect of the Public Protector, seems to indicate that there is a very real possibility that Mr Tsotsi actively sought to "sweep the contract under the rug" and try to have it ratified.

97. This could have been, as Mr Mkwanazi's evidence seemed to indicate, from the desire to just fix an "irregularity" that would have been a headache for the Board from an auditing perspective. But this could have also been more sinister stemming from direct or indirect pressure from the Guptas or their sympathisers. Regardless, even if Mr Tsotsi did not wilfully attempt to influence the ratification of the contract, at best for him he acted negligently and in contravention of his fiduciary duties and his legal duties as a member of an accounting authority of a public entity. This negligence facilitated irregular, fruitless and wasteful expenditure.

98. As for the other members of the Board, Mr Pamensky testified that had he known information that was not apparent from the round robin draft resolution, he would have been more sceptical about ratifying the contract. This included the following information:

    98.1 There was no Eskom branding at the breakfast briefings, and the address by the sponsor was not even aired

    98.2 The round robin resolution about Mr Choeu no longer being in the employ/operations of Eskom was incorrect; and

    98.3 Eskom had been asked to answer Parliamentary questions about TNA, and the Public Protector had expressed concern about the contract and the business briefings.

99. Mr Pamensky stated that he reached the conclusion that the TNA contract had some value because of what Mr Matjila said in his representations. In his representations, Mr Matjila had said:

    99.1 There had been two prior contracts with similar subject matter but what he neglected to mention was that those two contracts were also irregular.

    99.2 The platform had been a success in promoting awareness of the 49M campaign.

    99.3 The contract was a renewal and it allowed savings of 17%. Mr Matjila's representations did not reveal that there had been a gap of a year between the second and third contracts, which meant that it could not have been an extension of an existing service or contract. Mr Pamensky accepted that, if he had known this and that the gap was caused by the reputational problems with TNA, he would have approached what Mr Matjila said differently.

100. Mr Pamensky testified that he also took comfort in the fact that the Chair had submitted this round robin resolution – he believed the Board viewed the contract to have value.

101. Mr Pamensky accepted that under the PFMA, it is an act of financial misconduct to knowingly or negligently permit fruitless and wasteful expenditure; and that the Board was therefore required, in ratifying the contract, to ensure that there was value in the contract so that it was not fruitless and wasteful. He agreed he would have called for further investigation and would not have ratified the contract.

102. Mr Pamensky testified that he was not aware that the Public Protector had written to Mr Tsotsi on 29 October 2014, and again thereafter, requesting that the contract be put on hold pending her report. He stated that if he had known this, he would have taken the request very seriously.

103. It was put to Mr Pamensky that one of his fellow board members, Ms Klein, had stated before the Parliamentary Portfolio Committee that she had raised the issue that Mr Choeu had not been disciplined.

Mr Pamensky testified that he was not in that meeting but if he had been, he would have asked for an investigation.

104. Mr Pamensky made a number of fair concessions about the inadequacy of the information that was placed before the Board. He was also clear that, had this information been known to him at the time, he would have demanded that the necessary investigations take place. Mr Pamensky certainly cannot be accountable for what he did not know. However, he and his fellow Board members were accountable for what they did know and the decisions they took based on what was placed before them.

105. From a proper consideration of the round robin pack alone, it should have been apparent to any reasonable person that the summary of facts made very little sense and was ambiguous. It would also have been glaringly clear that the draft resolution pack did not even contain the very contract that the Board was being asked to ratify. It would also have been obvious that there was no proper assessment of the value of the contract. Despite this, the Board was being asked to ratify a R43.2 million contract at a time when the government had given Eskom a R23 billion support subsidy a few months earlier.

106. The Board members ought to have been aware of the provisions of the PFMA, particularly section 51 which requires the Board to prevent irregular and wasteful expenditure. The Board was also obliged to identify wasteful expenditure under the PFMA, and take action against those who caused it, but could not do so if it never evaluated the commercial value of the contract.

107. Mr Pamensky testified that at the stage when he was asked to ratify the TNA contract, he did not familiarise himself with the PFMA. He testified that he only became familiar with the PFMA about six months after he had been appointed as a member of the Eskom Board. In this regard he particularly referred to the obligation under section 51(1)(e) that the Board was responsible for taking disciplinary action against employees that were guilty of causing irregular or wasteful expenditure. He later claimed that a Board member could only be expected to understand their full obligations under the PFMA after about three to four years of serving on the Board. Quite clearly, this is a self-serving and preposterous claim. Board members are individually liable under the PFMA for performing their functions and keeping officials and their delegates accountable for the performance of their duties. They are given no grace period for doing so. Failure to do so would necessarily amount to negligence or even gross negligence.

108. There was one justification for ratifying the contract that was given by members of both the old and the new Board. It was that it was in the best interests of Eskom for the Board to ratify the contract because otherwise Eskom would have been bound by the contract in any event; failure to ratify the contract would amount to a repudiation; and TNA could have claimed damages for the full value of the contract while Eskom would get no value out of it.

109. However, there was another option open to the Board which does not appear to have been considered.

    109.1 Mr Tsotsi testified that he had no idea that he could have gone to court to have the contract set aside as invalid and was therefore not obliged to ratify it.

    109.2 Mr Pamensky claimed he was under the impression that if the Board did not ratify the contract, this was tantamount to repudiation and they would have had to pay damages to TNA. He said that this belief came from the Ledwaba Mazwai opinion furnished to the new Board.

110. This perception unfortunately stems from some hasty legal advice sought by the outgoing Board from Ledwaba Mazwai. It must be borne in mind that the instructions to Ledwaba Mazwai were given on a very urgent basis and also asked only about two options in respect of the contract – the prospects of ratification or cancellation.

111. It is patently incorrect that TNA would be entitled to the full R43.2 million in damages and Eskom would be left with nothing if it cancelled the contract. This does not take into consideration that TNA would have had an obligation to mitigate its damages and that it would have had to tender its

performance under the contract (or at least the value thereof) to Eskom in order to be eligible for the compensation under the contract.

112. This legal misunderstanding appears to have cost Eskom an enormous sum of money. Greater care by the Board in providing instructions and affording appropriate time to answer legal questions, and a more diligent approach to understanding their legal obligations, could have avoided this.

113. It must be considered why the Board did not ask for further legal clarity. If Mr Pamensky and Mr Tsotsi's belief about the consequences of failing to ratify the contract were correct – there would be very little purpose in ever having a system of ratification. The Board would always be bound to automatically ratify any contract concluded illegally by an unauthorised employee, because failure to do so would allow the other party to recover the entire contract price with no value for Eskom. This simply does not make any sense.

Subscriptions

114. In addition to sponsoring the business breakfasts, Eskom also subscribed to The New Age newspaper for thirty copies per day for an amount of R25 148 for the year. This figure then suddenly jumped up to two thousand copies of the newspaper per day at a cost of R1.3 million to Eskom. It is noteworthy that around the same time, Eskom procured 140 copies per day of the Business Day for R319 000 per year.

115. The Head of Communications at Eskom, Ms Wadja, provided an affidavit to the Commission in which she stated that she was instructed by Mr Choeu to increase the subscriptions in this manner. Mr Choeu denied this in his evidence and claimed that he had nothing to do with newspapers. However, when confronted with a letter from him instructing this increase, he was forced to concede that he did indeed do so and in fact asked for an increase to four thousand copies a day which would have cost Eskom R7 million.

116. Mr Choeu could not provide any explanation for his attempted increase and then claimed it must have been a "mistake". But this is not a credible response. Mr Choeu was content to deny any knowledge of his role in the subscriptions until he was confronted with clear evidence. When this conduct is viewed alongside the role he played in committing Eskom to the business breakfasts, it is clear that Mr Choeu saw fit to put the interests of TNA ahead of those of Eskom.

Constitutional institutions did not prevent the spending

117. The negative reputation that TNA had garnered in the independent media did not help to prevent the conclusion of the third contract. This contract was concluded because Mr Choeu and Mr Matjila were determined that they would do so, regardless of the law and the legal obligations they had to Eskom. The Board failed dismally in the exercise of its duties and ratified the contract to make the administrative inconvenience of an "irregularity" go away and they never bothered to take any further action against those who had originally committed Eskom to this wasteful expenditure.

118. However, other democratic safeguard institutions also failed to provide an effective mechanism to prevent this unlawful spending.

Parliamentary questions

119. On 14 November 2012, about a week after the second contract had been signed, Parliament directed various questions to Eskom about the TNA contracts. Some of the questions Parliament asked were:

    119.1 Whether an independent analysis to determine whether TNA was being read by the intended market had been conducted prior to Eskom placing advertisements in the TNA

    119.2 Who conducted that analysis and what were their recommendations; and

119.3 Whether there were any independent studies conducted about the effectiveness of the advertisements on the target market.

120. Mr Pretorius testified that the responsibility to answer the questions fell upon him as Head of Strategic Marketing at Eskom. He said that he asked Mr Laiza Zikalala from The Media Shop to assist him to answer the questions. Mr Pretorius said that Mr Zikalala explained that there had been no analysis of the newspaper because it had not been certified by ABC for circulation figures, nor through organisations to measure readership. He explained that this was why The Media Shop had recommended that Eskom not use TNA but they were instructed by Eskom to do so and to spend a particular amount of money. Mr Zikalala explained that, since then, AMPS had conducted behavioural research on readership and concluded that TNA had 39 000 readers (compared to The Citizen's 508 000 and The Star's 643 000). He stated that they could not perform an advertising effectiveness measure to ascertain whether the advertising had resulted in a reduction of electricity use.

121. The Parliamentary questions therefore failed as a safeguard for four reasons:

121.1 Eskom employees were willing to lie to Parliament and no further investigations were conducted

121.2 The Parliamentary questions were concealed from the new Board voting on the ratification of the contract

121.3 The new Board members appeared not to be concerned to keep abreast of what the media was reporting about Eskom; and

121.4 Individuals within Eskom were determined to ensure that the contract was concluded irrespective of the fact that there was no discernible value to Eskom.

Public Protector questions

122. On 3 June 2013, the then Public Protector wrote to Mr Matona, DG of Public Enterprises, to advise him that her office was investigating allegations of fruitless and wasteful expenditure in connection with the sponsorship of the business breakfasts.

123. The letter stated that the allegation was that the Department of Public Enterprises exerted undue influence on SOEs to enter into these sponsorship agreements. This, despite the fact that TNA was not a member of the ABC and its circulation figures could not be verified. The Public Protector then asked various questions about the policy on sponsorships, the amounts spent on the TNA sponsorships, the proposals and other relevant information.

124. Mr Pretorius was asked to address the questions from the Public Protector about advertising with TNA. He gave what he considered to be honest answers and sent them to the Head of the Legal Department at Eskom, Mr Willie Du Plessis, who reported to Mr Adam. The response he received was that the answers he prepared were not "sufficient". Mr Pretorius told Mr Du Plessis that he could not in good conscience write something untrue.

125. Mr Pretorius testified that he then received a phone call from Mr Adam who said that they needed to write that Eskom had benefitted from this advertising and that it was a good thing to do. As a result, the Eskom responses to the Public Protector's questions did not reflect reality. Mr Pretorius recalled rewriting the document on Mr Adam's instruction so that it "look[ed] a little bit better" than his original draft. Mr Pretorius said that he did not want to lie to the Public Protector; that he had gotten legal advice that he would be in a lot of trouble if he did so; and that it was unethical and against his professional ethical obligations. However, in the end, he confessed that he was ultimately "forced to do it".

126. Mr Pretorius admitted that several the statements made to the Public Protector were false. They included that:

126.1 The primary benefits were brand awareness for 49M and the opportunity to highlight the need to save electricity; and

126.2 Recent research undertaken with regard to 49M indicated that opportunities such as the sponsorship of the business briefings contributed to a 73% awareness by the public of the 49M Campaign.

127. The Public Protector's investigation continued and on 29 October 2014, she wrote to Mr Tsotsi asking him to hold the new (third) TNA contract in abeyance pending the release of her provisional report. The Public Protector also met with representatives of Eskom on 27 November 2014 in this regard.

128. Only after the outgoing Board had its final meeting, did Mr Tsotsi respond to the Public Protector's letter on 9 December 2014. The letter stated that the third contract was very different to the first two contracts – though there is no basis for this statement. It also explained that minutes of discussions about the contact were not available. This was also peculiar.

129. The Public Protector responded on 15 December 2014 to again implore the Eskom Board not to proceed with the contract until her report had been issued.

130. Mr Tsotsi conceded that none of this correspondence was ever brought to the attention of the incoming Board when they were voting to ratify the third TNA contract. He admitted this would have been "useful information" for the new Board.

131. The Public Protector's intervention was ineffective in curbing the TNA spend because employees in Eskom – even ones with a conscience – felt compelled to lie because their seniors instructed them to do so. As with Parliament's questions, the fact of the Public Protector's enquiries was kept from the new Board when they were asked to ratify the third TNA sponsorship contract for R43.2 million.

TRANSNET

TNA contracts with Transnet

132. Transnet concluded separate contracts with TNA for advertising in The New Age newspaper and for the different sponsorship arrangements.

132.1 In respect of advertising, Transnet employees were instructed to use The New Age newspaper exclusively for all the recruitment and tender advertisements.

132.2 In respect of sponsorship, Transnet concluded:

132.2.1 Contracts with TNA for "The Big Interview", to the value of R24.8 million from 2011 to 2016 – these contracts were renewed every six months; and

132.2.2 Five long-term contracts and one ad hoc contract for TNA Business Breakfasts, to the value of R122 809 526.70, from 2011 to 2017.

Gupta meeting with Acting Group CEO

133. Prior to the advertising spend set out above, Mr Tony Gupta approached Mr Mkwanazi who was the Chair of the Board of Transnet from December 2011 to December 2014 as well as the acting Group CEO from 16 December 2010 to 11 February 2011 and requested that a significant proportion of the Transnet advertising budget be allocated to TNA.

134. Mr Mkwanazi testified before the Commission that he received a phone call from Mr Gupta in January 2011, which was shortly after he had been made acting GCEO of Transnet. Mr Gupta told him that he obtained his number from Minister Gigaba.

135. In a response to a Rule 3.3 notice sent to Mr Gigaba arising from Mr Mkwanazi's evidence, Mr Gigaba denied that he had provided Mr Mkwanazi's number to Mr Gupta. Nevertheless, it needs to be stated that Mr Gigaba probably had Mr Mkwanazi's number because he and Mr Mkwanazi had had a meeting either at the end of October 2010 on Mr Mkwanazi's version or before the 14th November 2010 on Mr Gigaba's version where Mr Gigaba offered Mr Mkwanazi the position of Chair of the Transnet Board.

In fact, Mr Gigaba's denial of this is rejected. On his own version, he was friends with Mr Ajay Gupta and his legal advisor, Mr Siyabonga Mahlangu, met frequently with Mr Tony Gupta. Therefore, if Mr Tony Gupta wanted the number of the Chairperson of the Board of Transnet, Mr Gigaba would have been the most obvious person he would have approached and Mr Gigaba would probably have given him the member.

136. After receiving this call from Mr Gupta, Mr Mkwanazi met him at the Gupta residence in Saxonwold. Mr Duduzane Zuma was also present at the meeting. Mr Gupta indicated to Mr Mkwanazi that he was friends with President Zuma. He also stated that he was aware that Transnet had a marketing budget of R1 billion, and that he wanted 30 to 50% of that budget to be allocated to TNA. In fact, the marketing budget for Transnet was R27 005 399 for 2010 and R95 530 394 for 2011.

137. Mr Mkwanazi testified that he told Mr Gupta and Mr D. Zuma that he was not the correct person to approach in this regard and that they would have to go through the ordinary channels of procurement to provide the State with services. He testified that in response to this rebuff, Mr Gupta said how close he was to the then President, that they met once a week and that President Zuma came to their social events. Mr Mkwanazi testified that it was evident that Mr Gupta was "deep friends" with the President. Mr Mkwanazi explained that he felt that the Guptas were abusing their friendship with President Zuma.

138. Mr Mkwanazi testified that Mr Gupta was trying to convey how influential and powerful he was at this meeting by referring to being friends with cabinet ministers and members of Parliament.

139. Mr Mkwanazi testified that he then asked for a second meeting with Mr Gupta because he said he wanted somebody within the Department of Public Enterprises to also witness what was being asked of him. Mr Mkwanazi explained that he requested that Mr Siyabonga Mahlangu, the advisor to Minister Gigaba, accompany him to the second meeting. He wanted Mr Mahlangu to act as a witness, particularly because Mr Gupta had indicated that he had received Mr Mkwanazi's number from Minister Gigaba.

140. The second meeting took place around two weeks after the first meeting (around January 2011) and was attended again by Mr D. Zuma and Mr T. Gupta. This time, Mr Mahlangu was also in attendance. Mr Mkwanazi testified that at this second meeting, he again made it clear that he was not the appropriate person to speak to about the allocation of the marketing budget to TNA and that there was a procurement process that had to be followed. Mr Mkwanazi testified that Mr Gupta appeared to accept this answer. Mr Mahlangu merely observed and did not talk. Thereafter, the meeting ended.

141. Shortly after this meeting, a permanent appointment was made for GCEO to replace Mr Mkwanazi. Mr Brian Molefe was appointed as the new GCEO on 16 February 2011 and went on to play a significant role in facilitating TNA contracts at Transnet.

142. A few months after these meetings, on 9 June 2011, there was an article in the Business Day stating that Mr Mkwanazi was going to be removed from his position at Transnet by then Minister Gigaba. Mr Mkwanazi said he was shocked to read this as there had been no discussion with him regarding his removal.

143. In the Cabinet Memorandum of 25 May 2011, which recorded the proposal that Mr Gigaba made to Cabinet, it is indeed correct that he proposed that Mr Mkwanazi be removed as chairman of the board of Transnet and that he be replaced with Mr Iqbal Sharma. However, the outcome of the Cabinet meeting was that Mr Gigaba was unsuccessful and Mr Mkwanazi was not replaced.

144. Mr Mkwanazi testified that there may have been a connection between his reaction at the meetings with Mr T. Gupta and Mr D. Zuma and the efforts to remove him but he did not know this as a fact.

145. Even though Mr Mkwanazi did not accede to the Guptas' demands in early 2011, as will be shown below they were successful in acquiring a significant proportion of the Transnet marketing budget and did so without going through the procurement processes that Mr Mkwanazi told them they had to.

Advertising at The New Age newspaper

146. Mr Jackson was the Brand and Publicity Co-ordinator for Transnet's Group Corporate and Public Affairs from 2006 to December 2014. In that role, Mr Jackson was responsible for the management of Transnet's advertising.

147. Mr Jackson explained that, absent some specific strategic objective that it had to promote, Transnet's only advertising was for tender and recruitment purposes. Transnet would generally use an advertising agency to organise its advertising. This was done by a company called "The Agency". The Agency would advise Transnet about where to place adverts depending on the needs of a particular campaign. They would advise on demographics and circulation, and they would negotiate on Transnet's behalf.

148. Unlike Eskom, which had an advertising or sponsorship policy, Transnet had no official advertising or sponsorship policy. Instead, there was an unofficial advertising guideline. However, this draft policy or guideline did, according to Mr Jackson, contain some of the guidelines that Transnet would use for advertising decisions such as using resources cost-effectively.

149. Mr Jackson explained that, when he took over the advertising portfolio, he was responsible for the placement of adverts and how they appeared. He said that at some point in time, he was instructed by his superior, Mr Mboniso Sigonyela, to advise his colleagues that from then on, they were required to advertise for tenders and recruitment in the TNA. Mr Sigonyela simply told Mr Jackson that it "must be done". His instruction pertained to all advertising of tenders and recruitment. Mr Jackson explained that Mr Sigonyela had previously never prescribed to him the specific media that had to be used for any advertising purposes. Mr Jackson testified that he carried out Mr Sigonyela's instructions, even though he knew nothing about the circulation, demographics or readership figures of TNA.

150. Mr Jackson testified that his view was that the different divisions within Transnet were autonomous and could make their own decisions, depending on their budget and discretion. He said that, for that reason, his position was that he would only "recommend" that various divisions use TNA. However, Mr. Jackson was verbally reprimanded for not having followed this instruction and for using the word "recommend". Mr Sigonyela told Mr Jackson that he was incompetent and, if he did not comply, he would find someone else to do his job.

151. Ultimately, as will be evident from what follows, Mr Jackson did eventually assist TNA in securing significant Transnet spending on TNA advertising.

The Big Interview

152. Mr Jackson explained that "The Big Interview" was an insert in the TNA newspaper, where it profiled a media personality. The interview had nothing to do with Transnet.

153. On 1 December 2011, Mr Jacques Roux of TNA emailed a representative of The Agency, with a proposal for Transnet to sponsor The Big Interview in the TNA. The proposal would allow Transnet to advertise in the "ear space" on either side of the newspaper where Transnet would place their logo as well as naming rights – so the piece would be headed, the Transnet Big Interview. This was being offered for an amount of R327 576 per month. The amount for the six-month contract period was R1 965 456.

154. Ms Hanlie van Eck worked for Planet Media which was an advisory expert on media placement for Transnet. She would advise on the return on investment for a particular advertisement in a newspaper. Ms van Eck advised The Agency and Transnet via email on 14 December 2011 that the Big Interview sponsorship was extremely expensive and was not worth the return on investment. She recommended that Transnet not proceed with the opportunity. When approached again on this matter, Ms van Eck again said that, based on the given costs, they could not justify the feature. She made the additional point that there was no ABC certification on circulation. She therefore concluded that she did not support the offer. Mr Jackson also confirmed that there was no information available about the reach of the TNA newspaper or who was reading it. He also conceded that with a public

entity like Transnet, it was not clear what value they would get from sponsoring this interview as there was already brand awareness.

155. Mr Jackson testified that he found the decision by Mr Brian Molefe, pursuant to the recommendation of Mr Sigonyela, to participate in the sponsorship of The Big Interview by Transnet to be suspicious and not justifiable. The advice received from Transnet's consultant was that it was not worth the money, but then, a day later, the decision was taken to go ahead.

156. Mr Sigonyela produced an internal memorandum on the sponsorship of TNA, on 14 February 2012, addressed to Mr Brian Molefe, the GCEO at the time. The proposal stated that TNA "is one of the key publications that Transnet targets for positioning its brand and its image as part of its reputation management strategy." This was false.

157. The memorandum also stated that "this platform will afford Transnet the opportunity to send key messages to our stakeholders". Mr Jackson testified that this was also not a justifiable statement as there was no way to measure the reach of the newspaper to Transnet's stakeholders. In fact, the Big Interview was not even called the Transnet Big Interview, as the proposal suggested.

158. Mr Molefe signed the proposal on 23 February 2011, but there is an email from Ms van Eck confirming that she had authorisation from Transnet for the sponsorship to go ahead, which was dated 15 February 2011. Mr Jackson testified that the only person who had the delegated authority to give this authorisation at the time was Mr Sigonyela. He clearly gave this instruction before he received proper internal approval from Mr Molefe.

159. Mr Jackson, having seen this premature instruction, had then intervened by email to say that the internal processes had not yet been complied with as Mr Molefe had not signed off on the proposal. Mr Jackson testified that Mr Sigonyela told him he was hindering the process and making it go too slowly. Mr Jackson testified that he was put under extreme pressure by Mr Sigonyela who was very eager to get the arrangement in place as quickly as possible. Mr Sigonyela told Mr Jackson that, because progress was too slow, he had to provide him with a formal progress report to ensure that he was doing his job.

160. Mr Jackson testified that he had also prepared certain internal memoranda on TNA. One such memorandum was in support of the "renewal" of the New Age Big Interview sponsorship. However, this time, the memorandum referred to it not as a sponsorship but as a "partnership". Despite this name change, Mr Jackson confirmed that the deal was no different to the first one and that, in reality, it was a sponsorship. Mr Jackson explained that while he did not support the TNA arrangement, it was already a done deal and he was just concerned with getting the formal processes done.

161. Ms Palesa Ngoma, who was a communications specialist at Transnet during the relevant period covered by Mr Jackson's testimony, provided the Commission with an affidavit. Her affidavit deals with Transnet's support of the Big Interview and TNA business breakfasts. Ms Ngoma confirmed she was also instructed by Mr Sigonyela to produce memoranda in support of Transnet partnering with SABC in TNA business breakfasts. She indicated that she wrote six proposals on this matter; and Transnet ultimately spent a total of R24.8 million on the Big Interview from 2011 to 2016.

162. The Big Interview sponsorship contracts were irregular in that they did not follow the ordinary processes set out in Transnet. It is also clear that the spending was wasteful and fruitless expenditure as Transnet derived no value from it.

TNA breakfast briefings

163. Mr Phatlane was the Senior Coordinator for Stakeholder Relations at Transnet from 2011 to 2017. He also reported to Mr Siyongela. In this role, sponsorships and donations fell under his area of responsibility. This mandate fell under the office of the GCEO, Mr Molefe.

164. Mr Phatlane testified before the Commission and explained that the ordinary process for approving a sponsorship was for a party to send a proposal to Transnet. Then a process of assessment followed along the following lines:

164.1 A team would assess whether the proposal was in line with the draft sponsorship and donation policy

164.2 Transnet would perform a due diligence to check if the request was legitimate and whether it would be helpful to Transnet

164.3 A memorandum would then be generated and directed to the General Manager, who had authority to approve the sponsorship if it fell under the amount set out in his delegation of authority

164.4 If the General Manager approved it, the sponsorship would be executed and Transnet would ensure it received what was agreed

164.5 If the monetary amount exceeded the General Manager's authorised amount, the proposal would go to a person with higher authority; and

164.6 When a sponsorship was approved, a sponsorship contract would be drafted and, if signed, payment would follow.

165. Mr Phatlane explained that he first encountered Mr Jacques Roux of TNA in 2011. He noted that Mr Roux had been visiting and meeting with the General Manager, Mr Siyongela for several days – but Mr Phatlane said he did not know exactly what the meetings were about at that stage.

166. In September 2011, Mr Roux sent the first request to Mr Phatlane. The one page letter was addressed to Mr Sigonyela. It set out a proposal for Transnet to sponsor the Business Breakfasts with TNA. The proposal was for two such breakfasts with a total cost of R1 471 000. The offer contained no detail about value or the nature of the sponsorship "opportunity". It simply provided a table of the prices. Nonetheless, the proposal was still recommended by Mr Sigonyela and approved by Mr Molefe.

167. Mr Phatlane explained that Transnet never interrogated why they were being asked to pay for the catering and costs of the breakfast or what value Transnet would be getting out of the sponsorship.

168. Mr Phatlane stated that, after receiving the proposal, Mr Sigonyela instructed him to prepare a memorandum in support it. When asked whether he performed the due diligence requirement that is part of the process for sponsorship approval, his answer was evasive and he ultimately explained that he was not aware of what process to follow for such a large amount and was waiting to hear from the GM about what to do.

169. Mr Phatlane's memorandum stated that TNA was one of the key publications that Transnet targeted for the positioning of its brand and to improve its image. Mr Phatlane testified that Mr Sigonyela instructed him to write this. The memorandum was directed to the Acting Group Executive: Corporate Services at the time, Mr Siyabulela Mapoma. Mr Mapoma did not approve the proposal. Accordingly, Mr Sigonyela prepared another memorandum in support of the proposal, this time by-passing Mr Mapoma and going straight to Mr Molefe.

The first contract

170. On 20 March 2012, Mr Sigonyela directed the second memorandum to the CEO, Mr Molefe. Mr Phatlane testified that he drafted the memorandum. The memorandum sought to encourage Mr Molefe to approve a sponsorship contract with TNA whereby Transnet would purchase, through a contract with TNA, 16 business breakfasts worth R16 million. This was a departure from the earlier proposal which was for ad hoc business breakfasts. The motivation in the memorandum was brief. It claimed that the business breakfasts were popular and would provide a public platform for "robust discussions" to take place. This would give Transnet space for "maximum media exposure to highlight its achievements and its role in broader society". It claimed, without supporting evidence, that the "branding and speaking opportunities provided by this platform will be exploited to reiterate key messages through statements and questions intended to emphasise [Transnet's] profile and role in the development of the economy". The proposal was approved by Mr Molefe on 23 March 2012.

171. The contract giving effect to this proposal was concluded on 14 May 2012. It was signed by the Acting GCEO as Mr Molefe was away at the time. The contract was labelled as a "sponsorship agreement".

In this agreement, the early termination clause allowing Transnet to exit the agreement on notice, was struck out of the agreement, just as it had been in the Eskom agreements.

172. Mr Phatlane testified that he did not know why this had been done and did not ask about it at the time. He simply saw the agreement on his desk and archived it. He did, however, confirm that in the standard Transnet contracts, there was an exit clause to protect Transnet and that he had ensured that such a clause was in this contract – but, when he received the signed version, he noted that the parties had struck out that clause. The deletion of this clause was against legal advice and was contrary to the interests of Transnet. The removal of this clause shows that TNA was being preferred over ordinary media vendors, for reasons that were not explained.

The second contract

173. On 7 March 2013, TNA provided another proposal for the business briefings. This one was for 20 briefings for a total of R20 million.

174. The GroupCEO's limit under the delegation of authority at that time was a cumulative annual total of R10 million. He would therefore not have the authority to conclude this agreement – it would have had to be done by the Board of Transnet.

175. After this proposal was submitted, Mr Phatlane assisted in creating another memorandum supporting this proposal on 11 March 2013. The memorandum was from Mr Sigonyela to Mr Molefe. In this memorandum, the contract was described as a "partnership" instead of a "sponsorship". It seems that this was done to bring the contract within the GCEO's authority threshold, so that the agreement could be approved by him and did not require Board approval. This recasting of the nature of the contract in order to seek to have it fall within the delegation of authority of the CEO is a pattern that appears to have emerged in the TNA contracting.

176. At both Eskom and Transnet, TNA contracts got approval without scrutiny by the appropriate oversight bodies. This was achieved by disguising what was evidently a sponsorship agreement, as some other kind of agreement, and particularly, a type of agreement that the CEO did have authority to conclude. At Eskom, Mr Matjila tried to claim he had authority to conclude the agreement as it was an investment. At Transnet, Mr Molefe tried to claim it was a partnership. These were blatant attempts to avoid the corporate governance processes.

177. Mr Phatlane testified that he did not know why it would be called a partnership as there was no documentation about a partnership. He was, nonetheless, instructed by Mr Sigonyela to call it a partnership. He was also instructed to reduce the spending to R15 million which was then approved by Mr Molefe.

178. The agreement that was ultimately concluded on 19 April 2013 was entitled "Branding and Advertising Partnership Agreement". The agreement committed Transnet to provide an amount of R15 million (excluding VAT) for 15 sessions. Payment had to be made by Transnet within seven days after the signing of the agreement. This was a change from the previous agreements that allowed payments to be made in 30 days after TNA had presented an invoice. When Mr Phatlane was questioned about this change, he testified that Mr Sigonyela had told him that he had a meeting with someone from TNA who had insisted on this more onerous payment arrangement.

179. Mr Makode, the Executive Manager of Communications at Transnet, provided the Commission with an affidavit, setting out the budgets for Transnet during that time. The 2013 marketing budget for Transnet was a total of R138 648 799.20; of which R72 857 070 belonged to the Corporate Affairs Department budget. The agreement concluded on 19 April 2013 by Mr Molefe and Mr Howe was for R15 million which is approximately 20% of the budget. Mr Phatlane confirmed that this was a significant proportion of the Transnet Corporate Affairs budget.

180. This 2013 agreement was clearly irregular. Although it was no different from the 2012 sponsorship agreement, it was recast as a partnership agreement. However, that recasting did not change its nature. It was a sponsorship agreement. Mr Molefe did not have the authority to conclude it as it fell

within the authority of the Board. Despite this, Mr Molefe went ahead and concluded the agreement, committing Transnet to pay R15 million within seven days for a service that did not produce any discernible value for Transnet. The expenditure was therefore also fruitless and wasteful.

Ad hoc contract

181. Mr Phatlane testified that on 24 January 2014, he was involved in the drafting of another memorandum. This memorandum proposed two business breakfasts that would cost R3 million – a substantial increase in price from R1 million per breakfast in the previous contract. Mr Phatlane testified that he queried this higher amount with Mr Vida Talliep in TNA and objected that it was unfair. Mr Talliep told Mr Phatlane he was being rude and the matter was ultimately escalated to Mr Howe, the TNA CEO, and to the Transnet GM, Mr Sigonyela who ordered Mr Phatlane to include the higher price in the memorandum.

The third contract

182. On 31 March 2014 TNA made a further proposal for "sponsorship" of the TNA business breakfasts. The proposal claimed that the sponsorship would allow exposure for Transnet to three million people at a peak time. Mr Phatlane's memorandum in respect of this proposal was prepared on 14 April 2014 and was styled as a request to "renew the New Age/SABC Business Briefing Sessions Partnership". The memorandum repeated the claim that the business briefings reached an audience of two to three million people. Mr Phatlane testified that he had verified these figures by contacting the SABC marketing department. However, the evidence from the SABC was that only 600 000 adults actually watched the show in 2012. When Mr Phatlane was asked about this, he testified that he had no evidence or records of his interaction with the marketing department at SABC to obtain these figures.

183. This memorandum led to the conclusion of another "partnership" agreement in 2014. It was for 20 sessions valued at R20 million. It was signed on 6 June 2014 by Mr Molefe. This was once again far in excess of Mr Molefe's delegated authority of R10 million for sponsorships.

    183.1 The contract that was concluded also did not contain the usual early termination clause that would allow Transnet to cancel on 30 days' notice. Mr Phatlane testified that he approached the legal department which told him that the clause should remain in the contract for Transnet's protection.

    183.2 Mr Phatlane said that, later, the representative from the legal department met with Mr Sigonyela and the two of them went up to Mr Molefe's office for several hours. He testified that when he returned to work, the signed contract was on his desk and the termination clause had been amended to allow termination only by mutual agreement between the parties. This meant that Transnet could not unilaterally exit the agreement on notice even if it realised that the agreement was bad for it. Once again, TNA was entitled to an upfront payment of that R20 million.

184. Mr Phatlane testified that by 2014 there was a lot of negativity around any association with the Guptas. As a result, many people, who worked in communication at Transnet, wanted the TNA contract to scale down or even cease altogether. However, none of them were able to do anything about it.

The fourth contract

185. In 2015 Transnet concluded another agreement for business briefings with TNA. This was also styled as a "partnership" agreement and was signed on 14 April 2015 by Mr Molefe. This contract was for a further 20 sessions at a cost of R21 200 000. Once again there was no early termination clause, just a clause providing for a termination by mutual agreement between the parties.

The fifth contract

186. On 9 March 2016, Mr Phatlane was involved in yet another memorandum of support for a further "partnership" with TNA. This was approved by Mr Sigonyela and Acting Group CEO, Siyabonga Gama.

By this stage, Mr Molefe was no longer at Transnet as he had moved across to Eskom. The 2016 "partnership" was for 20 sessions at a cost of R21 200 000 (excluding VAT). The contract was signed on 9 May 2016 by Mr Gama. As with its predecessors, it had no early termination clause and the money was required to be paid upfront to TNA. An amount of R24 168 000 was paid in two tranches during 2016 (that is R21 200 000 plus VAT). In fact, it appears that an additional amount of R24 168 000 was again paid in 2017. However, the Commission does not have insight into the contracts or circumstances underpinning the 2017 payment.

The value to Transnet

187. The Manager of Group Governance Risk at Transnet, Ms Helen Walsh, provided the Commission with an affidavit setting out Transnet's total spend on the TNA business briefings from 2012 to 2017. The amount was R122 809 526.70. For the Big Interview, the spending was R24 872 200.16.

188. Mr Phatlane confirmed that, apart from Transnet's logo being broadcast in the background at the breakfast briefings and having someone connected with Transnet being present at the breakfast, Transnet was not featured in these business briefings and yet paid all the expenses associated with them. He explained that eventually he struggled to find sufficient people from Transnet to fill the seats at the business breakfasts as the support from Transnet declined significantly.

189. Then, in 2016, there was a change in leadership and the new General Manager for Communications, Mr Molatwana Likhethe, cancelled the Big Interview. At that stage, there were around six business briefings that still had to take place. But Mr Likhethe, changed the way they were done. He got Mr Phatlane to craft the content of the briefing so that it focused on what Transnet was doing. Transnet began scripting the interviews and interviewing people from within Transnet and its stakeholders. They were now directly supporting and promoting Transnet's business. Mr Phatlane testified that they were never afforded this opportunity in the previous five years and had merely had the terms dictated to them by TNA.

SOUTH AFRICAN AIRWAYS

Approach to Ms Carolus

190. Ms Carolus was the Chair of the SAA Board between 2009 and 2012. She testified that in 2011, TNA had approached SAA seeking advertising spend for the newspaper. This went through the Bid Adjudication Committee (BAC), which decided that the newspaper did not meet the business criteria for SAA and, therefore, declined the bid.

191. Thereafter, Ms Carolus received a phone call from the DG of the Department for Public Enterprises, Mr Matona. He summoned her, together with Ms Mzimela, the SAA CEO, to an urgent meeting about this decision. Mr Mahlangu, Minister Gigaba's special advisor, attended this meeting. Ms Carolus testified that the meeting had not followed due process within the organisation because ordinarily an appeal against a fair competitive procurement process would have at least first gone to the CEO before it reached Board members. She regarded it as inappropriate for the DG to choose this forum to plead his case to her as Chair of the Board.

192. At the meeting, Mr Matona told Ms Mzimela and Ms Carolus that TNA was a new entrant in the market and so in order to promote media diversity, SAA should support TNA. Ms Carolus testified that while she had sympathy with the mandate of developing new entrants to the media, this was not the mandate of SAA. This fell to entities like the Industrial Development Corporation (IDC) and the Public Investment Corporation (PIC). SAA had to spend money only on advertising that would reach a very particular segment of the population and was targeted so that it would increase profitability. TNA was not such a newspaper. It would have therefore been a violation of SAA's mandate and role to invest in TNA the way Mr Matona was requesting. Ms Carolus regarded Mr Matona's appeal to them as inappropriate. Ms Carolus said during the meeting that the correct processes must be followed,

that she had no legal standing to speak to them on SAA's behalf, and that it was inappropriate to be entering into discussions with them.

193. Ms Carolus testified that she could not remember all of the details of the meeting because she ended it quickly. However, she could recall that Mr Mahlangu played an important role at the meeting. Mr Mahlangu had attempted to exert pressure on the Board of SAA to influence their decisions about, among other things, TNA and that the mass resignation of the Board in 2012 was more of a constructive dismissal to pave the way for a more compliant Board.

194. Mr Mahlangu responded to these allegations in an affidavit presented to the Commission. He denied that he placed any pressure on Ms Carolus at this meeting. Instead, he described the meeting as "cordial" and nothing more than a discussion about the public policy position to promote media diversity. It is clear from Mr Mahlangu's response that he saw nothing wrong with supporting and promoting the TNA. The problem with this response is that it overlooks the vital point that public entities like SAA are spending public funds. Therefore, they must make procurement decisions based on the proper processes and only if it is in the interests of the SOE's mandate.

The subscription agreement

195. Mr Vuyisile Kona was the Chair of the SAA Board from 28 September 2012 to 26 February 2013. He was appointed acting CEO from 12 October 2012. He was suspended from his position as Acting Chair on 13 February 2013, and was replaced by Ms Duduzile Myeni.

196. Mr Kona explained that, when he first got to the airline, SAA was already doing business with TNA, but TNA was not happy with the quantity of advertising that SAA was giving them. After Mr Kona's appointment on 12 October 2012, TNA approached Mr Kona and asked that the TNA newspapers' volumes be increased. This approach was made by Mr Siyabonga Mahlangu on behalf of the TNA. Mr Mahlangu was the special advisor to Minister Gigaba at the time. Mr Kona told Mr Mahlangu that the TNA would need to approach the SCM Committee in this regard.

197. On 6 November 2012 the BAC submitted a proposal for Mr Kona's approval for a dramatic increase in volumes of TNA newspapers from three thousand to seven thousand per day. No reasons or justification for this significant increase in volume was provided. The submission proposed an extra R2.4 million to be spent on TNA subscriptions over the next year. The BAC submission did not deal with whether SAA could afford such an increase although there was a statement on the submission from the Operations Manager, Ms Ramasia that "there is currently no budget on operations for this".

198. Despite these glaring deficiencies in the BAC submission, Mr Kona approved the requested increase. When he testified at the Commission, he was asked to explain his decision. Mr Kona said that the absence of any budget did not concern him because he thought that the operational changes and expansion of the SAA network that he was planning to implement would free up some cash and so it would be affordable.

199. Mr Kona's approval of the increased subscription with no evidence of effectiveness, circulation, affordability or commercial value, was a breach of his fiduciary duties to SAA and of his obligations under the PFMA to avoid irregular expenditure as there was no budget to support the increase. It also amounted to fruitless and wasteful expenditure as there was no information about the commercial value of the subscription to SAA.

200. There were also a series of text messages between Mr Kona and Mr Mahlangu regarding the TNA subscription that are curious. Mr Kona testified that because Mr Mahlangu had approached him initially about the increase in subscription volumes for TNA, he had to keep him updated about the SCM process. It is strange for a CEO of an SOE to be keeping an advisor to the Minister updated on SCM matters.

201. It is not entirely clear in what capacity Mr Kona engaged with the Guptas and TNA. While his agreement to the subscription increase tends to indicate that he was a facilitator of TNA business at SAA, there was a further interaction that he had with the Guptas towards the end of 2012 which tends to

indicate that he put up some resistance to their advances. However, in the end, he did facilitate their transaction of increased volumes of TNA newspaper and he did so without any credible justification.

Approach to Mr Kona

202. On 29 October 2012 Mr Kona was asked by Minister Malusi Gigaba's special advisor, Mr Mahlangu, to go to Saxonwold to meet with members of the Gupta family. Mr Mahlangu acted as the intermediary for Minister Gigaba and Mr Kona. This was confirmed by Mr Mahlangu himself in his affidavit presented to the Commission. Mr Kona met Mr Mahlangu at the Gupta family home in Saxonwold. He was met first by members of a security team that took his cellphone. He was instructed this was standard procedure for people entering the property. Mr Kona and Mr Mahlangu met with Mr. Tony Gupta, Mr. D Zuma, and Mr. Tshepiso Magashule, the son of the former Free State Premier, Mr Ace Magashule.

203. Mr Kona's account of the meeting has a number of similarities with that of Mr Mkwanazi. Mr Kona testified that only Mr Gupta spoke during the meeting. Mr D. Zuma and Mr T. Magashule were totally silent. According to Mr Kona, Mr Gupta first flattered him which put him at ease. Then he "welcomed" Mr Kona "into the family" and offered him R100 000 as an introduction to the family. Mr Gupta also said he was aware that Mr Kona had not been paid the previous month. Mr Kona was surprised that Mr Gupta knew this because this was private company information that only Mr Mahlangu or someone inside SAA would have known. When Mr Kona questioned the money, and indicated that he would not accept it, Mr Gupta then offered him R500 000. Mr Kona informed Mr Gupta that he did not need this money and he refused to take it. After this point, Mr Gupta began to ask Mr Kona about the consultant that SAA was seeking to appoint.

204. Mr Kona had the discretion to award contracts up to R100 million without Board approval but had, nevertheless, asked the SCM officials to determine which consultant company offered the best price to create a turnaround plan for SAA on an urgent basis. SAA had sought quotes from three companies for the production of the plan. Kona could not recall what the third company's quote had been. However, he testified that Lufthansa and McKinsey both bid for the contract. Lufthansa's quote was for R6 million while McKinsey's was R40 million. The price difference had been great and the best and most-cost effective competitor was Lufthansa Consulting.

205. By the time of the meeting, Mr Kona had already informed Lufthansa that it had been awarded the contract. When he told Mr Gupta this news, Mr Gupta was "livid". The meeting then abruptly ended and Mr Kona was told that he could leave. Before he left, Mr Gupta called the DG of Public Enterprises, Mr Matona, in front of Mr Kona, and told him to come and explain immediately what was going on.

206. When Mr Kona was driving out of the building, Mr Matona called him and questioned why he had given the contract to Lufthansa. Mr Kona explained that it was the SCM committee that decided to award the contract to Lufthansa. Mr Matona left it at that. However, the following week, Mr Kona received a letter from the Department of Public Enterprises saying that they wanted to investigate his decision to award the contract to Lufthansa. What followed thereafter were a series of allegations and counter-allegations about Mr Kona's conduct at SAA. Mr Kona was suspended on 11 February 2013. This resulted in litigation, which was still pending at the time Mr Kona testified before the Commission. Despite the Commission having asked Mr Kona for copies of the papers in these proceedings, they have not been provided to the Commission.

207. Mr Kona was ultimately removed from his position as a Board member on 26 February 2013. Mr Kona's actions in respect of the TNA subscriptions took place before the meeting at the Gupta residence. He testified that the issue of TNA was not raised at the meeting. However, Mr Kona's willingness to approve an increase in subscriptions of an untested newspaper for many millions of Rands still remains inadequately explained.

CONCLUSIONS AND RECOMMENDATIONS

208. The evidence before the Commission paints a picture of a calculated strategy by the Guptas and their associates to appropriate public funds from SOEs.

209. It was key to their efforts to have "facilitators" within the SOEs who would ensure that they committed millions of Rands to TNA despite there being no discernible value to the SOEs in doing so.

210. Those "facilitators" required subordinates who would follow their instructions and do what was necessary to ensure that the processes for contracting were adjusted so that the TNA could benefit from these contracts. The adjustments included removing standard termination clauses, providing for upfront payments, misrepresenting the value of the contracts to watchdog bodies like Parliament and the Public Protector, and recasting the agreements as something different to what they really were so that they fell within the delegated authority of the "facilitators".

Conclusion: ESKOM

211. From the evidence set out above, a pattern emerges about the role players in Eskom.

212. Mr Matjila was the key facilitator at Eskom. Shortly after he took up the position of acting CEO, he approved the largest sponsorship contract with TNA that Eskom had ever entered into. He did so despite not having the delegated authority to enter into a contract of this size and at a time when there was no evidence of any value to be derived by Eskom from the services offered by TNA.

213. Mr Matjila received Rule 3.3 notices about the evidence presented at the Commission's hearings. He did not respond to any of them. The Commission's investigators also made several attempts to contact Mr Matjila directly but none of them was successful. There is, accordingly, no contrary version from Mr Matjila before the Commission.

214. The incoming Board of Eskom was also a facilitator. It was content to ratify a very controversial contract, where it had not assessed its commercial value, and in circumstances where the media, Parliament and the Public Protector had expressed grave concerns about the legality and value of the contract.

    214.1 Mr Tsotsi appeared to have either willingly or, at best, grossly negligently, concealed important information from the new Board before it ratified the contract.

    214.2 The new Eskom Board members were happy to ratify a contract they had not even seen, based on a round robin resolution that did not make sense and without any proper appreciation for their legal obligations under the PFMA.

215. It is unlikely that any of this would have been possible without those who:

    215.1 Ensured that these contracts were concluded and implemented despite not going through the correct procedures; and

    215.2 Were willing to give false justifications to the Public Protector and Parliament for expenditure that was nothing short of fruitless and wasteful.

216. Mr Choeu demonstrated very little, if any, sense of duty to Eskom. He stated on many occasions that he believed that any questioning of authority would have been viewed as insubordination and that it was just "not done" in a "corporate culture". The problem with this is that Eskom is not a private company. It is a public enterprise performing a vital function for the public, using scarce public money to do so. If "subordinates" (in this case as high up as division executives) do not feel any duty to act with integrity or speak out when processes are blatantly ignored because of "pressure from the CEO", then public institutions will be very vulnerable to corruption and irregularities of this nature. To the extent that Mr Choeu was advancing this as an excuse for his conduct, his "excuse" must be rejected as totally unacceptable. He was simply a "facilitator" of the capture of Eskom by the Guptas.

217. Mr Choeu also actively supported the unjustified increase of subscriptions of TNA newspaper to an absurdly high amount with no commensurate justification.

218. Mr Pretorius was far more pained and anxious at having to thwart well-established policies and processes in order to facilitate the TNA contracts. He took some steps to try and address the unlawful conduct but, ultimately, he capitulated under orders from his superiors and even allowed false information to be provided to the Public Protector because of the pressure under which he was placed. In the case of Mr Pretorius, it can be accepted that he took part in this wrongdoing because of orders or pressure from some of those above him. That cannot be said of Mr Choeu.

219. Eskom had policies and protocols in place to ensure that sponsorships went through appropriate approval mechanisms. However, this did not appear to help in preventing significant irregular and wasteful expenditure on the TNA newspaper and business briefings. The delegation of authority was only R3 million in respect of sponsorships and yet the acting CEO approved a sponsorship for R43.2 million and had this ratified by the Board, with apparently no consequences for the people involved.

220. This demonstrates that, while accountability structures are indeed useful, if the Board of a public entity fails in its duties to ensure that they are observed, they will prove useless in the fight against irregular and wasteful expenditure. If officials can be compromised and they exercise delegations of authority for nefarious purposes or ignore them altogether and suffer no consequences, then, again, the policies and processes serve no purpose.

221. If employees responsible for carrying out those processes can be intimidated into proceeding with contracts without following due process, then these policies and processes will be of little value. All that will happen is that those employees will assist in creating a paper trail of proposals and justifications that purport to legitimise the expenditure and prevent exposure of unlawful and wasteful transactions.

222. There was a significant lack of effective checks and balances operating at the SOEs that allowed this conduct to continue for as long as it did. This is evidenced by fact that these indiscretions were never picked up and addressed, bar a whistleblower report – which was effectively swept under the carpet by the new Eskom Board.

223. The boards and executives of those SOEs who supported and facilitated the conclusion of these contracts were likely guilty of financial misconduct. In some instances, that misconduct probably also amounted to a breach of their fiduciary duties to the SOEs. In particular, the Eskom Board members who failed in 2015 to discipline Mr Choeu and to report Mr Matjila to the shareholder breached their obligations under section 51(1)(e) of the PFMA. This failure occurred despite the previous Board having been explicit about the need for these further steps to be undertaken by the new Board. The new Board's conduct was therefore, at a minimum, grossly negligent. Section 86(3) of the PFMA makes such conduct an offence and carries a sentence, on conviction, of either a fine or a period of imprisonment not exceeding five years.

224. These matters should therefore be handed over to the National Prosecuting Authority for further investigation and, where warranted, prosecution.

225. In so far as Eskom is concerned, the Commission's limited time and resources did not make it possible to consider the position of every one of the 2015 Eskom Board members. All of the 2015 Eskom Board members received Rule 3.3 notices related to the Eskom TNA evidence presented at the Commission.

226. Only three Board members responded, namely:

    226.1 Ms Klein, who provided the statement that she had previously submitted to Parliament's Public Enterprises Portfolio Committee. She indicated that she had not supported the round robin resolution to ratify the third TNA contract.

    226.2 Both Dr Pathmanathan Naidoo and Ms Devapushpum Naidoo also responded to the Commission. Ms Naidoo explained that she was influenced by the Ledwaba Mazwai report in deciding to ratify the contract. In his affidavit, Dr Naidoo indicated that he was influenced by the impact the TNA contract had for the company's interim results.

227. The remaining board members did not respond to their Rule 3.3 notices.

228. The position of each of the new 2015 Board members of Eskom will therefore need to be investigated further before any charges could be brought against any of them individually.

Conclusion: TRANSNET

229. Mr Molefe and Mr Sigonyela were directly facilitating the use of public funds for TNA spending. They did not appear to resist and indeed appeared determined to ensure that these contracts were concluded on terms that were extremely disadvantageous for Transnet. Mr Sigonyela used threats and intimidation to ensure that his subordinates complied with instructions to advance the interests of TNA. The spending on these contracts was irregular, fruitless and wasteful.

230. Both Mr Molefe and Mr Sigonyela received Rule 3.3 notices related to the evidence presented at the Commission.

    230.1 Mr Sigonyela's lawyers informed the Commission in correspondence that they would consider Mr Sigonyela's position after the evidence had been presented and, if necessary, make application to cross examine the witnesses. No such applications were received.

    230.2 Mr Molefe did not respond to the Rule 3.3 notices. However, he did give evidence at the Commission and was questioned about these contracts with TNA. The gist of his evidence was that the millions of Rands that were spent on the Big Interview were justified because Transnet needed to "move away from paying for adverts and move our brand to the mainstream news ... and the Big Interview was an opportunity to do that".

    230.3 This justification does not hold water. The Big Interview did not move Transnet away from paying for advertisements. On the contrary, it cost Transnet handsomely – a total of more than R24 million.

    230.4 On the business breakfasts, Mr Molefe was questioned on two aspects: how Transnet derived value for money from the breakfasts and why they had changed from being described as "sponsorships" to "partnerships". Mr Molefe testified that the business breakfasts had value because they allowed for good news about Transnet to be covered in the media and gave the Transnet CEO an opportunity to speak about Transnet. However, this "value" could not have been worth the amount paid for it. It is doubtful that it could ever be justified for a SOE to pay R 1 million for its CEO to make a ten minute presentation to a room full of people whose identity would not be known beforehand.

    230.5 On the question of the change from "sponsorship" to "partnership", the issue was whether this change had been a deliberate one to keep the approval power with Mr Molefe because the change in description coincided with a change to his own delegation of authority from the Board of Transnet. If the contracts had not been changed from being described as "sponsorships", they would have required Board approval.

    230.6 When Mr Molefe was first questioned about this during his testimony, he did not have an answer and asked for an opportunity to submit an affidavit. The affidavit did not provide a credible response. Mr Molefe stated in his affidavit that the description was changed because, "we found that Partnership was a more accurate reflection of the nature of our relationship with the SABC and the TNA ... classifying the briefings as sponsorships did not reflect the fact that Transnet was benefitting commercially from the briefings in the form of exposure for the brand as well as advertising."

    230.7 However, the explanation that Mr Molefe provided does not explain why the way the parties described the contract mattered. This was a contract between the TNA and Transnet. They were the only parties affected by it and they could have called it whatever they wanted, unless what they called it had some bearing on whether it would be approved or not, and by whom. That is the issue around the name change that Mr Molefe never squarely addresses. The only relevance that the name change could have had is if the description mattered for some purpose.

The only purpose that has been proffered is the one that Mr Molefe does not directly address, namely, that the description mattered because if it remained a "sponsorship", then Mr Molefe could not approve it on his own and it would have to go to the Board. Finally, it is not clear that calling the arrangement a "partnership" is any more accurate a way to convey the fact that it presented a branding opportunity. The commercial benefit of sponsorships also lies in the branding opportunities that they present.

231. Mr Molefe's efforts at justifying the TNA contracts do not, therefore, bear scrutiny.

232. Neither Mr Jackson nor Mr Phatlane were direct facilitators for the Guptas. They did register their disapproval of the TNA spending. However, they failed to bring their concerns to the attention of anyone beyond their immediate superiors. They also failed to resist the instructions that they received. Therefore, they were complicit in allowing the spending on the TNA contracts for which there was no legitimate justification. And they allowed the contracts to continue for many years.

233. The only time some value was extracted from the contracts was when personnel were replaced in 2016 and Mr Likhethe saw to it that Transnet at least took steps to ensure that the last six business breakfasts provided exposure for Transnet.

234. The business breakfast contracts were clearly not partnerships. They were sponsorships that exceeded the Group CE's delegation of authority.

Conclusion: SAA

235. The patterns followed at Eskom and Transnet have also been uncovered in the aviation evidence heard by the Commission. The SAA Board would reach a decision and then, in a reversal of proper process, seek a recommendation from management to justify the decision. This type of *ex post facto* generating of a paper trail and this veneer of proper process and justification covered up the true situation at these entities and allowed state capture and corruption to flourish unabated for a number of years.

236. The Commission's investigation into the TNA contracts between TNA and Transnet, Eskom and SAA respectively can only lead to one conclusion: irregular, fruitless and wasteful expenditure.

SOUTH AFRICAN REVENUE SERVICE

INTRODUCTION

1. This report outlines the Commission's findings, conclusions and recommendations in relation to several witnesses that had given evidence before the Commission on the particular topic involving the state of affairs at the South African Revenue Service (SARS) during the period in which Mr Tom Moyane was its Commissioner.

THE PUBLIC PROTECTOR'S REPORT

2. The establishment of this Commission derives from a report by the Public Protector, No. 6 of 2016/2017 dated 14th October 2016. By way of Proclamation 3 of 2018, the President of the Republic appointed a Commission of Inquiry to investigate allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State with the TOR contained in the Schedule. The Commission was directed to, amongst other things, inquire into, make findings, report on and make recommendations guided by the said Public Protector's Report, the Constitution, relevant legislation, policies and guidelines, as well as the order of the Gauteng High Court of 14th December 2017 under case number 91139/2016.

3. The Public Protector's Report does not refer to any activities regarding the South African Revenue Service (SARS), but it is abundantly clear from the said Proclamation read in particular with Clauses 1.1 and 1.4 of the Schedule containing the TORS, that the Commission had the power to investigate allegations of state capture and any violations or breaches of the Constitution or any relevant ethical code or legislation, that may have occurred within SARS. The said Proclamation and the Schedule is couched in very wide terms and any recommendation or the absence thereof by the Public Protector was not a sine qua non for investigating and considering allegations relating to state capture within the confines of SARS whilst Mr Moyane was the Commissioner.

4. SARS is an Organ of State as per section 239 (a) of the Constitution of the Republic of South Africa. 1996. The Tax Administration Act 28 of 2011 governs its activities, and it is subject to the provisions of s 195 of the Constitution which deals with the basic values and principles governing public administration. It is expected that a high standard of professional ethics must be promoted and maintained at the organisation, and it must remain accountable and transparent in all its activities and operations.

5. The State cannot fulfil its socio-economic, constitutional and other commitments if SARS does not function honestly, effectively, professionally and with openness and transparency. A compelling and national interest is therefore at stake because SARS constitutes a fundamental and indispensable pillar of our country's fiscal framework.

THE SCOPE OF THE EVIDENCE RELATING TO SARS

6. What is the focus of the evidence presented to the Commission in relation to SARS? In the following paragraphs, the main points of contention will be summarised as follows:

    6.1 The SARS evidence was central to the Commission's mandate to enquire into allegations of state capture.

    6.2 SARS has featured prominently in allegations of state capture and it would be contended that the actors in question weakened and misdirected the operations of SARS, particularly its governance and compliance functions, rendering it less effective; for unlawful purposes. Accordingly, the SARS evidence falls squarely within the Commission's TORs.

    6.3 The Nugent Commission, Chaired by Judge J.A. Nugent, conducted an enquiry into tax administration and governance failures at SARS under the TORs published on 18th June 2018 and that Commission was required to make findings on and report on eighteen specific issues.

    6.4 The Nugent Commission focussed on irregularities at SARS including what it found "was the seizure of SARS" by Mr Moyane and others, whilst on the other hand this Commission was investigating capture of SOEs including SARS.

    6.5 This Commission has no desire to repeat the work of the Nugent Commission, nor does it seek to re-enter the fray. In the absence of any judicial review of the Nugent Commission's Report, its factual findings will stand, and no evidence in contradiction of any such findings can be accepted.

7. To determine the correct dividing line between what is a permissible topic of enquiry for this Commission and what is not, because it has already been dealt with, one must consider briefly what was investigated and found in the Nugent Commission Report:

    7.1 The first finding was that there had been a massive failure of integrity and governance at SARS brought about by the "reckless mismanagement of SARS on the part of the former Commissioner Mr Moyane".

    7.2 Mr Moyane had dismantled the elements of governance and seized control of SARS as if it was his own domain.

    7.3 Senior management was driven out or marginalised.

    7.4 The development of SARS's sophisticated information technology systems was summarily halted.

7.5 The organisational structure of SARS that provided oversight was pulled apart.

7.6 Accountability to other State Authorities was defied and capacity for investigating corruption and fraud was disabled.

7.7 Mr Moyane engendered a culture of fear, bullying and intimidation and there was a purging of competent top officials.

8. President Ramaphosa terminated the services of Mr Moyane on 1 November 2018. He had been appointed for a 5-year term from 29th September 2014 to 29th September 2019. Having regard to his qualifications, or rather the lack thereof pertaining to the duties and functions of such a crucial Organ of State, one must justifiably ask: why was this appointment made?

9. Mr Moyane refused to engage with the Nugent Commission, and after an interim report, the President suspended him on 19 March 2018. The actions of the President were challenged in the Gauteng High Court but the application was dismissed with costs.

10. Matters concerning SARS which were not within the remit of the Nugent Commission, were dealt with by this Commission. The focus was on the consulting company Bain & Company in connection with SARS as the Nugent Commission had concluded that Bain "had not told the full story". The Commission's mandate required that the strategic significance of the capture of SARS be contextualised within the big picture of the state capture inquiry. The Nugent Commission's findings and the evidence led showed that the "repurposing" of SARS followed similar patterns and processes of state capture that have been observed in other state institutions.

EVIDENCE

11. Mr Athol Williams, a former employee of Bain, was referred to his affidavit dated 20 August 2020. He confirmed that the affidavit was truthful and correct. He has impressive academic qualifications including five Masters Degrees. He was thus highly qualified in the fields of business and ethics. He joined Bain in 1995 and was stationed in various cities and in September 2009 he was offered a partnership in Johannesburg. From 2010 he acted in the role of an ad hoc adviser to Bain.

12. At the end of August 2019, Mr Williams resigned, because he was of the view that Bain had not been transparent with him and the South African authorities regarding their investigation into what happened at SARS under their tenure. He made various statements to the media to this effect in 2019 before the Nugent Commission.

13. He indicated that he had heard the testimony given by Mr Massone before the Nugent Commission and was shocked by it. He contacted a senior partner in London, as well as an investigative journalist by the name of Mr T. Moolman. His intention was "to do the right thing for South Africa". He offered himself as a consultant to Bain to assist it with the matter of internal investigations. The sentiment expressed between himself and Bain was that he would be allowed to have access to any required information in order to bring concerns to an appropriate outside party.

14. The agreement was concluded between Mr Williams and Bain on 7 September 2018. He was given authority to provide independent oversight of the external and internal investigations that Bain was conducting. The internal investigation was aimed at discerning what had occurred at SARS. The external investigation was to be conducted by a law firm, Baker McKenzie, on this matter. The intention behind this was to provide the Nugent Commission with an interim report. However, he was not given access to any report drafted by Baker McKenzie, though he did communicate with Judge Nugent on this matter directly.

15. During the so-called first period Mr Williams did receive selected non-privileged documents from Bain. There were emails during the so-called second period following which a remedy plan was developed but he received no new documents. All the documents referred to in his affidavit were documents presented to him by Bain or Baker McKenzie.

16. In his view neither Bain nor Baker McKenzie “had come clean” with the Nugent Commission. As mentioned, Bain had refused Mr Williams access to the findings report and he could make no assessment as to the truthfulness thereof. Judge Nugent had in addition written to him that Bain were being evasive and were not addressing real concerns.

17. Accordingly, he resigned from his engagement with Bain in August 2019 because they continued to withhold information which he thought was relevant. Thereafter he collated all the evidence in his possession (about 500 plus documents and emails), and this allowed him to develop the sequence of events described in his affidavit.

Bain and Ambrobrite contract

18. Mr Williams was referred to a “Business Development and Stakeholder Contract” concluded between Bain & Company SA and Ambrobrite (Pty) Ltd dated 1 November 2013. Ambrobrite was certainly not a business consulting or management consulting company as described in para.1 of the agreement. The company was set up by Mr Duma Ndlovu, a TV producer, and Mr Mandla KaNozulu. Both men are artists who work in the creative arts. They describe Ambrobrite as an events management company. The company had no internet presence, no website, and no financial records. It also had a tax certificate which SARS had indicated might be fraudulent. The description of the company is intentionally misleading.

19. Paragraph 2 of the abovementioned agreement is highly significant, and it is necessary to quote it in full.

> Bain & Company SA, in collaboration of Ambrorite, has identified the Government and State Owned Enterprise Sector as a strategic priority. This sector represents an important share of the GDP and is an important buyer of consulting services. It is commonly accepted that to build a sustainable consulting business in South Africa a substantial participation to this sector is required.
>
> In addition, Ambrobrite intelligence has allowed Bain in the last few months to acknowledge that in the next few years a number of State-Owned Enterprises and Agencies will be subject to leadership and strategic changes and will require significant transformation and turn-around processes. This is at “the core” of Bain activity and skills. Supporting competent, empowered and change orientated leaders in solving important strategic challenges is Bain & Company SA’s most important ambition.
>
> However, current Bain positioning in this sector is extremely weak: in terms of brand positioning, relationships, understanding of the internal situations and competitive dynamics, purchasing policies and procedures.
>
> Bain & Company South Africa is of the opinion that a collaboration with Ambrobrite would substantially benefit its business and the probability of success in this sector.

20. This reflects a clear intention to invade SOEs and Agencies when they were subject to leadership and strategic changes. The said relationships would be governed by Mr Massone, acting on behalf of Bain, Mr Ndlovu and Mr KaNozulu, at an eye-watering monthly “retainer fee” of R100,000 which would increase to R200,000 per month in case of an “exceed expectations” performance.

21. Mr Williams believed the contents of this agreement and the clauses referred to were shocking. Mr Williams understandably thought that it was bizarre that one of the pre-eminent consulting firms in the world would turn to two artists to give them strategic advice.

22. Paragraph 3 of the said agreement and bullet point 3 under the heading “Bain Brand Positioning”, are equally astounding and disturbing. The first mentioned refers to “Identify key priority targets in the Government/SOE sector, including SARS”, whilst the latter seeks to identify key opinion leaders who would in future have key roles in deciding or influencing future policies. In addition, the contract states that, according to Ambrobrite intelligence, in the next few years several SOEs would be subject to leadership and strategic changes and would require “significant transformation and turnaround

processes". The contract states that Bain believed a collaboration with Ambrobrite would substantially benefit its business and the probability of success in this sector. One could justifiably ask why such a clause was inserted in that it is, for example, almost common knowledge, or easily ascertainable, who a particular DG of a department is or the Chairperson of a particular SOE will be.

23. The fees which Bain paid for these services was R3.6 million per year, which made Ambrobrite the second highest paid of the 53 advisors that Bain worked with worldwide. It was paid 50% higher than the next highest paid advisor.

24. Mr Williams was referred to an email dated 10 November 2013 from Mr KaNozulu to Mr Massone. Invoices for September and October were annexed. Mr Williams then mentioned that prior to such, Ambrobrite had arranged a party that included President Zuma. In that context he was referred to an email dated 22 November 2013 from Mr Massone to his colleagues at Bain. In the fifth paragraph the following appears: "They have started working with me in September e.g., on SARS, the event with the President. . . ." The next logical questions would be: Why would the President attend a function arranged by these persons? Why is reference made to SARS?

25. On 18 December 2013, Geoff Smout, Head of Bain's finance office in London wrote to N. Venter saying: "Well I have just been to SARS who could not verify the TCC (Tax Compliance Certificate) and suspect it's fraudulent!" Mr Smout in this string of emails also mentions that he would like to see Ambrobrite's certificate of incorporation and VAT certificate. Mr Williams testified that their issues were never satisfactorily resolved. He added that Bain was a highly professional organisation, and the said contract was not typical of the type of agreements it entered into.

26. On 15 January 2014 Ms Wendy Muller, Global Head of Marketing for Bain sent an email to Mr Massone. She referred to a discussion with Mr Stuart Min, the Global Head of Legal at Bain. She had also penned the contract and asked for confirmation that neither of the two people mentioned by name in the contract, nor any of the other employees of Ambrobrite were South African government employees, as well as that there was no plan for money or favours changing hands between these two people or other Ambrobrite employees and any of the target executives or companies. Mr Massone responded that it was simply a business development arrangement where "these people" would inform them if they were aware of changes in the key positions in a few selected companies, provide them with intelligence on the current situation of a company's strategic and operational issues and possible leadership evolutions, and try to position Bain and introduce it to the relevant decision makers.

27. On 15 January 2014 Stuart Min sent an email to Wendy Muller asking the following:

> So, here's my main question – how are two "artistic producers" qualified to provide us with intelligence on company's strategic and operational issues, pending leadership changes, etc., which Vittorio claims is the purpose of the arrangement? .... it just seems disingenuous for Vittorio not to acknowledge in any way that we hope these guys will use their connections with President Zuma to influence executive selection decisions. . . .

28. On 2 June 2016 Mr Massone wrote to Ambrobrite on behalf of Bain extending their contract for a further six months. This was despite various concerns raised by very senior people at Bain, as Mr Williams acknowledged. The contract was in fact extended every six months until June 2016.

29. Mr Williams also confirmed that Mr KaNozulu had been paid for a party, which to him was an unusual activity. The new ANC Youth League head had apparently been invited and Mr Massone wanted to meet him. Mr Williams explained that this unusual activity disturbed him as Bain would normally pay for staff and running expenses but could not accept why it would pay for what was ostensibly an ANC Youth League party. This also fell outside the contractual arrangement with Ambrobrite. It was in fact a payment to a political party.

Involvement of President Zuma

30. Mr Williams was referred to an email from Mr Massone to Mr Paul Meehan, who was Mr Massone's superior at the time, dated 18 January 2014. Paragraph 2 mentions that a discussion had been had with President Zuma "on the country's vision and strategy". Some SOEs would be the key to change and economic development. It was said that Mr Zuma's idea is to create a concrete legacy during his second mandate which would start in June 2014. Fundamental pieces of that legacy would involve SARS, Eskom and others. It was made clear that the first "target" of such an institution would be the current or potential CEO.

31. Mr Williams described this as "a very concerning paragraph". He put his concern as follows: "It seems to me Bain had become President Zuma's consultants of choice because Bain seems to have this assurance that they are key to whatever the President's vision for the country is and his legacy". Telkom had been the first target under the name Project Phoenix. Mr Massone regarded this project as a "test case". He also explained what was contained in paragraph 3 of this email which referred to the estimated fees Bain would earn. For instance, in respect of SARS, it would earn $3 million per year.

32. Mr Williams explained that it was highly unusual for a management consultant to be meeting with the President of any country. They would usually meet with a DG of a Department or with a CEO of an SOE. Yet, Bain met the President seventeen times in the period 2012 to 2014, and such meetings continued up to 2016. This was all behind closed doors, after hours and at the President's official residence.

33. This evidence as substantiated by objective evidence in the form of emails confirms that Bain, through Mr Massone, conspired with the President and others to "invade" SARS and other SOEs for an ulterior, and most likely unlawful purpose.

34. It appeared that Bain understood that Ambrobrite's "intelligence" information regarding imminent "leadership and strategic changes" at SOEs and government agencies would be shared with them. An example of this was their introduction of Mr Moyane to Bain in October 2013, a relationship that led to the supposed "CEO coaching" engagements that Bain had with Mr Moyane for the year leading up to his appointment as Commissioner of SARS.

35. Mr Williams was of the opinion that the real intent of the contract between Bain and Ambrobrite was to take advantage of Mr Ndluvo's and Mr KaNozulu's proximity to President Zuma and other senior politicians, and to use that to their advantage to gain non-public information to use for their commercial gain.

36. Bain itself, through its due diligence process, had established some concerning features of this relationship. These concerns were raised, for example in an email exchange between the Director of Finance in Bain's London Office, Mr Geoff Smout and Ms Nicole Olmesdahl, who worked in finance in the South African office. In email correspondence, Mr Smout said, "this whole situation seems very dodgy" and that "for some reason, I do not trust the situation".

Bain's public statement

37. Mr Williams was referred to a public statement by Bain dated 20/3/20 which dealt with the Nugent Commission of Enquiry. It stated that the firm's involvement with SARS was a serious failure, for South Africa and SARS, and clearly Bain too. It said that the final report had laid bare the disarray in which SARS found itself, with both morale and performance severely damaged. Bain accepted that significant errors of judgment had been made in taking on this work. It said it had become an unwilling participant in a process that inflicted serious damage to SARS. Bain did not accept that its representatives knowingly participated in an effort to damage SARS, although it did make many mistakes.

38. However, it had no motive, monetary or otherwise, to damage SARS. The company confirmed that Mr Massone, Bain's former managing partner, was introduced to President Zuma in August 2012

and met with him seventeen times over the following two years. They were aware that they had met to build Bain South Africa's Public Sector Practice but were surprised to discover the frequency of their meetings. In October 2013, Mr Massone was introduced to Mr Moyane by Mr Ndlovu. It would appear, so it was put, that Mr Moyane was the President's intended appointee to be Commissioner of SARS well before it happened.

39. During the course of the following year, Mr Massone had numerous meetings that focussed on "coaching" Mr Moyane for this role, including preparation of a "First 100 Days" document. Following Mr Moyane's appointment in September 2014, SARS issued a formal procurement process in December. Bain won this process but this "may have been irregular" as the firm had prior knowledge of the Request for Proposals (RFP). It needs to be emphasised that this was Bain's own view, expressed publicly. However, there is no doubt that the process was irregular in that no procurement process as required by law, had been followed at all.

40. Bain acknowledged three significant mistakes: Firstly, it overstated the case for change at SARS, which was not justified. Secondly, when Mr Moyane disregarded their proposed organisational structure changes, and developed his own structure, they should have taken remedial steps, but they did not. Thirdly, by late 2016 they either knew or should have known, that Mr Moyane had a different agenda. It was a mistake not to question Mr Massone's decisions or actions closely enough. The statement continues to say that "clearly some responsibility should lie with Mr Massone who displayed poor judgment in dragging Bain into the SARS assignment. He did not adhere to some core Bain leadership values, especially around transparency, and their ways parted in November".

41. In South Africa Bain also allowed dissenting voices to be ignored or side-lined. They added that in hindsight, there was evidence to suggest that Mr Moyane was pursuing a personal political agenda at SARS. This evidence was presented to the Nugent Commission although Judge Nugent did not specifically deal with state capture but dealt in detail with the "seizing of SARS" with reference to a number of specific topics.

42. In the said Bain Press Statement and under the heading "Seeking the truth" the following appears:

> Since the fuller picture came to light through testimony to the Nugent Commission of Enquiry, Bain's mission has been to seek the truth of what happened, to make amends for behaviours which fell short of what was expected, and to make the necessary changes so that they can never happen again.
>
> After Mr Massone's initial testimony, it became clear that he was not being fully transparent with the Commission or with Bain, and we so hired global law firm Baker McKenzie to conduct a thorough, independent, forensic investigation. The work of Baker McKenzie identified almost 1,000 potentially relevant documents which were immediately submitted, unfiltered, to the Commission.
>
> We also mandated Athol Williams, a respected academic, social advocate and Bain Alumnus, to provide his own opinion to the independence and adequacy of the investigation by Baker McKenzie.
>
> Bain regrets the Commission's assessment that we failed adequately to co-operate with its work. We committed to be transparent with the Commission and believe we have made every reasonable effort to live up to that commitment.

43. Mr Williams was asked to comment on this press release. He agreed that Mr Massone showed poor judgment as did others at Bain. He disagreed that Mr Massone was solely to blame. On their own version Bain knew about the meetings with then President Zuma. They must have known about the contract and the exorbitant fees paid to fictitious management consultants. Mr Williams added that Bain knew, perhaps not all the details, but certainly what the relationship was meant to achieve.

Mr Moyane's role prior to his appointment

44. Mr Williams was referred to a document titled "Tracker Table". This document was compiled by Bain's legal team using Mr Massone's diary as well as his recall of meetings with then President Zuma. This reflects a schedule of such meetings between 11 August 2012 and 6 July 2014, as well as a column indicating the topic discussed. There were seventeen meetings. Mr Massone made several comments indicating that at no point was the appointment of Mr Moyane as Commissioner of SARS discussed at these meetings. However, he could not rule out that SARS was mentioned in passing. The "100 Days Plan" topic was discussed on six separate occasions. Bain had explained that these were basically marketing meetings, to display their capabilities to the President.

45. However, the question is why would a busy President attend seventeen of such meetings for such purpose? Mr Williams had previously testified that meetings occurred until 2016. When one reads the document as a whole and the footnote inserted by the legal team, which also refers to a meeting with Dr Zweli Mkhize on 14 August 2014 "to discuss ways to "reshape the South African economy", as well as a meeting with Mr Jeff Radebe on 18 August 2014, for the same reason, it becomes clear what the true purpose was. In the overall scheme of things, that these meetings were for marketing purposes as contended for by Bain, is absurd and cannot be accepted as true.

46. A document which totally contradicts Mr Massone's explanation referred to in the previous paragraph in the context of the schedule of meetings, dated 20 February 2014, from Mr Massone to Mr Franzen, who was a partner at Bain, and who led the day-to-day operations of the Bain project at SARS, was put to Mr Williams for comment. This is highly significant and wholly destructive of the exculpatory version tendered to the public by the Bain Press Release. It was also addressed to two other partners of Bain. Accordingly, it cannot seriously be suggested, as Bain attempted to do, that Mr Massone was largely acting on a frolic of his own over such a lengthy period. It is worth quoting:

> Subject: Quick note – please keep confidential guys, Met President yesterday in C.T. All good. There was also Tom (they (sic) guy we met re SARS) and it really seems he's getting that job, after elections. He was very friendly with me and seems a smart guy to work with.

47. This was on 20 February 2014 – many months before Mr Moyane would be appointed as Commissioner of SARS. This email reflects that Mr Massone was given some assurance that Mr Moyane would be appointed as Commissioner of SARS, some seven months before it occurred.

48. The evidence of the Minister of Finance for the period 2009 to 2014, Mr Pravin Gordhan, had been that the National Treasury had invited applications for the position of Commissioner of SARS. A total of 120 applications had been received and he had suggested to the President that a shortlist be prepared, and a transparent process be followed, but that this had not been done. It is plainly obvious why this route was not followed.

49. Mr Williams was then referred to his affidavit which dealt with the creation of a series of documents containing far-reaching plans to not only restructure certain government agencies and SOEs but also to restructure entire sectors of the South African economy. In his view, the restructuring was aimed at bringing as many organisations and as much financial resources under more concentrated control, which would greatly facilitate state capture. He himself had access to eight of such plans which he described.

50. He was referred to Bain's habit of assessing its personnel annually. The first step in that process was a self-assessment, which is intended to measure performance versus specific targets. Parts of this self-assessment are significant. It is worthwhile to quote para. 3:

> As a "halo-effect" of the relationship with Sipho and the role we played in Project Phoenix, we have been involved in preparing a high-level, outside-in strategic turn-around document on the SA Revenue Service (SARS). The person we prepared the document with and who pitched it to the SA President is most likely going to be appointed as Commissioner in the next few weeks/months and Bain will be assisting him, should he get the job. SARS is one of the largest and highly estimated Government Agency (sic) and a large Bain client in the previous dispensation (90's).

51. This self-assessment is dated 6 December 2013. Mr Williams regarded this comment as proof of the fact that Bain had developed a strategic turnaround document for SARS before either Mr Moyane or Bain were active at SARS. In other words, some ten months before he was appointed, Mr Moyane had "pitched" the turnaround document to President Zuma.

52. After studying the relevant eleven strategic planning documents that were referred to earlier Mr Williams believed they reflected a strategy to enable a grand scale capture, a pattern now well known to South Africa. In his affidavit he had also expressed the view (and confirmed in his oral evidence) that, if Bain was genuinely developing ideas to improve certain SOEs or sectors of our economy, he would have expected that they would present such plans to the DG of the appropriate Ministry or the Minister but not to the President. A project thereafter emanating from the President would in his view then remove proper governance and oversight. He was referred to an email sent by Mr Massone on 18 May 2014 to several persons concerning SAA but the significant comment which also applies to SARS, is the following: "I was told there's going to be change and they'll try to make this a "President's Project", like Telkom, to eliminate the Minister's discretionary power". Contrary to the view of Mr Min, who saw nothing sinister behind these projects and the methods adopted, Mr Williams's opinion was that one needed to consider the number of meetings with the President, after hours in his residence, the nature of the topics and the level of familiarity.

53. These were not benign projects. History has proven him correct. One merely needs to read and consider the Nugent Commission report. Amongst others, it describes the course of conduct of Mr Massone vis-à-vis SARS and Mr Moyane in some detail and, although its mandate was different, there is certainly a significant degree of overlap regarding what transpired at SARS after Mr Moyane's undoubtedly pre-planned appointment.

54. Mr Williams was referred to an email from Mr Ndlovu to Mr Mathepelo and copied to Mr KaNozulu and Mr Massone, dated 22 May 2014. The subject matter was "meeting with the principal". It referred to a "100 days document". This would seem to be the document titled "TM first 100 days" dated 26 May 2014. This document also featured in the Nugent Commission. Mr Williams said that this type of document would present in broad terms what a new appointee might encounter but it would only be presented when they knew who had in fact been appointed. The date is therefore significant. The justifiable question therefore was: how did Mr Massone know (as early as May 2014) that Mr Moyane would be appointed in October? This answer presents itself as obvious. Much of the document was "fairly standard stuff" but surprised him that in some places specific guidance is suggested which normally could only have emanated from someone with years of experience as a consultant to a specific organisation. The specific type of recommendations in his view raised red flags. Three items could be described as "red flags":

    54.1 "Build a healthy sponsorship spine to accelerate change and identify individuals to neutralize"

    54.2 "Leverage external influencers"; and

    54.3 "Identify individuals that could hamper change: 'watch outs' to 'neutralise'".

55. Paragraph 3 of that same section refers to "Take Control". It is ironic that Mr Moyane, speaking in broad terms, did exactly that, as the Nugent Commission report described in greater detail. Months before he was appointed it was also suggested to him that he should set up a transformation programme office and hire a new assistant. According to Mr Williams there must have been someone inside SARS feeding Bain with information.

56. His attention was drawn to a further plan titled "SARS 2.0 – what has to be done" dated August 2014. Under the heading "Executive Summary" the following appears: "In order to transform SARS into an innovative revenue and custom agency, SA government will have to run a profound strategy refresh. . . ." A "profound strategy refresh" suggests that the company or organisation is so dysfunctional, that one needs to "redo" everything from top to bottom. At that time no one would describe SARS as being that dysfunctional.

57. In his affidavit Mr Williams expressed the following view: "The intent was clear even before Mr Moyane and Bain arrived at SARS that they would not be merely updating the world-class organisation that

existed but creating something different."

58. A further plan dated August 2014 titled "Review of SARS Operating Model and Structure" was referred to in an email dated 30 October 2018 from Baker McKenzie to Bain, including Mr Williams. Bain's view had been that Mr Massone had merely been "coaching" Mr Moyane before his appointment. Mr Williams found this position unacceptable on the facts, namely that all these advance plans had been presented to then President Zuma.

59. In an email dated 18 January 2014 from Mr Massone to his superior Mr Paul Meehan, he said the following in this context: "We work with the person to create a high-level strategic plan for the company. If the plan is approved most likely we are going to work with the CEO in its detailing and implementation".

60. The question was raised whether Bain was aware that Mr Moyane would be appointed Commissioner of SARS. In Mr Massone's self-assessment which is referred to above it was also said that the person "we prepared the document with, and we pitched to the SA President is most likely to be appointed as Commissioner in the next few weeks/months and they will be assisting him should he get the job..." So, it does appear that Bain had information already in December 2013 that Mr Moyane was likely to be appointed as the new Commissioner of SARS.

61. Another string of emails was dealt with. On 28 August 2014 at 8:04 am Mr Massone emailed Mr John Beaumont and others and said, "Just had a call and heard that SARS announcement should happen tomorrow or Monday". The reply to Mr Massone and Mr Beaumont from Mr Stephane Timpano at 8:41 am is as follows:

> That's great news. The last thinking was to start with 1 team (M +4 to +6) for 3 months to do fundamentally 2 things: 1. Run a full operational/strategic assessment of SARS 2. Assist Tom in starting properly his new role (direct "CEO" support work). We will then be able, based on the operational/strategic assessment, to build up the platform for a broader SARS transformational program (6-12 months plan).

62. However, in August 2014 this appointment was not yet in the public domain as the announcement was only made in September 2014. It was highly unusual that Bain would have been privy to that type of information, Bain must have had access "to a channel of information into our public institutions". The insider at SARS must have been Mr Jonas Makwakwa, who resigned on 13 March 2018.

63. Bain had multiple meetings with Mr Makwakwa, Head of Internal Audit at SARS, and had been the so-called "deep throat" relaying information about SARS to Bain and Mr Moyane. This information had been discovered by Baker McKenzie on behalf of Bain. It was also stated that Mr Massone had multiple meetings with Mr Makwakwa. Mr Williams emphasised that, contrary to Bain's assertion that all information had been in the public domain, it appeared that there was factual information that no one outside SARS could possibly know.

64. This important paragraph reads as follows: "The level of specificity with which Bain was able to offer action guidance to Moyane would only be possible with access to inside information at SARS", and as it turns out, this is exactly what happened. An email on 30 October 2018, from US-based Baker McKenzie partner, Regan Demas confirms this as he wrote that they have found evidence in Mr Massone's diary that Mr Makwakwa delivered a flash drive to Mr Massone in August 2014. The flash drive contained a document written by Mr Makwakwa titled "Review of SARS' Operating Model & Structure, August 2014". This further confirms that the restructure of SARS was discussed even before Moyane was appointed at SARS. In his affidavit, Mr Massone suggests that he only met Makwakwa once and downplays this meeting. In his testimony to the Nugent Commission, Mr Massone claimed that the materials they prepared for Moyane as "outside-in," used "public data" implying that they relied only on information from outside SARS. However, this seems unlikely considering the discussions and document that they received from Mr Makwakwa.

Mr Moyane's appointment

65. As indicated above, Mr Moyane was appointed on 23 September 2014. SARS issued a request for proposals and Bain was awarded its first contract assignment in January 2015. Against that background, reference was made to an annexure which contained an email from Marilyn Batonga dated 22 November 2018 to Mr Williams and others. This dealt with law firm Baker McKenzie's investigation into the SARS saga. It called this "Project Arrow". The fourth sub-paragraph of paragraph 1 refers to the need to identify the critical components of the next wave of SARS transformation. It also contemplates the appointment of an external consultant. The process would be a closed tender. Bain was one of the potential consulting firms, but it had drafted the RFP specifications. Mr Williams found this improper and rightly so, but in fact it is unlawful in the context of s.217 of the Constitution.

66. Having regard to the Nugent Commission's finding about the conduct of Mr Moyane at SARS, it is important to note, as Mr van Loggerenberg said, that by 2013 SARS scored among the top five revenue and custom authorities in the world in the context of the internationally recognised tax administration diagnostic assessments tool. This makes it even more inexplicable why a total re-structuring and transformation was sought by Bain and Mr Moyane with the concurrence of then President Zuma.

67. On 18 November 2014 Mr Massone sent an email to Mr Meeham. Mr Williams saw the context as being the hope that Bain would be doing work for Telkom, though they admit that they did not have the required expertise.

68. On 4 December 2014 Mr Massone sent an email to Mr Sipho Maseko, the CEO of Telkom. He said:

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

69. Mr Williams was of the view that neither Mr Massone nor Mr Franzen from Bain had expertise of working with tax authorities anywhere. Mr Williams was then referred to an affidavit by Ms. Diyoka dated 16 February 2021. She was the executive in the SARS procurement department who had previously asked Bain for references. She states that her request to Mr Williams had nothing to do with any RFP process. The email was intended to establish whether Bain had a contract suitable for SARS's needs with any Organ of State, in which SARS could then participate. She referred to section 16A6.6 of the PFMA in this context, which in turn refers to a "competitive bidding process by any other Organ of State and subject to the written approval of such Organ of State and the relevant contractors". Her action was therefore legitimate, and she was not involved in any illegal or improper conduct. Mr Williams was of the view that the problem was that Ms Diyoka had sought references from Bain even before the RFP process had begun. She also did not deny that these references were sought for procurement purposes.

70. Why would these references be sought in December 2014? His view was that it had already been decided that Bain would be their consultant. This conclusion is supported by the other objective evidence dealt with above.

71. In his affidavit, Mr Williams described the procurement process in chronological order. On 12 March 2015 Mr Massone sent an internal email to colleagues informing them that Mr Makwakwa had related to him that Mr Moyane had met with the procurement department and that "he doesn't see a problem". Mr Williams explained that SARS had issued an RFP in December 2014 that Bain and others had responded to. That was for certain work to be completed over six weeks. The BAC expressed some discomfort with Bain's proposal but nevertheless appointed it.

72. The ultimate result was that Bain did work at SARS for 27 months after having been awarded an initial contract for six weeks, to the value of some R2 million. In the end they were paid R164 million.

73. With reference to various emails Mr Williams stated the procurement process was ultimately extended, after a to-and-fro debate, on the basis that a contract could be extended because of an emergency, or if it is a single source provider. At the end of the second phase, even a year later, the

problem again arose as to whether to extend the contract without an open tender process. The "solution" was found by arguing that, if Bain did not do phase 3, the first two phases would have become meaningless and wasteful expenditure. The result was that there was no open tender process for phases 2 and 3.

74. The resignation of certain people or the termination of their contracts was then dealt with. This topic was dealt with in detail in the Nugent Commission Report and one should defer to it. I will give one example of Mr Moyane's actions during his reign: On 3 December 2014 Mr Massone wrote to Mr Franzen in relation to the resignation of Barry Hore: "Now I am scared by Tom. This guy was supposed to be untouchable, and it took Tom just a few weeks to make him resign .... Scary...." Mr Hore was the COO of SARS. He was a key figure in the SARS structure as 70% of the operations people reported to him. Mr Hore was also the individual specified in the section of Mr Moyane's "First 100 Days" document that he was advised to "neutralise."

75. Another significant comment appears in the transcript of evidence with reference to an email written by Marlon Bouman to Mr Williams and the Baker McKenzie team. He said the following after briefly describing his tenure at SARS: "However, with hindsight, what does stand out to me was the arrogance with which the Moyane-Zuma-Bain links were dismissed .... I also felt leadership were dismissive of the reports when they first surfaced at the end 2015".

76. Considering the multiple emails referred to above it was clear enough that Bain knew of Mr Moyane's appointment in advance. The nature and content of the materials that Bain had prepared for Mr Moyane and the procurement process (or rather the lack thereof) all indicated that it could not genuinely be said that Bain had been an unwilling participant. Mr Williams also mentioned that Bain had declined an invitation to testify at the Nugent Commission. Neither Bain nor McKenzie ever presented a written report to the Nugent Commission, acting in contradiction to their earlier assurance that their investigation would be wholly transparent. It was clear to Mr Williams that Bain had deviated from any transparent process of investigation, had lied to the public and their staff and had lied to the authorities.

77. Mr Williams confirmed that he had prepared an interim report and submitted it to the Nugent Commission. Mr Williams was asked what further knowledge he had obtained after his reports. He replied that two things led him to change his views. After December 2018 Mr Williams spent another eight months at Bain and after the Nugent Commission he reviewed all materials at his disposal. He was referred to an affidavit by Mr Moyane dated 3 March 2021. Various comments of Mr Moyane were discussed with him, and his material replies thereto are the following:

    77.1 He agreed that he was disgruntled. He was angry and dissatisfied with the corruption in this country.

    77.2 He could not assess whether Mr Moyane acted unlawfully or not but from what he had read, he thought his conduct was unethical and improper.

    77.3 Mr Williams said he did not regard himself as an accuser. He had simply analysed the documents in his possession.

78. Mr Moyane himself stated that in the early part of 2014 the then President Zuma informed him in strict confidence that he intended to appoint him as Commissioner of SARS. Mr Moyane said that President Zuma told him that his intention to appoint him should be kept under wraps as he only intended to formalise it if the ANC won the 2014 general election and he continued to be President.

79. In the context of Mr Williams second affidavit, he was referred to an application made by Bain to cross-examine him, and the supporting affidavit of Mr Min, who admitted that there were ethical flaws in its conduct. Mr Massone had not acted appropriately in how he sought to interact with public entities and public figures. Mr Williams replied that his view was that an admission of unethical flaws was completely meaningless unless they identified what those ethical flaws were.

80. Mr Williams gave evidence that Mr Massone was certainly not the "lone rogue" who was acting wrongfully as Bain had tried to portray him. He said organisations do not work that way, but they do regularly

try to re-assure the public by stating that a particular wrongdoer has been dealt with and the problems were thus solved. The email exchanges and the self-assessment report supported this view.

81. Mr Min himself stated that Bain SA had given some input into the draft RFP (as Mr Williams had confirmed) and that Bain SA was well positioned, given its strong relationship with Mr Moyane.

82. Lastly, Mr Williams described the consequences of his involvement with the Commission for himself, his family, and his career. He wrote the 700 pages of his affidavits himself. No law firm in South Africa would offer him support. Even the Commission could offer him no legal support. UCT, at which he lectured ethics told him that he was neglecting his duties and asked him to leave. In his view whistle blowers do not have sufficient protection. All he wanted from Bain was to make a full disclosure and then make amends for it. He had launched a public campaign recently to urge this.

83. The conclusions that Mr Williams arrived at were fully supported by the emails and documents referred to by the Commission. He was held to be a strong credible witness speaking with courage and conviction. The Commission agrees that the whistle blower legislation should be revisited and strengthened for the benefit of persons such as Mr Williams.

ASPECTS OF THE NUGENT REPORT

Mr Vlok Symington

84. Mr Symington had been employed at SARS since April 1990 and was a senior executive in March 2021 when he gave evidence at the Commission. He was called principally to describe the events of 18 October 2016.

85. On 18 October 2016 Mr Symington was busy in the office drafting an affidavit when Mr Titi, the bodyguard of Mr Moyane, asked him to hand over a letter that had emanated from the Hawks. They then went to the boardroom where several Hawks officers were present. He was again asked to hand over that particular letter. It appears certain emails were attached to this letter erroneously, and these were from the National Prosecutions Authority (NPA) and were apparently confidential. Mr Titi did not allow him to leave the boardroom, a scuffle ensued, and Mr Titi grabbed the letter. Mr Symington then called the emergency number of the SA Police Service as he was being held against his will.

86. The detailed evidence regarding the background to the Hawks or Advocate Pretorius's letter is in my view not relevant to the TORs of this Commission. Be that as it may, serious allegations were made against Mr Moyane, including that he perjured himself when he denied in an answering affidavit that he had laid criminal charges against Minister Gordhan. This contradicted the police docket which indicated that he was indeed the complainant.

87. During September 2017, Mr Symington launched an urgent application in the Gauteng High Court seeking an interdictpreventing any disciplinary action against him resulting from the events on 18 October 2016 and the disclosures he had made to IPID, which are dealt with in his affidavit. The interdict was sought pending the relief referred to in Part B which sought a declaratory order that certain disclosures made by him to Independent Police Investigative Directorate (IPID) were protected in terms of the Protected Disclosures Act 26 of 2000. The application was dismissed with costs on 22 September 2017.

88. In his said affidavit Mr Symington states that the disciplinary enquiry would be attended to by the Chairman pending the resolution of Part B. Subsequently the interdict application issue was settled shortly before the main application was heard. In his affidavit he criticised the presiding Judge for holding that the incident on 18 October 2016 was trivial and exaggerated.

89. Mr Symington was referred to his further affidavit dated 24 February 2021. Again, this concerns facts pertaining to what led to the disciplinary enquiry against him, and the conduct of Attorney Mothle who was instructed by SARS to do the necessary investigation and to submit a report. Having regard to Mr Symington's urgent application, the subsequent events pertaining to his disciplinary enquiry and

the TORs, as well of the judgment of the Full Court in the Gordhan/Pillay matter, it is my view that this further evidence is no longer of any relevance.

Mr Johann van Loggerenberg

90. From the end of September 2014, when the appointment of Mr Moyane as Commissioner was announced "out of the blue", Mr van Loggerenberg said that two things happened. First, the public attacks on SARS and its officials ran unabated. By the end of 2014, these dossier type attacks were coming "thick and fast". Persons from within the state intelligence environment allegedly began to feed these dossiers into the media. Second, Mr Moyane did "absolutely nothing" to defend SARS or allow people in SARS who were able to defend SARS and its work to do so. The dossiers began to gain incredible traction in the media. There was no opportunity for implicated individuals to deal with or respond to these dossiers as they came in, let alone to be given a chance to see them. Mr van Loggerenberg said that on one occasion he was told that, if he released a statement to the media in response to one of these dossiers which implicated him personally, it would be regarded as gross misconduct on his part, and he would render himself liable to summary dismissal.

91. Mr van Loggerenberg attempted to engage with Mr Moyane with a view to explaining to him clearly that there was something bigger at play and that he could help to protect the revenue services. When his attempts were ignored, he engaged legal representatives to defend himself against what he said were consistent scurrilous and defamatory attacks that were aimed at discrediting him.

92. In what he described as the final attack, Mr van Loggerenberg told the Commission that a dossier appeared on 12 October 2014, alleging that senior investigators at SARS, located in the SPU, were part of what was styled a "Rogue Unit", a label to which Mr van Loggerenberg took grave exception. Among other things, it was said that the members of the Rogue Unit were illegally spying on President Zuma, and that they had bugged his home. Poor journalism at the Sunday Times allowed these allegations to appear in more than thirty articles published between August 2014 and April 2016. However, they have since been retracted.

93. Mr Moyane never questioned the veracity of these claims. In fact, Mr van Loggerenberg said that the attacks on SARS and the specific individuals implicated suited him perfectly. He immediately began to target SARS management by suspending the Executive Committee in November 2014, following the "fake news" headline about brothels being run by SARS.

94. On 13 October 2014 Mr Moyane sent a "Message from the Commissioner" to all employees in the Revenue Service in response to the previous day's article. He stated that SARS had lost the moral high ground with these serious allegations, which he had accepted as facts. He would not tolerate any rogue elements at SARS and had thus requested Advocate Sikhakhane to provide him an urgent provisional report.

95. In his affidavit Mr van Loggerenberg dealt with the reasons for the attacks and capture of SARS. He proceeded to give examples one of which is the following: various investigations by SARS into politically connected persons and entities have been ceased and no further action taken since 2014. He also gave details of the cigarette industry and the illicit part thereof and how the collection part of this project came to a halt since about 2015. He could however not refer to the evidence that he had seen in that context. The common denominator between all the cases or projects was that virtually every single one of them had connections to politicians and all of them had state intelligence operations footprints all over them.

96. It was his opinion that Mr Moyane had a clear brief to restructure SARS and dismantle its enforcement capabilities. The Nugent Commission had a similar view.

Mr Tom Moyane

97. Mr Moyane's evidence and his reply can be stated as follows:

    97.1 He was never involved in fraud, corruption, money laundering or similar crimes

97.2 He was not guilty of state capture as the term was generally understood

97.3 On the contrary he was privy to information which was likely to implicate some of his accusers in activities which might or might not fall under the general rubric of state capture; and

97.4 He requested that all the allegations against him be rejected.

98. Mr Moyane regarded the press statement made by Bain as "unfortunate". He said that he was aware of the findings of the Nugent Commission. He said that his view was that this was a well-orchestrated process, but he was not a party to it. He had also not read its interim report. When the final report was issued, he met with his Counsel and they gave him a breakdown of what it was all about.

99. He admitted that Bain had performed services for SARS from late 2015 to 2017 when he was Commissioner. His attention was drawn to the Bain Press Statement of 17 December 2018. It said amongst others that the firm's involvement with SARS was a serious failure for SARS, for South Africa and for Bain. His view was that this is not so and was misinformed. He was also referred to a passage that said the following: "In hindsight, there is evidence to suggest that Mr Moyane was pursuing a political agenda at SARS. Proper due diligence may have identified this risk". Mr Moyane's reply was simply: "preposterous". He added that they had failed to provide clear examples as to what this political agenda was about. In addition, SARS was not a political institution, it had clearly defined tasks and responsibilities. They were dealing with taxpayers and there was no time for politics.

100. In his affidavit he stated that there was nothing untoward or irregular about Bain's appointment. In fact, he could state without fear of contradiction that the Bain/SARS relationship yielded the best results ever recorded in the entire history of SARS. Notably, his view stands in stark contradiction of the views of Mr Williams, Bain itself, Mr van Loggerenberg and most importantly the Nugent Commission.

101. Mr Moyane was referred to a bundle of documents and correspondence between the Commission and Mabuza Attorneys on his behalf. This made it apparent that through his attorneys he was personally invited to attend and testify at the Commission. He was also given a transcript of the hearing from time to time and was asked whether he intended to respond to allegations concerning him. He took "cognisance" of that. He admitted ultimately that he did not take up the invitation to comment on the interim report prior to its release. The same applied to the final report. He was asked to state plainly and simply why he had not given evidence. His reply was that he did not want to answer the question. He agreed that he had not sought a review of the report.

102. He agreed that in the "early part of 2013" President Zuma informed him that he intended to appoint him as Commissioner, after he had applied for such position. This would be dependent on whether the ANC would win an outright majority in the 2014 elections.

103. Mr Moyane explained that his affidavit was incorrect where it referred to the early part of 2013. It should be after September. He stated in his affidavit that he felt well-qualified for the position though he did not have any experience in taxation but had been a generalist or senior executive in the public sector. He was then asked whether he knew why the President had appointed him. He replied that he was an economist, as he had completed a bachelor's degree in economics in Mozambique, whilst apparently working at various firms (having been seconded by the ANC). He had also already been the CEO of the Government Printing Works. Thereafter, he "transformed" Correctional Services. He did not know whether the President had considered a competitive process or whether he had discussed this with Mr Gordhan.

104. There was a follow-up meeting with the President, but he could not recall the date and month. It was after he had submitted his application. The President was in a meeting with the Chairman and CEO of Telkom and the Managing Director of Bain, Mr Massone. He did have extensive dealings with him as he was the lead person for Bain in South Africa. He did also tell him at a time that he had been earmarked by the President for the post of Commissioner of SARS. As stated above In April 2014 Mr Massone knew of Mr Moyane's impending appointment. In the context of the mentioned self-assessment by Mr Massone dated 6 December 2013, he accepted that there was reference to him. However, Mr Moyane he did not know what "Project Phoenix" was. He also was not familiar with

the company Ambrobrite. He knew Mr Ndlovu as a musician and a playwright. They had been at school together. He admitted that he had a number of meetings with Mr Massone and others at Bain.

105. Mr Moyane met with Mr Franzen from Bain perhaps once or twice a month. He was familiar with the "TM First 100 Days" document mentioned above. It contained discussion points between himself and Mr Massone. He agreed that the various plans were the product of his and Mr Bain's input if he would take over as Commissioner.

106. He stated that the word "neutralise" individuals should not have been mentioned in the context of the "TM First 100 Days" document. It merely referred to accelerated change to consolidate structures of the organisation. It was unfortunate that this word was used. His idea was to "build not to come into strife". He suggested that Mr Massone might be to blame for the word "neutralise" as he was of Italian origin. He certainly refused to accept that there had been any intention to "neutralise" anyone.

107. With further reference to the same document and the name of Mr Barry Hore, the former COO of SARS, there was also no intention to test him, despite what appeared in writing. Mr Moyane states that he could not tinker with something that brings revenue to the country. He also added that after three months in the post, Mr Hore resigned without any acrimony.

108. It was put to him that this was not an isolated departure. Six people from the top echelon of SARS left within a year of his tenure. He was referred to the email of 3 December 2014 from Mr Massone to Mr Franzen that stated: "Goodbye, Barry Hore. Now I am scared by Tom".

109. Mr Moyane could not explain why Mr Massone had written this and why he added "it took Tom just a few weeks to make him resign". He denied that this reflected negative or sinister conduct on his part and added that if there had been an agenda on his side, he would not have taken the matter to the Minister of Finance.

110. He agreed that within two weeks of his appointment he had disbanded SARS's Exco and that this was quite a dramatic move. The Sunday Times newspaper had published an expose of a rogue unit. He disarmed this with Mr Pillay. He also discussed this with the Exco members. He also raised this with the Minister of Finance.

111. When he was referred to the Nugent Commission's finding on these topics Mr Moyane disagreed with its conclusions and stated that all the six senior persons left for personal reasons. In his opinion the members of Exco knew of the existence of the "Rogue Unit".

112. Despite the evidence of Mr Williams that Bain staff had no experience working with tax authorities anywhere in the world, Mr Moyane was of the view that Mr Massone and Mr Franzen interacted meaningfully on issues that pertained to the sector. Before his appointment he never enquired whether the Bain staff had any relevant experience. He depended entirely on the knowledge of Mr Massone and accepted the good faith of Bain in general.

113. In the context of his affidavit and the heading "The Rogue Unit" and "State Capture", it was put to him that the Full Bench in the Gauteng High Court held that the finding of the Public Protector that this unit was unlawful, was simply wrong. The report was not only wrong in law but was irrational and subject to be reviewed and set aside. The Sunday Times report, as well as the Sikhakhane and the Kroon reports were all discredited.

114. Mr Moyane stated that he was not aware of the abovementioned decision of the court. He further disagreed that the six senior people left because of any connection to this unit. To him this unit was merely a "side-show". However, if this was so, why call Exco together urgently, release a Press Statement and disband Exco?

Minister Pravin Gordhan

115. Minister Pravin Gordhan gave evidence during 2018 and 2020 and he was also cross-examined by Mr Moyane's Counsel. The evidence of Minister Gordhan commenced on 19 November 2018.

116. In 1998 Mr Gordhan became the Deputy Commissioner of SARS and between 1999 and 2009 he was the Commissioner. From 2009 to 2014 he was the Minister of Finance and then until 2015 he was the Minister of Co-operative Governance and Traditional Affairs (COGTA). From 13 December 2015, he was again in the portfolio of Minister of Finance, (after the dismissal of Minister Nene and the subsequent very brief tenure of Mr Des van Rooyen) until 30 March 2016 when he saw on television that he and several other Ministers had been dismissed. He was not informed of that beforehand. However, he remained as Member of Parliament serving on the Public Enterprises Committee. Later during 2018 he was appointed by President Ramaphosa as Minister of Public Enterprises.

117. In his statement, Minister Gordhan referred to the role of the National Treasury as follows:

> National Treasury is placed at the centre of the State by our Constitution and by the applicable legal framework that regulates the management of public finances, State procurement, revenue collection, tax administration, protection of the financial and banking system, and forensic analysis and input into decision-making with significant financial and fiscal consequences. For this reason, I believe that the capture of the National Treasury was an eminent objective of State Capture, along with the weakening of law enforcement and the capture of the SOEs.

118. Mr Oupa Magashula was appointed as SARS Commissioner on 30 July 2009. He resigned on 12 July 2013 and the post was advertised in the latter half of 2013 with the closing date for applications being 13 September 2013. The Ministry received more than 120 applications. In terms of the South African Revenue Service Act 34 of 1997 as amended by the South African Revenue Service Amendment Act 46 of 2002, Section 6, the President of the Republic appoints the Commissioner of SARS.

119. Once the applications for the posts have been received there is normally a short-listing process. This may have involved one or more Ministers or Deputy Ministers and an External Director-General. A Cabinet memorandum is then prepared, and the Department of Public Service and Administration (DPSA) presents the candidate to Cabinet for approval. That was the procedure that led to Mr Magashula's appointment. After his resignation, Mr Pillay was appointed as Acting Commissioner. The intention was that after the 2014 elections on 7 May, the incoming Minister of Finance would become involved in selecting, or even head-hunting the most suitable candidate. Mr Moyane was appointed whilst Minister Nene was Minister of Finance. They did not get to the interview stage. There was no short list. In his evidence Minister Gordhan said that Mr Nene was best suited to explain what happened after the elections. However, in his written statement, he stated that he became aware that President Zuma wished to exercise his powers to appoint the new Commissioner. He advised him that he may want to put his preferred candidate through the usual process that he had referred to. It appeared that he had ignored this suggestion.

120. For present purposes the following is relevant:

    120.1 Mr Nene was removed as Minister of Finance in early December 2015 and on 9 December the appointment of Mr Des van Rooyen was announced.

    120.2 This caused economic and financial turmoil in the markets and a sharp depreciation in the Rand.

    120.3 A wide-spread public outcry ensued.

    120.4 On Sunday 13 December 2015 the President asked to see Minister Gordhan and subsequently asked him to accept re-appointment as Minister of Finance, which he did.

121. In agreeing to do so again he indicated to President Zuma that there were three issues that required discussion:

    121.1 The ongoing financial predicament of SAA

    121.2 The proposed nuclear procurement deal; and

    121.3 Mr Moyane's role at SARS as Commissioner.

122. At that time no understandings were reached as to how these problems would be addressed. The Nugent Commission had been investigating issues at SARS in a broad context.

123. On 19 February 2016, in the week before the budget speeches, an envelope was handed to Minister Gordhan at the insistence of General Berning Ntlemeza. The envelope contained 27 questions addressed to him from the Hawks. The questions related to the High-Risk Investigation Unit. Charges against him relating to that unit had been filed by Mr Moyane on 15 May 2016 (Brooklyn SAPS Case No. 427/05/15/). Mr Moyane denied having done so. The fact is that he did not lay a charge concerning the activities of the so-called "Rogue Unit" but did lay a charge concerning the alleged early retirement with benefits saga that concerned Mr Pillay, the Public Protector and later a Full Bench of the High Court.

124. Minister Gordhan arranged to visit President Zuma later that day to present that correspondence and to ask him whether he was aware of and agreed with this law enforcement against him. The President merely "flipped the pages of the letter" and said he would discuss this matter with the then Minister of Police, Mr Nhleko. Mr Gordhan subsequently received no information from the President in this regard.

125. On 22 February 2016, just before the budget speech and the preparation thereof, he was asked to meet senior ANC members in Cape Town. The 27 questions and the charges against him were discussed with the Secretary-General Mr Gwede Mantashe, the Deputy Secretary-General Ms Jesse Duarte and the Treasurer General Mr Zweli Mkhize. He was assured that a political solution would be found. However, these questions were leaked to the media which indicated that there was an agenda. Subsequent correspondence was also leaked and Mr Gordhan wondered who those forces were.

126. The NPA laid charges against him which were later withdrawn by the National Director of Public Prosecutions (NDPP) on 31 October 2016, stating neither he, Mr Magashula nor Mr Pillay had any intention to act unlawfully.

127. Minister Gordhan continued to deal with the relationships with and his interactions with Mr Moyane:

    127.1 Mr Moyane blatantly refused to account to him as Minister of Finance on material issues, such as the operating model of SARS.

    127.2 President Zuma did nothing to intervene in the deteriorating relationship nor to facilitate adjudication of the dispute.

    127.3 He faced ongoing personal and institutional attacks from Mr Moyane.

128. On 30 March 2017 President Zuma announced that Mr Gordhan and three other Ministers had been removed from their posts. Mr Gordhan was informed of this through a television channel and he had no contact with the President regarding his decision. He was replaced by Minister Malusi Gigaba. In his opinion the relationship between himself and the President had not broken down.

129. In the context of the term "State Capture" he believed that President Ramaphosa was attempting to steer South Africa in a way in which we could begin to find the moral centre again.

Mr Moyane's application to cross-examine Minister Gordhan

130. It is abundantly clear that there is great animosity between these two role-players and Mr Moyane alleges that Minister Gordhan "made it his life-long mission to have him removed from office, by hook or crook". It will not serve this Commission's purpose or mandate to deal with these personal issues or the "evidence" relating thereto. Mr Moyane's own conduct at SARS is particularly relevant and has been fully dealt with by the Nugent Commission. Whether or not such conduct amounted to "state capture, corruption and fraud" as in terms of the said Proclamation will be dealt with hereunder.

131. Regarding his proposed cross-examination theme of an alleged breach of procurement procedures in the so-called "Monyeki" case, that he improperly participated in the award of a tender to his friend, Mr Patrick Monyeki, and that he lied to Parliament by denying it, Mr Moyane made it clear that any details of such were not included in the sworn statement to the Commission by Minister Gordhan nor was there any evidence before the Commission in the transcripts. The Nugent Commission's Final Report did however deal with this topic in some detail (Chapter 16, par. [22], p. 158-161).

132. On the next proposed topic of racial and hurtful utterances, impairment of dignity and vendetta, these matters fall outside of the Commission's mandate.

133. Regarding the existence and role of the so-called "Rogue Unit", the Gauteng Full Court has ruled on this topic, which puts an end to this topic assuming even for the moment that it ever had anything to do with "state capture". Mr Moyane mentions that the Nugent Commission "inexplicitly and improperly" pronounces that the rogue unit was lawful. Neither did he accept the judgment of the Full Bench on this topic. Mr Moyane also referred to the fact that the envisaged prosecution of Minister Gordhan will provide all evidence, but as said, all charges against Minister Gordhan were withdrawn by the NDPP.

134. On 27 September 2018 a 90-page founding affidavit was filed in an application to the Constitutional Court. The respondents were President Ramaphosa, Minister Gordhan, Judge R. Nugent N.O, Advocate A. Bham S.C, Professor M. Katz, Advocate M. Masilo N.O. and Mr V. Kahla N.O. The last three respondents were assistants to the Nugent Commission whilst the fourth respondent was the chairman of a disciplinary enquiry instituted against Mr Moyane by the first respondent.

135. The main purpose of this application was to declare the conduct of the President in appointing the Nugent Commission and the disciplinary enquiry unlawful and invalid. It is clear that the integrity of every respondent was impugned with rigour. This application was dismissed by the Constitutional Court.

136. Minister Gordhan filed an opposing affidavit in the Moyane application for leave to cross-examine him. He pointed out amongst others, that personal issues were irrelevant and fell outside the Commission's Terms of Reference. The Nugent Commission had already made certain findings. Mr Moyane's services as Commissioner had been terminated by the President on 1 November 2018, following the Nugent Commission's interim report dated 27 September 2018. The "New Integrated Credit Solutions Contract" had been dealt with by the Nugent Commission, though not by this Commission.

137. On 30 November 2020 Minister Gordhan was led on the contents of a "clarificatory affidavit" that he had furnished to the Commission. In paragraph 22.5 Mr Gordhan said the following: "I believe [that] Mr Moyane's "personal goals" while he was SARS Commissioner included the advancement of a State Capture Project". In that context he referred to Chapter 2, par. [19] of the final Nugent Commission Report where it was said that "the failure of integrity and governance at SARS, soundly evidenced alone by the change over four years has certainly compromised the performance of its core function of collecting tax, to the detriment of this country at large".

138. During that clarification of evidence Mr Gordhan also rectified his earlier evidence that Mr Moyane had laid charges against him at the Brooklyn Police Station. That written complaint had surfaced later when it was disclosed to the Commission, and it does not contain his name. The charges preferred by the NPA later had to do with the pension fund debate involving the early retirement of Mr Pillay.

139. He described the lower tax compliance and the dismantling of various capabilities and institutions at SARS (all detailed by the Nugent Commission Reports). He concluded that Mr Moyane's conduct served the cause of "what today we know as state capture. . . "

140. This Commission is not concerned with whether Mr Moyane's actions were good or bad for SARS. It is first concerned with the question of whether Mr Moyane's actions at SARS were motivated by a desire to pursue state capture. And it is very important to keep these issues separate.

141. The crux of Minister Gordhan's cross-examination appears from his evidence:

    141.1 He agreed that his entire outlook was that Mr Moyane was motivated by state capture in performing his duties

    141.2 Amongst other things, "State Capture" was a term for crimes like corruption, fraud, and money laundering

    141.3 An allegation of being involved in State Capture was very serious.

    141.4 There should be facts supporting such allegations

141.5 As events unfolded during his tenure as Minister of Finance and Mr Moyane's tenure, hostilities developed

141.6 The activities that he began to see from 2016 at SARS when he was Minister of Finance led him to believe that Mr Moyane was engaging in activities that could be described as contributing to state capture

141.7 His knowledge and understanding of state capture evolved over time

141.8 Repeated changes to the Cabinet and the boards of SOEs were made to control such institutions by the "peddlers of state capture"

141.9 He accepted that state capture was essentially about capturing the Treasury, capturing the money; it could however also be by facilitating tenders, procurement and contracts

141.10 The four-day appointment of Mr van Rooyen was an attempt to capture the Treasury

141.11 The appointment of Mr Moyane followed a pattern of employing pliable persons within the government system and the private sector; and

141.12 The High-Risk Investigation Unit was the same entity as the so-called rogue unit. This topic dealt with its existence and its lawfulness. He confirmed that it did exist and that he had participated in the decision to establish it. This was around February 2007.

FINDINGS

142. How can "State of Capture" be defined? The Public Protector did not specifically define this concept nor explain explicitly why she used it. Reasonable deductions can however be made from her repeated references to Chapter 10 of the Constitution which deals with "Public Administration" and in particular s 195 which deals with "Basic values and principles governing public administration", which include in them the principles promoting a high standard of ethics, accountability, and transparency. The principles referred to in that section apply to administration in every sphere of government, Organs of State and Public Enterprises.

143. In addition, s1 of the Constitution describes other values such as the supremacy of the Constitution and the rule of law. Reference was also repeatedly made to the Executive Member's Ethics Act 82 of 1998 and the Executive Ethics Code promulgated thereunder. This Code required Cabinet members, Deputy Ministers and MEC's to act in good faith and in the best interest of good governance at all times. They may also not act in a way inconsistent with their office. Furthermore, they may not act in a way that may compromise the credibility or integrity of their office or of the government. In the recommendations the Public Protector's report referred specifically to SOEs like Eskom, Transnet, Denel and SAA but not SARS.

144. In terms of s 83 of the Constitution the President must uphold, defend and respect the Constitution. In paragraph (ii) of the Public Protector's report the following appears:

> This report relates to an investigation into complaints of improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and State Owned Enterprises (SOEs) resulting in improper and corrupt award of state contracts and benefits to the Gupta family's businesses.

145. This statement indicates what the Public Protector had in mind when using the term "State of Capture".

146. In his evidence Minister Gordhan agreed that the term "State Capture" related normally to crimes like corruption, fraud, money laundering and related activities. However, he added that, especially in the light of the conduct of Mr Moyane towards himself and the situation at SARS, state capture is to take control of an institution either at Board or CEO level, which was the case in the present instance. In addition, this "capture" protects those in power from an interrogation or transparency in relation

to the kind of damage that is caused within the institutions. Furthermore, Mr Gordhan said it was about "repurposing" an institution or part thereof. For example, in SOEs, the repurposing took place in procurement on the one hand and the Treasury function on the other hand.

The Role of Mr T Moyane

147. Mr Moyane was appointed for a five year term by President Zuma from 29 September 2014 to 29 September 2019 but was dismissed by President Ramaphosa on 1 November 2018 after the issue of the Interim Report of the Nugent Commission of Inquiry dated 27 September 2018. His application to the Gauteng High Court to interdict the implementation of the interim report and to have it set aside, and that President Ramaphosa be interdicted from implementing the remaining recommendations, as well as interdicting him from appointing any person as Commissioner of SARS, was dismissed with costs on 11 December 2018 under Case No. 82287/2018.

148. His application to the Constitutional Court directly on 1 October 2018 was refused on 21 November 2018 because no basis had been laid for direct access. His application to the Constitutional Court for leave to appeal the Gauteng High Court decision was also dismissed.

149. The conduct of Mr Moyane whilst at SARS, having regard to the evidence of witnesses before the Nugent Commission and the evidence of Mr A. Williams, Mr J. van Loggerenberg, Mr V. Symington and Minister Gordhan, can best be described as appears from the interim report of the Nugent Commission. Appropriately quoted in full it reads:

> What is clear to the Commission is that SARS reeks of intrigue, fear, distrust and suspicion. We have heard of it repeatedly in evidence, and we have encountered it ourselves. The trajectory of modernisation that had been in the making for a decade was summarily stopped when the current Commissioner, Mr Tom Moyane took office on 27 September 2014, and the systems are degenerating as technology advances. The operating model has been restructured such that fragmentation of functions inhibits co-ordinated action to the benefit of delinquent taxpayers. The Large Business Centre as it had existed has been eviscerated to the detriment of revenue collection. The restructuring of the organisation displaced some 200 managerial employees from their jobs, many of whom ended up in positions that had no content or even job description, and in exasperation many skilled professionals have left. Others remain in supernumerary posts with their skills going to waste. Measures to counter criminality have been compromised and those who trade illicitly in commodities like tobacco operate with little constraint. Relations between the Commissioner of SARS and other state institutions – the Treasury, the Auditor-General, the Davis Tax Committee, the Financial Intelligence Centre – are icy, if there is any relationship at all, and SARS is isolated from its former high status amongst international bodies. Meanwhile, the reputation of SARS continues to be tarnished by reports in the media, many of which are true, to which the only response by Mr Moyane has been to attempt to intimidate the media by spurious litigation. In the unanimous view of the Commissioner and those appointed to assist him, that has been brought about by at least reckless mismanagement of SARS under the tenure of Mr Moyane and it ought not to be permitted to continue. We consider it imperative that a new Commissioner be appointed without delay to remove the uncertainty at SARS and enable it to be set on a firm course of recovery to arrest ongoing loss of revenue.

150. As a result of this finding the President was advised to remove Mr Moyane from office and to appoint a new Commissioner.

151. The interim report also mentioned that it would deal with the role of Bain, the dissolution of EXCO, the lawfulness or otherwise of the so-called Rogue Unit and the replacement of the Operating Model at SARS, and the relationship with other institutions, in its final report. At that stage of the proceedings the Commission said:

> No responsible leader of a major and complex organisation would have acted as Mr Moyane did, with lasting impact on the current state of SARS. With no experience of SARS or of revenue collection, his first decisive step was to denounce and humiliate its senior management and de-

prive it of its role. Having done so he turned a world-class organisation upside down, leaving SARS as it is today: wracked with intrigue, suspicion, and distrust, and fear of senior management; information technology that is in decay; a fragmented structure that inhibits collaboration amongst functions to the detriment of revenue collection; space for the illicit trade to flourish; loss of long-serving skills; skilled and experienced personnel in supernumerary positions doing little if anything at all; and revenue collection compromised.

152. This is fully supported by the extensive evidence of Mr Williams together with the objective evidence contained in the annexures to his affidavit submitted to this Commission. In addition, the final report contains the following incriminatory comment:

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

153. It must be remembered that Minister Gordhan had testified that, although the position of Commissioner had been advertised and 120 applications had been received, the normal process of drawing a short-list of candidates and interviewing them had not been followed. Furthermore, despite suggestions to President Zuma that this process be followed, it was not. Instead, President Zuma told Mr Moyane in confidence some months before his actual appointment that he would be appointed.

154. Mr Massone of Bain & Company must have known this as he had, together with Mr Moyane prepared certain documents and plans that described in some detail what role Mr Moyane would play at SARS, once his appointment was in place. Included in this preparation was the document dealt with in some detail by Mr Williams, titled “TM First 100 Days”. This document referred to a major restructuring process including the removal of certain persons who would most likely oppose this. Mr Moyane attempted to down-play this by stating that the use of the term “neutralise” in this context was “unfortunate”.

155. Mr Moyane deposed four affidavits and gave oral evidence on certain topics. He also testified before Parliament on 13 March 2018 about the “New Integrated Credit Solutions Contract”. In its final report the Nugent Commission found that Mr Moyane had approved this appointment on 15 February 2018, and that his evidence to the contrary was not true. He was the final approver for the award of the contract.

Projects that involved or did not involve Mr Moyane

Bain & Company

156. Mr Williams gave extensive evidence of Bain & Company’s role on 23 and 24 March 2021. His evidence was supported by objective evidence in the form of identified emails and plans. The final report of the Nugent Commission also dealt with the role of Bain.

157. Mr Massone was the local representative of Bain. The partly exculpatory media statement released by Bain on 20 March 2020 sought to put the blame for the events squarely on Mr Massone’s shoulders. It omitted to give the full and true facts, namely that Mr Massone had either copied or sent a number of emails to Bain directors.

158. Bain concluded a so-called “Business and Stakeholder Management Contract” on 1 November 2013 with Ambrobrite. The latter company was however an events management company for artists and the like with no management consultancy experience. It was managed by two artists, one of whom was Mr KaNozulu, and the other Mr Ndlovu, who appear to have had a close relationship with President Zuma. The real intent of the mentioned contract was to take advantage of Mr Ndlovu’s and Mr KaNozulu’s proximity to President Zuma and other politicians.

159. Ambrobrite introduced Mr Moyane to Bain in October 2013. This relationship led to the so-called "CEO coaching" engagements that Bain had with him in the year leading-up to his appointment as Commissioner of SARS. Bain met President Zuma seventeen times between 2012 and 2014 and Mr Williams testified that such meetings continued up to 2016. Mr Massone represented Bain in these meetings.

160. Mr Moyane in turn knew Mr Massone, and also knew months in advance of his intended appointment having been told of it by President Zuma himself.

161. According to Mr Williams, Bain had become President Zuma's consultants of choice, without any honest procurement process as required by the provisions of s 217 of the Constitution.

162. Mr Moyane's appointment was similarly made without the usual process of compiling a short-list, interviewing candidates, and preparing a Cabinet memorandum for consideration, as Minister Gordhan had testified. An exchange of emails between Mr Massone to his superior Mr Franzen on 4 April 2014 indicates that President Zuma had assured Mr Massone that Mr Moyane would be appointed Commissioner of SARS.

163. The Bain document referred to above as "TM First 100 Days" is dated 26 May 2014 and confirms prior knowledge of the appointment of Mr Moyane as Commissioner of SARS.

164. In the context of Bain and Mr Moyane being in deep collusion to restructure SARS, the Nugent Commission dealt with the procurement of a contract to enlist proposals for a turnaround plan for SARS. On 11 November 2014 Mr Moyane addressed a memorandum to the Finance Minister, Mr Nene seeking approval to approach independent consulting companies. The Nugent Commission found that what Mr Moyane had represented to the Minister was untrue, both in what was said and in what was not disclosed. In truth the only approach was to be made to consulting companies to entice them to participate in a procurement sham.

165. Approval having been given by the Minister, SARS at first approached Telkom with a request to "piggy-back" (as Mr Williams described it) on a contract that Telkom had with Bain. Mr Massone said that he knew nothing of the approach to Telkom, which was untrue. He in fact wrote to Mr Maseko of Telkom on 4 December 2014, making that proposal and in fact used the word "piggy-back". This came to naught. A closed tender process was then followed which the Nugent Commission described as a sham. Some of the proposals, which included the pricing, were completed within a single day of the Request for Proposals. Though Mr Massone denied that Bain had prior knowledge of the proposal, an email of 28 August 2014 records that Bain would have a few weeks to "ramp up" the procurement process. The RFP was issued on 11 December 2014 and some of the documents indicated that Bain replied by 12 December 2014.

166. There was no intention by Mr Moyane (and Mr Makwakwa) that there would be a return to the market for phase 2, which had already been planned, and Bain was to get the contract. The Nugent Commission found that the procurement process was manipulated to secure the restructuring of SARS by Bain, which would serve Mr Moyane's interests in taking control of SARS, and Bain's interest in making money.

167. It also recommended that the apparent practice at SARS to accept "loss leader" bids where multiple contracts were envisaged for a project, be reviewed by the National Treasury.

168. In the context of the "restructuring" process, there is no evidence that SARS was in a poor state as at 1 April 2014. The most significant change insisted upon by Mr Moyane was to combine the roles of overseeing individual tax and of corporate tax into one division called "Business and Individual Tax" (BAIT), reporting directly to the Commissioner. Contrary to the suggestion that this had been approved, their approval presentation took less than an hour and no-one had knowledge of the structure it was supposed to replace, and with no guidance other than that of Bain and Mr Moyane.

169. The resultant fragmentation was to the detriment of SARS and the effect on enforcement was particularly severe.

The Gartner contract

170. The Nugent Commission's Report dealt with a further instance regarding Mr Moyane's role in "restructuring" Information Technology and the "Gartner Contracts. SARS is an information technology-driven business. IT enables it to deliver on its core business. SARS needs to be linked to the digital economy and ideally be ahead of relevant developments. During early 2014 it had an effective and world class IT division. The division had dedicated people and was led by a "core team" headed by Mr Hore.

171. Mr Hore left SARS in January 2015. Before that he had prepared extensive handover notes that gave some insight into the direction and future of the "Modernisation Programme" which was to run in three phases. This programme was aimed at delivering performance in three areas: service, enforcement and compliance and cost efficiency.

172. After Mr Moyane had arrived in September 2014, he without consulting Mr Hore, informed all employees that he required external service providers to conduct an independent review of the "Modernisation Programme" and the "SARS Operation Model".

173. Bain had recommended a year before that there be an IT review. An Irish enterprise called Gartner was brought in for that purpose. Gartner specialises in conducting information technology research, which it makes available to clients on subscription. A smaller part of its business is to provide consultancy services. SARS had subscribed to its research service for some years and it still did so in December 2018.

174. Until 2016, Gartner did not have a presence in South Africa and was represented by a sales agent. If it secured consultancy business it would contract the work to independent consultants. While the contract to provide its consultancy services was between Gartner and SARS, delivery of the services was to be made by its sales agent Mr Willemse. He also represented Gartner in the early discussions that led to its appointment, and in the execution of the various contracts. Mr Willemse knew Mr Patrick Monyeki, professionally, who is well-grounded in information technology. He was also an acquaintance of Mr Moyane. On 24 September 2014, a meeting took place at Bain that was attended by Mr Monyeki and Mr Moyane amongst others.

175. Mr Willemse testified before the Nugent Commission that Mr Monyeki had told them of a new Commissioner at SARS who had "identified various issues" relating to the modernisation programme that needed attention. He said that he did not know what Mr Monyeki's relationship was with SARS, nor in what capacity he was acting, nor did he ever ask. The Nugent Commission said the following on that topic: "We regret that we are sceptical of that evidence".

176. Mr Willemse had been told by Mr Monyeki that SARS had identified Gartner as the organisation to undertake the project, and he was asked to provide input for the development of TORs for this purpose. These TORs were written by Mr Monyeki and Mr Willemse. In this context the Nugent Commission's Final Report: "There are obvious risks in a potential supplier writing its own Terms of Reference. The first is that it might write the terms in such a way that they favour its eventual appointment. Another risk is that the supplier might tailor the Terms of Reference in a manner that increases the likelihood that it would be appointed or retained for further work". The Nugent Commission found that the ordinarily required competitive procurement was not followed. This was unlawful and it was recommended that, if this was found by SARS to be so, that the contract be declared void and that expenditure incurred which offered no value to SARS, be recovered.

177. All the evidence before the Nugent Commission and this Commission point to one unescapable fact: Mr Moyane, at the behest of President Zuma, and in collusion with Bain – who acted primarily but not solely through Mr Massone – took control of SARS and restructured it to their benefit and to the detriment of the organisation.

178. In addition to the comments regarding Mr Moyane's role in the "New Integrated Credit Solutions" contract, on 13 March 2018 Mr Moyane appeared before the Parliamentary Standing Committee on Finance. He was asked the following question:

> I just would like SARS or the Commissioner to confirm whether or not New Integrated Credit

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

179. In response Mr Moyane said:

> On the issue of NICS and the linkage with Mr Monyeki, I do not know whether Mr Monyeki is a board member or is a director of NICS, I do not know. All I can say is that I do know Mr Monyeki like any other person that I know. I think it is prudent and therefore important that the Committee can do its homework to prove that he is a Director there. Certainly, NICS has been doing work with SARS since 2004. They have been doing work with SARS on debt collection. That we have on record. Now the point that says we may have – the procurement processes at SARS are very clear. There is all the tender processes that are followed and then you have bid evaluation, the Bid Evaluation Committee. The Commissioner does not sit in any of those committees, none at all. The Bid Adjudication Committee which is the NBAC, which is the highest, comprises of all chief officers except the Commissioner and then they take a decision based on the presentation of the Bid Evaluation Committee and they make an announcement and the award the tender to the preferring tender, tender presenter.
>
> I do not get involved and I do not get informed as to who the companies are, except when they indicate in a meeting that six, eight companies have been submitted and they have been awarded and this is what happens. I do not get involved.

180. The Nugent Commission Final Report stated:

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

181. It is also not true that he does "not get involved" in such appointments. Mr Moyane was the final approver for the award of the contract. In his replying affidavit he acknowledged expressly that he had been "involved" in the award of the contract.

CONCLUSION

182. From a "State Capture" point of view as defined appropriately by Minister Gordhan above, a critical result was that the constitutional imperatives required by s195 and 217 of the Constitution were breached. This in turn resulted in lack of oversight, accountability and transparency and the avoidance of compliance with the provisions relating to fair, equitable, transparent, competitive and cost-effective processes. These transgressions seem to have been the primary motives of President Zuma, Bain & Company and Mr Moyane. This conduct falls squarely within paragraphs 1.1 and 1.4 of the Schedule to the President's Proclamation 3 of 2018.

183. The SARS evidence is a clear example of how the private sector colluded with the Executive, including President Zuma, to repurpose and hollow out an institution that was previously praised for its efficacy. SARS was systemically and deliberately weakened, chiefly through the restructuring of its institutional capacity, strategic appointments and dismissal of key individuals, and the instilling of

a pervasive culture of fear and bullying. This is a clear example of state capture. SARS' investigatory and enforcement capacity presented a hurdle to those involved in organised crime, and was, therefore, a target for those engaged in state capture. The involvement of the media in perpetuating false narratives which discredited targeted people as well as providing grounds for their removal, is a notable feature of this evidence.

184. There was evidence to the effect that President Zuma had wanted a "legacy" to be left behind, which included the almost total restructuring of SARS and other SOEs, with his preferred consulting company Bain, and his preferred SARS Commissioner Mr Moyane, both appointed without lawful and procedurally correct processes. Reference was made to "collusion" in this context, and rightly so. The National Prosecuting Authority should consider whether this uncontested conduct of the then President can be brought within the confines of Prevention of Combatting of Corrupt Activities Act 12 of 2004. Whether this is a practical suggestion because President Zuma is already on trial remains to be seen.

RECOMMENDATIONS

185. Considering the said Public Protector's Report, the Nugent Commission Reports and the evidence before this Commission as a whole, and against the background of the President's said Proclamation, it is recommended that:

185.1 In the light of the facts pertaining to Bain's unlawful role and its failure to explain its conduct fully and truthfully, all of Bain's contracts with Government Departments and Organs of State be re-examined for compliance with the relevant statutory and constitutional imperatives.

185.2 The NDPP should consider prosecutions in connection with the award of the Bain & Company contract at SARS.

185.3 The SARS Act of 1997 be further amended to provide for the appointment of a Commissioner of SARS by the President after consulting with the Minister of Finance and according to open and transparent prescribed processes.

185.4 Mr Moyane be charged with perjury in relation to his false evidence to Parliament.

185.5 The abuse of a position of authority be made a criminal offence, where such power is intentionally used other than for purposes relating to the position that any person may hold in the services of the central, provincial or municipal spheres of government, and all organs of state. Such a statutory offence should also require considerable sentencing powers. However, a reservation is that the Prevention of Combating of Corrupt Activities Act 12 of 2004, by way of Chapter 2, Part 1 of s.3 (b) (ii) already seems to cater for the abuse of a position of authority.

185.6 The Protected Disclosures Act 26 of 2000 be amended to protect disclosures and persons making disclosures outside of an employer and employee relationship.

185.7 The Conditions of Service of all employees in the public sector and Organs of State contain a clear provision that prohibits all such employees from entering into any contract for the supply of any goods or services to any such employer. Such similar conditions should apply to the Executive as well.

CORRUPTION IN PUBLIC PROCUREMENT

PUBLIC PROCUREMENT IN SOUTH AFRICA: THE MANDATE OF THE COMMISSION

1. The government is the single biggest procurer of goods and services in the country. In 2017, for example, South African Reserve Bank statistics show that the government channeled R967 billion towards public procurement for goods and services, which equates to 19.5% of the country's GDP.
2. The public procurement system must operate in a way which advances the national interest. It must do so in accordance with a system which, in the words of section 217(1) of our Constitution, is fair, equitable, transparent, competitive and cost effective. It must simultaneously address the exclusions and the discrimination of the past.
3. International experience suggests that, of all government activities, public procurement is one of the most vulnerable to fraud and corruption. It is widely acknowledged that a public procurement system will be fit for purpose only if it is founded on good governance and good management and enforced through effective monitoring and oversight measures which ensure accountability. Anything less renders the system open to abuse.
4. One of the reasons this Commission was established was to enquire into the functioning of public procurement in South Africa following widespread concerns that the system was rife with corruption. These concerns are reflected in certain of the Commission's TORs.
5. In summary, one of the tasks of the Commission is to assess the impact of corruption (including fraud) and undue influence on public procurement, and to make recommendations to curb irregularities and the corrupt manipulation of the procurement system.
6. It is one thing to identify through the evidence the nature and the extent to which corruption may have penetrated the system; it is quite another to say how that could have happened. This second enquiry involves a review of the procurement cycle as a whole in order to identify the points of systemic weakness which, however unintentionally, contributed to the growth and spread of corruption. So, for example, the decentralisation of our procurement system might seem to be unrelated to the present enquiry until one considers how that decentralisation may have hampered effective monitoring and oversight while simultaneously requiring a substantial increase in the number of trained procurement officials to operate the system. Hence, the wide-ranging considerations that are addressed here.

The procurement cycle

7. For present purposes the procurement cycle may be said to cover three main stages: pre-tendering; tendering and post-award. Each of those stages covers a range of activities:

    7.1 Pre-tendering

        7.1.1 Needs assessment

        7.1.2 Planning and budgeting

        7.1.3 Definition of requirements

        7.1.4 Choice of procedures

    7.2 Tendering

        7.2.1 Invitation to tender

        7.2.2 Evaluation

        7.2.3 Award

PATTERNS OF ABUSE AT EACH STAGE OF THE PROCUREMENT CYCLE

Pre-tendering phase

Unnecessary procurement

8. The evidence shows that goods and services were often procured when they were not needed, and often in duplication of work which had already been done.

Transnet

9. The evidence from Transnet shows that large amounts of money were extracted through payments for advisory services from consultancies like McKinsey, Regiments and Trillian. Certain advisory services were procured by Transnet even though Transnet had the necessary internal capacity and expertise and did not require such services.

10. In some cases, advisory services were procured for certain projects without the participation, knowledge or approval of the business owners of those projects. In other cases, transaction advisory services were procured for activities which had already been competently executed by Transnet's Group Treasury. The procurement of advisory services was not needs-based. Instead, it was driven by certain high-level executives deciding to give business to these companies.

11. Not only were these services not needed, in some cases Transnet's own Treasury warned that the transaction advice provided by Regiments and Trillian was dangerous and should not be followed.

12. Despite McKinsey having been appointed for certain transaction advisory service at Transnet, there was a parallel appointment of Regiments for the same services. No procurement preceded this agreement, and Regiments had no contractual relationship with Transnet. This meant that there were two contracts for the same work.

Eskom

13. In relation to Eskom, Ms Mosilo Mothepu, former senior manager at Regiments (and later CEO at Trillian Financial Advisory), states in her affidavit to the Commission that:

> Eskom internal teams had the expertise and skills to perform the duties that Trillian Financial Advisory/Trillian Management Consulting/Trillian Capital Partners ("TFA/TMC/TCP") was mandated to perform. The [exorbitant] fees that TFA/TMC/TCP charged were unjustifiable and Eskom did not get any value for money.

Free State Provincial Government

14. The Commission heard evidence related to the Free State/Estina Vrede Dairy project to the effect that Mr Mosebenzi Zwane, MEC for Human Settlements, declared in a provincial cabinet meeting in December 2010 that he would ensure that the unspent money in his budget would be committed before the end of the financial year, which was less than two months away. This was because, if unspent, those funds could not be rolled over to the next financial year. In January, Mr Zwane told his colleagues that 66% of the budget had been spent over the holidays, in building houses.

15. In fact, this money was paid to supposed service providers before any work had been done, without any proper procurement process. Some of these providers had no expertise in building houses, nor were they registered with the National Home Builders Registration Council, nor did they comply with other public procurement requirements. R631 million was disbursed rapidly in early 2011 on these contracts. The Department later struggled to find any housing that had been delivered in return.

SARS

16. Mr Vlok Symington told the Commission that by 2008/2009 the South African Revenue Service (SARS) was recognised internationally as one of the best and most efficient tax administration services. As a result of how effective SARS became at enforcement and oversight, it was "praised and studied worldwide". Mr Athol Williams said that no one, at this stage, could legitimately have described SARS as dysfunctional. Against this background, the need for the services of a management consultancy was doubtful at best.

17. Despite this, Mr Williams told the Commission how Bain was contracted to perform consultancy services at SARS, including recommending and implementing a "profound strategy refresh" and complete organisational restructure, to the tune of R167 million, over 27 months. For Bain to recommend restructuring, which is usually a last resort, suggests that SARS was completely dysfunctional and needed a complete overhaul of vision, mission, strategic plans and operations, which was not the case.

City of Johannesburg

18. Procurement abuse is not limited to the provincial and national levels of government. There has also been malfeasance related to procurement at a local government level. It was alleged in hearings before the Commission that suspicious payments flowed to a company owned by Johannesburg Mayor Mr Geoff Makhubo and to the ANC in the months directly before and after the technology company EOH was awarded major contracts with the City of Johannesburg.

19. EOH chief executive Stephen van Coller tasked ENS law firm to investigate irregularities at EOH. Mr van Coller and Mr Steven Powell (who had led the ENS investigation) told the Commission how an apparent front company was used as a vehicle allegedly to channel money for the ANC's benefit and to Mr Makhubo.

20. The alleged front company, Mfundi Mobile, was paid by EOH purportedly for work done on City of Johannesburg projects, but ENS's forensic investigations did not find evidence of work done by Mfundi Mobile in exchange for these payments.

21. In total, ENS identified tens of millions of Rands in "suspected payments" related to City of Johannesburg contracts "where the evidence suggests no work was done". Mr Powell told the Commission that this applied to several alleged service providers. And when they looked at the deliverables clauses in the agreements, these were either blank or had vague content in which consulting services were described in terms which are "as broad as they can be".

Frivolous use of deviation policy

22. The procurement mechanism that applies by default is the open and competitive tender process. However, Regulation 16A6.4 of the Treasury Regulations provides for deviation from the normal procurement processes, in cases of emergency or where the goods or services are from a sole supplier. In other words, there are very limited circumstances when deviation from normal procurement processes would be permitted.

23. The Accounting Authority/Officer (AAs/AOs, who are usually a Director-General, Head of Department, Municipal Manager or Board of Directors)[1] is required to report within ten working days to the relevant Treasury and the Auditor-General (AG) in the cases of deviation. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed open and competitive bidding process.

24. Due to the abuse of Treasury Regulation 16A6.4, in 2008, National Treasury issued Practice Note No. 8 of 2007/8 with threshold limits for the procurement of goods, works and services by means of petty cash, verbal/written price quotations or competitive bids. The Note informed AOs/AAs that should it be impractical to invite competitive bids for specific procurement (e.g., in urgent or emergency cases, or

[1] See https://oag.treasury.gov.za/RMF/Pages/s301AccountingAuthority.aspx

where there is a sole supplier) the required goods or services may be procured by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The objective of this practice note was to prevent the misuse of Treasury Regulation 16A6.4 to circumvent competitive bidding processes.

25. Following the issuance of Practice Note No. 8, a trend developed regarding expansion and variation of existing contracts, which required another intervention. Consequently, National Treasury issued Instruction Note No. 32 on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management on 31 May 2011. It directed AOs/AAs how to manage expansion or variations of orders against the original contract in exceptional cases, as well as prescribing a maximum threshold for contract variations. The limit for normal goods and services was set at 15% or R15 million, whichever is the lowest, and for construction-related contracts at 20% or R20 million of the original contract value, whichever is the lowest (including all applicable taxes). Any deviation in excess of these thresholds would be allowed only subject to prior written approval of the relevant treasury.

26. However, the implementation of this provision was postponed through a Supply Chain Management (SCM) Circular dated 24 April 2012 until a revised instruction was issued. As a result, during the period April 2012 to 2016, AO/AAs had to report deviations above R1 million approved by that officer or authority to the AG.

27. In 2016, National Treasury issued Instruction Note No. 3 2016/17 as the revised instruction to manage deviations and variations, directing AOs/AAs to deviate from inviting competitive bids only in cases of emergency or sole supplier status, as well as re-emphasising the limits set in Instruction Note No. 32 of May 2011 in terms of contract expansion or variations.

28. Deviations from normal competitive bidding processes are therefore supposed to be the exception. However, the number of applications for deviations submitted to National Treasury for consideration in the recent past demonstrates the level of poor planning by departments and public entities. Deviations appear to be the norm rather than the exception, and this resulted in the unintended institutionalisation of deviations which is contrary to section 217 of the Constitution, and sections 38 and 51 of the PFMA.

29. The potential risk in this practice is that certain service providers and suppliers get preferential treatment in the allocation of government contracts; it opens up room for potential abuse of the SCM system; it may promote corruption; it leads to the exclusion of broader participation of suppliers; creates the opportunity for anti-competitive practices to take root; supports the promotion of monopolies; constrains the assessment of opportunity cost for value for money, and leads to the creation of barriers to entry of new players, SMMEs and enterprises owned by designated persons.

30. Despite numerous instructions issued by National Treasury to regulate the management of procurement through deviations, there has been an increase in such requests. Weak contract management and poor planning contributed to the so-called emergencies that underpinned the deviations requested.

Free State Provincial Government

31. The Former CFO of the Free State Department of Agriculture and Rural Development, Ms Seipati Dlamini, was requested to explain why she had approved a particular deviation involving Paras, a dairy company. She explained that:

> if it is not practical to invite bids, the reasons should be recorded why you are deviating. So, ... with regard to the reasons that were recorded, I looked at the ... job opportunities that the Vrede Dairy Project is going to bring in that area, ... [at] the investment that Paras was going to bring and because Paras was coming with an investment, for me it is not practical to subject [an investor to] a bidding process.

32. In fact, there was nothing impractical in this case to invite competitive bids. This was clearly a misuse of the deviation process, and Ms Dlamini eventually agreed that there was nothing that prevented the Department from inviting competitive bids. In effect, Ms Dlamini allowed deviations from inviting

competitive bids where there was an entity that had already shown interest. This is directly contrary to what Treasury Regulation 16A requires.

33. The Commission heard further evidence relating to the Estina Dairy Project concerning unlawful deviations. Mr Mbana Thabethe, HOD for Agriculture in the Free State, signed an agreement on 5 June 2012 with Estina, but irregularities were later found by the Free State provincial Treasury, and a new version was drafted and signed on 5 July 2012. The agreement stipulated that Estina was to be both government's partner in the project and the implementing agent. This was done on the understanding that Estina was working with a dairy company called Paras to set up this project. There has been no sign that Paras was ever involved with Estina on the project. Despite the fact that the second contract was drawn up by the Department of Agriculture with the help of legal advisors from the Office of the Premier and so should have been in good order, it was full of irregularities. No due diligence was done on either Estina or Paras by the government; no proper procurement process was followed; a deviation was signed off by the CFO, Ms Dlamini, and by Mr Thabete, as the AO, despite stating no grounds for this; and the contract was signed after the project was already underway and without any existing budget – a serious violation of financial regulations.

Confinements

34. Confinements are a type of deviation from the default open procurement process and as such are to be approached with great caution. A misuse of the confinement process would have the effect of undermining competition and entrenching monopolies. Confinements were thus limited strictly to the following instances: (a) genuine urgency; (b) limited supplier source; (c) standardisation and (d) goods or services that are highly specialised and largely identical to those previously procured from the supplier. It is not the principle of restricted bidding, but rather it's potential for abuse, that creates a problem.

Free State Provincial Government

35. Evidence given to the Commission indicated that a 'sole provider' is the only entity at that point in time who could provide the service. Bearing in mind the nature of the Estina project, it is unclear why Paras Dairy, a dairy farm, could legitimately be considered a sole provider of that kind of service.

Transnet

36. During the period 2012-2015, Transnet awarded at least seven contracts to McKinsey for a range of consultancy work by way of a confined tender process. The combined value of the contracts, including the advisory contract, as at the date of award was about R1.6 billion. However, some of contracts were subsequently amended to increase the scope of work and its value to about R2.1 billion. These contracts proved to be problematic because none of these cases met the required grounds for confinement and should have gone out to open tender. The confinements were not in Transnet's best interests. The sheer volume of business confined to McKinsey created a monopolistic situation, contrary to Transnet's procurement guidelines. McKinsey was routinely engaged to commence work even before the tender process had been concluded, immediately after the confinement memo had been approved. It seems as if the confinements amounted to little more than an after-the-fact exercise to justify the award of business that had already occurred. This was part of a larger trend at Transnet.

37. For reasons of "confidentiality", some of the McKinsey confinements (such as the manganese, New Multi-Product Pipeline (NMPP) and iron ore transactions) did not follow the normal review and sign-off process. This meant that the confinements were taken to the GCEO for sign off with little or no input from internal reviewing bodies. None of the memos, however, explained why they should be confidential; "confidentiality" seems to have been a ruse used to bypass procurement procedures. Confidentiality is not recognised as among the four grounds for confinement in the Preferential Procurement Manual (PPM).

Eskom

38. At Eskom, in May 2015, Mr Molefe approved a proposal for the appointment of McKinsey for the

development of Eskom's internal consulting capacity, primarily by training Eskom's own engineers through McKinsey's "Top Engineers programme". The proposal document states that McKinsey would be hired without any competitive bidding process and that McKinsey would work on an 'at risk' basis. The work was to be self-funded through "savings" achieved for Eskom. Mr Molefe approved the proposal on the same day that it was submitted by the Acting Group Executive: Technology and Commercial. The proposal was also approved by the relevant Executive Committee (Exco), including for a sole-source procurement.

39. Later that month, Ms Suzanne Daniels issued a memorandum setting out that she deemed the necessary procurement process requirements to have been met when the Exco gave their approval for the sole-source strategy for the 'Top Engineers Programme'. In her memorandum, Ms Daniels points to Eskom policy allowing sole sourcing where "as a result of in-depth market analysis, only one supplier in the market has been identified as being capable or available to supply the assets, goods or services in the existing circumstances" and that the necessary form motivating for this had been provided.

40. Ms Goodson, who joined Trillian in January 2016 and questioned why Eskom was willing to award McKinsey a contract without going out to tender, believed that it was clear that the consulting services were being used to satisfy the objectives of this programme and not on the basis of any specialised services. Thus, if the alleged justification for the sole source tender had to do with specialisation, then it is fair to ask what type of skills and experience McKinsey and Trillian brought to the programme.

Transnet

41. At Transnet, China South Rail ("CSR") unduly benefited from irregular procurement when Transnet sought the urgent acquisition of 100 "19E type" locomotives for its coal export line. The urgency of the procurement of these locomotives was predicated on the delay experienced in the acquisition to release locomotives to General Freight. The Transnet Freight Rail (TFR) division had prepared a business case for the confined procurement of these locomotives from Mitsui & Co African Railway Solutions (Pty) Ltd (MARS). MARS was able to quickly deliver 19E type locomotives identical to those already used by Transnet, thus meeting the need for urgency while also standardising the coal line fleet. This business case was approved for presentation to the Board Acquisition and Disposals Committee (BADC) meeting in October 2012 but was withdrawn by Mr Molefe.

42. Three months later - a delay which calls into question the urgency used to justify confinement - Mr Molefe submitted a request for confinement to the BADC in similar terms to the MARS memorandum. However, the original business case had been changed in one significant respect: it now recommended confinement to CSR rather than MARS. Despite this fundamental change, several grounds for confinement in the MARS memorandum were reproduced in the CSR memorandum. These grounds, while accurate in motivating for confinement to MARS, do not appear to be applicable to CSR. At the same time, the very qualities that had earlier motivated for confinement to MARS were refuted and claims to the contrary were advanced as reason why continuing with MARS would pose an unnecessary risk to Transnet.

43. As the "prime author" of the business case motivating for MARS, Mr Callard recounted to the Commission how he was "taken aback" upon discovering these "unilateral changes" to the memorandum. He contended that these changes were made without consulting him or his technical and operational colleagues.

44. Mr Callard had serious concerns that technical requirements would not be met, delivery would be negatively impacted, the locomotives would be inoperable, additional costs would be suffered and that the procurement process was compromised. His evidence was that the 20E type locomotives are not inter-operable with the 19E type locomotives. Despite this, the Board was presented with the revised memorandum and was not informed about Mr Callard's concerns. By adopting this approach, senior management actively created a false impression as to the validity of the confinement process involving CSR. As a result, the 100 locomotives were confined to CSR.

45. On 26 February 2014, Mr Molefe issued an RFP to CSR. Since CSR did not in fact manufacture the required 19E type locomotives, TFR personnel were then requested to develop a specification

for tendering purposes. This process was irregular as representatives from CSR were involved in discussions about how to adapt their 20E type locomotives for use on Transnet's heavy haul coal line operations. As a result of the design changes, a new class ("21E") was created for the 100 locomotives from CSR. Despite these changes, CSR's accepted proposal did not comply with some of the bid conditions in the RFP, such as the minimum threshold for local content production. Transnet nevertheless made the award to CSR in March 2014.

46. The acquisition of the wrong kind of locomotives caused delays in the delivery of the 100 locomotives. This harmed Transnet's operations and set back plans to optimise operations on the coal line by standardising the fleet. The decision by management to arbitrarily and unilaterally change from MARS to CSR, without obtaining technical or operational advice, was characterised by Mr Callard as being "irresponsible in the extreme". The irregular confinement resulted in significant financial and operational harm to Transnet while unduly favouring CSR over a stronger competitor, MARS.

The tendering phase

Parcelling

Transnet

47. Parcelling occurs when high-value contracts are split into multiple smaller contracts, so that each contract is under the upper limit of the Delegation of Authority ("DOA") for confinement. In the case of Transnet, its GCEO was authorised to approve contracts below an upper limit of R250 million without seeking board approval or following any of the procurement processes.

48. It is clear that parcelling took place when several contracts for similar services were awarded to the same firm within a few days of one another, as occurred with McKinsey. Mr Volmink explained how this happened at Transnet. Over a period of 4 days in 2014, the GCE approved four confinement contracts to McKinsey: coal, iron ore, manganese and the NMPP contract. Given the fact that the transactions related to the same or similar services and were awarded to the same firm within a few days of each other, Transnet effectively awarded one package of projects to McKinsey valued at R619m. This package should have been taken to the BADC for approval. Instead, they were split into four contracts so that they fell under the DOA for confinement given to the GCEO, and so avoided the confinement approval process.

SAPS

49. Officials in the South African Police Service (SAPS) SCM division also abused parcelling. They split orders larger than R200 000.00 into separate procurements so that they did not have to go out on tender. None of the prices for goods/services ever exceeded R200 000.00.

Abuse of preferential procurement and "Supplier Development Partners" policies

50. Procurement has a legitimate transformation role to play in South Africa. State institutions are permitted to use procurement as a policy tool to advance the interests of various designated groups. However, evidence shows that the ideals of empowerment were grossly manipulated and abused to advance the interests of a few individuals.

51. Supplier development partnering is the process of working with certain suppliers on a one-to-one basis to improve their performance for the benefit of the buying organisation, leading to improvements in the total added value from that supplier in terms of its Broad-Based Black Economic Empowerment (BBBEE) rating. Supplier development helps to achieve high preferential procurement targets by ensuring the development of capable suppliers in key areas.

Transnet

52. This system was abused at Transnet by companies partnering with larger suppliers in order to "get a foot in the door" without having to go through as rigorous an evaluation process. The result was that, for example, Regiments was awarded millions of Rands worth of work, despite never having bid

for any Transnet contracts or going through the robust procurement processes that were set up at Transnet. This abuse is evidenced by the fact that the supplier partner was included only after the main tender process was complete.

SAA

53. Another example of an abuse of preferential procurement occurred at SAA, according to the evidence of Dr Dahwa, the former Chief Procurement Officer (CPO). From early 2015 the Board, particularly the Chairperson Ms Myeni and a fellow Board member Ms Kwinana, indicated that they were trying to align SAA to President Zuma's February 2015 State of the Nation Address (SONA).

54. In the SONA, President Zuma said that "Government will set aside 30% of appropriate categories of State procurement for purchasing from SMMEs, cooperatives, as well as township and rural enterprises". There was no mention in the SONA of how this would be implemented.

55. At that time, there were certain contracts in place at SAA that were nearing expiry. During July 2015, Ms Kwinana requested a list from Dr Dahwa of expiring contracts in various areas of the business. Dr Dahwa tried to adhere to SAA-aligned procurement policies and legislation, but experienced interference and intimidation from Ms Myeni and Ms Kwinana to subdue him into agreeing to the appointment of certain service providers.

56. In October 2015, Ms Kwinana and Ms Myeni instructed Dr Dahwa to sign letters of award to Swissport and Engen, two of the companies that the SAA Board had identified as having contracts ready for renewal. They were then approached to set aside 30% of their contract value for BBBEE entities. Dr Dahwa was not willing to do so as he was concerned that the 30% "set-aside" process was not lawful. He was also concerned that the process which had been used to identify the beneficiaries of the 30% was not regular or in accordance with proper procurement practices and sought advice from the Head of Legal at SAA. After Dr Dahwa refused to comply with this 'request', Ms Kwinana sent an email with a letter of complaint to Ms Myeni alleging Dr Dahwa's insubordination.

57. On another occasion, Mr Wolf Meyer, the SAA CFO at the time, attended a meeting with BidAir along with Ms Kwinana. She informed the BidAir executives that 30% of their contract had to be given to an unspecified SAA-nominated black-owned small business. There was also no formal communication in writing to BidAir.

58. As a result of the demands from Ms Kwinana, Mr Anton Alberts MP, wrote a letter to the BBBEE Commission to register his concerns. The BBBEE Commissioner advised SAA to stop demanding this 30% set-aside from service providers.

Communication with bidders

Transnet

59. Evidence to the Commission was that, in late 2011, Transnet issued a tender worth R2.7 billion for the supply of 95 electric locomotives for its general freight business. In December 2012, the tender was awarded to China South Rail Zhuzhou Electric Locomotive (CSR), which owned 70% of a consortium, with its local partner Matsetse Basadi owning the remaining 30%. The forensic investigations into the procurement of these 95 locomotives found that CSR unduly benefited from a special relationship with Transnet. There were improper communications between senior Transnet executives and CSR before and during the procurement process. In particular, Mr Molefe met and discussed the tender with CSR before the issuance of the Request for Proposals (RFP) and Mr Pita (Group Chief Supply Chain Officer) played an active role in ensuring CSR was aware of the RFP documents.

SAA

60. Mr Schalk Human, the acting HOD for SCM at SAA Technical (SAAT) told the Commission that during a tender process to procure aviation components, an official from AAR Aviation had been in touch with SAA's CEO at the time. He said it is unusual for a supplier to be in touch with the company while

a tender process was underway. In the public sector, interaction with suppliers is prohibited when a tender process is under way and it is explicitly prohibited in SAA's Supply Chain Policy.

SARS

61. At SARS, not only was there communication with Bain before a formal RFP was issued, but Bain itself drafted the relevant RFP. Mr Athol Williams told the Commission that Bain was able to draft the rules of the game. Not only is it hugely problematic that the RFP was designed for Bain, it is also a further example of consultancy services being procured when they were not needed. Moreover, Bain itself knew it did not have the expertise to complete the work. In truth, SARS had decided the outcome of the tender process before that process started.

City of Johannesburg

62. Mr Steven Powell (of ENS Attorneys) told the Commission that a small group of people at EOH would get an inside track on tenders with the City of Johannesburg before they were even advertised. They would get advance notice and more information than their competitors, or they would get sensitive information on tenders before their competitors did. There were some instances where confidential information relating to the tenders was leaked to EOH, and in other situations the EOH employers actually wrote the content of the tender themselves.

63. Not only was there communication with bidders, the evidence of money flows related to the City of Johannesburg shows that millions of Rands worth of donations to the ANC were made via Mr Makhubo (the Mayor of Johannesburg), before and after certain contracts were awarded. Of note was R50m donated to the ANC for the 2016 local government elections.

64. Mr Powell pointed to the elementary rule that tenderers should not be making any donation during any tender adjudication. The evidence shows that there was a pattern of regular solicitation of donations, coupled with the award of tenders. The extent of this practice showed that "it was almost as if the tenders were being granted in exchange for financial benefit to the party."

Free State Provincial Government

65. In relation to the Free State asbestos scheme, evidence shows Blackhead Consulting, owned by Mr Edwin Sodi, had received several lucrative contracts from government departments, most notably the 2014 asbestos audit valued at R255 million from the Free State government. Bank accounts show millions of Rands in payments to the ANC by Blackhead between 2013-2018.

Retroactive changes to bid criteria

Transnet

66. On more than one occasion, Transnet changed the criteria used to evaluate bids during the adjudication process. This appears to have been done to favour specific bidders. For example, the requirement for a BBBEE certificate was removed to benefit CSR, which would otherwise have been disqualified in the evaluation process. CSR scored zero for BBBEE by virtue of being a foreign company. The retroactive change of the evaluation criteria was irregular as it compromised the fairness, transparency and competitiveness of the procurement process.

Post award

Contract variations and expansions

67. Mr Mathebula (of National Treasury) said that the existing prescripts provide AOs/AAs with authority to vary or extend contracts within the set limit of 15% or R15 million and 20% or R20 million without the approval of the relevant Treasury.

68. The risks in approving contract expansions or variations above these thresholds is that relevant Treasuries may not have the full background, terms and conditions, including risks, involved in the conclu-

sion of the original contract. It is very difficult to respond to requests for variations without full details and background, which delays responses and, therefore, service delivery.

Transnet

69. With reference to Transnet procuring consulting and advisory services from McKinsey, Regiments and Trillian, Mr Mohamed Mohomedy noted that each increase in the contract value was justified by a supposed variation in the scope of the advisory work. Each variation would have required a new procurement process to be followed, as required by Transnet's procurement policies, which did not happen.

SARS

70. The SARS evidence shows that procurement legislation was flouted in order to extend what was originally supposed to be a six week contract for around R2.6 million, into one that lasted 27 months and cost SARS around R164 million. Email communications between Bain and SARS show that there was collusion between the consultants and SARS to get around the procurement process required for a valid extension of the original contract.

71. The 'solution' was for SARS to declare the Bain project an emergency or claim that Bain was the sole source provider. This is an example of an unlawful use of the deviation provisions as provided for in the Treasury Regulations. This was clearly not an emergency. Mr Williams had testified that no-one could say that SARS "drastically and urgently needed to be restructured" or that Bain was the only organisation in the country which could do that.

72. In this instance, the competitive tender process was avoided by Bain arguing that if phase three of the work was not done by Bain, then phases one and two would be meaningless. National Treasury was thereby misled into authorising phase three. Mr Williams explained, however, that phase three was actually focused on something quite different from the two earlier phases, so the argument held no water.

THE COLLAPSE OF GOVERNANCE IN STATE-OWNED ENTERPRISES

Centralisation of procurement

73. The patterns of abuse which appear in every stage of the procurement cycle are evidence of multiple areas of near collapse in the procurement system. Those patterns, by themselves, do not tell the whole story by any means. What has happened in the governance of state-owned enterprises (SOEs) needs to be detailed separately in order to understand to what extent the procurement system has been rendered unfit for purpose.

74. As the representative of government as the shareholder in SOEs, the Minister is responsible for the appointment of directors to the boards of SOEs. Obviously, the Board and senior management are both critical in ensuring good governance in SOEs. Directors on the Board have onerous fiduciary duties and must at all times act in the interests of the SOE. They remain accountable for leading the organisation ethically and effectively, and report to the Minister as the shareholder's representative. The CEO and senior management run the SOE, but report to the Board with which they have an employment contract.

75. The evidence received by the Commission demonstrates that in many cases, and in fundamental respects, the Boards of many SOEs have shirked their responsibilities, or worse, used their powers to corrupt the SOEs that they have been appointed to protect.

76. This collective misconduct was often evidenced by the abuse of centralised procurement processes so that the approval authority for high value tenders became concentrated in the hands of a small group of top executives and Board members.

Transnet

77. At Transnet, by centralising procurement decision-making, it was possible for parties inside and outside Transnet to collude in the award of contracts to redirect substantial public resources into private hands. Power was centralised in Group leadership to enable individuals to make certain procurement decisions, as opposed to committees and acquisition councils.

78. Historically, the Board of Transnet did not have direct authority over procurement-related activities under the Delegation of Authority (DOA) framework. Under this framework, only the duly delegated person or body may (a) approve the issue of a Request for Proposals (RFP), i.e., an invitation to tender; (b) adjudicate and approve the award of the tender; and (c) conclude the contract or issue a letter of intent to do so.

79. During 2011, a sub-committee of the Board (the Board Acquisition and Disposals Committee or "BADC") was created, which gave the Board powers to approve the approach to market and to conclude contracts for certain high-value transactions (exceeding R500 million). The BADC and the Board also had powers to appoint consultants and to approve confinements. During 2012, the BADC and the Board were given tender approval authority of up to R2 billion and above. By 2016 these approval authorities had increased to R3 billion and above.

80. The creation of the BADC and its creeping authority resulted in the simultaneous disempowerment of Transnet's operating divisions in relation to procurement decisions that would directly impact their work. A previously decentralised, democratic procurement system was restructured to concentrate decision-making for high-value contracts at the level of the Board and senior management.

81. The centralisation of approval authority at the level of the Board and senior management had the effect of shielding procurement processes from the scrutiny of a wider group of Transnet officials who could have detected and reported irregularities. There was a tendency to avoid the governance function, which required key procurement documents, such as RFPs, confinements, condonations and variations, to be properly assessed to ensure compliance with the regulatory framework. Increasingly, internal structures were marginalised from procurement processes and their functions were outsourced to private firms.

82. This is corroborated by Mr Volmink, who said that the primary challenge to good governance within SCM emanates from people at the top end of the organisation, i.e., the Exco and Board. The bulk of the R8.2 billion in irregular expenditure recently incurred by Transnet is directly attributable to decisions made by executives and board members. Also, all the transactions that lie at the heart of the state capture allegations at Transnet were decided by Exco and/or board members. A 'parallel universe' existed within Transnet.

Eskom

83. During his tenure as Minister in the Department of Mineral Resources (DMR), Mr Mosebenzi Zwane centralised much of the work and reporting lines directly to the Ministry and, in particular, to his own office. Former DG Dr Ramontja said that during Minister Ramathlodi's time at DMR, his Department's engagement over the Optimum mine issue was conducted by the Minister's officials and Dr Ramontja was kept updated. After Minister Zwane took over, such engagements were centralised in Minister Zwane's office and Dr Ramontja was no longer kept informed about what was happening related to the mine.

Free State Provincial Government

84. The Commission heard evidence that Mr Ace Magashule, as Premier of the Free State from 2009, immediately moved to centralise Government functions under his office, particularly procurement, in "Operation Hlasela". Mr Mxolisi Dukwana suggested that the purpose of this was to enable Mr Magashule to bypass MECs and work directly with officials and, in particular, to secure control of procurement.

Strategic appointments and dismissals

85. The different configurations of Board directors and senior managers across SOEs reveal how particular individuals were strategically positioned to repurpose those SOEs. These implicated individuals oversaw the corrupt award of high-value contracts that allegedly enriched entities connected to them at great financial loss to SOEs.

86. There is a pattern of executive interference and political overreach at SOEs. Evidence shows that Ministers, and even former President Zuma, were regularly involved with operational matters. However, it was never a precedent nor a policy prescription that Cabinet and/or the President must approve these appointments.

Transnet

87. In many ways, Transnet can be considered the pilot project for the repurposing of SOEs and, as such, a primary victim of state capture. This is in keeping with the evidence given by Ms Barbara Hogan, who said in her witness statement that:

> the nature of the interventions described by me in Transnet and Eskom manifested the beginnings of the President, and certain members of his Cabinet, unduly influencing the appointments of key executives and board members in SOEs.

88. Ms Hogan was then Minister of Public Enterprises, and therefore responsible for Transnet, from May 2009 to October 2010. She claims to have been removed as Minister for resisting repeated interference by former President Zuma that was intended to ensure that his preferred SOE board and executive appointments were put in place, and also for resisting requests from the Guptas. After the removal of Ms Hogan as Minister, her successor, Mr Malusi Gigaba, made a range of board and executive appointments that set in motion the "repurposing" of Transnet. These appointments were followed by the award of key contracts that benefitted the network of people who had influenced the appointments. Through the strategic position of these individuals and the weakening of governance structures in Transnet, the SOE was repurposed so that wealth could be extracted through corrupt and unaccountable procurement practices.

89. According to Ms Hogan, Mr Zuma "thwarted all the legal and legitimate procedures [she] took to obtain Cabinet approval for any appointments whatsoever [at] Transnet, including the appointment of a CEO." Mr Zuma insisted that Ms Hogan appoint Siyabonga Gama to the position of Group CEO, despite the fact that (1) the Board had already chosen their preferred candidate through an extensive and professional selection process, and (2) Mr Gama was facing serious allegations of corruption at the time. Mr Zuma insisted that no appointment be made until after the disciplinary case against Gama had been concluded.

90. Ms Hogan described Mr Zuma's conduct as unprofessional in that there was never an aide present at his meetings with her; he frequently held meetings in his house. There were no records made or kept of these meetings. His approach was to issue instructions to his Cabinet without bothering to justify them – he was "in charge of the show", according to Hogan, and did not appreciate that she had certain duties and responsibilities as an executive authority that she had to fulfil.

91. Ms Hogan describes "behind-the-scenes" processes running parallel to the official appointments processes. The ANC had expectations that they would influence board appointments via the ANC Deployment Committee. The practice of consultation with the ruling party was further tainted by a lack of transparency and the presence of conflicts of interest. She argued that factional battles within the ANC encouraged and entrenched nepotism and patronage, which compromised the integrity of the deployment process and damaged SOEs.

92. According to Ms Hogan, the ANC wanted Mr Gama and no-one else in that position. Hogan was also put under pressure to appoint Mr Gama by other cabinet ministers and senior ANC leaders (such as Jeff Radebe and Simphiwe Nyanda). A number of media statements by various ANC-linked organisations accused Transnet of persecuting Mr Gama and cast Hogan and the board as "anti-

transformation" and "racist". According to Ms Hogan, Mr Zuma did not protect her from these attacks. She experienced this media exposure as "an enormous amount of pressure being put on [her] publicly to accede to their demands".

93. Mr Zuma did not allow the appointment of a CEO until Mr Gama's disciplinary process was finalised. After Mr Gama had been found guilty and dismissed, the President did not respond to Ms Hogan's correspondence or requests for a meeting concerning the appointment. She was dismissed three days after requesting that Mr Zuma expedite the placing of a memo concerning Transnet appointments onto the Cabinet agenda.

94. Ms Hogan was replaced as Minister by Mr Gigaba who was able to make the necessary appointments at Transnet without similar delays. Within a month, Cabinet approved Mr Gigaba's recommendations for the Transnet Board, including Iqbal Sharma, an associate of Salim Essa and the Gupta Family.

95. Mr Gigaba appointed Mr Brian Molefe as GCEO of Transnet in February 2011, an appointment which had already been reported in the Gupta newspaper The New Age before it was announced. Shortly after Mr Molefe's appointment, Mr Gama was reappointed as CEO of TFR on the grounds that his misconduct had not been serious enough to warrant his dismissal. His reappointment was quickly approved by the new Board.

PRASA

96. Dr Popo Molefe explained that there is a discernible pattern with Board appointments. Key positions are first filled by individuals who have the veneer of professionalism and possess the appropriate experience. They lodge themselves in the vital positions such as CEO, CFO, procurement and the treasury. From these vantage points, they are then able to manipulate people, processes and systems to their ends and for the advancement of the agenda of looting. They create parallel processes that do not come under scrutiny, they weaken governance systems and they focus on high-value tenders.

Eskom

97. According to Mr Zola Tsotsi, former Chair of the Board of Eskom, when Mr Brian Dames resigned as GCEO, the Board wished to appoint Mr Steve Lennon, a divisional executive at Eskom, as Acting CEO. This was discussed with Minister Malusi Gigaba, who originally agreed but later changed his mind. Mr Gigaba allegedly phoned Mr Tsotsi and was irate, claiming that Mr Lennon could not be made Acting CEO because he was white, and there was an election coming up and that would not bode well for the ANC in attracting support.

98. Mr Tsotsi felt that this was not like Mr Gigaba, whom he knew very well, and that "somebody put him up to what he said". In a subsequent conversation, Mr Gigaba 'instructed' Mr Tsotsi to inform the Board that he would like Mr Colin Matjila, who was a Board member at the time, to have the Acting position. While the rest of the Board members were unhappy on hearing this, they nevertheless complied.

SAA

99. At SAA, it appears that Ms Dudu Myeni, as Chairperson, would remove any executives who refused to carry out her instructions. She was intimately involved with the appointment and dismissal of executives, often against the advice of the rest of the Board.

100. Ms Mzimela described SAA under Minister Hogan and Chairperson Cheryl Carolus as strong on corporate governance. According to Ms Mzimela, governance was well managed and transparent, and there were clear distinctions between the spheres of competency between the Ministry, the Board, and the executive management of SAA. The Board deliberately focused on ensuring good governance given "historical breakdowns" in the governance of the institution.

101. Ms Carolus characterised Minister Hogan's approach in much the same way. Communication under Minister Hogan was clear and transparent, and always took the form of formal written communication. Under Minister Gigaba, the management of information and communication became chaotic, as multiple Ministry officials with no connection to SAA would initiate communication without following the correct protocols.

Demarcation between the Board and executive decision-makers

102. Not only was there political involvement in the operations of the SOEs, but there was also no clear demarcation between the role of the Board as an oversight body and the role of the executive as the operational controllers of the SOEs.

Transnet

103. The evidence relating to the award of high-value contracts bears out Mr Volmink's allegations that recommendations were routinely presented directly to the Board for approval, rather than benefitting from the process put in place to ensure the involvement of Transnet's management committee, operating divisions or governance structures. For example, the decision to change from MARS to CSR as the supplier of 100 "type 21E" locomotives was made without consulting TFR for operational advice.

104. The result was that high-value procurement decisions by the Board were often uninformed or made on the basis of questionable advice received by external advisors and consultants. One example was the resolution of the Locomotive Steering Committee to approve an Estimated Total Cost for the 1064 locomotives acquisition of R38.6 billion excluding rather than including the potential effects of forex deading and escalation.

105. There are examples at Transnet where the Board directly overruled recommendations made by the Executive. Notwithstanding the fact that Ms Pillay, as the acting GCEO, had signed off on the award to Neotel, the Commission heard evidence that Mr Molefe instructed Mr Singh not to issue the letter of intent to Neotel as he wanted to review the award, intending to award the contract to T-Systems. An objection by a senior executive, Mr van der Westhuizen, was not well-received.

106. Mr Molefe lacked the authority to take the decision, as the powers vested in the GCEO to award the tender had already been exercised by Ms Pillay as the acting GCEO. His decision to rescind the award was also taken in a procedurally unfair manner and in contravention of Transnet's Procurement Practice Manual.

SAA

107. At SAA, an open tender process was followed for catering services and the winning bidder was LSG Skychef. Air Chefs, SAA's catering subsidiary, participated in the tender but their bid was not successful following the adjudication process. A letter of award was issued to LSG on 21 August 2015 in line with the standard practice. Following this meeting, the Board then passed a resolution to cancel the tender to LSG, and award it to Air Chefs.

Transnet

108. A slightly different issue, but also related to the demarcation between the Board and the executive, concerns evidence that executives presented propositions to the Board for approval that were misleading. The BADC was misled by senior management. First, Mr Callard's concerns about procuring "20E type" locomotives from CSR were not disclosed to the BADC. Secondly, it appears that senior management actively created the false impression that the confinement process involving CSR had been valid. Mr Brian Molefe used his position as GCEO to override his own procurement and contract management teams.

PRELIMINARY OBSERVATIONS

109. The evidence given to the Commission covers multiple cases of procurement corruption. The few examples discussed above are typical of the abuse patterns encountered in high value contracts.

110. The examples illustrate the involvement of senior Government officials (including the former President and members of the Cabinet) in corrupt relationships. Misconduct permeated the boards of the SOEs and also implicated senior administrative officials. The private sector entities identified in the examples were active in forming and perpetuating corrupt arrangements involving:

    110.1 McKinsey and Company in its relationship with Transnet and Eskom

    110.2 Trillian (a Gupta family-related entity) in its relationship with Transnet

    110.3 Regiments (a Gupta family-related entity) in its relationship with Transnet

    110.4 Bain in its relationship with SARS

    110.5 China South Rail (CSR) in its relationship with Transnet; and

    110.6 EOH in its relationship with the City of Johannesburg.

111. In most, if not all of these cases, the pattern of abuse extended through various stages of the procurement cycle evidencing an embedded corrupt relationship.

112. These examples illustrate:

    112.1 The use of political influence for malign purposes

    112.2 The appointment of pliable officials to oversee the improper grant of tenders or contracts

    112.3 The bullying or replacement of officials who objected to irregular practices

    112.4 The diversion of money, being the proceeds of corruption, to the benefit of the ANC

    112.5 The collapse of governance in the SOEs

    112.6 A lack of transparency

    112.7 The growth of a culture of impunity

    112.8 The ineffectual nature of oversight

    112.9 The absence of proper monitoring

    112.10 The absence of consequences; and

    112.11 The readiness with which the implicated private sector entities initiated or participated in corrupt arrangements and the absence of any internal safeguards in their corporate structures.

113. All these matters need to be addressed if the procurement system is to be properly reformed.

CORRUPTION IN THE PROCUREMENT SYSTEM BEFORE STATE CAPTURE?

114. It is important to know whether the procurement system had been functioning properly prior to the onset of state capture. If so, the state capture period was an aberration which temporarily damaged a viable procurement system. If, however, the record shows that corruption and criminality had manifested itself well before state capture, then one must face the sober reality that the procurement system as presently configured is not fit for purpose.

115. As early as 2002, and well before the grotesque events which we now call state capture, the Public Affairs Research Institute (PARI) had published a paper which identified South Africa's public procurement system as a system in crisis. In its paper "Reforming the Public Procurement System in South Africa" PARI found that there were five major causes of the crisis:

115.1 Public procurement is subject to extensive political interference

115.2 There are major deficits in the capacity of public procurement functions at regulatory and operational levels

115.3 Public procurement is subject to a complicated, fragmented and often inconsistent regulatory regime

115.4 Public procurement involves stark trade-offs between the procedural integrity necessary for fairness and to protect public funds, and the flexibility associated with the operational substance of purchasing; and

115.5 There is a mismatch between the formalistic approach to regulation and government's commitment to using public procurement to achieve social and developmental objectives.

116. In 2002 the procurement system operated through a State Tender Board and was therefore essentially a centralised procurement system and remained so until about 2008. Since 2002 the procurement system has been changed and modified in significant respects. More particularly, the legislative framework which has been enacted to regulate procurement has been extensively expanded. Did these changes put an end to well-informed criticisms of the system, or did these nonetheless persist?

117. In 2012 Ambe and Badenhorst-Weiss published their observations regarding public procurement challenges in which they noted a lack of proper knowledge, skills and capacity; non-compliance with policies and regulations; inadequate planning; a lack of accountability and increased fraud and corruption; inadequate measures for the monitoring and evaluation of public procurement and pervasive unethical behaviour. They also identified undue decentralisation of the procurement system and the ineffectiveness in achieving the objectives of BBBEE.

118. In 2013 Tarisma Maharaj and Professor Anis Karodia examined the impact which SCM had on fraudulent activities in the public sector and concluded:

> ... the reality [is] that there is massive fraud, misallocation of funds, and the breach of law. It also points to the fact that the flouting of SCM processes have become the order of the day in South Africa and that fraud, corruption and the violation of the law in the SCM chain has now become endemic. All of this compromises the Government of the day and further compromises South Africa on the international stage and makes the country a poor destination for investment. In addition it compromises growth, development and hampers service delivery which leads to massive strikes and protests by the population at large.

119. In 2017 Mazibuko and Fourie published their conclusions in an article titled 'Manifestation of Unethical Procurement Practices in the South African Public Sector'. They listed unethical procurement practices including uncompetitive bids; employees bids awards; non-compliance with supply chain management legislation, inadequate contract management, ineffective control systems, uncompetitive bidding, acceptance of less than three quotations, using an incorrect preferential point system and thresholds and irregular expenditure. They noted that unethical procurement practices were dangerous and ubiquitous, and that they could produce economic and social ills to society.

120. The substance of these criticisms has remained the same over the years and that has been the case before, at the outset of, and during the state capture period. It must also be noted that, in essential respects, the evidence given at this Commission confirms these criticisms. What was noted as far back as 2002 has not changed in its essential character, it has simply gotten much worse.

121. State capture, then, was not the beginning of the subversion of the procurement system - it was merely the most concentrated and aggressive attack upon it. To use the analogy of the current coronavirus pandemic, state capture thrived on a system which had already displayed long-standing co-morbidities.

122. In the circumstances, any serious attempt to address the problems which beset public procurement must go well beyond an understanding of "State Capture". It must assess the adequacy of the procurement framework, which is set out in the national legislation, to see whether that framework is

compatible with the realities on the ground or whether there are fundamental design deficiencies. It must also answer the troubling question: why has the system been so susceptible to misuse?

A REVIEW OF THE FRAMEWORK DESIGN FOR PROCUREMENT

123. The selected examples, and the evidence overall, show how poorly the procurement system has been working in practice. The picture is one of a procurement system which is vulnerable to extensive patterns of abuse. The design of this procurement system is set out in national legislation. Manifestly, the framework design was intended to be strong enough to withstand the very abuses to which it has fallen prey. A closer look at the legislative design is therefore unavoidable to see why and how the theory of procurement has so diverged from the practice of procurement.

124. To give effect to the constitutional requirements in section 217, framework legislation was enacted to regulate public procurement. The three critical statutes are the Public Finance Management Act 1 of 1999 (PFMA), the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) and the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA).

The PFMA

125. The PFMA grants National Treasury a host of general functions and powers of oversight, which also apply to public procurement and which can be viewed as fulfilling the mandate given in section 216(1) of the Constitution. Together with the MFMA and the PPPFA, these principal statutes enable the National Treasury to play its crucial role in guiding and overseeing public procurement.

126. The legal mandate of the National Treasury under the PFMA is threefold: (a) to create norms and standards; (b) to enforce a regulatory regime; and (c) to assist organs of state in implementing that regime.

127. The resulting institutional scheme that emerges from the PFMA in respect of public procurement is that organs of state have the power to formulate their own rules governing procurement by that entity and to procure in terms of those rules, but that these functions must be fulfilled in terms of the framework created by the National Treasury and under its supervision.

128. The PFMA provides that National Treasury may issue Regulations for the determination of a framework of appropriate procurement and provisioning systems. Acting in terms of section 76 of the PFMA, the National Treasury has made the Treasury Regulations, which include regulations on public procurement, the most important of which is Regulation 16A.

129. Regulation 16A binds entities to additional instructions from the National Treasury in implementing their SCM systems. These include the threshold values in terms of which particular methods of procurement must be adopted, the minimum training required of officials staffing SCM units, the procedure for appointment of consultants, and ethical standards to be adhered to.

130. The ethical standards to be adhered to are found in the Code of Conduct for SCM Practitioners. This includes requirements that officials must disclose any conflict of interest that may arise, treat all suppliers and potential suppliers equitably, may not use his or her position for private gain or improperly to benefit another person, ensure that he or she does not compromise the credibility or integrity of the SCM system through acceptance of gifts or hospitability or any other act, be scrupulous in his or her use of public property, and assist the AO/AA in combating corruption and fraud in the SCM system.

131. There are provisions specifically aimed at preventing abuse of the system, including that the AO/AA must take all reasonable steps to prevent abuse of the SCM system. Any allegation of corruption, improper conduct or failure to comply with the SCM system made against an official or another role player must be investigated by the AO/AA.

132. Treasury Regulations grant the National Treasury and provincial treasuries a reporting mandate in terms of which entities must report on their procurement functions to the National Treasury and

provincial treasuries, and the latter must report to the National Treasury. Entities are obliged to comply with the reporting requirements and the National Treasury is given a wide mandate to formulate the information to be included in such reports.

133. The reporting function and its adequacy is an essential element in any effective procurement system. The acid test is whether the mandated reporting system is properly implemented.

Supply chain management

134. It is only in section 112 of the MFMA and in Regulation 16A that one encounters a comprehensive framework intended to govern supply chain management. Although section 112 applies in the sphere of local government, the scheme's detail is a representative statement of the national framework.

135. Section 112 does not provide local authorities with any mandatory template, complete with the nuts-and-bolts content of the desired procurement system. Instead, it delegates that task to each municipality and municipal entity, limiting itself to a headline description of the topics to be covered, many of which are aspirational in nature.

136. Presumably this reluctance to set out how the design aspirations are to be achieved in practice derives from a feeling that each entity knows its own situation best, and hence flexibility must be built into the system. It may also be thought to be an appropriate approach given the constitutional recognition of the separate status accorded to municipalities,

137. The consequence of devolving the design function in this manner is assessed later in this Chapter bearing in mind that a similar dispensation also applies to other public procuring entities.

OBSERVATIONS ABOUT ASPECTS OF THE LEGISLATIVE FRAMEWORK

138. The purpose in reviewing the procurement legislation is to identify those aspects of the design which have proved problematic in the fight against corruption.

Fragmented design

Failure to address procurement separately

139. Procurement has not generally been recognised in the legislation as a specialised activity requiring separate treatment. On most occasions it is treated in the legislation as one item in a broader topic or else receives only passing mention in Acts focusing on broader activities (e.g., transport, health and the like). Indeed, apart from the PPPFA, none of the principal legislation directs its attention solely to procurement.

140. The result is that some twenty Acts deal with issues of public procurement and each of those Acts brings with it separate powers to issue regulations or directives of one sort or another. While, no doubt, there are nuances in the procurement process depending on its particular purpose, and that these must be recognised and addressed, the need for the centralisation of legislation and regulation has not been recognised. Fragmentation has had several negative consequences, each of which has contributed to the problems which need to be addressed.

Difficulties in interpreting the legislative mosaic

141. The sheer number of Acts and Regulations that deal with procurement issues makes it very difficult for conscientious officials to get a clear understanding of what is required from them. There is a need for procurement officers to interpret, and to try to harmonise their interpretation of the various laws, which would not be the case if the legislation was codified and unified. The gaps and the disharmonies caused by fragmentation present a considerable challenge to the honest procurement official while enabling the dishonest official to exploit obscurities and contradictions in the law.

Fragmentation of oversight responsibilities

142. The legislative fragmentation causes an equivalent fragmentation of the oversight function, which is of course a vital component in protecting the procurement system from abuse. There is a crowded field of oversight entities. These include Parliament; National Departments; Ministers; Provincial Government; the Auditor-General; National and Provincial Treasury; and the Department of Public Service and Administration.

143. Many of these authorities oversee procurement during their more general mandate dealing with all aspects of financial management (e.g., the AG and Treasury) while others are supposed to supervise the working of procurement in a particular sphere of activities (AAs and AOs in provincial, national and municipal departments).

144. Despite the crowded field, there is no single specialised oversight body that is given the specific mandate to fight corruption in all spheres of procurement, which underlines the need to establish the Agency against Corruption in Public Procurement (AACIPP) included in the Recommendations.

The lack of adequate monitoring

145. Whereas oversight operates at the macro level and tends to be reactive, monitoring operates at the micro level and its purpose is to track in detail the way in which procurement is being implemented by each individual procuring entity. Monitoring requires the detailed observation of procurement processes on the ground; it extends to all stages of the procurement cycle and its purpose is to track decisions that are being made at each stage to enable irregularities and corruption to be detected and addressed in a timely manner.

146. Monitoring must rank as *the* critical mechanism in safeguarding procurement from corruption. It is therefore a matter of concern that the legislative design makes no proper provision for an effective monitoring function.

147. The Auditor-General is not required to monitor the general working of the procurement system or to track the decisions made at the various stages of the cycle; his or her mandate is a more general one relating to financial management. Of course, an audit may reveal a material procurement irregularity, but that is not its primary focus.

148. Another entity charged with a monitoring function is the AO/AA who is, in addition to designing and implementing the procurement system, also tasked with its monitoring. While it may be natural to vest some form of monitoring power in the top echelon of an entity, such a measure, by itself, can never be sufficient or appropriate. The essence of monitoring is that it is undertaken by an outside and independent party with specialised skills. Leaving aside the possibility that the AO/AA is itself corrupt, there is no guarantee that it has the specialised skills required to detect irregularities, nor can there be any confidence in its ability to 'self-medicate' or self-correct.

149. Again, it is clear from the evidence that monitoring at the level of the AO/AA has contributed little to curbing corruption. Indeed, the patterns of irregularity that have been noted above are of a kind that should immediately have been identified by responsible AOs/AAs. Even more troubling, the patterns of corruption are of a kind which could not have taken place in most instances without the active, or at least passive, co-operation of those in charge.

150. In the South African situation there is an urgent need to strengthen the monitoring capability of the procurement system by introducing an external inspectorate committed exclusively to the detailed monitoring of the activities of the multiple procuring entities, a need that is intended to be addressed by the Inspectorate of the proposed AACIPP.

The extent of procurement decentralisation: Multiple procurement entities

151. Excessive decentralisation creates serious problems. The power to procure goods and services in the public sector has been given to the following entities:

151.1 National government departments

151.2 Provincial government departments

151.3 All municipalities

151.4 Major public entities

151.5 Other public entities; and

151.6 All constitutional entities.

152. The extent of the decentralisation places a massive strain on available capacity. A procurement system depends for efficient and ethical performance on the skill, knowledge and standards of conduct of the officials who identify the goods and services needed, accurately specify those requirements in the tender requests and who then administer the system as well as the procurement contracts that result. These activities require proper training as well as significant skills. The evidence given to the Commission indicates that all too often the officials involved have not been adequately trained and so lack the skills and a thorough understanding of the standards necessary to detect and confront corruption. Training, experience and competence are essential tools in the fight against corruption. Training includes instruction in ethical standards.

153. It is misguided to suppose that the requirements and the skills needed for procurement are available throughout the country and are at the disposal of each entity. It is fundamental to this discussion to acknowledge that procurement officials are members of a strategic profession, and they are not discharging a simple administrative function by rote. In formulating international principles for public procurement, the OECD identified, by way of fundamental principle, the need to ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

The absence of any constructive involvement with the private sector

154. South Africa is a signatory to the United Nations Convention Against Corruption (UNCAC). Article 13(1) of that Convention reads in part:

> Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.

155. The legislation under review makes no attempt to engage with civil society organisations (CSOs) in order to present a united front against corruption. An imaginative and open-hearted effort to recruit the stakeholders of civil society into the fight against corruption is entirely lacking. As a result, we have no shared Code of Conduct setting out the ethical standards to which both the public and private sectors commit themselves, and there is no attempt to give the private sector a voice in the design of procurement systems or to suggest how procurement could be improved and made more transparent. The relevant skills available in the private sector are ignored.

156. During its hearings the Commission had an opportunity to receive the evidence and the views of a range of private sector representatives and to consider a contribution made over the years by academic commentators and anti-corruption organisations. The Commission is satisfied that the involvement of CSOs and commentators is a significant but under-utilised control mechanism in dealing with corruption.

157. The constructive involvement of civil society is both a necessary and a legal requirement in the fight against corruption, and that is a function that the AACIPP must address.

Insufficient attention given to transparency

158. The need for transparency throughout the procurement cycle is essential for its integrity. Section 217(1) insists on transparency. The more transparent the process the less easily it is abused. While the legislation contains references to the need for transparency, it does not provide clear and realistic rules for its incorporation in any system design, and this needs to be addressed.

SEEMINGLY INTRACTABLE PROBLEMS

159. There is a range of problems that were frequently mentioned in the evidence before the Commission that appear to be intractable and which obstruct attempts to reform the procurement system. They are not related to each other, but each one points to a weakness in the overall system.

The need to encourage whistleblowers

160. The whistleblower is one of the most effective weapons against corruption. In most cases the whistleblower has information that provides a detailed insight into previously unsuspected criminality or wrongdoing that is not readily detectable by routine inspection. The present system offers no encouragement to the whistleblower to break cover. The good faith whistleblower is motivated by a sense of duty of the highest order.

161. A person contemplating making such disclosures must herself seek out an appropriate recipient and must trust that the disclosure will be treated in strict confidence and that the recipient can offer adequate protection against harm. Recent events in South Africa, which will be well known to every reader, make it the highest priority that a good faith whistleblower who reports wrongdoing should receive effective protection from retaliation.

162. The primary laws in South Africa that are intended to provide over-arching protection for whistleblowers, are the Protected Disclosures Act, 26 of 2000 (PDA) and the Protection from Harassment Act, 17 of 2011 (PHA).

163. The PDA is intended to protect employees in the private and public sector who disclose information regarding unlawful or irregular conduct by their employers or other employees or workers. These protections apply in respect of a disclosure which is classified as a protected disclosure. A whistleblower who acts in good faith is not liable to any civil, criminal or disciplinary proceedings because of the disclosure and if they suffer any 'occupational detriment' they may seek relief from the Labour Court or the CCMA or similar institution. The PHA allows for the issuing of a protection order against harassment.

164. These laws, although well-intended, are deficient in important respects. They do not provide a clear-cut procedure for the whistleblower to follow; they do not sufficiently guarantee that the disclosures will be protected; they are not proactive in providing physical protection; they offer no incentives to the whistleblower, and they do not ensure that all such information finds its way to a destination with specialised skills in receiving, investigating and utilising such information effectively.

165. In the view of the Commission, the whistle-blowing disclosure regarding corruption fraud and undue influence in public procurement should be received by the AACIPP by way of an electronic reporting system that permits and protects the anonymity of the reporting individual, provides for clarificatory questions, and guarantees confidential disclosures.

166. The importance of limiting disclosure to a single Authority, in this case the AACIPP, arises from the following:

    166.1 The AACIPP will be responsible to devise the optimal system by which disclosure can be made

    166.2 The format and procedures for disclosure to the AACIPP can be widely published so that the mechanism for making disclosure is simplified; and

166.3 The AACIPP can encourage the making of disclosures by publishing the range of concrete undertakings that it is obliged to offer in terms of article 32(2) of the UNCAC.

167. The Commission recommends that the mandate and the responsibility to litigate on behalf of the State for the recovery of damages or the return of the proceeds of corruption in public procurement should be the responsibility of the AACIPP. However, a fixed percentage of money recovered should be awarded to the whistleblower, provided that the information disclosed by the whistleblower has been material in the obtaining of the award.

Corruption in political party financing

168. The examples of corruption manifesting in high value contracts that have been described earlier in this Chapter indicate the likelihood that in at least two instances the proceeds of corruption were diverted to a political party, in both instances the ANC.

169. The one example involves the then-Johannesburg Mayor Mr Geoff Makhubo in dealings with EOH. In that case, it appears that a front company was used as a vehicle to channel money to the benefit of the ANC.

170. According to the evidence, Mr Makhubo had solicited a donation to the ANC from EOH and had repeated that request a week after the contract had been awarded to EOH. According to the evidence, about R50 million was donated to the ANC by EOH for the 2016 local government elections.

171. Another example involves the Free State Provincial Government in its dealing with Blackhead Consulting. Blackhead Consulting received several lucrative contracts including a 2014 asbestos audit tender valued at R255 million from the Free State Government, and between 2013-2018 Blackhead Consulting made payments amounting to millions of Rands to the ANC.

172. The evidence before the Commission did not seek to establish the full extent of corruption associated with political party financing or the extent to which other political parties may also have been implicated. However, the two examples mentioned are quite enough to indicate a serious problem that requires urgent attention and the active intervention of the NPA.

173. The recent promulgation of the Political Party Funding Act No. 6 of 2018 is at least a first step, but most likely an ineffectual step in addressing this abuse. Section 9 of the Act requires a political party to disclose to the Electoral Commission all donations received which exceed a prescribed threshold and imposes a similar obligation on any person or entity delivering a donation to a member of a political party other than for political party purposes. Section 19 constitutes any infringement a criminal offence punishable by a fine or imprisonment. However, the Act does not include any compulsory form of outside audit and its provisions are unlikely to address the critical problem effectively. More intrusive measures will need to be taken to prevent the proceeds of crime becoming a means by which political parties fund themselves.

The collapse of governance in SOEs

174. The evidence regarding events at Transnet, Eskom and SAA presented a scarcely believable picture of rampant corruption. The analysis given by Dr Popo Molefe regarding a discernible pattern in which key positions were deliberately given to corrupt actors is borne out by the facts and is corroborated by the further details in Ms Hogan's testimony.

175. People appointed to SOE Boards must have the necessary competence, capacity, experience, integrity, reputation and intellectual honesty to fulfil the demanding responsibilities of such an appointment.

176. The government is the sole shareholder of every SOE, but it holds those shares in trust for the nation. It follows that the people responsible for appointing members of these Boards owe a duty of care to the citizens of South Africa in making those appointments and must ensure that fit and proper persons are appointed to carry out the mandate of the SOE.

177. The question as to who appoints Board Members of SOEs is regulated by way of a complex web of overlapping and, at times contradictory, laws. With respect to most SOEs, there are three different legal frameworks that must be considered, namely, the PFMA, the Companies Act 71 of 1998 and the specific law establishing the SOE (founding legislation).

178. In addition to these laws, there are various "soft law" instruments like protocols and guidelines that are (usually) not binding but are (supposed to be) influential. Examples are the King III and King IV principles, the Protocol on Corporate Governance in the Public Sector, and the Handbook for the Appointment of Persons to Boards of State and State-Controlled Institutions.

179. While the law is unclear, in practice, Board Members are appointed by the relevant shareholder Minister, ostensibly in consultation with Cabinet. This, the evidence has shown, has proven to be problematic and does not represent the "robust and transparent" process recommended by King IV. Procedures for the appointment of SOE Board Members lack integrity and are not transparent. In addition, there is often a disconnect between the fiduciary duties of SOE Board Members and the profile, skills and expertise of incumbents. There are several alarming examples that show that Ministers have appointed persons to the Boards who meet none of the required criteria. The system of unstructured appointments does not serve the national interest. As President Ramaphosa remarked in his testimony, there has been a "massive system failure [in how Boards of SOEs have been appointed] and we need to correct what has happened in the past."

180. Furthermore, a fundamental divide between the concepts of authority and responsibility has been largely ignored. A Minister should never appoint either the chairperson or the CEO of an SOE. That must be the function of the directors who appoint their leader, the chairperson, and it is the Board that should appoint the CEO who, in turn, leads the management team in implementing the decisions of the Board.

181. It is the view of the Commission that the function of appointing directors of SOEs should no longer be left solely to Ministers. This system failure needs to be remedied urgently.

182. Following the exposure of state capture, it may well be that Ministers have been more careful in making appointments, and that the SOEs are beginning to show the benefit of better governance. Nonetheless, it is inconceivable that the system of appointments can be left unreformed. The national interest demands that SOEs operate under efficient and professional leadership.

183. The effective solution to address this systemic weakness, and one which the Commission strongly recommends, is the creation of a Standing Appointment and Oversight Committee to process appointments to the Boards of the SOEs and thereafter to deal with complaints which may be made concerning misconduct by Board Members.

Dishonest tenderers and their accomplices outside the public service

184. On the one hand, there are the corrupt officials in an organ of state. On the other hand, there are corrupt bidders or contractors who distort procurement processes by paying bribes or kickbacks. Any reform of the present system must therefore also deal aggressively with criminal acts committed by private sector actors.

185. It is recommended that there be four levels of response. These measures, each of which is discussed in further detail in the main Report, are (1) disqualification from participation in tenders, (2) deferred prosecution agreements, (3) criminal prosecution and (4) restitution for damages suffered and monies misappropriated.

THE WAY FORWARD: REMEDIES FOR INTRACTABLE PROBLEMS

186. There were occasions during the Commission hearings when a particular witness stepped back from the detail of the evidence and offered a generalised insight regarding the extent of system malfunction and the feeling of helplessness to which it gave rise. So, for example, Mr Peter Volmink was driven

to describe the well-intentioned and detailed legislative framework as belonging to one universe in sharp contrast to the reality on the ground.

187. So, too, the observations of Mr Themba Godi, the former chairperson of the Parliament Standing Committee on Public Accounts (SCOPA), are typical and provided a bleak insight into a system which has lost its moral compass. Mr Godi said that if one looks at SCOPA's resolutions, there are many where there is a call for action to be taken against officials who had not complied with legislation. But, he asked, "how do you get things right if there are no consequences?" Mr Godi said that it is "shameful" that Ministers and their AOs/AAs cannot deal with corruption.

188. Mr Godi also mentioned that leadership instability compounds the problem. Throughout the various entities and departments, an AO or an AA would promise to "sort things out", but a short while later that person is no longer there. In their place is a new person who is starting from scratch. This repeated scenario makes it extremely difficult to build a culture of compliance.

189. The efforts, albeit failed efforts, to address corruption show that there is no easy solution to the problem. Corruption has strengthened and extended its hold on public procurement over a very long period. Clearly a new approach is required.

The suggested approach to meeting the challenges

190. The challenges which beset procurement are of two types. There are the challenges that were identified as far back as 2002 and which demonstrate by their longevity that they constitute embedded weaknesses in a system which has been impervious to change. Then there are the challenges posed by state capture, which brought the procurement system to its knees, disabling the system for criminal purposes.

191. What is now required by way of a conceptual approach is to identify the critical starting points from which, and around which, a comprehensive and coherent scheme of reform can emerge.

A National Charter against Corruption

192. State Capture, and its exposure, has dominated the national conversation in recent years. The effect has been predictable and negative: a loss of confidence both in Government and political parties, as well as in the business sector, compounded by frustration at the pervasive lack of accountability for wrongdoing.

193. In the Commission's view, it is long overdue to take steps to restore broken trust, and the first step is for all sections of society to jointly endorse a national commitment to eliminate corruption in public life, and in the procurement of goods and services.

194. With that in mind, and by way of a symbolic gesture to mark the turning of the page, the Commission recommends adoption of a "National Charter against Corruption", incorporating a standardised Code of Conduct by Government, the business sector and relevant stakeholders.

Creation of an Anti-Corruption Authority

195. In the view of the Commission, the appropriate starting point for any scheme of reform must be the establishment of a single, multi-functional, properly resourced and independent anti-corruption authority, subject only to the Constitution and the law.

196. None of the oversight bodies as presently constituted have been able to withstand political interference in the procurement space or to take effective steps to prevent such interference. The fight against corruption must be led by an authority which is independent of government control, impervious to political (and private) influence and which, by reason of the powers to be conferred upon it, cannot be ignored.

197. Not only do the existing oversight bodies lack the necessary independence, but they exercise a fragmented jurisdiction. Each oversight body operates in terms of its own mandate, in respect of its own area of jurisdiction and in accordance with its own priorities. We know, only too well, that fragmented oversight is not effective to eliminate corruption. Overall responsibility to root out corruption must lie unchallenged in the hands of one designated entity, the AACIPP.

198. The present design for public procurement lacks an effective monitoring authority. This has given rise to a significant gap in the system. It is no longer possible to argue that the auditing function of the AG or the supervisory functions of the AO or AA are sufficient to deal with corruption.

199. A fundamental weapon in the fight against corruption is missing or is not being properly used. The creation of an anti-corruption authority with broad jurisdiction over the entire procurement system is a necessity.

200. Above all, the present system lacks the essential element of accountability. The prosecution service simply ceased to operate in the field of public procurement, leaving the country defenceless against a criminal enterprise that has challenged the ability of the State to provide essential services to the nation.

201. The absence of criminal prosecution has gone hand in hand with the absence of civil litigation aimed at recouping the financial loss and damage suffered by the State. Time and time again, as the evidence given to the Commission demonstrates, corrupt actors stole public money on an unprecedented scale and, for years made, kept and enjoyed the fruits of criminality without being called to account.

202. The Commission has considered several objections which might be made to its primary recommendation concerning the establishment of the AACIPP. These objections would include the criticism that the establishment of AACIPP creates yet a further oversight body in an already fragmented system; that its creation will involve additional cost; that its functions could be discharged in part by National Treasury and in part by the NPA. However, The Commission remains satisfied that, despite these and other objections, there is no plausible alternative to the creation of the AACIPP.

Interaction between the AACIPP, National Treasury, NPA and SIU

203. The Commission appreciates that the establishment of the AACIPP to lead the fight against corruption in public procurement requires an adjustment and re-alignment in the functions of National Treasury, which exercises the overall supervisory jurisdiction in public procurement matters. The Commission is also aware that National Treasury has published a draft Public Procurement Bill, 2020, which has far-reaching proposals to reform public procurement. The suggested reforms include the establishment of a Public Procurement Regulator within National Treasury who will exercise considerable statutory powers. The draft Bill proposes vesting the power of debarment in the Regulator and contains other important provisions - all based on the assumption that the Regulator is also the appropriate official to lead the fight against corruption.

204. The Commission must make it clear that it does not seek to question the vital leadership role of National Treasury in the design and oversight of the public procurement system in general. The Commission endorses many of the proposals contained in the Bill, which will serve to centralise and strengthen public procurement standards. Nonetheless, and for reasons already made clear, it is not appropriate that any Government department be tasked to lead the fight against corruption in public procurement. The vulnerability of any Government department to undue political interference remains and will always remain.

205. What will be required going forward is a close and constructive consultative relationship between the AACIPP and National Treasury. The same need for close co-operation will apply to the NPA and the SIU. There will be a need to share information and a commitment to close co-operation in coordinating action against corruption.

RECOMMENDATIONS

206. The Commission makes the following recommendations for consideration by the President.

Recommendation 1: A National Charter against Corruption

207. The Government, in consultation with the business sector, should prepare and publish a National Charter against corruption in public procurement. The Charter should include a Code of Conduct setting out the ethical standards which apply in the procurement of goods and services for the public benefit. Furthermore:

    207.1 The National Charter should be signed by or on behalf of all key stakeholders, including the country's executive leadership in all spheres of government, SOEs, political parties represented in Parliament, constitutional bodies, organised business, organised labour and anti-corruption civil society organisations.

    207.2 Every procurement officer in the public service shall, on assuming duty, be required to sign a commitment to observe and uphold the terms of the National Charter.

    207.3 Every person, company or other organisation tendering or contracting to supply goods or services by way of public procurement must sign a similar commitment to uphold and to adhere to the terms of the Charter and its Code of Conduct.

    207.4 The content of the National Charter and the Code of Conduct should be widely publicised.

Recommendation 2: Establishment of an independent Agency Against Corruption in Public Procurement

208. The Government should introduce legislation for the establishment of an independent Agency Against Corruption in Public Procurement (AACIPP) mandated to monitor procurement, investigate, expose and prosecute corruption, fraud and undue influence in the procurement of goods and services for public benefit, and recover the proceeds of these offences.

Recommendation 3: Appointments to the Boards of State-Owned Enterprises

209. The Government should introduce legislation to create a Standing Appointment and Oversight Committee mandated:

    209.1 To invite nominations from the public of suitably qualified individuals to fill any vacancy on the Board of a state-owned enterprise (SOE) or in a senior post in an SOE

    209.2 To hold public hearings to assess and recommend to the relevant shareholder Minister appropriate candidates for the appointment of directors and senior officials of SOEs; and

    209.3 To receive and investigate complaints relating to the conduct of such persons following their appointment and to make recommendations to the Minister concerned as to the merit of the complaint and the steps that should be taken to deal with it.

210. Members of the Commission should be comprised of the following permanent appointees, with a retired judge as chairperson:

    210.1 The Minister of Finance and the Minister of Justice and Constitutional Development or their delegates

    210.2 A senior representative from the accounting profession selected by the governing authority of that profession

    210.3 A senior representative from the business community selected by organised business

    210.4 A representative of a civil society organisation dedicated to fighting corruption

210.5 A member of the academic staff of a university with specialised knowledge of public procurement practices

210.6 The outgoing Chairperson of the SOE concerned; and

210.7 Two industry experts appointed by the SOE concerned.

Recommendation 4: Protection for whistleblowers

211. The Government should introduce legislation or amend existing legislation:

211.1 To ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be given the protections set out in article 32(2) of the United Nations Convention Against Corruption

211.2 To identify the Inspectorate of the AACIPP as the correct channel for making any such protected disclosure

211.3 To authorise the Litigation Unit of the AACIPP to incentivise such disclosures by entering into agreements to reward the giving of such information by way of a percentage of the proceeds recovered on the strength of such information; and

211.4 By authorising the offer of immunity from criminal or civil proceedings if there has been an honest disclosure of the information which might otherwise render the informant liable to prosecution or litigation.

Recommendation 5: Deferred prosecution agreements

212. The government should introduce legislation for the introduction of deferred prosecution agreements (DPA) by which the prosecution of an accused corporation can be deferred on certain terms and conditions, such as:

212.1 That a company has self-reported facts from which criminal liability could be inferred and has co-operated fully in making such report

212.2 That the company has agreed to engage in specific conduct intended to ensure that such conduct is not repeated

212.3 That the company has paid a fine or been subject to other remedial action; and

212.4 That the terms and conditions of the agreement has been confirmed by the Tribunal of the AACIPP.

Recommendation 6: Creation of a Procurement Officers' professional body

213. The Commission recommends the establishment of a professional body to which all officials who work in the area of public procurement should belong.

214. This professional body should determine the qualifications, and the necessary training and experience necessary for membership of the profession.

215. This training and qualification should include high standards of integrity and a commitment to resist mismanagement, waste and corruption.

216. The procurement system in every procuring entity should be managed by a duly qualified public procurement official being a member in good standing of the profession.

217. The Tribunal of the AACIPP should act as the disciplinary committee of the profession with power to strike a member from the Roll or to impose such other disciplinary sanction as the case may require.

Recommendation 7: Enhancing transparency

218. The Commission recommends that clear standards of transparency consistent with the OECD Principles for integrity in public procurement should be formulated by National Treasury for compulsory inclusion in every procurement system adopted by a public procurement entity.

Recommendation 8: Protection for accounting officers / authorities acting in good faith

219. It is recommended that the legislation dealing with the duties and responsibilities of accounting officers / authorities be amended to insert a provision which reads:"No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act."

Recommendation 9: Amendment to the Prevention and Combating of Corrupt Activities Act 12 of 2004

220. In order to strengthen the duty of private sector entities to put in place measures against bribery it is recommended that the Prevention and Combating of Corrupt Activities Act 12 of 2004 be amended by the introduction of a section 34A to create a new offence. The new offence would arise where any member of the private sector or any incorporated SOE gives or agrees or offers to give any bribe ('gratification') to a third party intending (a) to obtain or retain business; or (b) to obtain or retain an advantage in conducting business with a public body or entity. An exception would exist where the private sector or any incorporated SOE had in place adequate procedures designed to prevent any such agreement or offer.

TRANSNET

STATE CAPTURE AT TRANSNET

221. The Commission is required among other things to investigate allegations of state capture, corruption, and fraud in various state-owned enterprises ("SOEs"), including Transnet.

222. In the period between 2010 and 2018 Transnet was involved in major procurements of locomotives to update its ageing fleet, network services and infrastructure expansion. The abuse of the procurement process in relation to several transactions associated with these procurements, valued at about R70 billion, has led to the improper enrichment of individuals aligned with the Gupta racketeering enterprise at the expense of Transnet. Several witnesses testified before the Commission about the adverse financial consequences suffered by Transnet because of the malfeasance and repeated manipulation of the procurement process. The evidence reveals extensive wrongdoing by some members of the Board of Directors and senior executives at Transnet.

223. In his evidence before the Commission, Mr Popo Molefe, Chairperson of the Board of Transnet, outlined the complex role Transnet fulfils within the national logistics system and gave a high-level overview of state capture at Transnet. He was appointed as Chairperson of the Board on 23 May 2018. He was not a member of the Board during the periods investigated by the Commission.

224. Transnet is the proprietor of all rails, ports, and pipelines in South Africa, and a key implementing agent of the developmental state for job creation, skills development, industrial capability building, regional integration, energy efficiency and economic transformation. It is one of the largest SOEs financially (assets comparable to top ten listed JSE companies), in capital terms (R380 billion), and institutionally (five subsidiary companies with over 50 000 employees).

225. The Board of Transnet reports to the Shareholder Representative, the Minister of Public Enterprises (MPE). Transnet is subject to oversight by Parliament's Portfolio Committee on Public Enterprises to

which it submits its annual report on its programme of work and strategy. It also engages with the Portfolio Committee on Trade and Industry and the Standing Committee on Public Accounts (SCOPA).

226. In 2011 Transnet embarked on the so-called Market Demand Strategy (MDS). Mr Anoj Singh, the then Acting Chief Financial Officer (CFO), and Mr Brian Molefe the Group CEO, played important roles in the development of the MDS. The commencement of the MDS coincided with Mr Brian Molefe's selection as GCEO and the appointment of a new Board by the then Minister of Public Enterprises, Mr Malusi Gigaba.

227. The MDS envisioned the investment of R300 billion in TFR, TNPA, TPT, TPL and TE. The biggest portion of the proposed investment spend was allocated to rail and the procurement of locomotives. The investment in TNPA was mainly for the widening and deepening of the harbours, development and maintenance of container stacking areas, improving efficiencies in the ports and crane acquisitions. Additional investment was envisaged for the Johannesburg to Durban petroleum pipeline.

228. Transnet's substantial capital expenditure means that there are many high value contracts at stake in its procurement processes.

229. A small group of senior executives and directors were strategically positioned to collude in the award of key contracts. The centralising of high-value procurement decisions facilitated the misleading of the Board in obtaining approval for irregular transactions. This was most evident in the various unprofessional, ill-prepared or last-minute proposals sent to the Board to push through transactions that upon proper scrutiny should have been rejected.

230. The evidence further shows that key employees at an operational level in Transnet were disempowered or marginalised from participation in important procurement decisions which affected their work. Internal controls were deliberately side-lined with the result that irregularities went unchecked. Executives at Transnet manipulated procurement processes to ensure preferential treatment to certain suppliers and that Gupta-linked entities benefitted from these transactions. Increased reliance on consulting and advisory services was achieved by weakening internal controls, either by diluting the role of governance staff in key transactions and operational matters or by entirely outsourcing their functions to third parties.

231. During his evidence before the Commission, Mr Popo Molefe described a pattern where vital positions such as CEOs, CFOs, and procurement, among others, were filled with "... individuals who have a veneer of professionalism and possess the appropriate experience". This allowed the manipulation of people, processes and systems "... for the advancement of looting".

232. In June 2018, the new Board of Transnet was presented with forensic reports that revealed widespread corruption and wilful disregard of the rules for the benefit of a racketeering and money laundering scheme aimed primarily at benefiting the Gupta family, its enterprise, and associated companies. Law enforcement agencies, despite being given detailed information, have failed in their duties to investigate. To date, no prosecutions have occurred in relation to corrupt activities and practices at Transnet.

233. Key individuals at Transnet oversaw the corrupt award of high-value contracts that enriched entities connected to the Gupta entities and their associates at great loss to Transnet. The three persons identified as the primary architects and implementers of state capture at Transnet are Mr Brian Molefe, Mr Anoj Singh and Mr Siyabonga Gama. The former Minister of Public Enterprises, Mr Malusi Gigaba, was involved in the appointment of Mr Brian Molefe and Mr Singh as directors of Transnet, and in the reinstatement of Mr Gama as the CEO of TFR. They, in turn, gave free reign to Mr Iqbal Sharma, who in 2012 became the Chairman of the influential Board Acquisition and Disposals Committee (BADC) of the Transnet Board.

234. Mr Brian Molefe and Mr Singh's appointments and the reinstatement of Mr Gama in 2011 after his dismissal in June 2010, were followed by the award of significant contracts that benefitted the Gupta enterprise. Through the strategic positioning of these and other individuals, and the weakening of governance structures in Transnet, wealth was extracted through corrupt and unaccountable procurement practices. Steps were taken to centralise procurement decisions, making it possible for

parties inside and outside Transnet to collude in the award of contracts and to redirect substantial public resources to the Gupta enterprise.

An overview of the specific transactions and corrupt payments

235. During the relevant period Transnet procured 1,259 locomotives in three separate procurement exercises (the 95, 100 and 1,064 locomotives contracts). Various procurement irregularities were identified in respect of each of these procurement transactions. The irregularities usually favoured bidders associated with the Gupta enterprise. Investigations revealed: (i) improper engagements with the successful bidders; (ii) irregular changes to the evaluation criteria benefiting the preferred bidder; (iii) a failure to levy delay penalties; (iv) the improper use of the mechanism of confinement, which is a process that does not involve opening the tender to the market in cases justified by urgency, standardisation or highly specialised goods; (v) the questionable escalation of acquisition costs; (v) the request for proposals ("RFPs") not complying with legal requirements; (vi) improper deviations when evaluating technical compliance; vii) non-compliance with the local production and content threshold and the award of tenders to bidders that did not meet the threshold; (viii) impermissible batch pricing causing Transnet to incur an additional cost of R2.7 billion; and (ix) a corrupt relationship between the bidders and the Guptas.

236. In terms of these agreements, Mr Essa secured a 21% commission paid to the shell companies. A BDSA was also concluded with CSR in respect of a proposed locomotive maintenance contract and in respect of the acquisition of both the 95 and 100 locomotives providing for 20 – 21% commission. There is no evidence showing that Mr Essa's companies rendered much in the way of services to CSR and CNR or to CRRC Hong Kong which would justify the excessive payments that were made in terms of the BDSAs.

237. An email dated 22 August 2015, discovered in the Gupta-leaks, attached a payment schedule including a calculation of the moneys CSR had agreed to pay two companies, JJ Trading FZE (JJT) and Century General Trading FZE (CGT) related to the three locomotive contracts entered into between CSR and Transnet. These companies were later substituted by Regiments Asia and Tequesta.

238. The payment schedule reflects the following intended payments: (i) CGT would receive from CSR 20% of the total value of the 95 locomotive contract, equal to R523.32m; (ii) JJT would receive from CSR R925 million on the 100 locomotive contract, being 21% of the total contract value; (iii) JJT and Tequesta would receive from CSR approximately R3.806 billion, being 21% of the value of the 359 electric locomotives (part of the 1,064); and (iv) CGT/Tequesta would receive from CNR R2.088 billion, being 21% of the total value of the 232 diesel contract (part of the 1,064). Thus, Mr Essa's companies were to receive at least R7.342 billion from CSR and CNR for the provision of advisory services for Transnet's locomotive procurement, without evidence of any valuable services for these fees. Further, it discloses that JJT and CGT would not retain the full amount paid to them by CSR. They would retain 15% of the total amount paid by CSR. While the document is silent on who was to receive the remaining 85%, banking records from the Gupta-leaks confirm that at least a portion of this was paid to companies controlled by the Gupta racketeering enterprise.

239. In August 2016 CRRC (an amalgamation of CSR and CNR) signed an addendum to existing agreements with Tequesta varying the terms of the BDSA of 18 May 2015. The purpose was to modify the terms under which Tequesta was to be paid, and specifically to waive CRRC's right to withhold portions of the payments due to Tequesta. It appears that CRRC had retained 15% of all payments due to Tequesta as surety. The addendum stipulated that this would no longer be the case, and that the amounts withheld up to that date (equal to $15,144,610 million) would be paid to Tequesta. This was contingent on Transnet awarding CRRC contracts to provide maintenance services. If this was not met, CRRC would be entitled to recoup the 15% outlay against future payments that were due to be made to Tequesta. The withheld amounts would be released within ninety days of the final payment being made by Transnet to CRRC. The effect of the addendum was to expedite a large payment to the Gupta enterprise through Tequesta.

240. March 2014 saw the conclusion of the Locomotive Supply Agreements (LSAs) in respect of the 1,064

locomotives with the four original equipment manufacturers (the OEMs) that had bid successfully. During July 2015 Transnet approved the relocation costs of two of the OEMs, Bombardier Transportation South Africa (Pty) Ltd (BT) and CNR, amounting to R618.4 million and R647.2 million, respectively, for conducting their operations in Durban and not in Gauteng as originally envisaged in the requests for Proposals (RFPs). There was no actual relocation of either BT or CNR. Neither company had commenced operations in Gauteng. The variation orders to the LSAs were inflated and inadequately evaluated by Transnet. There was also a BDSA between CNR and a Gupta-linked company named BEX associated with this transaction involving a payment more than R67 million, with some of that being laundered to the Gupta enterprise. The language and format of the BDSA resembled the BDSAs concluded by Mr Essa for the locomotive contracts.

241. Throughout that time, Mr Iqbal Sharma, the Chairperson of the BADC of Transnet, had a matrix of business relationships with Mr Essa. The appointment of financial advisers in relation to the 1,064 locomotives procurement was a significant part of the Gupta-linked corruption and racketeering enterprise that took place at Transnet between 2011 and 2016 under the leadership of Mr Brian Molefe, Mr Singh, Mr Gama and Mr Sharma. This involved the siphoning of funds from Transnet using contracts for advisory services related to the locomotive procurements, sometimes providing little or no value for inflated fee payments.

242. The role of Regiments and its associated companies in corruption, money laundering and racketeering came to light in the testimony of Mr Ian Sinton, the former General Counsel of Standard Bank. In response to media reports about the Gupta enterprise, Standard Bank reviewed a transactional account held by Regiments and ascertained that over a period of approximately three years, regular large transfers were made into the account and shortly thereafter transfers were made out of it to Gupta related entities. Consequently, on 18 August 2017, Mr Sinton wrote to Mr Niven Pillay, a Director of Regiments, advising him that Standard Bank was required by law to ascertain the source of funds and the application of those funds. Relevant bank statements were attached to the letter and Mr Pillay was requested to explain the transactions in question. A meeting was convened on 6 October 2017 and attended by two Directors of Regiments, Mr Pillay and Mr Litha Nyhonhya, and by Regiments' COO, Mr John Rossouw.

243. Mr Pillay informed Mr Sinton that in October 2012, Mr Pillay and Mr Eric Wood, both Directors of Regiments, were invited by a friend of Mr Pillay, Mr Kuben Moodley, to a meeting in Sandton where they met for the first time Mr Vikas Sagar, a partner at McKinsey, and Mr Essa. According to Mr Pillay, Regiments was informed that McKinsey had concluded a consultancy contract with Transnet, but that Transnet required McKinsey to appoint a black-owned supplier development partner (SDP) for at least 30% of the consultancy fees to be earned. McKinsey offered to appoint Regiments as its SDP subject to Regiments agreeing to share with Mr Essa 30% of all income received. This would be in addition to the 5% of all income received from Transnet that Regiments agreed would be payable to Mr Moodley. Neither Mr Essa nor Mr Moodley would render any service beyond introducing Regiments to McKinsey and Transnet.

244. Regiments informed Mr Sinton that it accepted McKinsey's offer and was consequently appointed as an SDP for the consultancy work for Transnet. Regiments stated that the amounts transferred to the Gupta entities, exceeding R210 million, were the agreed 5% for Mr Moodley, plus 30% for Mr Essa. Mr Pillay and Mr Nyhonhya explained that, without their knowledge and from a later uncertain date, Mr Wood increased Mr Essa's share of the proceeds from Transnet consultancy work to 50%.

245. When Mr Sinton enquired how a consultancy firm such as Regiments could give away 35%, and later 55% of its income to Mr Moodley and Mr Essa, who provided no services to Regiments beyond the introduction to McKinsey and Transnet, and remain profitable, he was told that the consultancy rates that McKinsey had agreed with Transnet were 400% more than Regiments would have been willing to agree to, had it negotiated directly with Transnet.

246. Regiments went on to explain to Mr Sinton that it had worked alongside McKinsey on various assignments for which it was paid its share directly by Transnet. McKinsey was appointed as a member of a consortium of consultants to advise Transnet on its acquisition of 1,064 new locomotives, and

Regiments was substituted for Nedbank in that consortium. However, after having done work on the initial business case, McKinsey withdrew and Regiments, with Transnet's consent, assumed the role as lead advisor. In response to a question from Mr Sinton as to what role, if any, Regiments had played in the reported post tender increases in the locomotive prices, Regiments stated that it had advised Transnet to agree to the increases to compensate the successful tenderers for assuming foreign currency risks. When asked by Mr Sinton to comment on a media report, dated 1 June 2017, that Mr Essa, representing Tequesta, had been promised 21% of all amounts paid by Transnet to CSR, Regiments claimed to have no knowledge of the media report or Mr Essa's involvement.

247. In a letter to Standard Bank dated 10 November 2017, Regiments confirmed that it had agreed to pay Mr Essa 30% of revenue flowing from its relationship with McKinsey, that McKinsey was aware of this arrangement and that in November 2013 Mr Wood, on behalf of Regiments, increased Mr Essa's revenue share to 50%. Standard Bank then terminated its relationship with Regiments and its Directors.

248. The Money Flow Team of the Commission prepared a report dated 13 November 2020 outlining the relationship between Regiments and various Gupta associates, and identifying several payments made by Regiments to those entities. The cash flows analysed by the MFT confirm that the arrangement implemented by Regiments for most of the lifespan of the relationship with McKinsey was that Mr Essa's entities were ordinarily paid 50% of Regiments' revenue from Transnet with Albatime being paid 5%, leaving Regiments with only 45%.

249. Hundreds of millions of Rands were laundered through shell companies nominated by Mr Essa out of fees paid by Transnet to Regiments on the McKinsey/Regiments appointments at Transnet. These payments were supposedly "business development fees" due to Mr Essa who introduced them to McKinsey and to Mr Moodley who introduced them to Mr Essa. The shell companies changed over time. Within days, revenue received from Regiments by the shell companies was laundered to lower-level laundering entities. Apart from outflows to lower level laundry entities, the shell companies had no expenses of consequence and did not pay SARS.

250. The laundering arrangements with Mr Essa and Albatime on joint McKinsey/Regiments' contracts with Transnet were fraudulently presented by Regiments in joint McKinsey/Regiments bid submissions as Regiments supply development arrangements. In other cases, the laundering payments were made without any pretext of such payments in the proposals submitted by McKinsey/Regiments.

251. McKinsey denied any wrongful conduct on its part and committed to returning all fees received for work involving Regiment. As a result of an initiative of the Commission to confront McKinsey with certain evidence, McKinsey agreed to repay R650 million to Transnet (later increased to R850 million). In correspondence addressed to the Commission on 12 August 2021, McKinsey's legal representative confirmed that McKinsey commenced working with Regiments as an SDP in 2013 after conducting limited due diligence. It said that it terminated the relationship in 2016 when reports of Regiments' links with the Gupta network emerged in the media.

252. Mr Singh, who played the most important role in the appointment of McKinsey and Regiments, persisted with the proposition that there was a business need for the financial advisers and that Transnet received value for money. He said that McKinsey, because of its international expertise and significant history with Transnet, was best placed to execute the projects in the required time.

253. In relation to a loan of USD1.5 billion advanced by the China Development Bank, Regiments was paid a success fee of R189 million, of which R147 million was paid to Albatime (Gupta-linked laundering company). A R122 million portion thereof was then laundered to Sahara Computers (Pty) Ltd (another Gupta company). In relation to another funding arrangement, "the ZAR Club Loan" for R12 billion, Trillian Capital Partners (Pty) Ltd, in which Mr Essa had an indirect 60% controlling interest, through Trillian Holdings (Pty) Ltd), was paid R93 million for arranging the loan, without any services being rendered. Four days later, R74 million thereof was paid to Mr Moodley's company, Albatime.

254. There was also corruption in relation to key contracts for IT network and data services outsourced by Transnet. During 2013, Transnet issued a substantial tender for network services. After Neotel

(Pty) Ltd was identified as the preferred bidder, Mr Brian Molefe reversed the award and awarded it to T-Systems (a Gupta-linked company), the bidder that was ranked third in the scoring. Mr Molefe later revoked his decision, and the tender was finally awarded to Neotel. Various irregularities occurred in the awarding of this tender, most significantly, substantial improper payments Neotel made to (Gupta-linked) Homix (Pty) Ltd.

255. On 22 February 2017, Transnet awarded an IT data services tender to T-Systems as the second highest scoring bidder, rather than to the highest scoring bidder Gijima. Transnet held a view that there were objective criteria justifying such an award, while there was no reasonable basis for Transnet not to have awarded the tender to Gijima. The matter was litigated, and the decision was ultimately reversed and the award made to Gijima.

GOVERNANCE RESTRUCTURING AND WEAKENING OF INSTITUTIONAL CONTROLS

256. Capturing Transnet involved restructuring of governance and weakening of internal controls. Changing the established structures shifted decision-making power to individuals who were strategically positioned within Transnet to collude with persons outside the company. Centralisation of approval authority at the level of the Board and senior management had the effect of shielding procurement processes from the scrutiny of a wider group of Transnet officials who could have detected and reported irregularities. Heads of operating divisions did not have easy access to senior management and were afforded little input on decisions which directly affected their divisions.

257. Mr Peter Volmink provided testimony to the Commission regarding the internal controls applicable to procurement processes at Transnet. He joined Transnet in 2007 as GM: Legal, at the Corporate Centre, and was later transferred to the SCM unit, first as a Legal Specialist and later as the Executive Manager: Governance.

The role of governance

258. Historically, as a safeguard and check, Governance compiled monthly reports based on information received from the operating divisions to track compliance with Transnet's procurement requirements.

259. A rule of practice existed that key procurement documents requiring Group sign off by the Group Supply Chain Officer or higher had to be reviewed by Governance to assess compliance with the regulatory framework. This caused some frustration and resentment among officials, resulting in Governance being seen as a cause of SCM delays.

260. Mr Volmink pointed to two weaknesses that probably contributed to the corruption in Transnet's procurement processes. Firstly, most staff employed in the Governance function at operating division level are relatively junior and consequently lack the experience, training, and confidence to resist pressure from senior managers and executives. Secondly, the reporting lines of the Governance function at operating division level are problematic in that Governance reports to the CPOs. Yet, Governance is supposed to provide an independent, assurance function.

The changes to the delegation of authority framework

261. The Delegation of Authority (the DOA) Framework sets out the powers delegated to various bodies or officials to perform specified tasks in relation to various areas of operation such as treasury, human resources, and procurement, among others. The DOA Framework also covers other procurement processes, such as the use of emergency processes, confinements, blacklisting etc.

262. Transnet's procurement DOAs are structured around three key stages in the procurement process: (i) approval to approach the market; (ii) bid adjudication; and (iii) contract award.

263. In his evidence to the Commission, Mr Volmink explained that, historically, the Board of Transnet was not directly involved in procurement. Prior to 2011, the Board and its sub-committees did not have any DOA for procurement-related activities. These responsibilities were introduced during 2011 with the creation of the BADC as a sub-committee of the Board. Under the 2011 DOA, the BADC was established and empowered to approve the approach to market and to conclude contracts for certain high value tenders exceeding R500 million, to appoint consultants and to approve confinements. The timing of the BADC's establishment in February 2011 and the changes to the DOA framework coincided with Cabinet's approval of Mr Brian Molefe's appointment as GCEO on 16 February 2011.

264. The subsequent expansion of the BADC's authority and procurement powers over time closely tracked the injection of funds for capital expenditure and the consolidation of power in Transnet by Mr Brian Molefe, Mr Singh and Mr Sharma.

265. In 2013, certain individuals were empowered to give process approval for high value tenders. This effectively established one-person Acquisition Councils with more extensive approval authority, including the GCFO Mr Singh (up to R750 million) and the GCEO Mr Brian Molefe (up to R1 billion). By 2016, the BADC's approval authority had further increased to R3 billion, with the Board retaining approval authority for tenders above this threshold.

266. Accordingly, after 2011 and prior to 2019, the DOA framework and prevailing practice at Transnet provided for an abnormality, in that it granted certain individuals greater powers to award tenders and conclude contracts than Acquisition Councils. In the relevant time of state capture Mr Brian Molefe, Mr Singh and others awarded tenders up to R1 billion without the tender serving before an Acquisition Council. Individuals thus were permitted to perform the function of a multi-disciplinary adjudication body. The increase in authority worked to the benefit of the Gupta enterprise.

The procurement process

267. There are three stages (comprising a cycle of nine steps) in the procurement process. The first stage is a planning stage; the second is the actual procurement stage; and the third is the implementation stage where the contract is in place and must be implemented.

268. Evaluation of tenders at Transnet normally followed the classic two-phase methodology of the public sector. The first phase requires certain thresholds to be met and the second involves the evaluation of price and preference.

269. Bids are regarded as administratively responsive if all mandatory documents were provided by the closing date and time of the bid. Bids are regarded as substantively responsive if all pre-qualification criteria were met.

270. The BADC was concerned that this approach opened the door to "low-balling" i.e., the practice of bidders offering unrealistically low prices in order to win the bid, and then motivate for price increases after the award of contract. The BADC accordingly adopted a different formula, using the average price as the benchmark. Where a bidder's price was equal to or lower than the average price, it would be allocated the full number of points for price. Bidders who were more expensive than the average price were allocated fewer available points. Points were also allocated to SD and B-BBEE during stage 2. Here SD and B-BBEE served as differentiators i.e., to differentiate between bidders who met the minimum threshold, based on their SD and B-BBEE performance. Transnet enjoyed an exemption from the requirements of the PPPFA which expired on 7 December 2012. This meant that Transnet's procurement procedures had to align to the PPPFA thereafter.

The weakening of internal controls at Transnet

271. Mr Volmink identified several problems in procurement practices at Transnet during the period investigated by this Commission. In general these included: (i) inadequate needs assessment; (ii) poor or biased development and drafting of specifications; (iii) under budgeting; (iv) inappropriate deviations from the open bidding processes; (v) short time for bidders to respond to tenders possibly intended to

favour preferred bidders; (vi) changing evaluation criteria during bid evaluation and adjudication; (vii) inconsistent application of disqualification criteria; (viii) improper overruling of the evaluation team; (ix) manipulation of bid committee scores; (ix) the opportunistic use of risk factors as a reason to disqualify top-ranked bidders; (x) multiple repetitive awards to the same supplier; (xi) awards not made by the official with the requisite delegated authority; (xii) poor contract management; (xiii) abuse of variation procedures; (xiv) failure to pursue contractual remedies for delay and breach; and (xv) inadequate validation of services rendered prior to payment.

272. The formal restructuring of procurement processes at Transnet was accompanied by informal, but significant, shifts in governance culture and procurement practices that added to the centralisation of power in a small group of top executives and Board members. As Mr. Volmink noted in his evidence "the primary challenges to good governance within SCM emanates from people at the top... i.e., EXCO and Board. The bulk of the R8.2 billion on irregular expenditure that Transnet recently incurred is directly attributable to decisions made by Executives and Board Members". Mr Volmink observed that there were two systems for procurement at Transnet, one for lower-value transactions with rules, procedures, and systems; and an "alternative system" that applied to high-value contracts.

273. The concentration of power in a small group of senior executives and Board Members appears to have fostered an authoritarian culture of decision-making rather than inclusive and transparent deliberation. Mr Volmink testified that SCM staff members were often bullied by senior executives into complying with their wishes. Staff members often complied with improper instructions for fear of facing disciplinary measures, intimidation or even losing their employment. Several witnesses recounted to the Commission how Transnet employees who resisted irregular decisions were bullied into submission or dismissed, transferred, or rendered redundant.

274. The inappropriate use of confinements, emergency procurement and contract variations also aided corruption at Transnet. State capture happens through processes designed to override controls. Deviations from the open bid process helped to facilitate capture and enabled persons with nefarious motives to do what they wished.

275. During 2012, the Board expressed its unhappiness with the widespread use of confinements within Transnet and at first sought to remove confinement from the PPM altogether. However, the Board later agreed to retain confinements in the PPM as "special cases". The Board then removed the power to confine from the operating divisions and vested the power in Mr Brian Molefe, the GCEO, or higher, depending on value. However, the use of urgency as a ground for confinement was curtailed. If the urgency arose because of bad planning, a confinement would not be justified.

276. Mr Volmink was also critical of the previous practice of permitting the GCEO to award tenders by confidential confinement. A confinement is a deviation from an open bidding process. A normal confinement required multiple levels of review within Transnet and was subject to transparency, while a confidential confinement was not. Therefore, it was possible under the earlier versions of the DOA framework during Mr Brian Molefe and Mr Gama's tenure, for a confidential confinement of a tender worth R1 billion to go straight to the GCEO without any other person or body reviewing the confinement. This happened with the high value tenders awarded to McKinsey and Regiments for financial advisory services.

277. Emergency procedures were inappropriately resorted to during the period under investigation, as permitted in Paragraph 15.2 of the PPM (2015). However, the PPM stipulates that the concept of an "emergency" must be applied restrictively and should not be used as an excuse for bad planning. Emergency procedures apply only in cases where there is an imminent risk of human injury or death; suffering or death of livestock; serious business disruption that could not reasonably have been foreseen; interruption of essential services; serious damage to property or financial loss or serious environmental degradation.

278. Governance was also concerned about the occasional opportunistic use of risk factors during the process of bid evaluation or adjudication to disqualify deserving or successful but unwanted bidders on the basis of supposed material risks in making the award to such persons. Once a bidder has passed a functionality threshold, technical shortcomings in the bidder's offer cannot be used to disqualify the

bidder based on a "risk assessment". This would be seen as "double-dipping". All technical risks should be considered when functionality criteria are designed and evaluated.

279. Finally, the effectiveness of internal controls was also undermined by limiting access to information that would expose corruption. The upward flow of information was deliberately filtered so that limited information reached the Board. The internal audit unit, which should ideally report directly to the audit committee of the Board, had to “dilute” and “be selective” about what report reached the Board and the Audit Committee. This practice of withholding the disclosure of audit information appears to have continued, as the investigators tasked by the new Transnet Board were unable to obtain many reports from the Internal Audit unit.

The relegation of Transnet’s Treasury

280. During the period under investigation, internal structures at Transnet were increasingly marginalised from procurement processes and their functions were outsourced to private firms. The Transnet Treasury was marginalised in key financial transactions and ultimately made redundant as its work was taken over and outsourced to Regiments.

281. The role of the Transnet’s Treasury is to ensure that the Transnet Group has enough cash to meet all its operational and capital requirements. It does this by ensuring that funding is sourced cost effectively within approved risk parameters and without breaching key financial ratios. It is critical that Transnet remains a solid investment-grade rated entity to ensure that it can secure funds cost effectively and be able to access short term general banking facilities, capital markets and derivative credit lines.

282. Despite this extensive functional expertise and experience within its Treasury, Transnet engaged financial advisers, with links to the Gupta racketeering enterprise, at enormous cost, to manage the financing of the approximately R70 billion procurement of locomotives between 2012 and 2017. According to Dr Bloom, the use of external financial advisers was for the most part unwarranted.

KEY APPOINTMENTS AND RELATIONSHIPS WITH GUPTA ENTERPRISE

283. Mr Popo Molefe testified that the problems with governance and procurement at Transnet escalated with the appointment by Cabinet of Mr Brian Molefe as GCEO in 2011, on the recommendation of the then Minister of Public Enterprises, Mr Malusi Gigaba. Mr Brian Molefe, Mr Singh and Mr Gama denied involvement in state capture, corruption, and any association with or participation in the Gupta racketeering enterprise. However, the evidence clearly shows that all three had significant contact with the Gupta family, who benefitted considerably from the corruption at Transnet.

284. Mssrs Molefe, Singh and Gama facilitated the conclusion of irregular contracts at inflated prices, using deviations or improper confinements, and in some instances the changing of tender evaluation criteria, in order to facilitate entry for companies involved in the extensive money laundering scheme directed by Mr Essa on behalf of the Gupta network. Mr Sharma, as a member of the Board and later the chairman of the influential BADC, was a business associate of Mr Essa. They were co-directors and shareholders in several companies. They were regular visitors to the Gupta compound in Saxonwold.

285. Other role players implicated in the scheme of wrongdoing include Mr Garry Pita, who held various positions including the Group Chief Supply Chain Officer and GCFO, Mr T Jiyane who at relevant times was the CPO at TFR and Mr Phetolo Ramosebudi who was appointed as the Group Treasurer in 2015.

The refusal to appoint a GCEO

286. State capture at Transnet began with the resignation of Ms Maria Ramos as GCEO in 2009 and the election of Mr Jacob Zuma as President of the Republic.

287. In May 2009, following the national elections, President Zuma appointed Ms Barbara Hogan as Minister of Public Enterprises (MPE). From Hogan's earliest days in office former President Zuma interfered and sought to thwart her appointment of a new GCEO of Transnet. Approximately a month after her appointment, Ms Hogan briefed President Zuma on developments at Transnet, including the urgent need to appoint a GCEO, the position having been vacant since the resignation of Ms Ramos.

288. Following Ms Ramos' resignation, the then Minister of Public Enterprises, Ms Mabandla, appointed the GCFO of Transnet, Mr Chris Wells, as the acting GCEO. In early 2009, the Transnet Board, following a thorough selection process, recommended Mr Pravin Gordhan as its only candidate for the GCEO position. A week later, Mr Gordhan withdrew his candidature and ultimately was appointed the Minister of Finance after the General Elections of May 2009. Mr Gama was a candidate for the position at the same time.

289. Mr Gama had served as the CEO of TFR since 2005. In early 2008 there was an investigation into his conduct following allegations of corruption at Transnet made in two anonymous letters. The investigation looked at two separate procurements. The first was the acquisition of fifty "like new" locomotives at a cost of more than R800 million and the second was the procurement of security services from General Nyanda Security Advisory Services (Pty) Ltd (GNS), a company controlled by General Siphiwe Nyanda, then a Minister and member of President Zuma's Cabinet.

290. Ms Ramos handed Mr Gama's alleged misconduct to the Board for further action when she resigned. The investigation established that there was a prima facie case of misconduct against Mr Gama. The Board also considered Mr Gama unsuitable for appointment as GCEO. In a letter, dated 13 February 2009, to Ms Mabandla, the then Minister of Public Enterprises, the Chairperson of the Board, Mr Phaswana, explained that Mr Gama was not fit for appointment as GCEO because "... Gama was thoroughly considered, but there are important gaps, relative to the requirements for this position. He currently requires greater cognitive development to handle the complexity of the position". In further correspondence, Mr Phaswana stated that Mr Gama "... did not demonstrate the required level of skill for the Group Chief Executive..." and that his competency-based assessment showed "... worrying concerns in relation to the exercise of personal judgement...". He also highlighted the serious allegations of misconduct against Mr Gama.

291. After a further process, the Board recommended the appointment of Mr Sipho Maseko (the CEO of BP Africa at the time), a highly capable and experienced black candidate with the requisite experience and admirable managerial capabilities.

292. Reports then appeared in the media that Mr Gama was being victimised by an anti-transformation white cabal that had instituted an inquiry, and later disciplinary proceedings to prevent him from being appointed as the GCEO. It was claimed that Mr Wells wanted to be GCEO and had started the inquiry to eliminate his rival.

293. Ms Hogan testified that former President Zuma then thwarted her appointment of a new GCEO of Transnet. At a meeting in June 2009, President Zuma indicated that he was not prepared to accept the appointment of the Board's candidate, Mr Maseko, and insisted that Mr Gama be appointed. When Ms Hogan resisted this on the basis that he was not the Board's preferred candidate and was facing disciplinary proceedings, President Zuma adopted the position that no new appointments would be made at Transnet until the proceedings were completed. The effect was that Transnet had an acting Chairperson, an acting GCEO, and acting GCFO for one and a half years.

294. On 28 July 2009, Ms Hogan sent former President Zuma a comprehensive report detailing the selection process, the strong motivation for the appointment of Mr Maseko, the procurement irregularities under investigation, and the corporate governance aspects of GCEO appointments. The report recommended that in the interest of leadership stability at Transnet, the CEO be appointed without delay with due consideration for the Board's confidence in the competency of Mr Maseko as their preferred candidate. President Zuma did not respond to this report and recommendation. In August 2009, Ms Hogan sought to place a Memorandum before Cabinet recommending the appointment of Mr Maseko. Cabinet was due to meet on 26 August 2009. Recognising the urgency of the situation in Transnet, and still not having received a reply from President Zuma, Ms Hogan sent an urgent letter

on 25 August 2009 requesting his assistance to expedite the placement of Cabinet Memo 7/2009 on the agenda.

295. Ms Hogan stated that President Zuma gave her instructions to withdraw the memorandum and requested her to provide him with the names of three potential Chairpersons for Transnet. She testified that, following her letter, she thought that she had spoken to President Zuma telephonically, but could not remember. She surmised that President Zuma had said that "[t]his is not going through, I want . . . you to add three more names for a Chairperson". In effect, President Zuma's reaction to her letter was that "the memo was withdrawn from Cabinet, it did not serve at Cabinet". As she explained, "[t]he Cabinet Secretariat were instructed to withdraw the memorandum and they said that the President had given that instruction".

296. The choice of Mr Gama received support from two Cabinet ministers, Mr Jeff Radebe, and General Siphiwe Nyanda, the owner of the company implicated in the procurement irregularities that led ultimately to Mr Gama's dismissal, the ANC Secretary-General, Mr Gwede Mantashe and certain factions within the ANC.

297. Ms Hogan considered the support given to Mr Gama to have been part of "concerted attempts" to improperly influence the appointment process of the Transnet GCEO, with blatant disregard for the Board and herself as the then Minister. President Zuma's "absolute dogged insistence" that all appointments be deferred pending the outcome of Gama's disciplinary inquiry, in her view constituted a material breach of corporate governance.

298. When former President Zuma gave evidence on 17 July 2019, he objected to how he was being questioned in relation to the report of 28 July 2009 put before him by Ms Hogan regarding Mr Gama. After a discussion in chambers, the proceedings adjourned, and Mr Jacob Zuma did not testify again before the Commission. Thus, while former President Zuma did testify in relation to this issue, he did not fully address the allegations by Ms Hogan that he was party to a breach of corporate governance at Transnet.

299. In relation to Mr Gama's candidacy, former President Zuma said that following a process of discussion within Cabinet, there was a view that "this man [Gama] we know him, he has been working here, he is capable, and then at the end I think there was kind of a stronger view that now let us take the decision that we should take him".

300. Former President Zuma could neither admit nor deny that there was widespread vocal support for Mr Gama's appointment as the next GCEO of Transnet. He maintained that from his perspective he had no preference for Mr Gama and was willing to abide by the outcome of the decision. He recalled that there were allegations relating to Mr Gama and General Nyanda but did not remember the detail. There were murmurs about Mr Gama being victimised, but he could not recall the detail. He could not remember the final conclusion of Mr Gama's disciplinary inquiry.

301. Mr Jacob Zuma admitted that he had received and read the comprehensive report dated 28 July 2009 Ms Hogan sent him. He did not take issue with the report, which, inter alia, stressed the urgent need for the appointment of a GCEO. He was not able to remember whether he responded to Ms Hogan or the recommendation in the report. The process was that unless he raised an important issue with a Minister, a Cabinet memorandum would be placed before Cabinet for discussion. It was the Cabinet Secretariat's responsibility to ensure that the memorandum went to Cabinet.

302. Having denied that he insisted that Mr Gama be appointed and delayed the appointment of a GCEO, Mr Zuma intimated that he had no difficulty with the memorandum proposing the appointment of Mr Maseko being placed before Cabinet.

303. However, because he walked out of the Commission and refused to return, Mr Zuma did not directly answer the allegation that after receiving Ms Hogan's letter of 25 August 2009 he instructed her to withdraw the matter of Mr Maseko's appointment from the Cabinet agenda. The evidence of Mr Zuma that he did not insist at his meeting with Ms Hogan in June 2009 that Mr Gama be appointed and that he did not seek to prevent Mr Maseko's appointment, stands to be rejected. Mr Zuma's position was "Mr Gama or nothing". Despite having received Ms Hogan's report on or about 28 July 2009 and

acknowledging the urgent need for the appointment of a GCEO, he allowed the position to go unfilled right up until his removal of Ms Hogan as Minister with effect from 31 October 2010.

304. His failure to respond to the contemporaneous correspondence, the practices of the ANC deployment committee, the vocal public support for Mr Gama by senior members of the ANC, the attacks on the members of the Board and the subsequent removal of Ms Hogan as Minister of Public Enterprises support Ms Hogan's version that former President Zuma insisted on the appointment of Mr Gama.

305. Therefore, Mr Zuma's version is wholly improbable as most evident from the fact that Mr Maseko was not appointed despite the desires and best efforts of the Board and Ms Hogan. There is no other plausible explanation for the non-appointment of Mr Maseko.

Mr Gama's dismissal

306. Various witnesses gave evidence regarding the dismissal, reinstatement, and subsequent promotion of Mr Gama, which forms important background to the role he played at Transnet and the political pressure and influence brought to bear in his favour during the period of state capture.

307. When independent investigations confirmed that the allegations against Mr Gama were serious, disciplinary proceedings were instituted against him on three charges in late August 2009 and he was suspended with full pay from 1 September 2009. On 10 September 2009, Mr Gama brought an urgent application in the High Court challenging the legality of his suspension and the decision to institute disciplinary proceedings against him.

308. Mr Gama's disciplinary inquiry took place over 14 days between 13 January and 25 February 2010. The inquiry was chaired by Advocate Mark Antrobus SC, who found him guilty on three charges.

The Role of Minister Gigaba and the appointment of Mr Brian Molefe as GCEO

309. Following Mr Gama's dismissal on 29 June 2010, and Mr Maseko having withdrawn his application, Ms Hogan sought to secure the appointment of a new Board that would commence a fresh search for a new GCEO. She did so by attempting to place a memorandum dated 27 October 2010 before Cabinet. She was called to a meeting with President Zuma and the former Secretary-General of the ANC, Mr Mantashe, on 31 October 2010, and advised of her removal as the Minister of Public Enterprises and re-deployment as the Ambassador to Finland. She declined the re deployment and indicated her intention to resign as an MP. Ms Hogan contends that she was removed because she resisted the repeated attempts to improperly influence executive and Board appointments at Transnet and other SOEs.

310. The following day, 1 November 2010, President Zuma appointed Mr Gigaba as Minister of Public Enterprises. Mr Gigaba remained the MPE until 25 May 2014, which period spanned the procurement and acquisition of the 100 and 1,064 locomotives.

311. Mr Gigaba had a close relationship with the Gupta family, as did Mr Jacob Zuma and members of his family, which commenced in the early 2000s when he was the president of the ANC Youth League. In affidavits filed with the Commission and in response to questions from the Fundudzi Investigation, Mr Gigaba initially sought to downplay the relationship, but his testimony reveals that he had extensive, recurring contact with the Gupta family over several years.

312. Mr Gigaba in fact knew all the Gupta brothers and their mother, was especially a friend of Mr Ajay Gupta and made regular visits to the Gupta Saxonwold compound while he was Minister of Public Enterprises (possibly twenty or more visits in total). His Special Adviser, Mr Siyabonga Mahlangu, was tasked with managing the Gupta family and was a buffer between Mr Gigaba and Mr Ajay Gupta so as not to confuse the roles of friendship and business. He permitted Mr Mahlangu to travel with President Zuma's son, Mr Duduzane Zuma, to a Gupta wedding in India. The trip was paid for by Sahara Computers. Mr Gigaba attended the notorious Gupta wedding at Sun City and the Gupta family were invited to his wedding.

313. Mr Gigaba approved an internal memorandum which proposed a list of candidates for appointment as non executive directors to the Transnet Board on 24 November 2010. This memorandum indicated that only three non-executive Directors would be retained, in disregard of a decision taken at the Transnet AGM in July 2010 to reappoint all non-executive Directors. This meant that a total of 12 new Board positions were filled at this stage. In an addendum to the memorandum, it was proposed that Mr Vijay Raman be replaced by Mr Sharma (who in 2013/2014 was the business partner of Gupta associate, Mr Essa, and later assumed control of the BADC). The substitution of Mr Raman with Mr Sharma was questionable in light of the Minister's responsibility to ensure that the Board had an appropriate mix of skills and experience.

314. On 8 December 2010, Cabinet approved Mr Gigaba's recommendations for the Board at Transnet, including the appointment of a new Chairperson, Mr Mafika Mkwanazi, on 8 December 2010. The new Board included Mr Sharma. A few days after his appointment as Chairperson of the Board, Mr Gigaba appointed Mr Mkwanazi as acting GCEO to replace Mr Chris Wells, who had resigned on the day that President Zuma appointed Mr Gigaba as Minister.

315. Mr Gigaba was later party to an attempt to appoint Mr Sharma as Chairperson of the Board. Cabinet rejected that recommendation.

316. In December 2010, prior to the publication of the advertisement for applications to fill the GCEO vacancy, the Gupta owned newspaper The New Age predicted the appointment of Mr Brian Molefe as GCEO of Transnet. Mr Brian Molefe was contacted by the media about the possibility of being appointed but claimed no-one had spoken to him about the job at that stage.

317. On 7 January 2011 a special Nominations and Governance Committee was convened to discuss the strategy to appoint a GCEO for Transnet. A recruitment agency, Leaders Unlimited, was appointed to lead the process. On 13 January 2011, Board Members nominated 13 candidates and LU identified an additional 20 candidates for the vacancy. Mr Sharma nominated Mr Brian Molefe, who was contacted by LU a few days later.

318. In early February 2011, nine candidates were interviewed, including Mr Molefe and Mr Gama, who by then had been dismissed. Mr Sharma sat on the selection panel that interviewed Mr Brian Molefe. However, he belatedly recused himself and his scores were not considered, though his preference by then was clearly known. On 11 February 2011, the Board resolved to submit a list of three preferred candidates for GCEO as recommended by the NGC to the Minister, which included Mr Brian Molefe.

319. The Ministerial guidelines for appointment of a CEO for a SOE required the Board to submit a minimum of three shortlisted candidates and to indicate its preferred candidate. The Board in this instance failed to identify its preferred candidate but indicated that Dr Gantsho had scored the highest, followed by Mr Brian Molefe. According to Mr Mkwanazi, the Board accepted that the Minister had the right to appoint the GCEO and on that basis abdicated its responsibility to identify the person it preferred.

320. In a memorandum dated 14 February 2011, Mr Gigaba requested Cabinet to "note" the appointment of Mr Brain Molefe as "the most suitable candidate" for the position of GCEO. Mr Gigaba admitted that he failed to inform Cabinet that Dr Gantsho was the highest scoring candidate. Mr Gigaba sought to justify his omission on the basis that the annexures to his memorandum disclosed the scores. He conceded that it would have been more proper to have disclosed in the memorandum that he was recommending a candidate who had not scored the highest and that the Board had failed to identify its preferred candidate.

321. On 16 February 2011, Cabinet approved the appointment of Mr Brian Molefe as the GCEO. In effect, Mr Gigaba, a friend of the Gupta family was instrumental in the appointment of Mr Brian Molefe, another friend of the Gupta family, with his appointment having been predicted in the newspaper owned by the Gupta family.

322. Mr Brian Molefe went on to oversee the substantial procurements at Transnet from which the Gupta network illegally benefitted. Most of the transactions were approved by the BADC chaired by Mr Sharma, who was in a close business relationship with Mr Essa, who had a 20 – 21% interest via the

dubious BDSAs in the transactions. Ultimately, the Gupta enterprise received more than R3.5 billion in proven kickbacks in respect of the locomotives procured under Mr Brian Molefe's watch.

323. Despite the perpetrators of this massive racketeering, corruption and money laundering being his friends and associates operating in the Transnet space, Mr Brian Molefe maintains he was wholly unaware of any wrongdoing. It is noteworthy that Mr Brian Molefe was reluctant to acknowledge that he felt betrayed by the plundering of Transnet, during his time as GCEO, by his good friends, the Guptas. He stated that he preferred rather to reserve judgment until their crimes were established beyond all reasonable doubt.

The events leading to Mr Gama's reinstatement

324. On 22 July 2010, Mr Gama referred an unfair dismissal dispute to the Transnet Bargaining Council. On 14 October 2010, during pre-arbitration exchanges, Langa Attorneys recorded that Mr Gama would not contest that he was guilty of the disciplinary charges but contended that dismissal was an inappropriate sanction.

325. The process to reinstate Mr Gama appears to have begun in a meeting between Mr Gigaba and Mr Mkwanazi either before 1 November 2010 or in early November 2010. During the meeting, Mr Gigaba requested that the incoming Board should review the fairness of Mr Gama's dismissal. He thought the sanction of dismissal was unfair and too harsh for two reasons: firstly, because white employees had committed more serious acts of misconduct and had not been dismissed; and secondly, because Transnet had not followed the applicable condonation process in place in terms of which procurement irregularities are condonable. In his testimony, Mr Gigaba admitted that he had sought a review of the fairness of the dismissal, but denied giving a shareholder instruction, indicating that he considered the dismissal too harsh or raising the procurement condonation process. He wanted a review to be undertaken to make sure that the company was rid of the controversies surrounding a matter of high public profile.

326. On 22 December 2010, the Public Protector notified Transnet that she was investigating certain allegations that the Transnet Board had unfairly conspired to prevent Mr Gama from successfully applying for the vacant post of GCEO. Mr Mkwanazi enlisted the assistance of Mr Mapoma, GM: Group Legal Services, to deal with the Public Protector's investigation. According to Mr Mapoma, Mr Mkwanazi made it clear to him that he had been instructed to reinstate Mr Gama, and that he wanted to find a way to do so "cleanly". Mr Mapoma assumed the instruction came from former President Zuma. When Mr Mapoma later asked why Transnet was reinstating Mr Gama, Mr Mkwanazi "indicated initially that this was coming from the Ministry... later on, he indicated that it was coming from higher up".

327. Mr Mkwanazi denied Mr Mapoma's version, stating that the shareholder instruction was to review the fairness of the dismissal, and that Mr Mapoma had made his own assumption about President Zuma's involvement. He admitted that he had used the word "cleanly", and that this was meant to convey "legally". Mr Gigaba testified that he had not given Mr Mkwanazi an instruction to reinstate Mr Gama, did not discuss the issue with President Zuma and had received no instruction from him.

328. Transnet appointed KPMG/Nkonki, a joint venture, to undertake a forensic investigation into the issues raised by the then Public Protector. The letter of engagement dated 12 January 2011 records that the primary objective of the assignment was to assess whether Mr Gama was treated fairly in various respects. KPMG/Nkonki, in turn, contracted with the law firm Webber Wentzel to advise it on the procedural fairness of Mr Gama's dismissal.

329. Sometime before 13 January 2011, Transnet, on the advice of Mr Mahlangu, Mr Gigaba's special advisor, engaged Mr Gule of the law firm Deneys Reitz to assist it. Mr Mahlangu also testified that Mr Mkwanazi had informed him at this early stage that Transnet intended to reinstate Mr Gama. Mr Mkwanazi denied this, stating that he had told Mr Mahlangu of the decision to review the fairness of the dismissal and had sought the assistance of Mr Gule because he wanted a "new pair of eyes to look into this matter". Asked why he had not contacted Mr Todd, the attorney that had represented

Transnet in the matter, Mr Mkwanazi accepted that he did not really want to hear that Transnet was going to win the arbitration of the dismissal dispute.

The settlement negotiations for Mr Gama's reinstatement

330. On 18 January 2011, after a discussion with Mr Mkwanazi, Mr Mahlangu sent Mr Gigaba an email detailing that Transnet may be near a settlement with Mr Gama and that he would get the details of the settlement to brief Mr Gigaba. He further writes, "I suggest you socialise the President and his key aids (formal & informal) on the proposed settlement. It is intended that the forthcoming Board should consider and authorise it".

331. Mr Mkwanazi could not explain how Mr Mahlangu could have reported to Mr Gigaba that settlement was imminent as early as 18 January 2011, unless the decision was pre-determined. Mr Mahlangu testified that he intended President Zuma, his advisors, and senior political leaders to be made aware of the settlement. Considering the politicisation and importance of the issue, and the fact that it would be in the public domain, Mr Gigaba needed the President's support. Mr Gigaba testified that any settlement with Mr Gama fell outside his domain. He did not respond to the email as he saw it as a "run of the mill heads up" and had thus not "socialised" President Zuma.

332. On Friday, 21 January 2011, Mr Silinga, a Transnet legal advisor advised Mr Todd that Mr Mkwanazi had instructed that the steps taken to recover from Mr Gama the costs awarded to Transnet in the High Court application should be halted and that the arbitration set down for hearing during the week commencing Monday, 24 January 2011 should be postponed indefinitely, so as to allow the parties to engage in settlement negotiations. By this time, a warrant of execution had been issued by Bowman Gilfillan for the costs due by Mr Gama.

333. On 22 January 2011 settlement negotiations were held between Transnet, represented by Deneys Reitz and Mr Gama represented by Langa Attorneys. Deneys Reitz's consultation note reflects Mr Mkwanazi as having stated during a caucus held before negotiations commenced, that he would like to "...assist Mr Gama where reasonably possible..." but he needed good motivation to do so. Mr Mkwanazi in effect wanted some "friendly" legal advice from Deneys Reitz.

334. According to Mr Mapoma, after a meeting between Mr Mkwanazi and Mr Gama at Inanda Estate, Mr Mkwanazi mentioned that Mr Gama wanted to be "reinstated" as the GCEO of Transnet – a position he had never held and for which the previous Board considered him unsuitable. Mr Mkwanazi conceded that Mr Gama may have asked for that, but Mr Gama denied that he did.

335. On 24 January 2011, Mr Todd wrote to Mr Silinga confirming that his instructions had been carried out and noted that the legal team representing Transnet at the arbitration was satisfied that it was likely that the fairness of the sanction of dismissal would be upheld.

336. According to Mr Mkwanazi, the list of thirty cases that he spoke of arose from two Group Internal Audit reports in 2008, of which he did not have copies. There was a spreadsheet reflecting: (i) all the cases involved procurement irregularities; (ii) whether condonation was granted; and (iii) an indication of whether disciplinary action was taken (with some employees having been dismissed). Mr Mkwanazi accepted during his testimony before the Commission that the cases were not identical to Mr Gama's case but only broadly comparable.

337. On 2 February 2011, Mr Todd prepared a report ("the Todd Report") for Transnet on the disciplinary proceedings involving Mr Gama, giving a full account of the matter, Mr Gama's weak prospects of success and senior counsel's opinion that the sanction of dismissal was likely to be upheld. On 3 February 2011, a meeting of the Corporate Governance and Nominations Committee, comprising Mr Mkwanazi, Mr Mnyaka, Mr Tshepe and Mr Sharma, was convened. The meeting first considered whether there should be a deviation from Clause 4.8.4 of Transnet's recruitment and selection policy providing that the candidate must not have been previously dismissed from Transnet for reasons related to incapacity or misconduct so as to permit Gama to apply for the still vacant GCEO position. Clause 2 of the policy permitted deviation where necessary in respect of executive appointments. The GCNC resolved in favour of Mr Gama by deciding to allow him to apply for the position.

338. Following a meeting with Mr Mkwanazi on 4 February 2011, Mr Mahlangu sent Mr Gigaba an email advising him of Mr Gama's application for the vacant GCEO position and the settlement negotiations with him. Mr Mkwanazi shared this information with Mr Mahlangu on account of the instruction that he had received from Mr Gigaba to review Mr Gama's dismissal. Mr Gigaba claimed that he saw Mr Mahlangu's email as intruding too much into the internal processes of Transnet. He testified that he had subsequently told Mr Mahlangu to step back and allow the Board to deal with the issues.

339. On 10 February 2011, Mr Gama signed a draft of the settlement agreement, which provided for his reinstatement. This was before Deneys Reitz had provided any advice and appears to indicate that friendly advice was sought subsequently which accorded with a decision that had already been taken. On 14 February 2011, Mr Mapoma sent Mr Gule of Denys Reitz an email stating that the Chair requested a two page report for the Board meeting on 16 February 2011. This was the "Group Legal opinion", that proposed a settlement of the dismissal dispute on generic grounds.

340. The Board met on 16 February 2011 and discussed the possible settlement with Mr Gama. The Board Members had before them the Todd Report, the Group Legal opinion (with the input of Deneys Reitz) and a draft settlement agreement negotiated by Mr Mkwanazi, which provided for reinstatement. There was nothing before the Board from KPMG / Nkonki. The Board then decided that the sanction of dismissal was too harsh on the grounds of inconsistency.

341. The Board erred in this respect because the condonation of non-compliance with procurement rules and procedures in the assessment of bids does not absolve employees from disciplinary action and none of the incidents of misconduct for which Mr Gama was dismissed were mere non-compliances with bid requirements.

342. The Board thus decided to reinstate Mr Gama on the basis that he could still add value to the company. It acted on the strength of the "weak" Group Legal opinion and despite Mr Mapoma's advice that Transnet had a good case. The decision of the Board that Mr Gama could still add value and possessed critical expertise failed entirely to consider the implications of the findings of misconduct made against him.

The indefensible settlement agreement between Transnet and Mr Gama

343. On 23 February 2011, Transnet and Mr Gama concluded an agreement of settlement in terms of which Mr Gama would return to Transnet with effect from 23 February 2011 and resume duties as CEO of TFR on 1 April 2011. Any employment benefits that were due to him for the intervening period of 30 June 2010 to 23 February 2011 in terms of his employment contract were to be fully restored. Mr Gama was paid some R13 million under this clause. He was given a final written warning effective from 29 June 2010 to 29 December 2010 which he was deemed to have already served. Transnet agreed to "make a contribution equivalent to 75% of Mr Gama's taxed legal costs incurred during Gama's High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council." Mr Gama's attorneys were paid more than R4 million in costs. This payment is indefensible.

344. On 1 April 2011, Mr Gama resumed his duties as the CEO of TFR. The contents of the KPMG/Nkonki forensic investigation report is important here, specifically the findings that "...there was evidence of a number of projects where non-compliance with procurement procedures were condoned and persons responsible for non-compliance not held accountable".

345. The evidence justifies a finding that the decision to reinstate Mr Gama was pre-determined and there was no sustainable legal advice in support of the decision to reinstate or any objective review of the fairness of Mr Gama's dismissal.

Political interference and impropriety in the reinstatement of Mr Gama

346. The process followed in reaching the settlement agreement, the decision to reinstate, the terms of the settlement agreement and the payment of costs falling outside the terms of the settlement agreement

were all indefensible. There are two possible explanations for this: (i) Mr Mkwanazi and the Board were not legitimately wrong; or (ii) there was an instruction to reinstate Mr Gama which accounts for the complete capitulation in negotiations.

347. Both Mr Mkwanazi and Mr Gigaba denied that an instruction had been given by government. However, a conspectus of the evidence overall, especially the indefensible terms of the settlement agreement and the fact that the Board permitted Mr Gama to apply for the position of GCEO when he had recently been dismissed as CEO of TFR for serious acts of misconduct, strongly indicate that political interference was at play. Mr Mapoma's conclusion at the time was that the complete capitulation in the settlement negotiations arose from an instruction to reinstate Mr Gama, which he understood to have come from the former President Zuma, is the most plausible account. There is simply no other credible explanation for this level of indefensible decision-making.

348. Furthermore, there is a strong prima facie case that the Board, and its members who voted in favour of settlement, the GCFO and the GCEO contravened various provisions of the PFMA by agreeing to a wholly indefensible settlement.

349. On 17 April 2015, Mr Brian Molefe was seconded to Eskom as Acting CEO. At a meeting of the Transnet Board on 20 April 2015, Mr Gama was appointed as Acting GCEO "due to his vast knowledge of the Company". He was appointed as Acting GCEO initially from 20 April 2015 to 20 July 2015 on the assumption that Mr Brian Molefe's secondment to Eskom was temporary. On 30 September 2015, Mr Brian Molefe resigned from the Transnet Board and was appointed permanent Eskom CEO with effect from 1 October 2015.

350. At a meeting of the Transnet Board on 18 February 2016, the Chairperson of the Board, Ms Linda Mabaso, informed the Board that she had received a letter on 7 January 2016 from Ms Lynne Brown, the Minister of Public Enterprises, requesting that the GCEO appointment be finalised within thirty days. She then indicated that in the circumstances, an internal appointee would be ideal and proposed Mr Gama as the most qualified individual. The Board approved the appointment.

351. In a letter dated 24 February 2016, Ms Mabaso recommended to Minister Brown that Mr Gama be appointed on a permanent basis without any formal recruitment processes as the matter was "urgent". Mr Gama's delegation of authority would expire on 31 March 2016 and the Board did not feel it necessary to advertise the post internally or externally based on the urgency and Mr Gama's performance. On 7 March 2016, the DD: LGR of the DPE compiled a memorandum to Minister Brown requesting her to approve the appointment of Mr Gama as the new GCEO from 1 May 2016 to 30 April 2021. The memorandum was recommended by the DG Mr Seleke and approved by Minister Brown on 12 March 2016.

352. Mr Gama did not see out his full term of office. In September 2018, after the appointment of a new Transnet Board, Mr Gama was dismissed as GCEO and removed from the Board of Transnet because of serious violations of his financial procurement and fiduciary responsibilities and the Board having lost trust and confidence in his ability to lead Transnet.

353. Ms Mabaso confirmed the reasons for appointing Mr Gama as set out in her correspondence but could not remember why the issue of Mr Gama's delegated authority posed a ground for urgency. She averred that the Board was not aware of the indefensible settlement agreement, the admissions by Mr Gama that he was guilty of the misconduct, the nature of the serious misconduct of which Mr Gama had been found guilty, and his prior unsuccessful attempts to be appointed as GCEO. She stated that because Mr Gama "was within the structures of Transnet" there was no need for the Board to interrogate his history.

Mr Gama's links to the Gupta enterprise

354. Mr Gama's links to the Gupta enterprise are most evident from his association with Mr Essa. It suffices now, by way of overview, to note that Mr Gama claimed he met Mr Essa only on four occasions.

355. At the second meeting in July 2015, Mr Essa requested a meeting with Mr Gama who told him to get

his contact details from Mr Singh. Mr Essa followed up and phoned him in October / November 2015 and invited him to a meeting at what turned out to be the Gupta compound in Saxonwold, where Mr Essa introduced him to Mr Rajesh (Tony) Gupta. During a 10-15 minute meeting, Mr Tony Gupta indicated that there was scope for the development of a working relationship between Transnet and his businesses in the future. Mr Gama considered the discussion meaningless and indicated to Mr Essa that he was disappointed about having been duped into a meeting at the Gupta compound. Mr Gama said he did not visit the Gupta compound again and had no further interactions with the Gupta family.

356. On 3 December 2015, Mr Gama authorised the payment of R93 million to Trillian Capital Partners (Pty) Ltd for supposedly arranging a R12 billion ZAR Club Loan facility in relation to the 1,064 locomotives transaction. There was no evidence of Trillian having worked on the "ZAR Club Loan". R74 million of the amount paid to Trillian was laundered to Albatime, a company forming part of the Gupta racketeering enterprise.

357. Shortly after the payment to Trillian, and shortly before his promotion to GCEO, Mr Gama met Mr Essa again at the Oberoi Hotel in Dubai on 23 January 2016 on his return from the World Economic Forum. Mr Gama claims he had intended to stop over briefly in Dubai on his return to buy his daughter a dress. Mr Essa contacted him while in Davos, with a request to meet in Dubai. Mr Gama agreed and Mr Essa arranged the hotel accommodation. There is compelling (but disputed) evidence, pointing to the fact that Mr Gama's hotel bill was paid by Sahara Computers, a Gupta owned company.

358. By this time, Mr Essa had already been involved in a series of corrupt activities in relation to Transnet. Most notably, he had received half of the fees charged by Regiments and had concluded the corrupt BDSAs with CSR and CNR. Mr Gama initially denied that the meeting in Dubai was about Trillian but was compelled to change his version when confronted with earlier statements he made in an interview with a journalist. Mr Gama also had links with Mr Sagar of McKinsey who was implicated in the corrupt activities of Mr Essa, Regiments and Trillian at Transnet and Eskom.

359. The evidence of Ms Hogan confirms that President Zuma knew Mr Gama and supported his appointment as GCEO in 2009. Mr Gama denied any knowledge of this and denied having had any personal interactions with the former President Zuma, stating that he had only ever met him at various official functions. However, in 2015, shortly before being promoted to GCEO of Transnet, Mr Gama (while acting GCEO) decided on behalf of Transnet to donate R500 000 towards the Jacob G Zuma Foundation's Youth Day event held on 20 June 2015 in Durban.

Mr Singh's links to the Gupta enterprise

360. On 1 July 2012, Mr Singh was appointed as Transnet GCFO, having acted in the position since 2009. Mr Sharma was appointed as Chair of the BADC one month later. These appointments in 2012 coincided with the launch of the MDS, the R300 billion capital expenditure programme, which was the centrepiece of procurement corruption and malfeasance at Transnet in subsequent years and over which Singh exercised financial control.

361. Mr Singh also knew the Guptas fairly well. He was at pains to minimise the extent of the relationship. His denials must be assessed considering his poor credibility as evidenced by his many falsehoods exposed throughout his testimony before the Commission. He lied in his affidavit about the frequency and reasons for his visits to Saxonwold. By his own admission, Mr Singh visited the Saxonwold compound at least twelve times in four years "for religious or cultural functions only". He was invited to the notorious Gupta wedding at Sun City. Mr Singh also visited the offices of Sahara Computers. Mr Singh's girlfriend, Ms Naik, was originally employed at Transnet but later secured employment with Sahara Computers. She resigned from Transnet in December 2014, commenced employment at Sahara Computers in January 2015 and worked there until 2017. Her boss was Mr Ashu Chawla (the CEO) and to the extent necessary she worked directly with the Gupta brothers.

362. Mr Singh used the same travel agent as Mr Essa, stayed in the same hotel in Dubai as Mr Essa, and was, on occasion, present in Dubai (sometimes at the Oberoi Hotel) at the same time as Mr Essa.

Certain of Mr Singh's hotel reservations and invoices were forwarded by Chawla of Sahara Computers to Mr Essa. Ms Sameera Sooliman of Travel Excellence testified that Mr Essa and Sahara used Travel Excellence and that Mr Singh's flights were allocated to Mr Essa's account. She considered Mr Essa to be the guarantor of Mr Singh's tickets. Documents uncovered in the so-called Gupta-leaks further exposed Mr Singh's association with the Gupta enterprise through his travel arrangements.

363. The High Court has found Mr Singh to have been in a corrupt relationship with Mr Essa based, inter alia, on the fact that he had enjoyed all expenses paid trips to Dubai arranged by Mr Essa and Sahara Computers while he was at Eskom. In just over three years, Mr Singh accumulated R19 million in a current bank account because of spending virtually none of his remuneration, indicating that he had other sources of money besides his salary. The fact that this account was not an interest-bearing account obviated his declaring additional income from it in his tax returns. Mr Singh said he funded his living expenses from savings. He did not offer sworn testimony confirming this.

364. Mr Singh was struck from the role of Chartered Accountants by the South African Institute of Chartered Accountants (SAICA) on the grounds of improprieties committed by him in relation to procurements at Transnet.

Other key appointments

365. On 23 May 2011, Mr Gigaba was requested to approve a reshuffle of the Transnet Board proposed in a DPE memorandum, prepared following consultation with his special adviser, Mr Mahlangu. The memorandum proposed the replacement of Mr Mkwanazi with Mr Sharma as the Chairperson of the Board, on the ground that Mr Mkwanazi had become "intimately involved in the management of the company" and the DPE was of the view that "there should be a clear division of responsibilities at the head of the company, ensuring a balance of power and authority". The memorandum also recommended the removal of Mr Don Mkhwanazi (who had expressed reservations about the process for the appointment of Mr Brian Molefe) and Ms Mnyaka (whose name was subsequently struck out) as non executive Directors only six months after their appointment in December 2010.

366. On 7 July 2011, Ms Yasmin Forbes and Mr Nishi Choubey (a former employee of Sahara Computers) were appointed as non executive Directors.

367. On 26 May 2014, after the General Elections, Ms Lynne Brown was appointed Minister of Public Enterprises. A Board reshuffle took place in December 2014. Several non executive Directors resigned and were replaced with Mr Stanley Shane, Mr Brett Stagman and Mr Richard Seleke. Mr Shane served as a Board Member of Transnet from December 2014 to June 2017 and as the Chairperson of the Transnet Second Defined Benefit Fund (TSDBF) over the same period. He succeeded Mr Sharma as Chairperson of the Transnet BADC. Like Mr Sharma, Mr Shane had close links with Mr Essa. He was a Director of Integrated Capital Management, which was involved in the creation of the Trillian Group under Mr Essa and Mr Wood from late 2015 to early 2016. A CIPC company search undertaken in May 2021 reflects that Mr Shane and Mr Essa are both active Directors of Antares Capital, with their dates of appointment being 28 October 2014 and 5 June 2016, respectively.

368. Mr Shane presided over or was linked in three transactions (or sets of transactions) pointing to the possibility of his association or participation in the Gupta enterprise. First, he was a director of Transnet when CNR entered into the BDSA with BEX (linked to the Gupta enterprise) in relation to the relocation to Durban, which resulted in BEX being paid a kick-back of R76 million on 25 September 2015. Mr Holden's evidence establishes that R9 million of this was ultimately paid to Integrated Capital Management in November 2015, of which Mr Shane was a Director. Secondly, in his capacity as the Chairperson of the BADC, Mr Shane played a leading role in the award of the IT data services tender to T-Systems over Gijima in February 2017, despite Gijima having been the highest scoring bidder – an award that was set aside on review on the grounds of irrationality and bias on the part of Mr Shane.

369. The personnel changes and Board appointments during Ms Brown's tenure as Minister of Public Enterprises saw the departure of individuals in senior management who resisted the alleged corruption

and weakening of governance structures at Transnet. This included the resignation of Ms Mathane Makgatho as Head of Group Treasury in November 2014, who objected to several transactions that were not in the best interest of Transnet, especially the use of Regiments as advisors. She found herself increasingly side-lined from processes that were in her direct remit as Group Treasurer. After prolonged conflict with senior management, particularly Mr Singh, Ms Makgatho began to feel unsafe, suspecting that she was under surveillance and that her car had been tampered with. The impact of this working environment on her health prompted her to resign. Several Transnet Treasury members who worked under Ms Makgatho resigned at a similar time for allegedly the same reasons.

370. Mr Phetolo Ramosebudi replaced Ms Makgatho as Group Treasurer. Ms Makgatho said she resisted bypassing internal controls over procurement and financial processes, while Mr Ramosebudi was described as “compliant” and “perfect for the mandate” being executed by senior management.

The role of Mr Salim Essa

371. Mr Essa’s role and influence appears from the evidence in relation to all the significant transactions analysed later in this report, from October 2011 when Mr Gigaba appointed him as a Director of Broadband Infraco (an SOE in the IT sector). This SOE had some part in the questionable decision of Mr Brian Molefe on 20 November 2013 to reverse the award of the IT network services contract to Neotel and the appointment of T-Systems together with Broadband Infraco in its place.

372. Mr Essa probably played some part in facilitating the illicit Regiments fee arrangements and in concluding the array of BDSAs in relation to the acquisition of locomotives. He interacted extensively with Mr Singh and was apparently instrumental in setting up a meeting for Mr Niven Pillay (of Regiments) with Mr Singh on 3 December 2012, just before Regiments emerged as McKinsey’s new SDP.

373. Mr Essa had significant contact with Mr Singh and Mr Gama in the period under investigation. Mr Essa’s relationship with Mr Brian Molefe was more limited, but possibly more consequential. More likely, the role played by Mr Essa and Mr Sharma in advancing Mr Brian Molefe was part of a bigger strategy by the Gupta enterprise to capture Transnet. At a meeting in Melrose Arch in 2014, at which Mr Essa attempted to persuade Mr Henk Bester of Hatch Goba to appoint his preferred company as an SDP and illegitimately increase the contract value of the contract awarded to Hatch Goba by R80 million for that purpose, Mr Essa claimed that he and his associates had influence over executive appointments in SOEs and boasted that "they" had already decided that the new boss of Eskom would be Mr Brian Molefe and that an announcement would be made in the newspapers soon. Mr Bester later understood Mr Essa to be referring to the Gupta family.

374. Mr Essa also cultivated a relationship with Mr Pita who as the acting GCFO authorised the R93 million payment to Trillian on 2 December 2015, the day on which Mr Pita also secured two additional large safety deposit boxes at the facility known as Knox Vaults. Mr Pita was permanently appointed as GCFO on 1 February 2016. He met with Mr Essa at the Gupta compound around this time to discuss the cession of a substantial Regiments contract to Trillian. In or about April 2016, Mr Pita made a presentation on investment projects at the Gupta compound, with Mr Essa and Mr Rajesh Gupta in attendance. In October 2016, Mr Pita was summonsed to a meeting by Mr Essa at the Gupta compound to discuss the failure to pay Trillian. At the meeting Mr Essa and Mr Rajesh Gupta were threatening towards him. Mr Pita confirmed that he met Mr Essa on unspecified dates at the Gupta compound, at Mr Essa’s offices in Melrose Arch, at the Parreirinha Restaurant in Turffontein.

The cash bribes

375. Three witnesses testified before the Commission that Mr Brian Molefe, Mr Gama, Mr Singh, Mr Pita and Mr Gigaba were the recipients of cash bribes from the Gupta enterprise. Insofar as these allegations are sustainable, they will justify findings of misconduct in terms of the relevant TORs and possible referrals for prosecution and further investigation in terms of TOR 7.

376. All three witnesses were drivers and close protection officers who provided driving and protection services to these officials. They testified before the Commission without their faces being shown.

Their identities have been protected for security reasons.

377. Mr Brian Molefe was incriminated by Witness 1 who has worked in close protection since 1989. Prior to giving testimony to the Commission, he was subjected to sinister threats of death and extreme violence in messages sent to his phone. He also has been followed by vehicles acting suspiciously. Witness 1 performed close protection and driving services for Mr Brian Molefe from February 2011 until August 2014. He testified that he transported Mr Molefe to various meetings with Mr Ajay Gupta and others at different places. He provided entries from logbooks that confirmed fifteen meetings between July 2011 and September 2012. These meetings were not recorded in Mr Brian Molefe's diary.

378. According to Witness 1, Mr Molefe would take a light brown backpack with him to the meetings at the Gupta compound. Mr Brian Molefe confirmed that he owned such a backpack and pointed it out to the Commission during his testimony. Witness 1 indicated that he had observed Mr Molefe on some occasions come out of meetings with the Guptas carrying a sports bag containing something. Witness 1 was instructed on one occasion to take the brown backpack to Mr Ajay Gupta at Sahara Computers in Midrand.

379. One day while attending a meeting in the main Boardroom of Transnet, Mr Molefe instructed Witness 1 to fetch his cell phone from his brown backpack in his office. When he did so, Witness 1 discovered that the backpack was half full of bundles of R200 notes. He called Mr Brian Molefe's personal assistant, Ms Mbele, into the office and showed her the cash. He took the phone to Mr Molefe and informed him about the cash and advised him that having such amounts was a safety risk. Mr Molefe became annoyed and dismissed his concerns. Mr Molefe denied that he ever received cash from the Guptas.

380. Witness 1 testified further that he frequently deposited cash amounts on behalf of Mr Molefe at ABSA, Standard Bank and Nedbank. Mr Brian Molefe would fill out the deposit slips but Witness 1 would count out the cash which usually was several thousand Rand at a time. Mr Brian Molefe admitted that Witness 1 did indeed deposit large amounts of cash at ABSA bank on his behalf. However, he maintained that this money was cash receipts payable to a burial society of which he was the treasurer. He did not furnish any evidence to support his version.

381. Witness 3 incriminated Mr Molefe, Mr Singh, Mr Pita and Mr Gigaba. Witness 3 worked first for Mr Gigaba in 2005 and 2006 when Mr Gigaba was Deputy Minister of Home Affairs. He then worked in the private sector. Mr Gigaba's office then head hunted him in 2013 and he was employed by Transnet and seconded to Mr Gigaba for the period of July to December 2013 while Mr Gigaba was Minister of Public Enterprises. He was assigned to Mr Singh in July 2014 until Mr Singh was seconded to Eskom in 2015. Thereafter he worked for Mr Pita.

382. Witness 3 accompanied Mr Gigaba on six or seven visits to the Gupta compound in Saxonwold. These visits were not recorded in Mr Gigaba's diary or the vehicle logbook. The cross examination of Witness 3 by counsel for Mr Gigaba revealed a contradiction in Witness 3's version about whether the logbooks recorded some or none of the visits to the Gupta compound. Witness 3 held firm that some of the visits were not recorded on the instruction of Mr Gigaba. The contradiction between his written statement and his testimony is inconsequential because Mr Gigaba admitted to having regularly visited the Saxonwold compound.

383. During the visits to the Gupta compound, Witness 3 saw Mr Molefe, Mr Koko (the CEO of Eskom), Dr Ben Ngubane (the Chair of Eskom), Ms Mabaso (the Chair of Transnet) and former President Jacob Zuma. He did not know Mr Koko and Ms Mabaso when he saw them in 2013 but realised who they were later.

384. Witness 3 also testified to the fact that Mr Gigaba carried large amounts of cash and paid for expensive clothing and restaurant bills in cash. One day he opened the boot of the vehicle and witnessed Mr Gigaba take money from a bag full of R200 notes bundles. He suspected this money came from the Guptas. Mr Gigaba denied this.

385. After Witness 3 was assigned to Mr Singh, he transported Mr Singh to the Gupta compound in

Saxonwold more than ten times. Mr Singh would appear from the residence carrying a full sports bag. He suspected the bag was full of cash because Mr Singh gave him cash from it. On six or seven different occasions, Witness 3 drove Mr Singh from meeting the Guptas at Saxonwold to Knox Vaults, a facility in Johannesburg providing safety deposit boxes, where Mr Singh would alight with the full sports bag and return to the car with it empty.

386. It is common cause that Mr Singh leased safety deposit boxes at Knox Vaults. Mr Kuben Moodley, the Director of Albatime, the company that received 5% of the Regiments payments made to the Gupta racketeering enterprise, and Mr Garry Pita, Mr Singh's successor as GCFO at Transnet, also kept safety deposit boxes there.

387. Mr Singh denied that Witness 3 had ever driven him to Knox Vaults. He also initially maintained that he had only four boxes, one for himself and one each for his wife and two small children. His evidence was shown to be demonstrably false on several counts, which impacts on his overall credibility. Mr Singh lied about the number and purpose of the boxes. Secondly, in elaboration of his denial that Witness 3 ever took him to Knox Vaults, Mr Singh testified that he used to drive there himself during working hours in the week in his own car rather than his official car. This version is inconsistent with the undisputed evidence that Mr Singh left his own vehicle at Transnet during the week when he used his official car and driver.

388. After Mr Singh's secondment to Eskom in 2015, Witness 3 was assigned to Mr Garry Pita (previously the GCSCO), who became the acting GCFO when Mr Singh left and was later promoted to GCFO in February 2016. He drove Mr Pita to the Gupta compound twice; once in the week immediately preceding Mr Pita's appointment as GCFO (possibly in late January 2016). Mr Pita denied the intimation that the visit had anything to do with his subsequent appointment and maintained that it took place after his appointment on 1 February 2016. This visit, according to Mr Pita, concerned the cession of a contract from Regiments to Trillian. Mr Pita testified that he did not know at the time that the residence he visited was the Gupta compound.

389. According to Witness 3, Mr Pita was upset when he left the Gupta compound on the second time he drove him there. Witness 3 said that Mr Pita cursed and made a comment about a R600 million payment. Mr Pita confirmed that he was upset after the meeting at which he had been abused by Mr Tony Gupta and Mr Essa concerning payments that Mr Essa claimed were due to Trillian.

390. Witness 3 did not see Mr Pita emerge from the Gupta residence with any bags on either visit. However, he did transport Mr Pita to Knox Vaults six times and witnessed him remove a sports bag from the boot and go into the building. He also drove Mr Pita fifteen times to the Parreirinha Restaurant in Turffontein for meetings with Mr Essa, usually on Friday afternoons where lunch was had and much alcohol consumed.

391. During his testimony, Mr Pita was at pains to put distance between himself, Mr Essa and the Gupta family. He sought to portray that he was a victim of abuse whenever he attempted to question their claims for payment. The evidence nonetheless confirms that Mr Pita had ongoing engagements with them at several meetings at the Gupta compound, at Mr Essa's offices and at restaurants in Johannesburg.

392. Mr Pita admitted that he and his mother had safety deposit boxes at Knox Vaults, a fact unearthed not by his admission but by the investigators of the Commission in June 2019 when they seized a box leased by him. He acquired seven boxes over six months between June 2015 and December 2015, precisely at the time he took over Mr Singh's functions at Transnet as acting GCFO incrementally increasing the sizes as he required more space.

393. Mr Pita played a role in the illegitimate payment of R189 million as a "success fee" to Regiments in respect of a loan of USD1.5 billion from the China Development Bank, the payment of R647 million to CNR in relation to the relocation to Durban, with BEX having received an illegitimate kickback of R67 million, and the payment of R93 million to Mr Essa's company, Trillian, in respect of services already paid for and rendered by Regiments in relation to a syndicated "ZAR Club Loan" of R12 billion. These transactions all took place around the time Mr Pita was incrementally acquiring larger safety deposit

boxes at Knox Vaults.

394. Mr Pita's denials must be assessed in the light of his other conduct related to the pattern of racketeering activity at Transnet during his tenure in different roles. His visits to Knox Vaults alone are not sufficient to establish reasonable grounds to believe that he was a corrupt recipient of cash; but taken with the timing and manner of his acquisition of the boxes at Knox Vaults, his extensive dealings with Mr Essa and the Gupta family, and his role in various tainted transactions at the relevant time, they have weight and cogency in establishing reasonable grounds to believe that he received property from and participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity and, like Mr Singh and Mr Brian Molefe, received cash payments as a quid pro quo and thus may be guilty of corruption.

395. Witness 2 incriminated Mr Gama. He was his driver and close protection officer from May 2012 to December 2017 while he was CEO of TFR and GCEO of Transnet. Witness 2 testified that he took Mr Gama to the Gupta compound four times. These visits were not recorded in Mr Gama's diary.

396. Witness 2 testified that in November 2016, during one of the visits to the Gupta compound, Mr Gama came out of the residence and told him that he should expect someone to bring him a suitcase and instructed him to place it in the boot. A short while later, a person Witness 2 assumed was a member of the Gupta family came out of the residence with a suitcase which was put in the boot. Later Witness 2 drove Mr Gama to the Maslow Hotel in Sandton where they met Mr Jiyane. Mr Gama instructed Witness 2 to transfer the suitcase from his car to Mr Jiyane's car. Mr Jiyane gave Witness 2 his car keys. Witness 2 said that when transferring the suitcase, he opened it and saw that the suitcase was stacked with cash. While conceding that he did at times go to the Maslow Hotel, Mr Gama denied that he visited the Gupta compound in November 2016, received cash and arranged for Witness 2 to transfer the suitcase of cash to Mr Jiyane's car.

397. Witness 2 further testified that he transported Mr Gama three times to Melrose Arch, where he collected cash from Mr Essa and provided specific details of two of the collections.

398. Mr Gama denied these events and initially put up a case that Witness 2 had not transported him that day. He denied that he was at Melrose Arch or in Bryanston. The difficulty with accepting that version is that the Google maps history shows that Witness 2 was at Melrose Arch on 13 June 2017 from 20h27 to 21h36 and was parked at the home of Mr Gama's girlfriend between 22h37 and 01h57, confirming the version of Witness 2. Mr Gama could offer no convincing account for Witness 2 being parked at the home of his girlfriend at such a late hour. Mr Gama sought to argue that the Google Maps information was unreliable because it seemed to reflect that Witness 2 took more than three hours to drive to Pretoria on the morning in question. However, Mr Gama did not apply for leave to cross-examine Witness 2 on this issue.

399. In short, Witness 2's Google Maps travel history serves to corroborate his version that Mr Gama collected cash from Mr Essa at Melrose Arch. The lie is given to Mr Gama's denial by the improbability of Witness 2 driving to Melrose Arch (where Mr Essa lived) and Sandhurst (to an address that Mr Gama did not deny was that of his acquaintance) and then to the home of Mr Gama's girlfriend without Mr Gama.

400. Witness 2's evidence against Mr. Gama must be approached with some caution given the personal friction between them. Mr Gama alleged that Witness 2 had been set up to incriminate him and had been induced with an offer of reinstatement by Transnet, having been dismissed at Mr Gama's instigation for allegedly sprinkling "muti" at the home of Mr Gama's girlfriend. Witness 2's evidence is supported by the Google map history and the implausibility of some of Mr Gama's denials. Moreover, Mr Gama did not apply for leave to cross examine Witness 2.

401. The allegations of Witness 2 should also be assessed in the light of Mr Gama's alleged participation in the Gupta racketeering enterprise. Mr Gama was centrally involved in the award of contracts to Regiments and Trillian and the making of unjustifiable payments to them. He dubiously sought to deny his association with Mr Essa, whose company, Trillian, benefited handsomely from corrupt and fraudulent payments during Mr Gama's term as GCEO. It is accordingly probable that Mr Gama

received a quid pro quo in relation to these transactions. The evidence about his receipt of cash is also consistent with the accounts of the other drivers about similar payments made to Mr Brian Molefe, Mr Singh and Mr Pita, signifying the existence of a pattern of conduct on the part of the Gupta family and their Transnet associates.

THE PROCUREMENT OF THE 95 LOCOMOTIVES

402. The first locomotive transaction of significance is the procurement of 95 locomotives by Transnet from CSR Zhuzhou Electric Locomotive Company Ltd (CSR) which commenced in 2011.

403. Shortly after the appointment of Mr Brian Molefe as GCEO and the reinstatement of Mr Gama as CEO of TFR, on 20 April 2011, the Board of Transnet approved the Locomotive Fleet Modernisation Plan, subject to the BADC confirming affordability. Mr Gama submitted a memorandum dealing with affordability to the meeting of the BADC held on 3 August 2011.

404. The minutes of the BADC meeting of 3 August 2011 show that due to "action plans to create the much-needed liquidity", TFR could fund the acquisition of 138 locomotives (43 diesel and 95 electric). The locomotive fleet plan had identified that there was insufficient traction power to meet the corporate plan volume demand. The BADC accordingly recommended the acquisition of the 138 locomotives.

405. Mr Molefe, and Mr Singh recommended the procurement in a submission to the Board at its meeting of 31 August 2011. The Board approved what it termed "the interim locomotive fleet plan" at a value of approximately R3.6 billion and authorised Transnet to proceed with the acquisition of the 43 diesel locomotives by confinement. It resolved that a transparent (open bid) procurement process be used to acquire 45 electric locomotives in 2012/13 and 50 in 2013/14; and resolved to submit a PFMA application to the Minister in respect of the 95 electric locomotives.

406. On 5 October 2011, the then Chairperson of the Board, Mr Mkwanazi, notified the Minister of Finance of "the significant capital expenditure" involved in the acquisition of the 95 locomotives. It was not necessary to notify the Minister of the acquisition of the 43 diesel locomotives by confinement as the transaction was below the prescribed value. On 24 October 2011, Mr Mkwanazi wrote to the Minister of Public Enterprises requesting approval for the procurement of the 95 locomotives in terms of section 54(2)(d) of the PFMA.

407. On 21 December 2011, Mr Gigaba, the Minister of Public Enterprises approved the procurement of the 95 electric locomotives at an ETC of R2.7 billion, subject to the proviso that Transnet provide him with a comprehensive briefing on its engagement with the competitive supplier development plan, particularly the supplier development and localisation components for the procurement.

The pre-bid process

408. Prior to obtaining the Minister's approval, Transnet issued the RFP for the acquisition of the 95 electric locomotives on 6 December 2011 and advertised it in the Business Day newspaper. The closing date for collection of the tender documents was 30 January 2012.

409. The RFP required all bidders to submit a SD bid document demonstrating their commitment and support for the new growth plan (NGP), being the relevant government policy initiative, and how an appointment in terms of the RFP would assist in achieving the NGP objectives.

410. Foreign bidders would assume obligations under the competitive supplier development programme (CSDP) to develop local downstream suppliers, leverage local maintenance and manufacturing initiatives, and develop skills and technology transfers.

411. Section 6 of the RFP addressed the B-BBEE requirements under the Broad-Based Black Economic Empowerment Amendment Act 46 0f 2013 which aims to promote the inclusion of previously disadvantaged South Africans in the economy. Any verification certificate had to reflect the weighted points attained by the entity for each element of the B-BBEE scorecard as well as the overall B-BBEE rating.

Large enterprises (with an annual turnover greater than R35 million) were required to be rated by verification agencies or auditors on a rating level based on all seven elements of the scorecard.

412. On 20 December 2011, Mr She Yongjun wrote to Ms Lindiwe Mdletshe advising that CSR had made payment for the RFP documents by requesting its bank, the Bank of China, to debit its account with the ZAR equivalent USD and to pay Transnet. He attached proof of payment. Ms Mdletshe then sent the RFP to CSR by email and signed the RFP collection list on behalf of CSR.

413. On 19 January 2012, Mr Pan addressed a letter to Mr Molefe, prior to the compulsory clarification meeting scheduled for 31 January 2012. Mr Pan thanked Mr Molefe for allowing them the opportunity to participate in the tender for 95 new electric locomotives. Mr Pan informed Mr Molefe that Mr Fu Chenjun will lead their delegation to visit South Africa from 30 January to 3 February 2012. He requested a meeting with Mr Molefe and Transnet's technical group to discuss and optimise technical specification, to facilitate a site visit to a locomotive depot or engineering facility. Mr Molefe replied the same day without objecting to CSR's attempt to gain preferential access prior to the closing of the bids, stating that Mr Gama would process and respond to Mr Pan's request.

414. The investigation into allegations of state capture at Transnet and Eskom commissioned by the National Treasury and conducted by Fundudzi Forensic Services (Pty) Ltd unearthed a letter dated 8 February 2012 from Mr Molefe to CSR where he noted the meeting request but declined on the basis that the tender documents were out for bidding. This letter was sent after the dates proposed by CSR for the meetings and Fundudzi was not able to find the letter in a search of Mr Molefe's emails. No witness has presented any testimony regarding this letter to the Commission. Whatever the position, there can be no doubt that CSR improperly sought to influence Transnet officials prior to the adjudication of the tender.

415. The communication between CSR and the officials of Transnet was inappropriate. The tender notice required bidders to communicate exclusively with Ms Mdletshe. Mr Molefe should have directed Mr Pan to refer his queries to Ms Mdletshe, as the tender process was still underway. The communication affirms that CSR may have been favoured as a potential bidder giving rise to a reasonable apprehension that Transnet might have been biased in favour of CSR, inconsistent with the spirit and purposes of a fair and competitive tender process.

416. Most significant though, is that these events indicate that the Gupta enterprise was involved in some way with the procurement of the 95 electric locomotives at this early stage.

The bids and the changing of the B-BBEE evaluation criteria

417. Nine bidders submitted their tenders timeously on 17 April 2012 and complied with the submission requirements. However, on the closing date CSR was not registered as a company in South Africa and thus could not and did not submit: (i) valid South African VAT and company registration certificates; (ii) a B-BBEE accreditation certificate; and (iii) a valid South African tax clearance certificate. The MNS investigators disagreed with Fundudzi that this was a disqualifying factor.

418. According to the RFP, all respondents, including foreign companies, were required to comply with the B-BBEE requirement and failure to do so would result in a score of zero being allocated for B-BBEE in the evaluation of the bid. CSR failed to submit a B-BBEE certificate with its returnable documents.

419. The CFET's B-BBEE evaluation report reflected that B-BBEE evaluations were conducted on nine bidders as part of the stage 1 evaluations. Only three of the nine bidders scored above the required minimum threshold, namely: Bombardier (70%), Siemens (63%) and SSMM Consortium (62%). CSR was awarded zero for the B-BBEE scorecard resulting in an overall score of 56% (below the overall minimum threshold of 60%) meaning that it should have been disqualified at stage 1.

420. Instead of proceeding with the evaluation of the three bidders that achieved the minimum threshold in stage 1, Transnet, seemingly with the intention of avoiding the disqualification of CSR, introduced what it referred to as "option 2" which simply removed the B-BBEE requirement as a scoring criterion in stage 1.

421. In a memorandum addressed to Mr Brian Molefe, dated 6 June 2012, Mr Gama clarified the rationale for the change. He described the purpose of the memorandum as being to: (i) provide an update to the GCEO on the progress of the tender evaluation process; (ii) request the GCEO to approve the shortlisting of the tenderers that had met the SD threshold of 60%; and (iii) approve the issuing of letters to unsuccessful tenderers that did not meet the SD threshold for stage 1 of the evaluation process.

422. However, the main purpose of the memorandum was to obtain a change to the evaluation criteria in stage 1. Mr Gama explained that during the stage 1 evaluation it emerged that there was a local bidder (Nelesco) with an invalid B-BBEE certificate and a foreign bidder (CSR) that did not have a local office. This, Mr Gama maintained, meant that the methodology (if it included the B-BBEE certificate and the FRC) "would have been unfair to both the local supplier (Nelesco) and foreign supplier (CSR)". Mr Brian Molefe accepted and approved the recommendation of the CFET to change the criteria on 8 June 2012.

423. Only Siemens, Bombardier and CSR met the technical requirements in stage 2 and proceeded to stage 3. Mr Jiyane sent a memorandum to Mr Gama requesting him to approve the shortlisting of the three bidders. Mr Gama approved the short list on 13 July 2012.

424. A memorandum dated 8 August 2012 records that CSR scored the highest (76.4%) in the stage 3 evaluation process and became the preferred bidder.

Other irregularities

425. The RFP required bidders to submit a price including hedging and a price excluding hedging. Only Bombardier did this. Siemens and CSR failed to submit their pricing schedule as required by the RFP. CSR's recommended price for the tender was R2.7 billion (excluding VAT) including hedging and escalation costs. Ms Helen Walsh, the Acting GM: Governance, Risk and Compliance at Transnet, and a qualified chartered accountant, testified that between December 2012 and May 2017, R2 686 790 000 was paid to CSR under the LSA for the 95 locomotives. An additional amount of R376 150 600 was paid for VAT, giving a total of R3 062 940 600. Additional payments of R369 928 965 (R328 582 544 plus R45 449 856 VAT) were paid between December 2013 and December 2018. The total cost of R3 062 940 600 plus R369 928 965, being R3 432 869 565 was approximately R700 million more than the amount authorised by the Minister, being R2.7 billion.

426. There is no evidence confirming that this cost overrun was authorised by the Board or the Minister. This may point to a failure by the Board to take effective and appropriate steps to prevent expenditure not complying with the operational policies of Transnet, contrary to the provisions of section 51(1)(b)(ii) of the PFMA. Mr Molefe exceeding his delegated authority in contravention of section 57 of the PFMA.

427. In accordance with the delivery schedule of the LSA, delivery was to commence in April 2014 and continue over a period of 11 months with the last delivery due in February 2015. The first locomotive was delivered on 16 April 2014 and the last on 19 June 2015. Thus, the first locomotive was late and the last locomotive five months late. Clause 9.1.1 of the LSA states that if the acceptance of a locomotive occurs after its scheduled acceptance date, CSR shall pay a delay penalty at the applicable rate. Fundudzi determined that CSR delivered 85 of the 95 locomotives late. The MNS Report maintains that Transnet was entitled to impose delay penalties amounting to approximately R1.7 billion (being 63% of the contract price). The non-recovery of the delay penalties was a contravention of Section 51(1)(b)(i) of the PFMA, and possibly a criminal offence under Section 86(2) which requires the Board to take effective and appropriate steps to collect all revenue due to Transnet. It is a matter that may require further investigation by the current Board of Transnet.

Money laundering and racketeering

428. The evidence in relation to the procurement of the 95 locomotives discloses the beginning of a relationship between CSR and officials of Transnet that led to CSR's irregular appointment and further wrongdoing in other bids and contracts for the acquisition of more locomotives. It is thus important

background and may add to the evidentiary basis for any prosecution for participation in the conduct of the affairs of an enterprise engaged in a pattern of racketeering. However, the offences under the PFMA are not offences included in Schedule 1 of POCA. Nonetheless, the relationship of the events in the acquisition of the 95 locomotives to the acquisition of other locomotives from CSR may assist to prove the existence of an enterprise engaged in a pattern of racketeering activities.

429. The report submitted to the Commission by Mr Paul Holden of Shadow World Investigations shows that CNR (Hong Kong) and Century General Trading FZE (CGT) concluded an exclusive agency or consultancy agreement pertaining to "the 95 Project" on 14 April 2012. A 2015 accounting spread sheet of payments due from CSR to various parties confirms that CGT was due to receive 20% of the total value of the 95 Project, equal to R523.32m, as a kickback. An email dated 22 August 2015, discovered in the Gupta-leaks, also attached a payment schedule including a calculation of the moneys CSR had agreed to pay to CGT, amongst others. On 10 February 2015, CSR and Regiments Asia (Pty) Limited, a company controlled by Mr Essa, concluded a BDSA in relation to "the 95 Locomotive Project" indicating that Regiments Asia effectively displaced CGT under the consultancy agreement of 2012. Thus, Regiments Asia was due to receive what CGT had originally been paid on Project 95, namely, 20% of the total value.

430. In April 2012 the Board approved the procurement of the acquisition of 1,064 locomotives to give proper effect to the MDS. However, because a delay in the procurement of the 1064 impacted on the MDS targets, it was decided to procure 100 additional locomotives to be deployed to the coal export line. It would then be possible for the coal export line to release 125 ageing locomotives for deployment to General Freight Business ("GFB") to mitigate against the delays in the acquisition of the 1,064 locomotives.

The proposed confinement to Mitsui

431. Mr Francis Callard, a senior engineer at TFR, prepared a memorandum dated 15 October 2013 on the business case for the procurement of 100 class 19E electric locomotives for the coal export line at a cost of R3.871 billion, and the procurement of 60 class 43 diesel locomotives for GFB at a cost of R1.826 billion, (both excluding borrowing costs). The memorandum proposed an accelerated procurement to mitigate general freight MDS volumes at risk, by means of confinement to Mitsui African Rail Solutions of the 100 locomotives, justified on grounds of urgency, standardisation, and highly specialised and largely identical goods.

432. Mitsui had contracted with Transnet in 2009 and had already supplied 110 class 19E electric locomotives for use on the coal export line. A key justification for the proposed confinement was that TFR had taken delivery of the last class 19E locomotive from Mitsui in August 2012. The Mitsui class 19E locomotives, according to Mr Callard, were operating optimally and had exceeded their design parameters.

433. The proposal for the confinement to Mitsui was scheduled for discussion at a meeting of the BADC on 21 October 2013. However, the matter was removed from the agenda and not proceeded with at that stage allegedly on grounds of sensitivity arising from a media controversy caused by the previous acquisition of locomotives undertaken through confinement to MARS.

434. Mr Callard submitted a final version of his memorandum dated 20 January 2014. He received an email on 22 January 2014 from Ms Mdletshe attaching a revised memorandum dated 21 January 2014 requesting him to reformat it, to incorporate a slide on evaluation methodology and to make certain changes. When Mr Callard perused the memorandum, he noticed significant changes about which he and his team had not been informed or consulted. These were (i) it was proposed to confine the award to CSR instead of Mitsui; (ii) references to "class 19E locomotives or equivalent" had been removed; (iii) the discussion of the fact that the class 20E locomotives procured from CSR were not suited for heavy haul on the coal export line was deleted – CSR did not manufacture class 19E locomotives; (iv) it falsely stated that the locomotives would be "largely identical with those already supplied" when CSR had not supplied any locomotives; (v) it deleted all reference to the fact that Mitsui had already produced 110 locomotives for the coal export line which allowed for the

easy restarting up of the production lines, moving quickly through the design phase and obviated the need for training crew; and (vi) the discussion of the benefits of operational and maintenance standardisation set was also deleted.

435. None of this rationale addressed the key point of standardisation of the coal line fleet (dual voltage locomotives) and interoperability. The benefits of standardisation offered by a confinement to Mitsui were thus negated. Mr Callard was concerned, justifiably, that the business case had been altered in a way resulting in unsuitable locomotives being specified and procured. The locomotive in the 95 procurement from CSR was a class 20 locomotive, which is a different weight, less powerful, has different components and its operation is different.

436. On 23 January 2014, prior to the Board meeting of the next day, Mr Callard addressed an email to Mr Gama and Mr Jiyane highlighting his concerns and significant risk to Transnet due to the variance in technical specifications and capacity of the locomotives. Mr. Callard was of the view that the amendments to his memorandum were intended to mislead the Board that the confinement to CSR was in order when in fact the requirements for confinement were not met and the locomotives procured from CSR were not suited for use on the coal export line. He received no written response to his email of 23 January 2013 but he spoke to Mr Jiyane on the phone and told him that the alteration of the business case would result in unsuitable locomotives being procured.

437. On the afternoon of 23 January 2014, Mr Singh sent an email to Mr Gama seeking his signature on the submission to the Board. At 21h22 Mr Gama addressed an email to Mr Singh informing him of the concerns around the 20E locomotives.

438. The import of Mr Gama's email is that he had grasped the implications of the concerns raised by Mr Callard and was conveying them to Mr Singh in anticipation of the upcoming BADC and Board meetings scheduled for the next day. Mr Gama agreed with Mr Callard concerning the matters raised by him as he did not support the confinement to CSR. That, he said, was why he ultimately did not sign the memorandum presented to the BADC and the Board.

439. At 7h02 on 24 January 2014, Mr Singh replied to Mr Gama in an email suggesting that they discuss it later that day. Prior to that, at 7h00 on 24 January 2014, Mr Singh had forwarded Mr Gama's email to Mr Molefe in an email stating: "FYI". This correspondence confirms that Mr Gama and Mr Singh had internalised Mr Callard's concerns.

440. The BADC meeting was held on 24 January 2014 a few hours before the Board meeting. It was chaired by Mr Sharma and attended inter alia by Mr Molefe, Mr Singh and Mr Pita. Mr Gama and Mr Jiyane were recorded as having been in partial attendance. The minuted discussion of the procurement of the 100 electric locomotives makes no reference to any of the concerns raised by Mr Callard in his email of 23 January 2014 and Mr Molefe confirmed in his evidence before the Commission that Mr Callard's concerns, despite being known by himself, Mr Singh, Mr Gama and Mr Jiyane, were not raised or discussed.

441. The BADC resolved to recommend to the Board the procurement by means of confinement to CSR of the 100 electric locomotives at an estimated cost of R3.8 billion, excluding borrowing costs. Mr Gama testified that Mr Molefe later informed him that Mr Sharma in particular was strongly opposed to a confinement to Mitsui, and the BADC supported him.

442. Thus, management misled the BADC by creating the impression that: (i) a 26 ton heavy haul CSR locomotive existed when in fact that was not the case; (ii) using CSR would be faster, but in fact would have negated local content requirements; and (iii) the confinement was in compliance with the PPM when in fact no previous CSR product had been delivered to Transnet. And lastly, there was no audit report auditing the confinement process.

443. The Special Board Meeting of 24 January 2014 (attended by Mr Molefe, Mr Singh and Mr Gama) accepted the recommendation and rationale of the BADC.

The flawed rationale for confinement to CSR

444. The rationale for the use of a confinement to CSR remained one of urgency. The justification of urgency was further undermined by the fact that CSR intended to supply class 20E locomotives, which required additional modifications to enable them to interoperate with the existing class 19E locomotives that had been supplied by MARS earlier. Furthermore, CSR had no established history with the provision of similar locomotives in South Africa. Subsequent to the approval of the confinement, Transnet's technical design team had to engage with CSR to create prototypes which were named the "21E series". The suggestion by Mr Singh that CSR locomotives were acceptable, implying that they did not need adaptation is contradicted by the fact that the price of the CSR locomotives was increased by R347 million to alter the specifications of the locomotives to ensure they were fit for purpose.

445. The CSR memorandum suggested that Mitsui had not performed well during the tenders for the 95 and the 1,064 locomotive procurement and that awarding the 100 to MARS would create a risk to Transnet. However, three months earlier the original memorandum recorded that the Mitsui locomotives were operating optimally and had proven to be both efficient and reliable. The supposed concern about reputational risks on account of stories in the media is also not credible. If there were genuine concerns about reputational risks in using a confinement to Mitsui, it was inconsistent with that concern to resolve it by confining to CSR. If the process of confinement was the problem Transnet should have used an open tender process.

446. Management misled the BADC and the Board on 24 January 2014 with spurious motivations and false or misleading statements. The conduct of all involved is at least a breach of fiduciary duties - Mr Molefe, Mr Singh, Mr Gama and Mr Jiyane. Their conduct was part of an evident pattern to favour CSR.

Irregularities and the detrimental provisions of the LSA

447. The LSA for the 100 locomotives was concluded with CSR on 17 March 2014, the same day as the contracts for the 1,064 locomotives. After negotiations, CSR submitted an "updated price proposal for supply of additional 100 sets of 20E dual voltage electric locomotives for Transnet Freight Rail" dated 14 March 2014. The proposal put forward three options at different prices per locomotive, depending on the place and conditions of manufacture. Transnet eventually accepted option 3. The price per locomotive was R43.8 million.

448. The CSR proposal and the contract did not comply with the urgent delivery schedule required by the RFP. CSR also did not comply with the 70% mandatory and non-negotiable supplier development requirement. The upfront payment of 60% of the purchase price in respect of the 100 locomotives was unusual and not in line with past practice. This resulted in R1.32 billion being paid to CSR by Transnet before a single locomotive was delivered, suggesting again that CSR was unduly favoured by the officials involved. The norm in paying deposits was in the region of 10% with the balance being paid on delivery of the locomotives. By comparison, the upfront payment to Mitsui for the earlier procurement of 110 19E locomotives was 7.8% and the advance payment to CSR for the 95 locomotives was 10%.

The lack of security for the advance payments

449. CSR did not furnish requisite security in respect of the advance payments. However, seven months after signature of the LSA, on 10 October 2014, Mr Jiyane, addressed an email to Mr Singh confirming that there had been payment to CSR without an advanced payment guarantee (APG) and that this exposed Transnet. Mr Jiyane issued the instruction for payment to be made without an APG as payment was overdue. He noted that there was another payment due in five days.

450. There is some uncertainty as to which milestone payments Mr Jiyane was referring in his email. Prior to Mr Jiyane's email of 10 October 2014, Transnet had made three payments in respect of the 100 locomotives. On 28 March 2014, it made payment of the first 30% in the amount of R1 504 800 000

(R1 320 000 000 plus R184 800 000 VAT). On 12 September 2014, it made a payment of R184 800 000 as an advance payment of VAT for the second advance payment of 30%. On 1 October 2014, it paid the second advance payment of R1 320 000 000. Thus, it is safe to assume that Mr Jiyane was principally justifying the payment of the two advance payments and warning that he needed to make unknown future payments. The issue seemingly arose when Mr Jiyane instructed the finance team to make the second advance payments in September and October 2014. While there was no APG for that payment, it is not clear whether there was an APG in respect of the first advance payment. On the assumption that there was not, it means that Mr Jiyane knowingly exposed Transnet to a potential loss of R3 billion.

451. Most certainly the payment of the second milestone to CSR on 1 October 2014, prior to the issuance of the APG, was a breach of the LSA. It exposed Transnet to unwarranted risk, without any security for the advanced payment. Mr Jiyane acknowledged that he had wrongfully exposed Transnet to risk. Mr Singh and others in the finance department who may have authorised the payments also acted in breach of their fiduciary duties and the PFMA.

The price increase

452. Two months after the signature of the LSA, Mr. Molefe in a memorandum dated 23 May 2014 requested the Board to approve a significant increase in the price of the procurement. On 24 January 2014 the Board had approved the procurement of the 100 locomotives from CSR at an ETC of R3.871 billion. On 17 March 2014, Transnet signed the LSA with CSR for the supply of the 100 locomotives at a price of R4.840 billion (R48.4 million per locomotive). When asked during his testimony whether it would not have been more appropriate to have sought the approval of the Board for the approximately R1 billion (R969 million) increase before signing the LSA, Mr Singh argued that the Board on 24 January 2014 had delegated the power to Mr Molefe as GCEO to negotiate and conclude the procurement.

453. On 15 April 2014, Mr Callard was asked by Mr Laher to assist in updating a memorandum written by Mr Molefe, justifying the increase and to update the NPV. In Mr Callard's view, the increase of R969 million was excessive and difficult to justify.

454. CSR pushed for a price of R48 million per locomotive. Mr Laher was not party to the ultimate acceptance of the price but was told by Mr Singh that Mr Molefe had agreed to pay R44 million per locomotive. Mr Laher claims that he told Mr Singh that the Mitsui quote was cheaper. The Fundudzi Report maintains that Transnet would have saved R1.2 billion if it had procured the 100 locomotives from MARS.

455. In the memorandum of 23 May 2014, Mr Molefe addressed each item of price increase and provided elucidation of the reasons for the adjustment. Mr Allistair Chabi, the actuary employed by MNS, analysed those reasons, interrogated the figures, and concluded that an increase in the amount of R969.28 million was unjustifiable as some of the cost items were either incorrect or inflated. Mr Molefe during his evidence dismissed Mr Chabi's conclusions as "rubbish". He essentially maintained that risk specialists would differ in making valuations as estimation was an art not a science.

The transgressions

456. In June 2014, it became apparent that the procurement of the 95 locomotives from CSR had been delayed and this had a knock-on negative effect on the delivery of the 100 class 21E's by CSR. The rationale of the confinement of the 100 locomotives to CSR to protect the MDS volumes by the accelerated acquisition of the 100 locomotives was thus thwarted. Mr Gama accordingly addressed a memorandum to Mr Molefe recommending that approval be granted to negotiate delivery with CSR on the premise of 100% imported content for the 100 class 21E locomotives, in other words that the locomotives be fully assembled in China. This proposal does not appear to have been approved. It is not clear when exactly the class 21E locomotives were in fact delivered, but it can be accepted that the delays negated the entire raison d'etre of the project.

Table 1: as per Mr. Brian Molefe's memorandum of 23 May 2014

Base price per locomotive (excluding hedging and escalations)	R34.34 million
Item A: Impact of exchange rate to contract date (backward looking)	R3.69 million
Item B: Impact of inflation to contract date (backward looking)	R1.26 million
Item C: Additional cost for modification of the locomotives	R3.47 million
Item D: Cost for fix escalations (forward looking)	R2.63 million
Item E: Foreign exchange hedging (forward looking)	R1.08 million
Item F: Discount negotiated	- R2.47 million
Final contracted price per locomotive	R44 million
Item G: 10% contingencies (capital spares, variations and options)	R4.4 million
Proposed ETC per locomotive	R48,4 million
Proposed ETC for 100 locomotives	R4,840 billion
Business case	R3,870 billion
Increase:	R969.28 million

457. CSR paid a kickback of R925 million on this contract. The payment schedule attached to an email dated 22 August 2015 discovered in the Gupta-leaks show that JJT was to be paid 21% of the total contract value for the 100 locomotives, being R925 million, almost equivalent to the increase in the ETC. In August 2016, CRRC (CSR merged with CNR to become CRRC) signed an addendum varying the terms of the BDSA of 2 January 2015 between CSR and Regiments Asia (who had replaced JJT) in relation to the 100 electric locomotives. The payment schedule confirmed that in August 2015 an amount of $107 203 912 had been paid to JJT, part of which related to the 100 locomotives kickback. JJT was not to retain the full amount of the R925 million but only 15%, while at least part of the remaining 85% was to be paid to companies controlled by the Gupta enterprise.

THE PROCUREMENT OF THE 1,064 LOCOMOTIVES

458. During April 2011, the Board approved TFR's Locomotive and Modernisation Fleet Plan (the fleet plan) for the acquisition of 1,202 locomotives for GFB. This led to the acquisition of the 138 locomotives (95 electric and 43 diesel). The balance of the GFB fleet plan was the 1,064 locomotives, made up of 599 electric locomotives and 465 diesel locomotives.

459. The acquisition cost of the 1,064 locomotives was stated in the business case to be R38.6 billion. Two thirds of the cost would be financed using cash generated by operations and about R13 billion needed to be raised externally. Delivery of the locomotives was scheduled to take place over seven years.

460. On 9 March 2012, the Transnet Freight Rail Investment Committee (TFRIC) supported the acquisition subject to: (i) rephrasing the key assumptions; (ii) the business case being re-worded; (iii) the financial model to be included in the business case; and (iv) the retention percentage to be reviewed.

461. As the Board's delegated authority was limited to R4 billion, it was necessary to obtain approval from the Minister of Public Enterprises in terms of Section 54 of the PFMA. The Chairman of the Board addressed a letter to the Minister on 2 May 2013 and the Minister granted the approval by letter dated 3 August 2013 subject to certain conditions related to the role of TE, the road to rail migration strategy and the localisation strategy for certain strategic components.

462. Between May 2012 and April 2013, the business case was dealt with by Mr Singh (GCFO) and Mr Mahomedy (GM: Capital Assurance and Integration). Mr Callard and Mr Pillay together with others from TFR continued to support and assist McKinsey and Transnet Group with technical input. Mr Singh performed the key oversight role and Mr Gama as CEO of TFR provided human resources from TFR.

463. The procurement process was initiated by the issuing of RFPs, which in this case, unusually, took place (partly) prior to the Board's approval of the business case. It was followed by the receipt of bids, the tender evaluation stage, the BAFO (best and final offer) stage, the post tender negotiations (PTN) and ultimately the conclusion of Locomotive Supply Agreements (LSAs). The evaluation process and BAFO stage endured from May 2013 to January 2014. On 24 January 2014, the BADC and the Board split the procurement into four contracts and appointed four OEMs as preferred bidders. The PTN took place in February 2014 and the LSAs were concluded on 17 March 2014.

The Request for Proposals

464. Prior to obtaining approval Transnet issued two RFPs for the locomotives: one for 599 electric locomotives and one for 465 diesel locomotives. The first part of the RFP for the electric locomotives was issued on 23 July 2012 with a closing date of 16 October 2012; the RFP for the diesel locomotives was issued on the same day with a closing date of 26 February 2013. The closing dates were later extended to 30 April 2013. The RFPs were issued in two separate parts to enable Transnet to seek an exemption from certain requirements of National Treasury. From 7 December 2011 to 7 December 2012, NT exempted PFMA Schedule 2 entities (including Transnet) from complying with PPFA Regulations 5 and 6 that made it mandatory for Organs of State to evaluate bids in accordance with the preferential point system.

465. Transnet wanted to use a different preferential point system in the 1,064 locomotive procurement, which it believed would better advance its transformation objectives. In July 2012, a meeting was held at which National Treasury confirmed that Transnet was obliged to apply the 90/10 evaluation criterion. Transnet accordingly decided to split the RFPs into separate documents (Part 1 and Part 2) to afford Transnet an opportunity to obtain an exemption from the Minister of Finance. Only Part 1 of the RFPs was issued on 23 July 2012. Part 1 dealt with general, technical, and administrative information. Part 2 was issued in December 2012 without an exemption having been obtained from the Minister of Finance. Part 2 dealt with the evaluation criteria, evaluation methodology, weightings, etc. It provided for a six-stage evaluation process and a points preference system (in stage 6) with criteria of price/supplier development/B-BBEE on a 60/20/20 basis. Given the Instruction Note, and the lack of any exemption by the Minister of Finance, Transnet did not have the authority to adopt these evaluation criteria in stage 6. The evaluation criteria and the application of them therefore were not in accordance with the requirements of legality.

466. Transnet's motive in not complying with the National Treasury Instruction Note is not clear from the evidence but it acted on a directive given to it by the Minister of Public Enterprises, Mr Gigaba, in a letter dated 7 December 2012 addressed to the Chairperson of Transnet in response to the concerns Transnet had raised. In the letter he said that "Transnet should not feel constrained by Section 5.1.2 of the Instruction Note and should rather establish an evaluation framework that provides reasonable incentives to suppliers to support our industrialisation and transformation objectives".

467. Part 2 of the RFP was issued four days later on 7 December 2012. Transnet's preferred criteria in stage 6 of the evaluation process would have advanced affirmative action, perhaps at the expense of cost efficiency/price. However, whatever the motivation, neither the Minister nor Transnet had the legal authority to deviate from the provisions of the Instruction Note and Regulation 5 and 6 of the PPFA Regulations. Their conduct gave rise to a possible ground of review by an unsuccessful bidder and possibly amounted to a breach of fiduciary duty and contravention of Section 57 of the PFMA.

The misrepresentation of the ETC to the Board

468. The business case for the procurement was approved by the Board on 25 April 2013, some months after the original closing dates for the receipt of the tenders. The Board approved the procurement at an ETC of R38.6 billion "excluding the potential effects from forex hedging, forex escalation and other price escalations". The exclusion of the potential effects of forex hedging and escalations from the ETC was a matter of controversy. The issue is whether there was a misrepresentation to the Board

with the aim of inflating the cost of the acquisition at a later stage after the Board approved an ETC of R38.6 billion. The ultimate cost of the procurement was R54.5 billion.

469. The original version of the business case (dated 7 March 2012) presented to the TFRIC on 9 March 2012 proposed in paragraph 10 that the TFRIC should resolve to approve the procurement of the 1,064 locomotives at an ETC of R38.146 billion. Not much else happened in relation to the development of the business case until March 2013 when McKinsey was appointed the transaction advisor for the procurement. The role of McKinsey was to develop the business case. The relationship between the TFR team and McKinsey was at times strained and there was concern about McKinsey's grasp of the issues.

470. A version of the business case for submission to the Board was agreed on 18 April 2013. That version is dated 25 April 2013. It was submitted to the Board as an annexure to a memorandum authored by Mr Singh and Mr Molefe dated 18 April 2013.

471. At its meeting of 25 April 2013, the Board approved the business case at an estimated cost of R38.6 billion "excluding the potential effects from forex hedging, forex escalation and other price escalations". Mr Callard and others testified that the ETC figure of R38.6 billion presented to the Board had included provision for escalations, forex and hedging. He maintained that the ETC as originally calculated was intended only to exclude "borrowing costs" and this was inappropriately changed at a meeting of the LSC on 18 April 2013 before the business case served before the Board. Correspondence between Mr Saloojee of McKinsey and other role players during April 2013, as well as other documentation prepared while McKinsey was finalising its input on the financial model for the business case, indicates that the ETC originally made provision for and included escalations and forex. Tables and slide presentations setting out calculations show that the locomotive prices were based on projected US inflation and converted back to ZAR based on the forward rate obtained from the Transnet Treasury.

472. On 29 April 2013 (after both the BADC and the Board had approved the acquisition) Mr Naresh Budai of Transnet circulated a revised copy of the business case dated 29 April 2013, which had been updated as per input from the BADC. The final paragraph of Paragraph A of this document differs from that in the version of the business case dated 25 April 2013. The ETC in that version was stated to exclude only borrowing costs and not "the potential effects from forex hedging, forex escalations and other price escalations". It differed from the version dated 25 April 2013 in that it only excluded borrowing costs (interest on borrowed capital) from the ETC of R38.6 billion. However, on 30 April 2013, Mr Budhai circulated the final version of the business case dated 25 April 2013 (and not 29 April 2013), which was materially different in that it excluded not only borrowing costs but "the potential effects from forex hedging, forex escalations and other price escalations".

473. The meta-data for the file containing the final version reflects that it was modified on the computer of Mr. Yusuf Mahomed, who reported to Mr Singh. Mr Mahomed admitted that he amended the business case on 30 April 2013 by deleting the words "borrowing costs" and inserting the words "the potential effects from forex hedging, forex escalation and other price escalations". He explained that the change was on the instruction of Mr Singh to bring the document into line with Board and other committee resolutions during April 2013.

474. If it is accepted that the original business case ETC of R38.6 billion included some escalations, forex, and hedging costs – in the amount of R4.481 billion or R5.892 billion, the presentation to the Board that the ETC excluded such costs entirely was a misrepresentation and inappropriate because it caused the Board to take a decision without the benefit of a proper estimate before it.

475. At its meeting on 28 May 2014, the Board accepted the recommendation to increase the ETC from R38.6 billion to R54.5 billion and took note that the main reasons for the increase in ETC was "due to the exclusion" of the identified costs from it. That statement is false. The resolution did not mention or take account of the fact that the ETC had made provision for forex and escalations in the amount of R5.892 billion. Nor did it state that the provision for these costs in the ETC had proved insufficient and was understated.

476. On 31 March 2014, two weeks after the signature of the LSAs, Ms N Huma from the DPE addressed an email to Mr Singh noting that the DPE had approved an ETC of R 38.6 billion as per the section 54 PFMA application, querying why there was such a huge difference between the approved ETC and the actual transaction value and asking if Transnet would make a submission to explain the difference to the Minster. Mr Singh responded to the email on the same day and indicated that "the approval was for R38.6 billion but excluded the impacts of foreign exchange and escalations", which "... had a significant impact on the total ETC..." This email again misrepresented the true situation. Mr Singh did not submit a report seeking the approval from the Minister for the increase in price.

477. The evidence as a whole therefore establishes that there was a misrepresentation to the Board and the Minister of Public Enterprises concerning the elements making up the ETC. Consequently, the Board was not apprised of the true ETC before going to market. The false assumption that the ETC excluded all escalation, forex, and hedging costs, when it in fact made provision to the tune of R5.892 billion, probably influenced the negotiation of the final price. This must be so because instead of working from a base line ETC of R38.6 billion including some of these costs (or more accurately an ETC of R32.708 excluding them), Transnet proceeded on the assumption that all such costs (established later to be R14.9 billion) could legitimately be added to the final price. The approval by the Board on 28 May 2014 for an increase of the price (including the provision of R14.9 billion for forex and escalations) was granted on the mistaken premise that no provision for those costs had been included in the ETC. This false accounting may have facilitated the ability of CSR and CNR to pay the 21% kickbacks to the Gupta enterprise on the 1,064 locomotive contracts.

The bids

478. At the closing of the bids, on 30 April 2013, seven bidders submitted bids for the procurement of the 599 electric locomotives and four bidders submitted bids for the 465 diesel locomotives. The evaluation process endured until 15 January 2014. Two bidders for the electric locomotives went through to the best and final offer stage of the procurement process, namely Bombardier Transportation SA (Pty) Ltd and CSR E-Loco Rail Consortium Supply (CSR). All four bidders for the diesel locomotives went through to the BAFO stage, namely: CNR Consortium (CNR); CSR Loliwe Consortium (CSR Loliwe); EMD Africa (Pty) Ltd (EMD) and GE South Africa Technologies (Pty) Ltd (GE). After the BAFO stage, CNR and GE were recommended to proceed to the post tender negotiations in respect of the diesel locomotives, and both Bombardier and CSR went through in respect of the electric locomotives.

479. Much of the evidence before the Commission suggests that CSR and CNR were unduly favoured at various stages of the procurement process. In March-May 2013, prior to the submission and evaluation of the bids, Transnet engaged in direct negotiations with CSR and the China Development Bank (CDB) with a view to concluding a tripartite cooperation agreement. The original draft of the agreement explicitly provided for cooperation on the procurement and refurbishment of electrical and diesel locomotives. The cooperation agreement ultimately signed was between the CDB and Transnet. Now more conscious of the difficulty posed by a prior agreement favouring a bidder, the agreement provided merely for Transnet and the CDB to identify opportunities for CDB to participate in funding the development and upgrade of infrastructure in line with Transnet's MDS.

480. After the evaluation process, the BADC, Chaired by Mr Sharma, on 24 January 2014, recommended to the Board that Bombardier, CSR, CNR and GE be appointed as the OEMs to manufacture the 1,064 locomotives and that the award of the locomotives be split as follows: Bombardier 240 electric locomotives; CSR 359 electric locomotives; CNR 232 diesel locomotives; and GE 233 diesels locomotives. The Board accepted the recommendation of the BADC at its meeting of 24 January 2014 at an ETC of R33.4 billion (excluding hedging, escalations, and TE scope). The matter of TE scope is discussed below.

481. Mr Laher identified four risks that ultimately impacted on the price evaluation: (i) batch pricing; (ii) the decision to normalise the price by excluding the cost of using TE as the main subcontractor; (iii) the delivery schedules; and (iv) inconsistencies in the application of the TCO model.

482. In early January 2014, Transnet addressed letters to bidders 1 and 2 (Bombardier and CSR) for the

electric locomotives and all four bidders (CNR, CSR Loliwe, EMD and GE) for the diesel locomotives requesting them to provide a best and final offer. All the bidders submitted BAFO's on 10 January 2014.

483. Mr Callard dealt at some length with the accounting treatment and implications of the bidders using TE as a subcontractor. The accounting for TE as a subcontractor led to a flawed evaluation process on the issue of price.

484. In his letter dated 3 August 2013, approving the acquisition of the 1,064 locomotives, Minister Gigaba emphasised that he saw TE as playing a critical role in developing strategic and industrial capabilities relevant to the rail supply chain and suggested that the current locomotive procurement programme should be used to ensure that a world class enterprise and rail cluster is built. However, neither the PFMA approval nor the RFP's required the evaluation process to incorporate the use of TE as a sub-contractor.

485. On 10 December 2013, the CFET-Finance issued two reports detailing its findings from the stage 6 evaluation for the 599 electric locomotive and the 465 diesel locomotive tenders respectively. Both reports deal with the use of TE and proceed on the assumption that the RFP dictated that the participation of TE in the procurement process would be prescribed. The CFET-Finance determined in relation to the electric locomotives that: (i) Bombardier's price per locomotive would decrease by a price of R1 905 514; (ii) CSR's price per locomotive would decrease by R3 480 000; and (iii) bidder 5 indicated that there would be no impact on its bid price per locomotive. The ultimate implication of this adjustment was the reduction of Bombardier's total price per locomotive from R34 738 937 to R32 833 423 and the reduction of CSR's price from R38 196 188 to R34 716 188.

486. In effect this resulted in Bombardier moving from second best price per locomotive to best price. CSR moved from fourth best price to third within a close margin to the first and second, whereas before the adjustment, its price was much less competitive than the other three bidders. When it initially made allowance for the TE adjustment, CSR maintained that there would be a reduction of R3 480 000 per locomotive, but a subsequent submission indicated it to be R5 490 000, the difference of R2 010 000 per locomotive was later explained to be a discount. The CFET-Finance proceeded on the basis of excluding this potential discount and reduced the price by R3 480 000 per locomotive. This discount was inappropriately factored back in at the BAFO stage. The contract was ultimately awarded to Bombardier and CSR.

487. The outcomes in relation to the diesel locomotives were: (i) CSR's price was reduced by R1 530 190 per locomotive; (ii) EMD's price was reduced by R1 649 000 per locomotive; and (iii) GE's price was reduced by R1 046 060 per locomotive. This resulted in: (i) CSR's overall price per locomotive reducing from R34 785 009 to R33 254 878; (ii) EMD's price reducing from R44 401 272 to R42 761 272; and (iii) GE's price reducing from R28 539 541 to R27 493 481. The ranking of the bids for the diesel locomotives in respect of price did not change as a result of the TE adjustment.

488. More importantly, the TE adjustment changed the rankings of the bidders in the procurement of the electric locomotives. In the case of the diesel locomotives, the application of the two methodologies inclusive of TE and exclusive of TE was inconsequential as it had the same outcome in respect of the ranking of the bidders on the basis of price. However, as mentioned, in the bid for the electric locomotives, it changed the ranking of Bombardier from second to first, and CSR from fourth to third. In the end, given that the award was split between Bombardier and CSR, it probably made no difference to the appointment of Bombardier. The change of CSR's price significantly altered its competitive position. Without the TE adjustment it would have been difficult to justify CSR proceeding to the BAFO stage. In the BAFO stage CSR increased its price to add back the TE deduction.

489. Although Bombardier and CSR were evaluated on the price per locomotive without using TE as the sub-contractor, Transnet in the end paid the amount using TE. The quoted price per locomotive for Bombardier including TE was R34 738 937. The difference between its quoted price and BAFO price per locomotive was R1 905 514 (R34 738 937 minus R32 833 423). Bombardier was awarded 240 locomotives. Hence its total price was understated by R457 323 360. Likewise, the difference between CSR's quoted price and the TE adjusted price was R3 480 000 per locomotive (R38 196,188

minus R34 716 188). It was awarded 359 locomotives. Its total price was thus understated by R1 249 320 000. In the result, the total BAFO price for the electric locomotives to be supplied by Bombardier and CSR was understated by approximately R1.707 billion. This amount later was added back to the final price which entailed the increase of the ETC from R38.6 billion to R54.5 billion. The true prices were accordingly significantly understated by the bidders.

490. CSR clearly benefited from the TE adjustment changing its ranking on price in relation to the procurement of the electric locomotives, and CNR was favoured not by the TE adjustment, but rather by the inappropriate reduction of its BAFO price by R12 million per locomotive. CNR's unrealistic BAFO price likely led to its bid being inappropriately favoured.

The splitting of the awards

491. On 17 January 2014, the GCEO, Mr Molefe, addressed two memoranda to the Board of Transnet setting out results of the evaluation of the two tenders and proposing the splitting of the two procurements between the two OEMs in each tender.

492. In relation to the 599 electric locomotives, Bombardier received a total score of 65.96 and CSR 61.33. The memoranda explained that besides these two bidders scoring the highest points, their proposals offered local content and supplier development commitments of a high order and a delivery schedule close to Transnet requirements. They also scored highest on technical evaluations. The memorandum explained that in order to mitigate the commercial exposure for Transnet, Bombardier and CSR were invited to submit BAFOs. The outcome was that Bombardier offered to increase procurement to small businesses by R50 million and technology transfer through skills development training and support by R10 million. In addition, Bombardier offered a R450 000 reduction in price per locomotive based on a revised foreign currency content percentage. CSR offered a discount of R2.25 million per locomotive, including revised foreign content, thus offering the best price.

493. The memorandum then presented a motivation for the split of the award. This is relevant to the issue of batch pricing. Mr Molefe explained to the Board that the original MDS volumes as promised in the corporate plan were significantly at risk, due to the lack of tractive effort at TFR caused by the delay in the award of the tender. The use of more than one supplier would reduce delivery risk and enhance ability to meet MDS volume targets. Mr Brian Molefe thus recommended that two suppliers be used to manufacture the required locomotives with an allocation of 60% of the procurement to CSR and 40% to Bombardier. He justified the split favouring CSR on the basis of its track record in relation to the 95 locomotives. The memorandum concerning the 465 diesel locomotives made a similar recommendation: a split of the award between CNR and GE on a 50/50 basis.

494. On 24 January 2014, the Board approved the recommendation and split the awards along the lines suggested. The Board passed two resolutions. The resolution in relation to the 599 approved the tender evaluation process, the acquisition of 599 electric locomotives at an ETC of R19.8 billion (excluding hedging costs, escalations and scope of TE's work) and the allocation on a 60/40 basis. The resolution in relation to the diesel locomotives approved the evaluation process, the acquisition of 465 diesel locomotives at an ETC of R13.6 billion (excluding hedging costs, escalations and scope of TE's work), and the allocation on a 50/50 split to CNR and GE. The ETC at that stage was thus R33.4 billion (excluding hedging, escalations and TE scope).

495. Both resolutions approved the recommendation of the bidders "as result of the evaluation process for the negotiations and award of business, subject (to) a further endorsement by the BADC post the negotiation process" and delegated authority to the GCEO to sign, approve and conclude all necessary documents to give effect to the resolutions.

The post tender negotiations (PTN)

496. After the Board's approval on 24 January 2014, Transnet and the successful bidders commenced the PTN process for the conclusion of the contracts. The PTN took place during February-March 2014 and endured for about six weeks. The PTN process was led by Mr Singh and Mr Eric Wood

of Regiments, both associates of the Gupta racketeering enterprise and thus unlikely to act in the best interests of Transnet. Regiments essentially assumed the role that normally was reserved to Transnet's Treasury.

497. Ms Makgatho from Treasury assumed Mr Singh excluded her as part of his strategy to surround himself with people who would not be comfortable with disagreeing or have power to disagree with him. Ms Makgatho challenged Mr Singh for using external resources when it was not necessary because the Transnet Treasury team had all the necessary experience and understood Transnet processes and procedures. After the conclusion of the PTN, Ms Makgatho did not sign off on the proposed contracts with the OEMs and did not attend the signing ceremony.

The irregular adjustment for batch-pricing during the PTN

498. The issue of batch-pricing arose during the PTN in March 2014 as a consequence of the Board's decision to split the awards between two bidders in both tenders. The provision made for batch-pricing by the Transnet negotiation team during the PTN led to an increase of R2.7 billion in the ultimate price. Committing Transnet to batch-pricing was contrary to the provisions of the RFP, compromised the fairness of the procurement process and constituted an irregularity. Mr Singh, Mr Gama and Mr Laher justified the additional cost of R2.7 billion on the grounds that the reduction in the quantities of the locomotives awarded to each bidder necessitated the bidders to increase their prices.

499. The Board's approval of the splitting of the award did not amount to authorisation to commit Transnet to batch-pricing, especially when it was specifically brought to its attention that the RFP in effect prohibited Transnet from paying a price premium for changing the locomotive quantities procured from any one bidder. Despite that, the negotiations team ultimately agreed to batch-pricing.

500. Mr Laher notably misstated what the Board had decided. The Board did not decide to provide for batch-pricing. It merely split the awards between different suppliers. Mr Laher clearly appreciated the risks of batch-pricing and the fact that it was unacceptable for Transnet. He nonetheless believed it was correct to have agreed to unnecessary batch pricing of R2.7 billion.

501. Mr Molefe although not a member of the negotiation team, was a member of the LSC to which the negotiation team and Mr Singh reported. During his evidence before the Commission, he accepted that batch pricing ought not to have been included in the price. He conceded that he bore some responsibility but denied he acted deliberately to prejudice Transnet.

The revision of the delivery schedule

502. Another issue that arose during the PTN was a change to the rate of delivery of the locomotives. The accelerated delivery was used to justify the cost of R2.7 billion for batch-pricing. In his memorandum of 23 May 2014 to the Board, Mr Molefe argued that the R2.7 billion was offset by a shorter delivery period resulting in lower escalation.

503. In February 2014, Mr Singh requested TFR to respond to a proposal to reduce the delivery schedule from seven years to three or four years in the hope that accelerating the locomotives would save forex costs in the future. Mr Callard, Mr Pillay and Mr Roper produced a report dated 11 February 2014. The report noted inter alia that: (i) the fast parking of the old locomotives posed technical challenges; (ii) the market supported the additional tonnage; (iii) the wagon plan could be adjusted; (iv) certain projects had to be fast tracked to achieve the required tonnages; (v) the start-up of TE to a feasible standard of manufacture presented challenges; and (vi) there were insufficient staff to speed up commissioning. The report was sent to Mr Gama on 12 February 2014. Mr Gama suggested certain amendments. Mr Callard amended the report and sent it to Mr Singh and Mr Mahomedy cautioned that TFR could not realistically absorb more than 300 locomotives per year.

504. The key risk in accelerating the rate of delivery over a shorter period was that it required additional cash flow to effect payment for the locomotives at a time when there were constraints on the budget. Moving money to procuring the locomotives would take capital away from the projects which were

required to support acquisition of the locomotives. There was also considerable doubt about the preparedness of TE to handle the accelerated delivery.

505. The LSAs concluded on 17 March 2014 included the accelerated delivery schedule. A workshop was held on 27 May 2014 at which various tasks were allocated to key staff members to facilitate the accelerated delivery schedule. As it turned out, the delivery of the locomotives was delayed. By December 2018, only 497 of the 1,064 locomotives had been delivered.

506. The GCIA team opposed the Regiments proposal as Transnet did not need to incur further costs because at that stage all the OEMs were experiencing production challenges or had not commenced production at the time, meaning they could not meet the accelerated delivery schedule in any event. There was absolutely no need to incur this additional cost. Moreover, the deferral of locomotives delivery would have triggered deferral penalties. The proposal, which would have advanced the interests of Regiments and the Gupta enterprise, was not implemented.

The excessive advance payments

507. Mr Mahomedy testified that it came to his attention during the PTN that the negotiation team was negotiating a higher-than-normal advance payment to the bidders. Transnet had a historical practice of paying a deposit of 10%. Advance payments are made to cover costs that the OEM will incur before the first locomotive is delivered. The norm is to pay 10 to 15%. An amount more than this would invariably impact the cash interest cover - the financial ratio that is of particular interest to financial institutions and credit rating agencies. Payment of too large an advance payment could affect Transnet's credit rating and its ability to borrow at favourable rates. The advance payments paid in relation to the 599 electric locomotives (especially to CSR) were beyond the norm.

508. Mr Mahomedy met with Mr Singh to register his discomfort about upfront payments beyond the historical norm. Mr Singh said he would investigate it. Despite these concerns, the PTN negotiation team agreed to pay CSR a deposit of 10% on the date of signing and a further 20% within six months – on design review in September 2014. This meant that Transnet was obliged to pay CSR R5.4 billion upfront before any locomotive was manufactured or delivered. Bombardier similarly received 9% upfront, 9% on design review, and a further 9% after six months. CSR had in fact initially proposed under 2% upfront payment in its bid. Thus, CSR's advance payment increased dramatically during the PTN. Bombardier had originally put forward an advanced payment of 25%. Its advance payment increased by 2% to 27%, Likewise, CNR in the procurement of the 465 diesel locomotives increased its deposit from 1.08% to 15% (10% upfront and 5% on design review). No adequate explanation was ever tendered for these excessive payments.

509. The consequence of the negotiations team (led by the Gupta associates Mr Singh and Mr Wood) agreeing to excessive advance payments on all the locomotive procurements was that on contract initiation on 17 March 2014, Transnet had to pay upfront advance payments of R7.37 billion before 1 April 2014 and had to increase its borrowings in the order of R6 billion in 2014–2015. The agreement to pay these excessive amounts raises questions about whether the final negotiations were conducted in Transnet's interests and whether those responsible acted corruptly.

Non-compliance with local content requirements

510. The business case set out a strong motivation for the development of local manufacturing skills and job creation. It is questionable whether Bombardier and CSR should have been awarded the electric locomotive tender, and CNR the diesel locomotive tender, on account of their non-compliance with local production and content requirements.

511. The matter of the local/foreign content is of relevance also to the increase of the price of the procurements in that the computation for forward cost escalation failed properly to take account of the reduced local content and lower foreign inflation assumptions. That failure led Mr Molefe to overstate forward escalation costs significantly, which unjustifiably added R3.2 billion to the cost of the transaction.

512. During the PTN, the negotiation team used a favourable exchange rate that reflected changes resulting from the deterioration in the ZAR during the period between the advertisement of the bid and the conclusion of the PTN. This revision did not alter the overall result. The local content of the three bidders in fact decreased further as follows: Bombardier (45.6%); CSR (49.6%); and CNR (37.6%).

513. Hence, at the close of the PTNs, the bidders ought to have been disqualified or at least advised that they no longer met the prescribed minimum threshold. Notwithstanding this non-compliance, CNR, Bombardier and CSR were awarded the contracts.

The lack of Ministerial approval for the increase of the ETC

514. Before approving the increase of R15.9 billion, neither the Board nor the GCEO sought approval from the Minister of Public Enterprises. Paragraph 17 of the memorandum of 23 May 2014 noted that the acquisition had been approved by the Minister of Public Enterprises on 3 August 2013 and added that "although the approval from the Minister was not subject to a final cost of R38.6 billion, for good governance and for information purposes a letter will be sent to the DPE advising of the final ETC".

515. It is common cause that the Minister approved the acquisition at an ETC of R38.6 billion on 3 August 2013 but was never requested to approve the increase of R15.9 billion, nor was the increase reported to the Minister. Mr Molefe in effect advised the Board that there was no need for Ministerial approval.

516. Mr Gama claimed to be unaware of the increase until after the LSAs were signed because he was not part of the negotiations. Mr Singh, the author of paragraph 17 of the memorandum of 23 May 2014, dealt with this question in an affidavit filed with the Commission on 10 March 2021. He said that he stood by the contents of paragraph 17 of the memorandum as it was based on the DOA framework and the significance and materiality framework applicable at the time. Paragraph 5.1.3 of the DOA framework merely provided that an increase in the ETC of a project already approved by the Shareholder Minister had to be reported to the Shareholder Minister if the increase is in excess of 15%. Since the procurement of the 1,064 locomotives was approved by the then Minister of Public Enterprises, Mr Gigaba, on 3 August 2013, Mr Singh argued, Transnet only needed to report the increase in the ETC to the Minister and did not need approval for contracting at a higher price.

517. If Mr Singh's argument were accepted it would lead to the absurdity or anomaly that Transnet, for example, could obtain approval for a R10 billion transaction, then unilaterally enter into a contract for R20 billion for which it had no Ministerial approval and could regularise the ultimate transaction by the simple expedient of reporting it to the Minister who would be without power to veto the transaction. Despite Mr Singh undertaking on 31 March 2014 to provide a full report to the Minister, the ETC increase of R15.9 billion was neither reported to nor approved by the Minister, leaving the legality of the LSAs open to question.

The justification for the increase in the ETC

518. Regiments took over the role of financial adviser on the 1,064 procurements in February 2014, shortly before the LSAs were signed at the increased price. They also played a role in advising on and vetting the cost of hedging the exposure to currency volatility. The memorandum indicated that escalations of input cost had been verified by Transnet using publicly available data and by Regiments "using their intellectual property methodology techniques."

519. Table 2 of the memorandum of 23 May 2014 sets out the line items making up the ultimate price of R54.5 billion. It commences with an aggregate amount of the BAFO price in respect of the entire 1,064 acquisition and adds amounts for backward looking escalations and forex adjustments, batch-pricing adjustments, accounting for TE, forward looking escalations, hedging costs, and contingencies.

520. Table 2 was subjected to careful and thorough scrutiny before the Commission by Mr Chabi. He concluded that the increase from R38.6 billion to R54.5 billion was not totally justifiable. Mr Callard

Table 2: as the memorandum of 23 May 2014 sets out the line items making up the ultimate price of R54.5 billion

ITEM	RANDS
BAFO per Board submission excluding hedging and escalation:	**R29 355 532 740**
A. Escalation up to signature date (close of tender to March 2014):	R2 362 018 104
B. Add back original TE scope for BAFO purposes:	R1 706 643 360
C. Forex adjustment to spot rate:	R3 030 660 144
D. Batch price adjustment for batch size:	R2 754 402 335
BAFO updated for economic and other factors:	**R39 209 256 683**
E. Additional TE scope:	R883 172 732
New price including TE's scope:	**R40 092 429 615**
F. Cost to fix escalation to end of contract:	R6 725 784 499
G. Cost to hedging:	R2 729 046 496
ETC including hedging and escalations:	**R49 547 224 410**
H. Contingencies:	R4 954 775 590
ETC including hedging, escalation, options etc.:	**R54 502 000 900**

presented additional evidence about the alleged manipulation of the ETC which was aimed at uncovering anomalies indicating the possibility that the final BAFO prices were contrived to result in inflation or deflation of the price per locomotive to favour preferred bidders.

521. Mr Callard's evidence needs to be approached with circumspection. The disciplinary committee of SAICA made adverse findings about his reliability as an expert witness in financial and accounting matters and held that much of his evidence was conjecture, speculation and opinions on matters in which he lacked expertise. It is not possible to pronounce on the correctness or fairness of that finding. It nonetheless injects a note of caution. In the face of the confusing array of calculations, one relies on the BAFO figure of R29 355 532 740 in Table 2 as used by Mr Chabi.

The Tequesta BDSA kickbacks

522. The Shadow World Investigation report reveals that CSR agreed to pay kickbacks of 21% of the value of the 359 electric locomotives (awarded to it as part of the 1,064 locomotive procurement) to two Gupta linked companies, JJT and Tequesta Group Ltd, equalling approximately R3.806 billion. As with the kickbacks on the other contracts with CSR, approximately 85% of that was probably paid to the Gupta enterprise.

523. On 18 May 2015, Mr Essa acting on behalf of one of his companies, Tequesta company incorporated under the laws of Hong Kong, concluded a contract in Shenzen, China, with CSR Hong Kong Co Ltd. The contract is described on its cover page as a BDSA.

524. There are three important observations that can be made about the BDSA: (i) it confirms the exact number of locomotives that were awarded to CSR, 14 months prior to its signature; (ii) the services rendered pre-date the award of the tender; and (iii) Tequesta was responsible for CSR being awarded the contract. CSR actually bid for the full 599 electric locomotives; yet the project was defined as the 359 locomotives which were awarded to it. If there were genuine pre-award services, these would have related to the bid for 599.

525. There is no evidence of any services provided by either Tequesta or JJT. Mr Sedumedi of MNS reviewed videos of the PTN to see if Tequesta had assisted "the company in negotiating with the client on pricing levels in relation to the project". He observed that it was CSR personnel and not representatives of Tequesta who concluded these negotiations. There was no evidence that Mr Essa was involved in the negotiations either. It is also not apparent what, if anything, Tequesta had done to assist CSR to secure the bid. These facts alone lead to a reasonable inference of corruption.

526. In August 2016 CRRC signed an addendum to existing agreements with Tequesta varying the terms of the BDSA of 18 May 2015. The primary aim of the addendum was to modify the terms under which Tequesta was to be paid, and specifically waived CRRC's right to withhold portions of the payments due to Tequesta. It appears that CRRC had retained 15% of all payments due to Tequesta as surety. The addendum stipulated that this would no longer be the case and that the withheld amounts to date (equal to $15,144,610m) would be paid to Tequesta. This was contingent on Transnet awarding CRRC contracts to provide maintenance services. If this was not met, CRRC would be entitled to recoup the 15% outlay against future payments that were due to be made to Tequesta. The withheld amounts would be released within 90 days of the final payment being made by Transnet to CRRC. The effect of the addendum was to expedite a large payment to the Gupta enterprise through Tequesta.

527. CNR also paid kickbacks to the Gupta enterprise for the award of the 232 diesel locomotive contract. On the 20 May 2014 CNR and Tequesta entered into an exclusive agency agreement. This agreement replaced and superseded an earlier agreement of 8 July 2013 between CNR and CGT related to the same matters. The later agreement is a simple cut-and-paste operation in which CGT was replaced by Tequesta. The total kickback paid in this instance was R2.088 billion.

The maintenance services agreement with CSR

528. The LSA concluded between CSR and Transnet envisaged the parties concluding a maintenance agreement for the locomotives supplied. On 28 July 2016 the Board approved the conclusion of a 12-year maintenance services agreement with CSR for an amount of R6.18 billion. The memorandum supporting the award was not presented to the relevant governance structures for review prior to it serving before the Board. It was presented directly to the Board and subsequently sent to the Minister of Public Enterprises for approval. The minutes of the Board meeting record the attendance inter alia of Ms Mabaso, Mr Gama, Mr Nagdee and Mr Shane. The Board recommended that the Minister of Public Enterprises should approve the business case and award the maintenance services to CSR in terms of the LSA for the 1,064 locomotives. The Board further approved the delegation of authority to the GCEO (Mr Gama) to conclude the contract.

529. On 12 August 2016 Transnet issued CSR with a Letter of Award for the maintenance services of the locomotives. Clause 2.4 of the Letter of Award indicated that Transnet would pay CSR "Start Up Costs" totalling R 618 160 764 (excl. Vat) within 14 days of receipt of a valid and effective "On Demand Guarantee" issued by a financial institution. Pursuant to this clause Transnet paid CSR an advance payment of R704 703 250 (incl. VAT) in October 2016.

530. According to Mr Mahomedy, Transnet terminated the LOA in October 2017, amidst allegations of corruption on the grounds of non-performance. Despite the fact that Transnet had not received any goods or services in terms of this contract, no steps were taken to claim back the advance payment until September 2018 when Transnet notified the Bank of China of its claim under the bond on the grounds that CSR had failed to execute its obligations. Mr Gama maintained that the LOA was only terminated in September 2018 and intimated that Mr Mahomedy was responsible for the delay.

531. In December 2018, more than two years after payment had been made, CSR refunded Transnet R618 160 746. CSR failed to repay the VAT amounting to R86 542 504 as well as the interest due to Transnet in the amount of R136 473 803. On 11 February 2019, Transnet demanded payment of the VAT and interest in the total amount of R223 016 308. It is not clear whether this amount has been paid.

The offences

532. The procurement of the 1,064 locomotives was attended by a wide range of wrongdoing that reflected a pattern aimed at favouring CSR and CNR with the objective of facilitating the kickbacks to the Gupta racketeering enterprise. The wrongdoing comprised, inter alia: (i) the misrepresentation to the Board of the components of the ETC; (ii) the non-compliance with the preferential points system; (iii) the unfair favouring of CSR through the TE adjustment; (iv) the factoring of the R2 010 000 discount back

into the price of CSR's locomotives; (v) the understating of CSR's BAFO price; (vi) the marginalising of Transnet's treasury; (vii) the inflation of the price through the inappropriate use of batch pricing; (viii) the manipulation of the delivery schedule; (ix) the payment of excessive advance payments; (x) non-compliance with the local content requirements; (xi) the failure to obtain the approval of the Minister for the increase; (xii) the misrepresentation to the Board of the NPV by using the wrong hurdle rate; (xiii) the inflation of the provision for escalations, forex, batch pricing and contingencies in the price; (xiv) the dubious maintenance services agreement; (xv) the failure to recoup the excessive advance payment timeously and the VAT on it; and (xvi) the BDSA kickbacks.

THE RELOCATION OF CNT AND BT TO DURBAN

533. While negotiations were being conducted for the supply of the 1,064 locomotives, in February 2014, Transnet instructed Price Waterhouse Coopers (PWC) to conduct a review of TE's operational readiness to deliver in respect of the assembly of the locomotives. In terms of the LSAs TE and the OEMs were jointly responsible for setting up the assembly lines for the locomotives.

534. PWC submitted a report on 21 February 2014 reviewing and identifying risks associated with: (i) the locomotive designs; (ii) the production rates; and (iii) where the assembly lines should be located. PWC assessed different TE sites to identify which ones could be used for the assembly of the 1,064 locomotive order.

535. The original intention had been to use the Koedoespoort facility in Gauteng, but the PWC assessment indicated that the site in Bayhead, Durban could also be used.

536. In order to protect the intellectual property and other trade secrets of the OEMs, it would be best to mix the OEMs in each facility. Given that GE and CSR already had production lines at Koedoespoort, it made sense that they remain there to keep the benefit of shorter start-up periods. PWC accordingly recommended that the locomotives awarded to CNR and BT should be assembled in Durban.

537. PWC acknowledged that its recommendation risked an adverse impact on price in that the cost of the locomotives might increase due to the OEMs being required to operate from the Durban site. Locating the two OEMs with the least established local operations in Durban would minimise the cost by not requiring any relocation of existing infrastructure. PWC also recommended that TE develop a negotiation strategy comprising of a cost comparison between Gauteng and Durban to use as a leverage to minimise cost.

538. Discussions took place with CNR and BT about the location of the contractor facility in Durban during the PTN. In a memorandum dated 15 May 2014, Mr Richard Vallihu, the CEO of TE, requested the GCEO to communicate the decision formally to BT and CNR. The rationale for the decision arose essentially from the splitting of the award among the four OEMs and Koedoespoort not having the capacity to accommodate more than two production lines. Although setting up an assembly line in Durban was not envisaged in the business case for the 1,064 locomotives, the decision to do so was defensible. The decision resulted in the definition of "contractor facility" in the relevant LSAs being re-stated to mean "the facility at Koedoespoort, Gauteng or Bay-Head, Durban as notified in writing by the Contractor to the Company". Any costs associated with this decision were provided for in the 10% provision for contingencies in the ETC.

539. The series of transactions and events relating to the Durban assembly line have been referred to in the evidence before the Commission as the "relocation" of the two OEMs to Durban. CNR and BT strictly speaking did not "relocate" from Koedoespoort to Durban as they had never set up an assembly line at Koedoespoort. It was merely agreed during the PTN that the contractor facility for CNR and BT would be Durban. However, the term "relocation" will be used for convenience.

540. There is little evidence regarding BT's negotiation of an increase in price for the relocation to Durban. The negotiations with CNR and the evidence of Mr Gonsalves in particular, however, offer clear insight into what transpired.

541. When Transnet issued tenders for the acquisition of the 1,064 locomotives, Mr Gonsalves formed part of a consortium led by CNR, more precisely its South African counterpart, CRRC SA Rolling Stock (Pty) Limited (CRRC), formerly known as CNR Rolling Stock South Africa (Pty) Limited (CNRRSSA). Mr Gonsalves is a non-executive Director of this company. For the sake of convenience, the company will be referred to throughout as CNRRSSA.

542. The day-to-day operations and business of CNRRSSA are run by Gang Wang (CEO) and Tao Yu (CFO). The directors representing the minority shareholders, being those other than CNR, were all minority non-executive directors of CNRRSSA, and as such not involved in the operations and day do day business, except for attending Board meetings.

543. CNRRSSA submitted its tender to Transnet for the 465 diesel locomotives (part of the 1064) in April 2013. After Transnet decided to split the award of the 465 diesel locomotives on a 50/50 basis and to award the supply of 233 locomotives to BT and 232 locomotives to the CNRRSSA consortium, CNRRSSA entered into a LSA with Transnet for the manufacturing of 232 diesel locomotives on 17 March 2014. As discussed, the LSA stipulated that the "Contractor Facility" for CNRRSSA to manufacture/assemble the locomotives was at any one of two TE locomotive manufacturing facilities, namely in Koedoespoort or Durban. Mr Gonsalves testified that at the time of signing the LSA, CNRRSSA was aware that it would work in Durban, but had based its costing on the assembly of the locomotives at Koedoespoort.

544. During March 2014, Transnet requested CNRRSSA to provide a proposed costing of the impact of manufacturing/assembling the locomotives at the Bayhead facility in Durban. On 11 March 2014, CNRRSSA addressed a letter to Mr Pita and Ms Mdletshe of Transnet indicating that the total additional cost would be R9 755 600.

545. There is no response to the letter from CNRRSSA dated 11 March 2014 on record. There is however an unsigned proposal under a CNRRSSA letter dated 1 February 2015 dealing with the “Durban Locomotive Factory Relocation Proposal” which estimated the increased cost to be more than R100 million. Annexed to this document is a schedule that includes figures against certain items and a total estimate of R318.7 million.

546. A few months later, on 25 April 2015, CNRRSSA appointed Business Expansion Structured Products (Pty) Limited (BEX) to act as an intermediary for the purpose of negotiating a contract with Transnet for the claim of the costs of "relocating" CNRRSSA’s locomotive manufacturing /assembly to the Durban facility. BEX had not been involved in CNRRSSA’s initial costing exercise that arrived at a total figure of R9.7 million for relocation costs. According to Mr Gonsalves, BEX was appointed despite the serious reservations and opposition of the minority non-executive directors. They were concerned about inadequate consultation, the payment of an excessive fee to BEX, the failure of TFR to follow a tender process and there being no clear rationale for CNRRSSA being entitled to a relocation claim.

547. The appointment of BEX commenced in March 2015 when a draft unsigned BDSA dated 8 March 2015 was distributed by email. This BDSA referred to BEX Structured Products Limited (a different company to BEX) which was a company with some background and presumed credibility in the rail sector. However, BEX, with whom the agreement was ultimately signed, turned out to be a shell or dormant company with one director, Mr Mark Shaw, which had not traded and had no experience in the railway engineering business.

548. The BDSA dated 8 March 2015 bears significant resemblance to the BDSAs signed by CSR with Tequesta and Regiments Asia in Hong Kong (used to set up kickbacks from the CSR deals for the 95, 100 and 359 electric locomotive procurements) and was probably drafted by the same person. It uses the same cover page, fonts, layout and format throughout the document. Like the Tequesta agreement, and in almost identical language, the preamble to the BDSA stated that BEX was a “professional services advisory business” with long subsisting relationships in South Africa with “a familiarity with regulatory, social, cultural and political framework whereby it is capable to closely co-ordinate with the designated authorities” and to “lend consultancy on participating in various tenders and bidding processes”. It recorded further that CNRRSSA had approached BEX to provide advisory services in respect of the Project, for expanding their business and to help it achieve their BE objectives “in the

Territory on a long-term basis." The "Project" is defined in Clause 1 of the BDSA as "the change in scope whereby Transnet Engineering (TE) requires the Company to change the location of the local manufacture programme from TE Spartan Pretoria facility to their Durban facility".

549. On 8 April 2015, a written round robin resolution (signed by the CNRRSSA directors other than the minority non-executive directors) was circulated. The minority non-executive directors were requested to sign the resolution to authorise the conclusion of an agreement in relation to the relocation of the manufacturing facility. At a Board meeting of 10 April 2015, the minority non-executive directors objected strongly to the company entering into an agreement with BEX and requested that their dissent be expressly noted and minuted. Notwithstanding the objections of the non-executive directors, CNRRSSA proceeded to sign the agreement with BEX.

550. The minority non-executive directors later learnt that BEX is an Exempted Micro Enterprise (EME) based on the B-BBEE verification certificate issued to it on 30 April 2015 and (despite statements to the contrary in the BDSA) the company had never traded before that. The sole director of BEX, Mr Shaw, was only appointed on 15 April 2015.

551. It is not clear from the BDSA how BEX benchmarked the cost of CNRRSSA locating its business activities in Durban at R280 million. On 21 April 2015, Mr Gonsalves received a document, partly written in Chinese, reflecting the estimated cost increase amounting to approximately R287 million.

552. On 25 April 2015, BEX and CNRRSSA concluded a BDSA which to all intents and purposes was the same as the draft BDSA of 8 March 2015 but with one notable difference: the benchmark price was increased from R280 million to R580 million. Consequently, BEX had to ensure that Transnet agreed to pay an amount over R580 million to earn its expected agency fee.

553. The BEX proposal and costs were subsequently presented by CNRRSSA to Transnet which culminated in CNRRSSA concluding an agreement with Transnet in terms of which Transnet agreed to bear the cost of relocation in an amount of R719 090 548, less a 10% discount, amounting to R647 181 494.

Transnet's approval of the cost of relocation

554. On 19 May 2015, Ms Mdletshe (then Senior Manager: Strategic Sourcing Locomotives TFR) compiled a memorandum motivating for a variation order to finalise the relocation of the programme for the construction by CNR of 233 Class 45D locomotives to a maximum value of R669 784 286. This amount approximated the figure proposed by CNRRSSA and later included in the BEX agreement.

555. The proposal was recommended for approval in a memorandum dated 19 May 2015 to Mr Gama (then the acting GCEO of Transnet) by Mr Ravir Nair (the acting CEO of TFR), Mr Singh (GCFO) and Mr Silinga (GE: Legal and Compliance). The memorandum indicated that a negotiation team composed of Mr Singh (GCFO), Mr Jiyane (then CEO: TE), Mr Pita (Group Head SCM), Mr Silinga (GE: Legal and Compliance) and Ms Mdletshe would negotiate an agreement dealing with the costs of relocation. The memorandum recorded that on 24 January 2014 the Board had resolved that the GCEO be given authority to sign, approve and conclude all necessary documents to give effect to the resolution approving the acquisition of the 1,064 locomotives and thus the GCEO had the authority to approve variation orders in relation to the costs of the move to Durban.

556. In an earlier draft of the memorandum, Mr Gama approved the proposal but added that he needed clarity on three matters: (i) did the proposal apply to both BT and CNR; (ii) whether the amount of R635 million was still under negotiation; and (iii) how the proposal related to the delegation by the Board. Mr Gama added his signature to the document on the basis that the limit of his delegated authority was not exceeded and he was informed of the final negotiation outcomes. He did not date his signature on this document. The signatures of Ms Mdletshe, Mr Silinga and Mr Singh were added on 19 May 2015. Mr Gama signed the final version of the memorandum on 9 June 2015, so it may be assumed that he made his handwritten annotations sometime after 19 May 2015 but before 9 June 2015.

557. The memorandum sought approval for a variation order to a maximum value of R669 784 286. It explained that because of the relocation, there would be a number of cost drivers, namely: labour costs; material costs; operational and logistical costs; technical support; physical transportation of materials and resources; incremental warehousing costs; and financing and risk costs due to time constraints and delays. When Mr Gama ultimately approved, the capped figure for the variation order was changed to R635 851 786, which was possibly derived from another proposal by CNRRSSA.

558. The relocation negotiations began on 19 June 2015. The negotiation team held two separate meetings with CNRRSSA and BT at ORT International Airport. The attendance register of the meeting with CNRRSSA reflects that it was also attended by Mr Shaw of BEX. Mr Singh, despite leading the negotiation team at the OR Tambo meeting with Mr Shaw in attendance, presumably representing BEX, stated during his testimony that he had no sense of BEX ever having played any role in the negotiations and the finalisation of the relocation deal. He said he did not know who BEX was and did not know anybody from BEX. His testimony is not credible considering Mr Shaw's attendance of the negotiations.

559. There are no minutes of the meetings of 19 June 2015, but subsequent correspondence suggests that CNRRSSA put forward a proposal at the meeting while BT did not. There are transcripts of the meetings which unfortunately are difficult to follow because they do not indicate the identity of the speakers and have many gaps due to inaudibility. It appears from the transcripts that the OEMs were requested to clarify assumptions made and contingencies built into the proposals. They were further requested to make a price reduction and a revised offer in the range of 10 to 20% and to deal with the specifics such as milestone payments, and scheduling delays. Transnet indicated that it would seek approval on 30 June 2015. It appears from the imperfect transcript that there was some superficial interrogation of the figures but that the Transnet negotiation team was comfortable with a ballpark figure of R600 million and was to some extent just going through the motions.

560. The proposal made by CNRRSSA on 19 June 2015 is not clearly identified in the record. However, a document prepared by CNRRSSA, dated July 2015, titled "Analysis of Cost Increases for Locomotive Delivery and Locomotive Factory Relocation" gives insight into CNRRSSA's final position. Mr Gonsalves testified that this document was in fact the agreement that was ultimately signed between Transnet and CNRRSSA. The last page of the Analysis on record was signed by Mr Wang as CEO of CNRRSSA and provides a space for Mr Singh's signature but was not signed by him. Mr Singh could not recall if he ever signed the Analysis and claimed he did not have the delegated authority to do so.

561. The Analysis usefully provides a breakdown of the cost increases as follows: labour costs, R54,3 million; material costs R223,9 million; logistical costs R6,4 million; technical support R70 million; transportation R94,2 million; delta to warehouse costs R75,6 million; and other costs R194,5 million. The total cost is stated to be R719 090 548, less a 10% discount, giving an amount of R647 181 494. The document goes on to offer some justification for each line item.

The unanswered queries of Transnet officials

562. On 20 June 2015, the day after the meeting at ORT International Airport, Mr Pita (who attended the meeting) wrote an email in which he set out "comments and questions for CNR" and addressed it to the other members of the negotiating team and copied Mr Laher. It is clear that Mr Pita had reservations about the cost increase.

563. There is no evidence that any member of the negotiation team was ever informed of or queried the rise in cost from the R9.8 million initially quoted by CNRRSSA in its letter of 11 March 2014 addressed to Ms Lindiwe Mdletshe and Mr Pita to the R670 million proposal just over one year later.

564. On 23 June 2015, Ms Mdletshe circulated a revised proposal from CNRRSSA to the members of the negotiating team and Mr Laher. She noted that the meetings scheduled for that day were postponed and that BT's proposal was still outstanding and that it would revert later that day with a revised proposal. The costs in the revised CNRRSSA proposal remained essentially the same with some adjustment to the material and financing costs. The total claimed was R669 784 286. CNR however

proposed a discount of 10% and thus the total revised cost was stated at R602 805 858. CNRRSSA proposed an upfront payment of half amounting to R301 402 929 and 24 monthly payments of approximately R12.6 million per month.

565. The MNS investigation team were not able to find any emails or correspondence at Transnet dealing with the issues raised by Mr Pita and Mr Laher between 25 June 2015 and 10 July 2015. There is no evidence of any communication among the negotiation team members or any correspondence with other officials or entities within Transnet in which the relevant figures were discussed, analysed, or interrogated. When Ms Mdletshe was asked by the MNS investigation team why Mr Laher's concerns had not been addressed she allegedly replied that he was not a member of the negotiation team.

566. Mr Singh confirmed that he was a member of the team set up at Transnet to deal with the matter and that he had asked Mr Laher to look at the issues. When asked how the committee had resolved Laher's concerns, Mr Singh replied that they would have been dealt with by Ms Mdletshe who was the project manager for the relocation. When asked whether he as a member of the team was satisfied that Mr Laher's concerns had been resolved, Mr Singh stated that he was comfortable that Ms Mdletshe would have attended to them prior to sending him the memorandum. He was also reasonably comfortable with the R1.2 billion ultimately agreed as the cost of relocation as he believed the amounts "were relatively in the ballpark and therefore. . . the values – the memorandum could be supported".

567. On 22 June 2015, Mr Laher addressed an email to the negotiation team concerning BT's vague and unsubstantiated proposal, suggesting that clarity and a detailed costing of each element making up the additional cost. At a minimum, information was required in relation to additional costs of hedging, escalation, bonding costs, transport (number of trips, size of containers per trip and distances), warehousing (per square metre), insurance and new production layout. It was also necessary to ascertain any savings on transport costs for materials imported.

568. On 10 July 2015, Mr Pita addressed an email to Ms Mdletshe and copied the other members of the negotiation team, in which he mentioned that he had received feedback from BT that it would send a letter on the following Monday providing clarity on their offer. He requested Ms Mdletshe to update all the documentation and to compile a memorandum to be addressed to the Mr Gama for approval of the CNRRSSA and BT proposals.

569. There is no evidence that BT ever supplied this information or of any detailed analysis of BT's costing performed by the negotiation team or any official at Transnet. Mr Pita concluded that if the team was happy with the proposals the sign off could be affected quickly. He also asked Ms Mdletshe to ensure that sign off by TIA (internal audit) was included in the memo. Mr Laher was not copied in this email. Nor did Mr Pita explain whether his and Mr Laher's concerns had been adequately addressed.

570. On 14 July 2015, Mr Pita wrote an email to Mr Silinga asking him to "review the legal clauses and caveats raised in both proposals, especially the BT offer" as these might have a "significant impact". Mr Silinga responded to this email on 17 July 2015 stating that the agreed price of R618 457 125 and various other clauses were acceptable but noting that timelines needed to be agreed.

The agreement and payments

571. Ms Mdletshe prepared two memoranda requesting the acting GCEO to note the final outcome of the negotiation for relocation to Durban and to approve the variation orders for the agreed total amounts. The memoranda were recommended by Mr Nair (Acting CEO: TFR), Mr Singh (GCFO), Mr Pita (GCPO), Mr Silinga (GEL&C), and Mr Jiyane (CEO: TE) on 22 July 2015, and approved and signed by Mr Gama (acting GCEO) on 23 July 2015. Transnet agreed to pay BT R618 457 125 and CNR R647 181 494 for the relocation costs; being a total of R1.261 billion. The variation orders resulted in the total contract price of the 232 diesel locomotives awarded to CNR increasing from R9 947 116 464 to R10 594 297 958; and the price of the 240 electric locomotives awarded to BT increasing from R13 049 206 320 to R13 667 663 320.

572. It appears that Mr Gama approved the memoranda on 23 July 2015 despite the queries he had raised

with Ms Mdletshe in May 2015 not having been answered. Mr Nair confirmed in an interview with the MNS investigation team that the memoranda had been recommended and signed on 22 July 2015 by himself, Mr Singh, Mr Silinga, Mr Jiyane and Mr Pita in the presence of each other at a breakaway meeting held at Kloofzicht in Muldersdrift. He admitted to recommending the variation order without properly satisfying himself to the justifiability of the R1.2 billion cost increase.

573. Unusually, in a letter dated 23 July 2015 addressed to CNRRSSA, Mr Gama agreed that 50% of the variation order amount (R323.59 million) would be paid to CNRRSSA in advance and thereafter in 24 monthly instalments of R13.48 million without requiring it to submit invoices for specific expenditures incurred.

574. However, it seems that the full budgeted amount of R1.2 billion for relocation costs was not paid to the OEMs.

575. In October 2018, MNS attorneys appointed Loliwe Rail Solutions to assess the approved relocation costs to determine whether there was a rational basis for the increased costs. In its report, Loliwe noted that the negotiation team was not provided with any back up information pertaining to the alleged costs and thus could not have undertaken a proper due diligence. The lack of due diligence preceding these variations resulting in an increase of R1.2 billion to the price payable to BT and CNR is confirmed by the limited role played by TIA. In his email of 10 July 2015, Mr Pita instructed Ms Mdletshe to obtain TIA approval. He failed to do so in contravention of the PPM.

576. In a report dated 7 June 2017, the auditors reported that TIA had attended the meeting with the negotiation team, CNR and BT on 19 June 2015 at ORT International Airport, at which the GCFO Mr Singh requested both OEMs to submit their proposals for the cost implications of manufacturing out of Durban. A follow up meeting was scheduled, but despite being copied in various emails, TIA was not invited to any subsequent meetings where negotiations on relocation costs took place with the bidders in attendance, as required by the high value tender methodology in the PPM. TIA was not provided with the memoranda of 23 July 2015 or informed of the outcome of the negotiations. TIA was therefore not able to produce a formal report to indicate the adequacy and effectiveness of the processes undertaken in the relocation negotiations.

The challenge by the minority directors of CNRRSSA

577. The minority shareholders wrote to the Board of Directors of CNRRSSA on 8 June 2016 expressing their concerns and requesting explanations. They stated that although the agreement concluded with Transnet may have been financially beneficial for CNRRSSA it was unclear why it was concluded given that the LSA envisaged and provided for CNRRSSA to establish its operations in Durban and for the supply of locomotives to take place from Durban on a fixed price basis. They informed the Board that they would be scheduling a meeting with Transnet to discuss the matter. There was no response to the letter.

578. On 12 June 2017 Mr Fred von Eckardstein, an auditor at KPMG, reported an irregularity to the Independent Regulatory Board of Auditors (IRBA). In his report, Mr Von Eckardstein stated that according to information received by KPMG the relocation proposal of CNRRSSA significantly misrepresented the cost of relocation and Transnet had issued a variation order accepting the proposal. CNRRSSA had entered into the BDSA with BEX on 25 April 2015 relating to the proposal and had made payments to BEX which appeared to lack sound commercial substance and purpose.

579. Mr Gonsalves only became aware of the report to the IRBA on 22 September 2017 after he received a call from Ms Daisy Zhang of CNRRSSA telling him that KPMG was considering issuing a reportable irregularity letter in respect of a different irregularity. He called Mr Von Eckardstein who told him that he was considering a reportable irregularity in respect of certain project management fees. During the conversation Mr Von Eckardstein mentioned the first reportable irregularity of 12 June 2017 dealing inter alia with the BEX issue.

580. On 28 September 2017, Mr Gonsalves spoke with Mr Charles Yu of Hogan Lovells who informed him that Hogan Lovells no longer wished to act for CNRRSSA on the first reportable irregularity as one of

the BEX directors (presumably Mr Shaw) apparently had a relationship with the Gupta enterprise. On 10 October 2017, the minority non-executive directors met with KPMG. They made it clear to KPMG that they shared similar concerns with KPMG about the first reported irregularity. On 27 October 2017, KPMG resigned as CNRRSSA's auditor.

581. Following a meeting with Werksmans, the minority non-executive directors decided to report the BEX issue to the Hawks. Nothing has come of that report.

582. On 27 September 2018, Mr Stephen Nthite, a director of Endinamix, wrote to the Board of CNRRSSA on behalf of the Endinamix Board informing it that Endinamix regarded the payment of R67.18 million to BEX as a bribe to induce the award of this tender and demanded that CNRRSSA act and report this matter in terms of the PRECCA.

583. On 8 October 2018, after meeting with the minority directors, the new auditors, J Theron & Pietersen Inc, retracted the 2015, 2016 and 2018 annual financial statements of CNRRSSA. The draft audited annual financial statements distributed in March 2019 in respect of the year ended 31 December 2018 drew attention to the reportable irregularity of 12 June 2017 and recorded that the matter remained unresolved.

The PFMA transgressions, money laundering and racketeering

584. The "Enablers Report" submitted to the Commission in February 2020 by Open Secrets and Shadow World Investigations maintains that Mr Taufique Hasware, a general trader with no relevant experience, was a director of BEX and of three other companies – Homix, Forsure Consultants and Hastauf – all of which were front companies for Mr Essa and the Gupta enterprise. These companies were primarily purposed with facilitating kickbacks from Transnet contracts.

585. Mr Gama, Mr Nair and the members of the negotiation team in all likelihood breached their fiduciary duties and/or the PPM when negotiating and approving the variation orders. There is a strong prima facie case that these persons obviously did not act in the best interests of Transnet in managing its financial affairs, or with the requisite degree of care, skill and diligence that may reasonably have been expected of them.

586. To the extent that Mr Gama and Mr Nair may seek to rely on the skill of the members of the negotiation team whom they reasonably believed were reliable and competent, it cannot be said that they took reasonably diligent steps to become fully informed about the matter as required by Section 76(4)(a)(i) of the Companies Act. Moreover, the members of the negotiation team were all remiss and in contravention of the PPM in not resolving the issues raised by Mr Pita and Mr Laher in late June 2015.

THE FINANCIAL ADVISORS

587. In the period between 2012 and 2016 Transnet contracted with four companies to provide various financial and advisory services, namely: McKinsey, Regiments Capital, Trillian Capital and JP Morgan. The conclusion and execution of the various contracts were characterised by several irregularities.

588. The lead provider for the various financial services was initially McKinsey which over time ceded and delegated many of its rights and obligations to the other companies, most notably Regiments.

589. Mr Volmink, the Executive Manager: Governance, in his testimony to the Commission reviewed eight significant contracts involving McKinsey, Regiments and Trillian in the period 2012 to 2015. His overview of all the contractual arrangements establishes that McKinsey and Regiments were inappropriately favoured in the interest of advancing the Gupta enterprise. All the contracts were procured by the method of confinement on grounds of either urgency or standardisation/compatibility with existing specialised/identical services.

An overview of the McKinsey contracts

590. The most important contract, and perhaps most controversial, was for advisory services related to the acquisition of the 1,064 locomotives. The confinement memorandum explained that further work was required to strengthen the business case.

591. The confinement to McKinsey was justified on the grounds of urgency and the fact that the services were highly specialised and largely identical to work previously done for Transnet by McKinsey. Although the confinement was agreed to in May 2012, McKinsey only signed the contract on 21 February 2014 and Transnet signed it on 11 August 2014. This contract was ceded from McKinsey to Regiments on 4 February 2014 after Phase 1, the completion of the business case for the procurement. The cession to Regiments was in respect of the balance of the work. The original contract value was R35.2 million. Subsequent amendments resulted in a fee increase firstly to R78.4 million and a second amendment to include an "at risk" success fee of R166 million.

592. The second contract awarded to McKinsey was the so-called SWAT1 contract, a contract of services, capabilities, and resources to support procurement and capital excellence and productivity. The date of the confinement was 22 November 2012, but the contract was only signed during the course of 2014. The contract value was R174.6 million.

593. The third contract, the so-called the SWAT2, was an award to a consortium of McKinsey and Regiments for capital optimisation and implementation support. This contract was confined on 18 October 2013 and aimed firstly to "optimise the capital investment portfolio" by a minimum of R100 billion for a maximum fee of R173 million (excluding expenses and VAT) and secondly to implement and embed "the platinum standard" developed by capital integration for a fixed fee of R72 million. The contract price was reduced later from R245 million to R225 million.

594. The fourth contract was for professional services to increase the coal line with a breakthrough of 2 million tonnes per week ("the coal line contract"). This contract was confined in early 2014 and signed during 2015. The original contract value was R216.7 million (a fixed fee of R73.5 million plus a contingent fee of R143.2 million).

595. The fifth contract awarded to McKinsey was for the renegotiation of the Kumba Iron Ore contract. The existing Kumba Iron Ore contract was signed in 2007 for a 20-year period ending in 2027. That contract did not appropriately cater for allocating capacity to junior miners and could potentially cause economic hardship for Transnet. The contract was confined in April 2014 and signed during the course of 2015. The original contract price was R239 million (R34 million fixed fee plus R205 million contingent fee). The value was later amended to provide for a total contract price of R248 million.

596. The sixth contract was for the manganese project execution support ("the manganese contract"). This confinement was also made on the 3 April 2014, but the contract was only concluded in March 2015. The contract value was R179.9 million.

597. The seventh contract related to the New Multi Product Pipeline (NMPP), a pipeline project aimed at increasing volumes from 4.4 billion litres to 8.7 billion litres through the construction of a 555 kilometre, 24 inch diameter trunk line. The confinement was approved on 3 April 2014 and was valued at R446.2 million.

598. The eighth contract was a contract for professional services to support Transnet in increasing general freight business (GFB), with a breakthrough to reach the planned volume targets for the financial years 2015/16 and 2016/17. This contract was confined in March 2015 and signed during 2015. The original fee of R375 million increased to R463.3 million. The scope of the work under the contract was increased and there was a split of work and fees between Regiments and McKinsey and a cession from Regiments to Trillian Capital Partners (owned by Trillian Holdings (Pty) Ltd in which Essa had a 60% holding).

599. The total value of the eight contracts awarded by Transnet to McKinsey during 2014-2015 amounted to R2.2 billion. Half of the revenue earned by Regiments on six of the eight contracts (the coal line contract; the Kumba Iron Ore contract; the manganese contract; the NMPP contract, the SWAT 2

contract; and the GFB contract) was diverted to a Gupta associated company, Homix (Pty) Ltd as part of the money laundering scheme described earlier.

600. All eight contracts awarded by way of confinement were approved mainly by Mr Molefe, as the GCEO, on the basis of memoranda submitted to him by Mr Singh and Mr Pita. The evidence establishes that McKinsey and Regiments were in possession of Mr Singh's confinement memoranda to Mr Molefe prior to their making these bids.

601. Four of the confinements were approved by Mr Molefe over a period of four days - between 31 March 2014 and 3 April 2014. The four contracts appointed Homix and Albatime, Gupta-linked laundering vehicles, as SDPs. These contracts were: (i) the coal contract, R130 million; (ii) the Kumba Iron Ore contract, R239 million; (iii) the manganese contract, R150 million; and (iv) the NMPP contract, R100 million. They had a combined value of R619 million. It is even more concerning that the four confinements were done unusually on a confidential basis.

602. The four confinements awarded to McKinsey and Regiments in the four day period between 31 March 2014 and 3 April 2014 did not follow the normal review and signoff process, supposedly, for reasons of confidentiality. As discussed, these four contracts specifically concluded with McKinsey and Regiments exclusively by Mr Brian Molefe and Mr Singh, contributed substantial revenue to the money laundering scheme involving Regiments, Homix and Albatime. Mr Molefe accepted that the advantage of a confidential confinement was that it was done without scrutiny.

603. The memorandum for the approval of the appointment by confinement of service providers for the provision of transaction advisory services related to the 1,064 locomotives acquisition (the first McKinsey contract) was submitted by Mr Pita to Mr Molefe on 7 May 2012. In summary, the advisory services required by Transnet were: (i) business case validation; (ii) technical evaluation and optimisation; (iii) deal structuring and finance for large capital investment projects; and (iv) procurement and legal.

604. A confinement RFP was issued to nine entities by Transnet on 30 May 2012 for the appointment of the transaction advisors. Section 2.8 of the RFP set out the evaluation methodology and criteria. The methodology involved four steps: step 1 – administrative responsiveness; step 2 – substantive responsiveness; step 3 – minimum threshold; and step 4 – weighted scoring.

605. Four responses from three different consortia were received on the tender closing date, 7 June 2012. These were: KPMG Consortium; PWC Consortium; McKinsey Consortium; and Webber Wentzel Attorneys (in respect of legal services only). On 26 July 2012, it was resolved to award the contract to the McKinsey Consortium, which comprised: (i) McKinsey Incorporated (main bidder); (ii) Letsema Consulting (co-bidder); (iii) Advanced Rail Technologies; iv) Nedbank Capital; (v) Edward Nathan Sonnenbergs (ENS); (vi) Koikanwang Incorporated; and (vii) Utho Capital. The fee payable was R35 million as R15 million of the budgeted amount of R50 million was spun out for legal services, awarded to Webber Wentzel Attorneys.

606. The tender ought not to have been awarded to the McKinsey Consortium because it failed to meet the test for administrative responsiveness.

607. McKinsey's letter referred to a report by PWC, purportedly indicating its financial position. The MNS investigation produced no record of this report, and it was not enclosed in the bid documents. The way McKinsey sought to mitigate its non-compliance hence did not render the bid responsive. Accordingly, the decision to appoint the McKinsey Consortium as the successful bidder was irregular due to its failure to submit the mandatory returnable documents. McKinsey should therefore have been excluded and disqualified at step 1.

Appointment of Regiments Capital

608. On 20 August 2012, Mr Singh addressed a memorandum to Mr Molefe requesting approval for the appointment of the McKinsey Consortium for the advisory services and Webber Wentzel Attorneys for the legal advisory work as transaction advisors on the 1,064 locomotive tender. He also asked it to be noted that McKinsey would be advised to partner with another firm, with equal or better credentials

than Letsema, for the procurement elements, due to a potential conflict with Barloworld and Letsema. Surprisingly, the memorandum did not explain or discuss the nature of the alleged conflict of interest. Nevertheless, it was recommended that McKinsey be advised to partner with another firm, namely Regiments.

609. Mr Sedumedi of MNS testified that he had been unable to establish during the MNS investigation what precisely the conflict between Letsema and Barloworld had been. It was just accepted as a fait accompli that there was a conflict which necessitated the replacement of Letsema. Mr Molefe approved the recommendation on 22 August 2012. Mr Singh too, despite being the instigator of the recommendation to Mr Molefe that Letsema be replaced, was vague about the precise nature of the conflict, why it had not been picked up earlier in the process or explained in his memorandum.

610. Mr Singh's attempts to distance himself from Regiments are not credible. Correspondence between Mr Essa and Regiments' Mr Pillay and Mr Wood on 28 November 2012 confirms that Mr Essa set up a meeting between Mr Singh and Mr Pillay of Regiments at Mr Singh's office on 3 December 2012. Around this time, on 30 November 2012, Mr Singh addressed a LOI for the provision of the advisory services to McKinsey informing it that its offer had been accepted and that its consortium had been awarded the contract. It recorded that the parties to the agreement were: Transnet, McKinsey Incorporated and the other members of the consortium, namely Regiments Capital, Advanced Rail Technologies, Nedbank Capital and Utho Capital.

611. Regiments was included as a member of the McKinsey Consortium in place of Letsema despite it not having tendered as part of the consortium. The tender was awarded to the McKinsey Consortium based on its composition at the time of the submission of its bid. The capabilities of the consortium members to perform the various aspects of the 1,064 transaction advisory tender and the consortium's eligibility for the award was assessed based on the verification and evaluation of the claims made by its constituent members. The capabilities and other credentials of Regiments were not subject to the rigour of the verification, evaluation and adjudication process followed in relation to the tender and its appointment was therefore inconsistent with the constitutional requirements of transparency, fairness and competitiveness.

612. Regiments, and ultimately the Gupta enterprise benefited substantially from the replacement of Letsema. Paragraph 17.2 of the memorandum of 22 August 2012 from Mr Singh to Mr Molefe recorded that the percentage split of work to Letsema as McKinsey's procurement partner amounted to 20% of the total. An analysis of the evaluation criteria in the bid indicated that Letsema would have been involved in almost all the aspects of the bid. Mr Molefe testified that he did not consider the change from Letsema to Regiments (a transfer of 20 to 30% of the business under the tender) as a "big change".

613. Although he approved the decision to substitute Letsema with Regiments, Mr Molefe "categorically" denied any knowledge of the money laundering scheme and his participation in it. He refused to comment on the significance of McKinsey agreeing to repay Transnet R650 million in respect of fees paid to it in terms of various contracts with Transnet tainted by corruption.

614. Mr Molefe's testimony about his knowledge of the scheme involving Regiments and the Gupta associated companies must be assessed in the light of the evidence analysed earlier: that he enjoyed a long standing relationship with the Gupta family and had been a frequent visitor to their Saxonwold compound between 2009 and 2016; that he may have received cash payments from the Gupta enterprise; and that Gupta associates played some role in his appointment to the posts of GCEO of Transnet and CEO of Eskom.

Regiments' capital raising and risk management proposal

615. In early January 2014, Regiments presented a proposal ("the Regiments capital raising and risk management proposal") to Ms Makgatho (the Transnet Group Treasurer) in respect of their role as advisors on the 1,064 locomotives. The proposal is titled: "Transnet-Terms of Reference for Capital Raising and Risk Management Transaction Advisory for 1,064 locomotives procurement".

616. The proposal outlined Regiments' offering (mandate) as being: (i) deliver the optimal funding structure and financial risk solution for the 1,064 locomotives acquisition; (ii) a detailed evaluation of the economic, social and sustainability impact of the acquisition; (iii) collateral assessment down to the component level to enable sourcing of concessionary funding and optimisation of the financing structure; (iv) the application of a best practice risk management framework to the transaction will ensure all relevant risks are identified, quantified and tracked; (v) the optimal risk management solution embedded in the acquisition agreement, funding structures and/or in separate risk overlays to deliver the right balance between funding cost and risk; (vi) a comprehensive evaluation of all potential funding sources and mechanisms to enable the selection of the most appropriate avenues to pursue and execute; (vii) structured programme management will ensure seamless integration with the procurement process, opportune capital raising and dynamic risk management; (viii) appropriate resourcing of five joint Regiments-Transnet work streams focussing on programme management, impact studies, collateral assessment, capital raising and risk management; (ix) a 12 month project timetable dovetailing with the procurement process; and (x) a fee structure based on "a modest fixed monthly retainer" and a performance fee for "best alignment of interests".

617. Ms Makgatho had reservations about dealing with Regiments arising from concerns pre-dating the receipt of the proposal. In late 2013, she received a call from Mr Masotsha Mngadi, a Relationship Manager at Nedbank, enquiring whether Transnet was looking for money as Regiments was in the market looking for money on behalf of Transnet. She was surprised as borrowings were normally initiated by Transnet Treasury. The mandate to negotiate with banks rested with the Treasury and no one outside Transnet had authority to engage banks on Transnet's behalf.

618. A few days later, Mr Singh gave Ms Makgatho a funding proposal ("the R5 billion proposal") from Regiments, in hard copy, and informed her that it was a very important matter that Mr Molefe needed executed speedily. The proposal was that Regiments would facilitate a 5-year, R5 billion loan facility to be funded by Nedbank through an "in-between structure", similar to a Special Vehicle Structure, that would serve as a conduit between the lender Nedbank and Transnet. The details of the structure were not clear, but Transnet would pay interest to the "in-between structure" which would in turn remit the funds to Nedbank. This was unusual as Transnet normally deals directly with lenders. As Transnet had a direct relationship with Nedbank, there was no need to use a conduit like Regiments to engage with Nedbank. Ms Makgatho calculated that Transnet would have to pay an additional R150 million per annum in interest payments over and above what Transnet normally paid for similar facilities. This translated into potential losses of R750 million over a five-year period.

619. Ms Makgatho shared her analysis of the R5 billion proposal with Mr Singh and indicated that she would not recommend the proposal given potential excessive costs in interest payments. Mr Singh responded saying that it was an instruction from Mr Molefe and she should quickly complete the memorandum for approval the same day.

620. Ms Makgatho was reluctant to comply with that request and decided to discuss the matter directly with Mr Molefe. Ms Makgatho was irate at that time and explicitly told Mr Molefe that should they approve the structure, they would go to jail for stealing money as they were the custodians of Transnet's funds. Mr Molefe agreed and the structure was never implemented.

621. Mr Molefe confirmed the events as outlined by Ms Makgatho in relation to the R5 billion proposal but denied that he had directed Mr Singh to instruct Ms Makgatho to execute this proposal. He in effect denied that the R5 billion proposal emanated from him and shifted responsibility for it to Mr Singh. Mr Singh could not recall these events, saying that it was unlikely that he would have instructed Ms Makgatho as she described. Mr Molefe's concession provides sufficient basis to conclude that such a proposal was made which was not in the interest of Transnet and from which only Regiments, and the Gupta enterprise would have benefited had it been implemented.

622. Ms Makgatho met with Mr Pillay of Regiments to discuss the capital raising and risk management proposal. The proposed fee was a R1 million monthly retainer and a performance fee equal to 20% of the savings over the interest rate of Transnet's most recent funding secured prior to 1 January 2014. Ms Makgatho reported back to Mr Singh and informed him that she had requested Regiments to

revise the proposal and link the deliverables to proposed timelines and a proposed budget. Mr Singh responded with annoyance and informed her that she should not concern herself about timelines and budgets and that Regiments were not meant to be her advisors but his. She was surprised as in her opinion, the proposal was very vague, and she saw very little in the way of "value-add".

623. After that, Ms Makgatho was not involved in the appointment of Regiments or the decisions about the scope of its work under different contracts. She later learnt with disbelief that within six months of having made the capital raising and risk management proposal, Regiments was paid about R320 million (R107 766 135 between May 2013 and 31 March 2014 and a further R211 690 670 between 1 April 2014 and 16 July 2014) and that the invoices were paid within a day of submission, rather than after the usual 30 days.

624. Despite Ms Makgatho's concerns and the fact that the agreement with the McKinsey Consortium had lapsed, Mr Singh signed a contract ("the agreement of 23 January 2014") with Regiments on 23 January 2014.

625. The agreement of 23 January 2014 recorded that after the issuance of the original LOI a conflict of interest required the reallocation of the tasks originally intended to be handled by Nedbank to other members of the Consortium and thus Transnet wished to contract with Regiments for that purpose. The specified deliverables were: (i) determining the development and sustainability impact of the acquisition; (ii) conducting a collateral assessment to the component level to determine the potential for securing concessionary funding; (iii) developing and implementing a best practice risk management framework for the transaction; (iv) developing an optimal risk management solution by examining solutions that are embedded in the acquisition agreement, funding agreement and separate risk overlays; (v) evaluating all potential funding sources and mechanisms to select the most appropriate avenues to pursue and execute; and (vi) providing execution programme management and support in respect to funding.

626. Clause 2 of the agreement of 23 January 2014 provided that the proposed fee structure for the services to be rendered was understood by both parties to involve a retainer applicable every month and a performance fee on the funding raised at interest rates below the benchmark. The fees and related costs were quoted in South African currency and were exclusive of VAT. Expenses were capped at 10% of the value of the total retainer. Deliverables, except the actual fundraising, were to be executed for a fee of R15 million over a period of twelve months and provision was made for a performance fee equal to 20% of the savings achieved against the benchmark interest rate, being the interest rate at which Transnet was able to raise its most recent funding prior to 1 January 2014.

627. Mr Singh had no authority to appoint transaction advisors on behalf of Transnet without following a proper procurement process as such did not fall within his delegated authority. Moreover, the agreement of 23 January 2014 was irregular in that no procurement event preceded it. There is no evidence indicating that McKinsey was aware of this agreement. Thus, there was no valid amendment or variation of the LOI.

628. On 4 February 2014, two months after the LOI had lapsed on 30 November 2013, Transnet and Regiments concluded an agreement, titled: "Third addendum for GSM/12/05/0447-for advisory services related to the acquisition of the 1,064 locomotives tender" ("the third addendum to the LOI"), purporting to extend the scope of the lapsed LOI between Transnet and McKinsey. Mr Singh placed responsibility for this irregularity at the door of the procurement department, even though he signed the third addendum on behalf of Transnet.

629. The third addendum of the LOI is recorded as being between McKinsey and Transnet. However, on the last page of the agreement it is signed by Mr Wood, the Executive Director of Regiments, and Mr Singh. The agreement was not signed by any witness although provision was made for witnesses. A typed reference to McKinsey as a party to the agreement on the last page is scratched out and replaced in handwriting by "Regiments Capital" and initialled by both Mr Singh and Mr Wood.

630. Clause 4 of the third addendum varied the contract price. It stated that as a result of the additional scope of work required on the financial phase of the contract, the initial price of R35.2 million would

increase by R6 million, bringing the total contract value to the fixed amount of R41.2 million.

631. On 16 April 2014, Mr Sagar of McKinsey addressed a letter to Mr Singh in which he confirmed that McKinsey had purported to cede its rights and obligations under the 1,064 locomotives transaction advisory services contract to Regiments on 5 February 2014, the day after the third addendum of the LOI was concluded between Transnet and Regiments. It is significant that in this letter McKinsey recorded that all the work related to the mandate was in fact performed by Regiments. Transnet confirmed the purported cession in a memorandum dated 19 May 2015, a year after the purported cession compiled by Mr Singh and approved by Mr Gama. There is no written cession agreement on record. The cession was invalid on the grounds that at the time when McKinsey purported to cede the contract to Regiments, McKinsey's rights in respect of the advisory services had lapsed because of the LOI having expired on 30 November 2013. In the light of that, McKinsey had no rights and obligations to cede to Regiments and consequently the cession was null and void.

632. On 24 April 2014, just over a week after McKinsey had informed Transnet that it had ceded and delegated its rights and obligations to Regiments on 5 February 2014, and four months prior to Transnet signing the MSA with McKinsey in August 2014, Transnet and Regiments concluded a first addendum to the MSA with a view to varying the MSA by adding additional scope and amending the price.

633. Both the LOI and the MSA allocated R13.5 million for technical evaluation and execution services. These services included amongst other things the calculation of the escalation and hedging costs pursuant to the finalisation of the LSAs with the OEMs. This was the price for the technical evaluation and execution services that was agreed to through a competitive bidding process by the McKinsey consortium and Transnet.

634. On 16 April 2014, the same day that McKinsey informed Transnet of the cession, Mr Gebreselasie, a Senior Economic Advisor at Regiments, sent an email to Mr Laher of Transnet enclosing a draft close-out letter and requesting that Mr Laher provide his inputs and comments thereon before the closeout letter was made final. The closeout letter confirmed that the assignment had been successfully completed by Regiments within the specified timeframe. It then set out the nature of the mandate related to cost escalation, the cost of foreign exchange hedging and the cost of performance guarantees.

635. On the same day, Mr Singh addressed a memorandum to Mr Molefe requesting him to: (i) note the deliverables executed by the transaction advisor compared to the original scope per the letter of intent; (ii) ratify the amendment in the allocation of scope of work from McKinsey to Regiments; (iii) ratify the amendment in the makeup in the transaction advisor consortium from Nedbank Capital to Regiments; (iv) approve a change in the remuneration model of the transaction advisor compared to the original remuneration model; and (v) delegate power to Mr Singh to give effect to the noted approvals. Most importantly, Mr Singh sought payment to Regiments of an additional fee of R78.4 million (excluding VAT) which was an increase of approximately 200

636. Mr Singh did not seek input from procurement staff regarding the content and proposals of the memorandum. The recommendations were made by Mr Singh and approved by Mr Molefe without any supporting recommendation from the procurement department, governance or other interested persons or bodies.

637. The memorandum of 16 April 2014 set out the basis for the claim that value had allegedly been created by Regiments through savings from accelerating the delivery schedule. The acceleration supposedly resulted in savings in future inflation related escalation costs and foreign exchange hedging costs of approximately R20 billion. Thus, according to Mr Singh, the overall cost of the 1,064 locomotives transaction reduced from R68 billion to R50 billion. In addition, he maintained that Regiments achieved a saving of approximately R2.8 billion for the performance based foreign exchange and guarantee bonds. He added without explanation that Regiments also achieved direct benefit to Transnet of R219 million and indirect savings of over R500 million. If the savings had not been achieved, Mr Singh said, the 1,064 locomotives acquisition transaction would have been unaffordable at an amount in excess of R50 billion. All of this, in Mr Singh's view, justified a substantial increase in the fee payable to Regiments. The Regiments operating model for such engagements is usually

based on a risk sharing model or success fee (25% of value created/saved). But in this instance an additional fee of R78.4 million excluding VAT (representing 0,042% of the total savings) was recommended.

638. Mr Brian Molefe approved the request in the memorandum of 16 April 2014 on 17 April 2014. The MNS Report concluded that the claim of additional savings was misleading. The original estimated total cost for the 1,064 locomotives was R38.6 billion while Transnet ended up paying an amount of R54.5 billion. The reasonable costs for the locomotives should have been at most R45.7 billion. There were accordingly no savings that Regiments secured for Transnet.

639. In summary, McKinsey's contractual rights with Transnet originally arose under the LOI which lapsed on 30 November 2013. Regiments was not a party to the lapsed LOI. Considering that McKinsey's rights and obligations were derived from the LOI that expired on 30 November 2013, it was legally and practically impossible to cede any of those rights and obligations to Regiments on 5 February 2014. Consequently, the MSA between Transnet and McKinsey of 21 February 2014 was also invalid because its rights were derived from the LOI that had lapsed and, in any event, had been purportedly ceded in terms of the cession of 5 February 2014. The first addendum to the MSA derived its existence from an invalid MSA and Regiments was not a party to the MSA between Transnet and McKinsey.

640. An amount of R36.765 million was paid to Regiments between 18 February 2014 and 7 April 2014. These payments were made in terms of the purported third amendment to the LOI between Transnet and Regiments of 4 February 2014 and in terms of the MSA between Transnet and McKinsey (not Regiments) on 21 February 2014. An amount of R79.23 million was paid to Regiments on 30 April 2014 flowing from the first addendum to the MSA between Transnet and Regiments (not McKinsey) dated 24 April 2014. The invoice was issued in respect of this last payment on the 27 March 2014, before the first addendum to the MSA was concluded. Regiments was thus unjustifiably enriched with the additional payment of R79.23 million, as there was evidently no legal basis for the payment of this amount, because the alleged cost saving was part of the LOI/MSA deliverable that had been budgeted for at a cost of R13.5 million.

The Nkonki contracts

641. Nkonki was a service provider to Transnet for certain internal audit functions. In 2013, Transnet went through an open tender process to appoint firms to assist with the internal audit function. Three bidders were appointed: KPMG, Nkonki and Sekela Xabiso. The Nkonki contract was awarded for a five-year period commencing on the 1 August 2013 to end on the 31 July 2018 for a value of R500 million for the five year period. Trillian acquired Nkonki in 2016.

642. In March 2018 there were several announcements made by various authorities in the accounting, auditing profession, including the AG, asking state organs to consider termination of contracts with Nkonki because of its association with the Gupta family. Transnet heeded the call of the AG and terminated the internal audit contract sometime before 31 July 2018.

643. Mr Mahomedy, the then Acting GCFO, in response to the call of the AG reviewed the other contracts Nkonki had with Transnet. His investigation revealed that in January 2017 Transnet had received unsolicited bids from Nkonki and Mr Oliver Wyman for a variety of services related to supply chain efficiencies, the coal and iron ore line volume and tariff optimisation. In a memorandum approved on 7 February 2017 and submitted to the BADC, Mr Gama (the GCEO) proposed that Transnet utilise the existing internal audit contracts for these unsolicited proposals and requested the Board to appoint Nkonki for these services as permitted non-audit services and to delegate authority to him to sign all documentation.

644. The memorandum argued that the current SCM practices at Transnet were bureaucratic, complex, onerous, and impeded by restrictive red tape. The practices needed to be "reshaped and enhanced" in order to ensure they were "more responsive, agile, and automated to increase efficiencies, create improved economic value with the aim of reducing the cost of doing business with Transnet".

The Nkonki proposal included: (i) an initial analysis to establish potential cost-savings initiatives and levers; (ii) a suggested enhancement of the management information reporting system; (iii) the required roadmaps and action steps to realise the identified initiatives; (iv) the monitoring of progress on improvement campaigns; and (v) the requisite resource capability to deliver the identified action plans.

645. Mr Gama stated in the memorandum that initiatives were needed particularly to enhance the revenues earned from the iron ore and coal businesses and that Transnet Group Commercial did not have the necessary capability and resources internally to complete the initiatives, but Nkonki, an accounting and auditing firm controlled by Mr Essa, apparently did. The precise nature of those skills and capabilities were not clearly set out in the memorandum. Nkonki was a preferred supplier supposedly because it had institutional knowledge of the Transnet environment through their internal audit engagement.

646. The proposal envisaged the work being done on "a gain share methodology" which was optimistic about the possible savings. The initial estimation was that savings that could range between R1.1 billion and R2.6 billion with a possible gain share fee at about R260 million. In his testimony, Mr Gama said he had anticipated a saving of R5 billion and thus he expected to pay Nkonki a fee of R500 million.

647. On 17 February 2017, the BADC (Chaired by Mr Shane, with Mr Gama, Ms Mabaso and Mr Nagdee, among others, in attendance) approved the use of Nkonki as consultants and delegated Mr Gama as the GCEO to sign a letter of intent for consultancy services "up to a maximum cost of R500 million". The initial five-year audit contract had commenced on 1 August 2013, valued at R500 million. The suggested extension meant an increase in value of 100% and a further 20-month extension to 2 March 2020. By 2019 Transnet had paid R 26.1 million for these related services, with a further R16 million outstanding which has been disputed by Transnet.

648. The procurement was open to question because the award of the contract did not go out to open tender, it was an inappropriate "piggybacking" on an existing contract and seemed a duplication of some of the services that were supposed to be rendered by McKinsey/Regiments. Moreover, Transnet's acceptance of Nkonki's unsolicited bid did not comply with National Treasury Practice Note 11 of 2008/2009 which governs unsolicited proposals.

649. In strict terms, National Treasury Practice Note 11 does not apply to Transnet. It is addressed to accounting officers of national departments and constitutional institutions, head officials of provincial treasuries and the accounting authorities of public entities listed in Schedule 3A, 3B, 3B and 3D to the PFMA or any subsidiary of any such entity. Transnet is a public entity listed in Schedule 2 of the PFMA. The policy in the practice note is nonetheless a salutary one and Mr Gama and the BADC considering and approving the unsolicited proposal for a R500 million contract from Nkonki shortly after it became part of Trillian may be assessed in the light of it.

THE FINANCING OF THE 1,064 LOCOMOTIVES PROCUREMENT

650. Owing to rating agency requirements of matching commitment capital to committed funding sources to reduce liquidity risk, Transnet needed to identify appropriate and cost effective funding sources to fund the 1,064 locomotives procurement. Transnet thus concluded funding facilities with USEXIM and EDC to fund the GE and BT portions of the 1,064 locomotive contracts. These facilities provided approximately R13 billion of the required funding. In August 2012 the Transnet Board approved the use of a China Development Bank loan facility to fund the acquisition from China South Rail (CSR) and China North Rail (CNR) of the locomotives that were part of the 1,064 locomotives transaction. The intention had been to borrow USD2.5 billion from the CDB to finance the procurement. There was later a change of mind, and such that only USD1.5 billion would be borrowed from the CDB and that the balance would be raised locally through a "ZAR Club Loan".

651. On 1 July 2014, Mr Singh and Ms Makgatho attended a meeting with the CDB in Beijing. There was some movement on the pricing, but the CDB made it clear that it preferred to do the deal in

USD and not ZAR, thus exposing Transnet to a hedging risk and the cost of a cross currency swap. Upon her return from China, Ms Makgatho briefed her team about the trip and the next steps that were necessary to progress negotiations on the CDB funding proposal. At the end of July 2014, she learnt that the CDB was communicating directly with Regiments and that Mr Wood was leading the negotiations in parallel to Transnet. Mr Singh claimed that he got Regiments involved at this stage because he was concerned about the rating agencies. Transnet was under pressure to demonstrate to the rating agencies that it had an AB ratio that was acceptable. Mr Singh claimed Ms Makgatho and the Transnet Treasury team "had been reaching a point where there was no significant traction" in the discussion with the CDB. He then decided to get Mr Wood and Regiments involved "to understand to what extent they can actually accelerate the process and the discussions" with the CDB with a view to concluding the transaction.

652. On 25 July 2014, Mr Singh signed and despatched a letter drafted by Ms Makgatho to the CDB. The letter explained that the CDB financing was too expensive and not commercially viable for Transnet. The CDB's pricing was at between 12.9% and 13.3% whereas Transnet's weighted average cost of debt was about 9.4%. Furthermore, other fees proposed by the CDB were not in line with similar facilities and the covenants were not "investment grade" in that the CDB sought to rate and compare Transnet with Angola. This letter pointed out that Transnet had diverse sources of funding that were more attractive than the USD loan being proposed by the CDB. At the meeting in Beijing, Transnet's contracts with CNR and CSR were in ZAR and therefore a ZAR facility was a natural option for Transnet. It later became clear that the CDB would only agree to a USD loan.

653. Ms Makgatho repeatedly expressed her concerns about the financing of the procurement to Mr Singh and Mr Molefe and continued to argue against the CDB pricing proposal. She also strongly believed there was no need to use Regiments because of Transnet's internal treasury capacity. She received information that Nedbank was able to price the swap cheaper at even less than Transnet's internal pricing which was aligned to Standard Bank. Transnet's pricing model was tried and tested. However, Mr Wood later came up with a pricing proposal from Nedbank that was more expensive.

654. On 4 August 2014, Ms Makgatho was copied in an email from the CDB to Mr Wood at Regiments which indicated that the CDB was in discussions with Regiments about the pricing of the loan. She then sent an email to Mr Molefe and Mr Singh pointing out that Transnet Treasury had been negotiating with CDB since April 2014 regarding the terms and conditions of the facility and was busy comparing the current terms and conditions with similar facilities. She requested clarity about the role of Regiments in this matter at this point of the negotiations.

655. Mr Molefe called Ms Makgatho and Mr Singh to his office to discuss the matter. By then Ms Makgatho had lost confidence in Mr Molefe as she believed he was aligned with Mr Singh and intent on concluding the excessively expensive loan. Mr Molefe then convened a meeting at the Melrose Arch Hotel between Transnet and Regiments to resolve the CDB pricing proposal "impasse". The meeting was attended by Mr Singh, Mr Molefe, Ms Makgatho, Mr Wood and Mr Pillay. Mr Molefe suggested that as everyone seemed to think that Ms Makgatho's pricing indication was off the mark and the pricing Mr Wood had received from Nedbank seemed reasonable, she should agree to accept the CDB proposal. Mr Molefe testified that he saw the difference between Ms Makgatho and Mr Singh as a reasonable difference of opinion about the way forward and although he was sympathetic to Ms Makgatho's position he took a neutral position and accepted the majority view put forward by Mr Singh and Mr Wood.

656. No gap analysis was conducted to determine the needs of Transnet for the financial advisory services in relation to the specific funding needs. A gap analysis would have shown that Transnet had the requisite skills in-house to manage the CDB loan and Regiments' services were not needed. Despite Ms Makgatho's reservations about the excessively priced CDB loan, Regiments recommended that Transnet should proceed with the transactions and engaged in direct discussions with the CDB.

657. On 20 August 2014, Ms Makgatho drafted an internal memorandum for Mr Molefe to present to the Board for approval of the funding initiatives related to the procurement of the locomotives. The memorandum dealt with all the arrangements with the various funders (US-Exim; EDC; AIDB; and

CDB). The memorandum recommended that the Board approve the initiative to secure the CDB facility, "subject to further terms and conditions negotiations as their proposed terms and conditions are currently not in line with similar asset backed and development finance institutions".

658. On the same day, Ms Makgatho sent an email to Mr Singh in which she discussed issues arising in her memorandum for the Board. She was concerned that the Board should not be misled about the cost of the CDB loan. On 27 August 2014, Mr Singh addressed a memorandum to Mr Molefe in response to the concerns raised by Ms Makgatho. He recommended that Mr Molefe approve his response refuting Ms Makgatho's concerns that the CDB transaction was expensive and not worth it.

659. Instead of approving Mr Singh's recommendation, on 28 August 2014 Mr Molefe merely "noted" the recommendation which Ms Makgatho understood to mean that he appreciated that Ms Makgatho's concerns had merit. He seemed to suggest that he would be willing to accept the wrong view of Mr Singh above the correct view of Ms Makgatho simply on the basis that Ms Makgatho reported to Mr Singh as the GCFO. Mr Brian Molefe declined to take any responsibility for Transnet agreeing to the CDB facility because by June 2015 when the agreement was signed, he had been seconded to Eskom.

660. In the final analysis, Mr Brian Molefe's stance was prima facie inconsistent with his duty as the GCEO and a Board Member to act with fidelity and integrity in the best interests of Transnet and to prevent any prejudice to its financial interests. As such, there are reasonable grounds to believe that he contravened Section 50 of the PFMA.

661. Ms Makgatho later discovered that Mr Singh appeared not to have relied on her memorandum of 20 August 2014 but instead made a PowerPoint presentation to the Board that was based on an analysis provided by Regiments which she regarded as flawed.

662. Mr Singh and Mr Molefe's refusal to take responsibility for the imprudence of the CDB facility appeared most starkly when they were asked during their testimony before the Commission to comment on the suggestion made by Mr Mahomedy that the terms of loan were not in the interest of Transnet and advanced the money laundering agenda.

663. Instead of dealing with the merits of the loan and addressing whether the interest rate and arrangement fees were justifiable, Mr Singh and Mr Molefe without any foundation accused Mr Mahomedy, who has served as acting GCEO and GCFO of Transnet, of not being competent to comment on the arrangement and of dishonesty.

664. Ms Makgatho decided to resign with effect from 30 November 2014, as she felt that the environment in Transnet was not conducive for her to continue with her employment. She feared for her personal safety and well-being.

The success fee of R166 million paid to Regiments for the CDB loan

665. On 28 April 2015, Mr Phetole Ramosebudi, who replaced Ms Makgatho as Group Treasurer, compiled a memorandum seeking approval from the BADC for the confined appointment of JP Morgan to hedge the financial risks emanating from the loan of USD1.5 billion from the CDB and also to approve a contract extension from R99.5 million to R265.5 million for the appointment of Regiments for transaction advisory services to support Transnet on the 1,064 locomotives transaction at an additional success fee of R166 million.

666. The memorandum described the role of Regiments as advising on deal structuring, financing and funding options to minimise risk for Transnet. The memorandum explained that the financial advice and negotiation support provided by Regiments through the process was done at risk with an expectation of compensation only on successful completion of the transaction. The range of NPV fee outcomes for such work, it was said, can vary between 15 basis points and 25 bps on a transaction of a similar nature – i.e., R166 million – R277 million based on yield. Mr Ramosebudi's proposal was supported by Mr Pita, Mr Singh and Mr Gama.

667. The following day, 29 April 2015, the BADC approved the contract extension from R99.5 million to R265.5 million (an increase of R166 million) for the appointment of Regiment for transaction advisory services and support to Transnet on the 1,064 locomotives transaction. It is not clear how the figure of R99.5 million was made up. The BADC also granted the acting GCEO Mr Gama the authority to approve all documentation.

668. On 16 July 2015 Mr Gama approved the increase in the value of the contract to R265.5 million and "the allowance for the contract period to accommodate the successful conclusion of the funding and hedging agreements with CDB and JP Morgan in order to effect the remuneration (success or risk based fee) to Regiments Capital".

669. Before the conclusion of the CDB loan and a second addendum to the MSA in July 2015, Regiments submitted an invoice to Transnet on 3 June 2015. The invoice was for "debt origination USD 1.5 billion – China Development Bank" and "arrangement of cross-currency swap and credit default swap with JP Morgan". The amount owing was stated to be in respect of a "success contingency fee". The amount of the invoice was R189 240 000, made up of the success contingency fee of R166 million and VAT of R23 240 000.

670. When the second addendum to the MSA was eventually concluded on 16 July 2015, it varied the MSA by changing the scope of services, the remuneration model, and the duration of the agreement. The second addendum to the MSA dramatically increased the fee payable to Regiments for those services.

671. There was no legal cause for the success fee due to the fact that on 4 February 2014, Transnet and Regiments had concluded the third addendum to the LOI, which specifically allocated a fixed fee of R15 million for all the funding and financing services. The raising of the USD 1.5 billion funding fell within the scope of the third addendum to the LOI, and therefore, Regiments should have been remunerated in accordance with the fees as set out in the third addendum.

672. Mr Singh disputed the claim by MNS that the work fell within the scope of the agreed fee of R15 million. The scope of the deliverables in the third addendum of the LOI contemplates deliverables of that order and the fixed fee was all-inclusive for "the required work on the financial phase of the contract" which included selecting the most appropriate funding sources and mechanisms to pursue and execute. It is thus more than doubtful that Regiments was entitled to an additional success fee for its work on the CDB loan. The work on the CDB loan fell with the scope of deliverables Regiments agreed to in both the agreement of 23 January 2014 and the third addendum to the LOI

673. In his evidence before the Commission, Mr Bloom, a financial expert, agreed that most of the services performed under the second addendum to the MSA were envisaged and covered by the third addendum to the LOI.

674. Regiments charged a fee to its obvious advantage that was not in line with market conventions and Transnet practice. Moreover, and as Mr Bloom emphasised, Regiments in any event should not have been paid such a fee firstly because it had agreed to a transaction advisory fee of substantially less (R15 million) and since Transnet had sufficient capacity in internal skills to perform the required functions.

675. A payment advice from Transnet reflects that the invoice amount of R189.24 million (R166 million plus VAT) was paid to Regiments on 11 June 2015, before the second addendum to the MSA was concluded. Monies flowed from this payment to the Gupta racketeering enterprise via the money laundering scheme. The Advisory Invoice Tracking of 7 December 2015 produced by Regiments reflects that R147 607 200 was paid to Albatime of which R122 million was laundered to Sahara Computers.

676. Mr Singh justified paying Regiments the R189.24 million prior to the conclusion of the second addendum to the MSA on the unsustainable basis that the BADC had approved the memorandum earlier. The approval of the BADC on 29 April 2015 granted Mr Gama the authority to conclude the second addendum to the MSA; it did not conclude the contract with Regiments. Mr Singh indisputably authorised payment of R189.24 million before the contract was concluded.

677. It was accordingly at the very least a breach of fiduciary duty, and most likely corruption on the part of the Transnet officials, Mr Singh and Mr Gama, involved in increasing this fee as Transnet was entitled to this contractual performance against a fixed fee of R15 million. If the BADC on 29 April 2015 had properly scrutinised the request for confinement, it would have established that there was no basis for paying R189.24 million since the Third Addendum to the LOI had provided for the fixed fee of R15 million. The members of the BADC failed to take reasonable steps to be informed of the matter under consideration and thus failed to exercise the reasonable degree of care, skill and diligence expected of them. They were in breach of their fiduciary duties and committed an act of financial misconduct by negligently permitting irregular, fruitless or wasteful expenditure.

678. Transnet has issued summons against Regiments to recover the R166 million (excluding VAT) success fee on the basis that no work was rendered which justified such a payment.

The appointment of JP Morgan, Regiments and Trillian

679. There were also irregularities regarding the fees paid in respect of the syndicated ZAR Club Loan. USD 1 billion of the CDB loan facility was shelved in favour of a ZAR 12 billion syndicated Club Loan for 15 years with a floating interest rate. The Club Loan for ZAR 12 billion that was agreed later in 2015 was made up as follows: Nedbank (R3 billion); Bank of China (R3 billion); Absa (R3 billion); Omsfin (R1 billion); and Future Growth (R1.5 billion).

680. Mr Gama signed a revised term sheet and mandate letter in April 2015 with CDB for a USD 1.5 billion loan only. In the memorandum of 28 April 2015 prepared by Mr Ramosebudi and submitted by Mr Gama to the BADC, he recommended a dual-tranche denominated loan to fund the Chinese locomotive purchases by utilising only USD 1.5 billion of the funding from CDB and the use of the balance sheet of JP Morgan to underwrite a ZAR funding facility of USD 1 billion equivalent.

681. In the memorandum of 28 April 2015, Mr Gama requested the BADC to approve the appointment of JP Morgan by confidential confinement to: (i) hedge the financial risks (interest rate, credit and currency risk) emanating from the USD1.5 billion CDB loan; and (ii) to lead and underwrite the equivalent syndicated ZAR loan of USD1 billion. At its meeting of 29 April 2015, the BADC approved the appointment of JP Morgan to hedge the financial risks but for reasons that are not evident, it appears not to have considered the appointment of JP Morgan as the lead arranger or underwriter of the ZAR Club Loan.

682. No proper case for confinement was made out in that the memorandum did not address what aspects of the economic crisis affected the transaction as to justify urgency. JP Morgan did not have unique skills in hedging the currency exposure or lead arranging the ZAR Club Loan. Moreover, once again, no gap analysis was conducted. Before procuring external consultants, Transnet was obliged to determine whether internally it had skills and resources to perform such tasks. As explained, Transnet Treasury had the ability to raise the funds itself from diverse funding sources.

683. On 6 May 2015, Transnet issued the RFP for the provision of hedging financial risks (interest rate, credit and currency) and to lead and underwrite the syndicate ZAR loan. JP Morgan's bid tendered for the hedging of the USD 1.5 billion loan facility at R40 million and for its services as lead arranger and underwriting of the ZAR Club Loan at R24 million; and based on the above estimates, it tendered 35% of contract value for supplier development, being R22,4 million.

684. Less than two months after the decision to confine the contract, on 8 June 2015, Mr Singh terminated JP Morgan's role as lead arranger on the ZAR Club Loan on the basis that Transnet had incorrectly assumed JP Morgan would provide the underwriting facility on the balance of the USD 1 billion. In the letter terminating the agreement Mr Singh stated that Transnet had decided to pursue an offer received from the Bank of China and any other availability facility and balance will be drawn from the USD 1 billion standby facility and thus the coordination of ZAR loan was not required. According to Mr Ramosebudi, the real intention at the time was to award the lead arranger role to Regiments because JP Morgan did not have the "capacity".

685. Five months after the request to appoint JP Morgan on confinement, Mr Gama approved and submitted a memorandum to the BADC on 22 September 2015 recommending that the BADC approve the appointment of Trillian to replace JP Morgan as the lead arranger of the USD 1 billion ZAR equivalent Club Loan. Mr Wood was involved in the establishment of Trillian.

686. On 14 September 2015, a few days before Mr Gama submitted to the BADC the proposal for the appointment of Trillian, Mr Ramosebudi forwarded an email without any comment to Mr Wood attaching an order made to Land Rover Waterford for a Range Rover Sport valued at about R1.3 million. The balance on the invoice was R800 000 after a trade in. In his evidence before the Commission, Mr Ramosebudi explained that he knew Mr Wood's partner, Mr Litha Nyhonyha, was a part-owner of Land Rover and he was hoping he could "do something for me". Mr Ramosebudi saw no impropriety in his attempt to secure a discount or a good deal at the time he was involved in closing a deal on behalf of Transnet with Trillian, as the vehicle was ultimately not purchased, and the deal with Trillian was "above Board". Mr Ramosebudi's conduct is prima facie evidence that he agreed or offered to accept a gratification from Mr Wood (or Trillian) for his own benefit in order to improperly influence the procurement of the contract for Trillian and thus there are reasonable grounds to believe that he may be guilty of the offence of corrupt activities relating to contracts as contemplated in Section 12 of PRECCA.

687. On 16 September 2015, Mr Thomas addressed an email to Mr Ramosebudi and Mr Pita raising certain queries about the Trillian proposal. Firstly, he pointed out that JP Morgan was still contracted to perform the currency swaps. Secondly, the confinement was silent on the fees for leading and underwriting the loan which JP Morgan had failed to deliver. If the fee for leading and underwriting the loan was not included in the costs of the funding, then there should have been or needed to be disclosure of that specific fee payable to Trillian. Mr Thomas expressed doubt that Trillian had the capacity to underwrite the loan. It was not a bank with significant assets; it was a company recently conceptualised by Mr Wood. He was also uncertain about how the role of and services to be provided by Trillian would differ to what had been offered by JP Morgan. He suggested that the prior payment of fees to Regiments had covered the services proposed to be done by Trillian and payment to Trillian would duplicate what was paid to Regiments.

688. During his testimony to the Commission, Mr Ramosebudi conceded that Trillian had no capacity to underwrite the loan and thus that the services to be offered by Trillian were not the same as those offered by JP Morgan. Moreover, at the time of proposing the substitution of JP Morgan by Trillian, the persons having the capacity to arrange the loan were still at Regiments. No-one at Trillian had the capacity to arrange the loan. Mr Ramosebudi was thus compelled to admit that his answers to Mr Thomas in his email of 16 September 2015 were false and gave the incorrect impression. He could offer no plausible or credible reason for these misrepresentations. These concessions add to the case that Mr Ramosebudi was acting corruptly, in breach of PRECCA and the PFMA, and, given Mr Essa's controlling interest in Trillian and the link to the Gupta enterprise, was associated with the enterprise.

689. On 18 November 2015, Mr Gama and Mr Pita, on behalf of Transnet, and Mr Daniel Roy, on behalf of Trillian, concluded an agreement in respect of the ZAR Club Loan facility. The engagement letter set out the terms and conditions on which Trillian was engaged by Transnet "to act as Originating, Co-ordinating Mandated Lead Arranger" in relation to the proposed R12 billion facility.

690. Transnet agreed to pay Trillian a fee of R82 million, payable upon execution of a Club Loan facility agreement relating to the transaction. Trillian issued an invoice for R93.48 million (R82 million plus VAT) on the day the mandate was concluded.

691. A payment advice signed by Mr Gama and Mr Pita was issued the next day, 19 November 2015. Mr Gama justified this on the basis that Trillian had carried out the work in the six months prior to the BADC granting approval for their appointment. He referred to paragraph 24 of the memorandum of 22 September 2015 which specifically stated that the financial advice and negotiations support that Trillian provided through the entire process took in excess of five months which was done at risk with the expectation of compensation only on successful completion of the transaction. At the time

Mr Gama signed the payment advice authorising the payment of R93.48 million he had not met any person associated with the Trillian group of companies, other than Mr Wood.

692. The ZAR Club Loan of R12 billion loan was concluded four days later on 23 November 2015. The next day, on 24 November 2015, Mr Ramosebudi compiled and signed a memorandum addressed to Mr Pita and Mr Gama requesting them to sign off on Trillian's invoice "for services rendered" and recording that Trillian had "engaged Transnet with a financing solution". Mr Pita signed the memorandum and the Trillian invoice on 2 December 2015. Mr Gama signed them on 3 December 2015. The invoice value of R93.48 million (including VAT) was paid into Trillian's bank account on 4 December 2015 – 16 days after the mandate was concluded. Four days later, on 8 December 2015, R74.784 million of that, being 80%, was transferred by Trillian to the Gupta money laundering vehicle Albatime.

693. During its investigation, MNS interviewed Ms Mothepu of Regiments and Mr Ramosebudi. Ms Mothepu confirmed that all the work done in relation to the ZAR Club Loan was executed by Regiments. Mr Ramosebudi confirmed that he had only dealt with Ms Mothepu and Mr Wood from Regiments. Even though he had drafted the memoranda recommending the appointment of and payment to Trillian and drove the process, he never dealt with any personnel from Trillian. During his testimony to the Commission, Mr Ramosebudi conceded that the work had been done not by Trillian but by Regiments. His concession amounts to an admission that he misled the BADC, unless, of course, the members of the BADC were themselves aware of the true situation.

694. In addition to the indications that the transaction advisory work charged for by Trillian had already been performed by Regiments, Trillian could not practically have done the work it was supposedly mandated to do. The engagement letter was signed on 18 November 2015. Considering that there were five members of the syndicate what would normally be involved in finalising the loan, it is inherently improbable that it was negotiated within a few days. It is hard to see how Trillian could have performed any work as the lead arranger of the loan in the time available. The task would have taken months.

695. On 12 September 2016, Regiments wrote a letter to Transnet in which it confirmed that it (not Trillian) had completed the work on the ZAR Club Loan by December 2015 and stated that the fee paid to Trillian was "excessive when compared with the amount Regiments has invoiced for the same work". The payment of R93.48 million to Trillian for work allegedly performed as part of the transaction advisory services was fraudulent, irregular and unjustified. The fee was paid to a company that did not do the work.

696. JP Morgan had also performed some of the services in respect of negotiating the ZAR Club Loan. If anything, JP Morgan's replacement by Trillian should have been only for the services that JP Morgan had not performed and by implication should have been for less than the agreed fee of R24 million payable to JP Morgan. The payment of R93.48 million to Trillian was R69 million more than the agreed amount that Transnet would have been liable to pay to JP Morgan in respect of the lead arranger and underwriting services. This deviation alone supports a finding that Mr Gama and Mr Ramosebudi probably acted fraudulently and corruptly.

697. Had the members of the BADC applied their minds they would have realised that JP Morgan had partnered with Regiments on this transaction and performed the services. Mr Gama, Mr Ramosebudi and the members of the BADC did not act in the best interests of Transnet, breached their fiduciary duties and contravened the PFMA by causing Transnet to incur irregular, fruitless and wasteful expenditure. Most significantly, the payment of 80% of Trillian's fee to Albatime confirms that the entire arrangement was part of the money laundering scheme associated with the Gupta racketeering enterprise. Mr Ramosebudi denied knowing Albatime or Mr Moodley at the time he arranged for the appointment and payment to Trillian.

Mr Gama's links with Trillian

698. Mr Gama's involvement in the fraudulent and corrupt payment of R93.48 million to Trillian stands to be assessed in the light of his relationship with Mr Essa and the Guptas. The evidence in relation

to his earlier dismissal and reinstatement, his receiving cash payments from Mr Essa, as well as former Minister Hogan's evidence about President Zuma's efforts to have him appointed as GCEO, intimate strongly that he was favoured by those supporting State Capture. His appointment as GCEO of Transnet, in April 2016, took place shortly after he expedited the payment of R93.48 million to Trillian.

699. Mr Gama's desire to put distance between Mr Essa and Trillian is telling. His evidence that he first came to learn that Mr Essa may have been associated with Trillian was when Transnet gave consideration to cancelling its contracts with Trillian and Regiments towards the end of 2016, in the light of the ongoing dispute between them, is equally not credible. That evidence cannot be reconciled with the memorandum of 9 May 2016 from Mr Gama to the BADC, which sought approval for the cession of the GFB contract from Regiments to Trillian, wherein (following a formal vendor approval process initiated by Transnet) the shareholding of Trillian was reflected as "Trillian Holdings (Pty) Ltd 60% ... [w]holly owned by Mr Salim Essa". Mr Gama's suggestion that he just glossed over the memorandum before signing and recommending it is inherently implausible.

700. Mr Gama's dubious testimony about the extent of his relationship with Mr Essa must also be assessed in the light of other undisputed facts. By the time Mr Gama met Mr Essa in 2015, shortly after his appointment as acting GCEO, Mr Essa had in place the money laundering arrangement whereby 55% of the fees paid by Transnet to Regiments would be distributed through various vehicles to the Gupta enterprise. Mr Essa had also concluded several BDSAs with CSR and CNR on behalf of Tequesta and Regiments Asia in respect of the various locomotive procurements, and in terms of which his companies would be paid 20-21% kickbacks, most of which would be laundered to the Gupta enterprise. Mr Gama had accompanied Mr Essa to a meeting with Mr Rajesh Gupta at the Gupta compound in Saxonwold in November 2015, shortly after which he authorised a corrupt and fraudulent payment of R93.48 million to Trillian in early December 2015, 55% of which was channelled to the Gupta enterprise. A few weeks later, Mr Gama met Mr Essa in Dubai where his luxury hotel accommodation was possibly paid for (or was intended to be paid for) by the Gupta enterprise. Two months later Mr Gama was promoted to GCEO. Additionally, Mr Gama received substantial amounts of cash from Mr Essa during 2017.

The interest rate swaps on the ZAR Club Loan

701. Mr Bloom, the financial expert, analysed the risks associated with the CDB loan for USD 2.5 billion and the ZAR 12 billion Club Loan and the mechanisms used to mitigate those risks insofar as they related to interest rate and exchange rate fluctuations, credit risks and how these risks were addressed. Hedging instruments (swaps) were used to hedge both the exchange rate and interest rate risks on the ZAR Club Loan. The instruments used in relation to the ZAR Club Loan were applied corruptly to advance the interests of the Gupta racketeering enterprise.

702. On 3 December 2015, days after the conclusion of the ZAR Club Loan on 23 November 2015 at a floating rate, Mr Ramosebudi submitted a memorandum to Mr Pita, then still the acting GCFO, seeking approval for hedging the interest rate exposures from a floating to a fixed basis and permission to instruct Regiments to execute the hedges with Transnet approved counterparts. Mr Gama approved the request. The execution costs of the hedges by Regiments would be all inclusive in the rate of the interest rate swap.

703. Two tranches of interest rate swaps were executed by Regiments on the ZAR Club Loan with Nedbank as the counterparty, to the significant prejudice of Transnet. R4.5 billion of the ZAR Club Loan was swapped to a fixed rate of 11.83% for 15 years on 4 December 2015 and three months later R7.5 billion was swapped to a fixed rate of 12.27% for 15 years on 7 March 2016. The CDB debt was also swapped in cross currency swaps from USD to ZAR at each draw down. There was no significant adverse effect for Transnet in the cross-currency swaps other than the fact that these transactions could have been executed by the Transnet treasury, most likely at a lower cost. Mr Bloom and Mr Mahomedy testified at length about the prejudicial nature of the interest rate swaps. Their evidence accords in all material respects.

704. The interest rate swap on the ZAR Club Loan by Transnet was highly irresponsible for two reasons. Firstly, the ZAR Club Loan was negotiated at floating interest rates and literally within days of the agreement having been concluded the interest rate swaps were entered into changing the rates to expensive fixed rates. If there was concern about risk arising from interest rates a fixed rate should have been agreed to start with. Secondly, the fixed interest rate was set at a high level over a long period of time in an environment where it was likely that interest rates would decline and thus a floating interest rate was more beneficial to Transnet. The floating rates never exceeded the fixed rates and Nedbank's assumption that the floating rate would remain low and go lower, which seemed to be fairly predictable at the time, held true. Thus, instead of Transnet paying the floating rate which ranged between 8 to 10%, Transnet ended up paying a much higher rate of interest throughout that period.

705. Regiments played the role of executing agent, being the party that executes the transaction or the swap every quarter. Either of the parties (Transnet or Nedbank) could have been the executing agent. There were no special features to the transaction that justified the use of a service provider to execute the swaps. The swaps were so-called "vanilla swaps". Hence, the appointment of Regiments as an executing agent was not necessary. Regiments nevertheless received a commission, or an additional percentage, for every trade or every swap that it did.

706. The decisions regarding the interest rate swaps were not consistent with the FRMF which dictates that the decision to secure funding on a fixed or floating interest rate should be taken at the time of concluding the funding transaction (at the source) to avoid unnecessary costs of revising the position later. Had this been done in this instance, Transnet would have saved a substantial sum of money. They were also inconsistent with its fixed to floating debt policy. Transnet had previously adopted a "fixed rate" strategy as a matter of practice. Had Transnet stuck to this policy, the ZAR Club Loan would have been entered into on a fixed interest rate basis.

707. The justification for making the swap was baseless for a few reasons. Firstly, the decision of Transnet to lock itself into the interest rate swap agreement for fifteen years assumed an environment of higher interest rates over this period. Transnet assumed a steep increase in the trajectory of long-term interest rates. There was no indication at that point in time and to date that such dramatic upward movement in interest rates would apply. It is not possible to predict interest rates so far into the future. Secondly, to minimise the fees payable to the execution agent and counterparty, a phased approach of swapping in small increments (based on evolving market conditions or when circumstances dictated) would have been more prudent.

708. Looking at both interest rate swaps, it appears that the difference between the fixed to the floating rate on both swaps was exactly the same, approximately 2.65%. This was not in accordance with ordinary practice. Regiments and Nedbank profited from this excessive spread. Regiments would have known that the unnecessary interest rate swaps would result in it receiving significant fees.

709. Mr Bloom presented a table outlining the losses incurred by Transnet entering into these questionable transactions. The realised total negative cash flow for Transnet resulting from the first interest rate swap on the tranche of R4.5 billion was R299.3 million as at 14 May 2019, while the total negative cash flow for Transnet on the interest rate swap of R7.5 billion was R551.2 million. This translates into a total negative interest rate payment of R850 538 508. This amount of almost R1 billion would not have been payable had Transnet not effected the interest rate swaps. The table also reflects that the amount of the cost of exit (an unrealised negative cash flow) as at 14 May 2019 would be R980 478 025 in respect of both interest rate swaps. In the result, the realised negative cash flow together with the unrealised cost of exit totalled an amount of R1 831 016 534.

710. Thus, Transnet incurred a realised loss of R850 million from December 2015 until 19 May 2019. Given the trajectory of interest rates since that time and going forward, it is likely that the full loss of R1.8 billion will be realised by Transnet. In other words, Transnet incurred a potential liability of R1.8 billion by reason of having entered injudiciously or imprudently into the interest rate swap arrangements negotiated and executed by Regiments.

711. In conclusion, all the interest rate swaps were probably planned principally to benefit Regiments and

were achieved through the side-lining of Transnet's treasury. Transnet treasury had and still has the expertise to handle transactions of this kind without the support of external transaction advisors or execution agents such as Regiments. The relevant transactions were typically vanilla (stock-standard) swaps that the Transnet Treasury Dealing Room has previously done and does periodically without the need for external assistance.

712. The TSDBF went on to sue Regiments Fund Managers for amounts paid to it. In November 2019, Regiments settled the TSDBF action by paying it an amount of R500 million.

THE MANGANESE EXPANSION PROJECT

713. Two witnesses before the Commission made serious allegations of malfeasance in Transnet's Manganese Expansion Project (MEP), namely: Ms Deidre Strydom, a senior employee with long service at Transnet, and Mr Henk Bester an employee of the Hatch group of companies (Hatch) a service provider to the MEP. A third witness, Mr Gerhard Bierman, the former CFO of Transnet Capital Projects (TCP), filed an affidavit relating to the MEP, but did not testify before the Commission as he has emigrated to Australia.

714. The allegations of wrongdoing made to the Commission in relation to the MEP have a narrow scope. Essentially, it is contended that persons associated with the Gupta enterprise sought improperly to benefit from the project by seeking appointment as SDPs. The rationale, financing and other commercial aspects of the project have not been directly challenged as corrupt or improper, though there is some suggestion that the budget may have been inflated to accommodate payments for unqualified SDPs. Nonetheless, it will be helpful to examine the relevant details of the MEP to gain a better contextual understanding of the alleged wrongdoing.

The scope and purpose of the MEP

715. In 2009 Transnet decided to increase export capacity via the manganese ore terminal in Port Elizabeth (PE) to 5.5 million tonnes per annum (Mtpa). It was evident that demand for capacity would continuously exceed supply as a result of the unprecedented growth in manganese exports due to South Africa being viewed as a lucrative supply market to China. Transnet conducted feasibility studies into the investment case for expanding capacity to 16 Mtpa by 2018/19 through the Port of Ngqura in the Eastern Cape. The MEP came to be seen as an anchor programme of the MDS, aimed at expanding and modernising the country's ports, rail and pipelines infrastructure to promote economic growth in South Africa.

716. The MEP proceeded in two phases. On 17 October 2012, the GCEO recommended that the Board approve the execution of the first two phases to expand the rail network capacity from the Northern Cape to the Port of Ngqura to support the MEP from 5.5mtpa to 16mtpa at a cost of R2.4 billion. An MEP Steering Committee was constituted of which Mr Gama, CEO of TFR, and Mr Singh, the GCFO, were members. Following the completion of the Phase 2 feasibility studies, the MEP Steering Committee endorsed the creation of a centralised Programme Director role for the MEP to which Ms Strydom was appointed and tasked with setting up and managing the MEP structure. She was also required to deliver and maintain the integrity of the approved business case. When she became the MEP Programme Director, Ms Strydom reported to Mr Krish Reddy, the GM: Group Planning.

717. McKinsey developed a standard for capital execution for Transnet called the Platinum 20 Standard, which recommended that the capital expenditure for rail and port should be centralised so there should be from a Group perspective a central authority responsible for the management of the oversight of the capital expenditure reporting etc. This was a departure from previous practice whereby the operating divisions were accountable for the management of the capital expenditure associated with projects.

718. Although the platinum standard recommended that the programme director should have control over capital expenditure that did not happen in the MEP. Ms Strydom had no financial delegation to manage

the scope, cost and schedule of the MEP. TCP was appointed by the operating divisions to execute the respective capital projects on their behalf. This included the management of the transformation and economic development targets approved in the procurement strategy that accompanied the business case.

719. Phase 1 of the MEP was managed by TCP. During 2011, Hatch Goba was appointed by TCP via a task order under an existing "Hatch Mott McDonald Goba" contract to conduct the Front-End Loading (FEL) 2 and 3 phases of Phase 1, i.e., rail and port pre-feasibility and feasibility studies supporting the MEP. Most of the outputs for the studies were concluded towards the end of 2012.

720. Given the materiality of the estimated cost of the expansion and the requirements to spend further time on scrubbing the overall cost and schedule, a decision was taken by CAPIC towards the end of 2012 to support the ring-fencing and acceleration of critical rail operational and safety related work packages where environmental authorisations had been received. The project was named "Rail Phase 1" or "MEP 1 (Phase 1)".

721. A memorandum dated 11 January 2013 was submitted by Mr Molefe to the BADC meeting of 29 January 2013, chaired by Mr Sharma, recommending an initial R2.38 billion "no regrets" rail infrastructure investment "in support of the overall manganese ore expansion programme from 5.5 to 16mtpa". The BADC approved the "no-regrets" investment in the amount of R2.4 billion.

722. In terms of a memorandum submitted to Mr Molefe by Mr Charl Moller, GE:TCP, dated 6 August 2013, Phase 1 comprised the partial doubling of the line section between Kimberly and De Aar, and the extension of the Rosmead passing loop at an estimated cost of R2.38 billion (equating to the "no-regrets" amount approved by the BADC in January 2013). The Engineering Procurement and Construction Management (EPCM) cost was stated to range between 15-18% of project cost and calculated to be R220 million. Following an internal risk review, TCP recommended that the EPCM scope of the FEL 4 phase of Phase 1 (in which the project is executed to deliver the defined outcomes) be confined to Hatch.

723. Since the value of the transaction was below R250 million, final approval of the confinement resided with Mr Molefe, the then GCEO, and thus he had the delegated authority to authorise the expenditure. Mr Molefe approved the confinement on 19 August 2013. Ms Strydom was informed by Mr Rudie Basson, then the GM of TCP, that the ETC was deliberately reduced to fit in with Mr Molefe's delegated authority so that he could authorise the expenditure without the approval of the BADC. Mr Molefe denied this. Be that as it may, Ms Strydom accepted that the confinement to Hatch was justified. Hatch had completed all the pre-feasibility studies, so it was familiar with the detailed designs required for the rail scope of work at that stage. It was an extension of rail passing loops mainly and it would not have made sense to bring another company on board at that stage to start from scratch.

724. SDPs generally are Qualifying Small Enterprises (QSEs), Exempted Medium Enterprises (EMEs) or emerging black owned companies. Leniency applies where an SDP entity does not have extensive experience. A designated sub-contractor (that is not an SDP) is required to have the necessary extensive experience. This meant that, in terms of the RFQ, 50% of the value of the work had to be sub-contracted by Hatch to QSEs or EMEs. Ms Strydom and Mr Bester independently testified that a SD requirement of 50% was inconsistent with the norm that public sector tenders should have a 30% SD component and was probably a disincentive in that it required bidders to take on 100% of the risk but only do half of the work. Mr Molefe did not consider the 50% threshold as high.

DEC Engineering and PM Africa

725. On or about 15 July 2013, in an internal review session attended by Mr Bierman and others, Mr Singh requested that a company known as DEC Engineering (DEC) be profiled for capacity and requested it be a designated a sub-contractor on Phase 1. Mr Bierman considered the request to be inappropriate because DEC did not have a proven track record within the rail industry in respect of railway tracks. Notwithstanding his concerns, Mr Bierman conducted the profiling and concluded that the company did not possess the core skills for railway track work. He communicated his assessment to Mr Singh

who appeared to accept his opinion.

726. However, on 6 August 2013, Mr Singh revised the SD pre-qualifying criteria from 30 to 50%. Mr Singh's possible motive for doing that, as appears from Mr Bester's testimony about the various meetings and engagements leading up to the confinement to Hatch, was seemingly to favour DEC as an SDP (rather than as a sub-contractor that required a proven track record).

727. Before the confinement to Hatch was approved, Mr Bester received a call from Mr. Nalen Padayachee from PM Africa (PMA) to discuss Phase 1. Mr Bester agreed to meet with Mr Padayachee on 22 July 2013 at the Hatch offices. Mr Padayachee was accompanied to the meeting by Mr Dave Reddy from DEC. Mr Padayachee explained that they knew about the potential confinement of Phase 1 to Hatch and wanted to be included as a primary SDP on the project. Mr Reddy informed Mr Bester that "Number 1" had sent him to form part of the Hatch team in executing Phase 1 of the project. Mr Padayachee and Mr Reddy suggested that their respective companies would form a joint venture to work with Hatch on Phase 1. Mr Bester expressed surprise that they knew about the confinement as this was not public knowledge, nor had it been finally confirmed. Mr Reddy and Mr Padayachee explained that they knew everything about the project and the people "high up" in Transnet. Mr Bester asked Mr Reddy who "Number 1" was. Mr Reddy responded that he could not divulge but that Mr Bester could figure it out. Mr Bester initially thought "Number 1" was a reference to President Zuma but he later realised in subsequent discussions with Mr Reddy and others that it was probably a reference to Mr Brian Molefe as in "Number 1 at Transnet".

728. Mr Bester asked Mr Reddy and Mr Padayachee to send him a MOU which Hatch would consider before giving an indication of its willingness to use PMA and DEC as potential SDPs in the future. On 25 July 2013, Mr Bester received a draft MOU from Mr Padayachee by email. The contents of the MOU made it clear that PMA and DEC wanted to be the sole SDPs.

729. Mr Bester discussed the matter with Mr Alan Grey, the MD (Industrial Infrastructure) at Hatch. Mr Grey and Mr Bester felt that the MOU was too "loose" and vague and that it needed greater precision, clearer definition of the scope of the work and roles. Hatch decided that any MOU concluded with DEC and/or PMA would be on a non-specific and non-exclusive basis as would be applicable for any potential SDP. In other words, Hatch would not agree to include these companies specifically on the MEP.

730. On 26 July 2013, Mr Bester met with Mr Basson (the GM of TCP) and Ms Strydom to inform them about what had transpired and to seek their advice. Mr Basson was surprised that Mr Padayachee and Mr Reddy had met with Mr Bester. Mr Basson told Mr Bester that Mr Singh wanted a confinement approval condition included which stipulated that PMA and DEC should form part of the SD component for Phase 1 but that he and Mr Bierman had told Mr Singh that it would not be advisable to stipulate specific companies to be used in SD initiatives. Mr Singh's proposal was subsequently dropped and thus Mr Basson was surprised that Mr Padayachee and Reddy had approached Hatch.

731. In his evidence before the Commission, Mr Singh equivocated and was evasive about whether he had indeed requested Mr Basson and Mr Bierman to include a confinement condition stipulating that PMA and DEC be part of the SD component as SDPs or sub-contractors. At first, he objected to the hearsay nature of the evidence but simultaneously stated that the requirement had been dropped, thus implying that he in fact had raised it. When that became apparent, he sought to explain his intention in making such a request with reference to the context. He intimated that he made the proposal in the context of advancing the empowerment and SD agenda, as TCP was lagging behind, and the MEP was an opportunity to drive the agenda. However, he denied that he gave a "direct instruction" to include the participation of PMA and DEC as a confinement condition. After some equivocation, Mr Singh eventually settled on the following explanation for what had transpired between him, Mr Basson and Mr Bierman, indicating that he wanted them "... to explore opportunities, alternatives of methods..." to allow Transnet "... to meet its mandates as it relates to transformation and supply development".

732. This clearly indicates that there was a discussion (probably initiated by Mr Singh) about designating specific companies as SDPs. In a WhatsApp message Mr Bierman evidently wrote to Mr Singh

in response to a request to designate a specific company. In a WhatsApp reply to Mr Bierman, Mr Singh conceded that specific designation was inappropriate. Confronted with the inconsistency of this WhatsApp communication with his denial, Singh conceded that there was "a request from me to co-hire two companies". His concession reveals a willingness and inclination on his part to equivocate and dissemble until confronted with the indisputable, thus introducing significant doubt about his overall credibility.

733. Taking account of Mr Singh's concession, his equivocation and lack of credibility, Mr Bester's hearsay evidence about what Mr Basson told him is a more probable and credible version of what transpired. On Mr Singh's own version, he at the very least suggested that PM Africa and DEC be included in the confinement. Ms Strydom testified that she was disconcerted on hearing at the meeting of 26 July 2013 that Mr Padayachee and Mr Reddy had approached Mr Bester to include their companies as sub-contractors or SDPs. Firstly, the information about the pending confinement was not public knowledge and was an internal matter; and secondly Mr Reddy seemed to claim that he was acting with the authority of Mr Singh.

734. Later that day, 26 July 2013, Mr Basson phoned Mr Bester and suggested (without giving a clear reason) that Hatch sign the MOU with PMA and DEC. Mr Basson said: "just sign the damn thing". Mr Bester speculated that Mr Singh must have insisted that the MOU be signed. Mr Singh in his testimony denied that he had done so and declined to comment about the discussions concerning the MOU.

735. On 19 August 2013, the confinement was approved by Transnet. On 27 August 2013, a full tender document was issued to Hatch. A supplier code of conduct declaration was included in the tender document that Hatch had to complete and sign as part of the tender submission. The document required Hatch to declare that it was satisfied that the process and procedures adopted by Transnet in issuing the tender and the requirements requested from tenderers in responding to the tender were conducted in a fair and transparent manner. Hatch believed that it had acted correctly during the process and there was no proof of any fraudulent or collusive activity on the part of Transnet officials. It had elevated the approach by PMA and DEC to the relevant Transnet officials through the correct channels.

736. Hatch did not intend to engage with Mr Padayachee and Mr Reddy on Phase 1 nor their respective companies going forward. Any influence Mr Padayachee and Mr Reddy claimed to have had with Transnet regarding the award of the contract appears to have had no basis, especially because the confinement had been approved without Hatch having to conclude the MOU on Mr Padayachee and Mr Reddy's terms. Hatch thus concluded that the declaration could be signed and would remain the basis of all of Hatch's dealings in the future as it has been in the past.

737. There were ongoing engagements between Hatch, Transnet and Mr Reddy which culminated in a meeting at Transnet chaired by Mr Pita on 22 October 2013. This meeting was attended by Mr Grey and Mr Bester on behalf of Hatch and started late after Mr Singh failed to arrive, though Mr Bester saw him in the immediate vicinity of the office in which the meeting was held. Singh had no clear recollection of the meeting.

738. At the meeting, Mr Pita said that Mr Singh had requested that he speak to Hatch about the SD component. Hatch proposed that Transnet could itself nominate DEC as an SDP in writing. Hatch's background checks on DEC and PMA had not revealed any information about it on the internet. From Hatch's perspective, if DEC was to be appointed as an SDP, it had to come directly from Transnet and not be perceived as a decision that Hatch made of its own accord. Mr Pita responded that Transnet could not instruct Hatch in writing to appoint a particular partner as an SDP, but Hatch insisted that Transnet would have to do so if it wanted it to partner with an SDP not of its own choosing. The meeting became heated with Mr Pita at one point aggressively telling Mr Bester that he must do as he was told.

739. On 21 November 2013, Mr Molefe signed off on the memorandum, noting the award of the confinement of Phase 1 to Hatch. Paragraph 7 of the memorandum records that further negotiations led by Mr Pita had been conducted and that the requirement of 30% sub-contracting to emerging black

owned companies was met by Hatch.

740. The conduct of Mr Reddy and Mr Padayachee in strong arming Hatch to appoint DEC and PM Africa as SDPs prima facie amounted to an offer by them to accept a gratification (appointment as an SDP) from Hatch as an inducement to Hatch for influencing another person to award the tender to Hatch. Alternatively, the conduct amounted to an offer to give a gratification to Hatch in order to improperly influence the procurement of a contract with Transnet. Although Hatch was awarded the Phase 1 contract without it agreeing to the appointment of DEC and PM Africa as SDPs or sub-contractors, the mere offer to accept the gratification as an inducement is sufficient. Consequently, there are reasonable grounds to believe that the specific offences of corrupt activities relating to contracts or the procuring of a tender as contemplated in section 12(1) and section 13(1) of PRECCA may have been committed in this instance.

The Phase 2 tender and the preferred bidders

741. In May 2014, the then Minister of Public Enterprises, Mr Gigaba, approved the business case for the MEP, which included Phase 1 and 2. Ms Strydom saw the speed with which this business case was approved - within two months – as suspicious because elections were coming up and there were concerns that there would be a change in the cabinet and in particular within the DPE. Concurrent with the accelerated PFMA approval of the MEP business case, TCP approached the market in April 2014 for the execution of the Phase 2 rail and port EPCM (FEL3b and 4) contracts. The contracts had an estimated value of R700 million to R1 billion respectively. The tender process was managed as an audited HVT.

742. The SD criterion and small business development criterion were set at high thresholds. Bidders were required firstly to commit to 45% of the contract value being assigned towards SD. Secondly, and distinctly 30% of the contract value had to be sub-contracted to small businesses (EME and QSE start-ups and/or large significant black owned enterprises). Due to the onerous SD and performance bond requirements put forward in the business case, as advised by McKinsey, it was expected that no company on its own would have the financial backing to meet the tender requirements. Larger EPCMs had to form joint ventures and include smaller EPCM companies in their structures.

743. Two joint ventures, one comprised of Hatch, Aurecon, Mott McDonald and Siyathuta (H2N) and the other of Fluor, Aecom and Gibb (FLAG), were identified as the preferred bidders for both the Rail Phase 2 and Port Phase 2 scope EPCM contracts. Both joint ventures were advised that they would be in contention for both contracts depending on the outcome of the contract negotiation process.

744. Prior to Transnet advertising the tenders for Phase 2 in early 2014, Hatch sought the assistance of Mr Reddy to arrange a meeting with Mr Singh to discuss outstanding invoices due to Hatch for work on the New Multi Product Pipeline (the NMPP) that were causing Hatch serious cash-flow problems. Mr Reddy agreed to arrange the meeting, mentioning that he had a close relationship with Mr Singh. A meeting was then arranged at a restaurant in Melrose Arch in early 2014.

745. Mr Bester, Mr Craig Sumption and Mr Craig Simmer represented Hatch at the meeting. On arrival at Melrose Arch, as Mr Bester approached the restaurant, he was met by a man who introduced himself as Mr Salim Essa and said he was there to meet them with Mr Singh. Bester asked where Mr Singh was. Mr Essa replied that he would call him when he was ready. When Mr Bester asked Mr Essa if he worked for Transnet, he responded that he was “doing a lot of things" or had a lot of businesses. Before entering the restaurant, Mr Essa told Mr Bester that he first needed to check if the restaurant was “clean”. Mr Essa called Mr Singh, who arrived at the meeting a few minutes later.

746. The meeting focused on both the outstanding payments from Transnet to Hatch for work performed on the NMPP and the appointment of SDPs. Mr Singh did not offer any insight into the reasons for the late payments and Mr Essa was more concerned to convey that Hatch should appoint DEC as an SDP or sub-contractor on Phase 2. The meeting was brief and ended without any clear resolution of the problem of the invoices. Mr Bester had the impression that “Essa was the boss and Singh was the subordinate”.

747. Mr Singh in his testimony before the Commission on 23 April 2021 denied that he attended this meeting at Melrose Arch with Mr Essa and the representatives of Hatch. He maintained that Mr Bester's evidence was fabricated but could offer no explanation for why Mr Bester would do so. He conceded that there were no issues between them. Mr Singh made no application to cross-examine Mr Bester.

748. Mr Singh admitted that there had been problems with the invoices payable to Hatch under the NMPP. However, he sought unconvincingly to cast doubt on the credibility of Mr Bester on the basis that Mr Bester, as Director of Rail at Hatch, would not have been involved with the NMPP and had failed to attach the electronic invites to the meeting for Mr Sumption and Mr Simmer.

749. In an affidavit filed after Mr Singh gave evidence to the Commission on 23 April 2021, Mr Sumption contradicted Mr Singh's denial and confirmed that Hatch met with Mr Singh to discuss the reasons for delayed payment of invoices and the SD requirement. Mr Sumption confirmed that on arrival at the restaurant he and his colleagues were introduced to Mr Essa and Mr Singh arrived a few minutes after Mr Essa phoned him. During the meeting Mr Sumption sat next to Mr Singh. He had assumed that Mr Singh would take the lead since he was the GCFO, but in fact Mr Essa dominated the meeting. Although the intention was to discuss non-payment of invoices and issues with SD on the existing programmes, Mr Essa wanted to discuss the SDPs for the next phase of the MEP.

750. In light particularly of the evidence of the trips to Dubai and the statements of Mr Sumption, Mr Takane and Mr Gama, Mr Singh's denials about his relationship with Mr Essa are not credible and again confirm his proclivity for falsehood. The version of Mr Bester and Mr Sumption of the meeting with Mr Singh and Mr Essa at Melrose Arch is accordingly more probable.

751. Not long after the first meeting with Mr Singh and Mr Essa, Mr Bester received a call from Mr Reddy informing him that Mr Essa had requested a follow up meeting at Melrose Arch. That meeting was attended by Mr Essa, Mr Reddy and Mr Bester.

752. By then, H2N had already prepared its submission for Phase 2. At the meeting Mr Essa told Mr Bester that Hatch should include his company, which he did not name, in H2N's Phase 2 tender submission. Mr Bester told Mr Essa that H2N had already finalised its SD component and could not include his company in the submission at that stage. Mr Essa, seemingly undeterred, insisted and insinuated that he, Mr Singh and others had a lot of power. Mr Essa explained that they (Mr Essa and Mr Singh) would increase the contract value after the award and that H2N should provide initially for an additional R80 million for SD, that in time would increase to something in the order of R350 million with the contract value for Phase 2 increasing to R2 billion or more. Mr Bester was dismissive but Mr Essa assured him that he would decide what the budget of the project would be and where it would end up. Mr Essa further offered to provide Mr Bester with the tender documentation submitted by all the other bidders.

753. The second meeting with Mr Essa concluded with Mr Bester again telling Mr Essa that Hatch could not include Mr Essa's company in the H2N submission. Mr Essa nevertheless stated that he would be in contact. Mr Bester returned to Hatch's office and reported the discussion to his colleagues. He drafted an affidavit setting out what had transpired at the meeting for filing with Hatch's auditors. Mr Reddy subsequently phoned Mr Bester and asked for an answer to Mr Essa's proposal. Mr Bester replied that Hatch would not include Mr Essa's company in the H2N bid.

754. The events at the second meeting are prima facie proof of corruption. Mr Essa demanded or solicited a gratification (in the form of an SDP appointment for his company) from Hatch for the benefit of himself and his unnamed company as an inducement (by influencing Mr Molefe and Mr Singh) to award the tender in relation to a contract for performing work and providing services on Phase 2 to Hatch. Mr Essa's stated intention to inflate the contract price to facilitate the bribe is also evidence of his association with and participation in the Gupta racketeering enterprise.

755. H2N's bid for the Rail project was approximately R800 million and was ultimately successful. However, while H2N's bid for the Port project, for approximately R500 million, was the cheapest, it failed. On 30 November 2014, Mr Molefe signed a letter that awarded the Rail tender to the H2N and the Port

tender to FLAG. Mr Bester suspected that the appointment of FLAG was possibly due to Mr Essa finding other ways of benefiting from the project. Mr Molefe denied being influenced by Mr Essa.

756. The PTNs were led by Ms Corli van Rensburg and Mr Velile Sikhosana of TCP supported by Mr Edward Thomas the GSCM. During the PTN, Mr Bester told Ms Strydom about the meetings with Mr Essa. She saw the proposed increase of the contract value by R80 million as a bribe. She testified that experience has shown that it is possible to create a surplus of R80 million on a project of this nature either by increasing the contract value during negotiations (after award) or by increasing the delegated contract value internally. She believed that there was a network inside and outside of Transnet acting “to improperly secure tenders to the benefit of the few”.

757. Mr Pita and Mr Singh were in control of the approval of the contract value. During the PTN, the H2N bid for the rail project decreased by R287 million (from R1063 million to R776 million); while the FLAG bid for the port project increased by R64 million (from R687 million to R751 million).

758. The PTN in respect of both Phase 2 Rail and Phase 2 Port contracts concluded in early December 2014. Ms Strydom considered the award of the Phase 2 Port scope to FLAG at an amount of approximately R200m more than the H2N bid for Port as suspicious, and in direct conflict with the project scrubbing process where the focus was to reduce capital estimates across all work packages. She rejected the rationale of awarding the Phase 2 Port scope to FLAG at the higher price as business risk mitigation. Price should have been the overriding qualifier or criterion at that stage and the award to FLAG was not consistent with the procurement policies.

759. Both Mr Bester and Ms Strydom were critical of the role played by McKinsey. During the execution of the Phase 2 project, McKinsey was always present on what H2N were told was a "review" basis. McKinsey apparently enjoyed unrestrained access to Mr Singh. On Phase 2, McKinsey’s contract value to "oversee" the project was in the region of R340 million, yet, according to Mr Bester, nobody on the Transnet management team had a clear sense of what McKinsey’s brief or deliverables were.

760. According to Ms Strydom, prevailing market conditions, in addition to Transnet’s increasing capital affordability constraints, resulted in Transnet deciding to suspend the MEP and terminate the EPCM contracts in March 2017. Transnet was in a dire financial situation at that time and the manganese ore price bottomed out to the extent that customers questioned the viability of the expansion. Notwithstanding an intensive capital optimisation exercise jointly executed with the respective joint ventures, a decision was taken to put the expansion on hold and to terminate the rail and port EPCM contracts.

Corruption and racketeering

761. Towards the end of 2014, Ms Strydom reported her suspicions of fraud and procurement irregularities in relation to the MEP to Mr Bramley May, TFR head of forensic investigations, who appears not to have pursued the matter and destroyed the tape recording of the interview as he felt it was irrelevant as it was not a TFR matter. This has been referred to the SIU for investigation.

NEOTEL AND HOMIX

762. Three witnesses testified in relation to the procurement process and transactions associated with contracts concluded between Transnet and Neotel (Pty) Ltd (Neotel): Mr Volmink, Ms Chetty and Mr van der Westhuizen. Two others, Mr Vaghela and Mr Mazibuko, gave additional evidence regarding improper payments made by Neotel to Homix (Pty) Ltd (Homix), part of the Gupta enterprise.

763. The evidence in relation to the Transnet-Neotel transactions reveals irregular conduct and a motive other than a business rationale for the decisions made in relation to the tender, which sought to extract money from Transnet for the benefit of the Gupta enterprise, specifically by Homix, an entity related to Mr Essa.

764. During the period January 2007 to December 2014, Transnet concluded three key contracts with Neotel: the 2007 Master Network Services Agreement (the "2007 MSA”); the procurement of Cisco

Equipment (“the Cisco Transaction"); and the 2014 Master Network Services and Asset Buyback Agreement (“the 2014 MSA”).

765. Prior to 2009 two entities existed within Transnet which supplied IT services to Transnet. The first was Arivia which was the owner of Transnet’s data centre, including all the servers, information and data assets. It owned and operated all the hardware and software on which all the data of Transnet was kept. All the computer or electronic based information necessary for the operation of Transnet was thus centralised under the auspices of Arivia. The second entity was Transtel (Pty) Ltd, a subsidiary of Transnet, the network services provider that controlled the ICT network. It was responsible for and owned all of Transnet’s fibre assets, copper assets, routers and switches that enabled all of Transnet’s information applications to talk to each other. This comprised more than 9000 kilometres of fibre and copper cabling for regional communication and within Transnet campuses, as well as other substantial infrastructure including the switches and routers necessary for the electronic communication to take place. A decision was made in 2007 by Transnet to dispose of both businesses on the basis that they were not core to the operations of Transnet. A competitive procurement process resulted in T-Systems and Neotel respectively being the successful bidders for the data centre and the network.

766. The network services previously provided by Transtel were sold by Transtel to Neotel as a going concern in terms of a sale and purchase agreement (SPA) prior to the conclusion of the 2007 MSA in December 2007. As will become clearer later, this sale had significant strategic repercussions as it transferred control of Transnet’s network assets to an outside service provider, making it difficult (and prohibitively expensive) for Transnet to contract with any other service provider to take over the network later.

767. The 2007 MSA required Neotel to provide network services for a period of five years from 1 April 2008 until 31 March 2013. Clause 2.1 of the 2007 MSA provided that Neotel would “operate the business, assets, and infrastructure heretofore owned by Transnet and operated by Transtel in the provision of voice and data and additional telecommunications services to Transnet and its various divisions”. Hence, after the sale of Transtel, Transnet’s IT network, upon which it relied completely for the conduct of its business, was wholly outsourced and owned and managed by Neotel as an external service provider. At the same time, T-Systems managed Transnet’s data centre. Thus, the network was managed by Neotel and the data centre by T-Systems.

768. In 2012, Transnet opted not to extend the 2007 MSA with Neotel, but to put the IT network contract out to open tender. The time-consuming procurement process led to the extension of the 2007 MSA until late 2013.

769. In June 2012, nine months before the due expiry of the 2007 MSA, Transnet issued an RFP for a service provider to conduct a comprehensive due diligence exercise on its network assets and to develop a network sourcing strategy. The due diligence bid was awarded to Detecon International GmbH (Detecon), a company associated with T-Systems. Transnet further procured the services of another consulting firm, Gartner, to assist with the development of an RFP for the IT network services.

770. At a special meeting of the BADC held on 29 May 2013, the BADC resolved to authorise the GCEO “to approve the network services RFP, advertise, negotiate, award, contract and sign all relevant documentation in line with the approved strategy”. On the same day, Mr Singh and Mr Pita addressed a memorandum to Mr Molefe requesting him to approve the network services sourcing strategy and to grant authority to advertise an RFP to the open market for the provision of network services from August 2013 for three years with an option to extend for two years. The estimated spend for the network services contract was R1.5 billion over a period of three years, or R2.5 billion over five years, based on an estimate of R500 million per year. Mr Molefe approved the request and granted the necessary authority on 9 June 2013.

771. The RFP was issued on 14 June 2013 with an initial closing date of 16 July 2013 later extended to 13 August 2013. Five bidders submitted proposals: (i) Neotel; (ii) Telkom SA SOC; (iii) Dimension Data; (iv) Vodacom (Pty) Ltd; and (v) T-Systems in collaboration with Broadband Infraco SOC Ltd (BBI). BBI is a state-owned company, which at the time was working in co-operation with T-Systems. Mr Essa was appointed a director of BBI on 3 October 2011 and resigned on 14 October 2014.

772. The procurement process could not be completed by 31 August 2013, mainly due to extensions requested by the bidders, and thus the 2007 MSA was extended from 1 September 2013 to 31 October 2013 at a flat rate fee of R42.3 million per month (excluding VAT) less a discount of 0.25% per month, regardless of usage by Transnet.

773. Mr Molefe favoured T-Systems (a company linked to the Gupta enterprise) and attempted (in the end unsuccessfully) to award the network services contract to it, in addition to the data contract it already had. For that to have happened, the assets underlying the network business (the cables, the switches and the routers sold to Neotel by Transtel) needed to be transferred from Neotel. T-Systems, or for that matter any other bidder for the 2014 MSA, required the network assets to provide the service to Transnet. But after the SPA those assets were owned by Neotel and had been securitised by it after it concluded the 2007 MSA. Neotel had borrowed money and put up the assets as security for its loans.

774. The arrangement under the 2007 MSA had exposed Transnet to significant risk. Neotel as owner of the network assets had it in its power to switch off Transnet's network preventing it from using the network infrastructure, rendering it a "captive client". In addition, there was an exclusivity clause in the 2007 MSA which obliged Transnet to purchase any network equipment from Neotel. So, it was impossible for any other service provider (such as T-Systems) to provide the services unless it leased or bought the assets from Neotel; or Transnet replaced the assets at a significant cost. This led to the procurement of new equipment from Cisco, the supplier of the equipment, and efforts to buy back some of the assets from Neotel during the negotiations of the 2014 MSA. Once it seemed likely that T-Systems would get the contract and considering that much of the equipment was near the end of its life, Transnet officials entered into proactive discussions with Cisco to acquire the equipment through Neotel (due to the exclusivity clause) in order to start installing it and to transition the network from Neotel to T-Systems. Transnet at that point wanted to re-acquire ownership of the equipment but had to buy any new Cisco equipment via Neotel.

775. Neotel, Dimension Data and T-Systems were the only bidders that passed the functionality threshold and were thus considered for commercial evaluation. After a series of clarification sessions with the bidders and best and final offers were received, Neotel was ranked first of the bidders based on price and preference, with a price of R1.363 billion and preference points of 90. Dimension Data was ranked second with a price of R1.585 billion and preference points of 75.37. T-Systems was ranked third with a price of R1.737 billion and preference points of 65.35.

776. During the final clarification session held with the bidders, T-Systems indicated that its joint venture partner, BBI, was willing to negotiate optimisation with its shareholders which would result in an overall reduction of R248 million on their tendered pricing. T-Systems made this offer unilaterally and without being invited to do so at a time when the price negotiations were completed. Other bidders were not invited to make a corresponding offer of a price reduction, but some may have indicated the possibility of minor price adjustments. These proposals however were not taken into consideration by the evaluation team. Had T-System's offer been considered; it would have been placed second and Dimension Data third.

777. The evaluation team recommended that the tender should be awarded to Neotel.

778. On 30 October 2013, Mr Mahomedy (acting GCFO), Mr Matooane (CIO) and Mr Pita (GCSCO) addressed a memorandum to the acting GCEO at the time, Ms Sharla Chetty (then Pillay), requesting her, in accordance with the recommendation made by the CFET, to approve the procurement process, the award of business to Neotel and to sign the LOI and the letters of regret to the four unsuccessful bidders. Mr Molefe had appointed Ms Chetty to act in his position as the GCEO for the period 28 October 2013 – 1 November 2013 and delegated his powers to her. After considering the TEAR report, three TIA reports (confirming that the procurement process was compliant with Transnet policies), and an excerpt of the decision of the Board approving the extension of the 2007 MSA, Ms Chetty approved the procurement and signed the letters as requested.

The reversal of the award to Neotel

779. After Ms Chetty approved the award to Neotel and signed the letters of intent and regret, Mr Pita requested Mr Van der Westhuizen not to issue the letter, as he had been directed by Mr Singh not to do so, on the instruction of Mr Molefe, who was abroad at that stage and apparently wished to review the process upon his return. Neotel was then requested to continue providing the services.

780. During November 2013, Mr Van der Westhuizen was called to a meeting with Mr Molefe, Mr Matooane, Mr Thomas and Mr Singh. When he arrived for the meeting, he was requested by Mr Molefe's personal assistant to hand over his cell phone to her before entering his office. The other attendees were requested to do the same. He thought this was strange as he had previously attended meetings in Mr Molefe's office and had not been requested to hand in his phone. During the meeting, Mr Molefe indicated that he did not support the recommendation to issue a LOI to Neotel as the preferred bidder for various reasons which he later set out in a memorandum dated 20 November 2013. Mr Van der Westhuizen did not agree and raised various objections which Mr Molefe ignored. Mr Van der Westhuizen realised that his viewpoint was not being well received and decided in the interests of his career to refrain from challenging Mr Molefe. Mr. Van der Westhuizen saw the collaboration between T-Systems and BBI, of which Mr Essa at that time was a director, as factoring into Mr Molefe's decision.

781. After the meeting, Mr Singh instructed Mr Van der Westhuizen to draft a memorandum to record the outcome of the meeting. Mr Van der Westhuizen then prepared a draft memorandum, which was signed by Mr I Molefe and sent to Mr Singh (GCFO), Mr Matooane (CIO) and Mr Pita (GCSCO) on 20 November 2013. The memorandum overturned the decision of Ms Chetty to award the tender to Neotel and awarded it instead to T-Systems. Mr Brian Molefe specifically approved taking the R248 million into consideration as part of T-Systems best and final offer and referred to the following: (i) Neotel had indicated an intention to sell the network assets to Vodacom; (ii) the concentration risk arising from Transnet being Neotel's largest client; (iii) information that Neotel had diluted black ownership of the company; (iv) an information security incident at Neotel that had exposed Transnet to unnecessary risk; and (v) problems with the functioning of Neotel's security cameras in the ports. Mr Molefe recorded his view that awarding the business to Neotel would expose Transnet to unnecessary risk.

782. The award of the preferred bidder status to T-Systems by Mr Molefe made it necessary to plan for a transition of network services from Neotel to T-Systems. At the time, Neotel was still managing the ICT network and the relationship between it and Transnet had become strained. Mr Molefe was obliged to extend the 2007 MSA on 11 December 2013 for a period of 12 months at a substantially increased monthly fee. Having sold its network assets to Neotel in 2007, Transnet was in a weak bargaining position. Neotel also advised that certain network equipment had reached end-of-life and needed to be replaced. Transnet accordingly engaged with Neotel to purchase or lease the network related hardware and infrastructure deployed in the yards and ports of Transnet. Neotel was not amenable to the sale of these assets due to the fact that they had been securitised. It was also reluctant to replace any equipment during the extension period as the duration of the extension was uncertain.

783. On 21 February 2014, Mr Van der Westhuizen addressed a memorandum to Mr Singh requesting approval to procure equipment (switches and routers for all Transnet campuses) from Cisco via Neotel to a maximum value of R305 million. T-Systems undertook to remove this cost from their tender. Mr Singh approved the request on 21 February 2014 and Mr Van der Westhuizen immediately directed Mr Francois van der Merwe, the executive responsible for the Transnet account at Neotel, to proceed with ordering the equipment from Cisco.

784. On the same day, 21 February 2014, Mr. Taufique Hasware Khan the CFO of Homix (a company associated with Mr Essa) sent an email to Mr Van der Merwe at Neotel which attached a copy of a fax sent for his attention on 6 January 2014. The letter presented an opportunity for Homix to work with Transnet to replace network equipment to the value of R315 million (excluding VAT). Homix intimated that they were able to provide advisory services to Neotel and facilitate the direct award of contract

from Transnet to Neotel. Furthermore, given that Homix would carry great risk for the project, they requested a 10% success fee to be paid within 14 days from the date of the award of contract to Neotel. The next day, 22 February 2014, Mr Van der Merwe emailed Mr Khan at Homix attaching a letter of acceptance.

785. Mr Van der Westhuizen testified that he had not met any person or representative from Homix during the interaction with Neotel on the Cisco switches transaction. It was unclear to him how Homix identified this “opportunity” and was surprised that Homix knew about the approval of the transaction by Mr Singh on the very day of approval. He doubted whether Homix could have added any value. The exclusivity arrangement obliged Transnet to procure network equipment from Neotel and thus Neotel would have had no need at all for any services from Homix. Moreover, if there had been a genuine need for Homix’s facilitation services on the Cisco transaction, it would have been brought to Mr Van der Westhuizen’s attention as he was the team leader of the commercial team. This did not happen, which strongly intimates that no facilitation by Homix in fact took place.

786. A fee of R30.3 million (excluding VAT) was nonetheless paid by Neotel to Homix in respect of its alleged rendering of services in the Cisco transaction. There is no documentary evidence supporting this payment. However, the evidence of Mr Mazibuko, Head of Financial Surveillance at the South African Reserve Bank (SARB), confirmed that Homix was paid R75.5 million by Neotel in 2015. This amount seems to be made up of the payment for the Cisco transaction and the payment in terms of a business consultancy agreement that is discussed below. It is likely that the additional cost was passed on to Transnet.

787. During April 2014, Transnet’s external auditors reported that T-Systems should have been disqualified from the tender due to the conflict of interest and the rounding-off issue. They also questioned Mr Molefe’s authority to revoke the award and expressed the view that the factors which he took into consideration undermined the fairness and transparency of the tender process.

The 2014 MSA negotiations

788. The negotiations with Neotel to finalise the 2014 MSA took place in the final quarter of 2014. There were two streams in the negotiations: a commercial stream and a technical stream. Mr van der Westhuizen led the negotiation team in the commercial stream. A contentious issue during the negotiations was the buyback by Transnet of its ICT network assets and infrastructure. Transnet sought to re-acquire ownership of the equipment and infrastructure that it had imprudently sold to Neotel as part of the Transtel sale.

789. The negotiations were difficult and at a point in time there was a temporary stalemate because of the inability of Transnet and Neotel to find agreement on a number of issues. In an attempt to resolve the stalemate, Mr Singh became involved as did Mr Sunil Joshi, the CEO of Neotel. A meeting took place between Mr Van der Merwe from Neotel and Mr Singh, on 8 December 2014, in Umhlanga. Mr Van der Westhuizen was unaware of the purpose of that meeting or why the Transnet GCFO would meet directly with the supplier during the contractual negotiations without including anyone from the Transnet negotiating team. Mr Singh testified that he could not recall the meeting.

790. Three days later, on 11 December 2014, another meeting took place at the "SLOW Lounge" in Sandton attended by Mr Van der Westhuizen and Mr Singh from Transnet and Mr. Joshi and Mr Van der Merwe from Neotel. Mr Singh testified that the meeting was proposed either by Mr Van der Westhuizen or the negotiating team. A long list of issues still needed to be finalised and the negotiations had become strained. Mr Singh testified that a meeting was justified and there was nothing untoward in meeting Mr Joshi to discuss the matter because a stalemate had been reached by the two parties. It was necessary to engage with Neotel constructively at a senior management level to regularise the relationship. At some stage during this meeting, Mr Singh and Mr Joshi met separately to discuss the final terms of the repurchase of the network assets and infrastructure. Mr Van der Westhuizen was not provided with feedback after this breakaway meeting.

791. A final meeting to finalise the MSA took place on Saturday 13 December 2014 at the offices of Neotel.

When all was done, Mr Van der Westhuizen gave Mr Singh the final draft of the negotiated MSA and relevant approval documents. That day was Mr Van der Westhuizen's last day in the employment of Transnet. The 2014 MSA was signed by Transnet on 15 December 2014 and by Neotel on 19 December 2014.

792. Clause 25 of the 2014 MSA governed the asset buy-back issue. It dealt with distinct classes of assets differently. It provided inter alia that on the termination or expiration of the MSA, Transnet could exercise its rights to purchase any Service Provider Owned Equipment dedicated to the provision of services in accordance with clause 54.3.6 of the 2014 MSA. Clause 54.3.6 essentially provided that if and as requested by Transnet, as part of the disengagement, Neotel would convey to Transnet (from among those dedicated assets used by Neotel to provide the services) such assets as Transnet might select at specified prices. Further, in terms of clause 25.4, Neotel agreed to sell immediately to Transnet the assets identified in Attachment P to the agreement, used exclusively to provide services to Transnet and physically held within Transnet premises, for an amount of R200 million. Evidently then, the asset buy-back had been successfully resolved by Monday 15 December 2014 when Transnet signed the 2014 MSA.

793. On Friday 12 December 2014, unknown to Mr Van der Westhuizen, the CFO of Homix, Mr Khan (who was also associated with BEX, the Gupta linked company that benefited from the relocation of CNR to Durban), addressed a letter to Mr Joshi offering their services to assist "... both entities to find a workable solution". Mr Khan further intimated that "... Homix shall not bill for any time and material or any out of pocket expense. If successful, Neotel shall pay Homix" a number of fees including a full and final once off fee of R25 000 000 and 2% of the contract value for the MSA currently at R1.8 billion (excluded VAT).

794. This proposal by Homix thus envisaged that Neotel would pay Homix two amounts totalling R61 million: R25 million for the asset buy-back agreement and R36 million (2% of R1.8 billion) on conclusion of the MSA. The letter was sent by Homix shortly after Mr Van der Merwe on 11 December 2014 shared confidential Neotel documents with Homix, including a briefing document for Mr Joshi, the CEO of Neotel, in preparation for his meeting with Transnet later that day.

795. The assertion in the letter that the two deals (the 2014 MSA and the asset buy-back) were "lost business" on Friday 12 December 2014 (and confirmed as such by both Neotel and Transnet) is not credible considering that both deals were closed the next day (Saturday 13 December 2014) and signed by Transnet on Monday 15 December 2014. It seems improbable that services of Homix to the value of R61 million were either necessary or rendered in the 24 hours from Homix's proposal to the conclusion of the 2014 MSA and asset buy-back.

796. Mr Joshi signed two "business consultancy agreements" with Homix on 19 February 2015, two months after the 2014 MSA and asset buy-back was concluded. Both are signed and dated by Mr Joshi and signed but not dated by Mr Khan. Neotel paid Homix R41.04 million (being R36 million plus VAT of R5 040 000) on 27 February 2015.

797. Although the preamble and other clauses intimate that the two agreements were concluded in respect of future services, the other terms of the agreements indicate that in important respects they related to the 2014 MSA and the asset buy-back which had been concluded two months earlier.

798. Mr Van der Westhuizen who successfully led the negotiation of the MSA to a conclusion on 13 December 2014 (the day after Homix's initial letter proposing a business consultancy agreement with Neotel) was unaware of the existence of Homix at the time he closed deal. He subsequently learned in the media that Homix was paid by Neotel for allegedly facilitating negotiations between Neotel and Transnet. He testified that he never met or had anything to do with any person or representative of Homix during the negotiations with Neotel. No member of his team had anything to do with any person from Homix during the negotiations. The reference in the letter of 12 December 2014 to "lost business" and the representation of the negotiations as being at "impasse" was nonsensical in light of the successful conclusion of the deal the next day. The idea that any representative from Homix would have been able to get the parties to reach agreement within a single day is implausible.

799. Mr Singh could not confirm that Homix had performed in terms of the agreements and had no idea why Neotel had paid Homix R41.04 million. He testified that he had no interaction with Homix. After Deloitte the auditors of Neotel queried this transaction, Neotel was compelled to investigate it. During that investigation, Mr Ashok Narayan of Homix wrote a letter to Mr Joshi dated 2 July 2015 justifying the fee it received. No witness for Homix has testified to the Commission regarding the content of this letter. It is nonetheless the only account of Homix's version on record.

800. The letter commences with the inaccurate statement that "both the Asset Sale and the MSA were covered under a single Agreement between Homix and Neotel." That is not correct. There were two agreements. Moreover, the fee paid to Homix in terms of the invoice of 2 January 2015 was limited to a "success fee" for the successful conclusion of the MSA. No fee was paid (R25 million) for the asset buy-back. The letter sets out that Mr Van der Merwe met Homix's representative, Mr Mandla, at JB's Restaurant in Melrose Arch, the same restaurant at which Mr Bester of Hatch met Mr Essa in relation to Transnet's MEP project on 11 December 2014. At the meeting Mr Van der Merwe "requested consulting assistance with a fresh perspective to help Neotel close the deal". The following day, 12 December 2014, Mr Van der Merwe and Mr Mandla met again and agreed on a fee of 2%. The letter sets out the services rendered over three days supposedly justifying a fee of R36 million (excluding VAT).

801. The first observation that can be made about this explanation, besides its lack of specificity, is that it implies that Homix consulted with Transnet senior managers to assess the problem. The letter does not disclose who at Homix engaged with whom at Transnet and Neotel, besides Mr Van der Merwe. Mr Van der Westhuizen made it clear that neither he nor any member of his team knew of the existence of Homix or discussed the 2014 MSA or asset buy-back with it. Mr Singh confirmed that. Secondly, the claim that research by unidentified senior consultants (with unstated expertise) unearthed "a lever" is not substantiated. The auditors were unable to find any evidence that corroborated any of the assertions in the letter.

802. Furthermore, the advice allegedly given by Homix was so banal as to render the explanation wholly incredible. What it boils down to is that Homix advised Mr Van der Merwe, an experienced manager with negotiating experience, to: (i) act urgently to avoid censure by Parliament; (ii) arrange a meeting between Mr Singh and Mr Joshi; and (iii) ensure the presence of Neotel executives in the negotiations. This intervention, together with the pinpointing of "several key factors and a principal lever", Homix contended led both parties to understand each other's positions and reach agreement without further difficulty, thus justifying a fee of R36 million (excluding VAT). It achieved this result without meeting with or consulting a single member of the Transnet team and by allegedly meeting with Mr Van der Merwe once or twice.

803. The supposed "value add" by the intervention of Homix in the last hours of the negotiations is wholly improbable and a likely ex post facto false justification of a corrupt payment made to the Gupta enterprise as part of a pattern of racketeering activity. Mr Van der Westhuizen was not able to say whether Neotel inflated its price to use the additional money to pay the fee to Homix. He did consider the final price to be excessive, but Transnet was in a weak bargaining position because Neotel was in possession of the network assets, the 2007 MSA was about to expire and a further extension of the 2007 MSA would have been expensive. In paying the R41.04 million to Homix, Neotel breached clause 65.6 of the 2014 MSA which included a warranty against corrupt payments and permitted Transnet to cancel the 2014 MSA.

804. During the audit of Neotel for the 2015 financial year Deloitte, became concerned that the payments by Neotel to Homix were irregular. As part of its routine audit testing, the Deloitte audit team was provided with a creditors' age analysis on 28 February 2015, which identified Homix as a new vendor and reflected a debit balance of an amount of R41.04 million which was not disclosed properly in the financial statements. The incomplete and questionable nature of the available information prompted Mr Andre Dennis and Mr Chetan Vaghela of Deloitte to meet with Mr Steven Whiley the CFO of Neotel on 9 April 2015, and with Mr Joshi and Mr Whiley again on 11 April 2015.

805. Mr Joshi and Mr Whiley confirmed that Neotel had made two payments to Homix during the 2015

financial year totalling R75.57 million: an amount of R34.53 million was paid on 3 April 2014 in relation to the Cisco deal and R41.04 million was paid on 27 February 2015 in relation to the MSA. The controls applied by Neotel for the loading of creditors on its system were not followed in respect of Homix. The contract with Homix in relation to the 2014 MSA was concluded by Joshi, without Board approval and in the opinion of the auditors fell outside the scope of his authority. The payments were approved by both Mr Whiley and Mr Joshi. They explained to the auditors that Homix had come on Board on 12 December 2014 to assist with the supposed impasse in the 2014 MSA negotiations and was paid R41.04 million for one day's work. The suggestion to use Homix had come from Mr Van der Merwe. Neither Mr Joshi nor Mr Whiley could offer much in the way of description or explanation of the work performed by Homix other than to say that it had resolved the impasse.

806. Mr Vaghela met with Mr Van der Merwe on 13 April 2015. He became aware of Homix for the first time when he received the letter from Homix in early 2014 notifying him of the Cisco deal for which Neotel had not been invited to tender. This explanation is inconsistent with the fact that Transnet was tied into an exclusive supplier agreement with Neotel and thus did not need to tender. Mr Van der Merwe claimed Homix was a Dubai based company offering specialised consultancy services with a staff of 100 employees and offices in Silverton Pretoria. He usually met with Homix, particularly Mr Ashok Puthenveedu, at Melrose Arch. Mr Van der Merwe believed that the fee of R41.04 million for work of one or two days by Homix was justifiable. The Deloitte audit team doubted the commerciality of the fee paid and assumed it was a "facilitation payment" (a payment of a fee for no value).

807. Subsequent investigations established that Homix was a shell company with little or no resources. A CIPC search on the registration number of Homix returned no result; telephone calls made to the specified contact details were unanswered; an internet search on the registered address of Homix returned the address as being registered to a charity; and the website address did not return a valid webpage. Searches on Puthenveedu revealed that he was associated with Sahara, a company linked to the Gupta enterprise.

808. Following further engagements, the auditors on 8 February 2016 reported other RIs to the IRBA, in particular that the directors of Neotel had failed to report the corrupt transactions to the Financial Intelligence Centre within 15 days as required in terms of Section 29 of FICA and Section 34 of PRECCA. Neotel took issue with some of the reporting obligations which the auditors alleged applied to it in terms of FICA and PRECCA. However, it agreed on the advice of counsel to file some reports out of an abundance of caution but denied that there had been any breach of fiduciary duty in the failure to report and contended that in some instances it had complied with its PRECCA obligations.

809. Mr Joshi and Mr Whiley were placed on special leave by Neotel on 31 July 2015 and eventually re-signed on 30 November 2015 during the disciplinary proceedings against them. The audited financial statements were qualified in respect of the commerciality of the Homix transactions and disclosure on the matter is noted in the financial statements.

The SARB investigation into Homix

810. Mr Shiwa Mazibuko, the HOD: Financial Surveillance of the SARB testified before the Commission in respect of Homix and its directors (Mr Taufique Shaukat Hasware (Khan), Mr Yakub Ahmed Suleman Bhikhu and Mr Mugamat Shakif Adams) and the flow of funds on bank accounts held by Homix domestically and internationally.

811. SARB FinSurv established that Homix operated accounts at Standard Bank. From March 2014 (about the time of the Cisco transaction) there was a marked increase in the number of transactions in the accounts. During this period, the accounts received several large deposits. A cash flow analysis for the period 28 March 2014 to 3 December 2015 showed credits of more than R660 million among which were the two payments totalling R75.57 million from Neotel. Homix also received R179.5 million from Regiments during this same period.

812. The bank statements of Homix reflect regular large transfers to the accounts of two local entities, Ballatore Brands (Pty) Limited and Bapu Trading Close Corporation respectively. Notably, during April

2014, an amount of R34.5 million (including VAT) in respect of the Cisco transaction was transferred from Neotel to the Homix account at Standard Bank, after which the entire amount was depleted by means of electronic transfers to Ballatore Brands and Bapu Trading. The sole director of Ballatore Brands was Mr Mohamed Akram Khan who was the sole director of Syngen Distribution (Pty) Ltd. It appears from the statements of Bapu Trading's bank account held with Standard Bank that funds received from Homix were mainly transferred to Syngen's bank accounts.

813. The disbursement of the funds in the Homix Standard Bank accounts (including the money paid by Neotel) breached the Exchange Control Regulations. The exchange control function of the SARB is primarily governed by Section 9 of the Currency and Exchanges Act read with the Exchange Control Regulations. The Exchange Control Regulations prohibit various transactions which may only be entered into with the permission of the National Treasury or persons authorised by the National Treasury.

814. In May 2015, Mercantile Bank Limited, an authorised dealer, referred certain suspicious foreign exchange transactions involving Homix to FinSurv. During the period 21 to 28 May 2015, Homix effected thirteen cross-border foreign exchange transactions via Mercantile, with an aggregate value of approximately R51.8 million. On 29 May 2015, Homix attempted to affect a further three transactions, to the value of an additional R14.47 million but was prevented from doing so by the FinSurv. The relevant documentation revealed that Homix effected sixteen payments in favour of only two beneficiaries domiciled in Hong Kong, being Morningstar International Trade Limited ("Morningstar") and YKA International Trading Company that had little online or other commercial presence. Three MRNs were supplied by Homix to justify the sixteen transactions. Investigations on the SARS system revealed that while the MRNs were valid, the total value of goods cleared amounted to less than R50 000. Hence, the value of the payments made out of South Africa did not match the value of the goods claimed to be imported. Authorisation was sought for R51.8 million to leave the country, while only R50 000 worth of goods were to be imported.

815. All of the relevant transactions were 'booked' with Mercantile via Peritus Forex Solutions (Pty) Ltd, a treasury outsourcing company which acts as intermediary between an authorised dealer and a client attending to foreign exchange transactions on behalf of the client. A "trading account" was opened for Homix at Mercantile, and a mandate provided to Peritus to transact on its behalf. Peritus received instructions for the relevant foreign exchange transactions for Homix from Mr Bhikhu. After examining other documents, FinSurv was persuaded that the SARS EDI documentation provided to Mercantile by Homix was falsified.

816. After the finalisation of the investigation, a letter was sent by email and registered mail to Homix inviting it to make representations as to why the funds 'blocked' in the Mercantile account should not be declared forfeit to the state. FinSurv never received a response to this letter, nor did any person contact it regarding the contents thereof. The amount of R14.47 million was declared forfeit to the state in terms of Regulation 228 on 30 December 2016.

817. Mr Mazibuko testified that the Homix transactions displayed all the hallmarks of a money laundering scheme aimed at disguising the origin, true nature, and ultimate destination of funds.

T-Systems: The IT data tender

818. During January 2010, Transnet entered into an agreement with T-Systems for the provision of IT data services. Five extensions of the contract took place between 2010 and 2019. The total value of the contract over the nine years of its operation was approximately R4.8 billion.

819. Issues arose with T-Systems in 2015 when it was discovered that Transnet Group Capital was paying T-Systems for approximately 2200 computers when only 1100 were employed by the division. Furthermore, 450 computers leased through the T-Systems contract in July 2015 were delivered to Transnet but then disappeared. The forensic team of Transnet found that these computers could not be traced as the tracking software was not installed. The relevant contract was subsequently ceded initially to Zestilor and then later to Innovent Rental and Asset Management Solutions (Pty)

Ltd. Zestilor was owned by Mr Essa's wife. Transnet carried on paying rent for these leased computers for several years without having the benefit of them. Other evidence shows that T-Systems made regular monthly payments to Zestilor for the benefit of Essa and his wife, thus establishing some link between T-Systems and an associate of the Gupta enterprise.

820. During November 2015, Transnet issued an RFP to the open market for the supply of IT data services. Prior to issuing the RFP, Transnet contracted Gartner Ireland to review the services procured from T-Systems through the IT Outsourcing Master Services Agreement (MSA) and to draft new technical specifications, technical evaluation criteria and improved service level agreements. The process was initiated by the GCIO of the time, Dr Mantsika Matooane, who approved the business case, the service requirement specifications, the evaluation criteria and the appointment of the CFET. Before the RFP was issued, Transnet extended the T-Systems contract until 31 December 2016. The Transnet Board sub-delegated its authority to the GCEO (Gama) to approve the RFP, issue the RFP and conduct due diligence and PTN.

821. The RFP was for the outsourcing of data services for the whole of Transnet. The outsourced services related to the build and upkeep of Transnet's IT estate which included: (i) the data centre and hosting services - which included servers, databases, storage, mainframe and the disaster recovery of these services; (ii) the help and services desk; (iii) the collaboration services and applications used by Transnet; and (iv) end user computing. The tender, estimated to cost R1.85 billion over five years, was a consumption-based contract and had an un-costed portion driven by new projects when required.

822. Four witnesses testified in relation to the award of the RFP and the controversy that arose in relation to it: Mr Popo Molefe, Mr Volmink, Mr Mahomedy and Ms Makano Mosidi.

823. In January 2017, the T-Systems contract was extended for a second time by a further nine months to enable Transnet to finalise the award of the RFP, which at that time was still at the adjudication stage. Transnet was obliged to extend the contract three more times between October 2017 and 8 March 2019.

824. The evaluation process resulted in seven bidders meeting the technical standards of the tender: T-Systems; Gijima Holdings (Pty) Ltd (Gijima); Ubuntu Technologies (Pty) Ltd (Ubuntu); Wipro Technologies South Africa (Pty) Ltd; Business Connexion (Pty) Ltd; EOH Mthombolo (Pty) Ltd; and Mobile Telekom Networks (Pty) Ltd.

825. On 30 June 2016, Ms Mosidi received an email from Mr Pita recommending a shortlist of only two bidders for the final round of adjudication, namely T-Systems and Ubuntu. These, he explained, provided the first and second lowest priced bids in terms of the PPPFA 90/10 principle – 99% and 86.2% respectively. Ms Mosidi responded recommending to Mr Pita and Mr Gama (then GCEO) that four bidders be shortlisted because she was concerned that bidders sometimes withdraw unexpectedly in complex and commercially sizeable tenders, resulting in the extension of the evaluation process unnecessarily. A shortlist of two bidders was cutting it too fine. Seven bidders had successfully satisfied the technical requirements and increasing the shortlist from two to four would not be onerous.

826. In an email addressed to Ms Mosidi and Mr Pita dated 6 July 2016, Mr Gama rejected Ms Mosidi's proposal saying it was "adialectic to think negotiating with more will save more time or money". Ms Mosidi's view proved to be correct. On 20 July 2016, Ubuntu withdrew from the PTN process. On the instructions of Mr Gama, the third highest ranking bidder, Gijima, was then added to the shortlist.

827. During July-August 2016, due diligence was conducted on T-Systems and Gijima, after which they were requested to submit their BAFO. Gijima provided the lowest priced bid and scored a final score of 99%. T-Systems scored a final score of 85.07%.

828. After the due diligence exercise (done by Gartner Ireland), Mr Pita and Mr Thomas prepared a memorandum addressed to Mr Gama recommending the award of the tender to T-Systems. The purpose of the due diligence was to identify business risks to minimise Transnet's operational risks after contract award. No major risks were identified on T-System's bid. However, several risks were identified in relation to Gijima's bid. These included: (i) a risk that the data centre still needed to be built and

outstanding equipment needed to be procured from overseas, which may have delayed the transition; (ii) a marginal security risk that Gijima did not have a dedicated security operations centre; and (iii) a major risk with regards to Gijima's transition commitment from the current service provider (T-Systems) which would lead to additional cost for Transnet in the migration from CMO (current mode of operation) to FMO (future mode of operation).

829. An engagement with Gijima about addressing the risks did not prove satisfactory. The CFET felt that Gijima did not provide a strategy on mitigating the risks, which it believed were material. It was concerned that by selecting Gijima "with their current proposition", Transnet ran the risk at not being at CMO and FMO within six months. There was also a risk of the transition project over-running, which would be costly for Transnet.

830. Based on the identified business risks, the CFET decided that Gijima should not be recommended for the award of the tender and that T-Systems instead be recommended as the successful bidder. On 22 September 2016, Ms Mosidi was presented with the complete file of the evaluation process by Mr Thomas, the then GCSCO, and was requested to sign the memorandum to Mr Gama recommending the award to T-Systems. She went through the file and could not "reconcile some evaluation aspects to the final recommendation". While the procurement process was in accordance with the procurement policy, she felt the recommendation was not in line with the evaluation outcome. The bidders had submitted their BAFO in August 2016, which meant that all technical evaluations and risks had been assessed and finalised, with the result that the only consideration left for bid assessment was pricing. As mentioned, Gijima had offered the lowest priced bid in the BAFO stage. The recommendation of T-Systems as the preferred bidder, in her opinion, was accordingly inconsistent with the outcome of the BAFO evaluation process.

831. Ms Mosidi was later called to a meeting at the Carlton Centre to conclude the adjudication process and append her signature to the memorandum as the business owner. The memorandum presented at the meeting was similar to the memorandum she had seen earlier. It was compiled by Ms Pheladi Xaba, Commodity Manager: Group Strategic Sourcing. Despite her ambivalence and not wanting to delay the process, Ms Mosidi appended her signature to the recommendation but added in the manuscript that she thought the risks as captured could be mitigated, Gijima could deliver against the requirements and had the right country profile. Mr Thulani Mtshwene, the Executive Manager: Governance also had some reservations and noted on the memorandum that his signature was conditional on the high value tender report being satisfactory and that objective criteria were applied.

832. The discomfort that Ms Mosidi experienced about the recommendation to award the bid to T-Systems led her to write a detailed response regarding each mentioned risk, explaining why they were not real risks. She gave the document to Mr Mboniso Sigonyela, the Executive Manager in Mr Gama's office who advised her to hold back her response for "the right time".

833. At about the same time, Ms Mosidi was made aware of a letter, dated 5 October 2016, addressed anonymously by a group of "Concerned and Proud Transnet Employees" to Ms Disebo Moephuli, the then Chief Corporate and Regulatory Officer, pertaining to the tender. It is clear from its contents that the employees were either members of the CFET or worked closely with it. The letter made several allegations including: (i) the procurement process had been corruptly manipulated as part of state capture; (ii) the Gijima award was R230 million cheaper; (iii) the identified risks were manufactured to award the bid to T-Systems despite it losing on merit; and (iv) Gijima, a local company with better B-BBEE credentials, had been prejudiced by a deliberate flouting of the procurement policies. The letter confirmed Ms Mosidi's discomfort about there being something untoward in the process.

834. Around October 2016, Ms Mosidi met Mr Gama at the Tintswalo Hotel in Waterfall Estate, Johannesburg where they discussed the tender. She assumed that he had read her memorandum and knew of her objections. Mr Gama had not at any point in the past taken a contrary position to her or openly disagreed with her reasoning. Ms Mosidi explained to Mr Gama that the decision to award the tender to Gijima was the right one, as it was inappropriate for risks to be re-introduced post the BAFO stage. The risks were irrelevant, misleading, or immaterial. Mr Gama in response prevailed upon Ms Mosidi to get her facts straight as procurement could be a life endangering business. Mr Gama's warning

rattled Ms Mosidi. She understood him to be asking her if she was aware of the dangers of going against the tide.

835. In his evidence before the Commission, Mr Gama denied that he attempted to intimidate Ms Mosidi at the meeting at the Tintswalo Hotel. He intended to assure her that she had his full support to carry out her role as the GCIO and to determine why she had signed the September 2016 memorandum recommending that T-Systems should be awarded the business, despite her discomfort. He said he had a sense that she may have been intimidated to sign the document and he needed to engage with her to give her the comfort that she could disagree with things. He also needed to get a sense of whether she had the courage to disagree and put forward facts of her own for her to be able to make those decisions. He admitted though that he might have said people are willing to pay lots of money to survey people who make decisions about procurement.

836. The version that Mr Gama may have put pressure on Ms Mosidi gains a measure of credibility from the ultimate award of the tender to T-Systems. As will become clearer later, key decision-makers at Transnet were determined to give the contract to T-Systems and most likely wanted the support of the GCIO to advance that preference.

837. In late December 2016, Ms Mosidi met with Mr Gama and Mr Thomas in Mr Gama's office. Mr Gama suggested that she as GCIO and the business owner of the tender should test the identified risks with Gijima. He also directed that Procurement should facilitate an engagement and send questions to Gijima.

838. On 19 January 2017, Mr Macdonald Maluleke, Category Manager: Group Strategic Sourcing, addressed a letter to Gijima posing several questions related to the identified risks associated with Gijima's transition plan, possible delays; the reduction of its final price by 31% and the like. At a meeting held at the offices of Transnet Engineering in Kilner Park on 23 January 2017, Gijima was able to address all the issues raised concerning the transition from CMO to FMO, their R500 million price reduction, the steps to be taken in getting the data centre operational, the pre-ordering of equipment and related matters. At the end of the meeting, the Transnet team agreed that all risks had been mitigated and agreed that the tender should be awarded to Gijima.

839. In early February 2017, two separate memoranda were drawn up with different recommendations for Mr Gama's signature. The one memorandum from Mr Pita recommended the award of the tender to T-Systems, and the other from Ms Mosidi recommended the award of the tender to Gijima. Mr Gama requested Mr Pita and Ms Mosidi to "iron out" their differences and submit one memorandum for him to approve. They finally signed a memorandum dated 8 February 2017 recommending that the tender be awarded to Gijima.

The BADC and Board meetings and the award to T-Systems

840. The BADC met on 13 February 2017 to consider the award of the tender. Before the commencement of the BADC meeting, Mr Shane, the Chairperson of the BADC requested that the meeting be adjourned to brief Mr Gama. During the adjournment, Mr Shane informed Mr Gama that the non-executive directors intended to overturn the recommendation of management to award the contract to Gijima.

841. The tender was discussed in detail when the BADC meeting re-convened. Mr Thomas, Ms Mosidi and Mr Silinga made extensive submissions in support of the recommendation. Most members of the BADC were not favourably disposed to awarding the tender to Gijima. The minutes of the meeting accurately summarise the different points of view that were expressed and are reflected in the transcript of the meeting. The transcript of the meeting discloses a degree of irrationality and adverse animus or bias against Gijima on the part of some members of the BADC.

842. The interventions by Mr Shane specifically were troubling. His contribution was at times rambling, intemperate, incoherent and of a low standard. His pre-disposition favouring T-Systems was plainly evident, improperly motivated by irrelevant extraneous factors and demonstrated a failure to appreciate his fiduciary duty to act in good faith by testing the market and to seek alternative partners where

there was compelling evidence that the incumbent was performing below par.

843. Interventions by other members of the BADC were equally unedifying. Mr Nagdee (another member of the BADC alleged to have links to the Guptas) revealed a lack of understanding about the purpose of the clarification meeting with Gijima when he expressed the concern that Gijima was "given so many opportunities to fix things, to mitigate the risks you know, and there is no opportunity for anybody else". Ms Mabaso also believed that Gijima acted illegitimately when "all of a sudden they tricked and changed their price all of a sudden". Other members supported awarding the tender to T-Systems on the basis of the risks which were accepted to be "objective criteria". Some were concerned about the price reduction and Transnet having been too lenient to Gijima in affording it an opportunity to mitigate the risks.

844. Ms Mosidi made a valiant attempt to assure the members of the BADC that a proper assessment had been done on Gijima and that the risks had been appropriately mitigated. She explained that the R500 million reduction of the price came about after Gijima received further clarification on the scope of the contract, which it had previously misunderstood. The pricing risk could be easily mitigated and managed. The cost of data was progressively declining which also contributed to the reduction in price. As for the "perceived leniency" towards Gijima, Ms Mosidi explained that the clarification meetings were a standard process of engagement. Moreover, the tender to Gijima would introduce a saving of R1 billion.

845. The BADC (particularly the Chairperson) did not have faith that the risks could be adequately monitored and managed through contract management due to the existing challenges that plagued Transnet. Mr Shane described the performance of those responsible for contract management as poor. The BADC accordingly chose not to support the award of the tender to Gijima and recommended to the Board that it approve the award of the tender to T-Systems.

846. During the meeting, Mr Gama sent Ms Mosidi an SMS or WhatsApp telling her to "stop fighting because it was clear what the Board wanted". She only saw the message after the meeting. Mr Gama explained that he sent the message because it was clear to him that the non-executives, led by Mr Shane, had made up their minds to overturn management's recommendation. On 15 February 2017 Mr Gama and Mr Pita addressed a memorandum to the Board of Transnet recommending that it approve the award of the contract to T-Systems for a period of five years with an option to extend for a further two years. The memorandum explained that the BADC had not supported the recommendation for the award of the contract to Gijima, the first ranked bidder, based on the identified "objective risks".

Gijima's complaint and the final award of the tender

847. During March 2017, Gijima lodged a complaint with the Transnet Procurement Ombudsman objecting to the invocation of the perceived risks as "objective criteria" to justify not awarding it the contract. Because the complaint related to a decision taken by the Board, Transnet referred the matter to National Treasury for investigation.

848. National Treasury, in a letter dated 29 July 2017, concluded that the award had to be made to Gijima, as the highest scoring bidder. It held that the objective criteria on which the Board sought to rely ought to have been stated upfront in the tender document. Since the bid document did not specify the objective criteria, Transnet was obliged to award the bid to Gijima as the highest scoring bidder. This reasoning is questionable. In appropriate cases, and subject to certain safeguards being met, risk can be considered as an objective criterion; and the law is unclear on whether the objective criteria need to be stipulated in the RFP. However, where an Organ of State relies on objective criteria to justify not awarding the tender to the highest scorer, it must do so in a procedurally fair manner and invite representations from that bidder. Most importantly, factors already considered during the evaluation of the bid may not be revisited under the guise of "objective criteria". When Gijima's bid was evaluated, it was found that it had passed all relevant thresholds and met all bid requirements. The evidence showed that the perceived risks had been mitigated.

849. On 27 July 2017, Mr Silinga and Mr Volmink recommended to Mr Gama that: (i) Transnet abide by the ruling of National Treasury; (ii) T-Systems be invited to make representations on Transnet's proposed decision to abide the ruling of National Treasury; and (iii) Transnet proceed to make the award to Gijima, after following a judicial process to set aside its award of the tender to T-Systems. On 27 September 2017, the Board resolved to set aside its earlier award to T-Systems. In 2018, Transnet approached the High Court for an order declaring its decision to award the tender to T-Systems to be invalid and a direction that the tender be awarded to Gijima. T-Systems and Gijima eventually indicated that they would abide the decision of the court. On 12 December 2018, the Johannesburg High Court granted the order as prayed for by Transnet. Referring to Mr Shane's performance during the BADC meeting, the court remarked that it was left wondering whether the BADC was not driven by "extraneous considerations".

850. The conduct of Mr Shane and Mr Nagdee in relation to this tender was suspect and evinces a clear intention to favour T-Systems above Gijima. T-Systems was linked to the Gupta enterprise via Sechaba Computer Systems. Sechaba was T-Systems' SDP in Transnet contracts. T-Systems paid Sechaba more than R323 million between February 2015 and December 2017, while the MSA was extended. The Gupta enterprise took over, controlled or owned Sechaba from mid-2015. Sechaba made multiple payments to Gupta laundry vehicles, including Albatime and Homix running to R2.8 million while it was T-Systems' SDP.

851. Zestilor, owned by Mr Essa's wife, was paid a monthly retainer by Sechaba of R228 000 between October 2015 and May 2016, rising to R342 000 per month between June 2016 and October 2016. In total Zestilor was paid more than R5 million by Sechaba. Zestilor itself made payments to first-level laundry entities during the period July 2014 to November 2016 totalling over R2 million. From 2012 to 2015 T-Systems made regular monthly payments of more than R80 000 to Zestilor. More than R3 million was paid over that period. Moreover, as mentioned, T-Systems ceded to Zestilor the equipment sale and rental elements of the MSA that it had with Transnet. Following the cession by T-Systems of the equipment rental and supply elements of the MSA to Zestilor, Zestilor made several large payments to Sahara Computers.

FINDINGS AND RECOMMENDATIONS

852. State capture goes beyond and is qualitatively different from specific acts of bribery and corruption. It is a systematic scheme of securing illicit and corrupt influence or control over the decision-making and conduct of state institutions, including SOEs. The focus is on accessing and redirecting resources for the benefit of private, corrupt actors by gaining control over staff appointments and removals, restructuring of governance bodies, centralising power and influence over large procurements and capital expenditure, changes to the procurement mechanisms, such as the use of confinements rather than open tenders, the altering of bid criteria to favour corrupt suppliers, and the payment of inflated costs and advance payments.

853. The evidence shows that a series of carefully timed appointments and removals of senior executives took place. Transnet governance structures were deliberately changed to facilitate irregular procurement decisions for the benefit of specific individuals and entities. Corrupt procurement practices were sustained by bringing approval authority for high value tenders under centralised control and weakening internal controls designed to prevent corruption and malfeasance. Collusion between individuals inside and outside of Transnet, as part of a co-ordinated effort to access and re-direct funds and benefits in substantial procurements, resulted in the strategic appointment of specific individuals in positions of responsibility.

854. The evidence establishes that Mr Salim Essa, through using two shell companies, namely Regiments Asia (Pty) Ltd and Tequesta (Pty) Ltd) concluded several so-called Business Development Services Agreements (BDSAs). These were essentially kickback agreements with various companies, some based in Hong Kong (CSR [Hong Kong]) Co. Ltd, and CNR [Hong Kong] Co. Ltd, later known as CRRC Hong Kong, or with CSR Zhuzhou Electric Locomotive Company Ltd (CSR) and China North Rail (CNR) or its subsidiary, CNR Dalian Locomotive and Rolling Stock Co. Ltd. CSR and CNR were

two of the successful bidders in various procurements by Transnet. They amalgamated in 2015 and became known as CRRC.

855. Most of the corruption and money laundering at Transnet happened while Mr Singh was the GCFO, Mr Brian Molefe was the GCEO, and Mr Sharma was the chairperson of the BADC.

856. There is evidence of corruption in relation to Transnet's Manganese Expansion Project. Various witnesses provided compelling testimony that unqualified persons associated with the Gupta family sought improperly to benefit from the project by seeking appointment as SDPs and suggested that the contract price could be inflated to accommodate payments for services that added no value.

857. The evidence shows that many of the irregularities that attended the high value tender procurements between 2011 and 2017 took place within the BADC or at the instance of the GCEO, Mr Brian Molefe and GCFO, Mr Singh, on occasions when they acted without the prior scrutiny and review of Governance.

858. The evidence confirms that Mr Molefe knew the Gupta family well, particularly Mr Ajay Gupta to whom he often spoke to on the phone.

859. These persons failed to exercise the duty of utmost care to ensure reasonable protection of Transnet's assets' and did not act with fidelity, honesty, integrity and in the best interests of Transnet in managing its financial affairs. In acting inconsistently with their responsibilities, the Board members probably contravened Section 50(2)(a) of the PFMA.

860. It is a criminal offence for the Board or its members wilfully or in a grossly negligent way to fail to comply with the duties and responsibilities set out in Sections 50 and 51 of the PFMA. The nature of Mr Gama's settlement and its wholly unjustifiable content alone point to wilful or grossly negligent conduct. It follows that there are also reasonable grounds to believe that the Board members acted in a manner that inflicted harm on Transnet and which conduct amounted to a breach of trust so as to justify an application to declare such persons delinquent as contemplated in section 162(5) of the Companies Act 71 0f 2008, and an action for recovery of damages in terms of Section 77 of this Act.

861. The evidence of the role played by Mr Gigaba, President Zuma and Mr Mkwanazi in the Gama saga, and the likely benefit of Mr Gama's reinstatement and subsequent promotion for the Gupta enterprise, provides a reasonable basis to conclude that these individuals participated in furthering the affairs of the Gupta enterprise through a pattern of racketeering while associated with it, as contemplated in POCA.

862. The findings regarding the improprieties associated with Mr Gama's reinstatement thus reveal possible attempts by then Minister Gigaba and President Zuma to influence the Directors of the Board of Transnet through possible inducements and links to the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise.

863. The evidence before the Commission reveals that the individuals appointed to key positions had a relationship or contact with the Gupta enterprise and Mr Essa in particular.

864. The evidence of Witness 1, assessed together with the evidence regarding Mr Brian Molefe's appointment, the role he played in the various transactions tainted by irregularity and corruption that favoured the Gupta enterprise and his frequent association with the Guptas, left unanswered, would amount to a prima facie case of corruption and one or more of the racketeering offences. His denials must be assessed against his general credibility, which is reflected upon negatively throughout this report: his close association with the Gupta enterprise, his failure to cross-examine Witness 1, and his failure to produce any supporting documentation corroborating his version that the cash payments into his personal bank account were for the benefit of the burial society.

865. On this basis it is possible to conclude that there are reasonable grounds to believe that Mr Brian Molefe may have committed the crime of corruption by accepting a gratification to act in violation of his duties or to influence the price under various contracts or the procurement of tenders favouring the Gupta enterprise. There are also reasonable grounds to believe that Mr Brian Molefe was associated with or participated in the affairs of the Gupta enterprise through a pattern of racketeering activity.

866. As with Mr Molefe, the evidence of Witness 3 provides reasonable grounds to believe that Mr Gigaba might have been involved in corruption and racketeering and, justifying a referral for prosecution and further investigation.

867. The evidence of Witness 3, viewed with the conspectus of evidence incriminating Mr Singh in relation to his conduct at Transnet and Eskom during the period of state capture, together with his marked tendency to mislead, be evasive and to give false testimony, provides clear and convincing grounds for a finding ithat Mr Singh committed the crime of corruption by accepting a gratification to act in violation of his duties or in order to influence the price under various contracts or the procurement of tenders favouring the Gupta enterprise. There are accordingly also strong reasonable grounds to believe that Mr Singh was associated with or participated in the affairs of the Gupta enterprise through a pattern of racketeering activity. These findings justify a referral for prosecution and further investigation.

868. For the reasons outlined, the evidence relating to the cash bribes gives rise to strong and convincing reasonable grounds that Mr Brian Molefe, Mr Singh, Mr Pita, Mr Gama and Mr Jiyane corruptly received property from and participated in the conduct of the affairs of the Gupta enterprise through a pattern of racketeering activity. Appropriate referrals for prosecution and further investigation are justifiable.

869. In terms of the procurement of 95 locomotives, there are accordingly reasonable grounds to believe that these persons may have committed the offences of corruption and money laundering as contemplated in section 5 and 6 of POCA. Money laundering and corruption are offences listed in Schedule 1 of POCA; thus, any successful prosecution on such charges could be relied on in a racketeering charge.

870. These findings in terms of the procurement of the 95 locomotives are to the effect that there are reasonable grounds to believe employees and Board Members of Transnet violated the Constitution and other legislation by facilitating the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise and involved corruption. The likely offences and identified wrongdoing should accordingly be referred for further investigation by the law enforcement agencies.

871. Whatever the truth about CSR's modus operandi, the irregular procurement process and the BDSA with CSR prima facie constitute arrangements by Mr Brian Molefe, Mr Gama, Mr Singh, Mr Sharma, Mr Jiyane and Mr Essa with CSR, which facilitated the retention, control, use and possession of the proceeds of unlawful activities and from which they all may have corruptly benefited.

872. The conduct of Mr Singh, Mr Molefe, Mr Gama and Mr Jiyane in relation to the CRS probably amount to breaches of Sections 76(1) and (3) of Companies Act and Sections 50 and 51 of the PFMA. They knowingly did not act in the best interest of Transnet and acted prejudicially in relation to its financial interests. The submission of the memorandum to the Board recommending confinement also breached the PPM and not seeking the correct technical input was a breach of fiduciary duty. The failure to alert the Board about Mr Callard's concerns amounted to non-disclosure of material information and a failure to act with integrity in the financial affairs of Transnet. Submitting a misleading memorandum on the escalation of the price and Mr Jiyane's authorising of payment without an APG was also a breach of these provisions.

873. The obvious favouring of CSR and the evidence regarding the kickbacks points towards corrupt activity relating to procuring a tender in violation of Section 12 of PRECCA. There are accordingly reasonable grounds to believe that those involved participated in the conduct of the affairs of the Gupta enterprise through a pattern of racketeering activity in contravention of Section 2 of POCA. These findings are to the effect that there are reasonable grounds to believe employees and Board Members of Transnet violated the Constitution and other legislation by facilitating the unlawful awarding of tenders by Transnet to benefit the Gupta enterprise and involved corruption. The likely offences and identified wrongdoing should accordingly be referred to the law enforcement authorities for further investigation.

874. All of this wrongdoing detailed above in relation to procurement of 1,064 locomotives constitutes

contraventions of various provisions of Sections 50 and 51 of the PFMA on the part of the role players, namely Mr Brian Molefe, Mr Singh, Mr Gama, Mr Sharma, and other Board members in relation to the transactions in which they were involved. At various times they failed to exercise the duty of utmost care to ensure reasonable protection of the assets of Transnet. Individually they did not act with fidelity, honesty, integrity and in the best interests of Transnet in managing its financial affairs and did not comply with its operational policies and applicable legislation.

875. Taken with the allegations of corruption against Mr Brian Molefe, Mr Singh and Mr Gama concerning their receipt of cash gratifications from the Gupta enterprise and the payment of kickbacks to Mr Essa's companies and the Gupta enterprise by CSR and CNR, there are reasonable grounds to believe that Mr Brian Molefe, Mr Singh, Mr Gama, Mr Essa and Mr Sharma, as well as others, received property derived from a pattern of racketeering activity and participated in the conduct of the affairs of the Gupta enterprise through a pattern of racketeering and may have committed various offences under Section 2 of POCA and money laundering in terms of Sections 4 to 6 of the POCA.

876. With regard to the relocation of CNT and BT to Durban, Paragraph 12.6 of the PPM (2015) provides that where a contract amendment increases the value or period of a contract, supplier development must be re-negotiated based on the cumulative value and/or period of the contract. There was no compliance with this provision which should have been considered and effected by the legal personnel in the relocation negotiation team, in this case Mr Silinga. His conduct accordingly fell short in this respect.

877. The impropriety of the variations arising from the relocation, and their part in the Gupta money laundering and racketeering enterprise, is disclosed in the evidence relating to the payment made to BEX, contracted by CNRRSSA to assist it with the relocation negotiation process. The PFMA contraventions result in the payment to BEX being the proceeds of unlawful activities and thus there are reasonable grounds to believe that the directors of BEX, CNRRSSA and the relevant officials of Transnet contravened Sections 5 and 6 of POCA and Sections 3 and 13 of PRECCA respectively. The benefit to the Gupta enterprise means also that there are reasonable grounds to believe that Mr Singh, Mr Gama, Mr Silinga and Mr Shaw participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity in contravention of Section 2 of POCA.

878. As there was no legal basis for Transnet to pay Regiments an additional fee on a risk sharing basis, there being an agreement with McKinsey for a fixed fee (purportedly ceded to Regiments), both Mr Brian Molefe and Mr Singh were in breach of their fiduciary duties and their conduct led to prejudicial expenditure not in the interest of Transnet in contravention of Sections 50 and 57 of the PFMA. The contraventions of the PFMA constituted unlawful activity as defined in Section 1 of POCA and hence the payments to Regiments were the proceeds of unlawful activities. The acquisition and possession of these proceeds by Mr Essa's shell companies and the arrangement in terms of which they were transferred constitute the money laundering offences contemplated in section 5 and section 6 of POCA. These planned and continuous money laundering offences, being offences in Schedule 1 of POCA, establish a pattern of racketeering activity by the Gupta enterprise. There are accordingly reasonable grounds to believe that Regiments, Mr Brian Molefe, Mr Singh, Mr Essa, Mr Wood, Mr Moodley and others participated in the conduct of the affairs of the Gupta enterprise and may have committed one or more of the racketeering offences contemplated in Section 2 of POCA. The matter should accordingly be referred to the law enforcement authorities for further investigation.

879. The undisputed evidence alone establishes strong probable cause and reasonable grounds to believe that Mr Gama and Trillian were associated with the Gupta racketeering enterprise, and by authorising the wholly unjustifiable payment of R93.48 million to Trillian, Mr Gama acted corruptly and participated in the conduct of the affairs of the enterprise through a pattern of racketeering in contravention of section 3 and 13 of PRECCA and various provisions of section 2 of POCA.

880. In total an amount of R316 238 389 was paid to the transaction advisors by Transnet. Most of that, R305 235 000 was paid to Regiments. An amount of R11 003 389 was paid to McKinsey in terms of the LOI that expired on 30 November 2013. Regiments received an additional R228 million from the interest rate swaps involving the TSDBF. Part of these payments was transferred via the laundering

vehicles to the Gupta enterprise. The fees paid and the substantial losses incurred on the interest rate swaps were in contravention of the PFMA and thus were the proceeds of unlawful activity. There is thus reasonable ground to conclude there was planned and continuous money laundering and that Regiments, Trillian, Mr Gama, Mr Ramosebudi, Mr Pita, Mr Wood and others participated in the conduct of the affairs of the Gupta enterprise through a pattern of racketeering activity in relation to these transactions.

881. With reference to the Manganese Expansion project, as explained, the evidence regarding the attempts by Mr Reddy and Mr Essa, with the assistance of Mr Singh, to secure appointment of their companies as SDPs on both the Phase 1 and Phase 2 contracts, provides reasonable grounds to believe that the offence of corruption was committed in those instances.

882. Mr Singh and Mr Essa's proven association with the Gupta enterprise, Mr Singh's earlier attempts to make the appointment of DEC a pre-condition to the award, his manipulation of the SD component, the manner in which the meetings with Mr Essa were set up and their purpose, Mr Essa's disclosure of the modus operandi of inflating tenders for illegal purposes, together with Mr Reddy and Mr Essa's boasts about their access to Mr Brian Molefe and their corporate and political influence, all point to a pattern of racketeering involving the Gupta enterprise. There are thus reasonable grounds to believe that Mr Essa and Mr Singh may have committed corruption (schedule 1 of POCA) and, in the circumstances surrounding the award to Hatch of the tenders for Phase 1 and Phase 2 of the MEP, reasonable grounds to suspect that Mr Singh, Mr Essa, Mr Reddy and Mr Padayachee, whilst associated with the Gupta racketeering enterprise participated in the conduct of the enterprise's affairs through a pattern of racketeering in contravention of section 2(1)(e) of POCA.

883. These findings are to the effect that there are reasonable grounds to believe that Mr Essa, Mr Singh, Mr Reddy and Mr Padayachee violated the Constitution and other legislation and were involved in corruption. The likely offences and identified wrongdoing should accordingly be referred for further investigation by the law enforcement authorities.

884. There are reasonable grounds to believe that Mr Khan at Homix, Mr Van der Merwe at Neotel, and perhaps others, committed the offence of corruption relating to procuring the tender of R305 million from Transnet, as contemplated in section 13 of PRECCA. Mr Khan offered to accept a 10% commission, ultimately R30.3 million, (a gratification) from Neotel as an inducement (by influencing persons at Transnet) to award a tender for supplying the Cisco equipment. As Homix was an entity associated in fact with the Gupta enterprise, the planned participation and involvement in that corruption may be relied on to establish that Homix, Mr Khan, Mr Van der Merwe, Neotel, and possibly some officials at Transnet, by virtue of their involvement with this transaction, were associated with and participated in the affairs of the Gupta racketeering enterprise through a pattern of racketeering activity, and hence committed the offence envisaged in section 2(1)(e) of POCA. The likely offences should accordingly be referred for further investigation by the law enforcement authorities.

885. The evidence as a whole therefore provides reasonable grounds to believe that in relation to the payment of the R41.04 million to Homix there was planned participation by Mr Joshi and Mr Van der Merwe in the offences of corruption, money laundering and fraud, as well as contraventions of the schedule 1 of POCA for the benefit of the Gupta enterprise. The authorisation and facilitation by Mr Joshi, Mr Whiley and Mr Van der Merwe of the illegal payments to Homix whilst associated with the Gupta racketeering enterprise, in particular, give rise to reasonable grounds to believe that they participated (possibly along with Mr Singh) in the conduct of the enterprise's affairs through a pattern of racketeering and thus contravened section 2(1)(e) of POCA. These findings are to the effect that there are reasonable grounds to believe that these persons violated relevant legislation and were involved in corruption. The likely offences and identified wrongdoing should accordingly be referred to the law enforcement authorities for further investigation.

886. There is a prima facie case that in seeking to favour T-Systems they did not act with fidelity, honesty, integrity and in the best interests of Transnet. They acted prejudicially to Transnet's financial interests by unjustifiably favouring a bid that was R1 billion more expensive on spurious "objective criteria". There are accordingly reasonable grounds to believe that they contravened section 50(1)(b) and (d)

of the PFMA.

887. The evidence does not disclose any basis for concluding that Mr Gama, Mr Shane or Mr Nagdee accepted any gratification connected to their failed attempt to favour T-Systems and hence any reasonable grounds to believe the offence of corruption was committed by them in relation to this transaction. However, given the links of T-Systems, Mr Shane, Mr Essa and Mr Nagdee to the Gupta enterprise, their conduct may be of evidential value in establishing that they were individuals "associated in fact" with persons constituting the Gupta "enterprise" as defined in section 1 POCA and may be criminally liable in terms of Section 2(1)(e) of POCA for participating in the conduct of the enterprise's affairs through a pattern of racketeering established by their involvement (if any) in other Schedule 1 offences not linked to this particular tender.

DENEL

INTRODUCTION

1. This report specifically relates to transactions within the state-owned enterprise (SOE) called Denel SOC Limited (Denel) and certain of its subsidiaries and divisions as disclosed in the evidence presented to the Commission.
2. Under its TOR the Commission was directed to, amongst other things, inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector's SoCR, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016.
3. One of the SOEs implicated in media reports considered by the Public Protector was Denel.
4. The allegations raised concerning Denel are concerning for the following reasons:
    4.1 Denel was established in 1991 and is a state owned entity which specialises in arms and aerospace manufacturing. In 1992 the decision was taken to incorporate Denel under the portfolio of the Department of Public Enterprises.
    4.2 According to Denel's website,

        > Denel provides turn key solutions of defence equipment to its clients by designing, developing, integrating and supporting artillery, munitions, missiles, aerostructures, aircraft maintenance, unmanned aerial vehicle systems and optical payloads based on high end technology. Its defence capabilities date back more than 70 years when some of Denel's first manufacturing plants were established.

    4.3 Denel has over the years entered into numerous co operation agreements, joint ventures and equity partnerships which enable Denel to be a leading manufacturer within the aeronautical and arms manufacturing industry as well as a key supplier to the South African National Defence Force.
    4.4 Denel has twelve main divisions under which it conducts its various business activities. According to Denel's integrated company report 2015/2016, they rank among the world's top one hundred global defence manufacturers. This makes Denel one of the key SOEs, which need to be managed effectively and efficiently in order to promote growth within the South African economy.
5. Denel was established in terms of an agreement in 1992 between the Minister of Public Enterprises, the Minister of Defence and Communication, the Armaments Corporation of South Africa (Armscor) and Denel. Armscor was split into two separate state-owned companies, Armscor and Denel. Armscor proceeded to function as an acquisition agent for the Department of Defence and Denel as a

manufacturer of military equipment. Denel has five divisions, three subsidiaries and four international associated companies. It employs over 3 000 employees (60% artisans, technicians, engineers, and scientists). Relevant to the Commission are the Denel Landward Systems (DLS) division, and the subsidiaries: Denel Vehicle Systems (Pty) Ltd (DVS) and Land Mobility Technologies (Pty) Ltd (LMT).

6. In 2015 Denel acquired a South African subsidiary of the British company, BAE Systems PLC, previously BAE Land Systems (Pty) Ltd. Its name was changed to Land Systems South Africa (Pty) Ltd (LSSA) and then to Denel Vehicle Systems (Pty) Ltd (DVS). The purchase price was R855 million.

SCOPE OF THE EVIDENCE

7. The Commission's interest stems from the Public Protector's report (October 2016), which addressed allegations in the media and from other sources, particularly regarding the involvement of the Gupta family and associates in the establishment of VR Laser Asia and Denel Asia and the suspension of three key members of Denel's Exco, who were relieved of their duties (September 2015).

8. The evidence focussed on the following topics:

   8.1 Finances and corporate structure of Denel: 1990s until 2015.

   8.2 Denel internal processes whereby business was channelled to VR Laser, thus establishing VR Laser in a supremely dominant position as a supplier of Denel's requirements of "complex engineering systems" at stated tariffs for a period of ten years, and instituted as Denel's joint venture partner in "Denel Asia", intended to target the arms market in India and Asia.

   8.3 Conclusion of three large contracts between Denel and VR Laser: (i) the hulls contract (28 November 2014) between Denel Landward Systems (DLS) and VR Laser; (ii) the DLS single source contract (19 May 2015), appointing VR Laser as single source supplier to Denel of complex engineering systems at agreed tariffs for a period of ten years; and (iii) the DVS single source contract (14 December 2015), appointing VR Laser as single source supplier to Denel Vehicle Systems (Pty) Ltd for complex armour steel fabrications for vehicles and related steel products for a period of ten years.

   8.4 The replacement in mid-2015 of all but one of the members of the 2011 Denel board and the constitution of the new board (the 2015 board); the summary suspension (September 2015) of CEO Mr Saloojee, group CFO Mr Mhlontlo and group company secretary, Ms E Afrika, pending disciplinary enquiries that never took place, and their departure from Denel with substantial payouts; and the subsequent financial and governance decline of Denel.

HOEFYSTER PROGRAMME

9. In 2007 Armscor awarded DLS a contract ("Hoefyster programme") to manufacture 217 new generation infantry combat vehicle products systems to replace the Ratel infantry combat vehicle. Seven variants of the Hoefyster infantry combat vehicle (Badger) were to be manufactured. The Hoefyster design is based on a platform hull design from Patria Land Services Oy of Finland [2]. Because DLS was not a complete armoured vehicle manufacturer but specialised in the assembly of the vehicles, most of the manufacturing of the different parts of the vehicle had to be outsourced.

10. Hoefyster was to be completed in two phases: development and production. The development phase was to have been completed by 2012, but by 2021 it was still incomplete owing to Denel's lack of funds, engineering complexities, loss of critical skills, slow progress and protracted decision-making processes, exacerbated by COVID-19. Initial cost estimates had been inadequate. These issues were raised with the Portfolio Committee on Public Enterprises (October 2020), when the chair, Ms Hlahla said,

[2] A "platform hull" is the body of the vehicle onto or into which all the features of the vehicle are attached.

Hoefyster remains the biggest threat to Denel. If the parties do not find a way to resolve the technical issues around the programme, Hoefyster remains the single biggest programme on Denel's balance sheet or income statement.

11. The Minister of Defence and Military Veterans (Parliament, September 2020) said:

    Project Hoefyster suffered significant delays and Denel is currently reneging on contractual deliveries.... In 2018 Denel formally indicated to Armscor it cannot complete the project within timescales, specifications or budget and requested a reset of the contract.

DENEL FINANCIAL CHALLENGES

12. The Treasury concluded (16 February 2021), that Denel would run out of cash at the end of March 2021. It was battling to pay salaries and other expenses despite Government guarantee facilities of R5,93 billion and Treasury provision of R1,8 billion for recapitalisation (2019/20) and R576 million for 2020/2021. Denel could not meet sales targets or implement its turnaround plan, particularly to sell non-core assets and find strategic partners. Denel recorded a loss of R1,2 billion by December 2020 and forecasted a nett loss of R1,6 billion by March 2021.

13. Between 1992 and 2000, the equipping of the SANDF was restructured. Most (70%) of SANDF acquisitions were imported. Denel's cumbersome and unprofitable obligations impacted negatively. Research and development expenditure was drastically reduced. Access to commercial markets with non-military products was unsuccessful. Between 2001 and 2004 Denel adopted a strategy to centralise core activities but lost critical markets and sustained increased financial losses. Thus began a long period of financial problems.

14. Between 2005 and 2009, a turn-around strategy was adopted, inclusive of rightsizing, by reorganising the business, workforce and management and managed decentralisation of governance and authority to improve performance and accountability.

15. Denel's board was re-constituted in 2011, under its chair, Ms Janse van Rensburg. Its executive was headed by the group CEO, Mr R Saloojee, a veteran of Umkhonto we Sizwe (MK) and later the South African National Defence Force. Ms Janse van Rensburg testified that the business of Denel grew significantly from 2011 to 2015, reversing previous losses (corroborated by evidence of Mr Tlhakudi, then DDG of the DPE with responsibility for SOEs). From 2010 to 2012, a new strategy was undertaken to improve revenue, optimise efficiency and costs, and leadership and transformation. Shortly after its appointment, the 2011 board appointed Mr Saloojee as CEO.

16. The 2011 board achieved significant successes, and when almost entirely replaced in 2015, it left an unprecedented order book of R35 billion in Denel's traditional products such as missiles, artillery, and military vehicles. Tangible opportunities worth some R40 billion were being actively pursued. Denel's strategic markets had expanded to the Middle East, Africa, South America and the Far East. From a loss-making situation from 2005 to 2010, Denel showed a profit from 2011 to 2015. In 2015, Denel was solvent and liquid (equity R1,9 billion; assets R9,7 billion). Funds and borrowing facilities were sufficient for the next twelve months. This changed substantially with Denel struggling to pay salaries in 2021.

Denel and the 2011 Board

17. Denel's net loss of over R1,5 billion in 2005 had by 2015 been converted to profit, and work on hand worth R6 billion. Denel was praised in Parliament and in the media, and its board was deemed by Deloitte to be highly effective both in providing oversight and direction. Denel secured clean and unqualified audits from the Auditor General (AG). Nevertheless, the 2012 target date for completion of the development phase of Hoefyster had passed with no indication of completion.

VR Laser: Its shareholders and its relationship with Denel

18. VR Laser Services (Pty) Ltd was a large supplier to which Denel could turn for the manufacture of the components which went into the complex machine cutting and bending of armour plate and steel. Its shareholders were Mr John van Reenen and Mr Gary Bloxham and in 2007 Mr MJ Jiyane and his wife [3] acquired an interest in VR Laser for R270 million. A bank financed R61 million of the purchase price and the balance of about R200 million remained a debt owed by the company.

19. In 2012 Mr and Mrs Jiyane realised that the business of VR Laser was not producing the results anticipated due to less demand for products and services by the US government. They sought to negotiate a reduction of the vendor loan with Messrs van Reenen and Bloxham, who offered to sell their shares and loan accounts (including the vendor loan) for R120 million but the Jiyane's found no support from the banks or the Industrial Development Corporation (IDC).

20. Mr Jiyane had separate discussions in late 2012, in an effort to find a new partner, with Mr Saloojee, the Denel group CEO, Mr Z Ntshepe, the Denel business development and marketing executive, and Mr S Burger, the CEO of DLS.

MR ESSA AND THE GUPTAS

21. In February 2013 Mr Jiyane attended a defence exhibition in Abu Dhabi in the UAE where Denel was exhibiting and represented by Mr Ntshepe. Mr Ntshepe subsequently introduced Mr Jiyane to Mr Salim Essa, of Essar Capital, an associate of the Guptas. Mr Jiyane and Mr Essa agreed to take the matter further when back in South Africa.

22. Enter the Guptas. All the evidence shows that Mr Essa was an associate of the Gupta family and there was complete synergy between the interests of the Gupta family and the interests of Mr Essa. Mr Essa and his colleague Mr Iqbal Sharma negotiated with Mr Jiyane about buying out Messrs van Reenen and Bloxham while the Jiyanes would remain as shareholders and even possibly increase their shareholding. Mr Jiyane would become the CEO of VR Laser after the takeover.

23. Mr Essa called a meeting in September 2013 attended by Mr Jiyane, Mr Essa's financial advisors, Mr N Wyma and Mr J Loeb of Regiments Capital who gave Mr Jiyane offer documents that he was to pass on to Messrs van Reenen and Bloxham. One was an offer, signed by Mr Sharma on behalf of Elgasolve (Pty) Ltd to buy the property which VR Laser traded for R50 million from "Propco", whose identity was undisclosed. Another document was a sale of shares agreement by which Elgasolve bought the shares of Messrs van Reenen and Bloxham in VR Laser (74,9% of VR Laser's issued shares) for R72 million, to be paid on or before 10 December 2013.

24. Elgasolve paid Messrs van Reenen and Bloxham the agreed amounts and the property on which VR Laser traded was transferred out of the control of Messrs van Reenen and Bloxham. Mr Jiyane was told that Mr Iqbal Sharma had through Essar Capital (Pty) Ltd obtained control of VRLS Properties (Pty) Ltd, the company that had owned the property. There was no clarity on how Messrs van Reenen and Bloxham, and the Guptas, structured the property transaction.

25. Mr Essa did not keep his promises to Mr Jiyane. On 6 January 2014, the Guptas' new management team gathered at the premises of VR Laser. One of them was later identified as Mr Tony Gupta. Mr Sharma transferred all executive control from the Jiyanes to two representatives of the Guptas, an arrangement extremely unsatisfactory to Mr Jiyane and by an agreement dated 20 February 2014, Mr and Mrs Jiyane sold their 25.1% shareholding in VR Laser to Craysure Investments (Pty) Ltd for R16,5 million. Mr Jiyane was obliged to work for a further twelve months for VR Laser at a monthly cost to company package of R148 761, 43 until the Gupta's attorney, Mr Pieter van der Merwe took over from Jiyane as CEO in late 2014.

26. The evidence of Mr van der Merwe shows that from 2014 onwards, VR Laser made every effort to trade profitably and grow by supplying good work to its customers.

[3] Mr and Mrs Jiyane were married in community of property.

27. The Guptas bought, at market related prices, control of a significant supplier of armoured steel to Denel, although the Gupta connection with the transaction was never explicitly disclosed to Messrs van Reenen, Bloxham and Jiyane. The Guptas invested substantial sums in acquiring control of VR Laser and then caused it to operate, at one level, legitimately in the market in which it had always operated.

The Guptas begin efforts directed at capturing Denel through VR Laser

28. Parallel to the legitimate operations of VR Laser, the Guptas and Mr Essa were operating VR Laser in another dimension altogether. In the first quarter of 2014, Mr Essa contacted Mr Saloojee to meet individuals who were in a position to assist Denel with future business. This request came from the "very top" and it was in Mr Saloojee's interest to attend such a meeting.

29. Eventually, Mr Saloojee acceded to Mr Essa's request and was taken by Mr Essa the Gupta compound in Saxonwold where he was introduced to Mr Tony Gupta, Mr Atul Gupta and Mr Malusi Gigaba, the then Minister of Public Enterprises. It is here that Mr Saloojee says Minister Gigaba told him that "these people" were his friends and that he hoped that they and Mr Saloojee could work together. This evidence shows that then Minister Gigaba, was introduced to the CEO of one of the SOEs under his control by the Guptas at their home and place of business.

30. Mr Saloojee was aware that he had been brought to the Saxonwold compound to show him the reach of the Guptas' influence. This fact informed his further dealings with the Guptas.

31. Several weeks later Mr Essa summoned Mr Saloojee to another meeting at the Saxonwold compound. Here Mr Tony Gupta and Mr Essa introduced Mr Saloojee to Mr Duduzane Zuma, the son of the then president of the Republic, and a man introduced as Mr Ace Magashule's son. At this meeting Mr Essa told Mr Saloojee that the Guptas had supported his appointment as Denel CEO and that they had the full support of "number one". They also referred to them having the full support of "the old man". Mr Saloojee took these to be references to Mr Jacob Zuma. Mr Essa also informed Mr Saloojee that the Guptas wanted to do business with Denel and assist Denel in getting business in other markets, particularly in the Middle East and Asia. Mr Saloojee told them at this meeting and thereafter that, if they wanted to do business with Denel, they had to go through the proper channels.

32. Mr Saloojee evaded Mr Essa's requests to meet but eventually attended a meeting at the Saxonwold compound in the latter part of 2012 where he was told by Mr Tony Gupta to cooperate more closely with the Guptas. He said Mr Saloojee was "not cooperating" and that he did not want to "elevate it further" as the Guptas were working hard to get the Denel blacklisting in India lifted that arose from a criminal investigation into conduct in India attributed to Denel. The blacklisting lasted from 2004 until 2014. Even when the blacklisting was lifted, Denel was unable to penetrate the Indian market. At this meeting, Mr Tony Gupta complained that Denel was one of the few SOEs which was not supporting the New Age Newspaper, a Gupta- owned publication, with subscriptions or advertising. Mr Saloojee insisted the Guptas follow procedures and that to do business with Denel they had to follow the proper processes. When the meeting ended, Mr Tony Gupta walked out with Mr Saloojee and asked him why he, Mr Saloojee, did not take money because "everyone does". Saloojee replied that he did not. If the Guptas wanted to do business with Denel, Mr Saloojee said, they should contact Denel's then Business Executive: Marketing Development, Mr Zwelakhe Ntshepe.

33. Mr Saloojee later introduced Mr Essa to Mr Ntshepe. Prior to the meeting, Mr Saloojee cautioned Mr Ntshepe to follow due process regarding the Guptas. Mr Essa and Mr Ntshepe developed their own relationship. From time to time Mr Ntshepe asked Mr Saloojee to meet Mr Essa so that Mr Ntshepe could provide feedback on their discussions.

34. At one of these meetings, Mr Essa discussed buying companies that would allow the Guptas entry into the defence environment. Mr Essa asked Mr Saloojee about the viability of VR Laser. Mr Saloojee knew that VR Laser had a relationship of some years standing with Denel and responded positively. Ms Lyn Brown replaced Minister Gigaba in May 2014 as Minister of Public Enterprises and Mr Saloojee was told at a meeting with Mr Essa and Mr Ntshepe, that the Guptas had the support of

the new Minister. Mr Saloojee's evidence in this regard is consistent with that of Mr Jonas who said that the Gupta "brother" he had a meeting with on 23 October 2015 mentioned Ms Lyn Brown as one of the people who was working with the Guptas.

Background to MOU between Denel and VR Laser to produce hulls for Hoefyster

35. During 2014, Denel was required to deliver a quantity of platform hulls onto which the Badger infantry combat vehicle would be built under Hoefyster. The two main structural components of the vehicle were the hull and the turret. An intense debate within Denel arose around the question of to whom the work of constructing the hulls would be outsourced. On 29 April 2010, DLS and LMT concluded a contract under which LMT was to supply turrets (or trunnion machining) for Hoefyster. LMT was under severe financial constraints at the time. Denel agreed to make advance payments to LMT totalling R1,7 million. Contemporaneously, Denel acquired an option to purchase 70% of the shareholding in LMT. This was seen as operating as a sort of security for Denel for its investment in LMT.

36. A presentation to a sub-committee of the Denel board, 18 August 2011, identified LMT as a strategic supplier to DLS and critical to Hoefyster. By acquiring control of LMT, Denel not only secured a strategic supplier and denied it to Denel's competitors, but also established a vehicle for integration of capacity within Denel. Denel would thereby acquire a subsidiary/ division capable of constructing hulls, generate additional business and save costs.

Denel acquires control of Land Mobility Technologies (LMT)

37. The position of Group Chief Operating Officer (COO) was created in early 2013 becase the board saw the need for more technical and industrial expertise in the Denel corporate office team. Mr JM Wessels was the first such incumbent. This position enabled Mr Wessels to form an overview in regard to the acquisition of LMT by Denel.

38. On 8 May 2012 after the requisite permissions had been obtained, Denel exercised an option to purchase 51% of the shares in LMT from its erstwhile private sector shareholders, with Pamodzi Investment Holdings (Pty) Ltd taking 29% as Denel's empowerment partner. Pamodzi put up a total of R30 million towards recapitalising LMT: R10 million in cash and R20 million by way of preference shares.

39. The remaining 20% of the shareholding was retained by the erstwhile private sector shareholders in LMT: Dr Stefan Nel (8%) and Mr Andrew Hodgson and Mr Chris Gilliomee (6% each). Dr Nel had been the CEO of LMT at the time of its takeover by Denel. Dr Nel was kept on as CEO of LMT until he was replaced in March 2016 by Mr Wessels. Dr Nel then became COO of LMT and resigned from Denel on 19 September 2016.

40. During the period 2014 to 2015, negotiation and conclusion of contracts with suppliers was decentralised. That means that they were done by each Denel division according to approved thresholds set at Denel group level.

41. According to Mr Wessels tension arose between Mr Burger and Dr Nel, the CEOs of DLS and LMT respectively, on a variety of projects and technical issues. Both Dr Nel and Mr Burger were "world class" players with different views on the best way to success. This tension peaked in the debate whether Denel should acquire a majority stake in LMT. Resolving this tension became one of Mr Wessels' key tasks, allocated to him by Mr Saloojee. There were cogent arguments both for and against decentralising. On the one hand, decentralising spread the risk and enabled Denel to go into the market to select suppliers both for quality of work and price. On the other hand, there were strategic reasons why it was desirable for Denel to maintain capability in house.

42. Mr Wessels came to know VR Laser in 2014 as an armoured steel component supplier with a generally good reputation. In 2014 Mr Burger of DLS persistently argued to the Denel senior management that LMT could not be relied upon in this regard but that VR Laser was well equipped to meet Denel's

expectations regarding hull manufacture for the Hoefyster programme. This view, it seemed, was also held by Patria, the Finnish design company responsible for the Hoefyster vehicle.

43. At that stage, VR Laser was a highly regarded but also very narrowly specialised company and worked closely with LMT. VR Laser cut pieces of armoured steel precisely and then returned these to LMT who would weld them into the whole structure. However, after VR Laser had been sold to its new owners, its ambition was to obtain business in the field of welded parts, i.e., assembling the finished product from various parts, thus becoming a competitor with its old customers, including LMT.

44. LMT was acquired primarily to manufacture welded steel hulls for the Hoefyster programme. Around 2014, Mr Saloojee asked Mr Wessels and Mr Mhlontlo to advise him on the argument made by DLS that the hull manufacture no longer be awarded to LMT but that the contract be put out to a procurement process.

45. In an email dated 29 July 2014 Mr Wessels proposed a compromise: that the hull components be supplied by VR Laser and the doors and internal components be supplied by LMT. This position was supported by Mr Burger and Mr Mhlontlo.

46. In the opinion of Mr Wessels, this debate dragged on because Mr Saloojee did not make a decision. The impasse since July 2014 was potentially compromising the Hoefyster delivery schedule. The essence of the debate had to do with procurement processes in Denel and DLS and that LMT had become a subsidiary of Denel in order to do the work and to save Denel costs incurred from outsourcing.

Denel goes to the market by closed tender for hulls contract

47. Denel did not follow an open tender process with public advertisements calling for tenders from all possible bidders. Instead, a closed procurement process was followed by Denel involving a targeted and limited Request for Offers ("RFO") which was issued during February 2012. The RFO was sent to three specific entities, all having a history of active involvement in the arms equipment supply sector, being (1) Denel's own group subsidiary, LMT; (2) a locally based arms equipment supplier DCD-Dorbyl (Pty) Ltd ("DCD"); and (3) VR Laser. Of these LMT's price was the lowest, followed by VR Laser which was some R90 million higher. DCD-Dorbyl's price was the highest.

48. Each of the Cross-Functional Team members (or Bid Committee members) provided separate scorings for each of the bidders. These were aggregated to prepare an overall panel evaluation sheet showing the following scores allocated to the candidates:

BIDDER	**PRICE**	**TECHNICAL**	**BBBEE**	**TOTAL SCORE**	**FINANCIAL OFFER**
	max 25	max 45	max 30	max 100	Rands
LMT	25.00	39.78	0	64.78	R165,612,451
VR LASER	10.39	50.15	5	65.54	R252,406,634
DCD	4.42	41.86	0	46.28	R301,916,300

49. These scores show a marginal difference of less than 1% between the top two bidders, LMT and VR Laser: LMT received a score of 64.78, while VR Laser received 65.54.

50. Some within Denel, including Mr S Burger, regarded the work produced by LMT as substandard. A major criticism of LMT related to a consignment of Casspir hubs built by LMT for a UN order. The hulls of all those vehicles cracked and many in the professional engineering world in Denel blamed LMT's workmanship for the Casspir hull failures. Other criticisms of LMT included poor planning, late delivery and uncompetitive pricing. Although LMT scored less than VR Laser for technical/functionality, LMT

was found to be technically compliant by Patria and Denel's internal officials. And it was a subsidiary within the Denel Group, subject to its management control. LMT was not disqualified for lack of technical compliance; it was simply scored lower than VR Laser against that criterion.

51. On price, LMT was scored 25, whereas VR Laser was scored 10.39, reflecting the huge difference in the prices they tendered. LMT's offer translated into a total contract price of R165,612,451, substantially less than that of VR Laser at R252,406,634.

52. Reference was made above to the fact that VR Laser's average price of over R1.16 million per vehicle exceeded the previously set limit of R1 million per unit. VR Laser's bid probably should have been disqualified or rejected on that ground alone. LMT's bid, on the other hand, equated to an average of R763,191 per unit, well below the budget limit of R1 million per unit. Even if VR Laser was not disqualified, its bid would cost Denel R86,794,183 more than LMT's overall contract price.

53. A further aspect relates to the B-BBEE scoring. As Ms Malahlela's email to Mr Burger of 27 June 2014 indicated, VR Laser alone had received a score of 5 points. LMT and DCD had received a nil score, but this was subject to revision: LMT and DCD had submitted BBBEE certificates which had expired and needed to be updated. Furthermore, Pamodzi was in fact Denel's empowerment partner in LMT and had contributed R30 million towards getting LMT back on its feet. Ms Malahlela indicated to Mr Burger that (in terms of Denel's processes) they would be allowed the opportunity to do so within fourteen days, in which event their scores would be adjusted to reflect the B-BBEE assessment. This was particularly relevant in LMT's case, where its majority shares were held by Denel, an SOE.

54. Further, even without any score for B-BBEE, there was no material difference between LMT's overall score and that of VR Laser, and, crucially, LMT's total price was substantially lower than VR Laser's pricing.

55. The evaluation committee declared VR Laser the winner on scoring by a margin of only 0,76%. This gave rise to protracted boardroom battles. Prominent in the struggle to have the tender awarded to VR Laser was Mr Burger, the CEO of DLS. On the other side were Ms Malahlela, the Denel executive manager: supply chain, and Mr D Mlambo, the Denel group executive: supply chain.

56. After email correspondence with Mr Burger, Ms Malahlela received an unsolicited email from VR Laser that provided a revised lower price. The other two bidders were afforded no such opportunity. It is probable that VR Laser was approached by Mr Burger pursuant to Burger's emailed indication to Ms Malahlela on 27 June 2014 that he would be asking VR Laser to reduce its prices "outside the normal channels". Ms Malahlela forwarded the revised pricing to Mr Teubes, who noted his response as "Interesting". Later the same day he "recommended" that she should revise the Cross-Functional Team's memorandum to Exco to reflect (1) the revised pricing she had just received from VR Laser; and (2) a clear recommendation that the Platform Hulls Contract be awarded. The memorandum was then to be forwarded to Mr Burger "for his call" and further processing.

57. The Commission finds that this was unlawful and unfair, and intended to favour VR Laser inappropriately. The three bidders had submitted their prices previously. They were scored according to those bids by the Cross-Functional Team, and those scores reflected a much higher score for LMT on the important issue of price, whereas VR Laser's price as submitted was more than half higher than LMT's price. Now, VR Laser was being permitted, according to Mr Teubes, to revise its price – apparently in response to a request from Mr Burger "outside normal channels" – to make it more attractive. Neither LMT nor DCD was offered the same opportunity to revise their prices.

58. The course being followed was, the Commission finds, unlawful and unfair. It violated section 217 of the Constitution, the PFMA and the Denel Supply Chain Policy. A representative of Patria compiled a memorandum dated 3 March 2014 visiting the three bidders. This memorandum recorded that VR Laser was capable of manufacturing the whole hull from parts to delivery, that Patria was concerned about information leakage at DCD-Dorbyl and that Patria considered that LMT had a poor level of welding quality and needed to improve in order to be able to manufacture the hulls. Another factor of concern to the engineers within Denel was that LMT failed the land mine protection tests conducted by the CSIR.

59. Under the Denel Company Policy on Delegation of Authority, which applied to all group entities such as DLS, the award of a procurement contract with a value of over R20 million required prior consultation with the Group Executive: Supply Chain, who at that stage was Mr Dennis Mlambo. Procurement via a contract with a value between R50 million and R200 million required the approval of the Group CEO (at that stage Mr Riaaz Saloojee) after consultation with the Group Supply Chain Manager. A procurement contract with a value exceeding R200 million required approval from Denel's Board at head office (group) level. The latter would again require consultation with the Group Executive: Supply Chain.

60. Mr Mlambo explained, in his evidence before the Commission, the purpose of the rule requiring consultation with the Group Executive: Supply Chain prior to approval of all transactions above the value of R20 million was to prevent the award of tenders without following approved processes and applicable legislation. Regrettably it was not properly complied with in relation to this issue. Both Mr Mlambo and Ms Malahlela were opposed to the process followed.

61. At end October 2014, Mr Saloojee called a meeting in his office, attended by Mr Saloojee, Mr Burger, Mr Ntshepe, Mr Mhlontlo, and Mr Wessels. The recollection of Mr Wessels was that Mr Mlambo was not present. An intense debate ensued. During the debate, reference was made to Mr Mlambo's email dated 9 September 2014 in which Mr Mlambo had rejected the proposition that the contract be awarded to VR Laser because procurement procedures had not been followed. However, a counter-argument was advanced either by Mr Ntshepe or Mr Burger that Mr Mlambo's concerns had been adequately addressed.

62. Mr Burger argued at the meeting that he could not rely on LMT to ensure the safety of the crew within the vehicle and said that, if Mr Saloojee instructed DLS to contract with LMT for the hull manufacture, Mr Saloojee should relieve DLS of responsibility for crew safety and bear the burden himself.

63. The outcome of the meeting in Mr Saloojee's office at the end of October 2014 was that the compromise was accepted. VR Laser would get the hulls contract and LMT would be contracted by DLS to manufacture the hull doors and internal components. An agreement to this effect was signed on 28 November 2014 between DLS and VR Laser.

Failure of certain executives within Denel to adhere to appropriate tender process

64. Sections 217(1) and (2) of the Constitution provide as follows:

    64.1 When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

    64.2 Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for

        64.2.1 Categories of preference in the allocation of contracts; and

        64.2.2 The protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

65. The award of the hulls contract was irregular. The process was flawed in the following respects: it was improper to approach VR Laser to reduce its tendered price without giving the other two tenderers a chance to revise their tenders and, in particular, to update their BBBEE statuses; it was improper to sideline and then override Mr Mlambo who was against the award to VR Laser precisely because of flaws in the process; it was improper to accept the criticisms of LMT's capacity to perform without giving LMT an opportunity to deal with those criticisms; it was improper not to start the tender process afresh once the flaws in the process were pointed out; the process was concluded in an over hasty manner.

66. Several Denel executives defended the decision to put the hulls contract out to closed rather than open tender. Mr Saloojee justified the departure from the norm of open public tender on the grounds of

audit and risk assessments; supply chain management protocols and procedures; analysis of market and new opportunities; advantages and disadvantages of the deviation; and comparative analysis in favour of the deviation.

67. The evidence does not show that the decision to adopt a closed tender process was irregular. There is no evidence before the Commission which shows that Denel suffered any prejudice as a result of the closed tender process adopted or, indeed, the decision to award the hulls contract to VR Laser. VR Laser had not yet taken over by the Guptas. It had good BBBEE credentials: some 30% of its shareholding was black owned. There was in fact near unanimity among the Denel decision makers that VR Laser was the best and only supplier in a very small field that could be entrusted with the work. The objections to the appointment of VR Laser were at the level of process.

68. This is not to denigrate the importance of process. The requirements of s 217 of the Constitution are not something that Denel could choose or not choose to follow. The provisions of s 217 are binding on all organs of state, such as Denel, and all decision makers within Denel were obliged to implement its terms, both in letter and in spirit.

69. Regrettably, that was not how the Denel executives, except for Ms Malahlela and Mr Mlambo, saw it. They were preoccupied with getting the job done and frustrated by the lengthy and cumbersome decision-making process, which got in the way of getting the job done. So, they cut procedural corners and overrode or ignored the wholly correct objections to the process raised by Ms Malahlela and Mr Mlambo. Most, if not all, the other executives regarded supply chain process as an obstacle to Denel's capacity to get the Hoefyster job done.

Whether irregular award of hulls contract was induced to profit personally

70. The tasks of the Commission relevant to the award of the hulls contract are twofold: firstly, to determine whether any form of inducement or prospect of personal gain influenced any directors or functionaries employed by or office bearers of Denel to award the hulls contract as it did; and, secondly, to determine whether any of those persons breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of the hulls contract to VR Laser. There is no evidence before the Commission to justify any conclusion that any of the Denel decision makers was influenced by any form of inducement or prospect of personal gain to award the hulls contract to VR Laser. It must be emphasised that the award of the hulls contract preceded the advent of the Guptas. All those who participated in the decision-making process had as their goal the advancement of Denel's interest. There is no evidence to suggest that LMT would have done a better job if it, rather than VR Laser.

71. So, the question posed by the first of the tasks must be that there was no evidence that any form of inducement or prospect of personal gain influenced any directors or functionaries of Denel to award the hulls contract as it did.

72. The question posed by the second of such tasks must be answered in the positive. All the executives concerned who participated in the corner cutting procedural exercise which led to the award of the hulls contract to VR Laser either knew broadly that they were acting in violation of their obligation to promote a procurement process consistent with s 217 of the Constitution or ignored the readily available material which would have put them on the right path. For these executives, the means justified the end.

Facts do not call for Commission to recommend remedial action

73. The Commission has considered and decided against recommending any action arising from these conclusions regarding the hulls contract.

    73.1 Firstly, the evidence is that Denel itself has commissioned several reports and instructed teams of lawyers to do that in relation to many of the matters which occurred during the period covered by the evidence before the Commission.

73.2 Secondly, a lengthy period has elapsed since the hulls contract was awarded in 2014. In the case of internal disciplinary action against the errant executives and employees, the lapse of time would suggest that disciplinary action is now no longer appropriate. Where civil action to recover loss caused to Denel is concerned, there is the problem of prescription under the Prescription Act 88 of 1968 the provisions of which might well operate in the favour of any defendant in this connection.

73.3 Thirdly, the evidence is that Denel itself has already instituted disciplinary proceedings where it considered such appropriate.

73.4 Fourthly, many of those implicated in the irregular award of the hulls contract are no longer in Denel's employ and are therefore not susceptible to disciplinary action.

73.5 Fifthly, there is the problem that Denel is acutely financially strained.

How the Guptas used VR Laser to capture Denel

74. Next to consider are the circumstances in which the Guptas and Mr Essa took control of VR Laser and engineered for themselves a position as Denel's most privileged supplier of "complex engineering systems" and as Denel's single and exclusive partner in its effort to establish itself in India and Asia. The removal of all but one of the members of the Denel board appointed in and around 2011, the appointment in mid-2015 of a new board, in which only one member of the 2011 board was retained and the suspension of Mr Saloojee and his fellow senior Denel executives in September 2015 all form part of the Guptas' strategy to influence events within Denel.

75. The first meeting of the Guptas with Mr Saloojee at Saxonwold can be seen as the start of their influence in Denel. The following factual evidence should be considered with regards to the Guptas influence. Firstly, that they persuaded the then Minister of Public Enterprises, Mr M Gigaba, and Mr Saloojee, the newly appointed CEO of Denel, to go to the Gupta compound on the same day. Secondly, Mr Tony Gupta there introduced then Minister Gigaba to the CEO of one of his SOEs. Thirdly, that at this very brief meeting, Minister Gigaba asked Mr Saloojee to put Denel business the way of the Guptas, who were "friends".

76. The impression gained by Mr Saloojee was that the Guptas were demonstrating their reach and influence. Mr Saloojee's response to this overture, "If you want to do business with Denel, go through the proper channels." was appropriate. This was a refrain that Mr Saloojee repeated throughout his interactions with the Guptas and Mr Essa. It culminated in Mr Tony Gupta's question to Mr Saloojee: why did Mr Saloojee not take money for doing the Gupta's bidding, as everybody else did?

Minister Gigaba touts Guptas to Denel CEO

77. Mr Saloojee testified that Minister Gigaba used the position of authority and his status as Mr Saloojee's ultimate superior to solicit SOEs for business for his "friends". Accordingly, Mr Gigaba's conduct deserves strong censure. Such conduct violates the Constitution, which requires public powers to be exercised bona fide and for a proper purpose.[4] However, as the law stands at present, such conduct, by itself, attracts no criminal sanction. This lacuna in our law is addressed below and forms the subject of one of the Commission's recommendations. There is no doubt that the Guptas brought Minister Gigaba to the meeting with Mr Saloojee to show to Mr Saloojee that the then Minister was a mere tool in their hands. Mr Saloojee could expect no protection. A politician who did not recognise this to be so would be naive indeed. Mr Gigaba disputed this, but there is no reason to doubt Mr Saloojee's evidence as true.

78. The Guptas continued to apply pressure on Mr Saloojee through Mr Essa to meet with them but Mr Saloojee continued to resist them by restating his position by using the Denel channels created for

[4] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2017 2 SA 63 SCA para 34, citing with approval the following passage from T Bingham *The Rule of Law* (2010) at 60: "Ministers and public officials at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably."

that purpose. Mr Saloojee did not report or share with others the pressure applied by the Guptas because he did not know whom to trust.

79. Mr Saloojee was told more than once by Mr Essa that approval of the approach to him had been sanctioned at the very top. Mr Essa also introduced Mr Saloojee to the 2015 board chair, Mr Mantsha, before Mr Mantsha's appointment had been publicly announced. This introduction was manifestly designed to show Mr Saloojee that Mr Mantsha was the Guptas' man.

80. Mr Saloojee's evidence that he introduced Mr Essa to Mr Ntshepe as a way of creating distance between the Guptas and himself is similarly credible. Mr Saloojee was invited to attend the Gupta wedding at Sun City in 2013 but chose not to do so.

81. In May 2014 Minister Gigaba was replaced by Minister Lynne Brown. For a year or so, the relationship between Mr Saloojee and Minister Brown was good. This is not surprising: under Mr Saloojee's stewardship, Denel had been turned from a loss-making entity into one which made a profit. During this time Denel also achieved a clean audit from the AG.

82. In mid-2015 the terms of office of all but one of the members of the 2011 board had expired and were not extended. The Board member whose term was extended was Mr Motseki who appears to have had certain links with the Guptas. In her address to Denel's 2015 AGM on 23 July 2015 Minister Brown noted "another successful financial year". Ms Brown said that the professionalism and spirit with which the 2011 board had served Denel "not only ensured a smooth transition, but more especially set [Denel] on a long-term path of sustainable performance". Minister Brown noted that for the fifth year in a row, Denel was posting a profit. There were, however, areas of concern: commercial paper redemption was due in the financial year 2015/2016, current liabilities were at their highest in the last ten years and prepayments and their utilisation needed close attention. However, all in all, the Minister's address was in glowing terms. She concluded by thanking the outgoing 2011 board for a job well done. In her budget speech to Parliament on 15 May 2015, Minister Brown praised Denel's performance and the preliminary figures which showed a net profit of R200 million after tax.

83. Yet, the then Minister replaced all but one of the non-executive members of the 2011 board. Mr K Tlhakudi, who held the position of DDG at the DPE during this period (as he continued to do when he gave evidence), described how potential members of a board of an SOE such as Denel were identified, vetted and submitted to the Minister for her consideration by senior officials within the DPE. However, in the case of the 2015 board, the selection process was taken out of the hands of the officials. While the members of the 2011 board had distinguished themselves, the same could not be said for the members of the 2015 board, who appeared to be collectively lacking in the experience and skills required.

84. Ms Janse van Rensburg evidence emphasised the sterling qualities of several of the 2011 board members and the important parts they were playing in the then current projects. She said she could not speculate on Minister Brown's reasons for making the board changes but concluded that the then Minister's decision had not been reasonable: continuity was sacrificed; the former board had been highly effective and was in the midst of a successful turnaround strategy and the new board lacked essential skills. The decision to replace virtually the entire board could not have been made on the ground of poor performance as evidenced by her budget speech.

85. In a letter dated 25 May 2015, Minister Brown informed Ms Janse van Rensburg of her intention to replace the board members. She sought on several occasions to meet Minister Brown to discuss the proposed replacements but was unsuccessful. The terms of office of all the 2011 board members, except Mr Motseki came to an end on 23 July 2015.

86. Ms Janse van Rensburg identified several areas into which the 2011 board anticipated Denel would grow in the short term. Two are mentioned hereunder.

Land Systems South Africa

87. The first is LSSA, important in the wider context because the 2015 board and particularly Mr Mantsha claimed that misconduct by Mr Saloojee and the group financial director, Mr Fikile Mhlontlo, justified their suspensions.

88. The 2011 board concluded a transaction for the acquisition of LSSA in 2014. They regarded LSSA as an ideal fit for Denel to enhance its landward equipment capabilities, building on its experience and expertise regarding vehicle programmes such as the G5, G6, Rooikat and Casspir. LSSA had always been responsible for the production of these vehicles. Denel was responsible for the overall concept design, firepower, and integration. The 2011 board considered that the acquisition would better position Denel for future vehicle acquisition programmes by the SANDF and mitigate production risk on some of the bigger programmes.

89. Acquisition of LSSA was supported by the DOD and SANDF and the then Minister. Approvals were secured from the Competition Board and the Reserve Bank. The success of the acquisition transaction was dependent on the inclusion of a strategic equity partner who would bring at least R450 million as investment equity and provide significant access to markets and orders. The 2011 board before its departure had identified a few such potential partners with the right qualities and had commenced a closed bid process; at an advanced stage when the 2015 board took over.

90. However, the 2015 board discontinued the process for the participation of the strategic equity partner in LSSA. According to Ms Janse van Rensburg, there was no sound business reason for the discontinuation of the process as this partner was critical to the success of the LSSA transaction and the financial viability of Denel. She links the decline of Denel to the decision to terminate the search for a strategic equity partner in LSSA, exacerbated by failures of governance and what she called “other negative publicity”.

91. However, her evidence on the potential value of the LSSA acquisition is contradicted by Mr AS Burger, whose view is that LSSA was worth no more than R300 million, at most, while Denel bought the interest in LSSA for R855 million. This acquisition, according to Mr Burger was what led to Denel’s decline.

92. Mr Burger did not attempt to justify this firm assertion but said that an “objective assessment of all available evidence will undoubtedly reveal” that he is correct. However, Mr Burger’s opinion is based on speculation, reached without an examination of the facts and is part of the bluster he employed to deflect attention from his own conduct. Ms Janse van Rensburg’s conclusion is reasoned and supported by the facts. It is indisputable that the transaction went through many levels of scrutiny, including Denel itself, the Competition Commission, the DPE and the Minister.

93. Ms Janse van Rensburg described how in a process completed on 28 April 2015 Denel acquired Land Systems South Africa (Pty) Ltd (LSSA), which changed its name to Denel Vehicle Systems (DVS). Ms van Rensburg communicated to Minister Brown the position in regard to DVS in a letter dated 3 July 2015. However, the new board simply cancelled or discontinued this strategic equity partnership. This put considerable financial strain on Denel because its balance sheet was not strong enough to repay the loans which Denel had taken out to pay for the acquisition.

Denel Asia

94. The second area into which the 2011 board anticipated Denel would grow in the short term was the Asian market. Ms Janse van Rensburg indicated that the 2011 board did not decide to establish the Denel Asia venture. She said that in August 2014, once Denel had finally resolved the ten year criminal investigation into its affairs, the way opened up for it to seek to do business with the government of India.

95. Ms Janse van Rensburg noted the joint venture Denel had concluded with Tawazun Dynamics after the UAE had concluded a significant missile contract with Denel, as part of the offset provisions of that contract. This showed that Denel was open to such ventures under the 2011 board.

96. Considering these contracts, Ms Janse van Rensburg was of the view, that VR Laser had no manufacturing capabilities or any demonstrable access to markets; there were no offset imperatives that necessitated the creation of VR Asia under the joint venture with VR Laser, Denel would have an effective 25% ownership of the venture vehicle; and VR Laser had no demonstrable experience or access to the relevant Indian market.

97. Ms Janse van Rensburg accordingly concluded that the establishment of Denel Asia made no economic sense for Denel because it would have entailed Denel giving VR Laser a share in the venture without receiving any significant benefit in return. The venture also appeared to go counter to the established principles by which Denel had historically concluded successful partnerships.

98. On 24 July 2015, Minister Brown held a meeting with the incoming 2015 board. At the same meeting, she announced the names of the new members of the Audit and Risk Committee (ARC). This was a departure from usual practice: an ARC is a committee of the board and should have been appointed by the board. However, a possible reason why the ARC members' names were announced before the 2015 board had even met for the first time will emerge from what follows below.

99. Minister Brown, however, maintains that her actions in retiring the 2011 board members and appointing new board members were entirely regular. She testified that she excluded the DDGs such as Mr Tlhakudi from the process as a deliberate act of policy because the DDGs were too close to the decision makers within the SOEs and their involvement might lead to corruption.

100. Minister Brown acknowledged the failure to appoint a chartered accountant to the 2015 board. She accepted that because Ms Janse van Rensburg was a chartered accountant, she would have been an appropriate person to retain on the 2015 board. The positions on the 2015 board were advertised and a list submitted to her by an outside organisation called Nexus, which evaluated the candidates for board positions. Minister Brown then used her legal unit to examine the list. The list was then evaluated first by the deployment committee of the ANC and then by Cabinet.

101. Minister Brown appeared simply to transmit the list of candidates drawn up by the outside organisation to her party and then to Cabinet before she rubber stamped the nominees for appointment. She did not explain why the only non-executive member of the 2011 board to be retained, Mr Motseki, was selected for this purpose. Nor did she explain why the board chair, Mr Mantsha, who had been struck off the roll of attorneys and then reinstated in 2011, was selected as chairperson.

102. Former Minister Brown explained that she did not become involved in the disciplinary process regarding the three suspended Denel executives on advice of her officials that this was a matter appropriately left to play out between Denel and the executives themselves. However, she accepted that the DPE should conduct its own process to evaluate the probity of the process. But despite being asked specifically to do so by Mr Saloojee through his attorney, Minister Brown persisted in her supine attitude.

Denel board chair touts Guptas to Denel CEO

103. In early September 2015, the new chair of the 2015 board, Mr D Mantsha, called Mr Saloojee to a "briefing meeting", to be held probably at his office. While en route, Mr Mantsha called Mr Saloojee and said the meeting would be at the Saxonwold compound. At this meeting were Mr Mantsha, Mr Tony Gupta, Mr Essa and Mr Saloojee. Mr Tony Gupta said that the Guptas were interested in acquiring LMT. Mr Saloojee indicated that this would take time and would require several processes. Mr Saloojee testified that he got the impression that Mr Tony Gupta was frustrated by the way he appeared to be putting obstacles in the path the Guptas wished to follow with Denel.

104. In his affidavit of 28 August 2020 Mr Mantsha stated he did not request to meet Mr Saloojee. His recollection was that Mr Essa convened the meeting as a follow up to meetings he had previously had with Mr Saloojee.

105. Mr Mantsha thought there was an agreement between Mr Essa and Mr Saloojee that Mr Saloojee would ask the two private shareholders in LMT to sell their shares to VR Laser, then controlled by Mr

Essa. Mr Mantsha said that at that stage he did not even know what LMT stood for and what it did and that he had no background in the matter being discussed.

106. Mr Mantsha confirmed that Mr Saloojee had said to him "Chair, I need your support" and that he had told Mr Saloojee he would look into the matter. His impression was that Mr Saloojee and Mr Essa had a "long close working relationship with each other". In oral evidence Mr Mantsha departed from his affidavit, saying it was possible that he or Mr Essa might have asked Mr Saloojee to attend the meeting. According to Mr Mantsha, this was the only meeting at Saxonwold where Denel matters were discussed.

107. Apart from deviating from his affidavit, it is strange that Mr Mantsha would have attended a meeting at which he knew nothing about the topic discussed. Mr Saloojee's evidence that Mr Mantsha called him to the meeting is preferable. That Mr Mantsha was prepared to attend a meeting about Denel with the Guptas, at which he did not even know what was to be discussed, shows that at that early stage he was prepared to do the Guptas' bidding without question.

Denel ARC rushes to recommend suspension of Denel executives

108. On 9 September 2015 a special Audit and Risk Committee (ARC) meeting of newly appointed members convened to consider the acquisition of LSSA, renamed DVS by Denel. They received a full briefing from Mr Saloojee, whose impression was that the members of ARC had neither the experience nor the qualifications to evaluate this transaction. As noted above this transaction had gone through a rigorous process established to evaluate such an acquisition and met with approval of various key stakeholders, including National Treasury. The purchase price which Denel paid for DVS, some R855 million, was determined as an appropriate price by experts retained for the purpose, not by officers at Denel.

109. On 10 September 2015 the 2015 board held its first meeting. The members of the Denel executive were required to leave their cell phones outside the meeting. This had not happened before. Mr Saloojee and Mr Mhlontlo presented a written report that covered a wide range of topics, setting out Denel's position in the local defence industry and describing its products. The report addressed Denel's strategy for business development in Brazil, the UAE, Africa and Malaysia.

110. However, the 2015 board showed little interest in the presentation by the executive and proceeded to discuss establishing a formal presence in Asia, particularly India, to explore business opportunities. Mr Saloojee's evidence was that he expressed the view that such action was premature because, in the light of the lifting of the blacklisting of Denel in India, Denel needed first to undertake an analysis of the market and new opportunities, to develop a credible strategy and to explore potential strategic partnerships with established entities. This process would take time, after which the executive would present their findings to the 2015 board.

111. Mr Saloojee's impression was that his response did not please the 2015 board members but no further discussion on the question took place. However, in the report to Parliament submitted after 29 January 2016, (the date on which the report records Denel Asia as having been incorporated), it is stated that Mr Saloojee made a presentation to the board on 10 September 2015 in which he requested the 2015 board to authorise him to pursue the Denel Asia venture and to find a strategic partner for Denel in this venture.

112. This passage in the report to Parliament was either wholly inaccurate or did not capture the essence of Mr Saloojee's response when the prospect of the venture was raised. When the report was presented to Parliament, Mr Saloojee was under suspension and, therefore, did not take part in its preparation and was not responsible for its contents.

113. From 14 to 19 September 2015, Mr Saloojee and the Denel team, including Minister Brown and Mr Mantsha, attended the Defence Security Exhibition in the United Kingdom. Mr Saloojee arranged a briefing session with Minister Brown and Mr Mantsha to familiarise them with the objectives of the exhibition and key stakeholders and customers with whom they would be meeting. Before the briefing, Minister Brown and Mr Saloojee had coffee together and Minister Brown told Mr Saloojee that she

had instructed her officials to extend his term as group CEO, as recommended by the 2011 board and that she was happy with his performance.

114. However, during this UK visit, Mr Mantsha told Mr Saloojee that the ARC was unhappy with Denel's acquisition of DVS. On the day Mr Saloojee returned to his office after the UK trip, he was summoned to a meeting of the ARC. At the meeting, without any prior warning, he was asked by the ARC chair to provide reasons why he should not be suspended because of his participation in the DVS transaction. No specifics were mentioned, nor did the ARC members tell him what he was alleged to have done wrong or which aspect of the DVS transaction they expected him to address if he wanted to avoid suspension.

115. Similar meetings were held that day by the ARC with Mr Mhlontlo, the group CFO, and Ms Afrika, the group company secretary. Mr Mhlontlo responded in a manner similar to that of Mr Saloojee.

116. The following day, 22 September 2015, Mr Saloojee was handed a letter of the same date. The letter dealt in depth with the DVS transaction. Its thrust was that Mr Saloojee had defrauded the South African government through its relevant organs by giving fraudulent reasons to justify the transaction and that he had breached the terms on which permission to conclude the transaction had been given. The letter gave him about one day to advance reasons why he should not be suspended for a period of three months. Mr Mhlontlo and Ms Afrika received similar letters although the text of the letter to Ms Afrika was not placed before the Commission. Mr Saloojee, Mr Mhlontlo and Ms Afrika responded to the allegations by the ARC in a joint letter dated 23 September 2015 addressed to the Denel board.

117. They protested their innocence on the allegations made against them, protested that the time allowed to them to respond was grossly inadequate and that the process was thus unfair, asked for a short extension of time in which to present their case, pointed to their lengthy periods of good service to Denel, contended that the reputational damage to Denel and the executives would far outweigh any benefit of a suspension to Denel and offered to engage in constructive discussions with the members of the board in an effort to resolve the concerns raised against them.

118. Neither the board nor the ARC answered this letter. Instead, the three executives were summoned to a meeting of the ARC that same day (23 September 2015). Each of them met separately with the ARC. After these separate meetings the ARC members were joined by Mr Mantsha and other 2015 board members, after which the three executives were separately called back to the ARC meeting where the ARC offered each of them a three month package if they would resign. Each refused the offer and declined to resign.

119. In a letter dated 25 September 2015, the three executives jointly proposed a final and binding arbitration under s 188A of the Labour Relations Act, 1995. On the same day Mr Mantsha wrote to Mr Saloojee. His letter asserted that Mr Saloojee had failed to provide reasons why he should not be suspended and that the board had resolved on 23 September 2015 to suspend him for three months or such further period as the board might determine, on full pay. Mr Mhlontlo and Ms Afrika received equivalent letters.

120. The 2015 board then instructed Dentons Attorneys to investigate with the assistance of Grant Thornton. Each of the three executives was separately interviewed by Dentons. Mr Saloojee was interviewed on 14 November 2015. On 14 December 2015, he was served with a charge sheet detailing his alleged acts of fraud, breach of his obligations and other alleged malfeasances.

121. Perhaps by accident the Acting Group Company Secretary sent to Mr Saloojee a copy of a letter dated 17 December 2015 written and signed by Mr Mantsha to the Acting Group Company Secretary.

122. Mr Mantsha's letter reads as follows:

> I request you to furnish us with the charge sheet so that we can settle as we need to have the charges served upon the suspended employees before close of business tomorrow the 18 of December 2015. And further request you to draft a settlement proposal of three months payments in full and final to the three suspended employees. The offer of settlement must be delivered tomorrow together with the charge sheet and further with a letter informing them that

their suspension is extended until the finalisation of the hearing. You are further requested to inform Dentons that their report is not accepted and request them to provide us with a report within thirty (30) days and kindly direct them to provide information to support the charges. And lastly may you recall the circulated Denton's report and make sure it is not circulated.

123. This letter demonstrates that the suspensions were not affected in good faith and for the purpose of advancing the true interests of Denel. The suspensions were, based on this letter, a hatchet job. The suspensions were, literally, weaponised, to serve a corrupt purpose.

124. Mr Mantsha gave evidence initially over two days. He was consistently vague, taking refuge in lack of memory, and complained consistently of being victimised. He had been informed by the Commission's administrative staff about critical issues on which the Commission wanted to question him. He replied on paper frequently without any attempt to present facts to back up his bland assertions of innocence. He sought to present his relationship with Mr Saloojee as one which began with an admiration for the good work Mr Saloojee had done in Denel. At the first board meeting of the 2015 board on 10 September 2015 Mr Mantsha actually congratulated Mr Saloojee on turning Denel around. Mr Mantsha claimed that soon thereafter he had learned that Mr Saloojee had deceived the board when he concluded a bridging finance arrangement with Absa Bank.

125. Mr Mantsha was at pains to explain why Gupta money had been used to fund his travel to and transport and accommodation in Dubai and India in early October 2015. He explained that he had a private verbal arrangement with Mr Chawla, the then CEO of Sahara Computers, a Gupta company. Mr Chawla paid for Mr Mantsha's travel through invoices raised on Sahara. Mr Chawla would tell Mr Mantsha what he owed and Mr Mantsha would reimburse Mr Chawla the travel costs plus a fee for Mr Chawla. This was said to be a private business of Mr Chawla. There was neither a paper trail to back up Mr Mantsha's version, nor an explanation for Mr Mantsha's access to cash for travel costs and Mr Chawla's fees.

126. The conclusion is that the overseas travel was a quid pro quo for Mr Mantsha's services in effecting the capture of Denel. The letter that was quoted shows that Mr Mantsha tried to get Dentons to manufacture evidence to support Mr Mantsha's campaign to oust the executives. Mr Mantsha was a deliberately untruthful witness and his attempts to contradict Mr Saloojee's evidence were not accepted as fact or truth.

127. This is perhaps an appropriate place firstly to answer the question why was the new ARC constituted before the first 2015 board meeting? The answer is that Mr Mantsha needed the new ARC to neutralise Mr Saloojee. Secondly, it is appropriate to mention that the 2015 board appointed Mr Ntshepe, the relatively junior executive who had formed the link between Mr Saloojee and Mr Essa (and thus the Guptas) as Acting Group CEO in Mr Saloojee's place. They did so probably because Mr Mantsha knew that Mr Ntshepe would do as he was told.

128. All the directors who supported Mr Mantsha in his corrupt endeavour to get the three executives out of the way are similarly probably culpable. The evidence before the Commission does show that at least one of the new appointees to the 2015 board did not go along with this scheme.

129. Ms Nonyameko Mandindi had reservations about the suspension process because the 2015 board had been in office for too short a time to assess the allegations adequately and fairly. She was also confused because, according to the agenda, the board was supposed to discuss the LSSA transaction and not suspensions. She left before the conclusion of the board meeting. She learned the next day that the board had resolved to suspend the three executives and approve certain acting appointments.

130. Ms Mandindi wrote a letter dated 25 September 2015 to Mr Mantsha to express her concerns about the procedure and to the lack of wisdom shown by the board in proceeding as it did. Mr Mantsha did not reply to her letter.

131. On 7 October 2015, Ms Mandindi signed a round robin resolution of the board in which she disagreed with the decision to appoint Dentons to investigate the LSSA transaction. She followed up her letter with an email dated 13 October 2015 to her fellow board members in which she urged the board to

investigate and debate the LSSA transaction in a proper manner. She resigned as a board member in July 2016.

132. There followed a series of communications between the attorneys for the executives and those of Denel. The disciplinary hearing was scheduled for 25 January 2016. The executives' attorney called, entirely predictably, for production of a list of documents. None was forthcoming. Instead, Denel offered mediation, which proceeded unsuccessfully on 8 February 2016. In a letter dated 17 March 2016 to Mr Saloojee, Mr Mantsha offered to pay Mr Saloojee out for the balance of his contract, which was due to terminate on 17 January 2017. Mr Saloojee rejected the offer and pressed for a disciplinary enquiry to be held.

133. On 1 October 2015, the three suspended executives, through their attorney, wrote to Mr Mantsha as chair of the Denel board, complaining of the process which had been followed in their suspension. They copied this letter to the Minister and asked her to intervene. The acting DG of the DPE responded in a letter dated 26 October 2015, declining to intervene on the basis that this was a board, and not a shareholder, issue. Nevertheless, the DPE committed itself in the letter to undertake a process of its own to ensure that the actions taken by the Board in respect of the necessary governance processes have been followed in accordance with relevant regulatory principles.

134. Minister Brown approved this stance. By letter dated 25 April 2016, through his attorney, Mr Saloojee wrote to the then Minister. Setting the facts out fully and providing relevant documents, Mr Saloojee asked Minister Brown to intervene in order to cause his immediate reinstatement as CEO. Ms Brown did not respond to this letter and no process was ever undertaken by the DPE to examine the lack of probity with which the disciplinary processes of the 2015 board had been undertaken.

135. It is striking, and not to Minister Brown's credit, that when Mr Saloojee complained to her that he was being victimised to the prejudice of Denel, she did nothing to investigate the situation independently, after previously having offered him an extension of his contract.

136. Minster Brown's refusal to intervene in this matter relating to the Board of Denel and Denel's executives in regard to the suspension of the executives stands in the stark contrast to her willingness to influence the Eskom Board on 11 March 2015 to suspend the executives. The question that arises is: why was she prepared to intervene in the one but not in the other? Could it be that in the Eskom one her intervention may have been to assist the Guptas in their agenda but in Denel they would not have wanted her to intervene?

137. Finally, Mr Saloojee accepted the inevitable and signed a settlement agreement with Denel dated 8 November 2016. Denel paid Mr Saloojee out a total of R2 661 383 made up of accrued leave pay of R298 891 plus an "ex gratia amount" of R2 362 492.

138. Mr Mhlontlo received a settlement of his full salary while he was under suspension until the termination date under his settlement agreement, as well as a 13th cheque amounting to R163 711,35 and an ex gratia amount of R6 625 644 and a 'short term incentive bonus' of R1 656 411, all without prejudice to his rights under the rules of the Denel Retirement Fund and the medical aid fund. Mr Mhlontlo's settlement agreement with Denel was dated 25 July 2016. This means that Mr Mhlontlo was paid R 8 445 766,35 in addition for receiving his full salary for about nine months of suspension without working.

139. Why Denel was paying an employee, who, according to Mr Mantsha was guilty of serious acts of dishonesty, such a large amount. In settlement of her claims against Denel, Ms Afrika was paid an "ex gratia amount" of R1,642 million. Mr Mantsha's version on the conduct or lack of conduct of the disciplinary proceedings was vague. He blamed the Denel management for not proceeding with the process as should have happened. Mr Mantsha justified the very large pay outs to the suspended executives on the ground that this protected Denel's reputation. The damage to Denel's reputation took place when the executives were suspended. Their successful prosecution on the serious charges levelled against them would have improved Denel's reputation.

140. Mr Mantsha sought to justify these payments of some R10 million, at a time when Denel was in a critical financial state on the basis that the disciplinary proceeds would have cost more. There is no

evidence to show that he had the attendant financial and reputational risks and benefits analysed.

Denel awards single source supplier contract to VR Laser

141. On 19 May 2015, DLS and VR Laser concluded a contract appointing VR Laser as single source supplier to Denel of complex engineering systems at agreed tariffs for a period of ten years (the DLS single source contract). This contract gave VR Laser a right of first refusal in its field of work and effectively took its competitors out of contention for ten years.

142. While the Denel executives who were responsible for the decision to conclude the contract were remiss in advocating for it and ignoring the prescripts of the legislation and internal rules of Denel regarding fair, equitable, transparent, competitive and cost effective procurement, the Denel executives concerned acted as they did in the belief that they were advancing Denel's interests or at least not acting against them. The Denel executive who advocated most strenuously for the appointment of VR Laser as single source supplier was Mr Burger, the CEO of DLS. His motive was to speed up decision making and get the job done. He regarded VR Laser as by far the most competent and reliable supplier in its field. The appointment of VR Laser would eliminate what Mr Burger regarded as time wasting exercises which would inevitably lead to the conclusion that the work ought to go to VR Laser.

143. For Mr van der Merwe, the CEO of VR Laser, the single source appointment of VR Laser would give his company a welcome edge over its competitors. However, the appointment of VR Laser was not left, as it should have been, to the internal processes of Denel. There is credible evidence that Mr Mantsha put pressure on the Denel management to appoint VR Laser as single source supplier in this critical field. To avoid the rigid prescriptions of a single source supplier agreement, Mr Saloojee had authorised the conclusion of a memorandum of understanding (MOU) between Denel and VR Laser. The MOU was a legal tool frequently used by Denel. It committed the parties to examine the way forward but did not impose concrete obligations as did another form of contract used by Denel, a memorandum of agreement (MOA). Mr Saloojee was slow to authorise the conclusion of the MOU with VR Laser. However, he was frequently pressed by the Deputy Minister of Public Enterprises, Mr Bulelani Magwanishe, to conclude the MOU. There does not appear to have been any comprehensible reason why the Deputy Minister of Public Enterprises should be concerned about an MOU between Denel and one of its suppliers.

144. According to Ms C Geldenhuys (DVS legal and commercial executive), in November 2015, after the board had removed Mr Saloojee , the new Acting Group CEO Mr Ntshepe put pressure on DVS to agree to the proposal to upgrade the MOU to an MOA. DVS was a subsidiary of Denel, with its own board and exco. DVS saw the plan to make VR Laser a single source supplier to DLS as indicating that the work in question would all go to VR Laser, thus depriving DVS of lucrative and badly needed work. DVS therefore opposed the proposed MOA.

145. The implied threat used by Mr Ntshepe, in the name of Mr Mantsha, was that if DLS did not move ahead to withdraw its opposition to the MOA which appointed VR Laser as a single source supplier, the 2015 board would take steps to reduce the autonomy of DLS through a reorganisation which downgraded DLS to a division. In short, Mr Ntshepe used the DLS's executives fear of losing their jobs as a weapon to persuade them to approve the appointment.

146. From the wider perspective of Denel, the single source appointment of VR Laser made no commercial sense. VR Laser was not overburdened with work. If Denel wished to retain VR Laser for a specific job, it would not have to stand in line and wait until VR Laser had capacity to take on Denel's work. The appointment deprived Denel of the ability to go out into the market unfettered by obligations toward VR Laser. There was equally no good reason why Denel and VR Laser should agree a tariff of fees, with escalation, in favour of VR Laser for the next ten years. Even if, improbably, the market fell and the tariff disadvantaged VR Laser in the years after the conclusion of the single supplier contract, Denel would never have succeeded in forcing VR Laser to do work at a loss.

147. The next contractual step of significance was the conclusion of the DVS single source contract with VR

Laser on 14 December 2015, placing DVS under contractual restraints equivalent to those imposed on Denel through its division DLS.

148. From VR Laser's strategic perspective, the single source contract with DVS was desirable because DVS was, in law, a separate company. The contract with DLS therefore needed to tie up DVS and restrict its freedom to put its work out to the market. The single source contract with DVS also gave VR Laser a right of first refusal of work channelled by Denel through DVS.

149. From the perspective of Mr Essa and the Guptas, they had secured a monopoly for VR Laser in respect of Denel's most important work in South Africa and a seat at the table in the decision-making process around Hoefyster. A further step was to tie Denel up outside South Africa. This was to be done through the Denel Asia project.

150. The Denel COO, Mr Wessels, was not singled out for advancement after the three executives were suspended. Thus, he was most unlikely to have been party to the scheme to get Mr Saloojee and the others out of the way. From 8 to 12 November 2015, Mr Wessels attended an air show in Dubai as part of a Denel contingent. At this event, Mr Ntshepe, who had been advanced after the suspensions to the position of Acting CEO of Denel, instructed Mr Wessels to develop a relationship between DVS and VR Laser comparable to the relationship which had existed between DLS and VR Laser. This meant that the work which had previously been done by DVS would now be done by VR Laser.

151. Mr Wessels said that this was not possible as the work which he wanted to transfer to VR Laser was part of the core in-house business of DVS. Mr Ntshepe responded that he was giving Mr Wessels an instruction, which had been approved by Mr Mantsha. Mr Wessels did not verify the claim with Mr Mantsha but there is no reason to doubt that the instruction came through Mr Mantsha.

152. Mr Wessels and Mr Steyn, the CEO of DVS, then made efforts to delay the transfer of the work to VR Laser and to persuade the Denel management to reverse the decision to transfer the work to VR Laser. The response of Mr Ntshepe was to take the task of transferring the work away from Mr Wessels and to give it to Mr Burger. Mr Wessels was told after this that Mr Mantsha had directed that Mr Wessels would no longer be required to attend board meetings, as he had routinely done in the past. Mr Wessels was then eased out of the decision-making process in relation to the transfer of the work from DVS to VR Laser and, from December 2015 left mostly without productive work.

153. Mr Wessels protested this state of affairs to Mr Ntshepe and the acting CFO, Mr Mhlwane. Mr Wessels was then moved to become the acting CEO of LMT. LMT by this stage was in a poor financial state as its major Saudi client, the Saudi Ministry of the Interior, through its trading company SCC, was in dispute with LMT and had stopped paying. Mr Wessels was forced to approach the LMT shareholders for loans to pay staff and other overhead expenses, but LMT remained in financial difficulties. Mr Wessels left LMT and Denel on 31 August 2016.

The Denel Asia venture

154. Authorisation for a project such as Denel Asia had to be provided by both the DPE and the Treasury. The 2015 board rapidly initiated the process by which approval might be given. Its pre-notification letter under s 54(2) of the Public Finance Management Act 29 of 1999 (PFMA) to the DPE was dated 29 October 2015. A similar letter dated 10 December 2015 was sent to the Minister of Finance (who happened fortuitously to be Mr D van Rooyen MP) on behalf of the Treasury.

155. The relevant section in the PFMA requires that, before a public entity such as Denel concludes a transaction such as the Denel Asia project, the accounting authority for the public entity must promptly and in writing seek the approval of the transaction from both these Departments.

156. In short, the Denel Asia project contemplated a joint venture between Denel and VR Laser to market Denel to India and Asia generally. For this purpose, it was proposed that the venture parties form a company in Hong Kong called Denel Asia and open an office in Hong Kong to further the venture. Officials from both Departments raised queries, which had the effect of delaying the implementation of the joint venture. The officials highlighted the need for Treasury approval; the apparent lack of funding

plans; an inadequate business plan; questions about the suitability of VR Laser and its shareholders; the political implications. The team emphasised the questions around the suitability of VR Laser as a potential partner in the regions in question.

157. The team of officials received no further communication of substance on the subject either from the Minister or from the DG of the DPE (Mr Richard Seleka, who was associated with the Guptas). On 5 February 2016, Denel informed the DPE that it had proceeded to implement the transaction based on s 54(3) of the PFMA. This measure provides that a public entity may assume that approval has been given if it receives no response from the executive authority on a submission in terms s 54(2) within 30 days or within a longer period as may be agreed to between itself and the executive authority.

158. Mr Tlhakudi testified that he found this hasty recourse to s 54(3) unusual and discourteous. But, he said, from subsequent engagements between Minister Brown and the 2015 board, it was clear that the Minister had come to terms with the Denel board decision and that both Minister Brown and the 2015 board were looking for ways in which the Treasury could be persuaded to accept the Denel position that Treasury approval for the transaction had been deemed to have been given. It should be noted that Minister Brown challenged the detail of DDG Tlhakudi's testimony. Resolving these evidentiary conflicts has become unnecessary.

159. What is indisputable, however, is that National Treasury did not give its approval. Denel then sued the Treasury. By notice of motion dated 23 March 2017, under Gauteng Division of the High Court case no. 20749/17, Denel applied for an order against the Minister of Finance and the Department of National Treasury for an order declaring that Denel had obtained approval or was deemed to have obtained approval for the joint venture with VR Laser. Denel's founding affidavit was signed by Mr Ntshepe as the acting CEO of Denel.

160. The application was ultimately withdrawn by Denel and Mr Tlhakudi was threatened with not having his contract of employment extended. Mr Tlhakudi drafted letters to Mr Mantsha (15 July 2016) and the then Minister of Finance, Mr Pravin Gordhan (20 September 2016), indicating that Minister Brown accepted the deemed approval status of Denel Asia. Pressure was put on Mr Tlhakudi by Mr Richard Seleke (DG of the DPE) and Mr Mantsha at a meeting in February 2018 to amend the initial memorandum, which had effectively been highly critical of the proposed joint venture. The memorandum was amended to read that Minister Brown had granted conditional approval for the joint venture on 24 December 2015.

161. Although the company, Denel Asia, was incorporated in Hong Kong, the Denel Asia venture happened as the tide of public opinion turned against the Guptas. The Guptas' Denel dealings were made public in a detailed report in the Mail and Guardian newspaper on 5 February 2016. Concurrently, the commercial banks in South Africa terminated all the accounts of Gupta-linked entities, including VR Laser.

162. The Denel Asia venture made no commercial sense to Denel. VR Laser and the Guptas had no established expertise in the field in which it was proposed Denel Asia would operate. The Guptas were politically exposed persons at the time and no research had been done to investigate either the need for such a venture or the relative merits of other potential partners. Denel Asia was a shameless attempt to benefit the Guptas.

INTERVENTIONS IN THE AFFAIRS OF DENEL

163. The next section proceeds to analyse the character of the interventions by the Guptas and Mr Essa in the affairs of VR Laser and Denel:

    163.1 Were any attempts made, and if so to what extent and by whom, through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or directors of the 2015 boards of Denel to facilitate or advance the interventions of Denel into the affairs of Denel?

163.2 Did the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any SOEs breach or violate the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with Denel?

163.3 What was the nature and extent of corruption, if any, in the awarding of contracts to companies or business entities by Denel?

163.4 Were there any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts and any other governmental services in the business dealings of the Gupta family with Denel?

163.5 Were there any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts in the business dealings of the Gupta family with government departments and Denel; in particular, did any member of the National Executive (including the President), public official, functionary of any organ of state influence the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest?

164. It is reasoned that the entry of Mr Essa and the Guptas into VR Laser was conceived for the purpose of using VR Laser as a vehicle to achieve the capture of Denel. While the capture process proceeded and broadened, the legitimate business of VR Laser would continue. The denial by Mr van der Merwe that he participated in any illegal dealings is credible. It made 'capture sense' to deflect attention from the capture by presenting VR Laser as a legitimate business.

165. The Guptas were not prepared to compete for Denel's business. This is shown by their conduct, at the start of Mr Saloojee's term of office, in getting the then Minister of Public Enterprises Mr Gigaba, to make clear to Mr Saloojee that he was to exert himself to favour the Guptas. For this purpose, Mr Saloojee was brought to the Guptas' stronghold, the Saxonwold compound, to meet his ultimate boss, a man who had not previously found it necessary to meet Mr Saloojee.

166. Then, when Mr Saloojee showed that he would not dance to the Guptas' tune, steps were taken to gain control and oust Mr Saloojee. At that stage, Denel must have appeared an attractive target for capture. It was showing a profit, surely rare for an SOE at that time, had been given a clean audit by the AG and was praised both by the private sector, including the banks and by the then Minister, Ms Brown.

167. The first step was to remove control of Denel from the hands of a competent and honest board. The cover for this was the end of the terms of office of the members of the 2011 board. By then the Guptas had taken control of VR Laser. Their cover was in place. The evidence shows quite conclusively that the means used by Minister Brown to replace the members of the 2011 board and replace them with her own appointees excluded the DPE officials from any input into the process and ensured that no criticisms of Minister Brown's appointees would be raised by officials who might have concerns about their lack of probity, skills and expertise.

168. In this regard, it is significant that Minister Brown's choice for board chair, Mr Mantsha, was an attorney who, according to Mr Tlhakudi had previously been struck off the roll for something to do with his trust account and then re-enrolled. Surely, a prudent Minister would have had nothing to do with appointing an attorney with such a history as chairperson of such a board.

169. Well-nigh the first action taken by the 2015 board was to suspend Mr Saloojee. One can understand that on the same basis that Mr Saloojee had been suspended, action against Mr Mhlontlo could be made superficially credible, but the question that arises is, why did Ms Afrika need to be suspended? What had she done that warranted her being left on suspension, at considerable expense to Denel for the lengthy period that the 2015 board kept Mr Saloojee and Mr Mhlontlo at bay? All that was produced by Mr Mantsha to justify her suspension was that she had denied ARC the use of the boardroom and then, the same day, allowed ARC to use the boardroom after Mr Saloojee had spoken to her on the telephone from London.

170. It is impossible to understand why the action on the part of Ms Afrika warranted suspension, let alone a protracted period in which the company secretary remained away from her post, at full pay, and was then paid over a million Rands in settlement.

171. The utter cynicism of the suspensions was demonstrated by Mr Mantsha's letter to his acting company secretary dated 17 December 2015, in which he castigated Dentons Attorneys for producing a report which did not justify the suspensions and called on them to fabricate a report which did. Mr Mantsha talked about settling with the three executives, two of whom he had just found had prima facie committed fraud and otherwise misconducted themselves egregiously.

172. The question why Mr Mantsha and, indeed, probably other members of the 2015 board so misconducted themselves can now be answered. The purpose of the suspension of Mr Saloojee was to remove an obstruction from the path of the Guptas. The unscrupulous methods used by Mr Mantsha and his abettors to prevent this loyal servant from protecting Denel are quite palpable. While the other two executives, loyal servants of Denel both, were similarly sacrificed to serve as cover for the intervention to get rid of Mr Saloojee. The sweeping decapitation of the Denel exco also, usefully from the perspective of Mr Mantsha et al, served to warn the employees still at Denel that, if they stood in Mr Mantsha's way, they could expect the same treatment.

173. Viewed in context, the appointment of Mr Ntshepe as Acting Group CEO once Mr Saloojee had been removed is significant. Mr Ntshepe had worked with the Guptas and must have shown himself to be a person on whom they could rely. Certainly, during Mr Ntshepe's term of office, he did nothing to suggest that he would resist any of Mr Mantsha's moves.

174. These conclusions are only reinforced by the way Mr Mantsha evaded the disciplinary enquiry that was the ostensible, but not the true, reason for the suspensions. He knew the suspensions were unjustified and that the executives would be exonerated at an enquiry, but Mr Mantsha needed time for the Guptas to develop their capture strategy. Mr Mantsha therefore spent millions of Rands on preserving the suspensions and evading the enquiry. Then when he had run down the clock, at a time when the executives were confronted with the difficulties of securing reinstatement, in Mr Saloojee's case purely because his contract had come to an end by effluxion of time, Mr Mantsha caused further millions of Rands to be paid to the executives to ensure they went quietly. Moreover, this was at a time when Denel could not pay its own privileged supplier, VR Laser, to whom Denel was so much in arrears (at one stage R15 million) that VR Laser had to refuse to take on new work for Denel.

175. By this time, Denel was in serious financial difficulties, exacerbated by the need to pay back the large loans taken out to pay for the DVS acquisition. In this regard, as Mr Mantsha well knew, it was anticipated that funds to settle loans would be brought in by the anticipated equity partner with Denel in DVS. Yet Mr Mantsha was prepared to spend large amounts of money, which Denel did not have, to make what had now become Mr Mantsha's problem go away.

176. In November 2015 at an air show in Dubai, Mr Mantsha terminated the negotiations with Denel's potential equity partner whose entry, it was hoped, would inject capital into the acquisition and thereby alleviate Denel's burden. There is no suggestion that Mr Mantsha ever again sought such an equity partner. Thus, in a significant sense, Mr Mantsha brought about the financial embarrassment of Denel. Mr Mantsha knew that Denel had this large commitment. This was one of the main bases of the charges he had brought against Mr Saloojee which could have led to safety on this score. It is a fair inference that Mr Mantsha acted as he did because he did not want an equity partner entering the Denel space in potential competition with the Guptas.

177. During Mr Mantsha's testimony, he stated that, without having sight of the relevant minutes of board meetings, he was not able properly and fully to explain why Mr Saloojee, Mr Mhlontlo and Ms Afrika were suspended, why Denel never held a disciplinary inquiry in regard to the conduct of these employees and why Denel paid them substantial amounts in settlement of the disputes between Denel and the employees.

178. By letter dated 24 June 2021, the Secretary of the Commission sent to Mr Mantsha's attorneys' copies of the minutes of meetings of the board held between 8 September 2015 and 15 January

2017 and invited him to supplement his evidence in any way he deemed necessary now that he had ben furnished with these minutes.

179. Mr Mantsha responded in a supplementary affidavit (30 June 2021) in which he summarised the contents of the minutes of the meeting of 28 April 2016 and otherwise merely quoted passages from the minutes in question, the text of which he attached to his supplementary affidavit. He concluded with the assertion that the board had discharged its fiduciary duty diligently in matters relating to the suspension and termination of employment of the employees in question.

180. The minutes undoubtedly contain assertions regarding the misconduct of the employees in question. It is important to summarise comprehensively the allegations put before the board because the seriousness and wide extent of the allegations are relevant to a point explained next: that the allegations never arose above the level of mere assertion; that Mr Mantsha has at no stage given any content to justify those serious allegations; and that the evidence which was produced demonstrates, on a balance of probabilities, that the allegations themselves were no more than bluster, designed to manipulate an under-qualified and inexperienced board into removing the employees concerned so that they could be replaced by officials considered to be more amenable to the planned capture of Denel by the Guptas and their proxies.

181. The case against the three employees was put to the board by Ms Kgomongoe, the newly appointed chair of ARC. She levelled the following allegations against the three employees: DVS shares had been pledged to Nedbank as security for a loan made by Nedbank to Denel. The offer to Nedbank of cross-guarantees of all Denel subsidiaries appeared to be a contravention of the PFMA.

182. The board was informed for the first time on 10 September that Denel was obliged to pay Nedbank R450 million by 30 September 2015. This had been hidden from the board by the executive directors. The financial report of the group financial director, Mr Mhlontlo had not included any information regarding the payment in his financial report. The Nedbank loan had been signed by the executive directors without the required authority of the board and without the approval of the shareholder and the National Treasury. The executive directors had failed to obtain a valuation in accordance with s 51 of the PFMA and had accordingly misled Nedbank as to the ability of Denel to repay the loan by 30 September 2015. The executive directors had misled the Minister of Public Enterprises and the National Treasury by alleging that Denel was in a sound financial position and had an equity balance of R1,5 billion. This statement was not true because R1,2 billion was ring fenced for the Hoefyster project.

183. These acts of misconduct had caused an irretrievable breakdown of the relationship between the executive directors and the board. The company secretary, Ms Afrika, had misled the board by alleging on 9 September 2015 that the shareholder and the Minister of Finance had approved the LSSA transaction on the basis that Denel would find a suitable equity partner, by 'blocking Board members from certain meetings' and generally failing to communicate with members of the board.

184. Ms Kgomongoe advised the board that no good reason had been advanced by the employees in question for a postponement of the action to be proposed to enable the employees to better present their defences. The board decided that the executive directors were to be offered the opportunity to resign with payment of one month's salary, failing which they and Ms Afrika were to be suspended with immediate effect. Further investigations of the LSSA transaction were to be carried out. Disciplinary proceedings were to be instituted within ninety days; such that a law firm was to be appointed to investigate the LSSA acquisition.

185. The board further decided that Mr Ntshepe would be appointed acting group CEO, that Mr Odwa Mhlwana would be appointed acting CFO and Mr Tau Mahumapelo would be appointed acting company secretary. This drastic action was put into effect and Dentons was appointed to investigate the LSSA transaction. Dentons reported and found no misconduct, such had been alleged.

186. The response of Mr Mantsha was not to reconsider the action he had effectively promoted but sought in the letter to the acting company secretary to manipulate the authors of the report into producing a report more to Mr Mantsha's liking; in short to manufacture evidence for him.

187. The Dentons draft comprises 157 pages, including annexures, and a section titled “CONCLUSIONS” in which it is concluded that the application submitted by Denel pursuant to the PFMA was procedurally “not necessarily non compliant, but could have been prepared with a higher degree of care”. It also concludes that the Minister of Public Enterprises had approved the transaction conditionally, one of such conditions being that the terms and conditions of the final loan agreements to be concluded with Nedbank and ABSA should not be more onerous than those in the term sheets which the banks provided during the negotiations toward the conclusion of the acquisition transaction. The approval of the Minister of Finance was conditional on the compliance by Denel with the conditions attached by the Minister of Public Enterprises.

188. However, the Nedbank loan was for a five month period while the term sheet provided for a term of five years. Dentons regarded this as a material change, which did not conform to the board approval obtained for this aspect of the transaction on 11 February 2015. Dentons therefore concluded that both Mr Saloojee and Mr Mhlontlo were in breach of the board authorisation.

189. But both the chair, Ms Janse van Rensburg, and Dr Cruywagen, a board member with considerable commercial experience, were aware of the change in the terms of the Nedbank loan at the latest by 22 April 2015 and the terms of the Nedbank loan were disclosed to the 2011 board on 26 June 2015. Dentons concluded that there:

> ... seems to have been inadequate disclosure and analysis of the financial implications of the shortened term of the loan. In particular, there is limited analysis concerning the financial demands that would be placed on Denel as at the end of September 2015 and the manner in which these financial demands would be met. The ARC reports and presentations indicate that more detailed information was provided to ARC, as opposed to the Board.

190. Nevertheless, the 2011 board did not regard the change in the terms of the Nedbank loan as significant or warranting any further action. The 2011 board did not consider that any action against either Mr Saloojee or Mr Mhlontlo, let alone Ms Afrika, was warranted. Dentons concluded that there had been substantial compliance with the requirement of shareholder approval of the loans (all the essential elements of the funding component of the transaction having been disclosed during the PFMA approval process). However, Dentons regarded the language used in describing the bridging loans as misleading: the loans had not merely been “actuated” for five months pending restructure of the funding arrangements. This, according to Dentons, was because there was no provision in the five month agreement that entitled Denel to extend the loan for the full five years.

191. Dentons further concluded that they had found no evidence of fraud or corrupt conduct by Denel management or members of the 2011 board. Ultimately, in a section headed “RECOMMENDATIONS”, Denel left the taking of disciplinary steps against Mr Saloojee and Mr Mhlontlo up to Denel.

192. The conclusion is irresistible that when Mr Mantsha read the Dentons draft report before he wrote his letter dated 17 December 2015, he realised that the case made by ARC against Mr Saloojee and Mr Mhlontlo, on the strength of which he had executed the suspensions, had no prospects of success if the Dentons draft report was substantially correct. That was why Mr Mantsha wanted Dentons to change their report. The content of the report itself must convince any impartial reader that it simply could not be dismissed out of hand as Mr Mantsha suggested in his testimony.

193. There is no suggestion that Mr Mantsha or Denel ever obtained further evidence to bolster the allegations made against the three employees and laid before the board on 23 September 2015.

194. The allegations or arguments made in the board minutes as to why the disciplinary enquiry should not proceed and the three employees should be offered packages amount to the following:

    194.1 At its meeting on 26 February 2016, the board decided to pay out Mr Saloojee for the remaining ten months of his contract because the disciplinary process could be protracted and costly but the disciplinary process regarding Mr Mhlontlo and Ms Afrika were to proceed ‘immediately’. At the meeting of 28 April 2016, it was asserted that the acting company secretary, Ms Fortune Legoabe, had leaked the Denton draft report to one or more of the suspended employees. This

was said to have compromised the disciplinary process and to have led to the removal of the acting company secretary.

194.2 At the meeting of 8 June 2016, the board discussed the 'concern' that Denel had been captured by the Guptas but Mr Mantsha emphasised that Denel was doing very well. The board resolved that the disciplinary hearing should be concluded as soon as possible, preferably before the AGM. The cases against the other employees should be settled in preference to going ahead with the disciplinary process to save costs. This should be balanced with the public outcry to bring officials to account. Management needed to focus on operations rather than the suspensions. The Minister would like to focus on the positives of the business and see the process finalised urgently.

194.3 At the board meeting of 23 June 2016, it was resolved to pay Mr Saloojee "the remainder of the contract". This contradicts the contention made at the previous board meeting on 8 June 2016 that Mr Saloojee was no longer an employee. Despite a discussion around 'legal technicalities' such as whether Mr Saloojee was still an employee, the employment relationship being broken down and the risk that reinstatement might be ordered, the board was still firmly of the view that "nothing has changed in terms of success and the merits of the case" but the case could take long and cost Denel more money. There is nothing to suggest that any analysis was undertaken of the length of time the disciplinary proceedings might take or the alleged saving of cost by paying the three employees out.

195. There was no evidence that the Dentons draft report was leaked to the suspended employees. What was leaked, or inadvertently disclosed, by the acting company secretary was Mr Mantsha's letter to her in which Mr Mantsha directed her to instruct Dentons to manufacture evidence which would support Mr Mantsha's case against the three suspended employees. That report and the drafts that preceded a final report would in any event have been subject to discovery. It was not commissioned to provide Denel with legal advice in relation to a contemplated legal proceeding but to determine whether there had been any justification for the suspensions and the disciplinary process in the first place. If the alleged leaking of the draft report compromised Denel's case, it could only have been so because the report concluded that the disciplinary case against the employees was not likely to end in a justification of the action that had been taken against the employees. If the employees were, as they themselves maintained, innocent of any wrongdoing, there could have been no legitimate objection to their being reinstated.

196. The haste with which the suspensions were implemented should be contrasted with the leisurely pace at which Mr Mantsha allowed the actual disciplinary process itself to proceed. The alleged conduct of Mr Saloojee and Mr Mhlontlo related to matters of historical record. There was no suggestion that their continued presence in their positions might prejudice Denel going forward. That the board - and ARC - needed an investigation by a firm of lawyers to determine the facts showed that the board itself had no adequate grasp of the facts at the time it suspended the three employees. Surely, in these circumstances, the determination of the facts should have preceded the actions taken.

197. And once the lawyers had investigated, and found no wrongdoing, surely what was obviously required was that justice be done and the employees be restored to their posts? This could have been done without cost to Denel because the employees had been paid their salaries while under suspension. The very fact that Mr Mantsha, and the rest of the board, decided to spend Denel's money, at a time when it was already in difficulties, to get rid of the employees, reinforces the conclusion that the purpose of the suspensions was not to protect Denel but to advance an agenda of those who devised the suspension scheme.

198. The conclusion is unavoidable that the entire scheme was manufactured to get rid of three senior employees, not because they were guilty of wrongdoing because they were not, but because the employees in question were unlikely going forward to view wrongdoing with approval, their removal was devised to replace them with officials considered more likely to advance the very schemes of wrongdoing that were contemplated by those who had worked to oust the three employees.

199. The evidence points to the fact that Mr Mantsha was one of the central actors in the Gupta and Essa

scheme to capture Denel. He was not duped into acting as he did: he was a witting agent of state capture. He acted as he did in the expectation that he would be rewarded for his efforts on behalf of the Guptas, as he was when he travelled at their expense. Mr Mantsha almost certainly anticipated that, as the Guptas strengthened their grip on the South African state, he would be rewarded by access to positions of power and the fleshpots of power. Mr Mantsha enjoyed a taste for the fleshpots of power when he travelled overseas, in luxury, at the expense of the Guptas in early October 2015, only days after he had, with apparent success, managed the suspension of the three Denel executives.

Evaluation of the conduct of Minister Brown

200. It seems clear that on Ms Brown's own evidence, she did not appear to appreciate that she is individually, not collectively with her party and cabinet colleagues, responsible for the appointments she made. But there is a more serious aspect to consider: whether by abdicating her decision-making function, effectively, to an outside organisation in relation to the appointment of the 2015 board and failing to investigate and consider the probity of the disciplinary action taken against the three suspended Denel executives, she acted with the intention of promoting the campaign of state capture directed at Denel by the Guptas, Mr Essa, Mr Mantsha and perhaps other members of the 2015 board.

201. Minister Brown's failure to respond to Mr Saloojee's letter dated 25 April 2016 asking her to intervene is a cause for concern. To a Minister who had Denel's interests at heart, this letter would surely have come as a shock. Here was an executive of Denel, whom she had previously commended in public and had offered an extension of his contract, being accused of wrongdoing in relation to a transaction that had been comprehensively vetted both by her predecessor, by the Treasury and by the Competition Commission. Surely this, when brought to her notice, warranted an investigation, if not an intervention?

202. A factor which may weigh in favour of Minister Brown is the lack of evidence that she received any of the money which Mr Tony Gupta described as being paid to all those that helped the Guptas. Against this, however, is the fact that the Guptas did not use the influence they undoubtedly were able to bring to bear to replace her with another more willing to misuse his position and powers to advance the Guptas' interests. The mere fact that a captured person was left in his or her position might be adequate reward in certain instances.

203. The decisive factor in the evaluation of whether Minister Brown was a conscious agent of state capture is the analysis of her cell phone records. By notice dated 19 July 2021 under rule 10.6 of the Rules governing the conduct of the Commission, Ms Brown was called on to respond to a schedule containing evidence of telephone records which showed that there had probably been a telephone conversation between, firstly, Ms Brown and either Mr Nazim Howa or Mr Atul Gupta and secondly, several telephone conversations between Ms Brown and Mr Salim Essa.

204. The conversation between Ms Brown and Mr Howa or Mr Atul Gupta was recorded as taking place on 12 March 2015 and lasting 48 seconds. Minister Brown initiated the call. She suggested that the conversation might have been about a certain breakfast event. This conversation took place on the day before the three Eskom executives were suspended. It would have been an extraordinary coincidence if Mr Howa were to have been discussing a breakfast event with Minister Brown during the very period when a crucial phase of the plan to capture Eskom was being affected but I prefer not to base a credibility finding on this evidence.

205. The evidence of telephone conversations between Ms Brown and the user of the cellphone belonging to Mr Salim Essa, and, therefore, probably between Minister Brown and Mr Essa, is however of a different calibre. The evidence of Ms Brown before the Commission was unequivocal: she did not know Mr Salim Essa and had never spoken to him. However, the records show that she had a total of eight telephone conversations with the user of Mr Essa's cellphone, and therefore Mr Essa, in duration a total of 1 398 seconds, i.e., more than 23 minutes. The telephone conversations between Ms Brown and Mr Essa are recorded as having taken place during the period 24 November 2014 to

19 March 2015, after which no more attempts were made from Mr Essa's cellphone to contact Ms Brown.

206. Ms Brown responded in an affidavit signed by her on 30 July 2021 to this evidence of calls between her cellphone and Mr Essa's cellphone as follows:

> ... I do not know Mr Salim Essa as I have indicated ...
>
> ... I have racked my brain trying to recall and place these calls. I cannot deny the empirical evidence of the calls ...
>
> ... I simply cannot recall these calls, much less, the content of the conversations, if any.
>
> Let me explain it this way: before I received this Rule 10.6 Notice, it never occurred to me that a number believed to be used by Mr Salim Essa ever called me. Even when reading about him in the media, this never crossed my mind.
>
> I am afraid I cannot take this much further and assist the Commission.

207. In her response to the Rule 10.6 notice, Ms Brown does not dispute that she had the conversations with Mr Essa. There is no innocent explanation of the fact that Ms Brown talked on the telephone with Mr Essa while she was Minister of Public Enterprises on eight occasions during the period that the Guptas were putting into effect their scheme to capture Eskom. That scheme required that a board which would not resist the Guptas' capture initiative be put in place and that officials who might resist the Gupta capture be neutralised. That was the period during which the cellphone conversations between Minister Brown and Mr Essa took place. Four long such conversations took place on 24 November (two conversations within less than half an hour), 29 November and 1 December 2014, when the appointments to the new board were being made. For example, Mr Mark Pamensky was appointed to the Eskom board with effect from 11 December 2014 and there is no reason to believe that the timing of Mr Pamensky's appointment was any different to those of the other new board members.

208. Why would Minister Brown lie about her telephone conversations with Mr Essa? The only possible conclusion is that Ms Brown was a witting participant in the Guptas' schemes to capture Denel and Eskom.

209. In the case of Denel, Ms Brown participated in state capture by using the powers of her office to instal persons as members of the Denel board of directors whom she believed, probably because she was told so, would facilitate or at least not oppose the Guptas' state capture schemes and by failing to use the powers of her office when asked to exercise those powers to curb the manifest injustice and corrupt purpose of the scheme to oust the three Denel executives.

True character of sole supplier contracts in favour of VR Laser

210. The sole supplier contracts can now be seen in their proper perspective. They were designed to ensure that VR Laser effectively became able to participate in any lucrative undertaking in which Denel became involved within the borders of the Republic. Through the Denel Asia joint venture, the Guptas believed, no doubt with some justification, that they could do the same to a large extent outside our borders. In the hands of the Guptas, these opportunities enabled them, almost legitimately, to pass themselves off as actually being Denel. All it would take would be a suitably worded business card and a glib tongue. Any scepticism could be overcome by a call to the potential customer, or client, from Mr Mantsha. The Denel Asia joint venture, the Guptas no doubt thought, would gain them entry into the worldwide arms industry.

Capture of Denel established

211. To answer the question posed above: the entry into VR Laser by the Guptas and Mr Essa was affected with the intention of using it as a vehicle with which to capture Denel. Whether the Guptas and Mr Essa were knowingly abetted in their capture design by former Minister of Public Enterprises Gigaba

should await further evaluation. Whether Deputy Minister Bulelani Magwanishe and Mr Ntshepe were knowingly complicit in this scheme is not established on the information before the Commission. They might have thought they were just doing the lawful bidding of their superiors. Whether members of the 2015 board, other than Mr Mantsha, were wittingly complicit in the scheme to oust Saloojee and entrench the position of the Guptas has similarly not been established.

212. The attempted capture of Denel was ended by the public exposure of the scheme, a change in the identities of the persons exercising political control in the country and the actions taken by the financial institutions to deny the Guptas access to banking services, finance and credit. In this deprived environment, the Guptas could no longer function. They, and Mr Essa, left South Africa. Because Denel was believed to have been captured, its access to finance was drastically curtailed, morale within the organisation sank, skilled employees resigned, and its business generally declined.

213. VR Laser, the formerly premier supplier of steel armour plate within South Africa, fell along with the rest of the Gupta companies because of the withdrawal of its banking facilities and decline in reputation when it was cast as a Gupta controlled company. VR Laser's main customer, Denel, could not pay what it owed VR Laser. According to Mr van der Merwe, its former CEO, the amount owed by Denel and overdue for payment reached R15 million.

214. The capture of Denel was ultimately unsuccessful. There is no evidence that the Guptas made money from their raid on Denel. However, the reputational damage which Denel suffered from its capture and the fact that the control of Denel passed into unscrupulous hands was enormous. The evidence of its current group CEO shows that rebuilding Denel will take a long time. That is if Denel does not go under. As at mid-2021 Denel was associated with litigation in the media.

215. There remains the need to recognise that the capture of Denel caused harm to several individuals at a personal level. The suspended executives and the other executives whose careers at Denel came to an end through no fault of theirs. It is hoped that the exposure of the conduct that led to these sad results and the recommendations which follow will go some way towards ensuring that state capture and corruption generally are eradicated from our national life.

RECOMMENDATIONS

216. No specific action by Denel for recovery of losses sustained in the light of these findings is recommended. As alluded to above the time that has elapsed since the conduct identified was committed poses a problem. Denel has taken and is taking its own action to identify those who caused the loss and to quantify any loss it may have suffered. Denel will no doubt continue to evaluate action against those it suspects may have caused it harm.

217. Mr Mantsha and the other directors who supported his campaign against the three executives have prima facie shown themselves unfit to be directors of a company. Section 162 of the Companies Act 71 of 2008 prescribes that certain specified persons and bodies may apply to court for an order declaring a director or former director delinquent or under probation, amongst other situations where the director or former director grossly abused the position of director, intentionally or by gross negligence inflicted harm to a company of its subsidiary. The court on making a declaration of delinquency may make a range of consequential orders, including orders precluding such a person from exercising the office of a director or imposing conditions on the exercise of such an office.

218. However, all the persons and institutions entitled to apply for such orders must do so at the latest within 24 months after the director ceases to hold office as a director. The measure does not necessarily count this period from the time the director left the company where he or she misconducted himself. It is sufficient if the allegedly errant person was a director within 24 months of the institution of proceedings.

219. Denel itself, the DPE and the Companies and Intellectual Property Commission established by s 185 of the Companies Act would all have standing to consider bringing appropriate proceedings against Mantsha and other erstwhile members of the 2015 Denel board shown to have abetted Mantsha in

his efforts to capture Denel for the Guptas. It is therefore recommended that they all be asked by the Government to consider bringing such proceedings.

220. The Legal Practice Council should be made aware of the findings made by the Commission against Mantsha so that that body might consider applying to court to have Mantsha once again struck from the roll of legal practitioners.

221. The facts before the Commission have shown the inadequacy of punitive measures which currently form part of our law. Egregious violations of the Constitution have been demonstrated. Two forms of that abuse have been demonstrated by the evidence regarding Denel: the constitution of a board of directors for the purpose of achieving a result in direct conflict with the obligations imposed on directors by the Companies Act and other applicable legislation and measures; and the use of the suspension power in an administrative context for improper purposes. The methods by which unscrupulous persons can abuse public power are legion and abuses of public power pervade our public life. The present case merely demonstrates two of the potential violations of the duties attendant on public power which can arise.

222. But abuse of public power *per se* is not a criminal offence. And as has been shown in the present case, egregious abuses of public power tend not to be identified by legal processes until the perpetrators or those that protect them are out of power. And then the assessment of the relevant facts will be a cumbersome, time consuming exercise.

223. At the end of the process, perhaps all that can be achieved as the law now stands is the identification of the malefactors, years after the event, so that they can be judged by public opinion. Even civil law remedies may be unavailable because of the time that has passed between the commission of the abusive acts and the service of the document initiating civil proceedings. All that is not good enough.

224. It is therefore recommended that the Government consider the creation of a statutory offence rendering it a criminal offence for any person vested with public power to abuse public power vested in that person by intentionally using that power otherwise than in good faith for a proper purpose. Such potential violations might range from the case of a President of the Republic who hands a large portion of the national wealth, or access to that wealth, to an unauthorised recipient to the minor official who suspends a colleague out of motives of envy or revenge.

225. Such a statutory offence would therefore require considerable sentencing powers and might provide as follows in the operative section of the statute creating the offence:

> Any person who exercises or purports to exercise any public power, including any such power vested in such person by the Constitution, national or provincial legislation, any regulation made pursuant to national or provincial legislation or by municipal bylaw, otherwise than in good faith and for the purpose for which such power was conferred, shall be guilty of an offence and liable on conviction to a fine of up to R200 million or imprisonment for up to 20 years or to both such fine and imprisonment.

BOSASA

INTRODUCTION

1. This section contains a summary of the evidence presented to the Commission in respect of its investigation into the Bosasa group of companies and the individuals associated with these companies, including:

   1.1 The analysis of the evidence presented to the Commission with reference to the Commission's Terms of Reference (TORs) and the findings that may be warranted based on the evidence; and

1.2 The recommendations that may be considered, including whether any matter ought to be referred for prosecution, further investigation, or the convening of a separate enquiry, to the appropriate law enforcement agency, government department or regulator, regarding the conduct of any persons are provided. This is relevant to TOR 7.

SUMMARY OF THE BOSASA EVIDENCE

2. In this section, the evidence presented to the Commission regarding the activities and business dealings of the Bosasa Group of Companies is summarised. This includes the evidence pertaining to its tender practices and contractual relations with government departments and SOEs; its efforts to gain influence with officials, managers, and employees within those departments and SOEs; and the various role players within and outside Bosasa that were part of these endeavours.

Overview of the Bosasa Group

3. The evidence revealed an extensive network of companies associated with the business dealings of Bosasa. This constitutes an overview of the Bosasa Group, its management structure, Mr Gavin Watson's political connections and key employees.

4. Mr Agrizzi explained the Bosasa Group structure. Bosasa Group began as Meritum Hostels (Pty) Ltd. The company's name was then changed to Dyambu Operations (Pty) Ltd, which later changed to Bosasa Operations (Pty) Ltd. The shareholders of Dyambu Operations were Mr Gavin Watson, Mr Danny Mansell and Dyambu Holdings (Pty) Ltd. Dyambu Holdings held 10% of the shares. Other company name changes within the Group had also taken place. The decision to change the company's name from Dyambu Operations was because of some negativity regarding Dyambu Operations. The new contracts obtained around the time of the rebranding of the company were with the Libanon Gold Mine, Kloof Gold Mine, some smaller operational mines and Sasol.

5. The relationship between Mr Watson and Mr Mansell degenerated. Mr Mansell sold his shares in Dyambu Operations to Mr Watson. The shares so acquired were then divided up and held by various smaller entities.

6. Mr Agrizzi described the Bosasa Group as having a complex network of subsidiaries and entities that made it virtually impossible to identify the true B-BBEE status of a company. Through fronting the true B-BBEE status of the Bosasa Group of Companies was not represented in tender documents presented by Bosasa to various government departments.

Money laundering, cash generation and the payment of bribes

7. Both Mr Agrizzi and Mr van Tonder testified that Mr Watson required a substantial amount of cash every month which necessitated establishing mechanisms for generating cash. They stated that the purpose of this cash generation was to use the money for bribery. The various methods used to generate cash are set out below.

False invoices

8. Mr van Tonder testified that, initially, the required cash was generated by means of drawing the cash from Bosasa's bank account by creating fraudulent documentation to attach to a cheque requisition from the Accounts Department. The motivation provided for these cash cheques was that Bosasa was contracting with SMMEs that did not have bank accounts and required cash payment. This method became problematic as Mr Watson required larger amounts of cash.

9. Mr van Tonder explained that fake invoices for non-existent labour brokers would be generated. Another method involved using copies of Metropolitan funeral pay out documents as source documents for cash cheques. Mr Agrizzi testified that, when a Bosasa employee died, Bosasa would advance the payment that was to be forthcoming from the Metropolitan Death Benefit Fund. In doing so, they

would also reflect a cash donation by the company in an equivalent amount, although the latter donation would not be paid to the employee but instead would be used for purposes of generating cash for bribery. Bosasa at one point had some 6000 employees. So, it was a fairly regular event that an employee would pass away.

10. Mr Agrizzi explained that Mr Bonifacio was an astute accountant and between him and Mr Jacques van Zyl, also an accountant at Bosasa, they identified liquidated companies and used the names of these companies as suppliers to Bosasa. He elaborated that the fake invoice might take the form of the regeneration of a prior valid invoice for goods or services delivered.

Invoices for goods or services which were never received

11. The scheme to generate cash to bribe individuals also involved service providers supplying false invoices to Bosasa for goods and services that were never delivered or rendered. Bosasa paid the service providers, who repaid Bosasa in cash and deducted a percentage for their own account, with the cash being delivered directly to Mr Watson.

12. Mr Agrizzi testified that he started working closely with Mr van Tonder in 2009 who indicated that this had been the practice to generate cash for some time and explained how cash was generated through various other sources as well, such as Belfast Toyota and the creation of dummy invoices for companies that did not exist.

13. Mr Agrizzi further testified as to various methods of disguising the money flows necessary to pay the cash bribes. These included the following:

    13.1 A cash cheque would be issued and at the same time a fictitious invoice would be created to justify the cash transaction. The fictitious invoice would be created in the name of a company that was nearing liquidation or in liquidation.

    13.2 Mr Watson would instruct that companies be created specifically for purposes of issuing fake invoices which would be liquidated at a later stage.

    13.3 Bosasa arranged through Mr Riaan Hoeksma of Riekele Konstruksie CC that a cash flush company, Jumbo Liquor Wholesalers of Randfontein, would invoice Bosasa for alcohol and instead of alcohol being delivered, cash would be delivered by Mr Hoeksma for the equivalent amount of the invoice, with Mr Hoeksma receiving a commission of between 5 and 7.5%. The invoice from Jumbo Liquor Wholesalers would be settled by way of an EFT payment by Bosasa. It was either Mr van Zyl or Mr van Tonder who would make the arrangements in this regard with Mr Hoeksma. The invoice would be put through as tax deductible operational expenses. Mr van Tonder confirmed this evidence and stated that Mr van Zyl and members of the accounts department would attend to the administrative side of the transaction and he would collect the cash from Mr Hoeksma's offices in Randfontein.

    13.4 The next method appeared to operate in the following manner. A government department, such as a youth centre, would order a software programme from Bosasa. The payment by the government department in respect of the invoice would then be split between Bosasa and the government official arranging the transaction. The money paid to the government official would then be used for electioneering purposes by the ruling party. Mr Agrizzi was party to such a transaction involving the MEC for Social Development in the North West Province. The person from Bosasa that would facilitate these transactions was Syvion Dlamini, Director of the Bosasa Youth Development Centres. Mr Agrizzi estimated that, as far as he could recall, the value of this particular transaction was R3.4 million of which R1.8 million was paid out to the official involved.

14. Mr Agrizzi also testified about the high profit margins of the company and how these helped to disguise the illegality and to make it difficult for any forensic auditor to pick up the illegality. This included ensuring a consistent expenditure pattern through the year. Additional expenditure around Christmas time would be justified by what he described as "public holiday costs".

15. Mr Agrizzi testified that the person responsible for generating the fake invoices was Mr Bonifacio. He at one point decided to cooperate as a whistleblower and corresponded with Mr Agrizzi, including the preparation of a draft affidavit, but was then dissuaded when he confessed his intentions to Mr Watson.

16. Some of the companies and firms that provided cash to Bosasa using the false invoicing method are AA Wholesalers CC, Riekele Construction, Jumbo Liquor Wholesalers in Randfontein, Equal Trade 4 (Pty) Ltd and Equal Food Traders (Pty) Ltd and various derivatives of these names, and Lamozest (Pty) Ltd which, according to Mr Agrizzi was "not [used] for cash predominantly but for filtering, let us call it racketeering".

Cash sales at the Lindela Repatriation Facility

17. Another method of raising cash testified to by Mr Agrizzi related to Bosasa's contract to administer Lindela Repatriation Facility. Bosasa ran the canteen as well as a telephone facility at Lindela. These were the sole sources at the facility where detainees could purchase goods and make telephone calls. The detainees paid cash for the goods and the telephone services. A portion of the cash estimated at 10 to 15% was declared as revenue and the remainder transferred to the vaults at Bosasa headquarters. The total cash takings were estimated at between R300,000 and R400,000 per month.

18. A similar system operated in respect of the cash bars and canteens at the mine hostels that were administered by Bosasa. There was a special cash in transit team that would collect the cash from these facilities and bring it to "Gavin's vault". Mr van Tonder confirmed cash would be collected from the canteen at Lindela as well as canteens and bars run by Bosasa at mine hostels.

19. This practice dwindled in either 2002/2003 or 2003/2004 when Bosasa sold off the mining contracts to Mr Lacon-Allin of Equality Foods.

Payment to ghost employees

20. Another cash generation scheme testified to by Mr Agrizzi involved the creation of ghost workers. Bosasa had various sites where construction was under way. To generate cash, fictitious lists of casual employees were created by Riekele. Mr van Tonder and others were instructed to draw up fake payroll sheets on Excel reflecting ghost workers who would be paid wages in cash. Mr Agrizzi believed that it was easy to identify the wages to "ghost employees" because payments to employees were normally paid by EFT and these supposed casual workers are not reflected on the payment system. Further, there were no employment agreements for these workers.

21. Cash cheques would then be drawn on the local bank and Bosasa staff would collect the cash themselves. Mr Agrizzi accompanied them on one occasion. The amount then drawn was made up of three cheques which totalled R720,000. The cash was then packed in a bag and they left Key West FNB and drove to the Bosasa office. This was a weekly occurrence.

22. This practice was stopped when the Unemployment Insurance Fund started to require UIF contributions to be paid also in respect of casual labour.

Equal Trade and false invoices

23. Mr Agrizzi, Mr van Tonder and Mr Lawrence testified on the arrangement of procuring cash from Equal Trade. Mr Lawrence testified that in 2012, Mr Lacon-Allin told him to take the cash generated from Equal Trade's alcohol business to Bosasa instead of the banks given bank charges for cash deposits. The cash given to Bosasa was then paid back to Equal Trade by EFT. Mr Lawrence was aware that commission was payable for the cash handling but was not aware of the amount charged by Bosasa. Mr Lawrence explained that the cash handling arrangements worked as follows:

23.1 Once he had sufficient funds, he was required to contact an individual from Bosasa (whose name he could not recall) and meet him at the Bosasa Head Office to hand over the cash. This amount was never less than R100,000 and went up to R1 million.

23.2 Mr Lawrence kept no record of the cash taken to Bosasa but was "quite sure" that a record was kept by Mr Lacon-Allin and Bosasa.

23.3 Mr Lawrence could not recall how long this practice lasted but he "would say months". After some time, Mr Lacon-Allin informed him that the arrangement was coming to an end.

24. Mr Lawrence described having suspicions that the money delivered to Bosasa was to assist it in underhanded activities, given the rumour in the industry that Bosasa bribed government officials. After some time, Mr Lawrence began video recording the delivery of the cash to Bosasa because (i) he felt that the arrangement was wrong; and (ii) he wanted to protect himself.

25. In relation to the amounts that Mr Lawrence would have delivered to Bosasa, Mr Agrizzi recalled one specific delivery of R900 000 and a further R1 million the following week. Larger amounts of R2.8 million and R3 million would be collected by Mr van Tonder from a petrol station at Lanseria. Mr Agrizzi explained that payments made by Bosasa to Equal Trade would demonstrate exactly how much cash had been delivered.

26. After the period during which Mr Lawrence was involved in making deliveries to Bosasa, Mr Lawrence received an email from the Bosasa employee he dealt with in the cash deliveries and who was depicted in the video. Mr Lawrence read the email a few weeks later and it appeared that the email was sent to him in error. The email was intended for Mr Lacon-Allin. The email included a spreadsheet of purchase orders for 33 Department of Correctional Services (DCS) facilities. These purchase orders from Bosasa were addressed to Equal Trade to supply it with non-Vatable foodstuffs. Mr Lawrence confronted Mr Lacon-Allin about this and was informed this scheme was a different means of cash generation for Bosasa.

27. Mr Agrizzi confirmed that the *modus operandi* in this regard was like the one used with Jumbo Liquors. Mr Agrizzi tendered his cooperation in the further investigation of these transactions.

AA Wholesalers

28. Mr Agrizzi attested to a further method of raising cash for the illegal payments and explained that Mr Venter "understood the difficulties with trying to deal with the cash requirements in the company". Mr Agrizzi testified that Mr Venter had a client, AA Wholesalers, with whom he had dealings in Lenasia. Bosasa considered acquiring the business but decided against this "because there was a major culture difference between the two". However, it was decided that Bosasa would work with AA Wholesalers. The scheme was developed whereby AA Wholesalers would heavily over-invoice for a legitimate order of goods from the business. An EFT payment would be made by Bosasa in respect of the full amount of the invoice and the difference between the small amount of goods delivered and the full invoice would be delivered to Bosasa in cash.

29. Mr Venter testified that he knew the owner of AA Wholesalers, Mr Amod, from the time that he was employed at SARS and that they had become friends. Mr Venter introduced Mr Amod to Mr van Tonder. Mr van Tonder, according to Mr Venter, was impressed with Mr Amod's business and wanted to show Mr Agrizzi and Mr Watson. Mr Venter testified that he accompanied Mr Agrizzi, Mr van Tonder and Mr Watson to AA Wholesalers. At the meeting, Mr Watson, Mr Agrizzi and Mr van Tonder expressed an interest in purchasing the company from Mr Amod (though this did not take place) and asked about how much cash was generated in the business. Mr Venter testified that he was not involved in any of the cash schemes in relation to which Mr van Tonder gave evidence that he had been informed of the scheme to obtain cash through AA Wholesalers and Equal Trade by Mr van Tonder. However, he said that it was not part of his functions.

Mr Watson's vaults and safes

30. Mr Agrizzi, Mr van Tonder and Mr le Roux testified about cash stored at the Bosasa premises in a walk-in vault and safes. A video of the vault was handed in as evidence, along with a transcript of the soundtrack on the video. Mr van Tonder filmed this video on 28 March 2017 on request from Mr Agrizzi.

31. Mr Watson was the only person with keys for the safes. The Company Secretary had the keys for the vault. Mr Watson would take money from the drop safe and pack it into the other safes "when he was around". The origin of the money being deposited into the drop safe is dealt with in Mr Agrizzi's evidence.

32. Mr Agrizzi testified further in response to questions from the Chairperson that every one of the contracts in which Bosasa was involved was tainted with bribes and corruption. He would not say they were all awarded because of corruption, but, once they were awarded, corruption crept in because "somebody would have to be looked after". He went on to testify that corruption featured in both seeking the award of new contracts and in seeking the extension of contracts, save perhaps for one or two exceptions.

33. The focus then moved to the parts of the transcript of the video dealing with "Patrick". Mr Agrizzi explained that there were "two Patricks". The one was Mr Patrick Littler who was an operational leader within Bosasa and the other was Mr Patrick Gillingham. Mr Agrizzi was involved in paying money to Mr Gillingham. In this instance, Mr Agrizzi testified, "Patrick" was a reference to Mr Gillingham. This was confirmed by Mr van Tonder who explained that he was given instructions in the past to take a delivery of cash to Mr Gillingham in a grey, plastic security bag. Deliveries of this nature occurred at a shopping mall near Lanseria Airport.

34. Mr Agrizzi explained the difference between handling and paying. "Handling" meant doing certain things for the person being paid whenever he or she might need help other than cash and ensuring that the person did not "become like I did, a loose cannon in the opinion of Watson". Mr Agrizzi went on to explain that the same person would do both the managing and the paying (subject to what he said later about intermediaries) but in Mr Gillingham's case it was a unique situation which was very sensitive. For that reason, Mr Biebuyck was co-opted into handling him and Mr van Tonder was co-opted into paying him.

35. Before the handover regarding Mr Gillingham, Mr Agrizzi was responsible for both handling and paying him, although he explained that an intermediary would usually be involved in effecting the payment to the beneficiary. Mr Agrizzi confirmed that Mr Gillingham used to receive "a full 110,000 that was packaged specifically for Patrick Gillingham". The other Patrick, Patrick Littler, received the money for the unions at Kloof, Libanon and Leeudoring mines and he used to get the money for the hostel manager who used to be paid as well.

36. As pointed out above, Mr Agrizzi explained that the video was taken in 2017 when he was no longer employed at Bosasa. He had not been involved in any of the payments after the termination of his employment. He obtained the video as a form of protection and with the intention of publicising it.

Mr Agrizzi's role and cash payments

37. Mr Agrizzi testified that from 2009 he was tasked specifically with the handling of cash – getting the cash, taking and delivering the cash, handling the cash and counting it out for bribery and corruption. Prior to this time, Mr Agrizzi would be tasked to go "arrange and to do things" as requested.

38. Mr Watson stated that it would be more convenient to handle the cash for the payment of junior officials at the DCS if a safe was installed in Mr van Zyl's office, and a certain amount of money allocated to that safe, which was attended to. Mr Watson, Mr Gumede, Mr Leshabane and Mr Dikani made payments on a monthly basis from shortly after Mr Mti's resignation in 2007 until approximately the end of December 2016 to the following DCS officials: Mr Josiah Maako, Contracts Manager (R15,000); Ms Maria Mabena, Catering and Development and Care (R10 000); Mr Shishi Matabella,

Commissioner for Development and Care (R10 000); Mkabela Commissioner (R10 000); Ms Dikeledi Tshabalala, Head of Procurement (R15 000); Mr Zach Modise, Regional Commissioner (R20 000); and Mr Mollet Ngubo, Finance (R15 000).

39. Mr Agrizzi's evidence regarding the system that was implemented for the handling of cash was detailed. Initially Mr Agrizzi would not prepare the cash and would only prepare the codes and the list and would hand it to Mr van Zyl who would pack the cash from his safe. When the cash was handed to a director with a code, the director would know who the money was for because they would have been told the codes by Mr Agrizzi.

40. A payment at Bosasa could not be paid with just one signatory; it required at least four or five signatories to authorise an EFT transfer. The purchase order for a payment of this nature would be created and two signatures from the originator would be required. In addition, either Mr Agrizzi, Mr van Tonder or Mr Bonifacio's signature was required. It would also require a director's signature before payment could be made.

41. In 2013 Mr Gumede saw lists and cash in Mr van Zyl's safe, reported it to Mr Watson and questioned Mr van Zyl's loyalty in Mr Agrizzi's presence. Mr Watson instructed that the cash duties be taken over by Mr Agrizzi. Mr Van Zyl would still help in creating false invoices. Mr Agrizzi testified that he refused to handle the cash alone, would always ensure that there were two people present and would usually handle it with Mr van Tonder, or Mr van Zyl in Mr van Tonder's absence.

42. Mr Agrizzi estimated that the total amount paid in bribes by Bosasa monthly to be in the region of between R4 million and R6 million. He said that this amount was a drop in the ocean compared to Bosasa's turnover. Mr Agrizzi would deliver cash to people who would then distribute it further, including Mr Ishmael (Director of Bosasa); Mr Dlamini (Director of Bosasa); Mr Gumede (Chairperson of Bosasa); Mr Seopela (consultant); Mr Mti; Thandi Makoko (Director of Bosasa); and Mr Leshabane.

43. Mr Agrizzi wrote some of the codes and the full names of persons in his black book, which was locked in Mr Watson's safe for Mr Watson to check if he wanted to reconcile the cash.

44. Mr Agrizzi testified that around 2009/2010 he would deliver payments monthly to Mr Seopela to be handed over to officials, including senior officials, at the DCS. This would be in addition to the monthly payments managed by Mr Agrizzi as described above.

45. Mr Gillingham resigned in November 2010 after he had been suspended for approximately two years. He resigned the day before his disciplinary hearing for charges that had been brought against him based on an SIU Report. His resignation was accepted by the DCS. Bosasa assisted Mr Gillingham to secure the services of a firm of attorneys. Mr Agrizzi testified that, after Mr Gillingham had resigned, he approached Bosasa for financial assistance and Mr Watson agreed to pay him an amount of R110,000 per month. Previously he had received an amount of R47,000 per month. Mr Gillingham was still being paid the R110,000 per month at the time when Mr Agrizzi left Bosasa. The arrangement, according to Mr Agrizzi, was that the senior members would be paid by Bosasa for as long as the DCS contracts were in place.

46. Mr Agrizzi was approached by Mr Leshabane who requested that he be provided with a monthly amount of R71,000. Within the R71,000, R11,000 was specifically for informants that he had and R30,000 was for the payment of journalists. Mr Agrizzi recorded this information in his black book. In the black book, Mr Agrizzi made an entry "Papa – Journo's R30,000-00". The payment for the journalists was suggested by Mr Leshabane, following negative reporting on Bosasa. It was also utilised to get information from the media if there were to be negative stories published so that they could counteract it. These payments had already begun in 2012. The journalists mentioned were Mr Ntuli, working for the Times or the Star newspaper, Ms Pinky Khoabane and someone referred to as Bongs. Mr Agrizzi was unable to confirm if the journalists received the money given to Mr Leshabane.

47. Bosasa also employed media consultants, Ms Benedicta Dube and Mr Stephen Laufer, to counter the negative publicity and to discredit the journalists that were writing these articles. There was a campaign to discredit the journalists, including Mr Basson and Ms Carien du Plessis, following an in-depth report they produced.

Mr Agrizzi's black book

48. At one point Mr Agrizzi was tasked with managing and trying to keep a record of what cash was going in and out of the safes for inter alia bribes or gratuities. He was unable to record the date when he had been tasked with this responsibility. To this end, Mr Agrizzi kept a record in "a little black book" in which he recorded the amounts sought and communicated the amounts to Mr Watson. The director or manager seeking the payment would have to provide a short motivation either on a piece of paper or by SMS. Persons who received payments regularly would be paid by Mr Agrizzi without reference to Mr Watson, but if a new name came up or a new amount came up, he would have to get approval from Mr Watson. The code allocated to a payment would be written on the security bag.

49. In Annexure HH to Mr Agrizzi's Supplementary Affidavit, he sought to set out in a table, or spreadsheet as he described it, the names of the people that were referred to in the codes, providing the names of both the person to receive the bribe and the name of the person delivering it to them.

Payments of bribes and gratuities

50. Mr Agrizzi was asked to estimate the number of people on the "payroll" (referring to recipients of illegal payments) of Bosasa. He said that the forty names in the pages of his book represented about half of the recipients, so that the total number of recipients would have been in the region of eighty. These were the people receiving monthly payments.

51. Later, Mr Agrizzi recalled counting a list of 38 government employees and officials who received bribes on a regular basis. Mr Agrizzi went on to describe how Mr Watson would deal with deliveries to very high-profile officials himself. This was particularly so over the festive season.

Blake's Travel

52. Blake's Travel was the travel agent used by Bosasa to book travel and accommodation. Government officials benefited from travel and accommodation arranged by Blake's Travel and paid for by Bosasa. For example, Mr Agrizzi testified that flights, travel, and accommodation would be booked by him on the Bosasa "VIP account" with Blakes Travel for Mr Linda Mti, his wife and family.

53. Mr Brian Blake, Managing Director and 50% shareholder of Blake's Travel, deposed to an affidavit dated 28 November 2019. He also testified at the Commission on 29 July 2020. His evidence was in line with his affidavit. The affidavit is referred to below where it provides corroboration of oral evidence received by the Commission. For present purposes, we highlight the following aspects of Mr Blake's evidence in the affidavit:

    53.1 Mr Blake confirms a number of bookings made by Bosasa on behalf of various individuals, including Mr Gillingham, Mr Mti, Mr Katleho Mokonyane, Mr Mohamed Moorad, Ms Dudu Myeni, Mr Trevor Fourie, Ms B Smith, Mr Vusi Mbasela, B Njenje, Mr Joel Mbatha, Mr Peter Daluxolo, Mr Phumlani Seyema, Mr Jacobus Du Toit, FC Bopape, S Xulu, Mr Watson, Mr Seopela, Mr Dlamini, Mr Mansell, Mr van Tonder, and Mr Agrizzi. Mr Blake also provided the Commission with copies of invoices, collated into a consolidated spreadsheet attached as "BB" to his affidavit. The invoices supporting the information are also attached to the affidavit. The spreadsheet contained a summary of the clients to whom Blake's Travel provided services through Bosasa. Mr Blake testified that there may be further clients that had not been identified.

    53.2 Mr Blake confirms the process followed in respect of travel arrangements utilising various accounts that Bosasa had with Blake's Travel and payments made by Bosasa to Blake's Travel.

    53.3 Bosasa used the Bosasa Operations account for their day-to-day business travel arrangements and the account was settled by Bosasa Operations by way of an EFT or occasionally by cheque.

    53.4 The Bosasa VIP account and those that replaced it were utilised for Bosasa directors' travel arrangements, travel and accommodation of "non-directors of Bosasa, including government officials and/or private citizens.

Attorneys' trust accounts

54. Mr van Tonder testified that he was aware of substantial funds transferred from Bosasa into attorneys' trust accounts. He was told by Mr Watson that this was done to mitigate against the risk of Bosasa running out of funds in the event of the NPA freezing its bank accounts pursuant to an SIU investigation.

55. Mr van Tonder explained that from time-to-time Bosasa needed cash for cash flow purposes. A request would be made to withdraw funds in the attorney's trust account. In this regard, he referred by way of example to an email from Mr Agrizzi to Mr Biebuyck on 27 June 2016 in which Mr Agrizzi requested that R25 million be transferred from the trust account to Bosasa Operations. According to the email, the funds would be replaced as soon as payments were received from the Department of Justice and Constitutional Development (DOJCD) "that is currently R84 million outstanding."

THE AWARDING OF CONTRACTS AND TENDERS TO BOSASA

56. In this section, the evidence on the contracts awarded to Bosasa by various SOEs and government departments as well as key Bosasa employees' interactions with public officials during Bosasa's efforts to source such contracts is summarised.

57. Between 1999 and 2002 Bosasa received contracts relating to: (i) Kloof Gold Mine; (ii) Libanon Gold Mine; (iii) Sasol; (iv) Randfontein Gold Mines; (v) Hartebeesfontein Gold Mines; (vi) Harmony Gold Mine in the Free State; (vii) Goedehoop Colliery; and (viii) Horizon Youth Centre in the Western Cape.

58. During 2001 to 2004, Bosasa received (i) a contract to guard various post offices which also encompassed pension pay-outs; and (ii) a contract from ACSA for guarding a car park at OR Tambo International Airport (ORTIA).

59. During the period 2004 to 2007, Bosasa received contracts from the DCS. These contracts included: (i) a training contract run by Dr Smith and Mark Taverner; (ii) a catering contract at seven management areas; (iii) the Sondolo IT access contract and CCTV contract; (iv) the Sondolo IT television network system contract for every cell in every correctional centre; and (v) the Phezulu fencing contract. Most of these contracts had provisions for their extension or variation or a maintenance component attached to them. These contracts were discussed in more detail below. In addition to the contracts for the DCS during the period 2004 to 2007, Bosasa received contracts for various youth centres in the North West Province.

60. During the period 2007 to 2010 Bosasa performed the first guarding contract for the DOJCD. This related to the guarding of "all the rural areas ... for them". During this period, Bosasa also had contracts for various Limpopo Youth Centres through the Department of Social Development (DSD).

61. In the period 2011 to 2016 Bosasa had contracts with the Clanwilliam and Namaqua Youth Centres; a contract with the DoJCD for the provision of access control, fencing and CCTV facilities to 101 courts nationally. This was an integrated system managed by the Independent Development Trust (IDT). Three liaison people from the Department sat in on all meetings.

62. In the period 2011 to 2016 the contracts with the ACSA were extended to include all airports in South Africa, except for the airports in Polokwane and Lanseria. In addition, there were contracts with the Department of Home Affairs (DHA) pertaining to Lindela.

63. The aggregate value of contracts awarded to the Bosasa companies by various SOEs and Departments between 2000 and 2016 was at least R2,371,500,000. Approximately R75,700,000 was paid out in bribes. The value of the continuing contracts for Bosasa is in the region of R 90 million. Mr Agrizzi estimates the annual bribes paid in cash for these contracts to be at least R 9.4 million.

64. The Chairperson enquired from Mr Agrizzi whether, if Bosasa knew they were going to be paying bribes for the duration of the contracts, it would inflate the contract prices. Mr Agrizzi explained that the contracts were run at between 35 and 40% gross profit. Bribes were always factored in at around

2.5% or Mr Agrizzi was told they would need to pay X amount out and he would factor that into the contract prices. When asked how the bribes were ultimately accounted for in the company's books in relation to tax, Mr Agrizzi explained that they were not accounted for. Mr Agrizzi explained that these amounts were taken into consumption and they became costs of sales and, therefore, Bosasa paid less tax on them.

65. Mr Agrizzi was asked whether, apart from the bribes, the state was receiving value for money from Bosasa. Mr Agrizzi responded that it was not a one answer scenario. The state was receiving value for money in relation to some contracts but not others. For example, it was not receiving value for money in relation to the Lindela contracts, but it was for purposes of the youth centres.

Bosasa's early contracts

66. Mr Agrizzi testified that from 2001, the company grew rapidly with new contracts coming in. This included several additional mines owned by other mining houses. There was also a security contract with the SAPO which evolved to include pension pay out points.

Sasol and Simon Mofekeng

67. Mr Agrizzi testified about an instance where someone at Sasol informed them of flaws in a tender submitted by Dyambu Operations to Sasol for catering services, after the closure date. Mr Agrizzi was asked to meet with an official or employee of Sasol. He sought and was afforded an opportunity to amend the bid even though the closure date had passed. The procurement official he met was annoyed because they had been instructed from a higher authority to allow the change.

68. Mr Agrizzi also testified about a meeting with Mr Simon Mofokeng of the Chemical Energy Paper Printing Wood & Allied Workers Union. He accompanied Mr Watson to the meeting with Mr Mofokeng. Mr Watson explained the purpose of the meeting as being "to put pressure on the union, to create a work stoppage so that management was forced into submission in giving a tender". At the meeting, Mr Mofokeng provided Mr Watson and Mr Agrizzi the pricing that the other companies had submitted to enable them to tailor their price accordingly. Mr Agrizzi understood that this was entirely improper. Mr Mofokeng apparently had this information because he "had a phenomenal network at Sasol". Mr Agrizzi testified further that Bosasa employed Mr Mofokeng's wife, Maureen, to head up a newly established training department.

69. After the amendment of the bid, it was successful. Mr Agrizzi was instructed by Mr Watson to arrange for braai packs, cold drinks and various grocery items and the like to be delivered to Mr Mofokeng. Bosasa held the Sasol contract from 1999 until about 2002 when the contract was sold off.

South African Post Office

70. Mr Agrizzi then turned to a tender to provide security for the SAPO. Mr Watson informed Mr Agrizzi that he (Mr Watson) "was paying [Siviwe Mapisa, head of security at SAPO] and [Maanda Manyatshe, the CEO] for the SAPO contract and looking after them".

71. Mr Agrizzi testified that Mr Watson had instructed him to start the logistical preparations for the SAPO security contract before the tender was submitted. The contract was awarded and operated for a three-year period with a further extension of two years. At one point, Mr Agrizzi attended a trade show in Dubai focussing on security applications. He was accompanied by Mr Johnson Vovo, director of security at Bosasa, and Mr Gumede who was also a security director. When they had a free day, they purchased various "premium gifts" for Mr Mapisa and Mr Manyatshe.

Airports Company South Africa

72. The ACSA awarded Bosasa a tender to do the multi-storey carpark protection and guarding services at ORTIA. This was at a time when many cars were being stolen from the airport. The contract was

awarded in 2001 and, according to Mr Agrizzi, was a five-year agreement renewable at the end of each five-year term. He understood Bosasa still to have the contract. Mr Agrizzi was responsible for compiling the tender documents. Mr Agrizzi testified that, when drafting the tender bid, he was informed by Mr Watson and Johnson Vovo that Bosasa would be awarded the tender.

73. Mr Watson knew Mr Thele Moema, the head of risk at ACSA. He also knew Mr Siza Thanda, the head of security for ACSA. Mr Agrizzi used to visit ORTIA and often went with Mr Gumede, then a director of Bosasa and subsequently its chairperson. They would take with them grey security bags and give it to "certain people" at ORTIA. Mr Agrizzi testified (somewhat contradictorily) that he was not aware that there was money in the bags although he had himself received a bag with cash in it, with the result that he "knew what was in the bags".

74. These occurrences were a regular event. Payments continued to be made to people at ACSA until Mr Agrizzi left Bosasa. Mr Agrizzi confirmed that the payments were a monthly event. Payments to Messrs Thanda and Moema stopped when they left ACSA. Mr Agrizzi confirmed that he not only packed the money bags but also kept a record in this regard.

Department of Correctional Services

The catering / kitchen contract

75. Mr Agrizzi first met Mr Gillingham in mid-to-late 2003 at Lindela. He was introduced to Mr Gillingham by Mr Watson. When he met him, he gained the impression from his uniform that he had a senior rank. Mr Agrizzi learned at the meeting that he was employed in the DCS. During this introductory meeting, Mr Gillingham had a few requests. Mr Watson also told Mr Agrizzi to get cash from him every month for Mr Gillingham and during that meeting Mr Gillingham mentioned that there were issues with his house that needed to be attended to. Mr Agrizzi had to attend to this immediately.

76. In 2004 Bosasa had been awarded a contract to train senior officials of the DCS on compliance with meal intervals and related matters, as required by the Correctional Services Act 111 of 1998. Mr Agrizzi became aware of the contract at an awards evening for the officials who had attended the training. The function was coordinated by Dr Smith and Mr Taverner, Mr Watson's brother-in-law and employee of Bosasa. At the time, Mr Agrizzi was not aware that Mr Taverner was involved in the furnishing of Mr Mti's and Mr Gillingham's respective houses.

Initial efforts to secure the catering contract

77. Mr Vorster testified that Mr Watson approached him in 2003 with a request that he contact Mr Gillingham as Mr Watson would love to tender for the catering contracts at the DCS. At this stage, the catering at the DCS was not outsourced. Mr Gillingham was the Provincial Commissioner at the DCS for Mpumalanga, Limpopo and Gauteng and the project leader for the tender. Pursuant to this request, Mr Vorster approached Mr Gillingham and explained to him that Bosasa wanted to get involved in the catering sector at the DCS. From there on, Mr Vorster met Mr Gillingham regularly.

78. Mr Vorster explained that he would later take the cash to Mr Gillingham at a restaurant in Pretoria/Centurion. During this meeting, they discussed the specifications of the kitchens at the DCS and menus. Mr Vorster would then hand envelope of cash to Mr Gillingham in exchange for information. Mr Vorster would later pass this information on to Mr Mansell who was a "consultant" for Bosasa at the time.

79. In the beginning Mr Vorster's meetings with Mr Gillingham occurred on a bi-weekly basis. The frequency of these meetings depended on how much information was required. He did not take cash to Mr Gillingham on each occasion and did not know if there was an agreement between Mr Watson and Mr Gillingham. The amounts Mr Watson provided for Mr Gillingham varied but it was mostly around R20 000.

80. Mr Vorster explained that, with the information provided to him, Mr Mansell was able to prepare a presentation and strategy to obtain the catering contract. At the end of 2003, Mr Mansell presented

this plan to senior management of the DCS, although Mr Vorster did not attend this meeting. At this stage it was not known that the DCS would be outsourcing the catering services. In early 2004, Mr Gillingham did a presentation regarding the outsourcing of the catering contract which was prepared for him by the Bosasa team.

81. Mr Vorster also testified that Mr Watson had a close relationship with Mr Mti who, at the time, was Commissioner of the DCS. This led to Mr Gillingham being appointed in procurement and later as CFO to drive the processes which Mr Mti would then approve.

82. At the beginning of 2004 Mr Watson informed Mr Agrizzi that Bosasa had to visit prisons around South Africa, together with Mr Gillingham, to evaluate the catering needs and concerns of the DCS to create a blueprint for the catering services. This was the second time that Mr Agrizzi met Mr Gillingham. Mr Agrizzi and others were instructed not to wear Bosasa uniform so as not to be identified as Bosasa and that the tour was to be coordinated by Mr Mansell and Gillingham. Mr Agrizzi, Mr Vorster, Mr Viljoen, Mr Mansell and Mr Gillingham attended the tour. They visited approximately 26 facilities across Johannesburg, Port Elizabeth, Durban, Cape Town and Pretoria.

83. Mr Agrizzi submitted the report to Mr Watson and Mr Mansell. Mr Agrizzi wanted to include catering security systems and requested an employee, Mr Johan Helmut, to design a solution that they could implement or show to the DCS. Mr Helmut designed such solution that Mr Agrizzi included in the final report and specification layout.

84. Mr Agrizzi testified that after the report had been finalised, he emailed it to the two email addresses that Mr Watson had provided him with, that of Mr Mansell and Mr Gillingham. Mr Agrizzi became aware of the fact that the report was used as a specifications document when the invitation to bid was advertised on 21 May 2004 and he was instructed to respond. When he confronted Mr Watson, Mr Agrizzi was told that the tender would be awarded to Bosasa, he should keep quiet, keep his head down, do the paperwork and fill in the tender.

Award of the catering contract

85. All bids fell under Mr Agrizzi's supervision. He had a team that compiled the response to the invitation to bid. Bosasa was awarded the contract on 27 July 2004, initially for a three-year period with an annual value of R239,427,694.00. This was corroborated by Mr Bloem who explained that the contract was for seven large prisons, namely Durban-Westville, Pollsmoor, St Albans, Johannesburg, Pretoria, Modderbee and Krugersdorp. Mr Agrizzi explained that the costings were manipulated by doubling the price of a special meal (the exact same as a normal meal but prepared differently) and running the normal and special meals at a 70/30 ratio, instead of the 90/10 ratio. This resulted in a monthly costing that was on average 35% higher, with the DCS paying closer to R310 million instead of the R239 million for the first year.

Extension of the scope of the catering contract

86. On 29 September 2004 Mr Watson instructed Mr Agrizzi to propose to Mr Gillingham that seven satellite Correctional Centres should be included in the catering tender. This followed discussions between Mr Mansell and Mr Gillingham and approval from Mr Mti. The expansion of the contract was approved, and Mr Agrizzi had to provide a price for it. The monthly value of the expansion was R14 million. Mr Agrizzi testified that the scope of the catering contract was extended without authorisation in terms of the original tender or a new tender, and that everyone involved was aware of the fact. The contract was due to expire in September 2007 and was extended in July 2007 for a further year, a fact that was corroborated by Mr Bloem.

87. Mr Bloem testified that during a meeting on 26 February 2008 the National Commissioner of the DCS assured the Portfolio Committee that the tender for the catering contract would be advertised before its expiry on 31 July 2008. Despite this assurance, the contract was extended for a further six months until the finalisation of a new tender process chaired by Ms Sibushini Moodley (CDC: Care and Development), and not Mr Gillingham who had been closely linked to the extensions of the

Bosasa contracts. Mr Bloem believes that Ms Moodley was used to avoid Mr Gillingham having to account.

88. At this stage, Mr Bloem called the DCS to account for these extensions before the Portfolio Committee. A meeting was held on 19 August 2009 in which the catering contract was discussed and the DCS was requested to provide the Portfolio Committee with information relating to the feasibility study for the outsourcing, why and how the seven correctional centres were selected, and the role Mr Gillingham had played in this process. The DCS has never provided this information and proceeded to re-award the tender to Bosasa Operations. The Portfolio Committee became aware of this award through the media.

89. On 6 January 2009 the DCS awarded Bosasa a new catering contract. The contract was for three years and the specifications documentation that had been used for the prior catering contract was again used for the second catering contract awarded to Bosasa.

The next catering contract

90. Mr Agrizzi testified that in 2013 a further catering contract for the DCS was awarded to Bosasa. The DCS used the same specifications that had been used in the previous contracts. Bosasa submitted a bid and was awarded the contract for a three-year period to the value of more than R420 million per annum. Mr Agrizzi testified further that the approximate gross profit margin for the contract was 40% with 28% net profit.

91. Mr Agrizzi was introduced to the Treasurer General of the ANC Youth League, Mr Reggie Nkabinde by Mr Watson. Mr Watson asked Mr Agrizzi to see if he could assist Mr Nkabinde, given that Mr Nkabinde was very close to Ms Mokonyane. Mr Agrizzi knew that Mr Nkabinde was politically connected and that he was very close to Mr Tom Moyane and "would be able to resolve any issues at Correctional Services". Mr Tom Moyane was the Commissioner of the Department of Correctional Services at the time.

92. In 2016 Mr Agrizzi was called to a meeting at Bosasa during which Mr Watson, Mr Nkabinde, Mr Patrick Monyeki and Mr Sam Sekgota were in attendance. Mr Watson told Mr Agrizzi that he was required to work with Mr Nkabinde and Mr Sekgota if Bosasa was to retain the catering contract with the DCS. Mr Agrizzi was shocked by this, given that he thought Bosasa was "on top of issues". He later realised that Mr Nkabinde had a copy of the tender before it had been issued. After discussing the matter, Mr Watson and Mr Agrizzi approached Mr Sekgota for assistance. Mr Sekgota advised them to pay R5 million to his consultancy company to secure a six-month extension of the contract "which then would give us time to work out a plan of sorts on how to manage this thing", referring to the new tender.

93. Given that a six-month extension was equivalent to R150 million in fees, Bosasa paid the R5 million consultancy fee to Mr Sekgota's company. An invoice was raised by this company and then Bosasa "raised the second agreement". The second agreement with Mr Sekgota was for the renewal of the catering contract. This agreement required a payment of R10 million to Mr Sekgota's company. Mr Watson refused to pay that amount, effectively reneging on the agreement with Mr Sekgota. The decision to renege on the agreement followed advice given to Mr Watson from "people" that he did not need to pay that kind of money for the agreement. Consequently, Mr Sekgota "did not bother getting the renewal for the catering contract" resulting in Bosasa losing a portion of the contract (approximately 40%) of the catering contract.

The Portfolio Committee's concerns with the catering contract

94. Mr Bloem described the catering contract as "just a money laundering scheme". This is because, even though the function of taking over the kitchens and preparing food was outsourced to Bosasa, Mr Bloem witnessed inmates preparing the food and saw no labour from Bosasa. He explained that the Portfolio Committee were not given answers as to who supplied food to the prisons given that the DCS had its own farms. Mr Bloem was unequivocal that there was no way the Minister (at the

time, Mr Ngconde Balfour) would not have known about these concerns as Mr Bloem had raised them personally with him.

95. Mr Bloem testified that the only thing Bosasa did was "to give these inmates a certificate at the end of the year saying that he is trained". He therefore did not believe there would be any disruptions to the functioning of the DCS kitchens if Bosasa's contract was cancelled. Mr Bloem confirmed that attempts were made to intervene in the award of further contracts and extensions to Bosasa but these were ignored. He said that the speaker, Mr Max Sisulu and the chairperson of the caucus, Ms Vytie Mentor,[5] were aware of these problems. Ms Mentor attempted to discuss these issues with Mr Balfour. The Standing Committee on Public Accounts (SCOPA) also raised concerns and Mr Bloem raised these concerns with Mr Balfour directly. It was clear to Mr Bloem that Mr Mti had Mr Balfour's protection.

96. During 2004 and 2009 there were two burglaries at Mr Bloem's office at Parliament during which documents were removed. This included a letter accusing Mr Bloem of attacking Bosasa and promoting White Capital and threatening him and his family with personal attacks. Mr Bloem testified that Ms Winnie Ngwenya, one of his Committee members, visited him and stated that she was sent by the owners of Bosasa to say that they wished to meet with him. He said that he was not willing to do so. She referred to there being "inyuku" which is a township slang word for "money". Mr Bloem informed her that he was not interested. Mr Bloem later realised that Ms Ngwenya showed bias towards Bosasa and had no real concern for the DCS.

97. Mr Bloem testified that during the time he was vocal about the Bosasa tenders, he received many calls threatening his life. He pleaded with the Chairperson to investigate the death of Mr Vernie Petersen because he opposed corruption and the tenders to Bosasa. He also indicated that Judge Erasmus from the Western Cape High Court raised many concerns regarding the Bosasa contracts in his reports at the Judicial Inspectorate into prisons.

The access control contract

98. In November 2004, Bosasa was invited to attend a monthly meeting of the DCS at Supersport Park to present on the implementation of the catering tender and to showcase some of the other services Bosasa could provide. Mr Mti, Mr Gillingham, Mr Agrizzi together with several Bosasa directors (excluding Mr Watson and Mr Mansell), attended the meeting.

99. According to Mr Agrizzi, Mr Watson indicated that he had received very good feedback from Mr Mti after the meeting and that there was an access control contract in the pipeline. Mr Watson and Mr Mansell instructed Mr Agrizzi to draft a specifications document for an access control system that would be advertised. Mr Agrizzi was instructed to draft the specifications in a manner to ensure that the award of the tender to Bosasa would be guaranteed. This was done by including aspects in the specifications that only Bosasa would be likely to have, such as experience working in a correctional services environment and to be an accredited National Key Points service provider.

100. The DCS issued an invitation to bid, on 4 February 2005, based on the specifications drafted by Mr Agrizzi. Initially, Mr Agrizzi was instructed to bid under Bosasa Security (Pty) Ltd and was later instructed to amend the documents and to respond under a newly established company, Sondolo IT. Around April 2005 Sondolo IT was awarded the contract. The contract's initial period was for two years and was later expanded to include a control room contract in terms of which Bosasa was paid to manage control rooms for the DCS at 66 sites. The value of the expansion was R236,997,385.31. Mr Agrizzi testified that the contract was inflated from the start.

The fencing contract

101. In June 2005 Mr Watson informed Mr Agrizzi that high security fencing at the DCS was a business opportunity for Bosasa. From the discussion it was evident that Mr Watson was aware that the DCS

[5] Now deceased.

required a solution. According to Mr Agrizzi, Bosasa had never previously provided fencing and did not have the internal capacity to do so. An agreement was reached for Mr Watson to acquire 26% of the South African branch of Beta Fence.

102. Mr Agrizzi attended a meeting with Mr Watson, Mr Mansell, Mr Michael Roodenburg the Managing Director of Beta Fence, JP Hobbs (an engineer), and Riaan (Mr Agrizzi could not recall Riaan's surname). Riaan and Mr Hobbs were from the companies Teq-con and Modutech. Mr Agrizzi read up on the specifications used for high security applications and learned that the fence is made up of the Bode Mesh from Beta Fence and the taut wire system (which triggers an alarm when touched) from Modutech. It later became clear to Mr Agrizzi that this had been put together by Mr Mansell, Mr Roodenburg, Riaan and Mr Hobbs to capture the fencing business at the DCS. The arrangement was that there would be cooperation between the various entities (Sondolo IT, Modutech and Beta Fence) with the prospect of supplying security fencing to the DCS.

103. Due to the controversy about the Bosasa Group at the time Messrs Watson, Mansell and Perry negotiated with Mr Roodenburg and his wife, Jean, as well as with Ms Gloria Josephs to buy a company owned by the Roodenburgs and Josephs (the majority shareholders) called Phezulu Fencing. The sale would only go through (i.e., the shareholding would only be transferred) once the contract had been awarded to Phezulu Fencing by the DCS. The Bosasa Trusts (Bopa and Phafoga) were the buyers. The management of Phezulu Fencing was immediately taken over by Bosasa. The Roodenburgs and Josephs would transfer their shareholding for a "nominal fee of a few million Rands", and would retain an interest by subcontracting through Gordian (Pty) Ltd.

104. Mr Agrizzi testified that at the same time a supply agreement was entered into between Beta Fence and Phezulu Fencing where Beta Fence would supply all fencing material to Phezulu Fencing at a lower or "base cost". The fence was patented and sold at a premium price to any other customer, including any potential competitors of Phezulu Fencing. Beta Fence benefited by obtaining the contract and the black economic empowerment obtained through the transfer of the 26% shareholding to the Bosasa Trusts. Mr Agrizzi arranged with Beta Fence to pay the dividends in respect of the shareholders into the attorney's trust account of Mr Biebuyck who was instructed to transfer the money to Bosasa Operations. The dividends were not paid to the two trusts. The rationale for doing so, Mr Agrizzi testified, was because the shareholders reflected on paper were actually not shareholders and so did not get the dividends.

105. At this stage there was no public announcement of such a tender being issued. According to Mr Agrizzi, the various arrangements were put in place because of a preceding discussion between Bosasa and the DCS (Mr Mti and Mr Gillingham). As it was contemplated that the fencing would be provided for all prisons throughout the country, various companies were approached to act as subcontractors to Phezulu Fencing. The companies included Live Wire (Pty) Ltd, Gordian (Pty) Ltd, Mavundla Ironclad (Pty) Ltd, L&J Civils (Pty) Ltd and another company represented by Jaco Pitso (Siyaya Fencing). Mr Agrizzi testified that Mr Mansell compiled the specifications document for 47 correctional facilities for fencing, security and taut wire before any tender was issued. Bosasa personnel also had access to the DCS sites to survey the sites to assist in the preparation of the specifications and any bid document that would be submitted in the future. According to Mr Agrizzi, Bosasa was advantaged in that it had undertaken all the work required before the tender was advertised. These surveys took place over a period of two to three months before the tender was advertised.

106. The fencing tender was advertised by the DCS on 14 October 2005. The contract was awarded to Phezulu Fencing on 29 November 2005. The tender allowed for less than six weeks to prepare and submit the documents, which was virtually impossible to do for any competitor in respect of the bid. According to Mr Agrizzi, the DCS would have been aware of and appreciated this fact.

107. The submission value of the contract was R486,937,910. As with the catering tender, Mr Agrizzi testified that the figures were manipulated to grow the tender. The maintenance contract linked to the fencing that was installed ran for a period of three years, was billed separately, and was internally awarded from Phezulu Fencing to Sondolo IT. The maintenance contract did not go through a tender process. Mr Agrizzi was of the view that Mr Watson and his family were the ultimate beneficiaries of

the DCS fencing contract.

Integrated computerised offender management system and television contract

108. In late 2005, Mr Gillingham informed Mr Agrizzi and Mr Mansell that the DCS was interested in a centrally distributed television management programme. Under this system each cell, across the country, would have a television screen that would be able to be programmed so that the head of a prison could decide what would be watched and distributed on the television, to network and create a system where addresses by, for example, the Minister could be streamed nationally. The rating of the system was required to be Ingress Protection 65 to ensure that the unit was waterproof and vandal resistant.

109. Also at this time, Mr Mansell and Mr Watson received information in discussions with Mr Gillingham and Mr Mti that the DCS had surplus funds in their budget that they needed to use quickly to prevent it from going back to National Treasury. Mr Agrizzi testified that he learned of this and was instructed to design a system that incorporates an interfaced system to plug in other value adds such as cell phone detection and thermal imaging. Mr Agrizzi testified that Bosasa was also given the documents necessary to design an integrated computerised offender management system, based on "all the DCS forms". As far as Mr Agrizzi could recall, Mr Gillingham spent time with some of the people in the Bosasa IT division during the design process. The design (specifications document) was given to Mr Mansell and Mr Gillingham. Mr Agrizzi was then instructed by Mr Watson to have a specifications document drawn up. The document was drafted by Mr Agrizzi and, without their knowing of anything untoward, Elandre Fourie from Pinnacle Micro (Pty) Ltd.

110. The invitation to bid was only advertised on 14 October 2005. Mr Agrizzi was instructed to respond to the invitation to bid through Sondolo IT. According to Mr Agrizzi, he was aware that Sondolo IT would be awarded the contract, which award took place on 3 March 2006. The initial contract value was R224,364,480.

111. In 2006 Mr Watson instructed Mr Perry to register a company, Lianorah Investments, on behalf of Mr Mti. Mr Agrizzi testified that the negative publicity concerning Bosasa and its relationship with government departments, including the DCS, started around 2005, predominantly in the *Beeld* and *Die Burger* newspapers. Mr Watson, Mr Mti and Mr Gillingham were mentioned by name in the articles.

Interactions with the various officials of the DCS

Mr Patrick Gillingham

112. Mr Vorster testified that, after the catering contract had been awarded to Bosasa in 2004, Mr Watson instructed him to meet with Mr Gillingham and assist him to acquire a vehicle. Mr Gillingham was looking for a Mercedes Benz E270. At that stage, he was driving a gold Mercedes Benz which he sold to Bosasa for R155,000 despite its trade-in value being between R80,000 and R90,000. The money from Bosasa was deposited into Mr Gillingham's personal bank account. Mr Vorster confirmed that he negotiated this deal. Mr Vorster testified to three other occasions when he assisted Mr Gillingham to obtain a vehicle because he was able to negotiate the best deals.

113. Mr Vorster was then subjected to a fake disciplinary hearing at the time the SIU investigated the matter. The purpose of this was to mislead the investigation into payments to Mr Gillingham so that the company was not implicated. Mr van Tonder testified that he was present at a meeting where a Bosasa attorney drafted an agreement in terms of which Mr Vorster advanced R180,000 to Mr Gillingham to purchase the vehicle. The cost of this loan was ultimately carried by Bosasa. This credit agreement was confirmed by Mr Vorster who attached a copy of it to his statement. He indicated that the agreement was necessary to conceal the true nature of the transaction given the SIU investigation.

114. Mr Agrizzi testified that Mr Watson also instructed Mr van Tonder to purchase a new Volkswagen Polo for Mr Gillingham's daughter. Mr Vorster confirmed that Mr van Tonder dealt with the purchase of this vehicle. Payment for the vehicles were made from Mr van Tonder's personal accounts via electronic transfers. In return, a bonus would be paid to Mr van Tonder, via Consilium.

115. Mr van Tonder corroborated this evidence and elaborated on the financing of the purchase of the car for Mr Gillingham's daughter. According to Mr Agrizzi, Riekele built Mr Mti's house and was also involved in building a house for Mr Gillingham at Midstream Estate. Mr Vorster testified that it was "common knowledge" that Mr Hoeksma and Riekele built Mr Gillingham's house as well as Mr Mti's house in Savannah Hills.

116. Mr van Tonder explained that the expenses incurred in the building of houses for Mr Mti and Mr Gillingham were accounted for Bosasa's books in the "normal way" as if they were expenses incurred by the company itself (i.e., as legitimate business expenses), given that these expenses coincided with the renovation of company property. Mr van Tonder testified that this was an unlawful reflection of the expenses to SARS. The false invoices were documented in the books and the originals were destroyed when the SIU Report was released. Incriminating evidence was removed and replaced with dummy invoices – invoices were swopped because references could not be removed from the Microsoft System at that stage. According to Mr Agrizzi, the costs for work being done by Bosasa for government entities were inflated and the monies were used to pay for the building of the houses of Mr Mti and Mr Gillingham.

117. Mr Agrizzi testified that he was also instructed by Mr Watson to prepare a declaration on behalf of Mr Gillingham that the monies and benefits he had received were in fact loans, which declaration was to be backdated and approved by Mr Mti. Mr Gillingham signed the declaration and Mr Agrizzi took the declaration to Mr Mti. They met at the Protea Hotel in Midrand. Initially, Mti did not want to sign the declaration, but did so after Mr Agrizzi telephoned Mr Watson who spoke to Mr Mti. After the telephone discussion between Mr Watson and Mr Mti, Mr Mti signed and backdated the declaration in the presence of Mr Agrizzi.

118. Gillingham provided the letterhead of the DCS to Mr Agrizzi, who typed the declaration. The declaration was attached as annexure L to Mr Agrizzi's Initial Affidavit. The amount of R47,500 was the same amount that Mr Gillingham received on his salary slip. When Mr Gillingham was suspended and he subsequently resigned, this amount was doubled up so that he got approximately R95,000. There was an additional R2,000 added for cell phone costs and there were contributions to medical aid. That is how the amount of R110,000 was determined. This amount was paid over to Mr Gillingham for a period of about four years.

119. In 2008 Mr Agrizzi received what he referred to as a frantic call from Mr Gillingham to advise him that he had been raided by the SIU and that they had taken amongst other things his computer and had seen his safe with the cash in it. In addition, the SIU had found a Consilium business card with Mr Gillingham's name on it. Mr Agrizzi said he was astounded that there was a Consilium business card with Mr Gillingham's name on it and this did not make sense to him. Nevertheless, Mr Agrizzi had to rush through to go to see Mr Gillingham on Mr Watson's instruction to make sure that there was nothing else left. Mr Agrizzi described that it was interesting that, when the SIU raided Mr Gillingham, they did not check the garage that contained boxes which had files and files of "important stuff".

120. Mr Agrizzi described the Consilium business card as making him aware that there was something much deeper going on with Mr Gillingham. Mr Agrizzi confronted Dr Smith who had printed the business cards for Mr Gillingham. Dr Smith informed Mr Agrizzi that he was instructed by Mr Watson to do so because Mr Gillingham was to accompany Mr Watson to see manufacturers and suppliers of goods and Mr Watson wanted people to think that Mr Gillingham was the CFO and had an interest in the business. Mr Agrizzi explained the rationale for this strategy was to strong-arm the owner of the business to hand over a 26% stake in their company in return for business at the DCS.

121. When Mr Watson went to see Mr Gillingham, he was told that Mr Gillingham had been suspended from his position by the then National Commissioner of DCS, Mr Vernie Petersen. The morning after the raid at Mr Gillingham's house, Mr Watson came to Mr Agrizzi's office to request that he see Mr Mti

at his house in Midstream Estate. After that meeting, he went to see Mr Gillingham to make sure that they calmed him and that there were no mistakes made. They later met with Mr Gillingham in the car park of the shopping centre close to his house during which time Mr Watson told Mr Gillingham not to be concerned. Mr Gillingham's biggest concern at that stage was his pension fund as he was not worried about losing his job because he knew he was going to be receiving R110,000 per month from Bosasa. Mr Watson informed Mr Gillingham not to worry about his pension fund as Bosasa would stand in to cover that amount as well. On the way back, Mr Watson asked Mr Agrizzi to determine the value of Mr Gillingham's pension fund and to make a contingency available for such funds. During the meeting, Mr Watson also told Mr Gillingham not to worry about his legal fees as these were being paid for by Bosasa. Mr Watson instructed Mr Agrizzi to utilise an arm's length company to do so. The purpose of creating this arm's length company was to ensure that the payment of Mr Gillingham's legal fees could not be traced back to Mr Watson.

122. Mr van Tonder testified that Mr Gillingham's legal fees during the SIU investigation were paid to BDK Attorneys by Bosasa through Sinkoprop CC. Mr van Tonder testified that Sinkoprop belonged to Mr Watson, and it owned property in Ruimsig which was donated to Mr Agrizzi as an incentive. Sinkoprop was ultimately liquidated and the property was transferred to another entity known as Spilacraft which belonged to Mr Agrizzi and Mr van Tonder.

123. During 2015 there were talks again about the SIU Report and Mr Gillingham complained that he had been short-changed and insisted on being paid a salary via a company. Mr Agrizzi suggested that they put him on the Consilium payroll so he could show employment and get UIF payments. Mr Agrizzi recalls Mr Watson coming to him the next morning and saying that he had met Dr Smith and they did not want to put Mr Gillingham onto the Consilium payroll, but rather they should use an arm's-length company, BEE Foods, which was owned by Mr Taverner.

124. Mr Gillingham never worked for BEE Foods but he received a salary and vehicle from it. Mr Agrizzi estimated that the arrangement to pay Mr Gillingham through BEE Foods was made in and around 2015. However, he noted that he was not good with dates and names. Other benefits to Mr Gillingham included payment of his legal fees during his divorce from Bosasa funds retained in the Hogan Lovells trust account. Mr Agrizzi was referred to the evidence on record about the vehicle purchased for Mr Gillingham's child, Megan Gillingham. The purchase of Mr Gillingham's daughter's car happened just before Christmas and Mr Agrizzi had to leave everything and meet up with Mr van Tonder at a Volkswagen dealership in Alberton where they purchased a Polo for her.

125. In 2016 Mr Gillingham's son, Patrick, was implicated in using funds from his employer, Bakwena. Mr Agrizzi testified that he had to get a top labour lawyer to assist and ultimately there was a payment of R700,000 due to Bakwena. It was explained in Mr Agrizzi's Supplementary Affidavit that he was told to intervene and arrange the payment of this amount. In this regard, Mr Watson instructed him to draft a one-page loan agreement between Mr Gillingham and Mr Agrizzi's erstwhile in-laws to keep the transaction at arm's length

Mr R. Linda Mti

126. The first time Mr Agrizzi saw cash paid directly to Mr Mti was on his first visit to Mr Mti's house in Savannah Hills. The amount paid to Mr Mti on this occasion was R65,000. The second occasion occurred when a meeting was held at the 'Cod Father' restaurant off Rivonia Road where Mr Watson frequently met Mr Mti. Although Mr Agrizzi could not remember the date of this meeting, he recalled Mr Mti still being the National Commissioner and stated that the investigations ought to be able to pick up a date from his telephone records. After the meeting at the restaurant, Mr Mti walked to his dark metallic Volkswagen Touareg and opened his boot with the remote. Mr Watson took a briefcase from the boot of his own car, walked to Mr Mti's car, took cash out of his briefcase, placed the cash into a brown satchel and placed it in Mr Mti's boot. Mr Agrizzi recalled it being a considerable amount of money of approximately R150,000.

127. There were a few occasions when Mr Watson would call Mr Agrizzi to his vault while he was packing money. He would specifically count amounts for Mr Mti and others and ask Mr Agrizzi to keep it with

him until the next morning. The next day, they would both go to Mr Mti's house and wait for him in the study. Up to this point, Mr Agrizzi had no direct contact with Mr Mti and had only assisted Mr Watson, as instructed, with documents or information as required.

128. Mr Watson informed Mr Agrizzi that Bosasa had paid for Mr Mti's house as well as its furnishings when Mr Agrizzi met Mr Mti for the second time in 2007. In fact, Bosasa paid for the furnishings of both houses – Mr Mti and Mr Gillingham – through Mark and Sharon Taverner's company.

129. Mr le Roux estimated the costs of work at Mr Mti's homes to have been R350,000. In his further affidavit, Mr le Roux produced invoices for components used in the work done at Mr Mti's homes at his plot in Greenbushes, Port Elizabeth and in Colchester to the value of R70,306.19.

130. Mr le Roux also attached copies of WhatsApp messages between himself and Mr Mti in January 2017 in terms of which Mr Mti requested assistance with maintenance of the security systems at Greenbushes and Colchester. Mr Vorster testified that in 2005 he was instructed to procure a vehicle for Mr Mti, namely a silver Volkswagen Touareg V8. He negotiated the deal and the vehicle was purchased from Lindsay Saker, Krugersdorp.

131. After Mr Mti resigned from the DCS, Mr Watson and Mr Agrizzi met him at Savannah Hills Estate, as Mr Mti had wanted a proposal to be presented that he could utilise as a presentation on the 2010 World Cup security. Mr Agrizzi was instructed to prepare a security plan and to assist Mr Mti wherever possible in doing the presentation. Mr Watson handed a grey security bag to Mr Mti during the meeting, which contained Mr Mti's monthly fee of R65,000. Holidays and travelling costs for Mr Mti and his family were also paid for by Bosasa. After the meeting, Mr Watson jokingly said to Mr Agrizzi that Bosasa pays monopoly money, but that Mr Mti always delivers on his promises.

132. In his affidavit filed with the Commission, Mr Blake states that he is reasonably sure that Blake's Travel never received any funds from Mr Gillingham, Mr Mti or their direct family and that he could find no accounting record reflecting any such payment. Mr Blake's affidavit further provides that the travel and accommodation booked for Mr Mti and his family is too voluminous to include within the body of his affidavit and is, therefore, reflected in a spreadsheet attached to his affidavit, together with supporting invoices. The data in the spreadsheet shows that for the period October 2012 to January 2017 a total amount of R1,234,481.11 was expended on travel and accommodation for Mr Mti.

133. At a later stage, Mr Agrizzi had to arrange a meeting with Mr Mti and the attorney, Mr Biebuyck, to re-assure Mr Mti that the process was under control and that he would be protected. During this meeting with Mr Biebuyck, Mr Mti explained that Ms Jiba of the NPA had told him to prepare representations as to why prosecution should not take place. Mr Agrizzi handed over documents he had received from the NPA as well as his handwritten notes to Mr Biebuyck who then produced a lengthy document addressed to the then National Director of Public Prosecutions (NDPP) dated 28 September 2010.

134. The representations sent by Mr Biebuyck contained vital information that had been received via Mr Mti from, according to Mr Mti, Adv Jiba and Ms Jackie Lepinka (who was the secretary to Adv Mrwebi, Head of the Specialised Commercial Crimes Unit). It was on this premise that Mr Biebuyck would constantly remind Mr Agrizzi that there was no purpose in whistleblowing as the matter would never see its day in court.

135. When asked to comment by way of summary who made the decisions in relation to the assistance given to Mr Gillingham and Mr Mti, Mr Agrizzi stated that Bosasa was owned and run by only one person, and he would make the ultimate decisions. In this respect, Mr Agrizzi was referring to Mr Watson. Mr Agrizzi's Supplementary Affidavit was to the effect that the major beneficiary of all the contracts and tenders was Mr Watson and his family.

Mr Vincent Smith

136. Mr Agrizzi first met Mr Vincent Smith around 2010/2011 in Parliament. At the time, Mr Smith was a member of the Portfolio Committee on Correctional Services and was opposed to Bosasa and had been openly vocal about the SIU Report.

137. In 2011 Mr Watson collected Mr Agrizzi and they drove to a meeting with Mr Smith, Mr Seopela, a gentleman by the name of Mr Magagula, and Ms Ngwenya. The meeting took place at a hotel on Rivonia Road. During the meeting it became evident to Mr Agrizzi that the individuals present were members of the Portfolio Committee on Correctional Services. Mr Agrizzi described this meeting as a turning point in Mr Smith's attitude to Bosasa.

138. In his oral evidence before the Commission, Mr Smith confirmed, based on minutes of meetings of the Portfolio Committee when he was the Chairperson in October 2010 and October 2011, that there had been reports of corruption involving Bosasa and that he was aware of these reports when he met with Mr Agrizzi and Mr Watson. Mr Smith testified that he was comfortable to meet with Bosasa in 2011, after Mr Watson had called him. Mr Smith was previously not comfortable to meet with Mr Agrizzi when he had just been appointed as the Chairperson.

139. According to Mr Smith, he met with Bosasa as a stakeholder in the same way that he also met with various other stakeholders. Although he could not recall the detail, Mr Smith testified that normally, following a briefing by a stakeholder, he would ask them to reduce a request to writing or to attend a "formal stakeholder meeting where they were then presented to the Portfolio Committee". It was put to him that there was a record where he reported to the Portfolio Committee that he had met with Bosasa at a hotel in Sandton, seemingly to discuss negative reports about Bosasa. Mr Smith said that, whilst he could not recall the detail and had not seen the report, it would not be strange that, after such meeting, he would have reported to the Portfolio Committee because ultimately that is where decisions would be taken.

140. Smith testified that he never discussed the allegations of corruption involving Bosasa with Mr Watson, despite their longstanding personal relationship, because he had made an undertaking to the Portfolio Committee as Chairperson that the members should not sabotage the work of the SIU investigation and that he was very clear to separate politics from his work as a MP at the time.

141. According to Mr Agrizzi, it was discussed at the meeting that MPs would receive amounts of money in return for keeping quiet and managing the negative press on Bosasa to ensure that Bosasa would continue to get new business. On a monthly basis, Mr Smith would receive an amount of R45 000; Mr Magagula would receive an amount of R30 000; and Ms Ngwenya would receive an amount of R20 000.

142. In an affidavit filed in response to a Directive issued by the Chairperson under Regulation 10(6), the content of which was confirmed during his oral evidence, Mr Smith denies facilitating or influencing any unlawful award of any tender for himself, any other person, family, or entity. Mr Smith also denied influencing any individual to unduly favour a service provider or prospective service provider to the State, in particular Bosasa. Mr Smith also denied ever meeting Ms Ngwenya outside of Parliament and stated that he never had a discussion with Mr Watson regarding the working relationship between Bosasa and the DCS. He further denied ever being a recipient of monthly cash payments from Mr Watson, Bosasa or Mr Agrizzi. He contended that any requests for assistance he may have made to Mr Agrizzi or Mr Watson were never on a *quid pro quo* basis.

143. Mr Agrizzi testified that he delivered money to Mr Smith on many occasions, including at Mugg and Bean at Clearwater Mall, a Greek restaurant at Cradlestone Mall, and in Florida. If Mr Agrizzi met Mr Smith in a restaurant, he would take the cash in a newspaper. During 2015/2016, Mr Smith became uncomfortable with Mr Seopela as a "middleman" and it was agreed that Mr Seopela would be excluded.

144. Mr Smith denied ever receiving a payment at Clearwater Mall. According to Mr Smith, he met with Mr Watson and Mr Agrizzi at Clearwater Mall on a social basis when in Johannesburg, that the meetings were a continuation of his relationship with Mr Watson and that no exchange of money was ever done at these meetings.

145. Mr Agrizzi testified that Ms Ngwenya lived close to the Bosasa office and would frequently collect her payment there. Mr Agrizzi was present on an occasion when Mr Magagula took delivery of a payment, although Mr Agrizzi did not himself hand the cash to him. Payments to Mr Magagula and

Ms Ngwenya were stopped when they ceased to be members of the Portfolio Committee.

146. According to Mr Agrizzi, at that time, meetings with Mr Smith were held every second week, where Mr Smith would brief Mr Watson and Mr Agrizzi on the activities of the DCS and to enable Mr Smith to intervene where Bosasa had problems with Mr Zach Modise, then National Commissioner of DCS. Mr Smith denied that frequent meetings were held. Mr Smith further denied intervening or interfering in any way with Mr Modise's functions or attempting to unduly influence him. According to Mr Smith, his role as Chairperson and full-time member of the Portfolio Committee had come to an end in May 2014 and he was, therefore, unable to exert any influence on Mr Modise who was appointed in 2015, having acted since June 2014.

147. Mr le Roux confirmed that Mr Watson instructed him to undertake what became known as "Project Jones" for Mr Smith following an incident of crime. At the time, Mr Smith was the SCOPA Chairperson. Work was undertaken at Mr Smith's residence in Roodepoort. The work entailed electric fencing, installation of an IP CCTV system and continuous maintenance on the electric fence. The value of the equipment installed was approximately R200 000. Mr Smith stated that he allowed Mr le Roux access to his residence but was not involved in deciding who would do the installation, how it would be done and what make of system would be installed. After the upgrade, Mr Smith would call either Mr Agrizzi or Mr le Roux when there was a fault with the system.

148. Payments were also made to Aberystwyth University for Mr Smith's daughter's fees. One such payment was made on 14 July 2015 for an amount of R276,667.90, as a cash deposit to an entity called Euro Blitz at FNB Krugersdorp. Mr Smith stated that two loan payments were made through the bank account of Euro Blitz, a company in which Mr Smith is the sole Director. According to Mr Smith, the amounts paid to Euro Blitz were loan amounts that he had discussed and agreed with Mr Agrizzi he would repay when one of his investments matured in 2023.

149. Mr Smith was referred to an email sent by him to Mr Agrizzi on 11 May 2015 under the subject line "daughters study 2015 University Aberystwyth". Relevant correspondence from the university is attached to the email. The evidence leader asked Mr Smith why there was no request for a loan made in the email. In response, Mr Smith confirmed that the email is a request for funds but asserted that the reference to the earlier discussion between Mr Smith and Mr Agrizzi was a reference to the discussion on a loan.

150. When asked by the Chairperson, why Mr Agrizzi would continue to allege that the money paid to Mr Smith was corrupt and deprive himself of having the money paid back to him, in terms of a loan, Mr Smith said that he does not know what Mr Agrizzi's motivation was. Mr Smith further said that Mr Agrizzi may have done so because he knew that it was not his money but that he did not want to venture into that area or get into that argument. Mr Smith confirmed that a car was hired by Bosasa for his daughter on three separate occasions; the first for 25 days, the second for 17 days and the third for 30 days at an approximate total cost of R26,000.

Mr Vernie Petersen

151. Mr Petersen was appointed as National Commissioner of the DCS in mid-2007. Mr Agrizzi testified that he had attempted to communicate with Mr Petersen about possible future ventures but that he would not have anything to do with any of the companies in Bosasa.

152. Around the same time, two meetings were held with Mr Watson, Mr Agrizzi, Mr Khulekani Sithole, former Commissioner of the DCS, and someone by the name of Sbu, who Mr Agrizzi thought was the General Secretary of Police and Prisons Civil Rights Union (POPCRU) at the time. Mr Agrizzi testified that the purpose of the meetings was to discuss how they could swing Mr Petersen and get a solution where he would start communicating with Bosasa. It was agreed that Mr Sithole, Sbu and Mr Nxele, the Regional Commissioner of the DCS in KwaZulu Natal, would be paid R1 million per month in exchange for undue pressure that would be put on the DCS and Mr Petersen, through the associations with POPCRU and the unions, to ensure that the attitude towards Bosasa changed to get Peterson to agree to work with Bosasa. Mr Agrizzi testified that Mr Petersen's cooperation,

as decision maker and accounting officer of the DCS, was required because Bosasa wanted more business and new opportunities.

153. Mr Agrizzi testified that Mr Sithole would get somebody to email an invoice and he would pass it on to accounts, get Mr Watson to approve it and put it through for payment. The invoices were on a company letterhead, called Vleissentraal. Mr Agrizzi testified that he recalled an issue with the payments at a stage because the recipients were unhappy that the R1 million included VAT. Mr Agrizzi also testified that the amount was reduced to R700,000 per month after Sondolo IT lost the contract for the staffing of the control rooms at the DCS.

154. Mr Agrizzi attended a meeting with Mr Gumede and Mr Nxele at a restaurant at the Intercontinental Hotel at ORTIA. It was the first time that Mr Agrizzi met Mr Nxele, who was in full uniform. Mr Agrizzi testified that, prior to the meeting while Mr Watson was packing the money for Mr Nxele in the vault, he briefed Mr Gumede and Mr Agrizzi on what to say to Mr Nxele. Mr Agrizzi testified that he explained to Mr Nxele that Bosasa was not able to increase the amount agreed upon and that Mr Gumede handed the security bag of money to Mr Nxele. After the lunch, Mr Nxele said that he was unhappy with the money, as it was not the money promised to him and that he would convey his dissatisfaction to Mr Watson.

155. Mr Agrizzi testified that a few weeks later, he was instructed to accompany Mr Mathenjwa, at that stage Managing Director of Sondolo IT, to the Beverly Hills Hotel in Durban to meet Mr Nxele. This was after constant messages from Mr Nxele regarding his dissatisfaction with the amount he was being paid. Mr Mathenjwa and Mr Agrizzi met with Mr Nxele for about two hours. Mr Agrizzi explained that Bosasa was not able to increase the amounts. Mr Agrizzi testified that Mr Nxele was not happy, said he would deal with it in his own way and left without taking the grey security bag of money that contained R57,500. Mr Agrizzi testified that Mr Nxele called Mr Mathenjwa about ten minutes later and asked if he could come and fetch the bag which he did in Mr Agrizzi's presence.

156. In his affidavit filed in response to a Regulation 10 (6) directive, Mr Mathenjwa denies having any knowledge about any financial arrangements or discussions with Mr Nxele and denies that he was ever involved in paying Mr Nxele money whether in a grey bag or otherwise. According to Mr Mathenjwa, he was asked to join Mr Agrizzi in Durban. Mr Agrizzi advised him that there was concern over the use of emerging contractors on the DCS projects in KwaZulu-Natal which needed to be resolved. Although Mr Mathenjwa indicates that he did not have a working relationship with the Department, and it puzzled him why Mr Agrizzi wanted him to be part of the discussion, he nevertheless accompanied Mr Agrizzi as it was his prerogative as the COO to decide who should attend meetings regarding the affairs of the Bosasa Group, from time to time.

157. Mr Mathenjwa alleges that he excused himself to go to the washroom before Mr Nxele arrived. When he returned to the table, it was clear that Mr Agrizzi and Mr Nxele had had a disagreement. Mr Mathenjwa alleges that he sat some distance from them and that the discussion appeared to end abruptly when Mr Nxele left the hotel. Mr Mathenjwa denies that Mr Nxele contacted him later to arrange for the collection of the grey bag. Mr Agrizzi requested that he call Mr Nxele to see if he would resume discussions with Mr Agrizzi. He did so and there was no immediate answer. Mr Nxele returned Mr Mathenjwa's call a while later and told him not to bring a white man to KwaZulu-Natal to undermine him, and that he would not speak to Mr Agrizzi. Mr Mathenjwa alleges that he was confused but that Mr Agrizzi advised that he handle the matter. Mr Mathenjwa left Durban and Mr Agrizzi remained behind. According to Mr Mathenjwa, he had no further dealings with Mr Nxele after that interaction.

158. In late 2008 Mr Petersen was moved to the Department of Sports and Recreation and the DG at Sports and Recreation Ms Xoliswa Sibeko was appointed as the National Commissioner of the DCS. Mr Agrizzi testified that, after Ms Sibeko's appointment, they were informed that the DCS was going to cancel Sondolo IT's contract for the staffing of the control rooms, as Ms Sibeko was adamant that she did not want the Bosasa Group involved with the DCS.

159. Mr Agrizzi was tasked by Mr Watson to accompany Mr Leshabane to the Intercontinental Hotel at ORTIA to meet with Mr Modise (who at the time was Chief Deputy Commissioner in charge of Correc-

tional Care and Security at the DCS). Mr Agrizzi testified that he explained the benefits of outsourcing to Mr Modise when Mr Leshabane arrived and gave Mr Modise a packet wrapped in newspaper. The packet was a grey plastic bag of cash that Mr Watson and Mr Agrizzi had packed earlier that day. Mr Modise was one of the officials at the time who was receiving monthly payments from Bosasa.

Oversight of the DCS

160. Mr Bloem provided an overview of the oversight role played by parliamentary Portfolio Committees. Mr Bloem considered the multi-party Portfolio Committee as being a central instrument in our parliamentary democracy and commented that the Portfolio Committee was working in the interests of the country and as a single unit despite the varying political affiliations.

161. As to the difficulties encountered in the operation of the Portfolio Committee, Mr Bloem testified that the Committee had serious problems with the national leadership of the DCS, i.e., the Commissioner and his top structure. At the time Mr Bloem was the Chairperson of the Portfolio Committee, the Commissioner was Mr Mti, then Mr Petersen, and thereafter Mr Moyane. The Minister of the DCS at the time was Mr Ngconde Balfour

162. Mr Bloem described the Portfolio Committee as having had serious problems in respect of accountability from the DCS. Specifically, information requested at its meetings was either provided late or was not forthcoming. This made it very difficult for the Portfolio Committee to interrogate the DCS' operations. Mr Bloem considered this conduct to undermine the authority of the Portfolio Committee. Mr Bloem considers there to have been a breakdown of the relationship between the Portfolio Committee and the then executive authority of the DCS Minister Balfour. For example, when the then Commissioner Mr Petersen, was redeployed to the Department of Sports and Recreation, the Portfolio Committee was not informed, nor were they given reasons for his redeployment.

163. Mr Bloem described the DCS as being in a state of havoc when Mr Petersen took over from Mr Mti. Mr Moyane later succeeded Mr Petersen as the Commissioner. Mr Bloem testified that there was no control or discipline within the DCS and that "Bosasa was hampering the functioning of the Department of Correctional Services". The staff were unhappy with the situation and convened protest marches.

164. Mr Bloem testified that from 2004, the DCS received qualified audit reports. He attributed this to the weak internal financial controls within the DCS which impacted on the SCM process. Mr Bloem described it as being a "free for all that was happening in the department". Mr Bloem testified that despite the Portfolio Committee raising several concerns and objections (including concerns with corruption) with the then Minister as well as during "study group" meetings, these were not addressed. The Minister's response was that the DCS should be left to sort out their own problems and the Portfolio Committee should not interfere in its operations.

165. Mr Bloem found himself to be in a conflict of interest situation in the sense that he was trying to stop what he referred to as 'the havoc' at the DCS, but at the same time he was told by his party not to take certain steps. When Mr Bloem served as Chairperson of the Portfolio Committee, former President Kgalema Motlanthe was Secretary General of the ANC and several party members complained to Mr Motlanthe about Mr Bloem's conduct. However, Mr Motlanthe took a firm stand that Mr Bloem's conduct was in line with the function of an oversight committee which was meant to hold the Minister and the DCS to account. Many people labelled Mr Bloem as an opposition in the ANC.

The DCS and breaches of the PFMA

166. Insofar as the decision to outsource functions is concerned, Mr Bloem confirmed that, ideally, a department would perform its own functions internally. A feasibility study is conducted to determine whether a function should be outsourced and whether the budget allowed for the outsourcing.

167. Mr Bloem's affidavit noted that the Portfolio Committee voiced its reservations and objections regarding the outsourcing of services within the DCS primarily on the issues of cost-effectiveness and ne-

cessity. They considered there to be other urgent priorities requiring attention such as poor salaries of DCS personnel and overcrowded facilities. Notwithstanding this, contracts were awarded to Bosasa and the feasibility studies for outsourcing functions to it were not given to the Portfolio Committee. Mr Bloem identified four contentious contracts with Bosasa. These are (1) a catering and training contract in July 2004 called "Nutrition"; (2) a contract with Sondolo IT in April 2005; (3) a fencing contract for 47 DCS sites in November 2005; and (4) a television system. He estimated the value of the contracts awarded to the DCS to be over a R1 billion.

168. Mr Bloem testified that the Portfolio Committee on Correctional Services questioned the rationale for the television distribution contract (worth R224 million) and the explanation that it was for the development and training of inmates. He confirmed that, to date, educational programmes have not been rolled out.

169. Mr Bloem further testified that Mr Petersen's attitude as National Commissioner was to look at ways of stopping outsourcing given that he believed that outsourcing increased the opportunity for corruption.

Department of Justice and Constitutional Development

Contracts awarded to Bosasa and its affiliates

170. Around 2013, Sondolo IT was awarded the contract with the DOJCD at an approximate value of R601 million to install a security access control system for close to 110 courts nationally. Sondolo IT paid 2.5% of all money received to certain individuals in the DOJCD as lobbying fees or bribes. The project was managed by the IDT, on behalf of the DOJCD.

171. The contract awarded for the CCTV and access control was, according to Mr Agrizzi, irregular and was met with resistance from the procurement and financial divisions at the DOJCD. It came to Mr Agrizzi's attention during 2016 that various court managers were dissatisfied with the services rendered and, in many instances, installations were incomplete and substandard. This concerned Mr Agrizzi and he deployed a specialist team to survey and take corrective actions on a national basis to rectify the matter. Mr Agrizzi initiated and instructed a team to repair and replace the faulty equipment at these sites.

172. Accountants prepared and presented a document to Mr Agrizzi as proof that payments had come in and that certain monies were outstanding. The schedule reflected the year-to-date receipts as R98,842,025.32. The total receipts for February 2013 were reflected as R15,798,081.19 and the 2.5% paid to individuals in the DOJCD, referred to as a management fee, for that month was R394,952.03. The total 2.5% paid to date was R2,026,098.60. This was paid over and above other monies that were being paid to officials in the DOJCD.

Upgrades to the South African Legal Union (SALU) premises

173. The DOJCD rented the SALU premises from the Billion Group and security upgrades were done to the premises, for which the Billion Group was liable. No tender process was followed and Sondolo IT was appointed. The Billion Group resisted payment and so arrangements were made with Mr Seopela to facilitate the transaction. Mr Agrizzi testified that he was told by Mr Seopela that he needed to provide R1.9 million as a fee for arranging the contract. Mr Agrizzi gave the R1.9 million to Mr Seopela in cash and testified that he did not know whether Mr Seopela paid the money over to anyone or not.

Mr Desmond Nair

174. Mr le Roux gave evidence to the effect that he was instructed by Mr Mathenjwa in early 2016 to attend to work at the home of Mr Desmond Nair, the Chief Magistrate in the Pretoria Magistrates' Court. The work entailed installation of a full electric fence, IP CCTV system and alarm system with beams. This work was signed off by Mr Agrizzi. His initial estimate of the approximate cost of this project was R200,000. Mr le Roux also confirmed having attended to one or two maintenance issues on the fence and CCTV system.

175. Mr Nair, provided an affidavit in response to a Regulation 10 (6) directive, dated 26 August 2019, a further affidavit dated 14 July 2020 responding to Mr le Roux's affidavit of 30 June 2020, and he gave oral evidence. He denies any involvement in state capture, corruption, dishonesty, or improper conduct. Mr Nair said he had no discussions with Mr le Roux. He denies speaking to or knowing Mr Agrizzi or Mr Watson or Mr Mathenjwa, although he acknowledged that the latter may have been present at some meetings following a fire at the court.

176. Mr Nair came to know Mr "Deuts Baijoo," who had been assigned the Pretoria Magistrates' Court as one of his nodes of responsibility as an employee of Sondolo IT under its contract with the DOJCD to provide security for the courts. Mr Nair explained that during mid-2016 he was busy hearing a murder trial as an acting judge in Skukuza. He was away from home a lot of the time for this purpose. He was concerned about his family's security because there were 23 accused and they were out on bail. He was particularly concerned that he did not have CCTV cameras covering the premises. Therefore, he contacted Mr Baijoo and said that he had an amount of R50,000 available and explained his requirements. Mr Baijoo said that he would have to have a look at Mr Nair's premises. This he did. During his visit, Mr Nair also pointed out that there was an existing electric fence and alarm system that would sometimes malfunction. He asked if Mr Baijoo could also establish what repairs needed to be done in this regard. A verbal agreement was concluded on this basis. Mr Baijoo departed on the understanding that he would "try and ascertain prices". He knew suppliers personally and, for labour, would use "one or two of his boys".

177. Mr Baijoo started the work on the morning of 4 October 2016, while Mr Nair was away for a funeral, from which he returned on the evening of 5 October 2016. Upon his return he found that the monitor for the cameras had been installed in the garage. Mr Nair objected because he wanted visuals on his monitors and TVs in the house, including the TV upstairs. Installation of the monitor in the garage was in breach of their agreement. Mr Baijoo undertook to investigate the problem.

178. The first time that he heard that Bosasa was involved in the installation was when Mr le Roux testified in the Commission in January 2019. The evidence came as a shock to him because the only person he dealt with was Mr Baijoo.

179. Mr Nair asserted that a Chief Magistrate does not have any role to play in the awarding of contracts and tenders. There had been a fire at the court after which the Chief Justice had requested him to play a leadership role in getting the court back to an optimum level of functioning. Only at that point did he have some engagement with some service providers in "Steercom" meetings. Aside from this role, "any decision relating to finance . . . is a departmental issue" where the court manager must give final approval. Of course, the court manager would seek out his opinions on these matters as head of court and chief magistrate and report to him. That was as far as it went. By 2011, he had already delegated the function of chairing the Steercom meetings to the senior magistrate and the work to address the fire was completed around 2012, well before his private dealing with Mr Baijoo.

180. In response to a question from the Chairperson, Mr Nair confirmed that the equipment that had been installed was still at his premises. He had never paid for it. He declined to pay on the basis that Mr Baijoo "had the duty to perform first. I was fully within my right to withhold payment until he did what he ought to have done". Further, he insisted that he was unaware of any involvement by Bosasa / Sondolo IT. Mr Nair confirmed that he was aware that Mr Baijoo worked for Sondolo IT but was unaware that Sondolo IT was a subsidiary of Bosasa. While he was aware that Sondolo IT was the DOJCD's CCTV provider, he only knew Bosasa to be the service provider in terms of security guards at the court.

181. Mr Nair pointed to his concession that, following the fire at the Magistrates' Court he may have been in a meeting with Mr Mathenjwa. However, regarding the meetings as described in paragraph 4 of Mr Mathenjwa's statement to the Magistrates Commission he said he was "unaware of and they did not happen". Mr Mathenjwa denies that he instructed Mr Agrizzi to do anything about the security installation at Mr Nair's residence.

182. In his affidavit in response to a Regulation 10(6) directive from the Commission, Mr Mathenjwa repeated and confirmed the contents of his statement to the Magistrate's Commission. Mr Mathenjwa

explained that it was common practice for him to report back to Mr Agrizzi as the COO on the outcome of operational meetings he attended and that the meeting at the office of Mr Nair was no different. He gave feedback to Mr Agrizzi and, in doing so, drew attention to the concerns raised by Mr Nair. Mr Agrizzi did not foresee a problem in evaluating the system and would take the matter further.

183. Mr Nair was asked whether he understood Mr Baijoo to have his own company. Mr Nair said he did not. Because of Mr Baijoo's function at court, he was aware of his position as an employee of Sondolo IT. However, he engaged him as one might engage a family member who, for example, worked at an air-conditioning company, to install an air conditioner over the weekend in his private capacity.

184. Mr Nair was asked whether there was any arrangement insofar as a pre-payment or a deposit was concerned to enable Mr Baijoo to purchase the required equipment. There was not. When Mr Baijoo left him after their initial meetings, he understood that he was still sourcing the equipment. Mr Nair was questioned about the exchange of "WhatsApp communications" with Mr le Roux. A possible explanation for this, he suggested, was that it might have been that he complained to Mr Baijoo and Mr Baijoo asked him to call his technician.

185. Mr Nair was asked whether he had ever approached the DOJCD regarding his security problem. He said that he had done so but had been informed that there was no policy to provide for acting judges or magistrates hearing serious crime cases. In the circumstances it would have taken a year if he had pursued the route of a special motivation. He therefore did it privately.

186. Finally, Mr Nair drew the Chairperson's attention to affidavits deposed to by Mr le Roux in 2017 and 2018, which were attached as annexures to an affidavit of Mr Agrizzi wherein Mr le Roux sets out the special project beneficiaries and in doing so, makes no mention of Mr Nair.

Department of Home Affairs

The Lindela contract

187. Lindela is a detention and repatriation facility for undocumented migrants owned and managed by Bosasa Properties (Pty) Ltd under the authority of the DHA. The initial tender for the management of Lindela was awarded to another subsidiary of Bosasa, Leading Prospect Trading 111 (Pty) Ltd for a period of ten years.

188. Mr Vorster testified that Bosasa was paid per person detained at Lindela and he was instructed by Mr Watson to improve the Lindela figures so that "we could pay Riekele Construction for all the work that was done". The facility had enough beds for 5,000 migrants, but in approximately 2004 Bosasa was able to raise the number of occupants to 7,000. This was to be achieved by purchasing two buses and six trucks that were built to look like large versions of those used by the SAPS to transport prisoners between the police cells and court. Bosasa then provided the police with two private security teams to assist with transporting people to Lindela. When Mr Vorster started at Bosasa, they were paid R28.00 per person per day at Lindela. By the time he left Lindela in 2006, it had increased to R45.00 per person per day. The number of occupants at the facility increased over the festive season because migrants could not be deported using Transnet trains over this period.

189. Given that Mr Vorster headed up the facility, he was able to comment that Bosasa "was doing very well from Home Affairs". The DHA paid their invoices by cheque during this time. In 2006, the DHA's annual budget for Lindela was depleted within six months. This necessitated an additional R120 million being allocated to the DHA by the Minister of Finance.

190. Mr Vorster testified that when Mr Arthur Fraser became DG for Home Affairs, he was under pressure to explain why the DHA budget was utilised in a short space of time. To address this, Mr Fraser issued an instruction that Bosasa would not be permitted to transport people from the SAPS or assist the SAPS in their special operations to "catch" illegal immigrants. Thereafter, Mr Vorster used police reservists to drive the Bosasa vehicles to bring people into the facility. Mr Fraser stopped this practice and by 2007, the occupant count at Lindela was approximately 50% less.

191. Mr Vorster described Mr Watson as being upset by the decrease in the number of occupants and Mr Vorster was subsequently transferred to Bosasa technical division.

The review of the Lindela contract

192. Under the leadership of Minister Nosiviwe Mapisa-Nqakula, the contract for the management of Lindela came under review at the insistence of the DHA. Mr Wakeford describes this review as occurring in 2007 and as part of a turnaround strategy which involved large-scale restructuring of the DHA. The purpose of the review was to reduce costs at Lindela given that the DHA had since the early 2000's been paying a fixed minimum fee (calculated based on there being 3,500 occupants) irrespective of the number of occupants. Given that Lindela was only accommodating 1,000 people, the Minister considered the fixed fee to amount to wastage.

193. A consulting firm known as Fever Tree Consulting was engaged to conduct the review to determine the scope of the turnaround project and identify a comprehensive set of transformation projects for the DHA, including reviewing and renegotiating existing contracts. In turn, this firm, according to Mr Agrizzi, subcontracted the fee review discussion and negotiations to Mr Aneel Radhakrishna from Akhile Management and Consulting (Pty) Ltd (Akhile). According to Mr Agrizzi, Mr Radhakrishna was appointed because Mr Watson and Mr Wakeford decided that they could work with him. This was the first time Mr Agrizzi met Mr Radhakrishna.

194. According to Mr Agrizzi, an agreement was subsequently reached to reduce the contract price at Lindela by approximately R860,000 per month. Mr Agrizzi testified that, following the price reduction, the Lindela contract was extended for another five years. Given that the Lindela contract was subject to public scrutiny, the price reduction assisted in that "it kept everybody quiet".

195. Following this Mr Radhakrishna asserted that an agreement had been reached with Bosasa that he would be paid an amount of R7 million by them for facilitating the extension on favourable terms. Mr Agrizzi testified that he was unaware of this arrangement and approached Mr Watson. Mr Watson was unwilling to pay the R7 million but was willing to pay Mr Radhakrishna a monthly amount of R75,000 for which Mr Radhakrishna was required to submit an invoice. This he did through an agency with a name along the lines of the Wine Merchant Company. These payments were affected by Mr Bonifacio.

196. Mr Wakeford responded to these allegations as follows. He was appointed by the Minister of Home Affairs as Ministerial Turnaround Advisor to oversee the turnaround project. His appointment was through his close corporation and endured for two years from 2007 to 2009. His appointment ended a month before the general elections in 2009. He disclosed his consultancy services to Bosasa. He denied attending or participating in a meeting with Mr Agrizzi and Mr Watson concerning the renegotiation of the Lindela contract with the DHA, or with Fever Tree or Mr Radhakrishna. Mr Wakeford denied ever being part of any discussion that Mr Radhakrishna could be managed or where any deal was reached with Mr Radhakrishna to pay him R7 million. Mr Wakeford argued that plain logic made it unlikely that a consultant would be rewarded with R7 million if his efforts cost Bosasa R325,706,422, being the amount that Mr Wakeford calculated to have been saved by the DHA because of the renegotiation of the Lindela contract with Bosasa. Mr Agrizzi was the signatory of all contracts and addenda relating to Lindela. Furthermore, it was Mr Agrizzi that would have met with Mr Radhakrishna to renegotiate the contract. The annual report of the DHA recorded that the renegotiation of the Lindela contract generated a savings for the Department of R7.7 million per annum along with further savings of R68 million and potential future savings of R112 million.

The extension of the Lindela contract

197. According to Mr Agrizzi, apart from the renegotiations and price reduction, Mr Radhakrishna facilitated the extension of the contract. The contract with the DHA was consequently extended for a further five years. There was no tender process undertaken nor Treasury approval obtained for the extension of this contract. Mr Agrizzi testified that more favourable terms were included in the extended contract. The annual gross value of the contract to Bosasa was R93.6 million. Mr Wakeford

denies discussing the benefits of an extended contract with Mr Agrizzi.

198. According to Mr Agrizzi, he stopped the payments to Mr Radhakrishna in and around 2015 given that (i) Bosasa was under scrutiny from the banks; and (ii) the company could not afford the monthly payments due to cash flow issues. Mr Agrizzi told Mr Radhakrishna that he would be assisted with an alternative until "things came right". Bosasa assisted Mr Radhakrishna with rebranding Akhile.

199. Reverting to Mr Wakeford's version of events, he testified that there were two addenda to the original Lindela contract concluded in 2005, although he was not part of the negotiations. These addenda, known as the "Second and Third Addendums" were concluded on 18 February 2008 and 13 March 2009, respectively. Mr Wakeford pointed out that the "extension" referred to in the contract, was (i) only to be determined by the DHA, six years after the signing of the Third Addendum; (ii) a decision to be made six years after Mr Wakeford and Mr Radhakrishna were no longer connected to the DHA in any way, and (iii) no extension was eventually awarded to Bosasa in 2015. Mr Wakeford testified that Mr Agrizzi attempted to repurpose the demands he made of the DHA in 2007, i.e., that he would only consider reducing the monthly invoice to the DHA on condition that the original contract be extended for five years. At this time, the recommendation was that the DHA should only consider a three-year potential renewal subject to performance. Ultimately, Mr Agrizzi was not afforded the extension he demanded.

200. Mr Wakeford stated that, the price after renegotiations represents an immediate decrease in billing of R2,261,578 monthly, R27,138,936 annually. Bosasa did not increase this price by CPIX for the following five years (despite being contractually entitled to do so). Mr Wakeford tabulated the "actual" prices billed by Bosasa and compared them to what would have been billed by Bosasa had the renegotiation of the original contract not transpired. This exercise was for the period 2009 to 2015 when the contract expired and Mr Wakeford claimed it demonstrated that the true financial saving by the DHA over this period amounted to R325,706,422.

201. Mr Agrizzi stated that the turnover billing pre- the negotiation was approximately R7,894,120.00 with a profit margin of 35% on average yielding between R2,600,000 to R2,900,000 a month. Post the negotiation, the turnover dropped to R7,560,130 but because of reduced occupancy levels and reduced costs related to the operation thereof, the profit margin increased to between 55 and 61%, yielding "a net-profit contribution on average between R4,100,000 to R4,300,000 per month".

202. Mr Agrizzi alleged that, to disguise the actual profits from the directors and the DHA, Mr Watson created ingenious ways to dilute the profits by raising intercompany charges from non-performing entities and therefore profits in high-value contracts like Lindela were diluted. These included fictitious costs relating to security (which was provided by employees on the payroll), rentals (charged by Bosasa Properties), management fees and software.

203. Insofar as Mr Radhakrishna was concerned, Mr Wakeford stated that Mr Radhakrishna was only one member of a team of people responsible for negotiating savings at the DHA. All statutory powers remain vested in the accounting authority being the DG and his subordinates. Mr Wakeford claimed that Mr Agrizzi approached Mr Radhakrishna in October 2009 to enquire if Akhile could provide business advisory services in the negotiation of the terms of Kgwerano Phakisa's fleet management contracts with the Eastern Cape Government. A proposal was sent to Mr Agrizzi on 8 October 2009 detailing the work to be performed. Mr Agrizzi requested Mr Wakeford's input on this proposal.

Mr Radhakrishna

204. Mr Radhakrishna joined Akhile in 2007. He is the CEO. Akhile was appointed by a firm called Fever Tree which was engaged by the DHA for services regarding the DHA's turnaround project. Akhile's provided Fever Tree with consulting services on various projects including SITA, Telkom, SAPO, XPS/SkyNet Courier Company, Nthwese/ Double Ring, Government Printing Works and Lindela. Double Ring and Lindela had existing contracts in place with the DHA at the time, which required renegotiation. The primary focus was for the DHA to receive cost savings and increased service delivery. Mr Radhakrishna pointed out that renegotiation of existing contracts did not require a tender

process, nor did it require any National Treasury involvement or approval.

205. Mr Radhakrishna referred to the Lindela negotiations Fever Tree report of 4 December 2007 which reflects that Bosasa had offered cost reductions on the Lindela contract on the condition that the DHA extended the contract by five years, whereas Fever Tree recommended that no extension beyond three years be considered. Mr Radhakrishna confirmed that, ultimately, Bosasa conceded to the cost reductions without accepting any extension of the initial period of the contract.

206. Mr Radhakrishna confirmed that the negotiations pertaining to the Lindela contract were held with Mr Agrizzi and culminated in the conclusion of the second and third addenda to the initial Lindela contract of 2005. Both the addenda were signed by Mr Agrizzi as the authorised signatory of the service provider, being Leading Prospect Trading (Pty) Ltd, on 18 February 2008 and 13 March 2009 respectively. Mr Radhakrishna stated that none of the terms of the addenda were beneficial to Bosasa – all the terms of the addenda were to the benefit of the DHA.

207. Mr Radhakrishna addressed Mr Agrizzi's allegation that when the purported R7 million that was supposed to be received by Mr Radhakrishna from Bosasa for renegotiating the extension of the Lindela contract was not forthcoming, Mr Watson agreed to pay him monthly. He pointed out that Mr Agrizzi's oral evidence on this issue was contradictory: initially Mr Agrizzi said that he approached Mr Watson believing that Mr Radhakrishna should not be entitled to any payment, and that Mr Watson told him that Mr Radhakrishna should not be paid R7 million but should instead be paid monthly. Subsequently Mr Agrizzi says that he in fact proposed to Mr Watson that Mr Radhakrishna be paid monthly.

208. Mr Radhakrishna explained that the use of bank account of Distinctive Choice Wines to receive payments for Bosasa was because he did not wish to involve his Akhile co-directors in fees received for work performed in his personal capacity for Bosasa in 2011. He stated that that there is no logical basis for the contention he sought to disguise that the payments were from Bosasa, given that Akhile had already received consulting fees from Bosasa in November 2009, eighteen months before Distinctive Choice Wines ever received any payments from it. Mr Radhakrishna states that the fees received by Akhile and himself personally through Distinctive Choice Wines were not related to the renegotiation of the Lindela contract but were for various engagements for consulting work performed relating to introducing Bosasa to opportunities in the oil and gas industry, consulting work on e-learning projects for the Gauteng Department of Education and introducing Bosasa to opportunities in e-health.

209. Mr Radhakrishna referred to an allegation in Mr Agrizzi's replying affidavit to Mr Wakeford that prior to the renegotiation process, the pricing structure was approximately R8,900,000 per month and the average occupancy at Lindela exceeded 3,200 persons per day. After the renegotiations, the occupancy decreased to approximately 1000 people per day, yet the monthly amount payable reduced by only a nominal amount of R7,500,000. Mr Radhakrishna stated that the ultimate savings to the DHA would have been R2,169,693.50 per month or R134,520,997 over the 62-month period.

210. Mr Radhakrishna summarised his assertions as follows. Mr Agrizzi's accusations against him are untrue. The Lindela contract extension never transpired. Bosasa remunerated him for his work as an independent consultant. There was never any conflict of interest. Mr Agrizzi has sought to use the Commission to serve a personal agenda he has against his former employer for retrenching him and against Mr Radhakrishna for declining his advances.

Department of Education

211. According to Mr Agrizzi, Mr Mathenjwa employed a technician called Mr Bheki Gina whose sister worked at the Department of Education and had numerous contacts within the Provincial Education Department in the Northern Cape. A contract was issued without a tender for the provision of CCTV and access control for the offices of the Department of Education for an estimated R10.5 million. Mr Agrizzi explained that they tried to keep him out of the loop on this tender, because he was just about to resign for the first time.

212. Mr Mathenjwa approached Mr Agrizzi at one stage and mentioned that he had established a relationship with Mr Gina's sister who could procure additional business via the Department of Education and other departments in the Kimberley region. This discussion with Mr Agrizzi was precipitated by a concern Mr Agrizzi had with Mr Gina's performance in the company. At that stage, Mr Mathenjwa requested Bosasa to provide a bribe. Mr Agrizzi reminded Mr Mathenjwa that protocols required that he should be dealing with Mr Watson in terms of the formal arrangements.

213. When asked whether he was aware of any bribe money that was actually paid, Mr Agrizzi testified that there was an amount of R1.25 million that was paid out to the sister of Mr Gina. Mr Mathenjwa managed the project, and he handled the bribery. Mr Agrizzi was aware of this because Mr Mathenjwa showed him the costings and because they had made provision for the R1.25 million. In other words, the bribe money was included in the contract price.

Universal Service and Access Agency of South Africa (USAASSA) school tablet and connectivity project

214. Mr Agrizzi testified that a few years previously he had been involved with Sunward Park High School in implementing an e-learning facility where iPads were provided to learners. Mr Agrizzi was then approached by Mr Fezikile Mzazi who was a director at Sondolo IT. Mr Mzazi mentioned to Mr Agrizzi that he had contacts within the USAASSA, which is an SOE established under the Electronic Communications Act 36 of 2005 to provide digital education and which had been given the contract to provide iPads for schools in Gauteng. Mr Agrizzi described this as being a major contract.

215. An initial, informal, and underhand agreement was concluded between Mr Mzazi and the procurement personnel to ensure that lucrative portions of the tender would be allocated to Sondolo IT. This was done for an initial illegal sum of R500,000 which was paid in cash. Mr Agrizzi was present in the vault when this cash was handed over to Mr Mzazi. This tender was subsequently cancelled or it did not perform because USAASSA had been awarded a total of ten schools with maintenance contractors running and they just continued paying the contract.

216. Pursuant to the contract being awarded, a meeting was arranged by Mr Watson with the accounting officer at USAASSA whose name Mr Agrizzi could not recall. During this meeting, the accounting officer was categorically told that he would be looked after financially. The purpose of the meeting was to discuss the extension of the existing contracts and other opportunities. The accounting officer accepted the offer to work together. Mr Agrizzi did not know what had transpired with this contract since then.

Department of Transport

217. Mr Agrizzi's dealings with the fleet management aspect of Bosasa and its associates was recorded as being limited in Mr Agrizzi's Supplementary Affidavit. At that stage, Bosasa employed the services of Mr Vicus Luyt and Mr Alan Chapman to deal with the fleet management and to establish the necessary call centres. Mr Watson "utilised the employees of a Transnet related company known as HSA to establish a fleet management subsidiary called Kgwerano".

218. Kgwerano, Mr Agrizzi was informed, was originally a joint venture between Mr Itu Moraba, Mr Brian Gwebu and Wesbank, a subsidiary of FNB. Kgwerano Financial Services provided fleet management services for senior management in government on an RT62 Contract and managed 15,000 vehicles for government. These vehicles were to be driven by senior government officials.

219. Eventually Mr Watson decided to buy Mr Moraba and Mr Gwebu's shares in respect of which he paid R20 million. The payment for the shares was initially reflected as a loan in the Bosasa financial statements as Mr Watson did not want to incur tax charges.

220. Mr Agrizzi was told by Mr Leshabane that the contract awarded to Kgwerano had been pre-arranged and was unlawful. At that stage, Leshabane was not involved in Kgwerano and had a major issue with it. Mr Leshabane told Mr Agrizzi that they were paying a certain "Mlungise" at the Department

of Transport a substantial amount of money for this contract. The amounts were collected for Gwebu from Mr Watson's vault in cash.

221. Coming to Mr Vorster's evidence in relation to Kgwerano, he testified that in July 2011 he was called to a meeting with Mr Agrizzi and Mr Watson and told to fix the problem with the Kgwerano contract as they were running at a loss of R2 million a month. Mr Vorster was therefore appointed Head of Operations of Kgwerano Financial Services and was responsible for "everything" including dealing with clients, overseeing the operations in every province, and having all the call centre managers' report into him. He stated that he was able to turn the company around within three months and, by the time he left around the beginning of November 2017, the loan account that Bosasa had with Kgwerano was nearly R19 million. Mr Agrizzi's evidence does not, however, refer to Mr Vorster being responsible for Kgwerano.

Department of Social Services in the North West Province

222. Mr Agrizzi had the opportunity to give further evidence about the relationship between Bosasa and the North West Province. He recalled two women, Ms "Kgasi" and Ms "Chidi" to whom he had been introduced. Upon gaining access to his archived emails, he was able to identify one of them. In this regard, Mr Agrizzi explained that Ms "Chidi" appears to be a Ms Matshadisa Cordelia Mogale (Ms Mogale), a former HOD at the Department of Social Development (DSD) in the North West. Mr Agrizzi's supplementary affidavit refers to Ms "Kgasi" as a former Chief Director at the DSD in the North West. Mr Agrizzi explained that both these individuals were government officials in the North West in Mahikeng and it was Mr Dlamini who introduced Mr Agrizzi to them. Mr Agrizzi said that at a later stage Ms Mogale sent her CV to Mr Agrizzi when she was leaving the North West Department because things were "hotting up" in an investigation against her.

223. In an affidavit filed in response to a Regulation 10(6) directive, Mr Dlamini confirms that Ms Matshidiso Kgasi was the former Chief Director of DSD and Ms Mogale was the former HOD in the North West Province. Mr Dlamini denies ever introducing Mr Agrizzi to Ms Kgasi. Mr Dlamini admits that he introduced Mr Agrizzi to Ms Mogale after a contract had been awarded to Bosasa's Youth Development Centres, of which Mr Dlamini was a national trainer and was later promoted to the position of director of professional services and operations. Mr Dlamini alleges that he introduced Mr Agrizzi to Ms Mogale in the ordinary course of business of the Youth Development Centres. He further alleges that Mr Agrizzi had requested a copy of Ms Mogale's CV because she was an Advocate and Mr Agrizzi believed that he could employ her based on her qualifications. Mr Dlamini requested that Ms Mogale forward her CV to him and he, in turn, sent it to Mr Agrizzi. Mr Dlamini denies that there was anything untoward in his reasons or intentions when introducing Ms Mogale to Mr Agrizzi.

224. According to Mr Agrizzi when he met Ms Kgasi and Ms Mogale they discussed the need to provide software to raise funding for electioneering purposes. Mr Agrizzi referred to this as being a laundering type of system. For this arrangement, the North West Province would pay Bosasa R4.5 million. Another meeting was to discuss the fencing at one of the facilities and a security system.

225. Mr Agrizzi explained that, when a contract was awarded for the North West, Bosasa's fee was calculated as being inclusive of all services. However, they would sometimes receive messages that more money was needed for electioneering and Mr Dlamini would then raise an invoice for software. This was recorded as a once-off cost so that government was not burdened with a month-to-month cost. It was a simple way of raising money because nobody could prove that the software was not delivered given that the software was already at the facility and working. In response, Mr Dlamini alleges that Mr Agrizzi is not telling the truth. He denies any wrongdoing in relation to the contract awarded to Bosasa's Youth Development Centres. He alleges that the DSD had purchased software and owned it. Mr Dlamini alleges that if there was any inflation of invoices or drawing of cash for purposes of bribery, he was never aware and was not involved. According to Mr Dlamini, he was not authorised to engage in any financial negotiations, but that Mr Agrizzi alone was authorised to negotiate, sign, or authorise the costing in respect of any tenders. Mr Dlamini maintained that Mr Agrizzi was responsible for the inflated invoices or the bribing of officials. Mr Dlamini denies ever taking any cash to or

from anyone.

Department of Health, Mpumalanga Province

226. In November 2016 Mr Agrizzi was informed by Mr Gumede, Chairperson of the Bosasa Group at the time, that he had been successful in negotiating a contract for hospitals in Mpumalanga.

227. At that stage Mr Gumede wanted to arrange payment for the co-ordinator or the person who had worked on the contract for the DOH as he had promised a success fee to this person. Mr Agrizzi was annoyed to hear this because he had just returned to Bosasa under the promise that things were going to change. He, therefore, voiced his opinion to Mr Watson and said that this should not be entertained. Mr Agrizzi stated that his relationship with Mr Gumede had been good up to that stage. However, their relationship began breaking down. Mr Gumede then raised his discontent with Mr Agrizzi to Mr Watson.

228. Mr Agrizzi testified that he was led to believe that an amount was in fact paid to "the person" and that it was requested that Bosasa attend to the servicing of his vehicle, which Mr Watson approved. Mr Agrizzi stated that he refused to sign the invoice for the servicing of the vehicle and told Mr Vorster to take it either to Mr Watson or Mr Gumede. Mr Agrizzi thought that the repairs to the vehicle were considerable.

229. The person referred to in Mr Agrizzi's testimony appears to be a Mr MS Netshishivhe who was referred to in Mr Vorster's evidence. Mr Vorster stated that in May 2016 he was approached by Mr Gumede with an instruction to assist with fixing Mr Netshishivhe's Isuzu bakkie. His understanding was that Mr Netshishivhe sat in the security cluster of the Mpumalanga province and had influence over the contracts with the hospitals. The final quote for the repairs was R29,239.79. This cost was booked against one of the Bosasa vehicles.

230. Mr Agrizzi testified that Mr Watson signed this contract, and this was one of the exceptions to his rule not to put his signature on anything. Mr Agrizzi believed this was done because he was testing Mr Watson's and the Bosasa directors' patience, seemingly by refusing to sign the document himself.

Randfontein Local Municipality

231. Mr Agrizzi testified that incidents of corruption also occurred at a municipal level. This was prevalent at the Randfontein Local Municipality where, at times, tenders were not even issued. Instead, the Municipality used emergency type provisions instead of tender processes even though the value of these contracts were more than R10 million.

232. Mr Agrizzi testified that there were numerous irregularities that occurred within the Randfontein Municipality. For some time, Mr Agrizzi avoided doing any business with the municipalities even though they had been offered security contracts. Directors of Bosasa had meetings with municipal managers which Mr Agrizzi refused to attend. He also refused to put in tenders, or he would over-price tenders so that Bosasa had no chance of getting them anyway because he felt it was wrong of the people in the municipal area to put them under such contracts. Of the most recent activity was the installation by Bosasa of security fencing and CCTV access control at municipal buildings. No tender process was followed.

233. In March 2016 an employee of Sondolo IT, Mr Riaan Van Der Merwe, approached Mr Agrizzi to arrange a meeting between the local CEO of Dahua and Mr Andile Ramaphosa. Dahua is a company from China that is a provider of video surveillance products and services that grew exceptionally fast, but Mr Agrizzi refused to utilise their products because he believed the products to be inferior. Even though Mr Agrizzi responded in the affirmative to the meeting request, he did not attend the meeting allegedly held between Dahua and Mr Andile Ramaphosa. He indicated that an email is available to substantiate this. Mr Andile Ramaphosa, in his affidavit filed in response to a Rule 3(3) notice, denies having knowledge of the meeting referred to above, that he was ever contacted by Mr Agrizzi in relation to such meeting and never attended such meeting.

234. At the stage of the discussion with Mr Riaan van der Merwe, Mr Agrizzi had asked for his resignation to be made official and he had written a letter to Mr Biebuyck stating the format in which he had wanted this communication to be addressed to all staff at a board meeting and staff meetings. However, Bosasa refused to do so, and the staff were only notified of Mr Agrizzi leaving in August 2017.

235. The agreement with the municipal person who was involved in this arrangement, was that a proportionate amount of cash be paid to himself in respect of the provision of the systems, as well as a Dahua system being installed at his personal residence at no charge. Mr Agrizzi notes in his Supplementary Affidavit that evidence of this installation can be seen at the property situated at Randfontein. Even though this incident happened after Mr Agrizzi's departure, he was aware of the plan for this prior to him leaving Bosasa. Mr Agrizzi testified that one of the whistle-blowers had told him about this incident as well and that they may give testimony at the Commission. Mr Agrizzi visited the site and the residence of the person in question and can confirm that the Dahua system had been installed at the residence in Randfontein. The address has been supplied to the Commission's investigators.

THE SIU INVESTIGATION AND REPORT

236. In this section, the evidence regarding the events surrounding the SIU investigation into the allegations of the irregular relationships between Bosasa and DCS officials, as well as the irregular award of DCS tenders to Bosasa, is summarised.

237. In 2006, the Public Service Commission (PSC) and the Office of the Auditor General (AG) referred specific allegations relating to contracts awarded to Bosasa to the SIU for investigation. Reference is made in the executive summary of the SIU Report to the surfacing of various allegations in the media relating to the allegedly irregular awarding of contracts by the DCS to Bosasa Operations and its affiliated companies. Mr Oellermann described the role of the SIU as being to identify and investigate maladministration, public monies that are lost, and to recover those monies. He explained that there is a civil element to the SIU investigations, with the primary focus to ensure that maladministration is reversed, and remedies are implemented. Many of the remedies are civil actions, such as setting aside of contracts, recovery of losses and damages.

238. Mr Agrizzi testified that the SIU Report contained information that he was previously aware of and read into the record the information listed in paragraph 33.1 of his Initial Affidavit. He testified that he did not give any evidence or information to the SIU investigators and confirmed that the information in the SIU Report must have come from sources other than him. Mr Agrizzi further testified that he and Mr Watson had discussed the SIU Report and that Mr Watson blamed Mr Taverner, Mr Mansell and Mr Perry for not taking precautionary measures. Mr Watson also told Mr Agrizzi that "everything is under control and that they had to stick to him [Mr Watson] otherwise the future is very bleak".

239. Mr Agrizzi confirmed that the SIU Report only deals with the four contracts but that there are many other contracts tainted with the type of evidence that Mr Agrizzi had given. Mr Oellermann testified that the SIU, during its investigations, came across indications of wrongdoing other than those defined in the Proclamation. The indications of wrongdoing were significant and involved Bosasa and other government departments, including the DHA and ACSA. A request to the President to extend the scope of the Proclamation to include these issues was not made.

Implementation of the SIU Report's recommendations

240. Mr Oellermann testified that, to the best of his knowledge, and apart from the disciplinary proceedings instituted against Mr Gillingham, he was not aware of any recommendations that were implemented by the DCS after the SIU Report being issued. Other than the communication with the DCS related to the disciplinary proceedings of Mr Gillingham, the DCS did not respond to the SIU after receipt of the Report. Mr Oellermann testified that he had been advised that the contracts between Bosasa and the DCS continued, and were extended, notwithstanding the submission of the SIU Report to the DCS.

241. The SIU, because of the findings in the Report, convened a meeting with the NPA and handed over a copy of the Report and its annexures. Mr Oellermann clarified that the role of the SIU is to investigate a matter in terms of the relevant Proclamation, and to hand over evidence of criminality to the relevant prosecuting authority. At subsequent meetings with the NPA, the SIU gave several presentations where they set out the evidence and how they had gathered it and reached their conclusions. The SIU also handed over all the evidence that they had in their possession to the NPA. He said that if the NPA was satisfied that a crime had been committed that needs to be investigated or prosecuted, the SIU would embark on the process of handing over all evidence and providing the NPA with everything that they need for a criminal docket to be registered.

242. Furthermore, Mr Oellermann testified that although they had regular meetings with the NPA initially, concerns were raised by the NPA indicating that they needed to discuss the concerns internally. A few more presentations were conducted after that, but by the time Mr Oellermann left the SIU in October 2012, a case had not been registered and there was not much momentum on the investigation. Mr Oellermann described it as unique that the matter has taken ten years to be prosecuted.

Attempts to discredit the SIU investigation

243. Mr Oellermann described an incident where he was approached by a Captain from the Crime Intelligence Services in Gauteng, during his investigation into Bosasa. The Captain, whose name Mr Oellermann could not recall, wanted to see him specifically. He advised Mr Oellermann that he had been informed by a source in Bosasa that they had a list of the investigators that were conducting the investigation and that they knew their identities. He told Mr Oellermann that they were trying to acquire more personal information about them and that there was going to be an attempt to discredit the investigation team and Mr Oellermann himself. According to the Captain, they were trying to obtain Mr Oellermann's bank details so that they could make an anonymous deposit to discredit him and to taint the investigation, and to have Mr Oellermann removed from the investigation. Mr Oellermann reported these allegations to his principals but testified that nothing much happened, and that no anonymous money was deposited into his account.

244. Mr Oellermann explained that due to the sensitivity of the investigation, they would report once or twice a week to their principals and would immediately relay any information they considered important. They had to report regularly to ensure that they were operating within the agreement that had been reached to avoid any further legal challenge.

Bosasa Directors' response to the SIU investigation

245. At the time of the negative exposure of Bosasa in the press surrounding the SIU investigation, Mr Agrizzi and his colleagues would discuss the matter as they walked into the Bosasa office park so that nobody could tape the conversation. Mr Agrizzi confronted Mr Watson in the boardroom threatening to resign after he had been informed that Mr Watson had received advice that Mr Agrizzi should take the fall on behalf of the company in the SIU investigation. This entailed admitting to "absolutely everything" which included that he had corrupted Mr Mti and Mr Gillingham.

246. The Bosasa Directors were of the view that they needed to keep fighting the SIU case, fighting the NPA and fighting the Hawks. Mr Agrizzi recalls their attorney Mr Biebuyck telling him that the matter would never get to trial because the NPA is useless, and they would never be able to prosecute.

247. Mr Agrizzi explained that he had received instructions to place an aggregate of R40 million in attorneys' trust accounts to defend Bosasa although he was told categorically that this might not be enough. At that stage, he realised that he did not have the resources to fight the process by himself. It was for that reason he considered it a real risk to leave Mr Watson.

Leak of the SIU Report to Bosasa

248. Around mid-2009, Mr Agrizzi was sent a copy of the SIU Report by Mr Biebuyck while he was in Paris on holiday with Mr van Tonder and Mr Watson. Mr van Tonder confirmed that he was in Paris with Mr Watson and Mr Agrizzi when the SIU Report was released. Mr van Tonder recalled Mr Watson boasting that his name did not appear in the report. He believed this was because Mr Watson did not sign any documents that might incriminate him.

249. Mr Oellermann testified that the only authorised recipients of the SIU Report were the Minister and Acting National Commissioner of the DCS, the Head of the SIU, the SIU Programme Manager and the SIU archive. He confirmed that, if the SIU Report came into the hands of Bosasa at any stage, it would have been entirely unlawful. Mr Oellermann did not know how the SIU Report came to be in the possession of Mr Agrizzi or members of the public but confirmed that the SIU did not distribute the Report to any other entity or individual. Mr Oellermann testified further that within a day or two after the SIU Report had been delivered to the DCS, he received a telephone call from a journalist who indicated that he had a source within Bosasa which had informed him that the SIU Report was at Bosasa and was being discussed by the executives.

250. Mr Oellermann described measures taken by the SIU to ensure that it would be difficult for the Report to be provided to an unauthorised person which included: separating the entire investigation team from the rest of the SIU in a separate part of the building; forbidding any discussion of the matter with any colleague at the SIU; the investigations team reported directly to their principals, and Head and Deputy-Head of the Unit; restricting information sharing (including printing the report), delivering a hard copy to the DCS offices in Pretoria (no electronic copies were provided); meeting with recipients of the Report prior to delivery where SIU emphasised the importance of ensuring confidentiality of the report due to the sensitivity and the various legal challenges brought by Bosasa.

251. Mr Watson asked Mr Agrizzi to arrange a meeting to discuss the SIU Report with Mr Biebuyck. The meeting with Mr Biebuyck resulted in people being given certain responsibilities in the contemplated prosecution of Bosasa. Mr van Tonder needed to deal with the banks, the financing and cash-flow of the business to ensure sufficient funds for legal fees. Mr Agrizzi was responsible for all legal aspects in conjunction with Mr Biebuyck. Mr Watson took responsibility for handling the current political dynamics.

The SIU Report and criminal charges brought against certain individuals

252. Mr Oellermann confirmed that Mr Mti, Mr Gillingham, Mr Agrizzi, Mr van Tonder and certain companies known to be part of the Bosasa Group were named as accused persons in a charge sheet served in 2019. In response to a question from the evidence leader, noting that other Bosasa officials are absent from the list of accused persons, Mr Oellermann responded that Mr Watson is not mentioned in the SIU Report because the SIU never had an opportunity to interview him.

253. According to Mr Oellermann, at the time of issuing the Report, the SIU had wanted to investigate the matter further and did not have enough evidence to put Mr Watson's name in the Report. Although the SIU had received information that Mr Watson was aware of what was going on at all times and in fact was at the forefront of the irregularities that had been identified, the SIU never had an opportunity to test the allegations with Mr Watson. The persons that were interviewed told the SIU that Mr Watson never signed anything, never sent an email, always kept his nose clean and did not even use the computer that was in his office – the SIU felt that the evidence needed to be investigated further before they could approach Mr Watson. During this period Mr Watson dies on a car accident.

254. Mr Oellermann testified that the charges brought against Mr Agrizzi and others in February 2019 following the evidence of Mr Agrizzi at the Commission, substantially relate to the SIU Report and that in the main the charge sheet is based on this Report. Mr Oellermann highlighted two exceptions in the charge sheet, which in his view were not dealt with in the SIU Report, namely:

    254.1 Charges relating to payments and gratification to Mr Mti (accused number 1) for flight tickets, car rental services, accommodation, and cash payments over the period May 2004 to July 2015;

and

254.2 Charges for money laundering and the payment of R62,796 for travel expenses relating to a trip to Europe undertaken by Mr Gillingham (accused number 2) and Ms Teresa Gillingham.

255. In relation to the delay in bringing charges based on the SIU Report, Mr Oellermann testified that there would have been certain procedural issues that would need to be dealt with for the evidence in the SIU Report to be admissible in terms of the Criminal Procedure Act, 1977 and certain further investigations to be done, but that he found the delay of ten years incomprehensible.

The NPA - Adv Nomgcobo Jiba and Adv Lawrence Mrwebi

256. In this section of the summary, the evidence alleging that Bosasa paid certain individuals within the NPA to assist it by providing information related to the ongoing investigations into and possible prosecution of Bosasa and related entities is addressed.

257. Around 2009/2010, Mr Agrizzi accompanied Mr Watson to a meeting with Mr Mti at his residence where they had an informal discussion about the SIU investigation into Bosasa and potential criminal charges. They discussed what had been reported in the media and what was happening in the NPA. These meetings generally took place once a month.

258. Mr Agrizzi testified that at the meeting, Mr Mti was aware of the Hawks and the NPA's investigation and suggested that Bosasa needed to pay certain individuals within the NPA so that they could assist Bosasa. The assistance was in the provision of information as well as to interfere with the investigation. Mr Mti also had documentation that had been provided to him after he had met with various people. Mr Agrizzi further testified that Mr Mti and Mr Watson made it clear that packages needed to be made up for certain people on an urgent basis. The names that were mentioned at the meeting were Adv Jiba, Adv Lawrence Mrwebi and Ms Jackie Lepinka.

259. Mr Agrizzi said that Mr Mti indicated that he met with Adv Jiba and Ms Lepinka who, he said, provided him with detailed information about the status of the investigation and the prosecution. Mr Mti would mention to Mr Agrizzi and Mr Watson that the ladies were "with me", as a reference to their co-operation. According to Mr Agrizzi, Mr Mti said that Adv Mrwebi did not attend these meetings. The updates provided by them, according to Mr Agrizzi, were very accurate because they would receive two sets of updates and the update from Mr Mti was always accurate. Mr Agrizzi testified that in return, according to Mr Mti, these three officials would get the cash monthly.

260. According to Mr Agrizzi, the arrangement started in around 2010. Adv Jiba would be allocated R100 000 per month, Ms Lepinka would be allocated R20 000 per month and Adv Mrwebi would be allocated R10 000 per month. When Mr Agrizzi asked why Adv Mrwebi received less than Ms Lepinka, he was informed that Ms Lepinka was far more active and far more important than Adv Mrwebi and that he was calm and happy if he received his R10 000 and would not interfere in anything.

261. Adv Jiba denied the allegations made against her. She denied that she ever met with Mr Mti as alleged or at all. According to Adv Jiba, she was a Deputy Director of Public Prosecutions and was based in the Commercial Crimes Offices in Pretoria and had nothing to do with the Bosasa cases in 2009/2010. Adv Jiba, in her affidavit filed in terms of Rule 3(4), denies receiving cash in the amount of R100 000 monthly, or any amount at whatever frequency, in return for updates or the status of the investigation. In response to Adv Jiba, Mr Agrizzi's affidavit alleges that Mr Mti informed him that the staff from Bosasa handling the VIP transport were transporting Adv Jiba in a Toyota Fortuner, until Adv Jiba informed Mr Mti that she preferred a Mercedes Benz. As a result of the request and Adv Jiba's assistance in her position as acting NDPP, Mr Agrizzi alleges that Bosasa purchased a black E200 Mercedes Benz sedan that was dedicated only for Adv Jiba's use.

262. Mr Agrizzi testified that Mr Gillingham was extremely anxious about these arrangements. He expressed concern about the NPA "processes". Mr Agrizzi requested that Mr Watson speak to him. Mr Watson did so and explained to Mr Gillingham that he had personally spoken to everybody and that the NPA was under control and everything was sorted out. Mr Agrizzi further testified that there was a

discussion between Mr Mti and Mr Gillingham in his presence where Mr Mti advised Mr Gillingham not to be concerned, that he had it all under control and that he was dealing with Adv Jiba, Ms Lepinka and Adv Mrwebi.

263. Approximately a week after the meeting with Mr Mti, Mr Agrizzi was instructed by Mr Watson to take the cash earmarked for Mr Mti as well as cash to be delivered to several other officials, which was to be done monthly. Mr Watson instructed Mr Agrizzi to take extra cash for the persons in the NPA as well. Mr Watson explained to Mr Agrizzi that he had packed the grey security bags in a large plastic haversack, including R100 000 for Adv Jiba (marked Snake), R10 000 for Adv Mrwebi (marked Snail), and R20 000 for Ms Lepinka (marked Jay). Mr Agrizzi testified that there were six bags in the haversack, including for Mr Jolingane, Ms Grace Molatedi, and Mr Mti.

264. According to Mr Agrizzi, Mr Mti liaised with the persons in the NPA to obtain information and to provide Bosasa with such information, which would be verbal and written, including copies of secret documents, minutes of meetings and various other information sources. The information was given to Mr Watson and then to Mr Agrizzi, or at times Mr Agrizzi would be with Mr Watson and the documents would be handed to them.

265. Adv Jiba filed an application to cross-examine Mr Agrizzi. On 22 June 2021, she resolved not to persist with her application and her request to give evidence before the Commission on the basis that Mr Agrizzi had no personal knowledge of her having received any money.

266. In Adv Jiba's affidavit filed in terms of Rule 3(4), she also dealt with the allegations connecting her to Ms Lepinka. Adv Jiba states that it is not correct that she worked with Ms Lepinka in handling the case or in the manner suggested by Mr Agrizzi at all. According to Adv Jiba, she never "handled" the Bosasa investigation or any investigation in relation to its related companies.

267. In response to a Regulation 10 (6) directive issued by the Chairperson, Ms Jacobeth Lepinka, filed an affidavit in which she admitted that she was Mr Mti's secretary when he was the National Commissioner of the DCS (from September 2001 until November 2006) but denied receiving money from Bosasa and its associates, having been at any stage in her employment with the NPA secretary to Advs Jiba and Mrwebi, and having handed or caused to be handed any documents or information to any unauthorised persons during her employment with the NPA. Ms Lepinka recorded that Mr Agrizzi's allegations implicating her amount to hearsay evidence, and that she has no legal obligation to answer (based on legal advice she obtained).

268. An affidavit in terms of Rule 3(4), dated 16 March 2019, was filed with the Commission. The affidavit was in support of an application to cross-examine Mr Agrizzi and purports to be signed by Adv Mrwebi. The application was dismissed by the Chairperson on 15 June 2021. The application was dismissed following correspondence from Adv Mrwebi to the Commission wherein he stated that he never made this formal application, requesting documentation in this regard. It will not be considered or dealt with further.

Leak of NPA documents to Bosasa

269. The documents attached to Mr Agrizzi's statement as annexures "Q1" to "Q17" were given to Mr Agrizzi by Mr Mti directly or by Mr Watson who had received them first from Mr Mti. Mr Mti informed Mr Agrizzi that he had received the documents from Adv Jiba or when he attended meetings with the persons from the NPA. Mr Agrizzi testified that he had kept the documents at a storage facility away from his residence that he had hired especially to store these documents, together with other documents and hard drives, because he had reached a stage where he had wanted to use the documents "and open it up".

270. Adv Jiba denies having supplied the documents attached to Mr Agrizzi's Initial Affidavit to Mr Mti or to any Bosasa official. According to Adv Jiba, the documents were usually in the possession of relevant investigators, police and prosecutors dealing with the cases. During Adv Jiba's tenure as the acting NDPP, Ms Lepinka was responsible for the co-ordination and receipt of reports in cases on which she would be briefed, including Bosasa. When Adv Jiba was reassigned to NPS (after the appointment

of Adv Shaun Abrahams), Ms Lepinka was still in the division. According to Adv Jiba, she was never involved in any Bosasa investigation, beyond receiving briefings.

271. Annexure Q3 to Mr Agrizzi's Initial Affidavit is a memorandum from Adv Glynnis Breytenbach, then Deputy-Director of Public Prosecutions in the Special Commercial Crimes Unit (SCCU), to Adv Simelane, the NDPP at the time. The memorandum is dated 4 February 2010 and is concerned with the Bosasa investigation and shows that the investigation and prosecution was at that time in the hands of the NPA. The memorandum is a report from Adv Breytenbach to Adv Simelane concerning the progress of the investigation into Bosasa. The final paragraph of the memorandum notes the urgency of dealing with Mr Mti's position as a main suspect, who was then Head of Security for the 2010 World Cup. Mr Agrizzi confirmed that this is consistent with what he knew at the time and the fact that Bosasa had helped Mr Mti in relation to the bid for the security function at the World Cup.

272. The memorandum also states that the Bosasa matter was received by the SCCU directly from the SIU in late November 2009, which is consistent with evidence given by Mr Oellermann before the Commission. The memorandum also references a follow up meeting held by the prosecution team, investigating officer and Mr Oellermann to discuss material in the possession of the SIU and not yet supplied to the SCCU. Mr Oellermann testified that the information contained in the memorandum, including problems regarding the conduct of further investigations and prosecution, would be invaluable in the hands of potential accused persons as it would provide them with information which they could use to attack the process, the investigation and any subsequent prosecution.

273. Mr Agrizzi testified that the facts contained in the leaked documents concerning the progress of the investigation, who was involved and how the investigation was progressing were also confirmed to him by Mr Seopela. Mr Seopela was close to Adv Simelane. Mr Agrizzi confirmed that there were various sources of information that he had and that there was always confirmation of whatever documentation he received and that it would always "collaborate" (presumably meaning to corroborate or confirm or coincide with the information contained in the documents).

274. Mr Oellermann confirmed again that the SIU refers evidence of criminal conduct to the NPA. Mr Oellermann testified that the affidavit he provided with the SIU Report was confirmation of the SIU Report and the referral of evidence of a criminal offence that had been uncovered but was not a complainant's affidavit to initiate a criminal case. Mr Oellermann further testified that such a document in the possession of a potential accused person would provide them with ammunition to attack the investigation.

275. Mr Agrizzi testified that, prior to Bosasa receiving the assistance of Adv Simelane in helping them shut the investigation down, it was very tense in early 2010. Bosasa would receive reports, in writing or verbally, every week or second week. The reports that they received were consistent with the documents that they were given.

276. In response to the various challenges to a successful prosecution raised in the minutes, Mr Oellermann testified that:

    276.1 He was not aware of the unconstitutionality of the SIU Report, as the evidence was gathered in terms of the SIU Act and that the investigation was conducted within the parameters of the Proclamation and the Act. Mr Oellermann confirmed that even if there had been irregularities, the Constitution does not prevent the leading of evidence provided certain groundwork is laid for the admission of that evidence.

    276.2 It seemed to him that a judgment had been made on the admissibility of evidence at an early stage of the investigation without it going through a credible process where it can be properly evaluated.

    276.3 He did not believe it to be a fair comment that the SIU Report cannot hold water in any court and that any presiding officer will not proceed with the Report.

    276.4 He did not believe it to be true that the SIU investigation was not in line with the proper administration of justice without fear, favour or prejudice as the investigating team reported to their

principals, were given a mandate to investigate, and did so, and obtained evidence legally in terms of the SIU Act. Mr Oellermann did not believe that they acted outside of the Act or the parameters of the Proclamation. Mr Oellermann denied being on a witch hunt and said, "it would have been within my power to implement a witch hunt in any case at that stage." He confirmed that the team took advice from counsel on several matters and acted in accordance with such advice.

276.5 Mr Oellermann did not understand what was being referred to in the minutes that incorrect sections of the mandate were used to find evidence as, in his view, the Act and Proclamation were clear, and they acted within those boundaries. He further testified that all the affidavits that were obtained were done in accordance with how one would do so legally. Mr Oellermann was not aware of any political vendetta or agenda.

276.6 Mr Oellermann further testified that he was present when Adv Willie Hofmeyr presented the SIU Report to the Portfolio Committee and that he believed the presentation was made towards the end of 2009, prior to the Report being sent to the NPA and the DCS. Mr Oellermann was of the view that the media coverage of the Report had no impact on the investigation. Mr Oellermann testified that the investigative team was a diversity of race and gender.

276.7 Mr Oellermann confirmed that he is not aware of the unconstitutionality of the Report nor any political vendetta or any of the other issues raised which would prevent a successful prosecution.

277. Annexure Q6, on the letterhead of the SCCU dated 17 November 2010, appears to be addressed to the NDPP Adv Simelane and authored by Adv MC de Kock, with the subject being "the Bosasa matter". The purpose of the report is stated to be to apprise the NDPP of the status quo of the SIU Report on Bosasa. The report states that the SIU received information from various and sometimes unreliable sources and made use of the information without verifying facts. It contends that the SIU Report was drafted in a "careless and almost casual fashion" and that the lack of accuracy and precision with the drafting of the SIU Report will give ample opportunity to those seeking fault.

278. Mr Oellerman did not believe it to be correct that the SIU received information from unreliable sources and made use of such information. He explained that through the investigation process evidence and information is evaluated as a matter of course, which is what took place. He believes the report placed the SIU Report in a bad light and would be harmful to the prosecution's case. He also believes that any person who leaked the report to Bosasa must have known that it would harm the prosecution. He also stated that he did not agree with the comments in the report made by Adv de Kock.

279. Further, Mr Oellermann disagreed that the SIU Report was drafted in a careless fashion with a lack of accuracy and precision. He explained that there may have been further investigation to follow but that the purpose of the SIU Report was not to hand over a court-ready criminal case docket for charges to be immediately drawn and prosecution to be initiated. The SIU Report was to identify the areas where evidence of criminal offences had been uncovered and to link the individuals identified as part of the criminal offence and then for the investigation and prosecution to take its course. Mr Oellermann agreed that the person who handed the report to Bosasa would presumably have known expressly that the mere handing over of the report would undermine the prosecution and thus unlawfully assist the accused persons.

280. An information note marked "secret" and dated 17 October 2011 is attached as annexure Q7 to Mr Agrizzi's Initial Affidavit. The note is addressed to the commander of the anti-corruption task team the Directorate for Priority Crime Investigations (the DPCI or "the Hawks") and is headed *"Progress of Investigation: Bosasa Investigation: PC 5: Pretoria Central CAS 1556/02/2010"*. The note names witnesses that have been consulted and refers to draft statements being prepared for signature and further states from whom statements were intended to be obtained. Mr Agrizzi confirmed that because of the receipt of the note, he knew who was being consulted, who would testify and from whom statements were going to be taken.

281. Mr Agrizzi also received an unsigned memorandum authored by Adv de Kock of the SCCU dated 28 October 2011 and marked confidential. The memorandum is attached as annexure Q8 to Mr Agrizzi's

Initial Affidavit. The content of the memorandum examines the validity of a subpoena *duces tecum* that was served on the SIU during February 2011 by the *Mail & Guardian* newspaper. The conclusion reached in the memorandum is that "there are various levels of argument that could be advanced in support of the view that the subpoena amounts to an abuse of the process of court."

282. Mr Agrizzi explained that the memorandum was provided to Bosasa to use as a mechanism in defending its case. Mr Agrizzi testified that although the memorandum was authored by Adv de Kock, she was beyond reproach and, to his knowledge, was not involved in any interference with the investigation and/or prosecution. The memorandum deals with similar cases to Bosasa and not with Bosasa specifically.

283. Adv de Kock testified that the memorandum attached as annexure Q8 to Mr Agrizzi's Initial Affidavit is the same document attached to her affidavit as MDK1. Adv de Kock confirmed that she authored the memorandum following a request from Investigating Officer, Colonel Danie Kriel in October 2011. Colonel Kriel, the Bosasa investigator, asked Adv de Kock to study documents and give her opinion on a subpoena *duces tecum* dated February 2011. Adv de Kock did so and issued an opinion on 28 October 2011. She has no idea how the memorandum came into Mr Agrizzi's possession. An opinion authored by Advs de Kock and van Rensburg on 1 November 2012 regarding legal issues concerning subpoenas issued in terms of section 205 of the Criminal Procedure Act 51 of 1977 (as amended), is attached to Mr Agrizzi's Initial Affidavit as annexure Q9. Mr Agrizzi received it as part of the series of documents through the irregular arrangements at the NPA.

284. From the investigation into Bosasa, certain subpoenas were issued and Bosasa had an interest in avoiding the execution of those subpoenas. Whilst Bosasa was considering what to do in relation to certain subpoenas that had been issued, they were provided with the opinion authored by Adv de Kock regarding the legality of the very subpoenas which Bosasa had an interest in challenging. The opinion, in conclusion, found that a letter forwarded to Adv Mrwebi was an irregular attempt to review the issuing of subpoenas, avoid the required court appearances by the witnesses and mislead the NPA as to the true facts concerning the legal process.

285. After the release of the SIU Report, subpoenas were issued to Mark and Sharon Taverner amongst others. Mr Agrizzi testified that three subpoenas, specifically came to mind, those issued to Mr Brian Blake, and Mark and Sharon Taverner. Mr Agrizzi further testified that it was standard practice to make sure that there were delays in the witnesses appearing in court. Mr Agrizzi was instructed to meet with Mark and Sharon Taverner and to take steps to delay their appearance as much as possible. Mr Agrizzi testified that he was also instructed to attend every single meeting with them and Mr Biebuyck and make sure that Mr Biebuyck was the attorney of record for them, or whoever Mr Biebuyck agreed to if he did not do it himself. Mr Agrizzi had to ensure that Bosasa was not compromised and insisted that he saw their statements before they were submitted. The Taverners eventually appeared in compliance with the subpoenas after about eighteen months. Mr Agrizzi testified that the responses to the questions put to the Taverners were not necessarily the whole truth.

286. Mr Agrizzi was also in possession of a letter from Advs Mokgatlhe, de Kock and van Rensburg addressed to Adv Mrwebi under the letterhead of the SCCU dated 2 November 2012 about subpoenas issued to Mark and Sharon Taverner. The letter provides information on the status and the legality of the subpoenas from the SCCU.

287. Also provided to Mr Agrizzi by Mr Mti from the NPA was an email authored by Ms Lepinka and sent on 22 November 2012, who was the Manager: Executive Support to the ANDPP. Adv Jiba was the acting NDPP at the time. It is apparent from the preceding email trail that Adv Jiba sought a status report on various cases, including the Bosasa case. Mr Agrizzi testified that he received the document personally in Mr Watson's presence at Mr Mti's house and was told categorically that they could not just isolate and close the Bosasa case, as it would raise too many concerns and so it had to be done as part of five other cases.

288. On 20 November 2012, Ms Palesa Matsi, sent an email indicating the acting NDPP would like to discuss certain matters, including Bosasa, with the addressee's principals on 22 November 2010. Mr Agrizzi did not know who Ms Matsi was.

289. Mr Agrizzi was also in possession of a document addressed to Adv M Mokgatlhe, the acting Regional Head of the SCCU from Adv de Kock dated 26 November 2012 regarding progress on the Bosasa investigation. The report is made four days after the email of Ms Lepinka in which email it was indicated that there is no evidence or prospect of a successful prosecution in relation to Bosasa. Adv de Kock's view, at that stage, was that:

    289.1 The police investigation clearly indicates criminal behaviour on the part of Mr Gillingham, Mr Mansell, Mr Hoeksma and others

    289.2 The investigation is not yet completed, and a charge sheet has not been drafted. Almost 200 statements had been obtained since the start of the investigation, which will take another six months to complete. It is difficult to speculate on the anticipated date of enrolment, but it would definitely be impossible to enrol the matter prior to 14 February 2013; and

    289.3 A summary of the nature and quality of the current and still to be obtained evidence could not be provided except to say that it was not anticipated that it would be challenged on any known grounds.

290. Mr Agrizzi confirmed that he received information on or after 26 November 2012 that the investigation and contemplated prosecution was still on the table. According to Mr Oellermann, a further six months to finalise the investigation was a realistic estimate given his knowledge of the matter and the fact that over 200 statements had already been obtained.

291. Adv de Kock testified that around 2012 she was regularly requested to report on the Bosasa matter. Mr Agrizzi confirmed that as of 30 April 2013, the position was that at least one prosecution could occur during 2013 or shortly thereafter and that such knowledge came to his attention despite the earlier contradictory reports. Even though Mr Agrizzi had been provided with a copy of Mr Gillingham's draft charge sheet dated 30 April 2013, Mr Agrizzi testified that Mr Gillingham was never charged. Mr Agrizzi confirmed that there are several alleged acts in the charge sheet of which he had given direct evidence before the Commission.

292. Mr Oellermann testified that the information contained in the progress reports would be valuable to a potential accused as it would provide insight into the tracking and progress of the investigation, what is still outstanding and where there might be shortfalls in the investigation and prosecution. Adv de Kock testified that the progress report on the Bosasa investigation, dated 30 April 2013, was prepared by her and that the content is the same as annexure Q13 attached to Mr Agrizzi's Initial Affidavit. She explained that she had prepared the report and sent it to the personal assistant of Adv Mokgatlhe, Ms Moja, who transferred the content onto a new letterhead and corrected the formatting.

293. Mr Agrizzi was also provided with a document dated 8 August 2013 titled "Proposed Racketeering Memorandum – confidential document" which document consisted of the draft memorandum, a provisional draft racketeering charge sheet, and a provisional draft list of racketeering activities. Mr Agrizzi testified that he was provided with the document by Mr Mti in mid-August. Through the document Mr Agrizzi and Mr Watson had been informed of the identification of the individuals and entities who would be the subject matter of the racketeering charges before the Memorandum was completed. They were also made aware of contemplated charges in relation to racketeering in terms of the Prevention of Organised Crime Act (POCA) before the charges were brought. The document was intended for the attention of Advs Jiba, Mrwebi and Mosing.

294. Adv de Kock testified that she had sent an email on 8 August 2013 to Adv Mokgatlhe with the title *"Confidential Email: Bosasa, Gillingham, Mti and Others Racketeering Documents"*. Three MS word documents were attached to the email, namely *"Proposed Racketeering Memorandum, Bosasa and Others, 8 August 2013.doc"*; *"Provisional Draft Charge Sheet Bosasa Racketeering.doc"* and *"Provisional List of 149 Racketeering Activities POC and L Mti.doc"*. Adv de Kock testified further that:

    294.1 She indicated in her email to Adv Mokgatlhe that she had raised concerns about the security of the attached documents.

294.2 At some time prior to sending the email, her investigating officer, Colonel Kriel informed her that documents prepared by the SCCU, such as progress reports, were being leaked. She held a meeting with Colonel Kriel and Brigadier Simon to confront them about who was leaking documents. Adv de Kock testified that they denied leaking the documents and said they did not know who was doing so.

294.3 Adv de Kock explained that the NPA investigation started from the SIU Report, which was used as background and to provide direction to the NPA's investigation. The NPA undertook its own investigations (i) because the SIU Report was prepared for the SIU's own purpose, related more to civil proceedings, and (ii) where there were gaps that had to be met to ensure the criminal standard would be met. Adv de Kock further testified that it was not unusual for the NPA to conduct its own investigation.

294.4 Adv de Kock explained that the number "017514" printed at the top of the email she had addressed to Adv Mokgatlhe was a part of a numbering system that she had implemented after she had been removed from the Bosasa matter in February 2016. At that time, she prepared an index and numbered her working papers to be handed over to the next prosecuting team. Adv de Kock testified that document security and access to the documents were a priority to her because she had heard that Bosasa had destroyed servers during the time of the SIU investigation. As such, she would not work on the original documents and generally worked on scanned documents or photocopies of scanned documents. The number "017514" meant that the document was document number 17 514 (of approximately 22 000 pages). Adv de Kock testified that, after seeing Mr Agrizzi's documents, she recovered this specific email to show that the three attachments to Mr Agrizzi's Initial Affidavit actually comprised a single set of documents.

294.5 Adv de Kock confirmed that she was the author of the three documents attached to her email, and that those same, identical documents were in Mr Agrizzi's possession.

295. Adv de Kock confirmed that every document dealt with in her affidavit was identical to the documents presented by Mr Agrizzi to the Commission, which she established by finding those documents she had prepared and sent to Adv Mokgatlhe and others, on her computer. Adv de Kock was unable to say how the documents came to be in Mr Agrizzi's possession.

296. According to Adv de Kock, the documents were all confidential NPA documents which she had marked as confidential as an extra precaution. She confirmed that any person within the NPA would have been aware that to provide the documents to a suspect or a person affected by the investigation would be wrong. Adv de Kock testified that the leakage of the documents, in her knowledge and experience, was not random. She further testified that the possession of the documents by an implicated person would harm the investigation.

297. Although Adv de Kock had previously been told that documents were being leaked, the first time that she saw that specific documents had in fact been leaked was when she was shown the documents by the personnel from the Commission. According to Adv de Kock, she was criticised at the time for being paranoid about her documents and the docket and about people having access to her documents, and people had the attitude that she was "sort of crazy" in this regard. After she became aware that some of the documents relating to the Bosasa matter were being leaked, Adv de Kock took greater precautionary measures in the security and confidentiality of the dockets.

Further attempts to interfere with the NPA investigation and prosecution

298. Mr Agrizzi testified that he attended a meeting with Mr Mti, at his house, in the course of 2013 at which they again discussed what had happened at Mr Mti's meeting with Adv Jiba and Ms Lepinka. During the discussion, Mr Mti wrote instructions down for Mr Agrizzi to take to the legal representatives to provide them with a guideline on drafting of a letter as a basis to challenge the legality of the SIU investigation. The attorneys (Mr Biebuyck) were to draft a letter requesting that the case be closed and that no prosecutions are instituted. Mr Mti's written instructions are attached to Mr Agrizzi's Initial Affidavit as annexure Q16.

299. Mr Agrizzi testified further that the instructions from Mr Mti, following his meeting with Adv Jiba and Ms Lepinka, were: first, to challenge the legality of the SIU Report in its entirety based on the process the SIU followed in obtaining evidence and that the Report needed to be presented to the President first; second, to raise the fact that the fundamental rights of the company and of the individuals in the company had been encroached upon, which was highlighted as the most important argument to be used; third, to question the time period that had lapsed between the initial investigation and prosecution; fourth, the legal basis for the ongoing persecution and harassment; and fifth, to seek relief on how the issue should be resolved going forward.

300. Mr Agrizzi confirmed that, when Bosasa contemplated steps to quash the investigation, it was acting not only in its own interests but also in the interests of Mr Mti and Mr Gillingham.

301. Following his meeting with Mr Mti, Mr Agrizzi took the information to the attorneys and a document was drafted by the attorneys that Mr Agrizzi took back to Mr Mti. The letter was taken to Mr Mti so that he could read and consider it before it was sent to the NPA. It was also taken to Mr Mti to allow him an opportunity to take it back to Adv Jiba and Ms Lepinka to satisfy themselves that it reflected what they had told him.

302. Mr Agrizzi contacted Mr Mti the same evening after he had taken the draft letter to him and Mr Mti told Mr Agrizzi to come to his house the following morning. Mr Agrizzi went to Mr Mti's house the following morning and made notes of their conversation. That note is attached to his Initial Affidavit as annexure Q17. Mr Agrizzi testified that according to Mr Mti, he, Adv Jiba and Ms Lepinka were not happy with the draft letter and so Mr Mti read out to Mr Agrizzi points that needed to be addressed. Mr Agrizzi testified that he was told categorically that the advice emanated from the meeting that Mr Mti had with Adv Jiba after he had shown her the letter drafted by Bosasa's attorneys. At the time, the monthly payments to Adv Jiba, Ms Lepinka and Adv Mrwebi were still being made.

303. On 8 May 2015 Mr Watson and Mr Agrizzi went to meet with Mr Mti at his house following a story in the media about Adv Jiba either being suspended or compromised, Mr Agrizzi could not recall the details. Mr Watson emphasised at the meeting that Mr Mti and Adv Jiba were compromised and that Bosasa was at risk. Mr Agrizzi testified that Mr Watson proposed how the matter should be handled and said that he was going to see Mr Jacob Zuma. Mr Watson then conducted a role-play and showed Mr Agrizzi and Mr Mti what he was going to say and how he was going to approach the former President. Mr Agrizzi recorded the conversation.

304. The two topics discussed during the meeting were the contemplated prosecution of Bosasa and the involvement of various parties in that prosecution and the so-called "rogue unit" and SARS.

305. Mr Agrizzi testified that Mr Watson had the type of relationship with former President Zuma that he could tell him what to do and that he would visit Mr Zuma quite regularly. Mr Agrizzi further testified that Mr Watson was politically influential.

DESTRUCTION OF EVIDENCE

306. In this section of the summary, the evidence relating to Bosasa's attempts to destroy evidence which could implicate it, its employees and stakeholders in unlawful activities is highlighted.

307. Mr Agrizzi testified that Mr Watson instructed Mr Agrizzi and Mr van Tonder to fetch all the computers and invoicing books from Blakes Travel and to destroy them. This was confirmed by Mr van Tonder who elaborated that the incriminating documents were those pertaining to the "VIP account". Mr van Tonder explained that destroying this information was necessary given that the SIU had received information that Bosasa had paid for the travel of government officials.

308. Mr Agrizzi and Mr van Tonder testified that the documents and computers were handed to them, and they took these items to Luipaardsvlei Hostel for destruction. Mr Agrizzi and Mr van Tonder confirmed that a tractor was used to dig a hole in which they threw the documents and computers. Thereafter, fuel was poured into the hole and the content was set alight before the hole was covered and a concrete block placed over it. In Mr Agrizzi's evidence, however, he indicated that Mr Ryno Rhoode,

who was responsible for gardening, maintenance, and oversight, was tasked to collect petrol and the hole was covered using a tractor operated by Mr Gert van der Bank. This was confirmed in an affidavit deposed to by Mr Christiaan Gerhardus Johannes van der Bank dated 14 March 2019. Mr van der Bank stated that Mr Agrizzi's evidence was true and correct and that Mr Agrizzi had instructed him to close a hole with burned papers and computers inside, at Luipaardsvlei. Mr van der Bank confirmed that he closed the hole with soil.

309. Mr Agrizzi explained that Blake's Travel cooperated with them because it received R1.7 million to R2.2 million a month worth of business from Bosasa. He testified that Blake's Travel knew that they were going to destroy the computers and issued them with blank invoice books to be replicated and filed for auditing purposes.

310. In his affidavit filed at the Commission and in his oral evidence, Mr Blake disputed that Mr Agrizzi and Mr van Tonder took computers from Blake's Travel, buried them, and later replaced them. He stated in his affidavit that he did not recall this happening. Mr Blake stated that, after he had watched Mr Agrizzi and Mr van Tonder's testimony at the Commission, he realised that he had to give further information and contacted the authorities to arrange for the police to image Blake's Travel computers, which was attended to on 4 February 2019. Mr Blake testified that it was not possible for Mr Agrizzi and Mr van Tonder to have taken the computers belonging to Blake's Travel because they are still in possession of all the evidence on the computers and it would have required that the computers be reprogrammed, as a travel agent's computer must have a certain IP address.

311. Mr van Tonder testified that the travel coordinator rewrote the invoices with different information which did not reflect the actual travel that had taken place. This confirmed Mr Agrizzi's evidence that a Bosasa employee was instructed by Mr Watson to rewrite every single travel invoice in Bosasa's records replacing, for example, Mr Mti's name with that of Mr Agrizzi or of another person. That invoice would then be attached and given back to Blake's Travel with the other copy retained in their accounts folder. The new invoices would be used as a basis to counter the fact that a journalist had obtained copies of documents from Blake's Travel that showed that Bosasa used Blake's Travel to facilitate travel arrangements of government officials and others.

312. Mr Agrizzi testified that, after the destruction of the original documents, VIP travel was booked under the account of JJ Venter, which would be reconciled monthly and given to Dr Smith who would reimburse Mr Agrizzi for actual travel used for other individuals.

313. After the destruction of the evidence, Mr Blake was subpoenaed to testify in a matter instituted in the Pretoria High Court by the SIU relating to information, records, documentation, and hard drives that the SIU wanted in relation to dealings with the Bosasa Group of companies. Mr Agrizzi testified that there were various postponements of the subpoena as numerous excuses were given. A meeting then took place at Mr Blake's attorney's office in Randfontein with Mr Biebuyck and Mr Agrizzi, where they tried to intimate to Mr Blake's attorney that he had to postpone and play for time with the SIU. Mr Blake's attorney was not happy and told Mr Biebuyck that he was playing with fire because he was interfering with witnesses. Mr Agrizzi testified that he did not know whether Mr Blake ever testified or if they were successful in their endeavour to prevent the subpoena being carried out. Mr Blake testified that he was subpoenaed in 2014 to provide documents and related information to the Hawks for an investigation that they were conducting into three specific clients of Blake's Travel (including Mr Mti and Mr Gillingham). He cooperated with the investigation, deposed an affidavit and was ready to testify when "the case just disappeared".

314. After Mr Agrizzi's testimony at the Commission, Mr Blake contacted the Hawks and was advised that the original cloning of Blake Travel's server had been stolen or had disappeared. Mr Blake testified that he was advised by Colonel Smit that it was impossible for the evidence to disappear and that the evidence was locked up. In February 2020, an official from the Hawks took a further copy of Mr Blake's computer.

2007 server "crash"

315. Mr Agrizzi testified that Mr Watson, after receiving information in respect of the SIU's investigation, instructed an IT specialist and employee of Bosasa to fake a server crash and destroy files. The instruction was given by Mr Watson in Mr Agrizzi's presence to destroy any files that could implicate the company before the investigators could gather evidence. Prior to the destruction of the files, a disaster log was created on the server and Mr Agrizzi circulated a memo in this regard. In addition, the information was preserved on two or three hard drives before its destruction.

316. The Commission's evidence leader referred to a document headed *"Bosasa IT Disaster Log 8 November 2007"* and enquired whether Mr Agrizzi could indicate where in the document they would be able to find the list of contents, namely the scope of the disaster, the disaster classification, and the recovery strategy. Mr Agrizzi was unable to answer the question and was also unable to assist in respect of the meaning of the content of the document. Later he provided more information on the server crash stating that there was a file server failure or crash and that this resulted in approximately 70% of the data on the servers being lost, Mr Agrizzi said he could attest to the fact that *"the crash was, in other words, manipulated"*.

    316.1 Mr Agrizzi explained that an instruction was issued that the crash should occur, and, notwithstanding this instruction, steps were taken by Mr Agrizzi and others to preserve data. Mr Agrizzi instructed Mr van Tonder to backup and double up on the server and to keep it safe if they needed the information going forward. This occurred in 2007.

    316.2 Mr Agrizzi pointed out that 70% of the data lost was data regarding the tenders of the DCS.

Destruction of evidence before the SIU raid

317. Mr Agrizzi testified that Mr Watson contacted him on a Sunday afternoon to instruct him to return to Johannesburg as Mr Watson had received information from Mr Seopela that someone was going to raid the Bosasa office the following day. Mr Agrizzi could not recall whether it was the Hawks or the Scorpions but recalled that Mr Watson instructed him to meet at the office. Mr Agrizzi had to leave the American guests, arrange transport for their return on the Tuesday and drove back to the office. Mr van Tonder testified that, around the time of the SIU investigation, Mr Watson called him early on a Sunday morning to meet him at the Bosasa office. The purpose of this meeting was to "clean up all possible evidence" that might incriminate Mr Watson and Bosasa in unlawful activities given that Mr Watson had been informed that the offices would be raided the next day.

318. Mr van Tonder testified that Mr Watson instructed them to go through all the safes, employee's drawers, etc., to ensure that any possible sources of incriminating evidence were removed and destroyed. Evidence considered to be incriminating included documents relating to all tenders, business dealings with government entities and travel invoices. Mr van Tonder recalled that he and Mr Agrizzi searched for the incriminating evidence and Mr Watson personally went through documents in his walk-in vault. These documents included tender related documents as well as CD storage discs. They later met at Mr Watson's house and Mr van Tonder testified that Mr Watson handed Ms Lindi Gouws a metal box with money.

319. Mr Agrizzi testified that after they had removed the documents, they packed them into the boot of his car and took them to be stored on a farm. Following further media reports on the SIU investigation, Mr van Tonder approached Mr Agrizzi and informed him that Mr Watson had instructed them to go and destroy the documents. Mr Agrizzi testified that he phoned Mr Watson who confirmed the instruction and requested that they do not destroy an agreement signed by Mr Watson and Mr Mti. When Mr van Tonder and Mr Agrizzi took the agreement to Mr Watson, he was visibly relieved, shredded the document by hand, placed it in a Ziplock bag with water and then flushed it down the toilet.

320. According to Mr van Tonder, the information collected during the search of the offices was taken to a farm near Mooinooi in the North West Province where it was stored in safes installed by Bosasa. The information was kept there for approximately two years. Thereafter, Mr van Tonder and Mr Agrizzi collected the documents and CDs and took them to Buffelspoort Dam where they were burnt. Mr van

Tonder testified that there was one document that was not destroyed. Although he did not understand the relevance of this document, Mr Agrizzi explained to him that it was an agreement between Mr Watson and Mr Mti. Mr van Tonder confirmed that this document was subsequently handed over to Mr Watson who tore it up and flushed it down the toilet.

321. Mr Agrizzi testified that the raid did not take place and that Bosasa reached an agreement with the SIU that they could attend at Bosasa and copy the servers.

The deletion of files

322. Mr van Tonder testified that towards the end of 2008 and around the time of the SIU investigation, he met with Mr Watson and an engineer at Bosasa, Mr Matthew Lee-Son, and Bosasa's lawyers. After this meeting, he was instructed to make sure all "data documents" on the servers and selected employees' desktops and laptops were deleted. He was instructed to focus on the tenders awarded to Bosasa by the DCS during the period 2004 to 2007. Mr Agrizzi testified that, when he arrived at the office, Mr Watson, and Mr van Tonder were already there. Mr van Tonder and Mr Agrizzi were instructed to go through all the offices and to look for any incriminating evidence relating to the sale of shares agreement in respect of Phezulu Fencing as well as the agreement between Mr Watson and Mr Mti for the payment of money in return for an undertaking from him to favour Bosasa in relation to the awarding of tenders. Mr Seopela had informed Mr Watson that the SIU was looking for this information.

323. Mr van Tonder complied with the instruction and was assisted by Mr Lee-Son, Mr Allan Lee-Son and Mr William Brander. Mr van Tonder later signed a statement (on instruction from Mr Agrizzi) to the effect that the files were deleted during routine maintenance. Mr van Tonder considered this non-essential data but confirmed that the data related to tender specifications for the DCS catering contract. This was the first time Mr van Tonder signed a statement after routine maintenance work.

324. Mr Agrizzi testified that around January 2009, a meeting was arranged between the representatives of the SIU and Bosasa because of the rumours that the SIU was investigating Bosasa. Bosasa sent a communication to the SIU indicating that it had heard via the media that it is being investigated and would like further information regarding the investigation so that it could tender its assistance. Mr Oellermann testified that Bosasa had contacted the SIU and said that they had information that the SIU were going to conduct a search and seizure of their premises. Bosasa approached the SIU through their lawyers, after which they met and arranged for the SIU to get access to their servers to digitally and forensically image. According to Mr Oellermann, whilst it was the SIU's intention to conduct such an operation, it had not yet been determined where and how it was going to be done.

325. Mr Agrizzi testified that the arrangement for the SIU to attend at Bosasa was postponed on instruction of Mr Watson to allow enough time for the IT specialist to remove potentially damaging information. A letter was sent to the SIU requesting a postponement on the basis that Bosasa was busy with month and year-end and could not have the servers checked at that stage. Mr Oellermann testified that Bosasa requested an extension of time at the meeting because someone had to attend a funeral. After the meeting, the agreement was formalised by the SIU issuing a section 5(2)(b) notice to Bosasa. The SIU did eventually make mirror images of hard drives and laptops at Bosasa.

326. According to Mr Oellermann, it was unusual for subjects of a search and seizure to have forewarning of the operation and to persuade those who are going to conduct the operation to hold off for a time so that they can prepare. The danger is that it gives them an opportunity to sanitise the server and be selective as to what can be imaged, so that records pertinent to the investigation would be destroyed and lost. Mr Oellermann testified that Bosasa seemed to have an inside track into the investigation at times, that they would almost know what the SIU were planning and would try to obstruct it. Mr Oellermann said that throughout the investigation, there were regular incidents that occurred where it seemed that Bosasa had a very good idea or knowledge of the investigation's progress and where the SIU was with the investigation. This is the reason, according to Mr Oellermann, why the Head of the Unit decided to separate the Bosasa investigation team and provide them with a dedicated server outside of the SIU environment. Mr Oellermann testified that he raised his suspicions, but that the

decision was taken to proceed in that manner after a discussion and after being advised by the cyber forensic expert that if Bosasa did destroy files it would be likely that he would find that they had done so.

327. Mr Oellermann testified that Bosasa had indicated that they had dedicated people in charge of their IT and because of security reasons, only certain people had access and these people were not available. As the SIU did not know the environment they were going into, it was difficult for them to comment on how access was to be given. In Mr Oellermann's experience when executing a search warrant, the cyber expert would be taken with them to shut down the system upon arrival and then image the devices or servers. The service of internal IT would not be required. For this very reason, an expert is brought to do the imaging independently from any interference from the entity whose electronic data is being imaged. Mr Oellermann agreed with the Chairperson that it would have been expected of the SIU to refuse the postponement of the imaging. The problem, according to Mr Oellermann, was that as soon as Bosasa approached them and said that they knew that the SIU wanted to undertake a search and seizure and invited them to do so, the "cat was out of the bag" and they had lost the element of surprise, so it was immaterial whether it was delayed by a few days as Bosasa would have had ample opportunity to sanitise the servers before approaching the SIU.

328. Mr Agrizzi further testified that Bosasa had two servers (for redundancy purposes) with one server as the main server. The other server was linked to the main server. Mr Agrizzi testified that he understood that when something is done on one server, you can monitor it on the other server, that it is a mirror image. According to Mr Agrizzi, Mr Watson personally arranged with William Brander and Max Leeson to monitor what the representatives of the SIU were looking at and were doing, using the second server. Whilst Mr Malan and other representatives of the SIU were copying the data on the main server, their activity was being monitored on the connected server by William Brandon and Max Leeson. Mr Agrizzi testified that they were also tasked to ensure that they removed information which might damage or implicate Bosasa prior to the mirror image being made.

329. Mr Oellermann testified that Mr Malan is a cyber-forensic expert appointed by the SIU to assist with the imaging and obtaining of digital forensic evidence from Bosasa which was going to be crucial for the investigation. When the SIU team arrived at Bosasa, Mr Oellermann testified that they were met by Mr Agrizzi who took them to the server room. Mr Malan then prepared to image the servers, which was done over the period of a few nights because of the size of the servers. On the second night, Mr Malan informed Mr Oellermann that he could see that there were several files that were missing and that he suspected may have been deleted. When Mr Malan began the analysis of the information, Mr Oellermann testified that Mr Malan reported to him that he had identified software known as 'Eraser' which had been employed on the servers, and that he had identified over 40 000 files that had been intentionally destroyed or deleted from the server.

THE ROLE OF MEMBERS OF THE NATIONAL EXECUTIVE, PUBLIC OFFICIALS AND FUNCTIONARIES

330. In this section of the summary, the evidence regarding Bosasa's "Special Projects Team" and the assistance and benefits provided to members of the National Executive, public officials and functionaries of organs of state is introduced.

The Special Projects Team

331. Bosasa provided full security solutions at the residences of ministers, senior politicians, and senior government officials on a regular basis. To facilitate this assistance, a team known as the "Special Projects Team" was created.

332. During his investigation into the Bosasa matter, Mr Mlambo was informed by Mr le Roux that the members of the Special Projects team included Mr Johann Fourie, Raymond (whose surname is

not apparent from the transcript of the oral testimony or the witness affidavits or other documentary evidence), Mr Michael Ndho, Mr Tshepo Huma, Ms Nichola Du Toit and Mr Eugene Bredenkamp.

333. Mr le Roux's Affidavit records that part of Mr le Roux's duties was to head up the Special Projects Team and oversee the implementation of the Special Projects which included the purchase and installation of CCTV systems for Mr Watson's "high profile associates", i.e., ministers and high-ranking officials. The Special Projects Team had three unbranded vehicles and operated wearing plain clothes so that their services were not linked to Bosasa. The services rendered by this team ranged from installing CCTV systems to sorting out electric fences to fixing pool pumps and doorbells. This team undertook installations, maintenance, follow-ups and client customer-care at no cost to the recipients. Mr Agrizzi explained that the state was paying for these benefits indirectly. Beneficiaries of this practice were named in the affidavit of Mr le Roux. Generally, there were no invoices sent to recipients. If there were invoices, they would have been backdated and sent. These expenses were catered for in Bosasa's books as operational costs. As a result, these amounts were deducted from income in Bosasa's tax returns.

334. The Special Projects Team existed from approximately 2013. By the time Mr Agrizzi left Bosasa, members of the Special Projects Team had been dismissed, and new people had been employed. The reason for this was a concern that the old employees would uncover or unfold what was happening and whose houses were being monitored. Mr le Roux testified further that on 20 November 2017 Mr Watson instructed him to meet with Ms Lindsay Watson the next day and depose to an affidavit which stated that Mr Agrizzi had instructed Mr le Roux to do the special projects undertaken to date. Mr le Roux informed Mr Watson that he did not want to get involved in any disagreement between Mr Watson and Mr Agrizzi. He also did not want to depose to the affidavit as instructed given that the instructions on the special projects came from Mr Watson and other Bosasa directors rather than Mr Agrizzi. Ms Lindsay Watson informed him that he was required to sign the affidavit as Bosasa and Mr Watson paid his salary. Mr le Roux eventually signed the statement on 20 November 2017 because he was concerned about his job and family being at risk. On advice from Mr Agrizzi, Mr le Roux later annotated his statement with a note that it was false and not of any effect. It was witnessed by Mr van Tonder.

"Project PRASA"

335. Mr le Roux later testified that Mr Dlamini and Mr Agrizzi requested him to do a security analysis and installation code-named "Project PRASA" in Randburg for Mr Mbulelo Gingcana who worked for PRASA. The Special Project team installed an alarm system, full IP based CCTV system, new gate motor and an intercom system.

336. In his further affidavit, Mr le Roux stated that he was able to identify invoices marked "project sd" which related to Mr Dlamini who facilitated the work at Mr Gingcana's premises. Mr le Roux personally attended to the installation of the security at Mr Gingcana's property with five technicians over a minimum of 20 days. The total approximate value of the equipment, vehicle travel and labour was R239,486.84. This excludes the Paradox system which cost between R8 000 and R10 000. In respect of maintenance, Mr le Roux produced a WhatsApp message from Mr Gingcana requesting assistance when he was locked out of his home.

337. In his affidavit filed in terms of Rule 3.4, Mr Gingcana confirmed an alarm system with 7 IP based CCTV camera system together with a new gate motor and intercom system were installed at his home in Randburg. Mr Gingcana gave oral evidence more or less to the above effect. When he appeared before the Commission in June 2021, he had been dismissed from the employ of the South African Civil Aviation Authority (SACAA) because of the allegations that had been levelled against him. In the end he disputed that he ever met Mr Agrizzi in his house or anywhere. He testified that in 2016 he met Mr Dlamini at his house in connection with the security upgrades and that he had requested. It must be noted that Mr Dlamini stated that he had mentioned Mr Gingcana's details to Mr Agrizzi in a meeting and Mr Agrizzi offered to assist. Mr Agrizzi later involved Mr le Roux who requested Mr Gingcana's address, which he provided to Mr le Roux after he confirmed that Mr Gingcana still wanted

to proceed. Once the upgrade was completed, Mr Dlamini advised Mr le Roux and Mr Gingcana to exchange contact details, should Mr Gingcana experience any technical or operating challenges with the system.

338. Mr Gingcana also disputes the costs of the installation. He accepted that Bosasa made the installations in March/April 2017 and testified that a system had been installed at his home but that no part of the system had the "Paradox" name. He further testified that he was never given an invoice but he said he asked for it from Mr Dlamini. He had not requested an invoice from Bosasa directly, because he testified that Mr Dlamini was coordinating and organising his security upgrades and had promised to come back to him. Mr Dlamini stated that he had requested an invoice from Mr Agrizzi on several occasions but that Mr Agrizzi never provided him with an invoice.

339. Under cross-examination, Mr le Roux testified that the installation was done in March or April 2016. He confirmed that the equipment cost R48,000 and that with labour, travelling and expenses the cost was R239,486.84. When questioned about the fact that Mr le Roux did not dispute Mr Gingcana's statement (in his affidavit) that the equipment was installed in 2017, Mr le Roux indicated that it was an oversight on his part.

Ms Nomvula Mokonyane

340. Mr Agrizzi testified that Mr Watson provided various forms of financial and other assistance to Ms Mokonyane because she was very influential and held a powerful political position. Mr Agrizzi had been informed that Ms Mokonyane had influence over former President Zuma, the prosecution authorities and various persons in government departments who would take decisions on matters that could affect Bosasa. In return for Ms Mokonyane's scope of influence, Mr Agrizzi testified that Mr Watson and Bosasa provided her with various benefits including cash payments, food and alcohol, funding for Ms Mokonyane's birthday party and various repairs, installations, and maintenance work at her residence.

341. Ms Mokonyane explained that she knew the Watson family from as far back as pre-democracy when she was part of the "National Civic Organisation" (presumably SANCO) and involved in the UDF consumer boycott as a trade unionist. In response to a question from the evidence leader whether it was not problematic that Bosasa continued supporting the ANC once they had been awarded government tenders, she asserted that an SOE and other industries such as the wine industry had supported the ANC, including during the terms of Presidents Mandela and Mbeki.

342. In response to Mr Agrizzi's assertion that she had requested Mr Watson to arrange for Bosasa to fund and cater for election galas and lekgotlas in several national, provincial, and local elections, she disputed making any such requests and said that "the head of organising he is responsible for organising the ANC must provide resources. The head of organising is not the convenor of the lekgotla. Lekgotla is convened by the SG of the African National Congress".

343. Ms Mokonyane disputed Mr Agrizzi's evidence that he met Ms Mokonyane during 2002/2003 when she attended at the Bosasa office on social visit. She denied meeting him "at that stage . . . on a social visit". It was in response to this that Mr Agrizzi testified that he had met her at both business and social meetings and that he had "even coordinated . . . Mokonyane's 50th birthday party celebrations which was (sic) funded by BOSASA" with the theme "Break a Leg or words to that effect."

344. Ms Mokonyane admitted having attended meetings at Bosasa's offices but denied that she had ever attended a meeting with Mr Agrizzi, whether alone or with Mr Watson. She confirmed having met other people who worked at Bosasa, including Mr Watson. She disputed that any of the meetings had dealt with criminal prosecution being considered against Bosasa and its directors, or with the SIU report. In response to Mr Agrizzi's evidence that "BOSASA funded all celebrations, food, refreshments, including hiring and ancillary costs" of "social occasions . . . official headquarters and ANC events", she said that "This was for the ANC and it was not a social thing, it was a political programme of the ANC which I am a member of."

Ms Mokonyane's birthday party

345. Returning to Mr Agrizzi's evidence that he had coordinated Ms Mokonyane's 50th birthday celebrations, which were funded by Bosasa, and which were held at the Victoria Guesthouse in Krugersdorp with the theme "Break a Leg", Ms Mokonyane disputed this as being a false assertion. She testified that her 50th birthday was held in 2013 at the Silver Star Casino in Krugersdorp. On 22 July 2020, two days after this testimony, Mr Frederik Hendrik Coetzee, the owner of the Victoria Guesthouse, deposed an affidavit. He confirmed that the Victorian Guest House did host a birthday party for Ms Mokonyane, but it was her 40th birthday in 2003, not her 50th birthday in 2013. The birthday event was booked and paid for by Bosasa and the person whom he dealt with from Bosasa was Mr Agrizzi. the booking was first for eighty people which then increased to one hundred and twenty guests. However, on the night of the function a total of one hundred and seventy-four people arrived. all beers, hard liquor and soft drinks for the event were sponsored and supplied from a liquor store in Lewisham. The amount of liquor supplied filled an entire garage at the guest house. He was able to produce documentary evidence in relation to the event, including an event invoice which was charged to Bosasa for the attention of Mr Agrizzi and that the relevant invoice reflected an amount of R25,080 for the initial reservation in respect of 80 guests and a further R16,757 for the additional ninety-four guests, all of which was settled by Bosasa.

346. On 21 August 2020, Ms Mokonyane deposed an affidavit in answer to Mr Coetzee's affidavit in which she repeated her denial that her 50th birthday celebrations were held at the Victorian Guesthouse; admitted that her 40th birthday celebration was held at the said venue, declared that she had "no personal knowledge of most of the allegations regarding the booking and payment of the venue, including, catering and the provision of alcoholic and non-alcoholic beverages for the occasion" and that her family insisted on celebrating her birthday with a surprise party.

347. Furthermore, Ms Mokonyane testified that she was unaware of the arrangements made and was merely advised by her husband not to make any commitments on the day because he wanted to take the family out for dinner. Her late husband, she claims, was responsible for the arrangements in respect of the surprise party, which were kept secret to the extent that she was still unaware of "who did what". Her late husband never told her that he had received assistance from anyone outside her close family members and friends and that her late husband was a successful businessman who could afford to pay for such an event. She highlighted that neither Mr Agrizzi nor Mr Coetzee alleged that she had been involved in the arrangements.

348. Mr Coetzee gave oral testimony on 25 August 2020. He confirmed the evidence in his affidavit and provided the following additional information. The birthday function was arranged between Mr Agrizzi and himself. Bosasa was one of the Guest House's corporate clients and had been for many years. Mr Coetzee was introduced to Ms Mokonyane. Except for the arrival drinks, wine and sparkling wine for the speeches, Bosasa paid for all the beverages. He remembered the function well because it was one of those events that "stuck in your head".

349. Ms Mokonyane gave testimony again on 3 September 2020. She persisted in her evidence that she knew nothing about who had paid for the event but accepted that she could not dispute Mr Coetzee's evidence that the event was paid for by Bosasa. When referred to Mr Coetzee's affidavit and his statement that there was a birthday party held in Ms Mokonyane's honour at the guesthouse, Ms Mokonyane persisted with her version that she attended at the guesthouse for a private dinner and not to celebrate a birthday party. She believed that Mr Coetzee's version on the number of guests and the additional drinks were "a bit of exaggeration". Twenty or thirty people would fit in that venue, although the venue could accommodate more if other rooms were used. Given that she did not organise the event, she therefore could not dispute Mr Coetzee's estimate of there being 174 people at the dinner.

350. It was put to her by the evidence leader that in her previous testimony "[y]ou said no birthday of yours was ever held at this place". She stated that she did not mention the 40th birthday party previously because it had been more than a decade before and she was "preoccupied" by Mr Agrizzi's assertions that it was her 50th birthday party with a "Break a Leg" theme. There were many parties and functions

held at the guesthouse. When asked what jogged her memory, she said "What made me to recall it was when after this testimony here that now the story was by Mr Agrizzi outside in the media or whoever had did, now no longer about the 50th but about the 40th. When it was pointed out to Ms Mokonyane that it was strange that Mr Coetzee could recall her 40th birthday at the guesthouse but she could not, Ms Mokonyane stated that "[i]t can sound strange because honestly speaking, that was not a party that I knew was going to happen".

351. When it was put to her by the Chairperson that a surprise birthday of that nature should stand out in her memory, she said that she "would have preferred a better place", that she was looking forward to her weekend partying with her friends, that she did not like surprises, but that she "had a husband who would always go and do extraordinary things to surprise me". She disputed that her earlier evidence denying any party having taken place at the venue was misleading.

352. When asked if it was not strange that her husband would not have mentioned at any point during the years after the event that the party was funded by Bosasa she stated that her husband never ventured into the funding of the party. She testified that "we both knew that we did not pay for the party because we knew we did not organise it." When the contradiction was pointed out between this and her affidavit, where she said that she had always assumed that her husband had paid for the event, she confirmed that this was her assumption.

353. Ms Mokonyane confirmed her statement in her affidavit that the revelation that Bosasa paid for the event embarrasses her. She confirmed further that it was inappropriate.

Cash payments

354. Moving away from the birthday party and reverting to Mr Agrizzi's evidence, he explained that a monthly payment of R50 000 would be packed and delivered to Ms Mokonyane. Ms Mokonyane, in her affidavit, filed in response to a Regulation 10(6) directive, denies ever receiving payments. Mr Agrizzi testified that he was present on two occasions when cash was given to her by Mr Watson. Ms Mokonyane denied ever receiving money from Mr Agrizzi or Mr Watson and denied that Mr Agrizzi was ever at her house in Krugersdorp with Mr Watson.

355. Mr Agrizzi explained that he would never meet with Ms Mokonyane alone as this was "Gavin's deal". He would, however, receive an occasional phone call to attend to a task when Mr Watson's phone was off. Mr Agrizzi explained that there was a third occasion that he recalled where money was delivered to Ms Mokonyane. At the time she was still the Premier and Mr Watson requested him to pack R50 000 into a security bag. The purpose of Mr Watson's visit was to discuss the SIU matter as a matter of urgency. Mr Agrizzi, however, was not at this meeting. Ms Mokonyane denies receiving any money and states that she played no role in the security cluster and had no business discussing the issues of the SIU with any person, including Mr Watson.

Other benefits

356. As to benefits provided to Ms Mokonyane other than cash, Mr Agrizzi testified that Mr Watson would instruct him annually to provide for Ms Mokonyane's "Christmas needs". The list of items would usually include 120 cases of cold drinks, 4 cases of high-quality whisky, 40 cases of mixed beer, 8 lambs, 12 cases of frozen chicken pieces, 200kg of beef as well as various braai packs and numerous cases of premium brandy and speciality alcohol. Initially, he arranged delivery himself, but this was later passed on to a person named Catherine and Bosasa's executive chef. This was done over approximately ten years.

357. Ms Bongiwe Eves Dube testified that her predecessor as unit leader, Matabata, arranged "Christmas" deliveries on Mr Leshabane's instruction for Ms Mokonyane. Ms Dube referred to one instance in 2017 during which she received a call from Food Boys regarding a delivery despite the Bosasa offices being closed at the time. This delivery was intended for Ms Mokonyane. It contained a large order of meat to the value of approximately R17 000. Ms Mokonyane denies that Mr Watson saw to her family's

Christmas needs and that she ever received the items from Bosasa. She testified that she did not have the capacity to store the volumes of items referred to above.

358. Ms Mokonyane stated that she was aware that Bosasa provided large quantities of food and drinks to communities in Gauteng as part of its corporate social investment projects for Christmas activities and school feeding programmes. Ms Mokonyane recalled one instance where food items intended for the community were delivered to her residence – when the Kagiso Old Community Hall was under reconstruction. Community volunteers collected these items.

359. After this benefit started, Mr Watson began to give Mr Agrizzi other instructions pertaining to meeting requests conveyed by Ms Mokonyane's PA, Ms Thomas. According to Mr Agrizzi, these included organising and paying for funerals, catering for political rallies for the ANC for up to 40 000 to 50 000 people, and catering for the "Siyanqoba" rallies of the ANC. These were never charged. Ms Mokonyane stated that Bosasa assisted communities, veterans, military combatants, and destitute families with burial costs.

360. The Chairperson questioned Ms Thomas about the delivery of items at Christmas time. She said that she would liaise with Ms Mokonyane's sister, who also resided at the home, about the arrival of these items. They were delivered there because parcels would be made up there. Coordination could take place from there. It would then go to Kagiso. The goods would be placed in the garage at the home. This was a yearly event usually around Christmas time, save for the previous two years. Sometimes it would happen in the middle of the year around the time of Ms Mokonyane's birthday. At times Ms Mokonyane would not know about the arrangements and Ms Thomas and Mr Watson would work on it. Ms Thomas did not know who took the parcels to Kagiso. In response to the Chairperson's question whether she knew that the items were brought to the home by Bosasa, she said "I would be the one that would be called. Mr Agrizzi would indicate that, you know, you would get this call, just for a day and make sure that somebody is home to take responsibility of these things". Most but not all the years Bosasa delivered the items.

361. Ms Thomas also testified that, while she knew that Mr Watson was a family friend of Ms Mokonyane's, she only saw him in person once – when he attended the funeral of Ms Mokonyane's son. This was before 2014. However, she "knew Mr Watson telephonically for a very long time." She also recalled meeting Mr Agrizzi at the Mokonyane home in the period leading up to the funeral – this was the only meeting with him she could specifically recall although she said she would "come back".

362. Ms Thomas was referred to Ms Pieters' (Mr Agrizzi's PA) affidavit in which she asserted that, on instructions from Mr Watson and Mr Agrizzi, she arranged the provision of gifts for Ms Thomas and Ms Mokonyane annually from around 2010. Ms Thomas testified that she saw Ms Pieters' name for the first time when she received her summons to testify before the Commission. She had only spoken to her once, apparently when Ms Thomas was in hospital, about where to send the get-well gift. This was a gift she could account for.

363. Ms Thomas was taken to email correspondence attached to Ms Pieters' affidavit (not addressed to Ms Thomas herself) that pertained to organising gifts in 2010, 2014 and 2015 for Ms Thomas and Ms Mokonyane. The 2015 email from Ms Pieters bore the subject line *"2 X URGENT LADIES HAMPERS - CONFIDENTIAL"* and included a paragraph saying not to reference Bosasa and to contact Ms Thomas, providing her contact number.

364. Ms Thomas was referred to her evidence that she only dealt with Mr Agrizzi on one or two occasions, one of which was when she was in hospital. However, she went on to concede that "we could have spoken more", that "he would call me about various things", that "Mr Watson [would] ask me to call him" and that she developed a friendly relationship with him over the phone.

365. Apart from deposing to the affidavit referred to, Ms Pieters also gave oral evidence. She testified that Mr Agrizzi had requested her to send hampers to Ms Mokonyane and Ms Thomas. Ms Pieters could not recall the exact date when Mr Agrizzi first asked her to do so but knew that it was, at least, from 2010 because she had a record of that hamper. Ms Pieters testified that she would get hold of Ms Thomas to determine the delivery address, who asked her to send it to a home address

and not to the office. Ms Pieters testified that when something like ordering the hampers became a regular occurrence, she saved the details on her phone with an address and telephone number to make it easier to contact the person. She referred to an email that she had sent on 29 June 2015 to procurement staff at Bosasa asking them to assist with two ladies' hampers to the value of R1 500 each, for Ms Mokonyane and Ms Thomas.

366. Reverting to Mr Agrizzi's evidence, he stated that he signed off expenses such as the cost of hiring a marquee, air-conditioning, printing of memorial pamphlets, and refreshments for the funeral of Mokonyane's son. Ms Mokonyane denies this. She insisted her family procured the services of the undertaker and paid for the burial. They do however appreciate contributions that are made, although she does not know what Bosasa contributed.

367. Coming to allegations regarding Bosasa's involvement in arranging ANC events, according to Ms Mokonyane, in her capacity as the national organiser of the ANC, she had a duty to ensure that all the rallies organised by the ANC were funded but that she never approached Bosasa and never instructed Mr Agrizzi to cater for any ANC rallies. Ms Mokonyane stated that she could not deny that Bosasa supported the ANC, that ANC elections operations were held at the Bosasa office park or that Bosasa helped with lunch packs for volunteers. She explained, however, that all fundraising initiatives were led by the Treasurer General of the ANC and explained the process.

368. Insofar as Mr Agrizzi stated that funding and catering for various municipal, provincial and general elections was done by request from Ms Mokonyane to Mr Watson, she denied this was a personal request and testified that Mr Agrizzi's version demonstrated his naivity in understanding the ANC. The Head of Organising, i.e., the Secretary-General of the ANC, convenes the lekgotla. Although she indicated that she did not want to speak on behalf of the ANC, Ms Mokonyane pointed out that she did not think there was anything untoward about Bosasa supporting the ANC when it had been awarded government tenders. This is because even SOEs support the ANC golf events, and there are companies in the wine industry that endorse ANC events.

369. Mr Agrizzi also testified that he would receive instructions to "sort out birthday party cakes", and to "cater for supporters 10 000 at a time." He testified specifically to receiving a call one Sunday evening from Mr Watson instructing him to drive to Café Mozart where he dealt with "Fritz" and designed a cake for then President Mr Zuma's 72nd birthday. A photo of the cake forms an annexure to Mr Agrizzi's statement. Although not clear in the photo, he was able to point out the Bosasa logo on the cake.

370. In response, Ms Mokonyane states that she played no role concerning the catering for any of the former President's birthday parties and that "an attendance of a birthday or the provision of a cake to the then State President if done openly and for bona fide reasons cannot be faulted." She also did not think there was anything untoward with Bosasa sponsoring the birthday party.

371. Another aspect of Mr Agrizzi's evidence pertained to assistance provided to Ms Mokonyane's daughter. He explained that there were a few occasions where he was called to assist with hiring vehicles for up to three months at a time for Ms Mokonyane's daughter when she was back from China where she was studying (arranged through Blake's Travel). The cost of the car hire would range between R80 000 and R150 000 because there were additional issues such as accidents and demands. In Mr Agrizzi's supplementary affidavit, he recalled specific examples of the car hiring for Ms Mokonyane's children and detailed these in his affidavit.

372. According to Ms Mokonyane, her daughter Katleho, was very close to Mr Watson who treated her like his own daughter. Mr Watson engaged Katleho to assist him in coordinating, translating, and interpreting Mandarin for business engagements. Ms Mokonyane said that Katleho is fluent in Mandarin and assisted Mr Watson.

373. In his supplementary affidavit Mr Agrizzi stated that at one stage Bosasa employed one of Ms Mokonyane's children at the Clanwilliam Youth Centre "to assist with a program he was undergoing". Ms Mokonyane denied this and said that her eldest son had a drug abuse problem and being of age, booked himself at the said centre for rehabilitation and that nothing untoward occurred in this

regard and that she was not involved.

374. According to Mr Agrizzi, another benefit conferred upon Ms Mokonyane was the maintenance of her house when she lived in Silverfields, Roodepoort. This included attending to "electric fencing, generators, CCTV, gardening, ponds, lights, gates, absolutely everything really." Mr Watson would give Mr Agrizzi the instruction and he had to "make sure that the job got done." Mr Agrizzi explained that every time there was something wrong with her house, they would receive a phone call to get it sorted and, irrespective of the cost, it would get done. The estimated were approximately R350 000 to R400 000.

375. Mr le Roux testified that Mr Watson contacted him in 2013 to meet him and Mr Agrizzi at Ms Mokonyane's premises in Noord-Heuwel, Krugersdorp. Mr Watson instructed him to look at the electric fence, CCTV system, the generator, distribution board, the pool pump and attend to a green pool and garden clean up. This project was code-named "Project Blouberg". This project endured from 2013 to 2017. The garden clean-up was a once-off, but the maintenance of all the equipment was ongoing during this period.

376. In his further affidavit, Mr le Roux stated that the work undertaken by the Special Projects team at Ms Mokonyane's residence included repair of the electric fence, installation of CCTV, repair of gate motor, fixing of intercom system and rewiring of the police guard house at the main gate. The invoices for the purchase of the equipment would have been put down to maintenance at the Bosasa office park. Mr le Roux estimated the cost of the equipment to be in the region of R100 000 to R130,000. The cost of labour and travelling to undertake this work would have been approximately R58,080.

377. In addition to the above, Mr le Roux stated that he used the Bosasa Garden Maintenance team to do an initial garden clean-up before they repaired the electric fence. Bosasa also purchased new pots and new water feature pumps for the residence on Mr Watson's instruction and with cash provided by Mr van Zyl. Mr le Roux attached a copy of a WhatsApp message from Ms Thomas requesting assisting with the house alarm.

378. Ms Thomas in her testimony dealt with her role in relation to maintenance issues when they arose at Ms Mokonyane's private home. She referred to a day when the alarm kept going off. She called Mr Mokonyane and he advised her to call the person she knew as "Richard". She did not know his surname or who he worked for. She confirmed that she was asked to call him several times.

379. She went on to say that it was not over a long period and changed her stance to say that it was a few times that she had called Richard. She testified in relation to the specific WhatsApp or SMS dated 1 June 2017 when she had, on Mr Mokonyane's instructions, messaged Mr le Roux about the alarm that kept going off. She confirmed that this was not her first contact with him. Because he had been before for more or less the same problem, it was not necessary to give him the address. Her evidence suggested that "Richard" was only called in relation to problems with the alarm. Service providers would leave the invoice at the home, although she did not know if Mr le Roux would leave an invoice when he attended to the alarm.

380. At the time when Ms Mokonyane was MEC for housing, Ms Thomas was called by the office of the Premier to arrange a security and risk assessment and thereafter to install an electric fence, gate, CCTV cameras and a room for the police. It was put to her by the evidence leader that the Commission's investigators had contacted the office of the Premier and they said that they did not install any security features at the house. Following this she said that it was done through the (provincial) Department of Housing and the responsible person's name could have been Thabo. This was in a period predating the time when she would contact Richard.

381. Mr Charl le Roux testified that he was employed as an apprentice electrician from mid-2014 until 2019 at SAN Electrical, owned by Mr Van Biljon. Mr le Roux testified to various repair and maintenance works undertaken on instruction from Mr Van Biljon at a house in Krugersdorp, including works on the lights, water feature and backup power system. Mr le Roux testified that the house had high fencing with a guardhouse to the left when entering the premises. He also testified that he had observed an Aston Martin at the premises parked in the middle garage. Mr le Roux testified that he attended at

the premises many times.

382. The first time that Mr Charl le Roux attended at the premises, in 2014, he met Mr (Richard) le Roux and Mr Van Biljon at the premises when the backup power system was not working. On the next occasion Mr Charl le Roux visited the premises, the lights on the staircase and the walkway were not working and had to be repaired. On the third occasion, Mr Charl le Roux fixed the water feature and downlights in the ceiling of the entertainment area. Whenever Mr le Roux attended at the premises, the guard stationed at the property would open for him. Mr le Roux attended to repair work at the premises from 2014 to 2018.

383. The memo was supported by photographs, as confirmed by Mr Charl le Roux. Mr le Roux also confirmed Mr Agrizzi's evidence that the generator room with an automatic switch mechanism, which was supplied by Bosasa, was situated outside. Mr Van Biljon provided an affidavit that confirmed that he undertook work at Ms Mokonyane's house in Krugersdorp but at the time he did not know that Ms Mokonyane lived there. He details the work undertaken and provides copies of invoices.

384. Ms Mokonyane said that she had checked with Ms Thomas and there was only one instance during which Ms Thomas contacted Mr Watson to assist with Ms Mokonyane's house alarm. Mr Watson referred Ms Thomas to someone (but not Mr Agrizzi) within Bosasa who could assist. This was on Ms Mokonyane's husband's instruction to find someone that could assist. The usual service providers could not be reached in this instance. Ms Mokonyane said that Ms Thomas contacted Bosasa on her late husband's instructions. Ms Mokonyane did not request this.

385. Ms Mokonyane testified that she was not aware of the work done by Mr Charl le Roux as this was not on her instruction. She was not aware if her family paid for the work authorised by her husband as these were the responsibilities of her husband. He took responsibility from 2014 when she was appointed as a Minister. She asserted however that security for her private residence was done by the state, including close circuit television. She accepted the Chairperson's proposition that it would be strange, if the services had been provided by Bosasa as alleged by Mr Van Biljon and the two le Rouxs', and if her husband had been responsible for this, that he would not have shared this information with her. It was put to her that she could not dispute that Mr Van Biljon's company had done the work at her house. She responded that they never asked Mr Van Biljon to do the work.

386. The WhatsApp message from Ms Thomas to Mr le Roux dated 1 June 2017 seeking assistance with a problem at the house with the alarm system, was explained on the basis that this was the single occasion where Ms Mokonyane accepted that Bosasa's involvement had been sought by Ms Thomas. However, it was put to her that it was strange if this was a once-off item of work that she says in the message that there is a problem at "the house" without saying which house is spoken of, as if he knows the house. Her response was that she only had one home. She also speculated about the possibility that there might have been telephone calls that resulted in the WhatsApp message.

387. Ms Mokonyane confirmed Mr Charl le Roux's evidence regarding the details of the security guard-house and the generator. It was put to Ms Mokonyane by the Chairperson that it appeared indisputable that Mr Van Biljon's company did some work at her residence, that he, together with Charl and Richard le Roux had had all been to her house, that Mr Van Biljon's company had been paid by Bosasa and were there on Bosasa's instructions. It anybody came to do this type of work, it would have been her husband's responsibility, but in this case, as she had said, he would have shared this information with her.

388. With regard to the Aston Martin, Ms Mokonyane was asked how she could afford to pay a deposit of R2.2 million on the car (which cost over R3 million in 2013) when her total income was R143,137.66 per month. She explained that her husband was trying to get a contract from Eskom and from Denel and he had people that were mentoring and supporting him. These people could see that the business had a chance of growing. Her husband then made arrangements with the firm that was not doing business with government to provide them a partnership in his work on the Eskom contract in exchange for their assistance with the deposit. Ms Mokonyane explained that she also made a direct contribution to the deposit.

389. When pressed about who paid the deposit, Ms Mokonyane stated that it was their friend, Mr Thaba Mufamadi, and this was a business arrangement with her husband who had been short-changed in the bids with Eskom. A letter from the firm De Klerk Mandelstam to the Commission confirms that payment was made by Mr Mufamadi from a legitimate source of funds.

390. During her second day of testimony, Ms Mokonyane revisited, amongst other things, the security and maintenance work on her home. She informed the Chairperson that she had written to the office of the Premier to ask for information about the security for her house. A response of "piles of documents" was received the day prior to her testimony and she had not had the opportunity to go through them. It was put to her that she ought to have signed a document acknowledging receipt of the security. Ms Mokonyane stated that she did not remember signing anything as it is done through the SAPS and the people responsible for security in government. She testified that she did not know of any installation done by Bosasa of any security measure at her house. She assumed everything had been done by the state.

391. A letter was produced by the evidence leader, from the Department of Public Works stating that the Department did not have a record of a formal request for security measures in Ms Mokonyane's private residence either by the Gauteng Housing Department, the Gauteng Office of the Premier, the Department of Infrastructure Development, or the Department of Water and Sanitation. The Department indicated that generally security measures are administered by the province and not the national department.

392. Ms Mokonyane went on to draw a distinction between the time before and after she became a Minister at national government level. After Ms Mokonyane became a Minister at national level, the state did not take care of security at her home and she had to make private arrangements. She cannot dispute that Bosasa installed CCTV at her house.

Money allegedly paid to Ms Mokonyane

393. Mr Agrizzi testified that in 2014, at the time that Ms Mokonyane was the Minister of Water Affairs, Bosasa was requested to do an analysis and report on the securing of the dams in South Africa for the Department. The report was done under time pressure and at the cost of some R1.3 million. Mr Agrizzi was also instructed by Mr Watson to recommend a consultant group who would assist the Department of Water Affairs in managing the award of the tender for securing the dams.

394. Mr Agrizzi knew of payments made to Ms Mokonyane because he would pack the money and Mr Watson would often deliver it in front of Mr Agrizzi. The amount of R50,000 "was a monthly amount on a few occasions" but the payments continued for years. He could not remember the exact time though.

395. Ms Mokonyane denied receiving any cash from Mr Watson or Mr Agrizzi. She testified that Mr Agrizzi did not visit her home in her presence. She speculated that representatives from Bosasa may have met with her husband or when she experienced a bereavement. She denied having a wooden staircase as described by Mr Agrizzi. She speculated further that Mr Agrizzi might have become familiar with some features of her house when her fence was being looked at. Ms Mokonyane accepted that it would be fair to expect her husband to have told her if Mr Agrizzi had been at their home, but his response in this regard had been that "they are talking nonsense".

396. A discussion was referred to that took place in the car outside Ms Mokonyane's house between Mr Watson and Mr Agrizzi. Mr Agrizzi pointed out to Mr Watson that a lot of money had been paid to Ms Mokonyane with no return to Bosasa. Mr Watson's response was that "she has a lot of clout" and that her support was needed for protection from the SIU investigation, the Hawks and the NPA. In this conversation Mr Agrizzi claims to have complained about Mr Watson's method of doing business using bribery and corruption, saying that it threatened to close the business and lose the jobs of Bosasa's employees. Mr Agrizzi says that he "pleaded with him that we stop being politically based as a company".

397. In the ensuing exchanges with the evidence leader and the Chairperson, Mr Agrizzi to some extent

contradicted himself as to whether his complaint regarding the investment on Ms Mokonyane was that it was not delivering returns for the Bosasa Group or whether his complaint was that it was not an appropriate and ethical way to do business. His evidence appeared to be that he was making both points.

Ms Mokonyane's scope of influence

398. Mr Agrizzi was asked about the reason for the continued assistance being given Ms Mokonyane after her connections as Premier ceased. Mr Agrizzi explained that Ms Mokonyane was very powerful in politics and Mr Agrizzi had seen prosecutions being stalled on account of Ms Mokonyane and he was told categorically that she should not be messed with. She had influence over former President Zuma, the prosecution authorities and individuals in various government departments who would take decisions on matters that could affect Bosasa. Mr Vorster testified that he was told by Mr Watson, Mr Agrizzi and other directors that Ms Mokonyane was an influential person with links to former Presidents Mbeki and Zuma.

399. Ms Mokonyane denies that she could protect Bosasa from any prosecution, denies that Bosasa ever received any contract from any department where she was appointed as the executive head, and further denies payment ever being made to her.

Potential conflict of interest

400. An example of Ms Mokonyane's continued ability to affect Bosasa was her involvement in the adjudication of an appeal on an environmental impact assessment undertaken for a wind farm project in respect of which the Watsons had an interest. To expand on this example, Mr Agrizzi was referred to annexure GG to his Supplementary Affidavit which was an article from the *Mail & Guardian* newspaper titled *"The Minister, the gifts, the Watsons and the wind farm"* dated 13 March 2019. The article pertains to the Inyanda-Roodeplaat Wind Energy Facility that the Watson family wanted to build on a farm situated on approximately 12 200 ha between three portions of the Groendal Nature Reserve in the Eastern Cape. The Groendal wilderness area is protected under the National Forests Act and is critical to biodiversity and environmental sensitivity.

401. The entities owned or controlled by the Watsons involved in this project were Inyanda Energy Projects (Pty) Ltd, Laidback Investments (Pty) Ltd and O'Feh Investments (Pty) Ltd. The Watsons in this instance were Mr Ronnie Watson, Mr Valence Watson, Mr Jared Watson and Mr Ronnie Watson's daughter, Ms Tandy Snead.

402. The project proposal drew strong objections from inter alia the Eastern Cape Parks and Tourism Agency, the Eastern Cape's Department of Environment and Tourism, BirdLife South Africa, Wilderness Foundation Africa, and the Elands River Conservancy. Notwithstanding these objections, the project received environmental approval from the national Department of Environmental Affairs in April 2018. This decision was under appeal at the time of Mr Agrizzi's testimony. This appeal was to be heard by Ms Mokonyane in her capacity as the Minister of Environmental Affairs. There were concerns that this posed a significant conflict of interest given that Ms Mokonyane was receiving benefits from Bosasa but was also required to deal with the appeal relating to the Watsons and the wind farm.

403. The *Mail & Guardian* article recorded Ms Mokonyane's response to the allegation was that she would not withdraw from the adjudication process and there is no conflict of interest. Ms Mokonyane alleges that the acting Minister, Ms Lindiwe Zulu, attended to the matter and that she did not.

Ms Mokonyane's involvement in the SIU matter

404. Ms Mokonyane denied having anything to do with the SIU and its authority. She explained that she has never been part of the Criminal Justice System Cluster and has never been in meetings with any people responsible for the SIU investigation. She maintained that Mr Agrizzi was lying about her scope of influence.

405. Mr Agrizzi recalled there being constant pressure for a meeting to be convened with Mr Dramat so that the matter could be returned to Adv Jiba's office so she could arrange for the matter not to be prosecuted. Ms Mokonyane denies these allegations and states that she was not a party to any arrangement with Mr Dramat or Adv Jiba, who are not known to her. Ms Mokonyane however supported Adv Jiba through the ANC Women's League because of the onslaught against female leaders and the attempt to vilify them.

406. Mr Agrizzi testified that he was present in meetings during which Mr Watson would put pressure on Ms Mokonyane to ask Mr Dramat for the files back. Ms Mokonyane referred to this as a "damn lie" and stated that she did not have the kind of relationship with these individuals that she could influence them and had never met with them. In his supplementary statement, Mr Agrizzi recalled an occasion in 2014 when the ANC's election campaign was being run from the Bosasa call centre and an impromptu meeting was held where Mr Watson raised the matter of the SIU case and Ms Mokonyane confirmed that it was all under control, and that they should not concern themselves with it.

Ms Mokonyane's comments on Mr Agrizzi's evidence generally

407. Ms Mokonyane testified that she did not know the reason why Mr Agrizzi falsely accused her of many things, other than that, in her view, hatred is involved.

    407.1 She pointed out the timing of the allegations were at a time there were tensions within the ANC about differences concerning "preferential leaders". She believed Mr Agrizzi was playing into the perception that anyone that supported Mr Zuma was corrupt.

    407.2 Mr Agrizzi is on the record to be a known racist. Mr Agrizzi's evidence on Ms Mokonyane demonstrates hatred, misogyny, and racism. Ms Mokonyane described it as being character assassination and opportunism.

    407.3 Mr Agrizzi has "gone out himself to be the one who was frustrated about me not helping them". She believes he is punishing her for not giving them the assistance he thought she had the capacity to provide.

    407.4 Mr Agrizzi "wants everybody to believe that he is a holy cow". There was nothing untoward about Bosasa funding the ANC as the Ruperts wine and dine the presidents of the ANC and the Guptas funded the DA.

Ms Duduzile Myeni

Payments to Ms Myeni

408. Mr Agrizzi testified that Mr Watson was open about the fact that he paid Ms Myeni R300 000 in cash monthly. Mr Agrizzi was told by Mr Watson that this money was intended for the Jacob G Zuma Foundation. At the time, Ms Myeni was Chair of the Foundation. Mr Agrizzi suspected that the money was paid to former President Zuma.

409. Ms Myeni was referred to her affidavit in response to the evidence of Mr Agrizzi in which she had stated that all funds received by the Jacob G Zuma Foundation are done by electronic transfer and not cash. When asked about this, Ms Myeni initially took up the attitude that she refused to answer questions relating to donations to the Foundation firstly, because she was not the Foundation, it was not her business and it was an entity, and, secondly, because foundations linked to other former presidents were not being subjected to similar scrutiny. She explained however that donations from Bosasa for purposes of the Foundation's event for the birthday of Mr Zuma were deposited electronically to service providers. She appeared to accept that in respect of donations emanating other than from Bosasa, cash deposits might be made. At another point, she stated however that some of the questions she was being asked were "too operational" as she was neither a bookkeeper nor a fundraiser. She testified that she had never dealt with Mr Agrizzi and denied that he had ever given her R300 000.

410. This included a refusal to answer questions to avoid self-incrimination, pertaining to numerous cash deposit slips which were signed with a signature resembling Ms Myeni's in substantial amounts, including amounts of R20 000, R50 000, R80,000 and R100 000. She refused to answer for the same reason when asked to "assist the Commission as to where you got these large cash amounts from to deposit them into the Jacob Zuma Foundation bank account".

411. Mr Agrizzi was responsible for drawing the cash for Mr Watson and, on occasion, assisted with packing the money. When asked whether Ms Myeni's details were recorded in his "black book", Mr Agrizzi explained that Mr Watson often made these payments himself and did not want to keep a record of this because he did not want to get caught out. Ms Myeni testified that she never dealt with Mr Agrizzi. She later refused to answer a question about how well she knew Mr Agrizzi or Mr Watson as she did not want to incriminate herself. Mr Agrizzi witnessed the payments being delivered to Ms Myeni on three occasions – twice by Mr Watson and once by Mr Mathenjwa.

412. Ms Myeni denied having received money from Mr Agrizzi. She stated that she only dealt with Mr Watson. She also denied having received gifts from Bosasa.

Gifts to Ms Myeni

413. Mr Agrizzi testified that, at some stage, Mr Watson requested assistance with an idea to impress Ms Myeni. Mr Agrizzi's wife suggested they purchase a Louis Vuitton handbag for her and arranged for its purchase. The handbag was delivered to the Bosasa offices, Mr Watson filled it with R300 000 in cash and it was delivered to Ms Myeni. Although Mr Agrizzi did not witness the handbag being handed over to Ms Myeni, Mr Watson informed him that Ms Myeni was "over the moon" and she thanked him for choosing the right handbag. In her affidavit Ms Myeni denied "possess[ing] a Louis Vuitton handbag which was allegedly filled with cash to the amount of R300,000". She later refused to answer any further questions on the issue as she did not want to risk incriminating herself.

414. Ms Myeni often called upon Mr Watson to arrange high-end functions for former President Zuma. For example, Bosasa catered a birthday dinner for Mr Zuma on short notice. The cost of these functions was approximately R3.5 million per year. Mr Agrizzi approved the claims for these functions and the claims were allocated as corporate social investment payments in the company's financial records.

415. Ms Myeni confirmed Bosasa's involvement in arranging and funding birthday celebrations for Mr Zuma. Apart from gifts, Ms Myeni also called upon Bosasa to attend to the security at her home. Her claims were approved without interrogation. Mr le Roux testified that he was instructed by Mr Mathenjwa and Mr Watson to attend to security work in the form of electric fencing, a full CCTV IP system with offsite monitoring, and alarm system with perimeter beams at Ms Myeni's home in Richard's Bay.

416. Mr le Roux initially estimated that the value of the project was R250 000. In his further affidavit, Mr le Roux was able to identify a series of invoices for components in respect of the work done at Ms Myeni's home in the aggregate amount of R119 375.81 plus two credit notes in the value of R5 751.18. Again, the person invoiced as customer is "Mr A Agrizzi". Mr le Roux personally attended to the installation together with four other technicians. This took approximately 21 days. The total approximate cost of the equipment, vehicle travel and labour were R486,514.63.

417. Ms Myeni refused to answer any questions pertaining to the installation of the security system at her home, its value, its status as a gift to her and her failure to disclose the gift in terms of the conflict of interest policies at South African Airways (SAA) and uMhlathuze Water Board; and the Hawks operation at her home in Richards Bay to investigate the installation, on the basis that she may incriminate herself.

Reasons for assisting Ms Myeni

418. Ms Myeni was assisted because, according to Mr Agrizzi, "she was very, very important. She could swing deals and she was powerful." An example of a deal that was influenced by Ms Myeni was

the fracking transaction in the Northern Cape detailed by Mr Agrizzi. In this regard, Bosasa was approached by Mr Radhakrishna to participate in a transaction with a company known as Falcon Oil and Gas. Falcon Oil and Gas had expressed an interest in the transaction to Mr Radhakrishna's neighbour, Ms Liezl Oberholzer, and were looking for a facilities management company to render security, access control, guarding and operational management services. Pursuant to this, Mr Agrizzi was introduced to Mr Phillip O'Quigley, the international Chairman of the Falcon Oil and Gas group.

419. Mr Agrizzi testified that he was aware that the transaction was brought to Bosasa because of Mr Watson's close relationship with Ms Myeni, who, in turn, would be able to influence the then President. He explained that with Ms Myeni's influence Bosasa was able to demand that the normal rules regulating meetings with potential participants in the transaction not apply to it. For example, Chevron and Standard (it is unclear which entity is referred to here) required prospective partners to the transaction to interview at their offices. Bosasa was the only party able to insist that the interview take place at their own offices.

420. Around May/June 2016, Ms Myeni facilitated a meeting between Mr Jacob Zuma, Mr Watson, Mr O'Quigley and Ms Oberholzer to seek former President Mr Zuma's assistance in advising the then Minister of Minerals and Energy, Ngoako Ramatlhodi, to make certain amendments to what were considered restrictive regulations applicable to the oil and gas industry. Although Mr Agrizzi did not attend the meeting with Mr Zuma, he was informed about it in independent accounts by Mr Watson, Mr Radhakrishna and Ms Oberholzer. Following this meeting the Minister of Minerals and Energy's legal advisors were instructed to meet with Ms Oberholzer to make the necessary amendments to the regulations. Mr Agrizzi was uncertain if such amendments were actually affected. Mr Radhakrishna and Ms Oberholzer advised Mr Agrizzi that Mr Zuma indicated that Bosasa was favoured by him (Zuma).

421. Ms Myeni denied allegations that she had influence in the fracking matter, although she admitted in her affidavit that a meeting took place at Nkandla in this regard. When cross-examined about the meeting she conceded having taken place, she refused to answer on the basis that she may incriminate herself. She denied having set up a meeting between Mr Zuma, Mr O'Quigley, Mr Watson and Ms Oberholzer pertaining to fracking, but, for the same reason, refused to answer cross-examination based on Ms Oberholzer's affidavit, which confirmed that Myeni arranged the meeting. Ms Oberholzer's confirmation in her affidavit was based on an email that she provided dated 20 July 2014 from dudumyeni@telkomsa.net, seemingly addressed to Mr Watson and later the same day forwarded by him to Ms Oberholzer, which, under the subject line "Forward address by President Jacob Zuma at the launch of operation Phakisa big fast results implementation methodology" which read:

> For my Mkhokheli, I hope you are well. By God's grace we are all well. I have to get this speech of the launch of yesterday's event because I felt you have to know what the event or launch was about. Please be assured all is under control. I am trying to set up a meeting for the 27th. Regards.

422. Ms Myeni refused to answer any questions on the email as she did not want to incriminate herself. Mr Agrizzi testified that after this event there were numerous meetings coordinated by Ms Myeni at the now infamous Nkandla residence.

423. At some stage, Mr Watson grew concerned that Mr Zuma was not receiving the R300 000 per month paid to Ms Myeni purportedly for the Foundation. Mr Watson therefore asked Mr Agrizzi to pack the money so the funds could be delivered directly to Mr Zuma. Around the time of Mr Zuma's birthday party in April 2016 and prior to him departing for a trip to Russia, Mr Watson and Mr Gumede met with him at Nkandla. Mr Watson and Mr Gumede relayed to Mr Agrizzi that they delivered the money to former President Zuma and that he had confirmed during this meeting that he was receiving the monthly payments from Ms Myeni.

424. Mr Watson also raised the issue of the Hawks investigation of Bosasa during this meeting and Mr Zuma informed him that that he would "make a call or two". Mr Gumede subsequently advised Mr Agrizzi that the former President had indeed made these calls which gave rise to the Hawks contacting Mr Gumede to arrange a meeting.

Meetings with Bosasa

425. Ms Myeni would have frequent meetings with Mr Mathenjwa. Mr Mathenjwa was tasked with handling the NPA prosecution of Bosasa and Ms Myeni. Therefore, insofar as the Bosasa investigation was concerned, Mr Watson and Mr Agrizzi dealt with Mr Mti and Mr Mathenjwa dealt with the same issue through Ms Myeni. Mr Mathenjwa denies that he had frequent meetings with Ms Myeni and alleges that he was not involved in, nor aware of, discussions regarding the NPA or the prosecution of Bosasa.

426. Mr Agrizzi was present at a meeting where the contemplated prosecution of Bosasa was discussed with Ms Myeni and this led to the direct involvement of Mr Zuma.

427. Mr le Roux testified on his return from the UK he was placed in charge of the security camera systems at the Bosasa offices as well as maintenance of the server and the footage on the server. He was instructed by Mr Watson and Mr Agrizzi on numerous occasions to delete footage of VIP and VVIP guests that attended at the offices. This included the footage of Ms Myeni's visit to the premises along with Mr Jacob Zuma and Mr Bheki Cele.

Meeting at the Sheraton Hotel

428. Mr Agrizzi's affidavit refers to one afternoon (on a date he could not recall) that Mr Watson asked him to attend a meeting with Ms Myeni regarding information on the Hawks investigation and discussions she had with the NPA. Mr Watson prepared the R300 000 in cash. When they arrived at the Sheraton Hotel, they were escorted to a private lounge area with stringent access control on a member's only floor which was possibly the 6th floor.

429. During this meeting, Ms Myeni indicated that she was trying to arrange that the investigation be terminated. She produced a police case docket that had purportedly been obtained from the NPA and insisted that Mr Agrizzi could not make copies. He therefore requested that he be excused to study it and make notes in his journal. Mr Agrizzi took a few photographs of the docket on his cell phone but was later interrupted by Ms Myeni who seemed very nervous.

430. At the meeting with Ms Myeni, Mr Watson requested that the matter "be put to bed and shut down". He also requested that Ms Myeni speak to Mr Zuma as a matter of urgency.

431. Mr Dutton testified that he met Mr Agrizzi at his home on 18 December 2018. During this visit, Mr Agrizzi displayed a series of photographs of documents on his laptop which had been taken at the Sheraton Hotel. These appear to be photographs of confidential documents of the South African Police Service's Anti-Corruption Task Team relating to the progress of the police criminal investigation into corruption allegations against Bosasa. Mr Agrizzi had explained to Mr Dutton that Ms Myeni had shown him a file of these documents at the Sheraton Hotel and he had managed to photograph some of the documents using his iPhone.

432. Mr Agrizzi had told Mr Dutton that the photographs displayed on his laptop were taken on 23 September 2015. Mr Agrizzi copied these photographs onto a memory stick and handed them over to Mr Johan Hershling who is a member of the Commission's digital forensic team. The document photographed is titled "ACTT Monthly Progress and Audit Report" on the status of the Bosasa investigation. Mr Dutton referred to several of the photographs, in particular page 14 of Exhibit T7 which clearly indicated a pattern of what is apparently a carpet. Mr Dutton then visited the Sheraton Hotel to see whether he was able to match the patterns in the photographs to the carpet on the 6th floor.

433. Mr Dutton visited the Sheraton Hotel on 21 December 2018. Mr Agrizzi's description of the 6th floor aligned closely to what Mr Dutton observed. In addition, he observed that the carpet was the same as that featured in Mr Agrizzi's photographs. On 14 January 2019 formal inquiries in the form of a request for information from the Commission was sent to the manager of the Sheraton Hotel and thereafter a member of the investigation team visited the hotel to interview the general manager. Mr Dutton was advised by the investigation team that on 22 and 23 September 2015, Ms Myeni had been a guest of the Sheraton Hotel and she had been accommodated in Room 616. This was confirmed in an affidavit from the hotel's General Manager, Pascal Foquet, who confirmed through hotel records that

Ms Myeni had booked into the hotel on 22 September 2015 and there were no further transactions on her invoice after 24 September 2015. Although Mr Foquet's affidavit refers to the fact that the invoice relates to Ms Myeni booking the Mopani Boardroom on the 7th floor on 24 September 2015 and that she could have used it on one of those days while she was staying there, Mr Dutton confirmed that he did not do an investigation on the 7th floor, because Mr Agrizzi had emphatically told him that the meeting had occurred on the 6th floor. Mr Dutton explained that he could not comment on whether the 7th floor was like the 6th floor save for the fact that it was also a restricted area of the hotel.

434. Mr Dutton confirmed that the account for Ms Myeni's stay was paid off from the FNB account of one Nicole Stone. At the top of the customer registration card it stated, "Account Jacob Zuma Foundation".

435. The Commission's investigation team showed Mr Agrizzi's photographs to both General Moodley and Senior State Adv de Kock who was originally the prosecutor assigned to the matter and they both advised the documents appeared to be an ACTT progress report dated 24 August 2015. However, they had not been able to find the original document. These documents are not publicly available and are confidential documents or correspondence between the police and the NPA.

436. The memory stick handed over by Mr Agrizzi to the Commission did not contain the metadata of the photographs. When Mr Agrizzi had completed his evidence, he voluntarily handed over his iPhone and in his presence members of the Commission's digital forensic team continued an examination of the iPhone upon which they found the photographs as originally recorded. Upon examination of the metadata, it was revealed that the photographs on Mr Agrizzi's phone were taken on 23 September 2015 at 10:37:06. The longitude and latitude co-ordinates of the location of the photograph is within the vicinity of the Sheraton Hotel.

437. In respect of the invoice which appears at page 30 of Mr Dutton's affidavit, being an invoice from the Sheraton Hotel addressed to Ms Myeni, it states that her arrival was 22 September 2015 and departure was 5 October 2015. Mr Dutton explained that the departure date was likely to have been indicated as being 5 October 2015 as that is when payment was received. The arrival date corresponds with what the GM had declared in his affidavit and all expenditures generated by the guest had stopped by 24 September 2015.

438. Ms Myeni refused to answer questions regarding the meeting of 23 September 2015 as she did not want to incriminate herself. She similarly refused to answer questions relating to Mr Blake's evidence regarding payment in respect of her stay at the Sheraton between 4 and 6 May 2014. Ms Myeni also refused to answer questions relating to handing over a police docket containing information regarding the investigation into Bosasa as she did not want to incriminate herself.

439. Ms Myeni understood the impact of her refusal to answer questions on the evaluation of her evidence.

Ms Myeni's statement to eNCA

440. After Mr Agrizzi's testimony before the Commission in January 2019, Ms Myeni made a statement on eNCA regarding meetings held at Bosasa's offices. To this end, Ms Myeni stated that she had only attended one official visit which was Mr Zuma's visit to SeaArk during which he spent four hours on the Bosasa campus with Mr Watson and the rest of the directorate. Mr Agrizzi commented that Ms Myeni's statement was not true and recalled at least three meetings at the Bosasa offices. One such meeting was regarding the fracking transaction. A third meeting was held at what Mr Agrizzi described as "the Intercontinental, I think it is the Sheraton Hotel at OR Tambo Airport" after a meeting in the conference venue. Ms Myeni arranged this meeting to enable Bosasa officials to meet the then CEO or acting CEO of SAA, Mr Nico Bezuidenhout.

441. During the pre-meeting, a tender for security services was discussed and Ms Myeni wanted Bosasa to investigate the possibility of taking over the security contract and the catering contract for SAA. Confirmation that the meeting took place at the Intercontinental Hotel at ORTIA and details of the meeting were provided in an affidavit from Mr Bezuidenhout. Ms Myeni refused to answer any questions put to her based on his affidavit because of her concern that she may incriminate herself.

442. In relation to this catering and security contract for SAA, Mr Agrizzi testified that he realised that this was "going south" and he conveyed to Mr Watson that he did not think there was any money in it. Mr Watson agreed with Mr Agrizzi. Mr Agrizzi testified that the real reason why he did not want to engage in these contracts with SAA was because he wanted to stay far away from Ms Myeni and the Foundation. During mid-August 2016, Mr Agrizzi and his wife encountered Ms Myeni on a flight from Johannesburg to King Shaka International Airport in Durban. Ms Myeni asked Mr Agrizzi how Mr Watson was doing. Mr Agrizzi recalled being aloof with her and said he did not know. Ms Myeni asked him what was wrong and he responded by advising her that he had resigned from Bosasa.

Mr Watson's introduction to former President Zuma

443. According to Mr Agrizzi, Ms Zukiswa Madonga who ran a guest lodge in East London, had a very good relationship with President Zuma. Madonga was introduced to Mr Watson by a Director of Bosasa, Ms Thandi Makoko. Following this meeting, Mr Agrizzi received an instruction to top up the limit on Ms Makoko's credit card so that she could buy dresses for Ms Madonga.

444. Subsequently, Mr Watson was introduced to Mr Zuma by Ms Madonga at his Forest Town house. This occurred before May 2009, when Mr Zuma was President of the ANC but had not taken office as President of South Africa. Although he took Mr Watson to Mr Zuma's house, Mr Agrizzi did not participate in the meeting.

Meetings at the Bosasa office park

445. When high profile individuals were introduced to the Directors of Bosasa, they were taken on a tour of the Bosasa office and given an overview of its entire operations and staff. Mr Agrizzi described this as a 4.5 hour long "smokes and mirrors exercise". He testified that Ms Myeni visited the office park as well as Mr Zuma and the then Minister of Health.

Meetings at Nkandla

446. Mr Agrizzi testified that after the exposé on Nkandla, Mr Watson and Mr Gumede met Mr Zuma at Nkandla. The purpose of this visit was to discuss shutting down the Hawks investigation into Bosasa. During this meeting, Mr Watson asked Mr Zuma to call Mr Dramat to tell him to shut down the matter. At the time, Mr Dramat was avoiding Ms Mokonyane.

447. Mr Watson relayed the details of his visit with Mr Zuma during an Exco meeting convened by Mr Agrizzi the following Monday. Mr Watson commented during this meeting that he was shocked at the poor standard of the workmanship at Nkandla.

448. Mr Agrizzi also presented a recording of a meeting arranged by Mr Gumede during which the meeting with former President Zuma was discussed. The transcript of this recording refers to Mr Watson and Mr Gumede seemingly having been advised to "go and see the old man, the president, on this matter" when the investigation by the Hawks was "starting to brew again." Mr Gumede confirms having visited the President, saying "[w]e went to see him and he told me to say, he was going to Russia, I remember when we had a chat with him he said, no, before I go, I will phone the two people, and we didn't phone them because we got feedback and that's the reason why". In the recording, Mr Gumede goes on to say:

> Then the next thing, the guy from the Hawks, he even showed us, the meeting we were having, every month you were having a meeting, where he decides all those things. It's confidential information, he showed us, that meeting, the guy said the person they wanted to charge was Angelo and Ryker, none of you guys. Even if I showed this one and showed that guy was never gonna allow, I said please can I take the minutes? I took them on my phone. But the guys they want to charge, if at least they can throw this thing on the charging, it was four hundred, but they're charging two, he said, no, but the other people we are not worried. It was him and Patrick. I said but you're charging two, are you comfortable? We'll replicate the case. They said

no, the other people we are not even worried about. Even Angelo knows that copy, I took a copy of those minutes in my phone, and I showed him alone with Trevor. We had two meetings. Every month we were getting those minutes through that *inaudible*. And again, it was twice, those people came back to say hey, these guys, the only people they can charge, is those two. We said no, over our dead body, it cannot happen. And Angelo knows that, that's why, for him to even try and involve other people, he knows, he knows that even on that number, because he had minutes twice, I showed him the minutes of that number. Even he had a meeting at the Sheraton at four o'clock, and he was very clear to say that for them to close this project, the only people they think they will charge, is those two. He was aggrieved because Gavin did not appear on the list of the suspects.

Mr Zuma and the Bosasa investigation

449. In a later meeting between Mr Watson, Mr Agrizzi and Mr Mti, Mr Watson told Mr Mti that he should convey to Adv Jiba that he was waiting for her to make a move in the process to shut the Bosasa investigation down. Mr Watson referred to Adv Jiba as the "President's person". Mr Agrizzi was also present at a meeting at Mr Mti's house during which Mr Watson spoke to Mr Zuma on the telephone. During this call, Mr Watson handed the telephone to Mr Mti saying, "your boss wants to speak to you". Mr Agrizzi recalled Mr Mti taking the phone and speaking in either Xhosa or Zulu and when he was about to finish, he said in English "I am ready to be deployed".

450. During the morning meetings held at Bosasa, Mr Watson would praise Mr Zuma. Mr Agrizzi commented that Mr Watson believed that he was "totally bulletproof" with Mr Zuma on his side.

Mr Cedric Frolick

451. Mr Frolick met Mr Watson through the acquaintance with Mr Daniel Watson. His relationship with Mr Daniel Watson started in the late 1980s when Mr Frolick became involved in non-racial sports. When Mr Frolick was elected as a member of the National Assembly, he served on the Sports and Recreation Committee. Mr Daniel Watson was elected as the President of Eastern Province Rugby in 2006/2007 and Mr Frolick was roped in as an advisor and, later, joined the Board in 2012 and served as director of the company, the professional arm of the union. It was around this time he got to know the other Watson brothers.

452. Mr Agrizzi testified that he was first introduced to Mr Frolick by Mr Daniel Watson during a period when Bosasa was under severe attack from the media. Mr Frolick was a longstanding friend of the family. Mr Daniel Watson informed Mr Agrizzi that Mr Frolick would be visiting Bosasa Business Park which, at that stage, was known as the Mogale Business Park, with a certain Buti Komphela. At that stage, Mr Agrizzi was not aware of the purpose of the meeting.

453. Mr Agrizzi was thereafter advised by Mr Watson that the purpose of the meeting was to showcase the magnitude of the Bosasa business and the diversity of the office park as well as how as a "quasi-BBBEE" company it was performing in terms of development in Southern Africa. Mr Watson stressed that Mr Frolick would be instrumental in assisting them to cross the impasse that had developed with Mr Smith. Mr Smith, at that stage, was chairperson of the Portfolio Committee on Correctional Services and Justice. Mr Agrizzi described Mr Smith as being very anti-Bosasa. Given that Mr Frolick had served as "chairman of chairman's" in Parliament, it is believed that he would be able to influence Mr Smith to sort out this problem with Bosasa. Mr Frolick stated that the reference to him being the "chair of chairs" could not be correct as he was only elected to the position on 18 November 2010.

454. Mr Agrizzi testified that the meeting took place and he recalled having to book flights for the gentlemen to attend the meeting. In addition, he had to arrange a golf cart to assist Mr Komphela as he was disabled and would not be able to manage the 4.5-hour tour of the facilities. After a tour of the office park, the visitors were taken to lunch. Mr Frolick disputed the duration of the meeting and stated that it did not last longer than an hour because they had intended to see the youth facility and not the office park. He also disputed that Mr Komphela was driven around in a golf cart. He advised that Mr

Komphela agreed with his account of events. A confirmatory affidavit from Mr Komphela was put up by Mr Frolick in this regard.

455. According to Mr Agrizzi, a meeting was then held in a boardroom with Messrs Watson, Komphela, Frolick and Agrizzi. During this meeting they discussed a way of dealing with Mr Smith. Mr Frolick requested Mr Agrizzi to prepare a document and said that he would arrange with a Ms Bailee at the Parliamentary offices to meet with Mr Smith. Mr Frolick does not dispute that Mr Smith was discussed during his meeting with Mr Watson but denies, in his affidavit filed in terms of Rule 3(4), that Mr Agrizzi was present. He stated that Mr Watson was unhappy with the treatment Bosasa had received from the Portfolio Committee and Mr Khompela suggested that he request a meeting with Mr Smith and for Mr Frolick to assist as he was friends with Mr Smith. After discussion, they determined the best way forward was to approach Mr Smith directly. Mr Frolick undertook to attend to this as he was friends and colleagues with Mr Smith. He advised Mr Watson to request an audience with Mr Smith and that he would then talk to Mr Smith about a meeting with Bosasa. Mr Frolick explained that he entertained this discussion with Mr Watson because, as an MP, he had a general interest in concerns being raised by the public. As pointed out above, Mr Frolick denied that Mr Agrizzi was present during the discussion regarding Mr Smith.

456. Mr Agrizzi testified that he prepared the document requested by Mr Frolick. It showcased the benefits of having outsourced certain operations at correctional services. A formal introduction of Bosasa portfolio was to be used as a cover. After Mr Agrizzi drew up the introductory document requested by Mr Frolick. He asked Mr Watson whether he wished to sign it. Mr Watson's position was that one must always have a "whitey and a darky or it depends" sign documents. It was therefore suggested for a document addressed to Parliament, that Mr Gibson Njenje would sign the document. Mr Njenje was for a brief period the Chairman of Bosasa, although he was not actively involved in the business, Mr Agrizzi described him as a figurehead.

457. In essence, the purpose of the meeting which had been held was for Mr Frolick and Mr Komphela to see Bosasa's operations and its BEE work so they could go back and win over Mr Smith who was extremely anti-Bosasa. As far as Mr Agrizzi knew, Mr Frolick and Mr Komphela were not part of the Portfolio Committee on Correctional Services.

458. Mr Frolick testified that the visit to Bosasa was initiated after discussions with Mr Daniel Watson who informed them that there was a youth facility that required sport activities. The purpose was to get parliamentarians to note the role of sports in rehabilitating youth offenders. Mr Watson specifically requested Mr Frolick's presence since he was going to be in Johannesburg to meet with a potential sponsor for the Eastern Province Rugby Union.

459. Mr Agrizzi was asked whether Mr Watson ever addressed Mr Frolick directly in relation to any influence over Mr Smith. Mr Agrizzi responded in the affirmative and stated that there was a specific meeting where Mr Watson told Mr Frolick to do whatever is possible to ensure they could win over Smith. As an alternative measure, Mr Frolick was told to try and move Mr Smith out of the position so he could not be detrimental to Bosasa or its contract/s. Mr Agrizzi recalled that, while discussing the approach to Mr Smith, Mr Watson excused himself and went to the vault. Upon his return, Mr Watson called Mr Frolick into the passageway and placed a security bag in Mr Frolick's pocket. Mr Agrizzi was certain that the security bag contained money.

460. Mr Frolick disputes that Mr Watson left the meeting to go to the vault. Mr Frolick denied receiving money from Mr Watson or any person during this visit or that he was alone with Mr Watson. He describes the suggestion that he met alone with Mr Watson as being "untrue and artificial" because he was in the company of Mr Komphela for the duration of the visit.

461. At around the time of which Mr Agrizzi was referring in his evidence (approximately 2010), Mr Smith was instrumental in allowing Adv Willie Hofmeyr to present the SIU Report on Bosasa to the Portfolio Committee. Certain people were not happy about Adv Hofmeyr being allowed to speak to the Parliamentary Portfolio Committee about the Report and the allegations contained therein. Mr Agrizzi recalled Mr Biebuyck authoring a letter to several people informing them that Bosasa intended to bring an application to prevent the State Attorney and Adv Willie Hofmeyr from presenting any details of

the SIU Report. Mr Oellermann explained that the SIU is required by statute to report to Parliament on various matters. Mr Oellermann attended Parliament with Adv Willie Hofmeyr because he was involved in the investigation, as the SIU was giving feedback on the DCS investigations in general. Mr Oellermann testified that in 2009 Adv Willie Hofmeyr presented some of the key findings made during the investigation but was not specific with names or detail. Adv Willie Hofmeyr did provide an indication of some of the major concerns arising during the investigation. Mr Oellermann described the members of the Portfolio Committee as being shocked. He recalled that a member had approached them after the presentation and informed them that he had never experienced such blatant irregularities and evidence of possible corruption and asked them to ensure that the matter gets finalised and handed over to the relevant authorities.

462. Mr Agrizzi testified that he vividly remembered Mr Watson instructing him to arrange R40,000 to be delivered to Mr Frolick every month. Mr Watson said this would be the standard arrangement and that he would arrange to take it to Mr Frolick whenever he went to Port Elizabeth or give it to his brother Mr Valence Watson to take down for him. Mr Agrizzi questioned how Mr Watson would be able to take that amount of money in cash on a plane without security picking it up. Mr Watson responded that they never checked, and he would get "Bosasa guys" to carry his bags and surround him so that no-one would really worry to check his bags.

463. Mr Frolick confirmed having visited Mr Valence Watson's house on several occasions. He does not recall being in a meeting with Mr Agrizzi at the house. Mr Frolick checked his re-collection with Mr Valence Watson who could also not remember such a meeting. Mr Frolick pointed out that Mr Agrizzi could remember details about Mr Valence Watson's furniture but could not provide a timeframe when the meeting for the handover of money allegedly took place. Mr Frolick denied a meeting at Mr Valence Watson's house or anywhere else in Port Elizabeth. He further denies having received money from Mr Valence Watson. He stated that Mr Agrizzi provided no information on how monthly payments were made to Mr Frolick.

464. Generally, Mr Frolick denied receiving money from Bosasa, Mr Gavin Watson or Mr Valence Watson. He received amounts totalling R25,000 from Mr Valence Watson during 2014 as a contribution to the ANC's election fund. These funds were handed to the regional treasurer of the ANC. He also received a desktop computer for his office from Mr Daniel Watson for use by learners/students. This, together with two shirts, two pairs of shoes and a belt from Mr Daniel Watson for Mr Frolick's birthday was declared. In respect of other benefits to Mr Frolick, Mr Agrizzi testified that he was able to get a copy of an invoice from Blakes Travel Agency for a stay at City Lodge OR Tambo for "Guest Frolich Mr C" from 21/8/2010 to 22/8/2010 in an amount of R2,744.28. The Dr is made out to "EP Rugby c/o Mr D Watson". The invoice was emailed to Dr Smith on 14 December 2010. As appears from the email, Mr Daniel Watson had called Dr Smith and told him that Bosasa must pay for this invoice

465. Mr Frolick stated that the invoice from Blake's Travel was for accommodation while he attended a test match between the Springboks and All Blacks in his capacity as an advisor to the Eastern Province Rugby Union ("EPRU"). He was under the impression that these costs were borne by the EPRU. Mr Frolick testified that he did not get involved in operational issues such as the travel arrangements. Mr Daniel Watson did not explain to him why the travel was arranged by Bosasa. In his affidavit filed at the Commission, Mr Blake confirms that this booking was made through Blake's Travel and provides the details of further bookings made on behalf of Mr Frolick. Mr Blake states that the bookings were initially issued to EPRU, later changed to C Venter and were paid for in cash by Mr Agrizzi or his wife, as per the agreed procedure. Mr Blake identifies four invoices that were paid for by EPRU, and one paid for by Mr Frolick on behalf of Ms Goliath.

466. Mr Agrizzi explained that he had a meeting with Mr Njenje before meeting with Mr Smith to inform him that he was simply there to dilute Mr Agrizzi's whiteness and that he should just follow Mr Agrizzi's lead. Mr Agrizzi recalled Mr Njenje not being comfortable with the situation, but he was doing it because Mr Watson asked him to do so. Mr Agrizzi and Mr Njenje went to Parliament and were met by Mr Frolick and taken to wait in a specific office. Mr Frolick testified that they did not expect Mr Agrizzi to attend the meeting. Mr Frolick thereafter returned with Mr Smith who appeared visibly annoyed to see Mr Agrizzi and Mr Njenje there. Mr Agrizzi did not think that Mr Smith knew about the

meeting. Mr Frolick confirmed that Mr Smith, Mr Agrizzi and Mr Njenje briefly met. He said that the meeting took place in his absence, and he does not know what was said. Mr Frolick testified that Mr Smith did not raise a concern that he was ambushed by the meeting or that it was unannounced. Mr Frolick did not engage further with Mr Smith on this issue because he did not want to come across as putting him into an uncomfortable situation.

467. Mr Agrizzi described his meeting with Mr Smith as being very abrupt. While he tried to provide Mr Smith with the documents providing an introduction of the business, Mr Smith indicated that he was very busy and had to go to a meeting. Mr Frolick confirmed that Mr Smith was in a hurry due to another engagement. It most definitely did not seem as if Mr Smith had changed his mind on Bosasa.

468. Mr Smith testified that Mr Agrizzi (and the delegation's) visit was "facilitated by the Chair of Chairs, Mr Frolick", who had indicated to Mr Smith that there was a delegation that wanted to see him. Mr Smith could not recall if Mr Frolick was the Chair of Chairs in 2009 but testified that "towards the end", Mr Frolick held this position. Mr Smith did not know the capacity in which Mr Frolick brought the delegation to him. Mr Smith testified that he went to see the delegation at a venue that Mr Frolick had arranged, and that the meeting took place in 2009 when he was elected Chairperson. At the time, Mr Smith knew the name Bosasa by virtue of his relationship with Mr Watson. Mr Agrizzi testified that after this meeting Mr Njenje and Mr Agrizzi joined Mr Frolick for lunch at the canteen and Mr Frolick paid for the lunch on his card. Mr Frolick confirms this.

469. Mr Smith was referred to minutes of a meeting of the Portfolio Committee held on 17 November 2009, which confirm that the issue of corruption in Bosasa had been raised before it in 2009. Mr Smith was unable to confirm whether Mr Frolick would have been privy to the minutes or the discussion of the Portfolio Committee and said that there was no obligation on the Portfolio Committee to submit their minutes to any person and so it was possible that Mr Frolick never had sight of the minutes. Mr Smith testified that the SIU Report was a very worrisome report and that all members of the Portfolio Committee unambiguously agreed with that position.

470. Mr Agrizzi recalled that in and around 2015, Mr Watson was very excited because he was going to be meeting the then Minister of Justice and Constitutional Development. Mr Watson explained that there was going to be an ANC meeting or rally in Port Elizabeth and Mr Frolick was going to help him organise accommodation for Minister Michael Masutha and that they would have a meeting. Mr Agrizzi recalled Mr Watson explaining to him that Mr Frolick had offered Minister Masutha accommodation at a game reserve or wildlife estate at a house which belonged to Mr Watson. Mr Frolick denied the house was on an estate, stating that it was "literally a few minutes away from the Nelson Mandela Bay Stadium".

471. Mr Frolick stated that accommodation was arranged for Minister Masutha and other comrades involved in community- and sector-related matters in the run-up to the 2016 local government elections. It was arranged by Mr Valence Watson's wife as no other accommodation could be found. The house was used by the Minister for one night and it was situated in a residential area. Mr Frolick explained that the arrangements were not for the Minister alone. Mr Frolick also secured accommodation for the support staff of Deputy Minister Bapela.

472. Mr Agrizzi explained that Mr Frolick and Mr Watson had planned to make it seem as if there was no accommodation for members of the ANC and on that basis, accommodation could be offered by Bosasa or by Mr Watson. To Mr Agrizzi's knowledge, the meeting with Minister Masutha took place. Mr Watson was accompanied by Mr Valence Watson, probably because Mr Valence Watson was more known in political circles than Mr Gavin Watson. Mr Agrizzi did not believe the meeting with Minister Masutha was a success. He testified that if it was successful, he would have received a phone call from Mr Watson exclaiming so, as he usually did. On this occasion, he "did not really comment much".

473. In late 2016, a tender was submitted for the catering contracts for the DCS. The then Commissioner was "Zach Modise and he was being attended to by Leshabane. That was the contact and Sesinyi Seopela". Mr Agrizzi was concerned about the catering tender of the DCS and used other consultants namely Mr Nkabinde and Mr Sekgota. Mr Agrizzi explained that it was a "straight tender" and he had

got information that Bosasa was the cheapest at that stage and "we should have got everything". There were ten management areas of the DCS. However, it appeared the DCS had issued out two other management areas to other companies.

474. On the advice of Mr Watson, Bosasa instituted proceedings to set aside the award of these contracts to its competitors. In this regard, it utilised the services of Mr Biebuyck as well as Adv Etienne Theron. The day before the application was to be heard, Mr Watson arrived with some of the directors and stated that they had to take a resolution that they were not going to proceed with the application. The reason for this was because Mr Watson had received political advice that it would be suicide if they went ahead with the application. Mr Agrizzi challenged Mr Watson's suggestion that they abandon the court proceedings on the basis that he believed they had a strong legal footing to challenge the award of the tenders. According to Mr Agrizzi, Mr Watson then informed Mr Agrizzi to hear the advice directly from the horse's mouth and put Mr Frolick on the phone who advised that the litigation must be withdrawn.

475. Mr Frolick denies having a telephonic discussion or having instructed that the litigation be withdrawn. He stated that Mr Watson called him on a Wednesday morning while he was with his attorneys and two Bosasa directors to obtain a view on the litigation against the DOJCD. Mr Frolick advised them to consider the impact the litigation could have on their future business relationships with government. Mr Frolick however advised them to proceed with the case if they believed it was in Bosasa's best interests. Mr Frolick stated that he advised Mr Watson as a friend but stated ultimately it was their decision whether to proceed with the litigation. In explaining why Mr Frolick and Mr Smith were consulted on the litigation against the DCS, despite Mr Smith's attitude to Bosasa having not changed, Mr Agrizzi stated that for a long period of time, Mr Smith was friendly towards Bosasa following a meeting (discussed above) that was held at a hotel on Rivonia Road. Both Mr Smith and Mr Frolick agreed that the litigation should be withdrawn. The meeting with Mr Smith at Parliament coincided more or less with the release of the SIU Report for the first time which had been around 2009 and 2010 and the meeting with Mr Smith in Rivonia Road took place during 2011. The events that Mr Agrizzi was recalling relating to the advice to withdraw the litigation from Mr Frolick and Mr Smith took place in 2016 / 2017.

476. Mr Agrizzi was asked whether Mr Smith was won over because of Mr Frolick's efforts or through other efforts made by Bosasa. Mr Agrizzi responded that it could be both. Although he did not know specifically the position with Mr Frolick, he did know that Ms Winnie Ngwenya and Mr Magashula were the people that eventually won Mr Smith over during the meeting that was held in Rivonia Road in 2011.

477. Mr Frolick was referred to his call records which showed a call from Ms Mokonyane on 6 March 2017. He testified that he did not recall receiving a call from Ms Mokonyane. He only recalled a discussion with her in and around 2017 when she was unhappy with an issue in relation to her water and sanitation committee. The telephone records showing a call to his phone from Ms Mokonyane relates to a phone that is used by his child who is very active in the ANC in the Western Cape. Mr Frolick was also referred to a telephone record showing a call from Mr Gumede on the 11 December 2017. He describes Mr Gumede as an old comrade who worked for Bosasa, and Mr Leshabane as someone that worked for a subsidiary of Bosasa. He did not know Mr Dlamini. He explained that his number is publicly available on the Parliamentary website.

Mr Gwede Mantashe

478. Mr Agrizzi's version is that he was tasked by Mr Watson to attend to "special projects", which included installation and maintenance of security at Mr Mantashe's residences. Mr Agrizzi stated that he was aware that the installations done at the homes of Mr Mantashe were, according to Mr Agrizzi, "all . . . paid [for] by Bosasa Operations and not by a director as alluded to", i.e., not by Mr Leshabane in his personal capacity. The reason why Mr Agrizzi says this, is as follows. The whole issue was kept away from him by Mr Leshabane. They had arranged with one of the other technical heads, Mr Francois Cronjé, to go out and to do a site survey at a property in Boksburg, Sunward Park. This

was the first installation undertaken where they appointed a subcontractor. Mr Agrizzi confronted Mr Watson about this and he initially denied having any knowledge of agreeing to fund the installations, but later conceded that he had done so. Mr Agrizzi knew that Mr Leshabane would not have made a personal donation to fund the installations and had committed Bosasa to doing them. Knowing this, Mr Agrizzi instructed Mr le Roux to continue with it and Mr le Roux made the payments from money that he received in cash from Mr Van Zyl.

479. Mr le Roux testified that Mr Leshabane instructed him to attend to the following at three of Mr Mantashe's premises: CTV, lighting, perimeter and DVR at a house in Sunward Park, Boksburg; CCTV, IP system and lighting at a farm in Elliot in the Eastern Cape; and CCTV, IP system and lighting at a house in Cala in rural Eastern Cape.

480. Mr le Roux estimated the cost of the project as being R300,000. Mr Agrizzi conservatively estimated the total cost of installations for three sites for Mr Mantashe to be R650,000. This would be based only on an alarm system and 6-zone camera installation. Mr Agrizzi confirmed that the same equipment, lights and fencing were used for all the people who benefitted from what was called the "special projects". Mr Agrizzi said there was no doubt in his mind that the payments for these installations were done by Bosasa and they were covered up by using cash.

481. Mr Agrizzi stated that the account that the technicians opened at Regal and other suppliers was in Mr Agrizzi's name and he could pull up all the invoices for the investigators if required. Once he conceded having authorised the installations, Mr Watson explained to Mr Agrizzi that Bosasa's purpose in assisting Mr Mantashe was because Mr Mantashe is a "brilliant connection" to have. At that stage, he was Secretary-General of the ANC "who controls the rest of the people". He was also highly placed with the trade unions and in government. When it was pointed out to Mr Agrizzi that he does not mention any assistance that Mr Mantashe gave him, he answered that one did not know what other assistance was happening behind the scenes, like the situation with Ms Mokonyane.

482. Mr le Roux also confirmed that they assisted Mr Mantashe with maintenance work and assisted his security person, Mr Mzonke, with playing back security camera footage. To this end, he attached a WhatsApp message from Mr Mzonke requesting such assistance.

483. Mr Mantashe admits that cameras were installed at his properties in Boksburg, Elliot and Cala in the Eastern Cape. He explained that he had experienced attempted break-ins at his property in Boksburg. He therefore had a discussion with his security advisor (employed by the ANC) to deal with his security. It was then agreed that cameras should be installed. The task was handed over to his security advisor, Mr Mzuphela "Mzonke" Nyakaza, to attend to. However, Mr Leshabane later offered to give Mr Nyakaza "better cameras because the cameras we got from Game, were of [a lesser] quality". The camera installation at the Boksburg premises was done in July 2013. After the success of the installation done in Boksburg, this was repeated at Mr Mantashe's Eastern Cape properties in 2016. When asked who he engaged to install the cameras at his Eastern Cape properties, Mr Mantashe explained that, in the political setting, there is a very strict division of labour. He therefore kept out of the security arrangements, and this was handed by Mr Nyakaza.

484. Later, Mr Mantashe testified that he was not aware of who paid for the security installations at the time. When asked who he thought was paying for the security installations, he said "Papa and Mzonke and had arrangement that Papa would offer security that were of higher quality and he will do that his own costs (sic)."

485. There was a time, however, when he had a discussion with Mr Leshabane about the offer for the cameras at his Boksburg property and who would be responsible for the costs. Mr Leshabane said that he would assume responsibility for paying the costs. He was not sure what was discussed between Mr Nyakaza and Mr Leshabane regarding the payment of the security cameras at the other properties. He did not enquire whether Mr Nyakaza had approached Mr Leshabane. Mr Mantashe described the "nitty gritties" of the security arrangements as resting with Mr Nyakaza and that he was approached by his security team on a "need to know" basis. He initially stated that his security is financed by the ANC but later said "I did not say the ANC would pay for the installation" and instead remarked that the ANC was "responsible" for his security.

486. At the time the security installations were funded by Mr Leshabane (approximately 2013), Mr Mantashe was the Secretary-General of the ANC. The installations undertaken in 2016 occurred when he was still Secretary-General of the ANC. Mr Mantashe was aware that Mr Leshabane was working at Bosasa at the time he funded the security installations but stated that "we [as in the ANC] had no tensions with Bosasa at the time". He went on to say that he did not have a problem at the time that Mr Leshabane was working at Bosasa because it was a group that was initiated by ANC women. Mr Mantashe was asked if Mr Leshabane indicated whether the money was going to come from his pocket or from Bosasa. He answered that Leshabane said that "he will carry the cost".

487. When asked whether he was aware at the time that Bosasa had been awarded contracts by the government, Mr Mantashe responded that he was not in government at the time and that the only thing he knew about Bosasa was the West Rand Youth Centre. Other contracts "were really not [his] business". Mr Mantashe was not uncomfortable with Mr Leshabane paying for his security installations because, even though Bosasa had contracts with several government departments he was not one of those Ministers.

488. It was put to Mantashe that the Secretary-General and the executive committee of the ANC are very influential in government appointments including the appointment of government ministers. Mr Mantashe confirmed that, as Secretary-General of the ANC, he formed part of the NEC. He however stated that it would be unfair to ask him questions on the appointment of ministers and high-ranking government officials given that the Commission has asked the NEC to "come here and explain the issue of deployment" and it would be incorrect for him to be asked to give that evidence on 19 March 2021.

489. Mr Mantashe knew of Mr Watson from his time working with the mines. To his knowledge, Mr Watson had tried to bribe shop stewards to secure catering contracts at the time. He was aware that Mr Watson was the CEO of Bosasa. When it was put to him that it was strange to accept the funding from Mr Leshabane who was employed by a company headed by a person that previously attempted to bribe shop stewards, Mantashe stated that he was not worried about this because he is not a person amenable to bribes and is known for this. Now that he is a minister, Mr Mantashe stated that gifts arising from a social arrangement would be declared.

490. It was put to Mr Mantashe that Mr Watson adopted a clan name and was asked whether he knew it. He answered "I do not know. If you know that he has the clan name, tell us." Mr Mantashe did not dispute that Mr le Roux was present at the installation of the security cameras but did not remember speaking to him. He was questioned about Mr le Roux's recollection that Mr Mantashe arrived in a red "FJ Toyota Cruiser" and was asked whether he remembered having a car like that. He said, "I do not remember I had it". He did not recall that, using Mr Watson's clan name, he told Mr le Roux that he should thank Mr Watson on Mr Mantashe's behalf for the installations. Mr Mantashe said that that was the reason why he wanted to cross-examine Mr le Roux.

491. Mr Mantashe was again questioned about Mr Watson's clan name and whether it was Scally or Secaly. He answered "[i]t is not Secaly. It is not close to that. I know that", demonstrating that he did in fact know Mr Watson's clan name. He was again asked what the clan name was. He answered "People, you see you want me to give you information to use it against me, you know." When pressed on the issue he said, "Gavin Watson was known as Radebe".

492. No invoices were sent to Mr Mantashe for the installations at the Boksburg or Eastern Cape properties. He therefore did not know the cost of the installations. Mr Mantashe did not dispute the costing provided by Mr le Roux because he had no dealings with Mr le Roux or Mr Agrizzi. He pointed out, however, that there was a dispute regarding the cost as between Mr le Roux and Mr Agrizzi, with Mr Agrizzi almost doubling the cost, which, to Mr Mantashe appeared suspicious.

Mr Thabang Makwetla

493. Mr le Roux testified that the Special Projects team attended to "Project Bramley". This involved a security installation for Mr Thabang Makwetla, the Deputy-Minister for Correctional Services. According

to Mr le Roux, this was on instruction from Mr Watson and, at the time, even Mr Agrizzi was not aware of the project. Mr le Roux stated that the work undertaken for Mr Makwetla included the installation of a full electric fence and alarm systems, maintenance on these systems, and installation of an IP CCTV system, Cathexis Server and off-site monitoring capabilities. The approximate value of the work undertaken was R308,754.25.

494. Save in respect of its value, Mr Makwetla testified that Mr le Roux's version, generally, about the security installation that was done by Bosasa at his residence is accurate. In providing context to the matters raised, Mr Makwetla testified that he received a telephone call in early-2015 from Mr Watson, requesting an urgent meeting. Mr Makwetla obliged and met with him. At the meeting, Mr Watson raised concerns that the DCS did not understand the catering industry which, according to Mr Watson, was on the verge of a crisis. Mr Watson indicated that an upward adjustment to the pricing (of the rates in terms of the catering contract with Bosasa) was required. Mr Watson explained to Mr Makwetla that two other companies also providing catering services to the DCS at the time and that Mr Watson had discovered that these companies' rates were higher than Bosasa's rates. Mr Watson had requested that Bosasa be paid at the same rate as the other two companies. He requested the Ministry's intervention to assist in the renegotiation of the rates because Bosasa's catering operations were not making money. Mr Watson indicated that Bosasa should be paid at the same rate as the other two companies and requested Mr Makwetla's assistance. Mr Makwetla took this suggestion to the accountant general of the Department.

495. During a discussion about the festive season that had recently passed, Mr Makwetla informed Mr Watson of a burglary that had taken place at his residence in Johannesburg and explained that he had been unable to source a service provider to install an electric fence at his premises because of the time of year. Mr Watson indicated that Bosasa could assist him very quickly. Mr Makwetla testified that he was surprised because he had visited Bosasa in December 2014 to familiarise himself with its operations and the services being provided to the Department, and that he was not aware that Bosasa was involved in home security. Mr Makwetla said that he was pleased to be advised that Bosasa did home security and had asked Mr Watson to send a team to his residence to do an evaluation and to provide a quotation.

496. Mr Makwetla was questioned on whether he found it strange that Bosasa would provide him with security services when it had a contract with the Department and had requested his intervention on its behalf regarding its rates in terms of its contract. He said "[n]o, not at all" because he requested a service that he was going to pay for, so there was no conflict of interest. He further pointed out that Mr Watson had requested his assistance on the rates before he raised his home security.

497. When Mr Makwetla returned to his residence a week or two after he had met with Mr Watson, he found that the installation of security features was almost complete, and the only outstanding work was because the Bosasa team did not have access to the inside of his house. He arranged for his son to allow them access during the week to complete the work as he was in Cape Town during the week and lived in a government house in Pretoria. Mr Makwetla testified that he telephoned Mr Watson enquiring about the cost because he had not yet been provided with a quote. Mr Watson said that it should not worry him and that he would explain everything when they next met. Mr Makwetla was anxious because he observed aspects of the installation that he had not requested and did not understand the purpose of and was keen to meet with Mr Watson as soon as possible.

498. Mr Makwetla testified that he could not do much at the time because the works were almost complete and because of his relationship of mutual respect with Mr Watson. He did not want to undermine their comradeship and he sought a resolution in a way that would not suggest that he was "playing to the gallery and wanting to make [himself], you know, a better more disciplined person in terms of, you know, appearance, you know, to procedure."

499. Upon his return to Johannesburg at the end of the week, Mr Makwetla met with Mr Watson who said that he would not charge him for the work because the cost was insignificant to him. Mr Makwetla said that he was shocked at the time because he thought that Mr Watson would appreciate that he could not make such an offer because Bosasa was doing business with the DCS at the time. Mr

Makwetla explained to Mr Watson that he could not accept a favour from Bosasa for this reason. Mr Makwetla also testified that he did not expect Mr Watson to make such a proposal because he had heard about reports in the media about Bosasa, as far back as six years prior to 2015 when he was the Premier of Mpumalanga, and that a person would not want to be involved with Bosasa.

500. Mr Makwetla testified that he resolved to take the matter up with then President Zuma because Mr Watson had indicated that he had access to the President whom he saw from time to time. Mr Makwetla was of the view that the President would take it up with Mr Watson and explain that it could not be allowed. Despite several attempts by Mr Makwetla to meet with President Zuma, no meeting took place. Mr Makwetla indicated that he secured a meeting with President Ramaphosa in December 2018, although he had requested a meeting from January 2018 to brief him about the matter. By the time he met with President Ramaphosa, the fact of the installation at his residence had been made public. Mr Watson had contacted him, acknowledged that Mr Makwetla had been correct and apologised for what he had done. Mr Watson indicated that he would send an invoice to Mr Makwetla who advised Mr Watson that the damage had been done and that he should direct his apology to Parliament's Ethics Committee. Mr Makwetla attached a draft letter that Mr Watson had sent him at the time to his submission to the Ethics Committee. In the letter, Mr Watson proposed that Mr Makwetla pay the amount to a charity organisation, which Mr Makwetla refused to do instead insisting Mr Watson send him the invoice.

501. The invoice was for an amount of R90,000 including VAT but it was not itemised. Mr Makwetla indicated to Mr Watson that he "[did] not have that budget" and that he was only going to pay for the items that he had requested and not for the items installed that he had not requested. Mr Makwetla paid R25,000, which was never queried or disputed by Bosasa. Mr Makwetla testified that he did not obtain a quotation to assess the value of the work at the time; instead, he used a previous report by the government that had assessed the security measures at his residence. Mr Makwetla had made the payment by the time that he met with President Ramaphosa. The payment was made in two separate amounts – one of R15,000 (for the installation of the electric fence) and a second of R10,000 (for the repair to the home installation). It was done on this basis because Mr Makwetla did not have the full amount at his disposal to pay at one time.

502. The Ethics Committee found Mr Makwetla guilty of breaching certain provisions of the code in that he had breached the public trust when he allowed Bosasa to conduct work at his private residence that was not paid for. Mr Makwetla explained that he did not agree with the Ethics Committee that buying from a company that did business with the Department was a conflict of interest. Mr Makwetla indicated that there may be circumstances where it would differ and be dependent on the specific facts. He said that he had requested a quote from Mr Watson because he had still wanted to confirm the amount to protect himself. Mr Makwetla admitted that he knows now that doing so was a conflict of interest but that at the time, he did not know that a situation such as this would arise.

BOSASA AND THE ANC

The "War Room" for the ANC

503. Mr Agrizzi referred to the setting up of operational centres for elections as the "War Rooms". He was asked to explain what the War Room referred to in a newspaper article was, how it came about that Bosasa funded and created the War Room, and how it was run. Mr Agrizzi testified that "War Rooms" were set up for Mr Zuma for the ANC's national conference in Mangaung in 2012 and for the ANC for the national elections in 2014 and the local government elections in 2016 and certain other elections. Although Mr Agrizzi was told to get the centres running, he did not get involved in what he referred to as the "nitty gritty" because this task would consume the company for up to two or three months at a time.

504. Mr Agrizzi testified that Bosasa had a massive call centre. One half dealt with government fleet contracts. The other half was vacant. It was initially built to deal with the integration of CCTV access control for the DOJCD but that never happened. Mr Agrizzi was told to kit out the centre with new

computers, new video boards and ANC branding. They also had to convert the lodge for volunteers and provide them with food three times a day because some Ministers were at the facility. Mr Agrizzi said, if he asked a question about these War Rooms, he was told to just shut up and do it and that everything, like the SIU matter, would go away.

505. Mr Vorster testified that in approximately 2014, he was instructed by Mr Watson, Mr Leshabane and Mr Gumede to set up the vacant half of the Kgwerano call centre for the ANC to run its call centre prior to the national elections. All related expenses were covered by Mr Vorster's allocated budget for Kgwerano.

506. In response to an email produced by Mr Agrizzi which appears to be a report of the call centre statistics and canvassing information reports, to Ms Mokonyane's PA, Ms Mokonyane pointed out that there was nothing untoward about the contents of the email. The email was providing information in terms of canvassing and voter turnout. She indicated that she only had brief interactions with Mr Agrizzi when operations were live at events such as this and all arrangements were done between Bosasa and the ANC directly and not with Ms Mokonyane personally.

507. Mr Vorster testified that, after the national elections, Bosasa Operations paid for a function at its premises which was managed by the general manager of the office park, Mr Allister Esau. The process was driven from the ANC side by Ms Mokonyane. Mr Agrizzi was asked by the Chairperson whether Bosasa's name was up for everybody to see at the War Rooms. Mr Agrizzi explained that Bosasa was not branded everywhere; however, it was done subtly. For example, people would eat in the diner and see the Bosasa campus and would be impressed by what they saw.

508. Mr Agrizzi explained that people would know that Bosasa was involved because there were many times where Ministers and MECs visited the facilities. Mr Agrizzi indicated that the installation and its operation for Mangaung lasted two months. The installation and operation for the national elections ran for two to three months. This operation was stationed at the Bosasa head office. The call centre at the Bosasa head offices housed 100 call centre seats and it was split in two – the operational side on the right-hand side and the left-hand side is reserved for the "War Room" type of operation.

Response by the President of the ANC

509. In his opening statement before the Commission, appearing as President and former Deputy-President of the ANC, President Ramaphosa stated that the government and the governing party would not shy away from appearing before the Commission so that they may shed light on the matters it is dealing with and assist the Commission in fulfilling its mandate. President Ramaphosa indicated that the Commission is the instrument through which South Africa as a nation seeks to understand the nature and extent of state capture and to confront it, to hold those responsible to account and to take the necessary measures and steps to ensure that such events never occur again. President Ramaphosa explained that the ANC's position was to support the objectives and work of the Commission, knowing that it would be placed under great scrutiny and that the process of examining matters would very likely be difficult and painful for the ANC.

510. In the President's affidavit, he explained that, despite the absence of an official policy on donations, there is an expectation in the ANC, based on the ANC constitution, its principles and values, that the ANC would not knowingly accept monies that are the product of a criminal act, are offered in exchange for favours or from a source known to engage in illegal or unethical activities. President Ramaphosa confirmed the principle that the ANC would not knowingly receive funding from tainted hands. He explained that breaches of the principle present a problem because the money would have already been donated to the ANC, and, as a political party that is strapped for cash, the money would be used for a variety of activities that would not allow for a refund. President Ramaphosa further explained that these issues would be addressed through the Political Funding Act, which would bring about transparency and was in many ways "revolutionary".

511. The evidence leader stated that it must have been known to parties in government, the administration, and the executive that Bosasa was heavily reliant on government contracts, particularly the DCS, and

that it must have been known that the ANC benefitted as well, including through the elections war room and Mr Zuma's birthday party. He asked President Ramaphosa how it could have happened that the ANC continued to receive benefits from a company that relied heavily on government contracts without a thorough investigation of what was taking place. President Ramaphosa responded that "it did happen." He said that it was one of the anomalous events that did happen. He said that it was prominent in his mind to see what they could do to prevent it from happening and that, on the one hand, the Political Funding Act "is going to be our saviour." President Ramaphosa further testified that, if a company donated money to a political party, and in some form does business with government, but the funding is not provided in return for getting contracts, and it happens openly and transparently, then it should not be a problem. Transparency, openness, and a limitation on the amount donated were described as measures of control that would stop any entity being able to have control over a political party.

512. The Chairperson asked, having regard to the number of years that Bosasa enjoyed contracts with government departments and the fact that allegations of its involvement in irregular and corrupt contracts were made public in the media for a long period of time, which the ANC ought to have been aware of, whether the ANC turned a blind eye because it was receiving donations from Bosasa. The President indicated that was one of the issues that he would address at the end of his evidence. He acknowledged that the Chairperson was "absolutely right" and that the ANC should have been aware that there were problems in relation to Bosasa obtaining contracts unlawfully and unfairly.

513. Relating to the matter of party funding, two issues were put to President Ramaphosa. First it is difficult to accept that vigilant members of the ANC would not have known Bosasa was helping the ANC through donations and benefits, Second, given that Bosasa was the recipient of large contracts under dubious circumstances from government, how could it be that the party continued to receive benefits from and be financed by Bosasa.

514. President Ramaphosa considered the above to be a "very valid" query and accepted that one should have been aware of this at an earlier stage. He stated that he had visited the election centre which Bosasa financed during the election campaign and it "never really. . . occurred to [him that Bosasa was] bank rolling or [that it] was financing in full that whole centre for – on behalf of the ANC". He stated that the Treasurer-General and other ANC members who ran the elections were aware, but it did not occur to him. President Ramaphosa reiterated that the ANC would not knowingly and intentionally accept donations from companies or donors who had been involved in criminal activity and it should be regarded as a major lapse on the part of the ANC in accepting the funding from Bosasa, particularly given that it had been proven that Bosasa had obtained its contracts unlawfully. It was put to President Ramaphosa that it is difficult to avoid the conclusion on the facts that, despite stating that the ANC would not knowingly accept donations, there was a breach of this principle in circumstances of the ANC receiving donations from Bosasa while key ANC officials, including the President of the time, knew of the concerns regarding Bosasa's conduct. This was accepted by President Ramaphosa.

515. It was put to President Ramaphosa that the reason why there was no reporting of this specific receipt of donations from Bosasa was that the then President was in control of the party. President Ramaphosa responded "Yes, certainly the President plays a very key role in the life [of] the party . . . she leads . . . and provides leadership and gives direction".

516. Turning to the issue of the CR17 donation from Bosasa into the FNB account, President Ramaphosa stated that there were aspects that needed to be considered:

    516.1 The campaign managers had taken a conscious decision that they would not involve President Ramaphosa at all in the fundraising process. This was to create a wall so that those funders who give money would never think that there is anything that they will get in return for such funding. Although he met some of his funders at dinners, it was merely to advise them of what he was seeking to achieve in his candidature.

    516.2 The campaign managers also solicited money directly from President Ramaphosa which he gave, and it was put in an account. He was not and still is not aware of how those funds were

managed, save to say that there was proper record-keeping and accounting.

517. Seemingly based on hearsay evidence obtained after the event, President Ramaphosa testified that one of his colleagues approached one of the Watson brothers whom the colleague knew from many years previously in the ANC and UDF structures. The Watson brother referred to must be Mr Gavin Watson, because President Ramaphosa referred to his colleague as knowing him "before he passed away". The colleague specifically indicated to Mr Watson that he wanted him to provide funding in his personal capacity and not through the company. However, the news reports seem to suggest that this money came from Bosasa, although he thought "the money never really came from there".

518. President Ramaphosa was "far away from the finances that financed the CR17 Campaign". He commented that the ANC has arrived at a situation where there are formal campaigns that are now mounted for people to be elected to positions when it should never be a campaign-style type of contestation for leadership. He considered this approach to be regrettable. A billion rand was not raised in funding. President Ramaphosa was told that the amount that was raised was some R 300m or so.

519. President Ramaphosa made it clear to his colleagues that he never wanted to be part of a campaign that descends into "deviant . . . behaviours that we talk about in the ANC about vote buying. And I said that I would rather lose the race . . . than have votes bought."

520. The campaign funds were used to transport people, for food costs, to hire venues, and for purchasing paraphernalia like T-shirts and caps to be given out for the campaign. There is still a debt that is to be paid after that campaign that happened in 2017. The people who were running the campaign were methodical about recording the funds received and the source of these funds. At times, these funds were paid into the accounts of other persons so that they could be used for venues, etc. President Ramaphosa confirmed that he was never involved in this.

521. People who donated to the campaign did so before the new law on political party funding came to be and they expected their identity and the fact that they donated to a campaign be kept out of the media. The campaign managers agreed to this confidentiality and President Ramaphosa did not know how much specific donors contributed. President Ramaphosa claimed that there was nothing sinister about the CR17 campaign funding. Mr Watson may have transferred money from one account to another which gave the Public Protector the perception that money was being laundered, but there was no such money laundering.

522. After the story regarding the alleged Bosasa's contributions broke, President Ramaphosa said to the NEC of the ANC that they needed to regulate how internal leadership contests are managed in the ANC, i.e., the issue of funding, the management of campaigns, how money should be given and issues of accountability.

523. President Ramaphosa accepted that:

    523.1 Principles applied to party funding should apply to individual campaigns within the party; and

    523.2 There should be a limitation of how much should be given when candidates are raising money for internal contests to avoid a situation where you could have huge amounts coming from one donor. He referred to there now being a limit of R15m. This would allow for greater transparency, openness, and confidence in the process.

524. President Ramaphosa conceded that there was enough information relating to donations from Bosasa that demonstrated a breach of the principle that the ANC would never knowingly accept donations that were the proceeds of criminal conduct, such that there should possibly have been an internal investigation. However, he pointed out the limitations of a party undertaking such investigations (e.g., the Secretary-General does not have the power to subpoena documents and evidence) but accepted the investigation could have been outsourced.

THE ROLE OF CONSULTANTS, FORMER EMPLOYEES AND RELATED ENTITIES

525. In this section the evidence on the role consultants, former employees and related entities played in furthering Bosasa's business interests is outlined.

526. Mr Agrizzi was introduced to Mr Seopela during 2005/2006 at a meeting with Mr Watson, Mr Mansell, Mr van Tonder, Mr Leshabane and Mr Watson's children at Tasha's Restaurant at the Hyde Park shopping centre. Mr Agrizzi was informed that Mr Seopela was a former bodyguard and driver to the late Mr Peter Mokaba, was a previous ANC Youth League leader, had an LLB degree but had never done articles or practised as an attorney, was very close to the previous detail of the late President Nelson Mandela, was very influential in government circles and had been substantially involved with Mr Fana Hlongwane in relation to the Arms Deal.

527. Mr Seopela became employed in Consilium as a consultant and "was being managed by Dr Jurgen Smith and Watson". Mr Watson and Mr Seopela worked on tenders together. In this regard Mr Agrizzi refers to a video that was in the press during which Mr Watson stands up at an imbizo and calls Mr Seopela and asked him to explain as the "Commander" what must be done at night. Mr Agrizzi explained that they would talk about having caucus tenders at night and Mr Gumede would get pulled into these conversations. Mr Seopela was also instrumental in arranging the meeting with Mr Vincent Smith in 2011 when Mr Agrizzi was asked to accompany Mr Watson.

528. During 2011, Mr Agrizzi was instructed by Mr Watson to purchase a new vehicle for Mr Seopela along with a company expense card and company credit card for petrol. These expenses were not deducted from his income.

529. Mr Agrizzi described Mr Seopela's function as consultant to liaise with potential clients of Bosasa and "to get involved with politicians which he had introduced us to." According to Mr Agrizzi he was informed by Mr Seopela that the DOJCD was looking to investigate the implementation of new security systems, including access control and surveillance equipment. This must have been around 2010. Mr Seopela told Mr Agrizzi that he was well-connected with high-ranking officials in the NPA, Hawks and the erstwhile Scorpions. Mr Seopela told Mr Agrizzi and others that Bosasa could benefit from his interactions, which went right up to ministerial level, from tenders that were coming out.

530. To this end, Mr Agrizzi was instructed by Mr Watson to make cash available to Mr Seopela for purposes of making payments to influential persons. Sometimes, but not always, Mr Seopela would inform Mr Agrizzi who the payments were destined for. However, the instruction from Mr Watson was that whatever Mr Seopela asked for should be handed over. Although Mr Watson did not require this, Mr Agrizzi would always still check with Mr Watson about the monies handed over to Mr Seopela, even if it was after the event.

531. What impressed Mr Agrizzi about Mr Seopela is that the information which he provided based on his influence would later turn out to be verified as being correct. This was particularly so in relation to the information he gave about the SIU investigation into Bosasa, referred to in more detail above. Mr Agrizzi became involved in supplying the cash to Mr Seopela from 2009 onwards.

Payments and the connection to Bosasa's contracts with the DCS

532. Mr Agrizzi confirmed that all monies handed over for purposes of bribery were recorded in a black book, as discussed above. Mr Agrizzi then went on to refer to specific beneficiaries of the payments arranged through Mr Seopela. He confirmed expressly that these were bribes. Payments were made monthly. Bribes to officials in the DCS were initially in the amount of R500,000 per month and, after Mr Tom Moyane was appointed as National Commissioner of DCS, increased to R750,000 per month. These payments continued during 2008 to 2016. The increase from R500,000 to R750,000 per month was specifically attributed to the appointment of Mr Moyane as Commissioner by Mr Seopela. At the time of these payments, Bosasa was enjoying the benefits of contracts with the DCS.

Payments and the connection to Bosasa's contracts with the DOJCD

533. The security contract for the DOJCD was awarded to a company within Bosasa, being Sondolo IT. Seemingly there was an understanding that 2.5% of the total contract value would be paid out over time to officials of the department by way of bribes. 2.5% of the contract value amounted to R15 million in total. From his own knowledge, Mr Agrizzi was aware of four names amongst the DOJCD officials who were receiving payments. These were Ms Masha who had a position in the security section within the DOJCD, Mr Norman Thobane, Ms Mamsi E Nyambuse head of security, and the fourth person whose name he could not remember at the time of giving evidence. These were smaller amounts in comparison to those paid to some of the other officials. Mr Agrizzi was present when some of these were handed over by Mr Gumede of Bosasa. He clarified that he was present on one of the payments to Ms Masha. The other three he was present on more than one occasion. At a point during his evidence in relation to the DOJCD officials who, to his knowledge, received payments, Mr Agrizzi asked to go back to his testimony in relation to Ms Mokonyane. Mr Agrizzi accepted that this was not entirely consistent with his earlier evidence to the extent that it suggested that Bosasa did not receive anything in return from Ms Mokonyane.

534. Reverting to the payments made to officials of the DOJCD, he referred to payments which he said he had been told were made to Dr De Wee, Chief Operations Officer of the DOJCD at the time. This name was mentioned to him as a recipient of payments by Mr Seopela. Mr Agrizzi recalled an occasion when he was told that he was late with packing a delivery of cash in an amount more than R2 million and he was informed that Dr De Wee was very upset with him because he was late in getting the cash delivered to Mr Seopela. This was around 2013/2014. Mr Agrizzi understood that this payment was to be made to a group of people of whom Dr De Wee was one.

535. Dr De Wee, in his statements filed in terms of Rule 3.4, denies that Mr Seopela had any basis for allegedly mentioning his name to Mr Agrizzi. He denied that he received any payments or was involved in any other wrongdoing and could therefore not have been upset with Mr Agrizzi for any alleged late delivery of money to Mr Seopela. He also made the point that Mr Agrizzi's evidence about him was hearsay. In his oral evidence, Dr De Wee read out the statement submitted in support of his Rule 3(4) application for purposes of it being recorded under oath. The statement incorporates strenuous denials that Dr De Wee was aware that Mr Seopela was receiving money from Mr Agrizzi and that he received money from Mr Seopela, and that Mr Seopela would have had any basis for mentioning his name or stating that he (Dr De Wee) was upset with Mr Agrizzi because of a late delivery of money. He pointed to the harm suffered to his dignity and reputation. He confirmed that he was Chief Operations Officer (COO) for the DOJCD from 1 April 2005 until 30 June 2015. Prior to that, he was Director-General for the Free State Province. He was responsible for four directorates within the DOJCD, including the security and risk management directorate. He thus had oversight, management, and control in relation to all the aspects concerning the operations within the security and risk management directorate. The Chief Director of the Directorate reported to him.

536. Dr De Wee asserted that he was not intimately involved in procurement because this was largely driven from the office of the Chief Financial Officer. However, there were one or two occasions when he chaired the Bid Evaluation Committee ("BEC), which makes recommendations to the departmental Bid Adjudication Committee ("BAC"). He also at times had acted as Director-General. Dr De Wee also explained the concept of a change of scope during implementation of a tender. That, too, had to follow a particular process.

537. Reference was made to a service level agreement between the DOJ&CD and Sondolo IT dated 15 July 2009. The contract was for the supply, delivery, installation, commissioning, support and maintenance of a comprehensive CCTV alarm and access control system at various nominated court buildings. The amount of the bid was R601,863,308.80 in respect of 127 court buildings. Mr De Wee's signature does not appear on the contract. The agreement in question was signed on behalf of the DOJCD by a Deputy Director-General, Mr Vusi Shabalala.

538. Dr De Wee confirmed that he was on the BEC for this contract. As COO of the DOJCD he "might have been the Chairperson of the BEC". Both the BEC and the BAC awarded points. Dr De Wee

referred to a memorandum dated 10 June 2008 from his office to the BAC and pointed out that the fact that the bid was issued on 29 February 2008 and closed on 20 March 2008 showed that the market was tested in terms of the PFMA. He could not recall whether it was a closed or open tender. The memorandum also records that pre-qualification was done and, from that process, one bidder was recommended. The bid was evaluated by the BEC on 5 June 2008. The criteria were in the ratio 90/10 where 90 was for price and 10 for functionality. As the memorandum records, the BEC concluded that the recommended bidder's price was fair and market related. Dr De Wee confirmed that two legal opinions were sought before the recommendation was made by the BEC, one from the Department of Justice Law Enforcement Unit and the other from National Treasury. In response to the question why these two opinions were sought, Dr De Wee said that they were very worried about the efficacy of physical security in the form of guards with batons and questioned why they were relying solely on that when the security industry had modernised security by using technology.

539. Dr De Wee's attention was drawn to the forensic report prepared by Grant Thornton. They worked out that, considering that no services were delivered at 32 of the 127 court buildings, there were actual cost overruns on the agreed contract price, which amounted to R177 million, constituting unauthorised expenditure. Dr De Wee asserted that proper authorisation was obtained for the R177 million expenditure. He pointed out that the ultimate cost was R567 million which was less than the R601 million contract price. He also asserted that the changes in contract price were brought about consistently with schedule 2 to the SLA which established an operational steering committee with equal representation from each of the two parties to the contract.

540. Dr De Wee referred to paragraph 3.2 of a memorandum dated 8 February 2015 from the Chief Director: Risk Management and the Director: Security Management, to the Director-General via Dr De Wee and the Chief Financial Officer. This refers to delays in signing the SLA, which were due to "internal frustrations" and limited cooperation from the Department of Public Works and SAPS, leading to a rapid risk assessment after signing the SLA, which then led to the discovery of a wide range of changed or unanticipated circumstances at the various implementation sites.

541. Dr De Wee was asked why, if 127 facilities were contracted for and only 95 were completed, Sondolo IT received full payment for their services. In response, Dr De Wee referred to the Grant Thornton forensic report detailing costs of the security installation.

542. Dr De Wee was referred to a document being an internal memorandum dated 9 December 2010 from both the BEC and the BAC to the Director-General pertaining to the adjudication of a bid for the appointment of a service provider to render 24-hour security guarding and special services at various offices. He confirmed having signed the document in the capacity of Acting Director-General of the Department. His signature reflected approval of option 2 of three options in the memorandum. This option involved Bosasa sharing the contract with other companies. Dr De Wee asserted that this "counter[ed] the narrative that Bosasa was privileged in the Department of Justice". It evidenced a move away from monopolies and the giving of an opportunity to as many service providers as possible.

543. Dr De Wee was referred to the minute of a briefing given by the DOJCD to the portfolio Committee on Justice and Correctional Services on 28 March 2011. The Department was confronted about awarding tenders to Bosasa while it was being investigated by the SIU for corruption. The minute records that Dr De Wee in his capacity as COO of the DOJCD answered, saying that this was recently of concern to the department as well. He informed the committee that the tenders were compliant and, although cancellation had been considered, none of Bosasa's directors had been charged and several departments had awarded to, or renewed contracts with, Bosasa. For this reason, the DOJCD had continued with the contract.

544. Dr De Wee confirmed that this maintenance contract related to the R601 million tender. It arose from a query in relation to whether the original contract included or excluded maintenance, which this new contract was concerned with. Before the evidence leader could take up the issue of the timing of the new contract in relation to Dr De Wee's knowledge of the corruption allegations against Bosasa, Dr De Wee intervened to refer back to the minute of the Portfolio Committee where he had pointed out

that, if contracts with Bosasa were blocked on the basis of the SIU report and hearsay alone, the PFMA and regulations' requirements of objectivity, fairness, genuine competition and avoidance of discrimination were likely to be violated.

545. At this point, the Chairperson pointed out to Dr De Wee that there were allegations of corruption involving Bosasa and the DCS in the press long before 2010. The Chairperson enquired how it was possible that in those circumstances, where there were serious allegations of corruption against it, Bosasa was able to continue getting contract after contract from government departments. In response, Dr De Wee suggested that one could not always rely on the media because the media can get it wrong. He said that there were concerns about it but that

> the difficulty that all of us were confronted with was that we did not have a clear basis to act on this matter. And like I say, if we knew then what we know now, I am sure a different set of considerations would have been made because we share your concern.

546. The Chairperson made the point that, if faced with two job applicants, one of whom had serious corruption allegations against it, one would not hire the job applicant facing corruption allegations over the one who did not. Dr De Wee accepted this but said that "this is a question for reflection from all of us and this is where we hope that your report will guide us on this matter." Dr De Wee filed a further affidavit dated 10 August 2021 denying all knowledge and participation in corrupt activities to influence tender outcomes and always asserted compliance with relevant legislation, as well as observing that if he had acted on hearsay and media reports, he would have risked non-compliance with the procurement process.

Payments and the connection with the fleet management contract

547. Mr Agrizzi also testified about a payment relating to the fleet management contract for Kgwerano, also known as the RT62 contract. Mr Agrizzi would have to pack R300,000 per month which would go via Mr Leshabane to be delivered to various officials. Mr Agrizzi clarified that these payments would sometimes be handed to Mr Leshabane and sometimes to Mr Seopela for distribution to officials. When the money was handed to Mr Seopela he would indicate where Mr Agrizzi was to meet him. Sometimes it would be alongside the road. Sometimes it would be at Monte Casino in the parking lot at the Palazzo Hotel. Quite often it would be in a restaurant such as Tasha's Morningside, or at the Fishmonger at Thrupps Centre, Illovo. Sometimes it was at a petrol station, and he would follow him from the petrol station on "some obscure road and then stop halfway and then hand it over." About 70% of the time the payments would be made via Mr Seopela and the balance would be via Mr Leshabane.

Mr Danny Mansell

548. Mr Agrizzi testified that he met Mr Mansell for the first time when he went to Dyambu. Mr Mansell was exceptionally close to Mr Watson, and he was a shareholder in the business. In addition, Mr Mansell and Mr Watson had been involved in some dealings in the Small Business Development Corporation. Mr Smith provided this information to Mr Agrizzi.

549. Mr Agrizzi testified that Mr Mansell was the link between Mr Mti and Mr Gillingham, that it was Mr Mansell who would write up the specifications that were sent to Mr Agrizzi and who was the first person to really get involved with the DCS. He also testified that Mr Mansell left Bosasa after an acrimonious fight with Mr Watson. Mr Agrizzi described the fight as being very embarrassing and Mr Mansell left after he was paid an amount of money. Mr Agrizzi stated that Mr Mansell blamed him for interfering with Mr Watson, which he never did. Mr van Tonder confirmed that there was a disagreement between Mr Watson and Mr Mansell which led to Mr Watson acquiring Mr Mansell's shares in Dyambu Operations. However, Mr Mansell reappeared on the scene in later 2003/2004. Mr van Tonder recalled that this was because his services were required in a potential business deal with Rand Water Board which involved cattle. Mr Agrizzi testified that, upon his return, Mr Mansell was

actively involved in building and construction with Riekele at the company's facilities in Randfontein and another hostel in Luipaardsvlei.

550. Mr Agrizzi stated that Mr Mansell was involved in meetings with Mr Mti and Mr Gillingham as well as Mr Watson upon his return. The purpose of these meetings was to arrange for amongst other things payments from Bosasa to his company called Grande Four (Pty) Ltd. Mr van Tonder testified that Mr Mansell introduced him to Mr Gillingham during a visit to the Bosasa offices by officials of the DCS. During this time, Bosasa had commenced extensive upgrades on the kitchen at Lindela and the Youth Centre in Krugersdorp. Mr van Tonder was told that the visit by the DCS officials was to prepare for a kitchen tender.

551. Mr van Tonder testified further that on 25 February 2005, Mr Mansell arranged that he fly Mr Gillingham in a private aircraft to Mafikeng and back the next day. This was paid for by Bosasa. Mr Mansell merely indicated that this trip was to enable Mr Gillingham to "meet people in Mafikeng". Mr Agrizzi testified that after having done the technical management of four tenders for the DCS, Mr Mansell and his son Jarod started doing work for Phezulu Fencing and Sondolo IT. A company called L&J Civils was used and this was the entity periodically used to purchase items for Mr Gillingham and Mr Mti. When asked whether the books for Grande Four and L&J Civils were ever dealt with, Mr Agrizzi responded that he would often walk into the office and Mr Perry would be sitting with Jarod and Mr Mansell busy with cheque books and stubs and doing a reconciliation of what payments had to be made by Bosasa to Grande Four.

552. In 2012 following Adv Willie Hofmeyr's report to Parliament on Bosasa, Mr Mansell arrived at Mr Agrizzi's office early one morning. He insisted that Mr Agrizzi call Mr Watson as Mr Mansell was extremely nervous and felt that Mr Watson had left the blame on him. Mr Mansell indicated that he wanted to leave South Africa. When Mr Watson arrived that morning, he instructed Mr Agrizzi and Mr van Tonder to put everything in place. Mr Agrizzi stated that the instruction received from Mr Watson was to relocate Mr Mansell to the United States of America. Mr van Tonder recalled Mr Watson informing him that Mr Mansell would be emigrating and instructing him to accompany Mr Mansell to the US to ensure that he does not turn back. The air tickets for Mr van Tonder and the Mansells were paid for by Bosasa.

553. Mr van Tonder testified further that there was a concern that Mr Mansell's passport might have been blocked because of the SIU investigation. Mr Leshabane used his contacts in the DHA to ensure that customs control would not block Mr van Tonder and Mr Mansell at ORTIA. Mr van Tonder recalled Mr Mansell appearing "extremely stressed out" at the airport and had tears in his eyes because he could not accept the reality of having to emigrate. Mr van Tonder described feeling sorry for Mr Mansell and referred to an email in which Mr Mansell stated that he had to start over five times since beginning his association with Mr Watson.

554. Mr Agrizzi testified that a company was established in the USA called Safe SA Fences America. Bosasa agreed to pay Mr Mansell $7,000 USD a month for as long as he was alive and stayed in the USA. Mr van Tonder confirmed this arrangement with reference to invoices from Mr Mansell and explained that Mr Mansell needed to stay in the US because he was very involved with Bosasa's unlawful dealings in the past, specifically with the DCS. Mr Agrizzi stated that, in exchange, Mr Mansell agreed not to divulge any details of Bosasa and to remain in the USA. Mr Mansell would invoice Bosasa monthly. Bosasa also helped Mr Mansell in his application for residency in the USA.

555. Mr Agrizzi testified that the work specified on the invoices from Mr Mansell was not actually done, it was fictitious. Mr van Tonder confimed this. The amounts were deducted as expenses in the books of Bosasa. Mr Agrizzi knew that the payments to Mr Mansell continued until he left Bosasa in December 2016.

556. Mr van Tonder testified that Mr Mansell requested that Bosasa assist him in acquiring American citizenship. To this end, Mr van Tonder and Mr Agrizzi signed a letter to the USA Citizenship and Immigration Services dated 21 February 2017 in which they stated that Mr Mansell had been transferred to the US by Bosasa to market speciality high security fences. The letter further records:

556.1 Mansell American Inc. d/b/a Safe As Fences is a subsidiary of Solectric CC, a South African company that operates as a security fencing contractor providing gate automation and perimeter security and access control.

556.2 Solectric CC had a working relationship with Bosasa for several years and in February 2015, Bosasa Operations (Pty) Ltd formally acquired Solectric CC and Mansell American Inc.

556.3 Mr Mansell founded Solectric CC in 2008 and served as its CEO and CFO before transferring to the USA. As CEO of the company, he determined the overall direction of the company and the types of projects to be undertaken. He managed government contracts for fencing construction and installation.

556.4 Mr Mansell transferred to the USA in April 2014 to lead the marketing and business development of the USA office.

556.5 Mr Mansell is the Operations Manager of the business and will oversee company operations, planning, systems, and controls. He will oversee the work of the Finance Manager and provide know-how for a joint venture between Bosasa and the South African Public Private Partnership Correctional Services model.

556.6 Mr Mansell would continue to receive an annual salary of $45,000 USD per year plus travelling and accommodation expenses.

557. Mr van Tonder testified that, contrary to what was stated in this letter, Mr Mansell was not involved with Bosasa. When Mr Mansell left in 2012, Mr Agrizzi was tasked to take over the role that Mr Mansell had played with Mr Gillingham. This included taking care of Mr Gillingham's meetings and attending a lunch once or twice a month with Mr Gillingham to keep him under control.

Mr Venter and Miotto Trading

Miotto Trading

558. Mr Venter testified that around 2013 he advised Bosasa to make use of a company belonging to Dr Erasmus, the tax attorney, Tax Risk Management Services ("TRM Services"), which assisted Bosasa and Mr Venter with the SeaArk SARS audit. Bosasa was hesitant to do so, according to Mr Venter, because Dr Erasmus is a well-known litigator against SARS and they did not want to attract attention. D'Arcy-Herrman was still providing auditing services to Bosasa at the time.

559. In 2016, it was agreed that TRM Services would invoice a dormant company of a family member of Mr Venter, Miotto Trading, for services provided to Bosasa. Miotto Trading would then on-invoice Bosasa to recover the fees for TRM Services/Dr Erasmus. Mr Venter testified that he had questioned the practice and was told by Mr Agrizzi and Mr van Tonder not to worry as they were signing off the invoices. This practice continued until Mr Agrizzi left Bosasa in 2016, with the last invoice from Miotto Trading being issued in January 2017. Mr Venter testified that he used Miotto Trading for various things, that he was reflected on the company records but that the intention was to change it, that he considered himself the financial manager of the business and that he took the business over from a family member.

560. Once TRM Services had invoiced Miotto Trading for actual services rendered to Bosasa, Mr Venter would approach Mr Agrizzi and Mr van Tonder who would dictate the wording as well as the amount of the invoice to be issued by Miotto Trading to Bosasa. Mr Venter explained that the invoices were always inflated to provide a commission for Mr Agrizzi, Mr van Tonder and himself. Mr Venter testified that D'Arcy-Herrman did not know of his involvement with Miotto Trading. Mr Venter testified further that D'Arcy-Herrman did not pick up the fact that the introduction of Miotto Trading increased the costs of Bosasa because there were invoices and they would have checked the invoices and the payments made.

561. Mr Venter testified that he had proof of payments made by him from Miotto Trading towards the legal costs of Mr Hlaudi Motsoeneng as well as three payments to a company called Moroka Consultants

Training and Development (Pty) Ltd and a payment to a bank account referred to as "EFG2", held at ABSA. He provided these to Mr Agrizzi at the first meeting at Mr Agrizzi's house.

562. Mr Venter confirmed that in the middle of August 2017, on instruction from Mr Watson, he paid two amounts into the trust account of Majavu Attorneys for the legal costs of Mr Motsoeneng. The first payment was an amount of R600,000 on 20 August 2017 and the second of R587,656, was made on 21 August 2017. The money had been paid into Miotto Trading's bank account from Lamozest. Mr Venter described Lamozest as "one of the Gavin Watson group of companies".

563. Mr Venter confirmed that Mr Watson requested him to assist him and Mr Syvion Dlamini, in September 2017, to make three payments to Moroka Consultants. Ms Lindsay Watson prepared a consulting agreement between Miotto Trading and Moroka Consultants but no services had been provided as it was merely a front for the payments to be made. From September to November 2017, three payments of R450,000 were made from Miotto Trading to Moroka Consultants. Mr Venter testified that he did not know who Moroka Consultants were and did not know what the funds were for but was instructed to make the payments and that no services were rendered.

564. Mr Agrizzi testified that the situation with Miotto Trading was explained to him by Mr Venter after Mr Agrizzi left Bosasa. The true reason for the payments was concealed by reflecting that the payments were made to Moroka Consultants for training. This training did not take place. According to Mr Agrizzi, that is how Mr Dlamini and Mr Watson decided to move the funding. Mr Agrizzi testified that Miotto Trading had only two employees, namely Mr Venter and his sister-in-law. However, they invoiced R1.4 million for training. Once that invoice was paid out, the bribes were paid out. Essentially, Miotto Trading was used to make disguised payments and to make payments that could not easily be traced. Mr Venter showed Mr Agrizzi the documentation and that is why Mr Agrizzi included this issue in his statement. He testified that he tested the documentation, and he tested the information submitted by Mr Venter. Mr Dlamini denies that no training took place and avers that Mr Agrizzi has no personal knowledge of these facts as he had left the employ of Bosasa at that time. Mr Dlamini alleges that there was a supplier development agreement between Bosasa and Miotto and that, to the best of his knowledge, services were rendered in terms of the agreement. According to Mr Dlamini, his involvement in matters related to Miotto was when he was copied on any communications and invoices so that he could follow up on these matters in the interests of efficiency.

565. Mr Venter testified that Mr Watson approached him again on 17 October 2017 to assist in making payment of R2.5 million towards the purchase of a residential property for Ms Lindie Gouws. Ms Gouws was a close colleague of the Watsons who used to work at Bosasa and, at the time of Mr Venter's testimony, was still doing the branding and group marketing for Bosasa. Mr Watson instructed Venter to affect a payment of an amount of R3 milliom from his personal account into Miotto Trading's bank account, with R2.5m to be paid to Ms Gouws, as a loan. Mr Watson also instructed that a payment of R500,000 be made to the "EFG2" account. Seemingly this also came from Mr Watson's personal account via Miotto Trading's account. Mr Venter was told that the R500,000 was for a "foundation trust" of Mr Andile Ramaphosa, the son of the then Deputy President, Mr Cyril Ramaphosa.

566. Mr Venter was surprised when he was informed of the R500,000 to be paid for Mr Andile Ramaphosa. He was not aware of the relationship and why Mr Watson would make a payment to the son of the Deputy President. Mr Venter also confirmed that he made a payment from Miotto Trading's bank account in October 2017 in the amount of R500,000 to a beneficiary "EFG2", with the description "social development". Mr Venter testified that Mr Agrizzi was very curious when he mentioned the name "Ramaphosa" to him, despite Mr Agrizzi's testimony that he was not really interested. Mr Venter confirmed that Miotto Trading was used as a vehicle to disguise the true nature of the transaction because otherwise Mr Watson would have paid it from his own account directly. Mr Venter testified that he is not aware of any other payments made to the Foundation or to the account referred to as "EFG2".

567. Mr Venter confirmed that on 6 November 2017, Ms Gouws called and informed him that she would not proceed with the transaction and that he should repay Mr Watson's money immediately. This followed Ms Gouws' meeting with her attorney about issues pertaining to Mr Agrizzi, whom she was "paranoid"

about. Mr Venter confirmed that Mr Watson asked him to assist Ms Gouws on many occasions. One of the tasks he was instructed to do was to register a company called the Exchange Space (Pty) Ltd, to do the marketing and branding of Bosasa. According to Mr Venter, over and above the monthly salary paid to Ms Gouws by Consilium, he now had to pay her an additional gross salary of R42,000 from Exchange Space in order that she could clear a net amount of R24,000, which amount went towards Ms Gouws' bond repayment. The salary from the Exchange Space was purely for the bond repayment, as Ms Gouws was paid by Consilium.

The end of Mr Venter's relationship with Bosasa

568. Mr Agrizzi assembled a group of about 22 people who were going to act together as whistleblowers against Mr Watson. According to Mr Agrizzi, Mr Venter indicated a willingness to join the group and become a whistleblower. Mr Agrizzi facilitated his preparation of a statement for this purpose. After preparing a full statement and in the middle of November 2017, Mr Agrizzi testified that Mr Venter said that he had had a change of heart because he had been offered a substantial amount of money by Mr Watson in return for not acting as a whistleblower.

569. Mr Agrizzi testified that during December 2017, Mr Venter contacted Mr Agrizzi to indicate his wish to re-join the group. Another meeting was arranged which took place at the Chicken Pie on the way to Lanseria at 14h00. Following this, Mr Agrizzi received a call from Mr Venter to say that he had spoken to his wife and decided to go ahead with the whistleblowing, and he sent Mr Agrizzi a signed and commissioned statement before he went away on holiday.

570. Later, during January 2018, on Mr Agrizzi's version, Mr Venter reverted to Mr Agrizzi to say that he had once again had a change of heart after meeting with Mr Watson and had decided against cooperating in the whistleblowing. Mr Venter testified that this was not true as he still had contact with Mr Agrizzi for three to four months and only terminated all communication with Mr Agrizzi in April 2018, after he became aware that Bosasa was monitoring his phone calls and knew he was talking to Mr Agrizzi. According to Mr Venter, Mr Agrizzi would keep him informed of the processes that he had explained through the flow diagrams, that he was busy with the negotiations with Bosasa to take over the contract and keep Mr Venter informed of progress in that regard. In February 2018, Mr Agrizzi requested Mr Venter to provide him with financial information regarding Bosasa's turnover and profits as he knew that Mr Venter was busy with the group's provisional tax at the time. Mr Venter testified that he provided Mr Agrizzi with very limited information and explained to Mr Agrizzi that Bosasa did not trust him fully and that he did not have access to the information he previously had. Mr Venter further testified that persons within Bosasa were leaking information to Mr Agrizzi because he knew where Mr Watson was, where he was going and who he was meeting with, as if Mr Agrizzi was still employed at Bosasa.

571. Mr Venter testified that on a Friday in April 2018, Mr Agrizzi sent him invoices that had been leaked to him via a message and requested that Mr Venter print the invoices, place them in an envelope and take them to Mr Watson. The invoices related to a security company that rendered services to Bosasa and Mr Agrizzi insisted that Mr Venter take them to Mr Watson that same Friday. Mr Venter explained that Mr Agrizzi was suspicious as he did not know the supplier and had wanted to make a point to Mr Watson that he was aware of it. Mr Venter duly took the invoices to Mr Watson and explained to him that the invoices had been delivered anonymously at his (Mr Venter's) office. Mr Venter testified that Mr Watson was very upset when he opened the envelope and saw what was inside. Mr Watson contacted Louis Passano who had taken over from Mr van Tonder and showed him, and both were very upset. When Mr Venter acknowledged that he still had contact with Mr Agrizzi, he was questioned on his loyalty and was told to decide whether he was loyal to Bosasa or not, and whether they would remove them as auditors of Bosasa. Mr Venter had to make the decision and let them know that afternoon that his loyalty was with Bosasa and that the relationship could continue. Mr Venter testified that he believed that Mr Watson knew that Mr Agrizzi had sent the invoices to him and that they had not been delivered anonymously. He believed that Bosasa were monitoring his telephone calls. Mr Venter explained that they accepted his word but that things changed and he was not trusted anymore.

572. The last time Mr Venter spoke to Mr Agrizzi was the Monday morning in April before his meeting at Bosasa. The telephone call with Mr Agrizzi was the usual call he made with Mr van Tonder, Mr Vorster and others every morning and every afternoon, to find out how they were, what had happened, and who they were going to see, and to try and get information. Mr Venter informed Mr Agrizzi that he was meeting Mr Watson that morning. Mr Agrizzi was furious that Mr Venter stopped speaking to him and started threatening him via anonymous email addresses – including PSVenterleaks@pm.me. Mr Venter testified that Mr Agrizzi would email his firm, the South African Institute of Chartered Accountants ("SAICA"), IRBA and various other people about him, threatening that he needs to come clean otherwise consequences would follow. Because Mr Venter did not respond, Mr Agrizzi may have thought that he (Mr Venter) had changed his mind about his statement and going through with being part of Mr Agrizzi's whistleblower group. In August 2018, Mr Agrizzi carried out his threat of exposing Mr Venter and sent his signed first affidavit to D'Arcy-Herrman.

573. Mr Venter testified that the last time he spoke with Mr Watson was in August 2018 when Mr Agrizzi made his statement public. Mr Venter said that he never received any payment from Mr Watson in return for his loyalty. Mr Venter explained that he had been suspended in August 2018 and was asked not to have any contact with Bosasa or its Directors or Mr Watson and so he had no communication with anyone at Bosasa from early September 2018. Mr Venter resigned in September 2018. Mr Venter confirmed that he had no further contact with Mr Agrizzi, Mr van Tonder and Mr Watson and placed on record that Mr Watson had contacted him twice the week before his testimony at the Commission and had left a message for Mr Venter to call him back but that Mr Venter did not return his call.

The circumstances giving rise to Mr Venter's two affidavits

574. The evidence leader dealt with the circumstances surrounding Mr Venter's first affidavit with Mr Agrizzi. Mr Agrizzi confirmed Mr Venter's signature on the affidavit. Files 1 and 2 which are referred to as annexures to the affidavit he said were in the possession of "the attorney who dealt with the matter in the beginning and are still with him at the moment." The affidavit was seemingly based on a structure which was sent to Mr Venter by Mr Agrizzi. The structure was obtained from the affidavit that was done by Mr van Tonder. He testified that at the time the affidavit was deposed to, he [Mr Agrizzi] was in Krugersdorp, while Mr Venter was on holiday in Mossel Bay or George. The Commissioner of Oaths at the end of the affidavit has an address in Mossel Bay.

575. Mr Venter confirmed that he had been requested, in November 2017, to prepare a statement that would reveal Mr Watson's illegal activities. Mr Venter went to Mr Agrizzi's house in Fourways and could recall sitting next to Mr van Tonder who had his statement open on his computer and who guided Mr Venter through the process with Mr Agrizzi dictating some of the wording. Mr Venter testified that Mr van Tonder and Mr Agrizzi would remind him of certain things that had happened which they wanted him to include in the statement. Mr Venter confirmed that he was not requested by Mr Agrizzi or Mr van Tonder to fabricate information and said that they had wanted him to include information which he is aware of and had in his possession.

576. Initially Mr Venter did not want to make a statement but testified that Mr Agrizzi threatened to expose him and that, like Mr Watson, Mr Agrizzi could destroy a person. Mr Venter indicated that he was scared when Mr Agrizzi showed him a table full of files of evidence accumulated over time and said that Mr Venter had a choice, to go down with Mr Watson or to prepare a statement. Mr Venter testified that Mr Agrizzi referred to the use of Miotto and the fact that a boundary wall had been built for him by Riekele Construction and paid for by Bosasa, which had not been declared by Mr Venter. Mr Venter explained that Mr Agrizzi would take advantage of his knowledge of any wrongdoing by a person to expose them.

577. Following various threats sent by Mr Agrizzi to Mr Venter via telegram messages, Mr Venter agreed to meet with Mr Agrizzi and Mr van Tonder in December 2017 before going to Mossel Bay on holiday. Mr Agrizzi showed Mr Venter a flow diagram at the meeting and explained that he was busy with negotiations with the Bosasa Group for the cession of certain of the DCS contracts to Mr Agrizzi. Mr Agrizzi was negotiating in this regard on his own behalf as well as that of Mr A van Tonder, Mr van

Tonder and Mr Vorster.

578. Mr Agrizzi explained to Mr Venter that he would use the evidence he had accumulated as ammunition and that if the negotiations were successful, he would hand back all evidence to Bosasa. A series of flow diagrams had been prepared by Mr Agrizzi, which would be implemented to, if necessary, "bring Mr Watson down". Mr Venter explained Mr Agrizzi's plan as:

    578.1 Mr Agrizzi would use his company, "Malandela Crearis", to run the DCS contract. At the time Bosasa was making approximately R2.5 million to R3 million profit per month and were negotiating a price increase on the contract. Mr Agrizzi believed that Bosasa ought to have allowed him to do the negotiations. This would result in a profit of R12.5 million per month. Mr Agrizzi intended to give Bosasa 30% of the profits, which would have been more than they were making at the time. The potential advantage to Bosasa would be from a reputational point of view, due to the negative media at the time, and that Bosasa would receive an annuity for doing nothing, because Mr Agrizzi would be managing the contract.

    578.2 If the negotiations were successful, they would conclude the cession of the contract and Mr Agrizzi would hand over all documents.

    578.3 If the negotiations were unsuccessful, Mr Agrizzi would leak the information to social media, and "it would trigger something with the banks, it would trigger the auditors, underneath the auditors it refers to IRBA, politicians, [SAICA], he would use all of this against Bosasa, should it be unsuccessful".

579. Mr Agrizzi, the van Tonders and Mr Vorster were concerned about where the money would come from to make payment to them. For this reason, they were in negotiations via Mr Biebuyck for a team payment to them. If the negotiations were successful, they would return the information and files and would sign an anti-whistleblowing and anti-competition agreements. If the negotiations were unsuccessful, the plan included a "non-governmental expose" (sic) including various leaks to the print, electronic and social media with "systematic 1 story per week for 14 weeks from 1st Feb 2018". This would involve exposure of "questionable business interests", "houses CCTV", "VAT and tax fraud" and "payoffs and bribes". The flow chart suggests that this, in turn, would lead to a response from the public, NGOs such as Afriforum, Solidarity and Corruption Watch, banking institutions and various regulatory and prosecutorial bodies. The ramifications for Bosasa would include exposure, public scrutiny, reluctance of banks to provide facilities, reviews of tenders and criminal and related consequences. Mr Venter testified that this was essentially what had taken place over the course of the past few months.

580. Mr Venter was required to decide on whether he would sign a statement at the meeting with Mr Agrizzi and Mr van Tonder. Mr Venter testified that he agreed to do so after he had seen the flow diagrams and heard the plan from Mr Agrizzi. The second draft of Mr Venter's first statement was emailed to Mr Venter by Mr Agrizzi and Mr Venter signed it and emailed it back to Mr Agrizzi on 18 December 2017. He signed it on the same day that it was sent to him, after quickly reading through it. Mr Venter testified that he realised that Mr Agrizzi had changed some of the wording and added some information into the statement but went ahead and signed it.

581. In December 2017, Mr van Tonder sent an SMS or WhatsApp message to an audit partner at D'Arcy-Herrman, informing him that there were several employees that wanted to meet with him in respect of illegal activities by Mr Watson and Bosasa. Mr Venter testified that this was part of the plan that was carried out as per the flow diagram. Mr Venter was advised before the message was sent that it was going to be sent and the message was forwarded to him by the partner once it had been sent. Mr Venter no longer had a copy of the message. The audit partner followed up with Mr van Tonder in January 2018. Mr van Tonder informed the audit partner that he had been advised by attorneys not to meet with him at that point in time. Mr van Tonder did this as a delay mechanism "in order for Mr Watson to see the seriousness about this whole text message to the audit partner (sic)."

Mr Venter's Carte Blanche interview

582. Mr Venter testified that he had no contact with Mr Watson since September 2018 but had contact with an internal risk consultant from time to time, who requested Mr Venter to meet with Mr Gumede and Mr Leshabane. At the meeting with Mr Gumede and Mr Leshabane, Mr Venter was asked to do an interview with Carte Blanche. Mr Venter was informed that the purpose of this interview was to discredit Mr Agrizzi based on the plan (flow diagrams) to sabotage Bosasa as well as the similarities between Mr Venter and Mr van Tonder's statements. Mr Venter agreed to do so. He had the interview with Carte Blanche on the basis agreed with Mr Gumede and Mr Leshabane. Mr Venter further testified that while he only discussed those aspects on Carte Blanche, there was nothing in the interview that was dishonest or untrue. Mr Venter agreed to do the interview for the possibility of future reappointment as tax consultant with Bosasa again.

Consilium Business Consultants

583. As to the company known as Consilium, Mr Agrizzi testified that this company was formerly owned by Dr Smith and, to his best recollection, 10% of the company was owned by Dr Smith's son. When Dr Smith fell ill, the company was transferred to Mr Venter's sister Ms Longworth. That company was owned by Mr Venter and the shareholders were Booi and Nklele for the purposes of BEE compliance. Consilium only had one client which was Bosasa.

584. Mr Agrizzi was asked to comment on Mr Venter's testimony that he had been told that for all members of the Watson family who received money from Consilium, services were rendered, and proper contracts of employment were in place. Mr Agrizzi responded that this was not true. He stated that Dr Smith would bring him an invoice every month and the attached payroll to sign off and Mr Agrizzi was sworn to secrecy as to the fact that there were family members on the payroll. Mr Agrizzi explained that Consilium was developed to cover up what people were earning because the law had changed in that financial statements had to reflect what the highest earners were earning. Mr Watson did not want the black directors to know exactly what they were earning therefore half of their salaries were paid by Consilium and half paid by Bosasa. Apart from the Watson family that were paid by Consilium, Mr Seopela was also paid. Mr Agrizzi referred to it being like a secret payroll and if he could recall correctly, there was Consilium 1 and Consilium 2, meaning that as soon as Consilium 1 reached the threshold, a second Consilium would open on the payroll. Mr Agrizzi explained that this meant that there were apparently two separate legal entities but the directorships and the shareholders were the same.

585. In respect of whether the persons who received monies, purportedly for services rendered or as employees of Consilium, actually did work for Consilium. Mr Agrizzi testified that there was no work done. Mr Agrizzi was asked to comment on Mr Venter's testimony that Consilium was or is a labour broker. Mr Agrizzi responded that Consilium was never registered as a labour broker, but it was intended to perform that service as a separate company to Bosasa. He further elaborated that Consilium never made a profit while Dr Smith owned the company. He described Consilium as being a desk and a computer.

586. Mr Venter testified that Consilium would invoice Bosasa Operations, Bosasa Youth Development Centres and Kgwerano Financial Services monthly for services provided. Mr Venter explained that a spreadsheet was prepared to monitor who was employed in which company. Where they would render services in more than one company, each of those companies would be separately invoiced. Mr Agrizzi was asked to comment on Mr Venter's testimony that Consilium had raised three invoices for Bosasa Operations, Sondolo IT and the Bosasa Youth Development Centres monthly to recover the fees and salaries paid by it. Mr Agrizzi responded by saying that they had to allocate charges to the various companies and that the charges were split amongst the companies so that it would not all be lumped into a single company.

Lamozest

587. Mr Agrizzi testified that Lamozest was created at the pinnacle when there was a major concern about the SIU investigation to look after white employees and senior white management. It would be a company to be established that would charge a fee to Bosasa for special skills.

588. Mr Agrizzi testified that Mr Watson called Mr van Tonder and himself to a meeting which was held in Mr van Tonder's office. Mr Watson advised them that he wanted to start a new company because he could not give them direct shareholding and this company will have a long-term agreement with Bosasa in respect of which they can have dividends from this company. The idea was this company would provide them with bonus payments to develop an entity that the other black directors were not aware of. Essentially, the company would be registered and Mr Agrizzi and Mr van Tonder would charge for their skills. Mr Venter was involved in forming the company and registering it, but it was never used for those intended purposes. Rather, Lamozest became a mechanism to pull funds out of Bosasa to pay for services, building the Watson children's homes and other personal use. Mr Agrizzi described it as becoming a real bone of contention in the company because Mr van Tonder and he were subsequently told that it was not possible to remunerate them from Lamozest and that they should rather look at a new arm's length company. In other words, the promises made to them were simply not kept. Ultimately, most of the profits were taken out of Bosasa and transferred to Lamozest.

Mr Kevin Wakeford

589. Mr Agrizzi testified that Mr Kevin Wakeford was Mr Watson's long-standing friend. Mr Wakeford did not dispute this, providing details of how they met in the 1980s when being recreuited into ANC underground cell. Mr Agrizzi claimed that Mr Wakeford provided consulting services to Bosasa in relation to the negative press the company had received as well as the various audits of both the company and its directors in their personal capacities by SARS.

590. Mr Wakeford explained that he secured a consultancy contract through his company Wakeford Investment Enterprises CC with Bosasa in 2006. This consultancy arrangement was because of Mr Valence Watson's intervention during a time that Mr Wakeford was "unemployable" due to having blown the whistle on the manipulation of the Rand during his time as Chief Executive of the SA Chamber of Business. Mr Wakeford confirmed that he received R50,000 per month (plus VAT) to provide on-going consultancy services to Bosasa, including analysing the broader political economy and assessing the strengths, weaknesses, opportunities, and threats in the business context of the group.

Mr Wakeford's relationship and dealings with Mr Agrizzi

591. It was clear from Mr Wakeford's evidence that he had a strained relationship with Mr Agrizzi. Mr Wakeford described it as being "unproductive from the start" and testified that he had expressed concerns to Mr Watson about Mr Agrizzi's character and attitude. Mr Wakeford's view remained that Mr Agrizzi was a racist and had perjured himself when denying claims of racism. Mr Wakeford described Mr Agrizzi as having built an institutional mode of control around Mr Watson. He described Mr Watson as managing by walking and not a "details" person whereas Mr Agrizzi was "the CEO here". He expressed his view that "if anything went wrong ... he was an inexplicable part of what went wrong at Bosasa". He described Mr Agrizzi as someone that exploited every relationship that he had.

592. Mr Wakeford testified that Mr Agrizzi was motivated to falsely implicate him in the alleged corruption at Bosasa because of (i) of their contentious relationship given Mr Wakeford's relationship with Mr Watson and the Watson family; (ii) Mr Wakeford's non-racial values; (iii) Mr Agrizzi's perception regarding Mr Wakeford's part in the termination of his employment; and (iv) Mr Wakeford's usefulness to Mr Agrizzi to promote the interests of the Democratic Alliance.

593. To demonstrate Mr Agrizzi's vindictive character, Mr Wakeford referred to Mr Agrizzi disseminating confidential Commission documentation to Lord Peter Hain on 23 March 2021 on his publicly available

email address even though Regulations 11(3) and 12(2)(c) prohibits this without written permission of the Chairperson.

594. Apart from his involvement with the DHA, Mr Wakeford was questioned about his involvement in advising Mr Agrizzi and Mr Watson about a Portfolio Committee meeting relating to the DCS and a "judgment call" which Mr Wakeford had said (in an email) had to be made in this regard. Mr Wakeford stated he could not recall the specifics of why he advised Mr Agrizzi and Mr Watson about the meeting, although it was consistent with his function of alerting Bosasa to what is taking place in the Parliamentary and other spheres. The Chairperson pointed out that this Portfolio Committee was holding hearings in connection with the SIU report and serious allegations of corruption against Bosasa at the time. Mr Wakeford said that he "would have encouraged engagement and attendance rather than avoiding those."

595. It was put to Mr Wakeford that the evidence revealed that he had enquired from Mr Agrizzi about job opportunities within Bosasa for acquaintances. Mr Wakeford admitted to doing so on several occasions, explaining that Bosasa was a growing organisation. He stated that there was no response to these requests and no employment opportunities were created for anyone within his network. In return for his services, Mr Agrizzi stated that Mr Wakeford received a monthly fee of R100,000. Again, Mr Wakeford denied that this was their agreement and pointed out that nothing had been produced by Mr Agrizzi to counter this. Mr Wakeford stated that the only months he received R100,000 from Bosasa was as a result of arrear payments or catch-up payments due in terms of his retainer agreement with Bosasa. Mr Wakeford stated that Mr Agrizzi was "adjusting and playing the fool" with his consultancy payments.

596. As to the signing powers within Bosasa to approve invoices, Mr van Tonder explained that any two directors could authorise payment. Mr Watson's signature was not a prerequisite for approval. Authorised signatories included Mr Watson, Mr van Tonder, Mr Agrizzi, Mr Leshabane, Mr Gumede and Mr Leyds. When asked about Mr Wakeford's role during the SARS investigation that spanned over two years, Mr van Tonder indicated that Mr Watson had insisted that he (Mr van Tonder) give continuous feedback on the SARS investigation to Mr Wakeford. According to Mr van Tonder, the only services rendered by Mr Wakeford in respect of the SARS investigation were to attend meetings with Mr van Tonder. Mr Wakeford did not provide any reconciliations, reports, opinions, or advice.

Mr George Papadakis

597. Mr Agrizzi testified that Mr Wakeford approached Mr Watson with the recommendation that Mr George Papadakis be brought on board to resolve Bosasa's issues with SARS. At the time, Mr Papadakis was employed at SARS and the idea was to make representations to him in relation to the ongoing investigation against Bosasa. Mr Wakeford disputes this and testified that no discussion took place with Mr Watson, Mr Agrizzi and himself about using the services of Mr Papadakis, nor had he ever told any party within Bosasa that Mr Papadakis could resolve any issues at SARS.

598. During the section 417 enquiry in the liquidation of African Global Operations, Mr Agrizzi testified that the "issues" at SARS related to the Biorganics tax write-off, which was the "CR continuation exercise". Mr Agrizzi acknowledged in the enquiry that Mr Wakeford was not an attorney or accountant or tax consultant and suggested Mr Andries Van Tonder was better placed to explain the precise ambit of Mr Wakeford's alleged assistance to Bosasa was at the time, other than that Mr Wakeford consulted with Mr Papadakis and Mr Watson "on the SARS matter". Mr Agrizzi testified that Mr Wakeford and Mr Papadakis introduced Mr Watson to Mr Gorbi Mokonyane at SARS.

599. Mr Wakeford testified that Mr Papadakis could never have assisted Bosasa in resolving any major investigation at SARS before 26 February 2009 as no SARS investigation existed before 23 March 2011, given that there was no notice of an initiation of an investigation until the end of 2010. Further, there was no need to ask Mr Papadakis for tax advice because Bosasa had some of the best tax advisors. Mr Wakeford would only ask Mr Papadakis for guidance from an administrative perspective from time to time.

600. Mr Agrizzi also claimed that Mr Wakeford arranged for Bosasa to provide wet and dry cement to a property in Meyersdal owned by Mr Papadakis where a house was being built. Mr Wakeford disputes this.

601. According to Mr Vorster, Mr Watson introduced him to Mr Wakeford in mid-2008. Mr Vorster recalled Mr Wakeford visiting the Bosasa offices often. During late 2009, Mr Watson called Mr Vorster and informed him that Mr Wakeford would instruct him to buy and deliver wet and dry cement. Wet cement was purchased from WG Wearne in Randfontein and the dry cement was purchased from Randfontein Trading Centre ("**RTC**"). Mr Vorster understood the cement was intended for Mr Papadakis.

602. Mr Wakeford explained that his role in assisting Mr Papadakis in 2008/2009 was when Mr Papadakis was building a house and there was a shortage of cement. Mr Wakeford thought that Bosasa had shares in AfriSam and could assist Mr Papadakis in procuring the cement at a cheaper rate. He therefore referred the builder to Mr Agrizzi, who would, in turn, have referred the builder to Vorster. From time to time, Mr Wakeford was phoned by the builder and asked to assist in getting hold of Mr Agrizzi. He claims that there was nothing "malicious" about this, nor was there any quid pro quo. Mr Wakeford said initially in his oral testimony that he understood that "he" (seemingly referring to Mr Papadakis), paid Bosasa for the cement. Later in his oral evidence, responding to questions from the Chairperson, Mr Wakeford said that much smaller quantities of cement than was claimed, were involved and that "there was some assistance and as far as I understand there was payment for it from Mr Papadakis's builder".

603. Mr Wakeford was questioned by the evidence leader with reference to his email communications with Mr Papadakis. Email communications were conducted through Papadakis' wife, Ms Chrisna Engelbrecht, not with him directly. He said this was because Mr Papadakis was "running around all the time".

604. Ms Engelbrecht deposed to an affidavit on 13 August 2020 in response to a request for information by the acting secretary of the Commission on 30 January 2020. Ms Engelbrecht was married to Mr Papadakis in the period January 2009 to January 2014. During this time, Mr Wakeford was introduced to her and he visited the home she shared with Mr Papadakis. From her understanding, the association between Messrs Papadakis and Wakeford commenced in approximately 2002 when they were involved in the Commission of Inquiry into the rapid depreciation of the exchange rate and related matters. It was Mr Wakeford that had introduced Mr Papadakis to the Watsons. Mr Valence Watson occasionally accompanied Mr Wakeford to Mr Papadakis' house.

605. Ms Engelbrecht states she did not have any personal or business dealings with Mr Wakeford. However, she had several interactions with him solely because of his association with Mr Papadakis. Ms Engelbrecht confirmed having used the e-mail address chrisnae@gfia.co.za during the period January 2009 to January 2014. This was her work e-mail address and Mr Wakeford sent e-mails intended for Mr Papadakis to this address. Ms Engelbrecht would print these e-mails as well as attachments and provide them to Mr Papadakis. Examples of these emails were attached to Ms Engelbrecht's affidavit. Mr Wakeford referred to Mr Papadakis in these emails as either "advisor" or "George". Despite printing the emails from Mr Wakeford as described above, Ms Engelbrecht claimed to have no knowledge or information of the services or of the association between Messrs Papadakis and Wakeford nor was she aware of the services Mr Papadakis provided to Mr Wakeford or Bosasa.

606. Ms Engelbrecht referred to information obtained from SARS dated 3 April 2020 which recorded that Mr Papadakis' first day of employment with SARS was 10 March 2008 and on 1 July 2012 he occupied the position of Executive: Specialised Auditor. This position was on a fixed term basis from 1 July 2012 until 31 July 2015. However, Mr Papadakis submitted a resignation letter on 3 June 2013 and the SARS personnel system shows that his employment was terminated on 14 September 2013. Based on this, Ms Engelbrecht confirmed that Mr Papadakis was employed by SARS over the period 2008 to 2013.

607. Ms Engelbrecht confirmed that she was a trustee of the Evergreen Environment Trust for the period February 2005 to March 2017. Mr Papadakis had informed her that the purpose of this trust was to ensure the financial future of their son. She does not have any knowledge of the operations of

the Trust. According to Ms Engelbrecht's knowledge, Erf 361 Meyersdal Nature Estate, Extension 3 is owned by the Evergreen Environment Trust. Ms Engelbrecht is aware that cement was delivered to construct the house situated at this property, However, she has no knowledge of who ordered, provided or delivered the cement or whether the cement was provided by Bosasa or any its affiliates.

608. From an undated map of the Meyersdal Eco Estate, Ms Engelbrecht confirmed that Erf 361 was situated at Unit 55. She is not aware of any other house in the Meyersdal area that is owned by the Evergreen Environment Trust. She did however provide the Commission with details of the properties in the Meyersdal area that were owned by Mr Papadakis and trusts associated with him.

609. Mr Wakeford was asked why he referred to Mr Papadakis in some of the emails as "advisor". He said they were friends and that it was his nickname. His nickname was also on account of him being knowledgeable and always having advice to offer.

610. Mr Agrizzi testified during the section 417 enquiry in the liquidation of African Global Operations that the value of cement delivered to Mr Papadakis was over R1 million. When pressed he however said that he did not know the exact amount, which could be obtained from the Commission.

611. Mr Papadakis filed an affidavit responding to excerpts from the affidavit of Mr Agrizzi dated 15 February 2019 and the affidavit of Mr Vorster dated 4 April 2019. Mr Papadakis referred to Mr Agrizzi's evidence to the effect that at a point when Bosasa was being "pestered by SARS" with tax audits and, at another time, a major tax investigation, Wakeford suggested "getting Mr Papadakis on board ... to help in sorting out the SARS issue", following which a meeting took place between Mr Watson, Mr Wakeford, and Mr Papadakis. Mr Papadakis disputed this evidence and denied being party to any such meeting.

612. He pointed out that the first alleged email between Mr Wakeford and Ms Engelbrecht is dated 21 February 2013, approximately three years after the alleged last delivery of wet cement, said by Mr Agrizzi to be the quid pro quo for the assistance provided by Mr Papadakis. Furthermore, Mr Papadakis could only recall attending one meeting at Bosasa in late 2014, after he had left SARS' employ.

613. Mr Papadakis confirmed having met Mr Wakeford during the Rand Commission. He also met Messrs Ronnie and Valence Watson during this time. Mr Papadakis met Mr Gavin Watson in late 2014, after he had left the employ of SARS. He denied having requested or being offered any financial inducement or benefit from Mr Wakeford or anyone else in relation to Bosasa. In relation to the cement provided to him, Mr Papadakis explained that while building at Eco Estate, Messrs Ronnie and Valence Watson indicated that they were engaged with a major cement manufacturer and informed him that he should let them know if he ever encountered difficulties with cement supply. Mr Papadakis was to communicate with Mr Wakeford, if needed.

614. Mr Papadakis stated that he was "fully employed" during the period of construction and "as such the building activities were attended to by my contractors, including the ordering of supplies". Although Mr Papadakis could not recall the quantities of cement ordered, he testified that "toward the latter part of 2009 I was provided an amount that needed to be settled, which was settled." Mr Papadakis stated that the quantities and values of cement attested to by Messrs Agrizzi and Vorster are fallacious. He asserted that the delivery notes made available to him demonstrated that no deliveries for wet cement were made by Wearne after 10 July 2009 and the RTC records reflected an invoice and delivery in February 2010 which was credited as the goods had not been ordered. Other than this, there is an invoice which only refers to delivery to the general Meyersdal area. Mr Papadakis stated that purchases of material for the wet works at Eco Estate, cement and building material were ordered, "in the main", by his contractor and these purchases were either "settled by him or directly with his suppliers".

615. Insofar as meetings with Messrs Watson and Agrizzi are concerned, Mr Papadakis stated that he did not attend any such meetings during his employment with SARS. He pointed out that Annexure A to Mr Agrizzi's January 2019 affidavit does not list him as a person whom Mr Agrizzi dealt with, nor does his name appear in Mr Agrizzi's "Black Book".

616. In respect of the evidence of Mr van Tonder, Mr Papadakis pointed out that, as CFO, Mr van Tonder would have been intimately involved in all dealings with SARS and the audits of Bosasa, yet his evidence does not implicate Mr Papadakis in any wrongdoing. There is no allegation in Mr van Tonder's evidence that he signed-off any invoices pertaining to cement purchases for Mr Papadakis. Mr Papadakis referred to there being "destructive facts" pertaining to the allegations made by Messrs Agrizzi and Vorster. In this regard, the delivery of cement predates the first engagement initiated by SARS. He highlighted that, despite the documents from Wearne and RTC destroying the very basis of their allegations, Messrs Agrizzi and Vorster refuse to admit that their evidence is false.

617. Insofar as the deliveries of wet cement from Wearne are concerned, Mr Papadakis provided an analysis in which he sought to demonstrate that the quantities of cement said to have been delivered in the Wearne documentation were inconsistent with the stages reached in the construction of the house on the relevant dates. As evidence of the state of construction on the relevant dates, he used images showing the progress of the construction from time to time on Google Earth.

618. On this basis he asserted that "the information provided by Wearne is, at best, unreliable, and only signed delivery notes would constitute reliable evidence." On this basis he contended that "the empirical evidence conclusively proves the fallaciousness of Mr Agrizzi and Mr Vorster's allegations."

Mr Wakeford's cross-examination of Mr Agrizzi

619. Under cross-examination, Mr Agrizzi stated that he could not answer yes or no to the question of whether he stood by his evidence relating to Mr Wakeford, Mr Radhakrishna and Mr Papadakis. While he may have made mistakes relating to a date or time, he never faltered in terms of explaining the corrupt relationships. Mr Agrizzi indicated that he no longer wished to refer to himself as a whistleblower after reading a book by Motshilo Maseku on the issue. He also no longer considered himself to be a racist as he had worked with Mr Barney Mhlatla from the Human Rights Commission who has helped him to not think of race as a colour. Furthermore, he previously stated that he was a racist in the context of the language he had used at the time.

620. Mr Agrizzi confirmed that he was not at the meeting alleged to have taken place between Mr Watson, Mr Wakeford and Mr Papadakis to discuss the assistance Mr Wakeford and Mr Papadakis would provide in relation to the SARS investigation. Mr Agrizzi stated that, as far as he could recall, Mr Papadakis was still employed by SARS during the time his assistance was sought. In answer to whether he accepted that Mr Papadakis had to have rendered services to Bosasa before the cement was delivered to him, he answered "Probably, yes", but later sought to retreat from this position.

621. When asked during which "major SARS investigation" Mr Wakeford approached Mr Watson, Mr Agrizzi stated it was "one of the big companies". He could not specifically recall which of the big companies SARS was investigating but thought it "might very well have been" Phezulu Fencing. Mr Agrizzi conceded that he does not know which investigation it was specifically. It was put to Mr Agrizzi that he had adapted his version regarding the timing of the delivery of the cement for Mr Papadakis from late 2009 to mid-2011. Mr Agrizzi simply stated that this was the opinion of Mr Wakeford's counsel.

622. When asked to comment on the specific amounts paid by Bosasa to RTC, Mr Agrizzi did not deal with the details put to him and instead stood by a generalised allegation that cement, paid for Bosasa, was delivered to Mr Papadakis as gratification. Mr Agrizzi was thereafter referred to an affidavit by Ms Luanda Davids - debtors supervisor at Ready Mix which is a subsidiary of Wearne – supplier of the wet cement. Ms Davids attached invoices to her affidavit, nine of which related to the delivery of cement to the Papadakis property. The invoices demonstrated that the first order for Mr Papadakis was placed on 22 February 2009, and it was therefore put to Mr Agrizzi that Mr Papadakis would have rendered his services prior to or around February 2009. Mr Agrizzi responded by stating that Mr Watson worked differently with each person and some people would receive payment for services rendered before they did the job.

623. From the invoices attached to Ms Davids' affidavit, the last delivery by Wearne to the Papadakis'

property was on 9 July 2009. Mr Agrizzi was unwilling to concede that this was objective evidence regarding the date of the last delivery of cement because he has no access to the records of Bosasa or Wearne. He later accepted that he cannot dispute that the last delivery to Mr Papadakis was in 2009.

624. When it was put to Mr Agrizzi that there was no evidence before the Commission of a SARS investigation prior to 9 July 2009, Mr Agrizzi denied this. Mr Agrizzi could furthermore not dispute that Mr Wakeford was paid a fee of R50,000 per month plus 14% VAT in total and, on the odd month, there were additional expenses.

625. Mr Agrizzi could not dispute that Bosasa fell into arrears in paying Mr Wakeford for a period. He disputed that he controlled the payments to Mr Wakeford and stated that any withholding of payments was done on Mr Watson's instructions. When referred to his email of 7 March 2012 instructing Mr Bonifacio to make payment to Mr Wakeford for February and March as Bosasa was behind on payments, Mr Agrizzi alleged that Mr Wakeford's accounting system was "such a mess" and this made it difficult to dispute that there were some months that Mr Wakeford received double payments. Mr Agrizzi denied that there was no evidence to demonstrate that Mr Wakeford was paid R100,000 to manage Mr Papadakis.

626. It was put to Mr Agrizzi that the allegation of an extension of the Lindela contract was verifiably false, which he disputed. Mr Agrizzi stated that the contract is still in process and is continuing and it was therefore extended naturally. He referred to Mr Radhakrishna visiting him during 2020 to complain that Mr Watson did not pay the balance of the R7 million due to him.

627. At the Commission, Mr Agrizzi was referred to a letter from his attorneys dated 15 December 2017, which counsel sought to characterise as calling on Bosasa to cede its catering contract with the DCS to inter alia Mr Agrizzi and it was put to him that this was a demand to take over the contract. Mr Agrizzi disputed this letter was a demand and referred to the contents of the letter as a proposal stemming from an agreement that such a proposal would be made.

628. When referred to the "game plan" attached to Mr Venter's affidavit, Mr Agrizzi stated that the Carte Blanche interviewer believed Mr Agrizzi's version, and he considered that to tell a lot about Mr Venter's statement. Ultimately, it was put to Mr Agrizzi that long before the Commission, he had devised a scheme to destroy Bosasa if he could not take it over or ensure that it went into liquidation; further, that Mr Agrizzi's motive in approaching the Commission was to blacken the name of Bosasa and that he misled the Commission in many respects, but certainly in respect of Mr Wakeford, Mr Papadakis and Mr Radhakrishna.

629. In re-examination, Mr Agrizzi confirmed that Mr Wakeford had received R6,502,783.01 as a consultant from Bosasa over the period 2006 to 2015. In addition, Mr Agrizzi confirmed that "R2,109,000 was paid to Distinctive Choice Wines of which R1,821,600 was paid over directly to Mr Radhakrishna". Further, during the period 20 November 2009 to 2011, R1,132,000 was paid to Akhile Management Services which belonged to Mr Radhakrishna.

SEAARK

630. This section addresses the evidence surrounding the establishment of a prawn aquaculture business by Bosasa and subsequent attempts to avoid adverse findings in an investigation by SARS into this enterprise.

Messrs Fred Alibone and Arthur Kotzen

631. Mr Agrizzi testified that during 2005 and 2006, Bosasa was extremely cash flush with over R300 million in the bank. At that date, Mr Watson decided to go into a prawn aquaculture project with Mr David Kevin Wills. Mr Agrizzi's involvement was dealing with Mr Fred Alibone and Mr Arthur Kotzen. Mr Agrizzi testified that he had to employ Mr Kotzen's son Jason.

632. Mr van Tonder testified that during 2005/2006, Watson commenced a process of building an aquaculture pilot project called "SeaArk" in the Coega IDZ in Port Elizabeth. This project entailed breeding and growing seawater prawns in a controlled environment. At the time Kotzen had a small building company. Mr Watson decided he wanted to use Kotzen to build SeaArk. Mr Agrizzi questioned Mr Kotzen's ability to undertake this R300 million construction project given that his business comprised of essentially two bakkies and a cement mixer. Since there were numerous insurmountable issues with the Environmental Impact Assessment at SeaArk at that stage, Mr Watson deployed people from Bosasa to help build it. He then bought Mr Kotzen's company, BuildAll, for R15 million. Mr Agrizzi testified that it was very important that Mr Watson controlled both Mr Kotzen and Mr Alibone.

633. Mr Agrizzi was informed by Mr Alibone that he was tasked by Mr Kotzen and Mr Watson to keep a little black book of any expenses incurred for parliamentarians and politicians. The assumption was that this pertained to politicians in the Port Elizabeth area, being the region in which Mr Alibone and Mr Kotzen were active.

The establishment of SeaArk

634. SeaArk Africa (Pty) Ltd was established as a wholly owned subsidiary of Bosasa Operations for the aquaculture project. In addition, an American company known as Sustainable Resources International (SRI) was involved in the project. Consultants were employed by Bosasa and SRI.

635. Large sums of money up to approximately R50 million were transferred to SRI over three years by Bosasa Operations through SeaArk for payment to the consultants. In Mr van Tonder's assessment, Bosasa did not receive value for money for these consulting services. As CFO of Bosasa, Mr van Tonder was involved in the application for funding for the project and had direct knowledge of its financial transactions.

636. Mr Agrizzi testified that he was often informed, whilst SeaArk was operational, that it was an ideal model to get international funding and that it would, in effect, be a game-changer. Mr Agrizzi explained that he became aware of large amounts of money that were being paid to SRI. Mr Agrizzi testified that there was a bulk payment to the value of R35 million transferred to this company and thereafter single monthly payments of between R700,000 to R1 million. He described the payment as draining all the profits off the company. Mr Agrizzi subsequently learned that Mr Watson owned 51% of SRI. In Mr Agrizzi's opinion, SRI was a scam because he could not understand why Mr Watson would want to invest money offshore when the company in South Africa was doing very well.

637. Mr Agrizzi testified that at one stage when the business was "going south", he approached Mr Biebuyck to try to recover funds from SRI. However, he was told to not touch it and to just leave it with Mr Watson.

638. The project was unsuccessful and due to a lack of funding, Bosasa could not grow the project. There were also operational concerns which prevented the continuance of this project. Mr Venter testified that due to bad publicity at the time, the banks would not finance the project or the business so they could not carry on. They closed it down and moved it to Krugersdorp. The project was subsequently terminated. On termination, the project was recorded as having an assessed loss of R138,498,378 in the books of SeaArk. This assessed loss was derived from the expenses on the project as well as equipment write-offs. In this regard, the prawn processing plant equipment was purchased but never unboxed or used. This equipment was written-off in the books for income tax purposes over this period.

SeaArk change to Bosasa Supply Chain Management

639. The main business of SeaArk was changed to accommodate the utilisation of the assessed loss for tax purposes within Bosasa Operation's kitchen operations, after the project termination. That is, the catering contract with the DCS and the kitchen utilised for cooking for people in the youth centres and at Lindela. These contracts generated profit for Bosasa. The name of the company was also changed from SeaArk to Bosasa Supply Chain Management (Pty) Ltd (BCSM) which acted as a

procurement company for food items which were then on-sold to Bosasa Operations for use in the kitchen operations. These food items were marked up by 20%.

640. Mr Venter testified that the name and the nature of the business changed and that BCSM became the supply chain for Bosasa. Mr Venter was not aware if prices were inflated but testified that his audit colleagues at D'Arcy-Herrman found nothing untoward. According to Mr Venter, SeaArk's main business was changed based on an internal decision. As far as he was aware, there was nothing untoward in doing so. Mr van Tonder testified that the procurement portion of the BCSM business was a genuine business transaction but the on-selling of the food items to Bosasa Operations was not. The profit margin created by the mark up of the food items was reflected as a profit in BCSM and set-off against the reflected assessed loss. The result was that the assessed loss in BCSM could be utilised for the income tax purposes of the day-to-day businesses of Bosasa Operations. The value of the benefit to Bosasa Operations from this scheme was R38,700,000.

641. Mr Agrizzi confirmed that SeaArk was interposed as a supply chain management company to acquire goods for the Bosasa companies and charge at a mark-up. Mr Agrizzi also confirmed that the profit made by SeaArk was offset against the assessed tax loss. Mr Venter confirmed that SeaArk benefitted by using the loss, and by using BSCM which would then make a profit to on-sell and by not paying tax on those profits. In response to a question from the evidence leader on whether this could have created an opportunity for tax fraud, Mr Venter testified that it could have but that he relied on the audit division to have established that, and that SeaArk and BSCM each received a clean audit and so he could not comment on that.

642. Mr Venter testified that he advised that equipment could be leased out to constitute trade for tax purposes because Mr Watson did not want to forfeit the loss.

The SARS investigation

643. Later, SARS investigated the utilisation of the assessed loss, the existence of the assessed loss within BSCM and Bosasa Operations and the equipment write-offs. Mr van Tonder was involved in responding to the SARS investigators so that Bosasa could justify the use of the assessed loss and the write-offs. To achieve this, two things had to be shown:

    643.1 Firstly, Bosasa had to show that the SeaArk project continued. This was done by building a prawn production facility in Krugersdorp where artificial seawater was manufactured to grow prawns. An entity called Biorganics (Pty) Ltd was created as a 100% subsidiary of Bosasa Operations for this purpose. Mr van Tonder recalled being formally introduced to Mr Zuma during his visit to this facility. Mr Vorster testified that on 9 October 2013, Bosasa's Senior Accountant, Ms Coleen Jansen Van Rensburg, instructed him to make certain entries into three truck logbooks that would accompany a statement to SARS to confirm that equipment was moved from SeaArk in Port Elizabeth to Krugersdorp. He was asked to submit another affidavit to SARS in March 2014. Mr Vorster confirmed that the purpose of his statement and affidavit to SARS was to mislead it in its investigations. Ms Jansen Van Rensburg commissioned the affidavit and statement before it was sent to Mr Vorster. He confirmed that he did not want to sign the documents but was forced to. The truck logbooks were later confiscated and locked in Mr Watson's vaults.

    643.2 Secondly, Bosasa had to demonstrate that the processing plant equipment was installed and utilised within the various kitchen operations in the group when in fact they were never used.

644. Mr van Tonder stated that part of the response to SARS was clearly a misrepresentation. On the strength of these representations, SARS concluded that the assessed loss was legitimate and only disallowed a portion of the processing plant write-offs.

645. When asked to comment on the truthfulness or correctness of the following allegation made in his first statement in relation to an opportunity to evade tax on an amount of R38, 779, 545. Mr Venter explained that, at the time of the SARS audit on SeaArk, he utilised the services of a tax attorney to formulate the response to SARS and based on the information made available to Mr Venter and the attorney, they successfully defended the assessed loss. Mr Venter testified that they were not involved

in anything unlawful. He explained that he could not confirm the validity of what was provided to him by Bosasa and would not know whether documents or processes were fraudulently manufactured. Mr Venter confirmed that SARS required proof to be submitted to substantiate the claims, including the proof of trade in order to retain the loss but that he was not aware of anything that was fraudulently drawn up.

646. A few months after the outcome of the SARS investigation, Mr Watson instructed Mr van Tonder to close down Biorganics with immediate effect and retrench staff. Mr van Tonder pointed out to Mr Watson that closing down Biorganics was in contradiction with the information provided to SARS that it was a genuine ongoing production facility. He discussed this instruction with Mr Agrizzi and explained that it was unlawful to terminate the facility. Mr Agrizzi agreed with him.

647. The facility was closed and the processing equipment later sold to Connie Muller from Ibhongo Traders for R3,200,000. Mr Agrizzi was referred to Mr Venter's evidence which strongly suggested that this arrangement was entirely legitimate in that it involved no prejudice to SARS and that any falsification of invoices would have been picked up by the auditing firm, D'Arcy-Herrman. Although he acknowledged that he was not an accountant, Mr Agrizzi insisted that the use of the assessed tax loss was a defrauding of SARS.

648. Mr Agrizzi and Mr van Tonder lied to Mr Watson and said that the company could no longer pay the R1 million a month to SRI. To this end, Mr Agrizzi and Mr van Tonder told Mr Watson that "the Reserve Bank is closed" and they would not allow them to transfer any more money. Mr Agrizzi explained they were battling to pay salaries and wages and he and Mr van Tonder had to bond their houses to pay wages. That led to the closure of SeaArk. When Mr Watson realised that they were not going to get money from the Development Bank of Southern Africa and the Department of Trade and Industry, he agreed to close SeaArk but the problem was that they had a lot of equipment which had been specifically designed (by a company called Shrimp Co in the US) and cost them in the region of R20 million.

649. Mr Agrizzi testified that Mr Venter suggested that they change the name of the company and the focus of the so-called "guts of the company". That is when SeaArk closed, and a series of fictitious invoices were created. These pieces of equipment were moved out to all the catering operations under the guise that they were continuing business, whereas in fact they were changing the very nature of the business.

650. This involved the leasing of equipment to various Bosasa operations. Mr Agrizzi was asked whether this equipment was of any use in the prison catering department. In response, he indicated that the equipment was never used and rather stood in a shed in Port Elizabeth. He mentioned that Mr Vorster would be able to tell the Commission how they got the equipment to a place called Luipaardsvlei because SARS was doing an audit and they informed SARS that this was part of the meat processing plant.

Burying of evidence at SeaArk

651. When asked if there was anything else about the operation of SeaArk that he could assist the Chairperson with, Mr Agrizzi mentioned one anecdote in relation to SeaArk pertaining to computers that were buried at SeaArk. In this regard the company tendered its assistance for the burying of Grande Four and L&J computers and of documentation. The documentation reflected all the purchases for the houses of Mr Mti and Mr Gillingham. For this reason, this documentation had to be destroyed. Mr Watson sent the information to Port Elizabeth and said it must be buried at SeaArk. Mr Agrizzi confirmed that Mr Kotzen was subsequently instructed to collect the computers and to bury them at the SeaArk site in Coega and that he was later told by Mr Watson and Mr van Tonder to recover these computers and burn them.

652. SeaArk is a factory on the coast and they put the information into plastic bags and dug a big hole in which the computers were buried. A few weeks later, Mr Agrizzi received a call from a news reporter in Port Elizabeth asking why they were digging up at SeaArk. Mr Watson later insisted that they pick

up the computers and they get burnt. However, they were never burnt. They were kept in a garage of Mr Kotzen's son-in-law and Mr Agrizzi testified that they were probably still there.

653. The excavation work undertaken at the SeaArk location in Coega was done by the Hawks and Mr Agrizzi was surprised that they did not ask him for assistance because that area had already been excavated. This failed excavation took place two or three weeks prior to Mr Agrizzi's testimony on 29 March 2019.

654. Mr Agrizzi confirmed that with SeaArk, Bosasa received a tax write-off of approximately R148 million. They were not entitled to that tax loss. The rebate and remittance from SARS were arranged by Mr Watson, Mr Curtis Venter and Mr Daniel Erasmus who "paid some other people off within SARS". Bosasa received that assessed tax loss for the prawns that supposedly moved from Port Elizabeth to Krugersdorp.

MR AGRIZZI'S RESIGNATION AND SUBSEQUENT DEVELOPMENTS

655. In August 2016, Mr Agrizzi resigned from Bosasa. Mr Daniel Watson approached Mr Agrizzi to take over the reins at Bosasa. Mr Agrizzi says that he was offered a substantial retainer and a shareholding in Bosasa. Mr Agrizzi testified that he accepted the offer. Upon his return to Bosasa he set about preparing a turnaround strategy based on restructuring the company into one focussed on the private sector and not based on corruption. According to him, the strategy was well received, including by Mr Gavin Watson.

656. Mr Agrizzi asserts that problems however arose in relation to the transfer to him of the share certificates pursuant to the agreement concluded. He claimed further that Mr Watson showed signs of reverting to a corrupt way of doing business. On 15 December 2016 Mr Agrizzi went on leave. He was then hospitalised on 25 December 2016. He required emergency surgery which did not go as planned and became extremely ill. Once he had been discharged from hospital, Mr Biebuyck called him to inform him of an alternative offer of a consultancy agreement form him for a lesser amount of remuneration. The agreement suited Mr Agrizzi and he decided to accept it.

657. Mr Agrizzi claimed that he started to receive threats from two of Bosasa's directors, Mr Gumede and Mr Leshabane. The terms of the consultancy agreement were also not complied with. Seemingly his employment came to an end in March 2017 amidst developments in relation to possible whistleblowing by him and a group of fellow employees.

658. Mr Wakeford was of the view that Mr Agrizzi was coercing these employees to make false statements. Further, Mr Wakeford was of the view that Mr Agrizzi's true motive was to take over Bosasa or, failing that, bring about its liquidation. This would enable him to take over Bosasa's contracts into his own entity, Malandela Crearis. Following advice from prominent legal personalities, on 21 August 2017, Mr Agrizzi issued a press release that he was going to come clean. During the latter part of August 2017, there were further negotiations between members of the Watson family and Mr Agrizzi around a fresh agreement. However, this did not come to anything.

Threats against Mr Agrizzi

659. On one of the days of testimony before the Commission, reference was made to a serious threat within the preceding week that had been made on Mr Agrizzi's life. However, Mr Agrizzi did not wish to go into the details of the threat. The proceedings of day 75 started with the Chairperson of the Commission referring to certain events in the public domain that had concerned him. He informed Mr Agrizzi that he had made enquiries and was assured that it was not connected with the evidence that Mr Agrizzi was giving at the Commission, and he was assured that the processes of the Commission would be respected until its work was finished. The Chairperson was also informed that the new Director of Public Prosecutions knew nothing about those events. The Chairperson noted that he was very concerned and continued to be concerned that nobody should do anything that would discourage witnesses from assisting the Commission.

660. Mr Agrizzi's referred to Exhibits LL1 and LL2 which were documents written in isiZulu and an attempt at a translation, respectively. The document LL1 in isiZulu and was found on Mr Agrizzi's windscreen after he left breakfast at Nicolway. Essentially the document was a threat with reference to his mother and a statement to the effect that the persons know what car he drives and that he should stop talking about state capture and about Bosasa.

661. A second incident which was placed on record is the fact that the Commission's investigators received a message from a senior police officer on 27 March 2019 informing them that Mr Agrizzi's life was under threat. This was based on reliable information. As a result of that, further security was provided to Mr Agrizzi. Notwithstanding those threats, Mr Agrizzi was willing to give evidence at the Commission.

Destruction of further evidence

662. Mr Agrizzi was asked to comment on the concern that at the time of the liquidation and when documents were returned to the liquidators at the Bosasa offices, documents were being destroyed. Mr Agrizzi confirmed that he had reported this to the liquidators and investigators. Mr Agrizzi testified that documents pertaining to the Bosasa supply chain management had been removed and destroyed and various other documents were being destroyed as well, but he had attempted to give all the information to the investigators.

Intimidation of journalists

663. Mr Basson testified on acts of intimidation against him. He explained that in 2006, he had occasion to publish articles concerning Bosasa while working at *Die Beeld* newspaper together with his colleague Ms Carien Du Plessis who was working for *Die Burger* newspaper at the time. These articles concerned numerous allegations levelled at the Parliamentary Portfolio Committee on Correctional Services about Bosasa which had suddenly received "an avalanche of tenders from the Correctional Services Department". While employed at the *Mail & Guardian* newspaper and doing work there which pertained to the allegations referred to above, Mr Basson received threats on two occasions. He adduced that the only purpose of such threats at the time was to stop him writing about Bosasa. In January 2009, Mr Basson published a series of articles in the *Mail & Guardian* based on leaked emails that exposed how Bosasa employees had written large sections of tender documents for contracts that were awarded to the Bosasa companies detailed in evidence.

664. Following the publication of the article, Mr Basson started receiving calls on his cellular telephone. These calls always came during the day and night and early parts of the morning, sometimes from a number that was visible on his phone and sometimes from unknown numbers. The purpose of these calls and messages were always a person claiming that they were a Bosasa employee and saying to Mr Basson that he was threatening their jobs and that he would cause them to lose their jobs. They also asked Mr Basson to stop writing and reporting on Bosasa. In addition, there were other callers who accused him of racism, saying that he was only doing these articles because he was white and a racist. Mr Basson describes these phone calls as being upsetting and perturbing given that they were received at all times of the day. The callers also used profanities and an aggressive tone that made it clear that they believed Basson was endangering their livelihoods.

665. Mr Basson received confirmation from someone in Bosasa that his number had been distributed in the group to employees and that the employees were tasked to call and threaten him. The name of one specific Bosasa director was named as giving this instruction to employees. However, Mr Basson was reluctant to disclose the name of this director given that he had not been able to corroborate this information from his source.

666. The second episode during which Mr Basson was threatened and intimidated took place in February 2009.

    666.1 He received a call from a woman who did not introduce herself by name, but said she was a colleague or somehow involved with the media and that she wanted to warn Mr Basson about the investigations into Bosasa. The woman tried to convince Mr Basson that she was helping

him by saying things like what he was doing was dangerous and she wanted to make sure that she was talking to the right person. She asked Mr Basson to verify his ID number, his home address and to confirm a list that she would provide him of his friends and family. The woman then proceeded to read an accurate list of names of friends and family members and their professions. Mr Basson got the clear impression that the woman was reading from some kind of intelligence document that had gathered information on Mr Basson and the real purpose of the call was not to help him but to scare him. The woman told Mr Basson how dangerous Bosasa was. The woman also had records of Mr Basson's tertiary studies where he studied, what he studied as well as the information of where he was born.

666.2 Mr Basson was perturbed by the call and that someone had known all this personal information about him. His impression was that some kind of intelligence operation was conducted on him.

666.3 The woman warned Mr Basson with the words "I will kill you if you tell anyone about our conversation". Although Mr Basson knows that sometimes people use that phrase jokingly, he did not believe this was joking as it was in the context of a much larger longer conversation with very ominous use of language and even the tone of her voice was very harsh in supposedly trying to help him.

667. Mr Basson later googled the telephone number and the identity of the caller came up as someone by the name of Ms Benadicta Dube. Ms Dube was a public relations consultant of a company called Igagu Media. Mr Basson quickly established that Ms Dube was in fact a journalist who worked for reputable publications like the *Financial Mail* and eTV before joining the public relations realm. Mr Basson testified that one of his sources within Bosasa had told him that Ms Dube was on the company's payroll and had been consulted about Mr Basson.

668. The call from Ms Dube was the subject of an article published by Mr Basson in the *Mail & Guardian* under the tile 'Very brave for a young man' on 22 May 2009. He explained that at the time of the article many journalists in South Africa were being targeted by either rogue private intelligence services or rogues state intelligence operators. The *Mail & Guardian* then published a series called *'Spy Nation'* which dealt with all these occurrences where journalists had been spied on. The call that he received from Ms Dube was the subject matter of this article.

669. Mr Basson confirmed that his conclusion on the call received from Ms Dube was that her motives were never to caution, but rather to intimidate him. He also confirms the contents of the article that noted the *Mail & Guardian*'s lawyer wrote to Bosasa and Igagu Media on 6 May 2009 demanding an immediate return of Mr Basson's personal information in their possession. Bosasa's lawyer denied the company had acted in an unlawful manner as alleged or at all and said Ms Dube's information falls within the public domain. Mr Basson confirmed that the information about him conveyed by Ms Dube on the telephone call was not in the public domain.

670. This concludes the summary of the evidence. The analysis of the evidence with reference to inter alia the Commission's TORs is contained below.

EVALUATION OF THE EVIDENCE

Analysis of the evidence against the TORs

671. This section provides an analysis of the Bosasa-related evidence presented before the Commission against the relevant TORs. The evidence is analysed with reference to the questions raised by each TOR.

672. The questions do not provide for hermetically sealed analysis, with evidence sometimes being relevant to more than one TOR. The evidence is analysed based on where it fits most comfortably.

Analysis and findings with reference to TOR 1.1.

Whether there were attempts to influence public office bearers: The evidence of Mr Agrizzi

673. The evidence of Mr Agrizzi provides the primary basis for an answer to this question. If his evidence is to be accepted, then the answer is a resounding yes. But can it be accepted? One must immediately acknowledge that several criticisms may be made in respect of Mr Agrizzi as a witness. His evidence was contradictory in certain instances. Examples of this include the following:

    673.1 He was clear in his initial affidavit that Mr Siza Thanda was head of security and Mr Thele Moema was head of risk for ACSA. When he gave oral evidence, he had difficulty recalling which positions they each occupied, acknowledging that he would need to clarify this.

    673.2 His evidence was contradictory as to whether the cash kept in the vaults was, apart from the payment of bribes, used to pay legitimate bonuses to employees, or to buy employees' silence.

    673.3 His evidence was contradictory as to whether the bundles of notes for large cash amounts used for bribery came in amounts of R100,000 or R150,000.

    673.4 On one occasion, Mr Agrizzi referred to Ms Lepinka as "Jay" and on another to Adv Mrwebi as "Jay".

    673.5 Mr Agrizzi to some extent contradicted himself as to whether his complaint regarding the investment on Ms Mokonyane was that it was not delivering returns for the Bosasa Group or whether his complaint was that it was not an appropriate and ethical way to do business.

    673.6 Mr Agrizzi testified that "more favourable terms" were included in the extended Lindela contract for Bosasa. He testified that Mr Wakeford explained these terms to Mr Agrizzi, which included making it "more feasible" for contract price increases. However, in his testimony during the Section 417 enquiry in the liquidation of African Global Operations, he conceded that the renegotiation of the Lindela contract was aimed at introducing cost savings for the DHA. He later revised his position to explain that the "more favourable contract terms" he claimed had been negotiated for Bosasa lay in the five-year extension and avoiding a tender process.

674. There are other examples of contradictory testimony on his part, as noted in the relevant places in the summary of evidence. His evidence was fallible in relation to detail. Examples include the following:

    674.1 He said that his employment with Dyambu Operations began in 1999, whereas it may have been 1998.

    674.2 He could not recall whether he had personally packed or delivered bags of cash to Siza Thanda and Thele Moema at ACSA, arguably, this type of criminal conduct is something that would stay in one's memory, although the large number of recipients of bribe money may well justify his inability to recall the details of his involvement with the payment of cash to specific recipients.

    674.3 When discussing the date when he met Mr Gillingham, he contradicted himself and acknowledged that "I get confused sometimes."

    674.4 He wrongly named a senior DCS official, Ms Jabulile Sishuba, as having received corrupt payments. To his credit, however, when challenged in this regard in her application to cross-examine him, he readily acknowledged his error and made a public withdrawal and apologised.

    674.5 When cross-examined by Mr Wakeford's representative as to whether he stood by his evidence relating to Mr Wakeford, Mr Radhakrishna and Mr Papadakis, Mr Agrizzi acknowledged that there might well have been mistakes in relation to dates and times, although he insisted that his evidence was correct insofar as it pertained to corrupt relationships.

    674.6 When asked to comment on the specific amounts paid by Bosasa to RTC, a cement supplier, Mr Agrizzi did not deal with the details put to him and instead stood by a generalised allegation that cement, paid for by Bosasa, was delivered to Mr Papadakis as gratification.

674.7 Mr Agrizzi could not provide detail about which "major SARS investigation" Mr Wakeford approached Mr Watson, nor could he recall which of the "big companies" was under investigation.

675. He was prone to exaggeration. Examples include the following:

675.1 He estimated that there were about eight walk-in vaults at the Bosasa premises. Mr le Roux testified that there were only four.

675.2 His claim that his estimate of total Bosasa contract values would be accurate to within R1 to R 2 million, is likely to be an exaggeration.

675.3 His estimates of the value of the security installations at Mr Mantashe's houses appear to be exaggerated when compared to the evidence of other witnesses.

676. His evidence was less convincing where he tried to portray a less corrupt version of himself. Examples include the following:

676.1 Mr Agrizzi tried to suggest that when Mr van Zyl approached him to change the methodology for securing large cash amounts without raising suspicion, he "did not want to get involved at first" and "kind of shunned the idea", because he was "getting a bit fed up of all this" and told Mr Watson "look I really do not want to know".

676.2 At one point, Mr Agrizzi claimed that despite being Group COO, "my influence [in Bosasa] is very limited, in actual fact."

677. His demeanour as a witness was open to criticism in certain respects.

677.1 There are instances where Mr Agrizzi unreasonably refused to concede that certain aspects of his evidence were inconsistent with objective evidence put to him. For example, the invoices attached to Ms Davids' affidavit which demonstrated that the last delivery by Wearne to Mr Papadakis' property was on 9 July 2009. Mr Agrizzi was unwilling to concede that this was objective evidence regarding the date of the last delivery of wet cement, despite accepting that he could not dispute that the last delivery to Mr Papadakis was in 2009.

677.2 Under cross-examination by Mr Wakeford's representative, he was at times unnecessarily defensive or argumentative.

677.3 His motives in revealing the extensive corruption to which he testified may have been mixed ones, rather than exclusively public-spirited ones. The disclosures followed a breakdown in relations between him and Mr Watson and, if he could somehow avoid prosecution, might have advanced his own business ambitions.

678. Notwithstanding these observations there was substantial corroboration on the main pillars of Mr Agrizzi's evidence. This included the investigations of the SIU reflected in their report and amplified in the testimony of Mr Oellermann; the evidence of other witnesses who were previously employed at Bosasa and were willing to incriminate themselves in their testimony; the video evidence put up, particularly that of the vault and safes where the cash was stored and distributed, with the handling of cash underway; and, in several instances, the admissions and concessions of the persons implicated in his evidence.

679. More detail of the corroborative evidence is provided below. As pointed out earlier, one must also consider that Mr Agrizzi implicated himself widely and extensively in the criminal conduct to which he testified. Whilst he may sometimes have sought to lessen his role to some degree, he was, on his own evidence, guilty of criminal conduct on a substantial scale. Taking this into account, along with the corroborative evidence, it may be accepted that Mr Agrizzi was in the main a truthful witness, the above criticisms notwithstanding.

680. To the extent that he may have underplayed his role in the corruption and has sought to shift a greater share of the blame for the corrupt activities to Mr Watson, it does not detract from the fact that, with reference to the first question asked by TOR 1.1, there is overwhelming evidence that there were indeed attempts through various forms of inducement and gain, to influence members of the National

Executive, and office bearers of state institutions and organs of state. This is particularly so when the evidence is looked at as a whole or as a mosaic.

681. In fairness to Mr Agrizzi, whatever the true distribution of corrupt activities as between him and Mr Watson, the evidence of Mr Watson's involvement in corrupt activities is overwhelming. That conclusion is reached mindful of the fact that he is not able to defend himself on the allegations against him, having lost his life during the Commission's proceedings. It is significant in this regard that:

    681.1 By the time of his death Mr Watson had not sought the opportunity to testify in the Commission to defend the allegations made against him by Mr Agrizzi

    681.2 By the time of his death, Mr Watson had not responded to the Rule 3.3 notice calling upon him to file an affidavit in response to the allegations (the Regulation 10(6) directive had not yet been served on him); and

    681.3 None of Mr Watson's siblings, who were to a lesser degree also implicated in the corrupt activities of Bosasa, have stepped forward to respond to the allegations against themselves or those made against their deceased sibling, by volunteering testimony in the Commission or responding appropriately to the Rule 3.3 notices issued to them.

682. To conclude on the question whether Mr Agrizzi's evidence can be accepted, it must be answered in the affirmative, save where indicated otherwise in any specific instance. Taken cumulatively, there is clear and convincing evidence pertaining to Bosasa, of attempts to influence persons in the categories of office bearers and officials listed in TOR 1.1.

What was the extent of the attempts to influence public office bearers?

683. Bosasa's primary mechanism for attempting to influence public office bearers was the payment of cash bribes. The amounts paid tended to be commensurate with the degree of influence that could be exercised by the official concerned. The system involved seeking to do so, in most instances, on an ongoing basis. This was no doubt aimed at developing a corrupt form of loyalty to Bosasa, through the dependence on the regular payments that would develop. By spreading the benefits relatively widely, it also sought simultaneously to maximise its corrupt influence, but also to decrease the likelihood of whistleblowers coming forward to expose particularly corrupted public office-bearers.

684. However, the attempts at influence through inducement or gain were not confined to cash payments. Bosasa also built houses, provided various furnishings for homes, installed several home security systems, purchased motor vehicles, bought gifts (from premium luxury gifts such as pens and jewellery to food and grocery items) and paid for travel and accommodation.

685. Perhaps the best sense of the extent and scale of the attempts at influence is that to be derived from an examination of the various mechanisms that Bosasa established to generate, store, and distribute sufficient cash to sustain the payments used to influence the public office bearers concerned.

686. The evidence establishes that various mechanisms were used by Bosasa and its associates to generate cash for these purposes. Mr Agrizzi and Mr van Tonder testified that Mr Watson and Bosasa required a substantial amount of cash every month, which necessitated establishing these illegal mechanisms. The various illegal methods used to generate cash included:

    686.1 The creation of fraudulent documentation and fake invoices by Bosasa

    686.2 Utilising Metropolitan Death Benefit Fund documentation as source documents for cash cheques - symptomatic of the level of depravity of the corrupt activities of Bosasa and those of its directors and employees involved in the bribery

    686.3 Service providers supplying false invoices to Bosasa for goods and services, where, in truth, cash rather than goods and services were delivered

    686.4 Fictitious transactions between Bosasa and government departments for the supply by Bosasa of, for example, software programmes

686.5 Cash sales at Lindela that were not accounted for as income from Lindela, but rather shifted to the vaults at Bosasa.

686.6 Cash bars and canteens at various mine hostels administered by Bosasa, that were similarly not accounted for as income, but rather shifted to the vaults at Bosasa

686.7 Payments to ghost employees; and

686.8 Over-invoicing for goods supplied by AA Wholesalers where the difference between the goods supplied and the total invoice would be delivered in cash to Bosasa.

687. Mr van Tonder testified that Bosasa had also used various attorneys' trust accounts to hold Bosasa monies to mitigate against the risk of Bosasa running out of funds if its bank accounts were ever frozen. When Bosasa required cash, requests would be made to withdraw the funds. As an example, Mr van Tonder referred to an email sent by Mr Agrizzi to Mr Biebuyck and himself where Mr Agrizzi requested that R25 million be transferred to Bosasa from the trust account.

688. Mr Agrizzi, Mr van Tonder and Mr le Roux testified to the cash stored at Bosasa's premises. Mr Agrizzi testified that the amount of cash stored in a walk-in vault behind the main boardroom would range from R2 million to approximately R6.5 million, which amount would be exceeded over the December period. The amount of cash stored would depend on the amount requested weekly by Mr Watson and members of Bosasa's board or management, who would ask for money to be paid out as bribes. Mr Agrizzi and Mr van Tonder testified that employees involved in the administrative process of arranging the cash would also be paid monthly "bonuses" from the cash as a means of retaining their loyalty and buying their silence.

689. A video filmed by Mr van Tonder on 28 March 2017 at Bosasa's office supports the evidence regarding the cash stored at the premises. Mr Agrizzi testified that he was tasked specifically with the handling of cash, which included getting the cash, counting it out and delivering the cash for making the attempts at influence. Mr Agrizzi often made up cash bundles himself to be paid to government officials, as he was instructed to do by Bosasa's board of directors.

690. Mr Agrizzi also gave evidence regarding the system that was implemented for the handling of cash. Mr Agrizzi and Mr Watson would meet monthly with the board who would give instructions on what needed to be paid to whom. After Mr Watson had approved a list compiled by Mr Agrizzi, Mr Agrizzi would encode the list and the cash would be packed per code-identified recipient. Mr Agrizzi would then hand grey sealable bags with the money to the member of senior management who would deliver the money to the relevant officials. Some of the senior managers included Mr Dikane, Mr Dlamini, Mr Gumede, Ms Makoko and Mr Leshabane. Mr Agrizzi explained his system of assigning codes to the bribery money and attached some of the lists that he had compiled in early 2016 to his Initial Affidavit. Later, Mr Agrizzi started to record the various codes in what he referred to as his "black book". The code would contain information of the person to receive the bribe, the amount and the name of the person delivering the bribe to them. Some of the discrepancies in the codes used by Mr Agrizzi were pointed out to him. Mr Agrizzi explained that the codes changed when he and Mr Gumede realised that Mr van Zyl was able to decipher the standard codes and that he varied the codes to avoid them becoming a trail. Mr Agrizzi acknowledged that there were errors in some of the codes where he had made mistakes.

691. Mr Agrizzi testified that an estimated amount of R4 million to R6 million in bribes was being paid monthly at the time he left Bosasa. He also testified that Bosasa gave gifts to individuals other than cash payments, although less frequently. According to Mr Agrizzi, the most important criterion to determine whether a person should receive a payment would be that they would be supportive of Bosasa and, in particular, that they would ensure that a tender would be awarded to, or retained by, Bosasa. Mr Agrizzi estimated that the total number of persons who would be paid by Bosasa monthly was in the region of 80 and he recalled a list of 38 government officials and employees who received bribes on a regular basis.

692. Mr Agrizzi confirmed that various emails between him and Mr van Zyl from early to the middle of 2011, where reference is made to arranging "loaves" of bread and "breadroll requirements", were

references to money bribes. Mr Agrizzi also explained that reference in an email between him and Mr van Zyl to a DOJCD management fee was code for bribe money that was paid in cash to Mr Seopela (who would then hand over the money to officials in the DCS). Other emails exchanged between Mr van Zyl and Mr Agrizzi show the references to codes where payments were to be made, including payments to Reuben Pillay (security manager at ACSA) authorised by Mr Gumede and payments to Ms Makoko, including R100,000 for a funeral in Rustenburg and a R5,000 donation for Ms Zukiswa Jamela.

693. Mr Agrizzi in his evidence estimated the aggregate value of contracts awarded to the Bosasa Group of Companies by various public departments and entities between 2000 and 2016 to be at least R2,371,500,000.00. Mr Agrizzi estimated that approximately R75,700,000 was paid out in bribes. The breakdown of the various contracts within the Bosasa Group and an estimated value that was paid out in bribes annually, per contract, includes the value of houses built, fixtures and fittings, security systems, furnishings, motor vehicles purchased, and travel expenses incurred.

694. The evidence thus reveals that the attempts at influence by Bosasa and its leadership were carried out at what may fairly be characterised as an industrial scale, requiring, and evidenced by, mechanisms to secure an ongoing generation and delivery of cash in quantities that were not feasible through normal trading operations, particularly where the nature of Bosasa's business was not inherently cash based. Payments pursuant to the catering and security tenders that it was awarded by government departments, municipalities and SOEs would have been affected by electronic funds transfers. Cash generating activities, such as the canteen at Lindela, were not the main source of income for Bosasa. Hence the need for the illicit mechanisms for large-scale cash generation and the need for substantial vaults at the Bosasa offices where the cash could be stored and processed.

695. Even if one accepts that Mr Agrizzi was not always accurate in his estimations, judged purely by the quantum of evidence placed before the Commission, the attempts at gaining influence through inducement or gain by Bosasa and persons associated with it were central to its business model and operated at a very substantial scale.

By whom were the attempts at influence made?

696. The evidence was that the following individuals and entities were involved in providing inducements and gain, in the form of cash payments or other material benefits, to various functionaries or office bearers employed by state institutions or organs of state:

    696.1 Mr Watson made cash payments to Mr Siviwe Mapisa (head of security at SAPO) and Mr Maanda Manyatshe (CEO at SAPO).

    696.2 Mr Agrizzi and Mr Gumede purchased premium gifts for Mr Siviwe Mapisa and Mr Maanda Manyatshe. These were provided by Bosasa in exchange for a security contract at SAPO. There was similar evidence against Mr Johnson Vovo, but no Rule 3.3 notice was issued to him and accordingly, no negative finding may be made against him.

    696.3 Mr Agrizzi testified to having, together with Mr Gumede, made cash payments to various officials at ACSA, including Mr Thele Moema (head of risk), Mr Siza Thanda (head of security), Mr Reuben Pillay and Mr Johannes Serobe. Messrs Moema, Pillay and Serobe did not respond to Rule 3.3 notices and the evidence may be taken as established in respect of the payment of bribes to them.

    696.4 Ms Bongi Mpungose, Mr Jason Tshabalala and Mr Mohammed Bashir were also named as having received corrupt payments. However, these three persons have not been provided with Rule 3.3 notices and accordingly negative findings may not be made against them.

    696.5 Messrs Watson, Agrizzi, Taverner, Mansell and Vorster were involved in making cash payments and providing fittings and furnishings to the private residences of Mr Gillingham and Mr Mti in exchange for information regarding DCS tenders, permitting corrupt involvement by Bosasa officials in the development of tender specifications and generally enabling Bosasa to secure

and retain the contracts flowing from the tenders. Mr Venter corroborated the fact that cash payments were made to Mr Gillingham. Various travel expenses, including international travel and flights, were paid for by Bosasa for Mr Mti and Mr Gillingham. Bosasa paid for the studies of two of Mr Mti's children and for security guards to be placed at Mr Mti's house. Mr Gumede paid cash to an official at a court to make a drunk driving charge against Mr Mti disappear. Bosasa also paid Mr Gillingham a 'salary' through BEE Foods after his resignation from DCS. Mr van Tonder testified that he attended to various computer repair issues for Mr Gillingham and Mr Mti, on instruction from Mr Watson, on numerous occasions from 2008.

696.6 Mr Watson, Mr Vorster, Mr van Tonder, Dr Smith and Mr Bonifacio were involved in the purchase of motor vehicles for Mr Gillingham and his family members, including his wife, son and daughter. Mr Agrizzi, Mr Vorster and Mr van Tonder gave corroborating evidence in this regard. Mr Agrizzi and Mr Vorster's evidence differed on whether an amount of R180,000 (or R150,000) paid towards a Mercedes Benz E320 was paid to Mr Bonifacio and then transferred between other accounts before being paid to Mr Gillingham, or whether it was paid to Mr Bonifacio who then paid it to the motor vehicle dealership. It is apparent from the evidence that fake documents were drawn up and that the money was paid between different individuals and accounts to conceal or disguise the true nature of the transactions. Mr Vorster testified that he was instructed to procure a motor vehicle for Mr Mti in 2005 and that he presumed that the vehicle was paid for by Bosasa. Mr Agrizzi testified that Mr Mti's children also benefitted from flight tickets and cars.

696.7 Mr Agrizzi and Mr van Tonder testified that Bosasa, through Mr Watson and Mr Hoeksma, paid for the building of Mr Gillingham's house in Midstream Estate and Mr Mti's house in Savannah Hills. Bosasa paid for the cost of the construction of the houses via companies that Mr Mansell had set up to handle these transactions – Grande Four and L&J Civils. False invoices were submitted with the costs of the construction being accounted for as a legitimate business expense in Bosasa's books. Mr le Roux testified that he had been instructed by Mr Agrizzi and Mr Watson to install security systems at Mr Mti's homes to the value of R350,000. The total approximate cost of the equipment, vehicle, travel and labour for work done at Mr Mti's residences in the Eastern Cape was R417,980.19, which excludes miscellaneous costs Mr le Roux purchased on his credit card in the Eastern Cape.

696.8 Mr Agrizzi and Mr van Tonder testified that Bosasa had paid for Mr Gillingham's legal fees during the SIU investigation, through a company called Syncho Prop. Bosasa also paid for Mr Gillingham's legal fees related to his divorce as well as R2.2 million in settlement to Gillingham's wife. Bosasa paid for the legal fees related to Mr Gillingham's son's labour dispute with Bakwena, as well as for the payment of R700,000 owed to Bakwena. A fictitious loan agreement was drawn up between Mr Gillingham and Mr Agrizzi's erstwhile in-laws.

696.8.1 Bosasa paid a "consultancy fee" of R5 million to Mr Sekgota's company to secure an extension of the third catering contract at DCS, pending its renewal. Mr Agrizzi's evidence was that the third catering contract was granted using the same corruptly prepared specifications drafted for the first catering contract and that he was instructed by Mr Watson to work closely with Mr Nkabinde and Mr Sekgota to ensure that Bosasa retained the catering contract. On the probabilities, the monies paid to Mr Sekgota and Mr Nkabinde were, in part, used for the payment of inducements or gains, for them to be able to secure the tender awards. Mr Agrizzi made several allegations to suggest that Mr Nkabinde and Mr Sekgota had the ability to facilitate the award of the catering contract to Bosasa, despite not being officials of the DCS:

696.8.2 Mr Nkabinde had a copy of the tender before it had been issued.

696.8.3 Mr Sekgota required a R5 million fee to be paid to his consultancy company to secure a six-month extension of the contract which would then give them time to iron out details for obtaining the new tender. This amount was paid by Bosasa.

696.8.4 Mr Sekgota required payment of R10 million to secure a renewal of the catering contract. When this was not paid, Bosasa was unable to retain 40% of the catering contract but

retained the remaining 60% of the contract that had been irregularly awarded.

696.9 Despite being issued with Rule 3.3 notices, neither Mr Nkabinde nor Mr Sekgota sought leave to cross-examine Mr Agrizzi or present evidence in contradiction of his version. Mr Agrizzi's evidence in this regard therefore stands undisputed.

696.10 Bosasa made monthly payments of R1 million (later reduced to R700,000) to Mr Sithole, 'Sbu' and Mr Nxele, in exchange for undue pressure being placed on the DCS and Mr Petersen, through the unions, to get Mr Petersen to agree to work with Bosasa.

696.11 Mr Agrizzi testified that Bosasa made payments to officials in the DCS, through Mr Seopela, including to Mr Moyane when he was National Commissioner.

696.12 Mr Leshabane, Mr Watson and Mr Agrizzi paid cash to Mr Modise, who Mr Agrizzi testified was receiving monthly payments from Bosasa.

696.13 Mr le Roux testified that Bosasa paid for the maintenance and installation of a security system at Mr Makwetla's residence, which included the total approximate cost of the equipment, vehicle travel and labour to the approximate value of R308,754.24. There is little doubt that from the perspective of Bosasa, the security system was provided as an attempted inducement.

696.14 Sondolo IT paid 2.5% of all money received through the DOJCD secure systems contract, to individuals within the Department as lobbying fees or bribes. Bosasa also paid for the repair of vehicles, for the purchase of furniture and it paid cash amounts to officials in the DOJCD.

696.15 Bosasa, through Mr Gumede, paid monthly cash amounts to Ms Nyambuse (R40,000) and Mr Thobane (R30,000). Mr Agrizzi was present on a few occasions when money was handed over to them by Mr Gumede. Both names also appear in Mr Agrizzi's black book. Mr Agrizzi testified that he was present on one occasion when money was paid over to Ms Masha around 2013/2014. Bosasa (Sondolo IT) also paid Mr Seopela R1.9 million as a 'fee' for arranging the DOJCD security upgrades contract at the SALU building. However, Ms Nyambuse and Mr Thobane have not been provided with Rule 3.3 notices and accordingly negative findings may not be made against them.

696.16 Mr Agrizzi testified that Mr Mathenjwa facilitated payments for Bheki Gina's sister at the Department of Education to secure the contract for the provision of CCTV and access control systems. On the one hand, Mr Agrizzi testified that approximately R1.25 million was paid as bribe money to this individual, but on the other hand, he stated that he was "out of the loop" on this tender. Given this contradiction, no finding may be made in this regard, although it would be appropriate for the matter to be investigated further by the appropriate authority. Mr Mathenjwa denied that he facilitated payments to secure a contract.

696.17 Mr Agrizzi testified that Mr Mzazi facilitated and secured, through his contacts at USAASSA (procurement personnel and the accounting officer), that portions of a tender would be allocated to Sondolo IT. To secure this undertaking, Mr Mzazi paid an illegal inducement in a sum of R500,000 in cash. According to Mr Agrizzi, at a meeting with Mr Watson and Mr Agrizzi, the accounting officer agreed to work with Bosasa. Whilst the procurement personnel and the accounting officer have neither been identified, nor served with Rule 3.3 notices, and accordingly may not be the subject matter of negative findings, Mr Mzazi failed to respond to a Rule 3.3 notice and it may therefore be accepted that he provided inducements or gain to unidentified persons in an attempt to influence them.

696.18 Mr Agrizzi testified that payments were made to a certain "Mlungise" at the Department of Transport for the award of the contract for fleet management to Kgwerano. This evidence is hearsay as Mr Agrizzi relied on the version purportedly conveyed to him by Mr Leshabane. Mr Agrizzi also testified that when Avis bought Bosasa's shares in the joint venture, Phavisworld, for R23.5 million, an amount was included therein to be paid to Mr Seopela and Mr Leshabane to pay officials at the Department of Transport to secure an extension of the fleet management contract. "Mlungise", if a person exists or existed by that name in the Department of Transport, has not re-

ceived a Rule 3.3 notice, with the result that no negative finding may be made in respect of him. However, the stance of Mr Seopela and Mr Leshabane, explained above, has the consequence that the evidence against them stands uncontradicted. At least on a balance of probabilities, Mr Seopela and Mr Leshabane sought to influence the award and the extension of the contract for fleet management through unlawful inducements and gain, as contemplated in TOR 1.1. On Mr Agrizzi's version, Clive Els may have participated in, or at least had knowledge of, the unlawful inducements and gain. However, no Rule 3.3 notice was issued to him and no negative finding may be made against him. There is a reasonable prospect that further investigation will uncover a *prima facie* case in this regard.

696.19 Mr Agrizzi and Mr Vorster testified that Mr Gumede instructed that Mr Netshishivhe's Isuzu motor vehicle be serviced, which was approved by Mr Watson. Mr Netshishivhe was a member of the Mpumalanga Department of Health's security cluster and is alleged to have had influence over the award of contracts. Mr Netshishivhe has not received a Rule 3.3 notice, so no negative finding may be made against him, but having regard to Mr Gumede's stance, the evidence against him is undisputed and it may be accepted for purposes of TOR 1.1, on a balance of probabilities, that he attempted to influence unidentified persons in the Department of Health, Mpumalanga, through unlawful inducements or gain.

696.20 Mr Agrizzi testified that he together with Mr Watson and Mr Mti were involved in making monthly cash payments to Adv Jiba, Adv Mrwebi and Ms Lepinka at the NPA to provide Bosasa with information regarding ongoing investigations into Bosasa and to interfere with the investigation and possible future prosecutions. Although Mr Agrizzi was not present when the deliveries were allegedly made by Mr Mti to Adv Jiba, Adv Mrwebi and Ms Lepinka, he made the deliveries of the cash to Mr Mti and recorded them in his black book. Adv Jiba denies ever receiving bribes from Mr Mti or anyone else. Mr Agrizzi testified that Mr Mti liaised with the persons in the NPA to obtain information, which included copies of secret documents, minutes of meetings and other information internal to the NPA. Adv Jiba denies having supplied the documents to Mr Mti or to any Bosasa official. Adv Mrwebi distanced himself from Adv Jiba's application to cross-examine Mr Agrizzi, which purports to be signed by Adv Mrwebi. The application was dismissed as a result. As such, the evidence against Adv Mrwebi is undisputed, but remains hearsay.

696.21 Mr Agrizzi attached twelve documents to his Initial Affidavit, which he alleges were given to him or Mr Watson by Mr Mti, who informed Mr Agrizzi that he had received the documents from Adv Jiba and persons within the NPA. Mr Agrizzi testified that the facts contained in the documents were confirmed to him by Mr Seopela, who was close to Adv Simelane. Mr Oellermann was of the view that the persons who leaked the documents to Bosasa must have known that the information would harm the prosecution. Adv de Kock confirmed that six of the twelve documents were in fact what they purported to be and were all confidential NPA documents which she had marked as confidential to ensure that the relevant information security provisions were applicable. She believed the leaks were not random and that any person within the NPA would have been aware that to leak the documents would be unlawful, as possession of the documents by an implicated person would harm the investigation. Mr Oellermann testified that throughout the course of the SIU investigation, there were regular incidents which occurred where it seemed that Bosasa had a very good idea or knowledge of the progress of the investigation. Mr Agrizzi's evidence regarding the alleged participation of Adv Jiba, Adv Mrwebi and Ms Lepinka is hearsay. Adv Mrwebi did not dispute the allegations made against him. Adv Jiba resolved not to persist with her application to cross-examine and her request to give evidence before the Commission on the basis that Mr Agrizzi had no personal knowledge of her having received any money. Ms Lepinka filed an affidavit in response to a Regulation 10(6) directive issued by the Commission in which she denied having received any money from Bosasa, Mr Agrizzi, Mr Watson or their agents for any purpose and denied having handed any documents or information from the NPA to any unauthorised person. It nonetheless remains probable that some form of inducement or gain was paid to a person or persons in the NPA for Bosasa to have been able to gain possession of confidential documentation which they were not lawfully entitled to have in their possession. This matter should also be the subject of further investigation.

696.22 Mr Mlambo and Mr le Roux testified to security upgrades being undertaken by Bosasa at two properties owned by Mr Mti, located in the Eastern Cape and KwaZulu-Natal. That evidence stands uncontested for the reasons given above.

696.23 Mr Venter testified about payments he was instructed by Mr Watson to make to Mr Motsoeneng, Moroka Consultants and a trust established by Andile Ramaphosa (President Ramaphosa's son). According to Mr Venter, Miotto Trading was used by Mr Watson as a vehicle to disguise the true nature of the transactions. No findings may be made against Mr Andile Ramaphosa, Mr Motsoeneng or Moroka Consultants as no Rule 3.3 notices were issued to them. Miotto Trading did not respond to the Rule 3.3 notice, but it would be prejudicial to the other parties referred to in this paragraph if a finding were to be made against it.

696.24 In addition to those persons already named, Mr Agrizzi recorded in his black book that the following individuals employed by or associated with Bosasa were involved in making unlawful payments to various state officials and functionaries as forms of inducement or gain as contemplated in TOR 1.1: Syvion Dlamini, Ryno Roode and Patrick Littler.

697. Mr Dlamini filed an affidavit in response to a 10 (6) directive in which he denies ever taking money to or from any person. Given that Mr Roode and Mr Littler have not responded to Rule 3.3 notices, the evidence may be taken as established against them. This matter should also be the subject of further investigation.

698. Mr Johann Fourie, Raymond (it is unknown what his surname is, but he formed part of the Special Projects Team), Nichola du Toit, Eugene Bredenkamp, Danie van Tonder and Johan Aubrey were implicated in the evidence but no Rule 3.3 notices were issued to them. No negative findings may thus be made against them. These instances, along with similar ones referred to above, should be subject to further investigation. Tshepo Huma was issued with a Rule 3.3 notice on 11 August 2020, to which he failed to respond. The evidence against him is uncontested.

698.1 The above evidence in relation to the persons and entities by whom inducements or gain as contemplated in TOR 1.1 was provided, may be taken as established, at least on a balance of probabilities, save where an implicated party has not received a Rule 3.3 notice or has responded to a Rule 3.3 notice or Regulation 10(6) directive in a manner that precludes a negative finding.

Messrs Wakeford and Radhakrishna

699. Mr Agrizzi testified that he was advised by Mr Radhakrishna that Mr Watson and Mr Wakeford had agreed to pay him R7 million for facilitating the renegotiation and extension of the Lindela contract on favourable terms and without following any tender process. Mr Wakeford denied being party to any such agreement and further denied being aware of any discussion regarding payment to Mr Radhakrishna. Mr Agrizzi contended that Mr Watson refused to pay the R7 million, but did agree to monthly payments to Mr Radhakrishna, disguised by being made through a company with a name along the lines of "the Wine Merchant company".

700. Mr Agrizzi's oral evidence on the allegation that a fee of R7 million was claimed by Mr Radhakrishna from Bosasa for renegotiating the extension of the Lindela contract was contradictory. Initially, Mr Agrizzi said that he approached Mr Watson believing that Mr Radhakrishna should not be entitled to any payment, and that Mr Watson told him that Mr Radhakrishna should not be paid R7 million but could instead be paid monthly. Subsequently Mr Agrizzi said that he in fact proposed to Mr Watson that Mr Radhakrishna be paid monthly.

701. There are also problems with Mr Agrizzi's version in relation to timing and the role he played. Mr Agrizzi testified that, at the time that the monthly payments to Mr Radhakrishna were agreed, he had not yet examined the revised Lindela contract in detail and was not aware of its favourable terms. This was why he had questioned why Mr Radhakrishna should be entitled to any payment at all. Mr Agrizzi himself signed both the second and third addenda on 18 February 2008 and 13 March 2009 respectively. By then he must surely have been aware of at least their main terms. However, the

monthly payments to Mr Radhakrishna (through the "wine merchant company" which turned out to be Distinctive Choice Wines) only commenced in July 2011. Mr Agrizzi's evidence does not hang logically together.

702. Mr Radhakrishna was frank in his acceptance of the fact that he received payment from Bosasa through the bank account of Distinctive Choice Wines. He proffered an explanation for this – the fees from Bosasa were received for work performed in his personal capacity (he said it was for consulting work performed relating to introducing Bosasa to opportunities in the oil and gas industry, consulting work on e-learning projects for the Gauteng Department of Education and introducing Bosasa to opportunities in e-health) and he did not wish his Akhile co-directors to share in the fees earned.

703. Mr Radhakrishna stated that there is no logical basis for the contention he sought to disguise that the payments were from Bosasa, given that Akhile had already received consulting fees from Bosasa in November 2009, i.e., twenty months before Distinctive Choice Wines ever received any payments from it and only a few months after the third addendum was concluded. Further, Akhile still received funds from Bosasa in August 2011, subsequent to Distinctive Choice Wines receiving fees in July 2011. Again, this evidence was not challenged by Mr Agrizzi in any meaningful way, nor was he able to present any evidence to contradict the version of Mr Radhakrishna.

704. Based on the foregoing, no findings can reasonably be made against Mr Radhakrishna in this respect. It may or may not be that his diversion of fees to himself through Distinctive Choice Wines instead of Akhile was open to question as between them, but that is not conduct falling within the Commission's terms of reference.

705. It follows that it cannot be said that either Bosasa or Mr Wakeford sought to influence any of the categories of officials listed in TOR 1.1 through the payments to Mr Radhakrishna via Distinctive Choice Wines.

Messrs Wakeford and Papadakis

706. Mr Agrizzi testified that Mr Wakeford approached Mr Watson when Bosasa was undergoing "a major SARS investigation" with the recommendation that Mr Papadakis be brought on board to help resolve Bosasa's "issues" with SARS. Bosasa, and some of its leadership were being "constantly hounded" by SARS with audits. At the time, Mr Papadakis was an official at SARS and the idea was to make representations in relation to the ongoing investigation against Bosasa to him. Mr Agrizzi also claimed that Mr Wakeford arranged for Bosasa to provide wet and dry cement to a property in Meyersdal owned by Mr Papadakis. In return for procuring Mr Papadakis' assistance in the particular investigation and other ongoing SARS investigations, Mr Wakeford received payment of a fee of "about R100,000 a month" from Bosasa.

707. Messrs Wakeford and Papadakis denied the allegations and that there was any malfeasance on their part, as alleged by Mr Agrizzi. In support of his denial, Mr Wakeford explained that he secured a consultancy contract through his company Wakeford Investment Enterprises CC with Bosasa in 2006. This consultancy arrangement was because of Mr Valence Watson's intervention during a time that Mr Wakeford was "unemployable". Mr Wakeford testified that he received R50,000 per month (plus VAT) to provide on-going consultancy services to Bosasa.

708. Mr Wakeford stated that the only months he received R100,000 from Bosasa was because of arrear payments or catch-up payments due in terms of his consultancy agreement with Bosasa. This version was substantiated by documentary evidence in the form of schedules of invoices and an independent audit report.

709. Mr Agrizzi was not able to dispute that Mr Wakeford was engaged by Bosasa as a consultant during the period 2006 to April 2015. Mr Agrizzi could furthermore not dispute that Mr Wakeford was paid a fee of R50,000 per month plus VAT in total and, in some months, there were additional expenses. Mr Agrizzi initially accepted that the invoices issued by Mr Wakeford were in the amount R50,000 plus VAT. However, subsequently in his evidence he sought to walk back on this concession and ultimately

refused to concede that there was no evidence to demonstrate that Mr Wakeford was paid R100,000 to manage Mr Papadakis.

710. During the section 417 inquiry, Mr van Tonder testified that the payments to Mr Wakeford did not start only during the SARS investigation. He confirmed that it was not unusual for Mr Wakeford to receive monthly payments; however, the amounts were sporadic – in some months it was R50,000 and in others R100,000. His evidence furthermore confirmed Mr Wakeford's version that Mr Agrizzi was opposed to the payments to Mr Wakeford and, at times, payment to Mr Wakeford was late as a result, "and then it was ... double up".

711. Weighing the contrasting versions on this issue, that of Mr Wakeford regarding the nature and amount of the monthly payments to him is largely to be preferred and there is insufficient evidence to support a finding that the payments to Wakeford were exclusively for corruptly "managing" Papadakis in relation to the "major SARS investigation". Indeed, other evidence of Agrizzi himself points to a substantially wider role of Mr Wakeford as consultant to Bosasa. Accordingly, it cannot be said that the payments to Wakeford were made exclusively to influence Mr Papadakis as an office bearer of SARS as a state institution.

712. That finding does not, however, mean that the role of Mr Wakeford as consultant, in relation to Mr Papadakis should not be scrutinised.

713. Mr Wakeford testified that Mr Papadakis could never have assisted Bosasa in resolving any major investigation at SARS before 26 February 2009 as no SARS investigation existed before 23 March 2011, given that there was no notice of an initiation of an investigation until the end of 2010. Instead, the first notification of an impending audit from SARS was issued on 18 August 2010. Mr Wakeford testified further that he would only ask Mr Papadakis for guidance from an administrative or administrative justice perspective from time to time.

714. Mr Papadakis declined to respond to Mr Agrizzi's allegation because he claimed that it would constitute a violation of section 69(1) of the Tax Administration Act ("TAA") and he had requested "an undertaking from the Commission" which request had not, by the time of deposing to his affidavit, been responded to by the Commission.

715. Despite Mr Agrizzi's inability to recall precisely what SARS matters Mr Papadakis' assistance was purportedly procured for, documentary evidence revealed that email communications between Mr Wakeford and Mr Papadakis were conducted through Mr Papadakis' wife, Ms Engelbrecht.

716. Ms Engelbrecht explained that, from her understanding, the association between Messrs Papadakis and Wakeford commenced in approximately 2002 when they were involved in the commission of inquiry into the rapid depreciation of the exchange rate and related matters. It was Mr Wakeford that had introduced Mr Papadakis to the Watsons. Mr Wakeford referred to Mr Papadakis in the emails addressed to Ms Engelbrecht as either "advisor" or "George". Examples include the following:

    716.1 An email dated 25 July 2011 is addressed by Mr Wakeford to Mr Agrizzi, "bigjohn" and Ms Engelbrecht under the subject line "Food Supply Opportunities" saying "Meeting postponed as suggested by George".

    716.2 An email is sent by Mr Wakeford on 10 October 2012 to Ms Engelbrecht with the subject line "Letter", referring to advice that is needed "on this matter". On the same day she responds "Advisor in CTown until Friday, 19 October so don't expect response before then? Ok?"

    716.3 An email is sent by Mr Wakeford on 21 February 2013 to Ms Engelbrecht incorporating a draft letter intended to be placed on Bosasa's auditors' letterhead and seemingly to be addressed to SARS regarding a tax audit, complaining about the tax treatment of certain expenses and complaining that "our client feels that it has been overly subject to audits". The source of the draft letter is Mr Agrizzi. Above the draft letter is the request "Please see below and ask advisor to comment." Ms Engelbrecht responds, saying "Will ask advisor tonight only if that's ok?"

    716.4 An email is sent by Mr Wakeford on 17 May 2013 to Ms Engelbrecht saying, "See attached re discussion!" and forwarding an email from Mr Bonifacio with the subject line "Tax Audits in the

Spotlight", attaching a newspaper article on the subject.

716.5 An email is addressed by Mr Wakeford on 30 September 2013 to Ms Engelbrecht under the subject line "Tomorrow's meeting". It reads

> I will be meeting George tomorrow at 2pm. Please cancel your driver's collection at my office as I will give him the Fidentia file personally.
>
> In addition I will drop off 75% of the Biltong and Dried Wors for him, Nick and Athos.
>
> I attach a document that he needs to peruse before I meet him.

and attaches a draft letter addressed to SARS complaining about tax audits conducted against the Bosasa Group of companies, alleging breach of an agreement reached with a SARS official not to raise further queries, and threatening possible review proceedings in this regard.

717. An email is addressed by Mr Wakeford on 5 December 2013 to Ms Engelbrecht under the subject line "Letter of findings" and reads "Please ask advisor to have a look." Attached is a document from SARS setting out certain "Audit Findings".

718. Ms Engelbrecht referred to information obtained from SARS dated 3 April 2020 which recorded that Mr Papadakis' first day of employment with SARS was 10 March 2008 and that on 1 July 2012 he occupied the position of Executive: Specialised Auditor. This position was on a fixed term basis from 1 July 2012 until 31 July 2015. However, Mr Papadakis submitted a resignation letter on 3 June 2013 and the SARS personnel system shows that his employment was terminated on 14 September 2013. Based on this, Ms Engelbrecht confirmed that Mr Papadakis was employed by SARS over the period 2008 to 2013, i.e., the period during which the emails referred to above were sent, save for the emails dated 30 September 2013 and 5 December 2013.

719. The email communications between Mr Wakeford and Mr Papadakis raise several queries:

719.1 When asked why he referred to Mr Papadakis in some of the emails as "advisor", Mr Wakeford stated that they were friends and that Mr Papadakis' nickname was "my Advisor" and that he "called him Advisor because of his head space and his knowledge". Mr Wakeford also pointed out that he continued to use the nickname after Mr Papadakis terminated his employment with SARS. Nevertheless, the innocent use of such a nickname does not ring true and the emails post-dating his employment with SARS continued to deal with matters raised during his employment which he plainly ought not to have been involved in. As explained below, the duties of SARS officials not to disclose confidential information continue after termination of employment.

719.2 If there was nothing untoward about the correspondence, why did Mr Wakeford elect to correspond with Mr Papadakis through Ms Engelbrecht on her work email as opposed to with Mr Papadakis directly? The explanation proffered by Mr Wakeford, that it was because Mr Papadakis was "running around all the time", is unconvincing. Accessing email on the go is part of modern life and has been for many years now. Ms Engelbrecht also referred to having received calls from Mr Wakeford on her private cell phone for Mr Papadakis, some of which were made by Mr Wakeford on his wife's phone. Tracking down Mr Papadakis via his wife may be understandable, but why would Mr Wakeford call him from his wife's cell phone?

719.3 In respect of the email dated 25 July 2011, addressed by Mr Wakeford to Mr Agrizzi, "bigjohn" and Ms Engelbrecht, it is not properly explained what the food supply opportunities referred to were or why Mr Papadakis, then employed by SARS, would have had anything to do with food supply opportunities.

719.4 The email sent by Mr Wakeford on 21 February 2013 is particularly telling. In it, Mr Papadakis comment is sought on a draft letter to SARS complaining about Bosasa's treatment in relation to tax audits and a meeting recently held with a Ms Herbst of SARS in this regard – this in circumstances where Mr Papadakis held the position with SARS of Executive: Specialised Auditor:

719.4.1 This gives the lie to Mr Wakeford's assertion that Mr Papadakis only assisted with tax matters from an administrative or administrative justice perspective.

719.4.2 Mr Papadakis was acting in conflict with his employer's best interests in the field of tax audits, in circumstances where he was employed to protect SARS' interests.

719.4.3 The draft letter refers to the fact that the matter is being taken up with Bosasa's "relevant consultative tax experts, as well as the legal team". This demonstrates that Mr Wakeford saw Mr Papadakis' advice as being of value, notwithstanding the availability to Bosasa of leading tax experts. This undermines Mr Wakeford's assertion on this basis that there would have been no reason to seek tax advice from Mr Papadakis.

719.4.4 If Mr Papadakis' was not involved in conduct that was untoward, the natural response to such an email would have been to say to Mr Wakeford in no uncertain terms that he could not involve himself in providing any such advice, because it conflicted with his contractual and, possibly, statutory obligations towards SARS. He could not have done so, because on 17 May 2013 Mr Wakeford felt free to forward to Mr Papadakis (via Ms Engelbrecht) a newspaper article about tax audits and to comment "See attached re discussion!". Nor is there any suggestion in Mr Papadakis' affidavit that he raised a red flag.

719.4.5 Further, the provision by Mr Papadakis of advice in these circumstances may have constituted a breach of section 68 of the TAA insofar as it prohibits disclosure by a current or former SARS official of various categories of confidential information related to SARS, including "information relating to the ... audit selection procedure or method used by SARS, the disclosure of which could reasonably be expected to jeopardise the effectiveness thereof".

720. The evidence emanating from the emails does not support Mr Agrizzi's assertion that the assistance took the form of Mr Papadakis actually receiving representations from Bosasa and making decisions on behalf of SARS favouring Bosasa in relation to the tax audits. Rather, the evidence points to Mr Papadkis being influenced by Mr Wakeford to provide advice to Bosasa in relation to both tax administration matters and tax audits, using the knowledge, information, and expertise that he had by virtue of the position that he occupied at SARS. That is sufficient to constitute influence as contemplated in TOR 1.1, and it was the consequence of:

720.1 Direct successful attempts by Mr Wakeford; and

720.2 Indirect successful attempts by Bosasa, through Mr Wakeford, to influence Mr Papadakis to provide the advice. Mr Papadakis, in turn, was an office bearer in SARS, which constitutes both a state institution and an organ of state, as contemplated in TOR 1.1.

721. The question which must then be asked is whether any inducements or gain were paid or provided to Mr Wakeford or Mr Papadakis or both to influence the latter to provide the said advice. The emails suggest that Mr Wakeford's work as the person who liaised with Mr Papadakis was an important component of the consultancy services that he provided to Bosasa in return for his fee of R50,000 plus VAT per month. The payment of that fee, in part for purposes of getting Mr Wakeford to solicit advice from Mr Papadakis, falls within the concept of "any gain of whatsoever nature" in TOR 1.1. Therefore, from the perspective of the attempts at influence through Mr Wakeford, there was conduct by Bosasa as contemplated in TOR 1.1.

722. That leaves unanswered the question whether there was "any form of inducement or ... any gain of whatsoever nature" paid or provided to Mr Papadakis. Mr Agrizzi claimed that Mr Wakeford arranged for Bosasa to provide wet and dry cement to a property in Meyersdal owned by Mr Papadakis where he was building a house, for no charge. This is disputed by Mr Wakeford and Mr Papadakis.

723. However, during his evidence before the Commission, Mr Wakeford accepted that he was instrumental in securing Bosasa's assistance for Mr Papadakis in 2008/2009 when Mr Papadakis was building a house and there was a shortage of cement. It is uncontentious that Mr Papadakis was employed by SARS during this time. However, Mr Wakeford asserted that the cement was paid for and was therefore a legitimate transaction.

724. Mr Agrizzi's allegation that Mr Wakeford arranged for Bosasa to provide wet and dry cement to a property in Meyersdal owned by Mr Papadakis was corroborated by the evidence of Mr Vorster. Ac-

cording to Mr Vorster, during late 2009, Mr Watson called him and informed him that Mr Wakeford would instruct him to buy and deliver wet and dry cement. Wet cement was purchased from WG Wearne in Randfontein and the dry cement was purchased from RTC.

725. Mr Vorster testified that Mr Wakeford instructed him to deliver the cement to an address at Meyer Park Eco Estate in Meyerton. According to Mr Vorster, the value of the cement purchased was "round-about" R600 000. Mr Vorster understood the cement was intended for Mr Papadakis. There appears to be no real dispute that the cement was in fact delivered to Mr Papadakis. What is contentious is the quantity and value of the cement, who assumed responsibility for payment of the cement and the timing of the deliveries.

726. As to who assumed responsibility for the payment of the cement, Mr Wakeford's evidence was contradictory. He initially said in his oral testimony that "he [i.e., Mr Papadakis] paid for the cement. It was done above board." Later in his oral evidence, Mr Wakeford said that much smaller quantities of cement than was claimed, were involved and that "there was some assistance and as far as I understand there was payment for it from Mr Papadakis's builder." Under re-examination, Mr Wakeford said "I do remember him [i.e., Mr Papadakis] contacting me Chair and saying I have settled. I have paid this thing, because he was worried if I recall that he didn't want to be fingered for being naughty".

727. Mr Papadakis asserted that "the purchases of material for the wet works at Eco Estate, the cement and other building material was in the main ordered by the contractor .... Purchases were either settled by him or directly with his suppliers". Mr Papadakis stated that he was "fully employed" during the period of construction and "as such the building activities were attended to by my contractors, including the ordering of supplies". Mr Papadakis later stated, vaguely, that "toward the latter part of 2009 I was provided an amount that needed to be settled, which was settled." He does not say what the amount was, how it was calculated, who provided him with the information about the amount, whether he was provided with this information verbally or in a document, if in a document, what the nature of the document was, or who precisely it was that settled the amount. If it was he who made the payment, it would be a relatively simple matter to demonstrate with reference to a bank statement that he had done so. If not, he could have explained this and why it was not possible to verify the payment. After all, he is a chartered accountant with experience in auditing.

728. The contradictions in the evidence of Mr Wakeford regarding payment and the failure of Mr Papadakis to deal fully and squarely with the assertion that the cement was provided by Bosasa free of charge as a quid pro quo, are matters of concern and inevitably arouse suspicion.

729. Mr Papadakis focussed on challenging the allegations regarding the total quantity and value of the cement delivered, and its timing. As to the quantities of the cement, Mr Papadakis' provided a reasonably convincing analysis of the documentary evidence to challenge the veracity of the allegation that approximately R600,000 worth of cement was delivered to his properties. As to the quantities of dry cement, the documentary evidence, he pointed out, cannot be linked specifically to the address where he was building the house. As regards wet cement, his analysis suggested that only an amount valued at R204,734.26 was delivered. On this basis he contended that "the empirical evidence conclusively proves the fallaciousness of Mr Agrizzi and Mr Vorster's allegations."

730. This analysis notwithstanding, it was not in dispute that wet and dry cement was indeed provided, albeit of a considerably lower value than contended for by Mr Agrizzi and Mr Vorster.

731. In respect of the timing of the deliveries, Mr Papadakis was able to demonstrate with reference to the Wearne documentation that no deliveries of wet cement were made after 10 July 2009. He also pointed to a Google Earth image dated 27 December 2009 that demonstrated that by that date there was already a roof on the house under construction, thereby confirming that there would not have been any need by then for the delivery of further wet cement. He juxtaposed these dates with the date of August 2010, which appears to be the earliest reference to a SARS tax audit on a Bosasa entity, and the date of the 21 February 2013 email discussed above.

732. This line of thinking takes as its premise that a quid pro quo would only have been forthcoming in return for advice given by Mr Papadakis in response to a major SARS investigation or tax audit. Cer-

tainly, that is a factor to be considered in assessing the evidence and the probabilities. However, it is not in conflict with the probabilities that Bosasa, with the assistance of Mr Wakeford, may have wished to get Mr Papadakis onside at an early stage of Mr Wakeford's consultancy, before any services had been provided by him (Mr Papadakis). By the time of Mr Papadakis' appointment at SARS, Mr Wakeford's consultancy agreement with Bosasa was already in place. That remained the position until the termination of Mr Papadakis' employment with SARS in 2013 and covers the period of the cement deliveries, payment for which has not been satisfactorily explained.

733. Nor is there any attempt by either Mr Papadakis or Mr Wakeford to explain what the basis was upon which he was providing advice during the period when Bosasa was facing successive tax audits. Why not volunteer this information to assist the Commission? It is improbable that this advice was being provided for free, particularly given the risk that Mr Papadakis' breach of his employment contract with SARS (and possibly breaches of the TAA) would be uncovered. The email correspondence with Mr Papadakis under the subject line "food supply opportunities" and the reference in Mr Wakeford's email to his intention to "drop off 75% of the Biltong and Dried Wors", also arouse suspicion.

734. Although arising in a different context not pertaining to Mr Papadakis, the emails of 16 and 20 June 2011 addressed by Mr Wakeford to Mr Agrizzi under the subject lines "Smarties" and "Smarties confirmed" and referring to "confectionery" are similarly suspicious and point to the use of food items as a form of code. Mr Wakeford's attempt to explain the emails away on the bases of a challenge to their authenticity, that he had such a good relationship with the then Minister of Correctional Services that he did not need to provide gratification to her adviser to have access to her, and that Bosasa was involved in catering and tended to spoil their guests, are not sufficiently compelling to warrant ignoring these emails.

735. In the circumstances, there are reasonable grounds for suspecting that there was conduct on the part of Bosasa and Mr Wakeford as contemplated in TOR 1.1, which warrants further investigation. Mr Papadakis' conduct also requires investigation.

Mr Mantashe

736. To précis the evidence and contentions in relation to Mr Mantashe, Mr Mlambo and Mr le Roux testified to security upgrades being undertaken by Bosasa at three of his properties in Elliot and Cala, Eastern Cape and in Boksburg, Gauteng. Mr Mlambo corroborated Mr le Roux's evidence regarding the location of the cameras and CCTV monitors and obtained invoices of the lodge where the Special Projects team was accommodated while undertaking the work, booked by Blake's Travel. Mr Mlambo also testified to visiting Mr Mantashe's property in Cala, where he observed mounted cameras and LED perimeter lights, which Mr le Roux indicated were installed by Bosasa. Mr Mantashe admits that the security upgrades were installed at his properties but:

    736.1 Disputes that there was anything untoward about the installations, which were arranged as between his security adviser and Mr Leshabane

    736.2 Contends that it was not done on any basis to solicit favours from him

    736.3 Disputes that the evidence pertaining to him falls within the terms of reference as he was secretary-general of the ANC at the relevant times and did not hold any position in any component of the State contemplated in the terms of reference

    736.4 Disputes that he was in any position to influence any officer bearer in any such position; and

    736.5 Disputes the value attributed to the installations.

737. At the time of the security installations at his homes Mr Mantashe himself clearly fell outside of the list of public office bearers in TOR 1.1, 1.4 and 1.9. Nor was he an office bearer in, or associated with, any entity contemplated in TOR 1.5. His position clearly places him beyond the reach of TOR 1.4, 1.5 and 1.9 (as well as TOR 1.2, 1.3, 1.6. 1.7, 1.8). Does this, in effect, mean that the consideration of the evidence pertaining to Mr Mantashe fell outside the ambit of the Commission's TORs?

738. The only term of reference which requires consideration in relation to Mr Mantashe is TOR 1.1. Two questions are raised:

738.1 Does it include within its ambit an attempt through inducement or gain to influence the list of office bearers indirectly through another person who does not fall within that list?; and

738.2 If so, does the term of reference require that the office bearer sought to be influenced be specifically identified?

739. In relation to the first of these two questions, having regard to the broad purpose of the Commission being to unearth corruption (as Mr Mantashe recognised in his evidence) it would represent far too narrow a reading if the Commission was forced to turn a blind eye to attempts at corrupt influence of State office bearers through the agency of a third person. The answer to the first question posed must therefore be in the affirmative.

740. Turning to the second question, answering this in the affirmative would require the Commission to turn a blind eye to a corrupt attempt at influence through the agency of a third person if the attempt was based only on that person's perceived potential to influence unspecified or unnamed office bearers falling within the list in TOR 1.1. Again, this seems to conflict with the purpose of the Commission and its terms of reference. It also fails to take into consideration the inclusiveness of the wording of TOR 1.1, which brings within its ambit both influence and attempts at influence; describes the concept of inducement broadly; does not require that the influence had any positive result; and spreads the net wide in terms of the public office-bearers that might be influenced. The second question must therefore be answered in the negative, to include attempts to influence unspecified or unnamed public office bearers on the list. Accordingly, the TORs do not preclude a consideration of the evidence pertaining to Mr Mantashe.

741. The matter must first be viewed from the perspective of Bosasa and Mr Leshabane. A finding that they were guilty of conduct as contemplated in TOR 1.1 does not automatically translate into guilty conduct or knowledge on the part of Mr Mantashe.

742. There can be no doubt that the provision of security installations for no charge amounts to "gain of whatsoever nature" as contemplated in TOR 1.1. Whilst the value of the installations may be in dispute, the fact of the installations, and the fact that they were not paid for by Mr Mantashe, is common cause. The provision of free security installations was manifestly part of the corrupt *modus operandi* of Bosasa and its directors, including Mr Leshabane himself. Mr Leshabane has not come forward to testify that this arrangement was different from the others and was an altruistic attempt on his part at assisting a family friend.

743. The next question from Bosasa, Mr Watson and Mr Leshabane's perspectives is whether they sought, through the political party funding of the ANC as well as free installations for Mr Mantashe, to influence the listed office bearers. In this regard, there is no evidence of a particular named office bearer they sought to influence through Mr Mantashe. However, the evidence that stands uncontradicted by Mr Leshabane is that Mr Mantashe was seen by the leadership of Bosasa as a "brilliant connection". Objectively, this is borne out. The majority party, through its majority in Parliament, wields very substantial constitutional power. Mr Mantashe was at the relevant times the secretary-general of the majority party and a member of its national executive committee ("the NEC"). On Mr Mantashe's own version, whilst the President of the Republic of South Africa appoints Ministers, he must consult with the NEC before doing so. In terms of the constitution of the ANC, the secretary-general:

743.1 May have delegated to him or her any of the powers of the NEC

743.2 Is a member of the National Working Committee, which carries out the decisions of the NEC and the ongoing work of the ANC

743.3 Is the chief administrative officer of the ANC; and

743.4 Acts as president of the ANC in the absence of the president and deputy-president of the ANC.

744. Bosasa was a business organisation that was heavily invested in securing tenders from government

departments and organs of state. At the very least on a balance of probabilities, it sought to be able, through Mr Mantashe and the inducements and gain provided to him, to influence the leadership of those departments and organs of state, a leadership drawn almost exclusively from the ranks of the ANC and falling within the categories of public office bearers listed in TOR1.1. That is conduct sufficient to fall within TOR 1.1.

745. What then of the position from Mr Mantashe's perspective? He did not dispute the provision of the three installations; nor did he dispute that he received them for free. However, he contends that his receipt was an entirely innocent one, borne of arrangements made between his security person, Mr Nyakaza, and a family friend, Mr Leshabane. He also downplayed his capacity for influence as secretary-general, characterising the position as "secretary-general of an NGO called the ANC". His version however faces the following difficulties:

    745.1 His characterisation of the ANC as a mere "NGO" does not withstand scrutiny. It is the majority party, with the levers of legislative and executive power at its disposal through its elected members of Parliament and the persons it deploys to positions of executive leadership.

    745.2 His characterisation of the position of secretary-general of the ANC is inaccurate - it is a powerful position with scope for influence over the listed persons, for the reasons given above - and the term of reference does not require an enquiry into whether or not the influence sought was in fact achieved (to be clear, there is no evidence that Mr Mantashe did act in the way that Bosasa and Mr Leshabane would have intended).

    745.3 Even though the evidence of the value of the installations was unsatisfactory, it was uncontested that this was on a significant scale - three separate homes were provided with security installations and two of them required the installation to be done a long way from Bosasa's headquarters in Johannesburg, which carried with it significant additional expenses.

    745.4 His characterisation of the security installations as being a manifestation of traditional intra-family support or a traditional project, akin to contributions for a traditional wedding ceremony, is not convincing and is undermined by The scale of the generosity and his failure to offer to make any contribution whatsoever of his own towards the costs - if it was a project based on a traditional sharing of costs one would have expected him at least to contribute commensurate with his means.

746. With each additional installation, the improbability of his having no knowledge about who exactly was responsible and at what cost, increases.

747. The nature, manner and content of his testimony was not satisfactory:

    747.1 Mr Mantashe's attempt to characterise the installation of security equipment at his three houses as a traditional project, similar to a traditional wedding, where family members or friends voluntarily contributed to the cost, was not convincing.

    747.2 He initially denied knowledge of Mr Watson's clan name, but later gave it.

    747.3 His response to the question whether he knew that Mr Leshabane was working for Bosasa, was that this was immaterial - this is not an adequate response when, to his knowledge, the organisation was led by Mr Watson whom he knew to have been involved in earlier bribery in relation to contracts for catering at mine hostels.

    747.4 His testimony that all he knew of Bosasa was of their contract in relation to the West Rand Youth Centre was unconvincing, given the widely reported allegations in the press of corruption on the part of Bosasa emanating from the SIU investigation and his knowing Mr Watson well enough to know his clan name and his bribery in relation to hostel catering contracts.

    747.5 His evidence that he could not remember whether or not he had a red Toyota Land Cruiser, was improbable - this is the type of thing that every person would remember.

    747.6 His testimony was hesitant and evasive, not of a kind that one would expect from a leader of the majority party seeking to assist the Commission in every possible way to uncover the truth.

748. In the circumstances, it may be concluded that there is a reasonable suspicion that Mr Mantashe received the free installations, knowing that Mr Leshabane sought through him to influence unspecified or unnamed office bearers in the categories listed in TOR 1.1 that lead departments that Bosasa did, or sought to do, business with. As pointed out above, there is no evidence that he did act in the manner intended by Mr Leshabane. The significance of this is dealt with further below.

The African National Congress

749. Like Mr Mantashe, the ANC as a political party falls beyond the reach of TOR 1.4, 1.5 and 1.9 (as well as TOR 1.2, 1.3, 1.6. 1.7, 1.8).

750. However, TOR 1.1 requires consideration in relation to the ANC. For the reasons set out above in relation to the evidence of, and pertaining to, Mr Mantashe, the terms of reference do not preclude a consideration of the evidence pertaining to the ANC, on the basis that influence of the public office bearers listed in TOR 1.1 may in principle be achieved through the ANC because, for as long as it was the majority party, through its members elected to the legislature and the persons deployed to executive leadership positions, it would indirectly wield legislative and executive power. The capacity to influence the ANC as a juristic person or organisation, necessarily means the ability to influence persons in those positions.

751. The matter must first be viewed from the perspective of Bosasa and its directors. What requires particular consideration here is the provision of the "War Room" facilities. The provision to the ANC of the "war room" facilities, according to Mr Agrizzi, at a cost of millions to Bosasa and at no cost to the ANC, amounts to "gain of whatsoever nature" as contemplated in TOR 1.1. Mr Agrizzi may have exaggerated the expenditure, but it is clear from the sophistication of the equipment and facilities, and the time period over which they were provided (three months in respect of the 2014 elections and two months in respect of the Mangaung conference) that the value was substantial. Ms Mokonyane did not dispute that such assistance had been provided by Bosasa to the ANC at no charge. President Ramaphosa testified that, whilst he visited the facility, it never occurred to him that Bosasa were bank rolling the "war room" facilities. However, "the Treasury (sic) General as well as colleagues or comrades who ran the elections knew."

752. The question from the perspective of Bosasa and its directors, is whether they sought through the provision of the "war room" facilities to the ANC at no charge, indirectly to influence the public office bearers listed in TOR 1.1.

753. There is no evidence to suggest that the provision of the facilities was a bona fide contribution by Mr Watson based on his long-standing relationship with the ANC. Instead, the evidence is that it was provided by Bosasa as a business organisation at its office park, at the instance of its directors, Mr Watson, Mr Gumede and Mr Leshabane. Bosasa was a business organisation that was heavily invested in securing tenders from government departments and organs of state. Against the backdrop of all the evidence received by the Commission in connection with Bosasa, and the extent to which its business model was based on its ability to influence public office bearers, one need merely consider the potentially catastrophic consequences for Bosasa if the ANC were to be voted out of power, to understand how important the provision of the "war room" facilities to the ANC was, in order for Bosasa to be able to achieve its business objectives.

754. On a conspectus of the evidence about Bosasa and its corrupt *modus operandi*, and viewed from the perspective of Bosasa, the provision of the "war room" facilities was, at least on a balance of probabilities, aimed at ensuring that:

    754.1 The ANC would remain the majority party and thus in a position to appoint to positions of public office, persons whom Bosasa was able to influence or would seek to influence; and

    754.2 Members of the ANC deployed to senior positions in State institutions, Organs of State and SOEs would remain well-disposed towards Bosasa, in its business dealings, which included tendering for and retaining contracts with such State institutions.

755. It follows that the availing by Bosasa of the "war room" facilities constituted a form of inducement and gain aimed at achieving influence as contemplated in TOR 1.1.

756. The matter must next be viewed from the perspective of the ANC. Whilst President Ramaphosa testified that it never occurred to him that the "war room" facilities were being provided entirely at the expense of Bosasa, he confirmed that the "Treasury-General" as well as those ANC officials involved in running the elections did know this. Although he testified that the ANC would not knowingly and intentionally accept donations from companies or donors who had been involved in criminal activity and pointed out that the allegations of corruption against Bosasa had taken place a few years beforehand, President Ramaphosa appropriately accepted that there was a "major lapse" on the part of the party in accepting this assistance from Bosasa.

757. President Ramaphosa also appropriately conceded that it is difficult to avoid the conclusion on the facts that the ANC received this and other forms of assistance from Bosasa:

757.1 In breach of its rule that it would not knowingly receive donations from donors involved in criminal activities; and

757.2 While key ANC officials, including the President of the time, must have been aware of the earlier serious allegations of corruption against Bosasa.

758. In the circumstances, there are reasonable grounds for suspecting that the "war room" facilities were received by the ANC as a juristic person with knowledge on the part of the ANC officials directly involved in the election campaigns, that Bosasa and its directors, including Mr Watson, sought through the ANC to influence unspecified or unnamed office bearers in the categories listed in TOR 1.1 in the departments and organs of State with which it did or sought to do business.

759. The ANC office bearers involved in organising the ANC election campaigns have not been identified. Nevertheless, there is a reasonable prospect that further investigation will identify them and uncover a *prima facie* case against them. This matter is accordingly dealt with further under the referral section.

760. Turning to the contribution to the CR17 campaign, the evidence emanating from President Ramaphosa is largely hearsay and lacking in any detail. It is therefore difficult to draw reliable conclusions with reference to TOR 1.1 in respect of either Bosasa or its directors, on the one hand, or those involved in managing the CR17 campaign on the other. Suffice it to say that the fact that the moneys were seemingly passed through more than one account by Bosasa, if correct, suggests on the face of it that Bosasa and Mr Watson's motives were not bona fide ones. However, there is far too little first hand or detailed information to draw any reliable conclusions. The issue was the subject matter of an investigation by the Public Protector and thereafter the subject matter of court proceedings.

761. Insofar as President Ramaphosa himself is concerned, there is no evidence to gainsay his assertion that he was deliberately kept out of the funding arrangements in respect of the campaign and that he had no knowledge of the donation at the time. He readily came forward to testify before the Commission under oath and made himself available for questioning by the Chairperson and the evidence leaders on the issue. This is something that is seldom seen on the part of the President of a country and stands in marked contrast to the approach towards the Commission of his predecessor in office. His demeanour as a witness was impressive. He readily made concessions, even though they may not have been in his interests or those of the ANC. He was open in his approach and did not seek to avoid difficult questions put to him by the Chairperson or the evidence leaders. He gave the impression of wishing to assist the Commission in the performance of its function.

762. In the circumstances, and on the limited evidence available to the Commission, no negative findings can be made in respect of President Ramaphosa in relation to the donation to the CR17 campaign.

Mr Nair

763. To précis the evidence and contentions pertaining to Mr Nair, the evidence of Mr Le Roux, Mr Baijoo and Mr Van der Merwe is that Sondolo IT installed new cameras and related hardware, along with repairs to an existing electric fence and alarm system at Mr Nair's home, as part of the work of

the Special Projects team. However, Mr Nair in his affidavit and oral evidence insisted that this was the result of a private, oral agreement with Mr Baijoo in his personal capacity. He denies any involvement in corruption or state capture. Any involvement of Messrs Le Roux, Mathenjwa or Agrizzi, or of Sondolo IT or Bosasa, or the Special Projects team, was without his knowledge. Nor was he acquainted with them.

764. Mr le Roux gave evidence that he was instructed by Mr Mathenjwa to install the security system at Mr Nair's residence and carried out this instruction. On Mr Nair's version, Mr Baijoo did the installation but never complied with his contractual obligations in terms of their oral agreement, as the CCTV camera system was so unsatisfactory that it amounted to a breach of contract. On the basis of the exceptio non adimpleti contractus, because of Mr Baijoo's failure to perform he (Mr Nair) was excused from his performance in the form of payment.

765. Mr Nair set out his assessment of the evidence of Mr le Roux, which in his view militates against a finding that he was a beneficiary of Bosasa's Special Projects team. Mr Nair asserted that Mr le Roux did not know who he (Mr Nair) was; that Sondolo IT branded vehicles and employees in uniform came to his premises on one occasion, contrary to evidence that unbranded vehicles would be used for special projects; no project name was assigned to the installation at Mr Nair's residence; and that no direct link was established between Bosasa and Mr Nair. Mr Nair also alleges that there was a lack of corroboration of Mr le Roux's evidence. He pointed out that, in any event, there was no evidence whatsoever that he corruptly provided anything in return for the installation.

766. Does the evidence pertaining to Mr Nair fall within the scope of the terms of reference? None of TOR 1.2 to 1.9 come into play. Does TOR 1.1 apply?

767. There can be little doubt that from the perspective of Bosasa and its subsidiary, Sondolo IT, the installation of the security system for no charge was an attempt at inducement. Whatever Mr Nair's ability to influence the outcome of tenders, his perceived influential position as chief magistrate would have made him an appropriate target for inducement in circumstances where Bosasa and Sondolo IT wished to retain their security service contracts with the DOJCD. This is so notwithstanding Mr Nair's evidence distancing himself from procurement activities at the court. On his own version, the court manager would seek out his opinion on operational matters of this nature, even though it is the court manager who had the final say. One can also see an advantage for Bosasa in having a senior member of the magistracy "onside", in case Bosasa's activities ever resulted in one of its office bearers or employees being prosecuted.

768. However, with reference to the wording of TOR 1.1, a magistrate would not fall under "members of the National Executive" or "directors of boards of SOE's". Nor would a magistrate be considered a "functionary". Would he be "an office bearer of any state institution or organ of state"? The definition of "organ of state" in the Constitution expressly excludes "a court or a judicial officer". The only possible basis for inclusion in the terms of reference is if a magistrate is an "office bearer of any state institution".

769. Applying the purposive approach advanced above to the interpretation of the TORs, it would be surprising if a broad enquiry into the phenomena of state capture and corruption would have contemplated the exclusion of a member of the judiciary. It was more likely that corrupt office bearers within all institutions exercising public power under the Constitution, were to be subject to scrutiny. Textually, the recognition of a magistrate as "an office bearer of [a] state institution", does not give rise to any dissonance. A magistrate therefore falls within the reach of TOR 1.1. Mr Nair's version, that the installation was the fruit of a legitimate private contract with Mr Baijoo must therefore be considered.

770. There are several aspects of Mr Nair's version that present difficulties for its acceptance:

    770.1 Whilst it would reflect questionable judgement in the first place to contract privately with an employee of a court security contractor, one would have expected that Mr Nair, as a seasoned magistrate and acting judge, would take deliberate steps and great care to ensure that there was no misunderstanding as to whether it was Sondolo IT or Mr Baijoo himself who was to do the installation. He gave no evidence that he took such steps and care.

770.2 If the work was to be done by Mr Baijoo other than in his capacity as a Sondolo IT employee, one would expect it to have been done after hours, but on Mr Nair's own version, the work began on 4 October 2016, which was a Tuesday.

770.3 It would be surprising if a person doing work based on an oral, private agreement with an acquaintance, would advance significant amounts of money for new equipment for the installation, without expecting any form of deposit or assistance with purchasing the equipment.

770.4 Mr Nair failed to provide an adequate explanation for the SMS/text messages that he exchanged with Mr le Roux. These run counter to his assertion that he did not know him. His suggestion that it might have been because Mr Baijoo referred him to Mr le Roux as a technician, does not align with his assertion that Mr Baijoo did the work himself, privately. The politeness of Mr Nair's "Ok thank you" message, is not what one would expect from a person who was frustrated by a failed installation that had not been attended to in six months.

770.5 His explanation for not returning the equipment defectively installed - that he thought Mr Baijoo was going to return to address the problems - loses force when Mr Nair also says that he reached a point where he gave up on this ever happening.

770.6 Mr Baijoo does not corroborate Mr Nair's version as to a private, oral agreement. Instead, he confirmed the involvement of Mr le Roux and the Special Projects team.

770.7 It is incongruous that, on his own version, when Mr Nair next saw Mr Baijoo at court after his alleged fundamental breach of their oral agreement, said to be a source of considerable frustration for him, Mr Nair said nothing to him about it.

770.8 He provided no corroborating evidence to support his averment that he had to employ a third-party contractor to set up a parallel CCTV system.

771. None of these improbabilities were satisfactorily explained by Mr Nair in his oral evidence. Mr Nair was critical of the case against him in various respects. These do not however significantly undermine it. The request to cross-examine Mr le Roux was dropped and no significant weaknesses in his version were pointed out by Mr Nair. Inaccuracy, if there was any, in Mr le Roux's estimates of the value of the work, is not a sufficient reason to disbelieve him on the main fact of his having been responsible for the installation as a special project. He had no motive to falsely implicate Mr Nair. It is not correct that Mr Baijoo's affidavits failed to mention the meeting at the Pretoria Magistrate's Court with himself, Mr Mathenjwa and Mr Nair. One did not. One did. This was not a sufficient basis to prefer Mr Nair's version.

772. Mr Nair is quite correct in pointing out that there is no evidence that he corruptly provided anything in return for the installation. However, this is not a component or requirement of TOR 1.1. However, it may have significance as to whether the matter should, insofar as it pertains to him, be referred to the appropriate authorities for further investigation. This is dealt with further in relation to TOR 7.

Dr De Wee

773. If Mr Agrizzi's evidence pertaining to Dr De Wee were to be accepted, the circumstances pertaining to Dr De Wee would fall squarely within TOR1.1. Dr De Wee was an office bearer employed in the DOJCD which is both a state institution and an organ of state. He was directly involved in the decision-making processes in relation to tenders in which Bosasa's subsidiary Sondolo IT was involved. As chair of the BEC, and at one point, Acting DG, he was clearly able to influence the outcome of decision-making in relation to these tenders. Cash payments to him by Bosasa through Mr Seopola would clearly have amounted to attempts through a form of inducement to influence Dr De Wee.

774. The difficulty is that the evidence of the cash payments was pure hearsay. There was no direct corroborating evidence. Dr De Wee's name did not feature in the black books to which Mr Agrizzi referred or in any other documentary evidence.

775. Notwithstanding the unreliable nature of the evidence against him, it is appropriate to consider the evidence put up by Dr De Wee in his defence. It can unfortunately not be said that his evidence laid to rest any concern regarding malfeasance in the DOJCD under his watch or on his part. There were several aspects of his evidence which were less than satisfactory.

776. He initially explained the origin of the two opinions as being in relation to the appointment of a consultant to draw up the specifications for the security contract. However, in explaining the need for the opinions he shifted to the need for the opinions arising from only a single bidder having scored above the 65% cut-off point. This evidence however manifestly pertained to the bid for the security contract itself, not the drawing up of the specification. Later in his evidence he reverted to the position that the two opinions were obtained for purposes of the drawing up of the specification.

777. Dr De Wee's evidence in relation to the complaint that the BAC was not informed about the Treasury opinion was not satisfactory. He asserted that the minute of the BAC meeting of 24 April 2008 demonstrated that the committee was alerted to the existence of the two opinions, and he suspected that they had been provided with copies. The relevant portion of the minute of the meeting records as follows:

    777.1 Since it was one bidder who met the requirements, the Department requested advise [sic] from the National Treasury and the State Law Advisor.

    777.2 The advise [sic] obtained was:

        777.2.1 To re-advertise and lower threshold from 65% to 50% - but then it will prejudice the company that met the threshold.

        777.2.2 The conclusion was to invite a bid for phase 1 only from the qualifying bidder.

        777.2.3 New bids will be invited for phase 2.

778. The following comments are apposite in this regard:

    778.1 There was no reference to the fact that there were separate written opinions (only a reference to a request for "advice").

    778.2 There was no reference to the fact that the written opinions were divergent.

    778.3 On the contrary, the minute suggests that the BAC was led to believe that the advice from National Treasury and the State Law Advisor was unanimous and as set out in the three sub-bullet points.

    778.4 No clear reference is made to the content of the divergent advice emanating from the written opinion from National Treasury.

    778.5 The internal departmental opinion seems, misleadingly, to have been ascribed to the State Law Advisor.

779. The bid process in question took place in 2008. Dr De Wee sought to justify preferring the internal opinion based on the urgency created by the crime problem in courts. He justified this with reference to a memorandum which referred to the problem. However, that memorandum is dated 8 February 2015, more than six years later than the time of the tender.

780. On the face of it, clauses 2.2 and 2.3 of the SLA with the Contractor are troubling. The clauses read as follows:

> The Bid was awarded to the Contractor in the amount of R601 863 308.80 in respect of 127 Facilities, however, in order for the Principal and the Contractor to ensure an economic, effective and efficient services is rendered, the Parties agree that *negotiation may take place in terms of the Change Control Policy with regards to either the Bid Price, the number of Facilities or the specifications of the Services*.

The following Faculties / Sites have been identified as the Pilot Sites for this project. These are the Magistrate Court: Johannesburg, Magistrate Court: Kempton Park, Magistrate Court: Pretoria, Magistrate Court: Pretoria North, High Court: Johannesburg, and High Court: Pretoria,

Due to the *incomplete Service specifications* in the Bid document, the Parties have agreed that the *Contractor will conduct a comprehensive audit at the Pilot Sites to establish the Principal's security requirements in general*. The parties recognise that this will result in additional costs to both parties and in this regard the parties have agreed that *the Principal will be liable for the costs of any additional Equipment* that may be required, but that the Contractor will forfeit any labour costs relating to the installation of the additional Equipment. A PDR will be completed for each Pilot Site and the Contractor will not proceed with any additional work at the Pilot Sites unless the PDR has been signed off by both parties.

The purpose of the Pilot Sites is to identify a complete solution to be adopted and used during the roll out of the remaining Facilities (emphasis added).

781. Clause 2.2 essentially permits the parties, outside of the tender process, completely to renegotiate the central terms of the agreement, namely bid price, the number of facilities and the specifications for the services. In this regard it should also be borne in mind that there had already been a tender process for the drawing up of a proper specification for the contract. Why should there be any need to renegotiate it?

782. Clause 2.3 compounds the problem. It permits the Contractor, Bosasa, to conduct an audit of the selected pilot sites "to establish the Principal's security requirements in general". Clause 2.3.2 then goes on to provide that "the purpose of the pilot sites is to identify what will then be rolled out at the remaining facilities." The combined effect of these provisions is to allow Bosasa to completely rewrite the specification. Having rewritten the specification, in terms of clause 2.3.1, the Department is automatically liable for the costs of "any additional equipment that may be required" albeit with the Contractor purporting to forfeit labour costs. However, with Bosasa or Sondolo IT supplying the equipment, with no competitive process for that supply, it would be a simple matter to build a labour cost into the price of the equipment.

783. In the absence of any proper explanation, these provisions appear to create fertile ground for undermining the entire procurement process and to create real opportunities for corruption.

784. In the context of this clause, it is significant that what then proceeded to happen is that 32 of the 127 sites where Bosasa was bound under the tender to install security equipment and services, were dropped from the contract. Yet the Department was billed an amount only just short of the original contract price of R601 million. Grant Thornton estimated that the net effect of this was an unauthorised overpayment of some R177 million. Although Dr De Wee referred to other provisions in the contract providing for variations, and the role of the operational steering committee in this regard, he never provided a direct answer to the evidence leader's question as to whether the excess expenditure of R177 million was ever properly authorised and certainly pointed to no documentary evidence in this regard.

785. A further matter of considerable concern is the evidence that, in a memorandum of February 2015, Dr De Wee recommended the conclusion of a further maintenance contract with Bosasa. This was after he and other departmental officials had been confronted by the Portfolio Committee on Justice about tenders to Bosasa in circumstances where it was facing allegations of corruption. He sought to justify this based on there not being sufficient evidence against Bosasa's directors. However, there was no suggestion on his part that he made any effort whatsoever to enquire what the nature and outcome of the SIU investigation of Bosasa entailed. Surely his senior position in the DOJCD would have given him the opportunity at least to attempt to obtain the information?

786. In terms of his demeanour as a witness, Dr De Wee displayed a worrying tendency to avoid giving direct answers to the evidence leader's questions, sometimes under the guise of offering to "deal with this thing in full" or expressing a desire to assist the Chairperson or alleging that the investigators had confused the evidence leader.

787. In fairness to Dr De Wee, the hearing of his evidence was a hurried affair. Further investigation of the matters about which he testified is clearly called for. There is sufficient evidence to find a reasonable suspicion that further investigation might reveal corruption in relation to the tenders entered into with Bosasa under Dr De Wee's watch.

Mr Gingcana

788. Mr Agrizzi testified that he was aware of an access control contract with PRASA (through Sondolo IT) but that he did not know the contract value. Mr Agrizzi said that he had received reliable information that bribes had been paid but was waiting for tested information to provide to the Commission's investigators. Mr le Roux testified that he undertook a security analysis and installation, at the request of Mr Agrizzi and Mr Dlamini, at a Randburg property for Mbulelo Gingcana under the code name "Project PRASA". The Special Project team installed an alarm system, full IP-based CCTV system, new gate motor and an intercom system, including the cost of vehicle travel and labour, to the value of approximately R239,486.84.

789. Mr Gingcana gave evidence that he had been employed by SACAA since April 1999 and was seconded to PRASA from around October 2015 until October 2016 in the position of Acting Chief Procurement Officer, and thereafter to the National Treasury in the office of Chief Procurement Officer. Mr Gingcana disputes that at the time of the security upgrade to his home there was a project linked to PRASA or that he was a secondee of PRASA. Mr Gingcana confirmed that an alarm and CCTV system with a new gate motor and intercom system were installed at his home in Randburg. He alleges that the upgrade was installed in 2017.

790. Mr Dlamini visited Mr Gingcana's residence in 2016 and provided an approximate cost to upgrade Mr Gingcana's security system that was installed at his residence at the time.

791. Initially, Mr le Roux was unable to recall the dates when he undertook the installation. Under cross-examination, Mr le Roux testified that the installation was done in March or April 2016. When he was questioned about the fact that he did not dispute Mr Gingcana's affidavit wherein Mr Gingcana alleged that the equipment was installed in 2017, Mr le Roux indicated that it was due to a mistake on his part at the time of responding to Mr Gingcana's affidavit.

792. Mr Gingcana did not dispute that Bosasa installed a security system at his residence, for which he did not pay, although he contended that at the time of the installation, he did not know that Bosasa installed the system and was of the view that it was a company of which Mr Dlamini was a director. Mr Gingcana's version is that, despite various requests to Mr Dlamini for an invoice for the upgrade, none was forthcoming. Although Mr Gingcana disputes when the upgrade was installed, it is likely that the upgrade was installed at Mr Gingcana's residence in 2016 and not during 2017 for the following reasons:

    792.1 Mr Dlamini was at Mr Gingcana's residence in 2016 when he provided an estimate of the cost to upgrade the security system to Mr Gingcana.

    792.2 Mr le Roux testified that this was the only special project installed on the instruction of Mr Dlamini and supporting evidence in the form of invoices were identified by Mr le Roux because they were marked "project sd", which stood for Syvion Dlamini. Those invoices are dated 26 April and 10 May 2016. Mr le Roux testified that he would not hold stock for a year before installation.

    792.3 Mr Gingcana was unable to provide any explanation on why the security system was only installed in 2017 when he had first discussed the security upgrade with Mr Dlamini in 2016. Accepting Mr Gingcana's version that the security system was to be installed from September 2016, when he was due to receive a bonus, he was still unable to provide any plausible explanation. Mr Gingcana said:

        > That is the question that I want to understand, because it was agreed that we were going to install after September but because the year was almost over then it was only installed in April. I was ready for installation after September.

792.4 2016 accords with the period when Mr Gingcana was seconded to PRASA, which is consistent with Mr le Roux's evidence that Mr Dlamini and Mr Agrizzi had requested him to do a security installation for Mr Gingcana, who worked for PRASA.

793. As indicated, Mr Gingcana gave evidence that the security upgrade would be undertaken by Mr Dlamini. He said that he repeatedly requested an invoice but never received one. In his affidavit, Mr Dlamini avers that he mentioned Mr Gingcana's details in a meeting with Mr Agrizzi, who offered to assist. According to Mr Dlamini, Mr Agrizzi thereafter involved Mr le Roux to whom he provided Mr Gingcana's address after he confirmed with Mr Gingcana that he still wished to upgrade his security system.

794. Does the evidence pertaining to Mr Gingcana fall within the scope of the terms of reference? Other than Mr Agrizzi's hearsay evidence that he had received reliable information that bribes had been paid for an access control contract through Sondolo IT with PRASA, there was no evidence of irregularities concerning a contract or a tender being awarded to Bosasa or any of its subsidiaries. None of TOR 1.2 to 1.9 come into play. Does TOR 1.1 apply?

795. As was the case with Mr Nair, there can be little doubt that from the perspective of Bosasa and Sondolo IT, the installation of the security system for no charge was an attempt at inducement. Whatever Mr Gingcana's ability to influence the outcome of tenders, his perceived influential position as a senior procurement officer would have made him an appropriate target for inducement in circumstances where Bosasa and Sondolo IT wished to secure or retain security service contracts with PRASA. This is so despite Mr Gingcana's evidence that he did not form part of any procurement or bid committees.

796. With reference to the wording of TOR 1.1, is a chief procurement officer an "office bearer of and / or functionary employed by any state institution or organ of state". A chief procurement officer is an office bearer of an organ of state (as defined in section 239 of the Constitution) and therefore falls within the reach of TOR 1.1. Mr Gingcana's version must therefore be considered.

797. There are several aspects of Mr Gingcana's version that present difficulties for its acceptance:

797.1 It would be expected that a chief procurement officer would take deliberate steps and great care to ensure that there was no misunderstanding as to who was responsible for the security upgrade, whether it was Bosasa, Sondolo IT, or a company linked to Mr Dlamini. Mr Gingcana gave no evidence that he took such steps and care. He testified that he was told that the persons installing the equipment were from a company of which Mr Dlamini was a Director.

797.2 Mr Dlamini does not corroborate Mr Gingcana's version as to a private agreement. Instead, he confirmed the involvement of Mr Agrizzi, Mr Le Roux and the Special Projects team. Mr Dlamini denied that he ever undertook to invoice or to collect payment from Mr Gingcana. Mr Dlamini alleges that he indicated to Mr Gingcana that he would pass the invoice on to him if and when he received it. This does not accord with Mr Gingcana's version that the upgrade was by agreement with Mr Dlamini.

797.3 Mr Agrizzi and Mr le Roux testified that Mr Gingcana was at his residence when they attended with Mr Dlamini. Although Mr Dlamini avers that Mr Gingcana was at work at the time, all versions corroborate the fact that employees of Bosasa and Sondolo IT were at Mr Gingcana's residence. Mr le Roux was clear in his evidence that Mr Gingcana met Mr Agrizzi at his residence. It is unlikely that Mr le Roux would have reason to fabricate that Mr Gingcana was present at the meeting.

797.4 Mr Dlamini gave evidence that he advised Mr Gingcana after the upgrade had been completed to exchange contact details with Mr le Roux, should Mr Gingcana experience any technical or operating challenges with the system. Mr Gingcana later in fact contacted Mr le Roux for assistance. He did not fully explain the context in which he contacted Mr le Roux if he believed that Mr Dlamini was in fact responsible for the security upgrade at his residence.

797.5 Mr Gingcana's version that the security upgrade was installed in 2017 is improbable, for the reasons detailed above.

797.6 Mr Gingcana's testimony was that he was still willing to pay for the security upgrade at his premises. However, he has not done so despite becoming aware that it was Bosasa that installed the upgrade. He testified that after the allegations were made public in the media, there was turmoil at Bosasa and he could not get hold of Mr Dlamini. He never attempted to discuss the invoice or payment with Mr le Roux and never attempted to contact Bosasa directly.

798. None of these difficulties were satisfactorily explained by Mr Gingcana in his oral evidence. Under cross-examination, no significant weaknesses in Mr le Roux's evidence were pointed out. He had no motive to falsely implicate Mr Gingcana. There is no evidence that Mr Gingcana corruptly provided anything in return for the installation. However, this is not a component or requirement of TOR 1.1. It may however have significance as to whether or not the matter should, insofar as it pertains to him, be referred to the appropriate authorities for further investigation. This is dealt with in relation to TOR 7.

Conclusion and findings in relation to TOR 1.1

799. Mr Agrizzi's evidence is corroborated in various respects by the evidence of Messrs van Tonder, le Roux, Mlambo, Venter, Vorster and Lawrence. The testimony of these witnesses is also corroborated by documentary and video evidence. As with Mr Agrizzi, when assessing the weight to be accorded to the evidence of Messrs van Tonder, le Roux, Venter, Vorster and Lawrence, consideration must be given to the fact that these witnesses implicated themselves in the various unlawful acts. Evidence is also given particular weight where the witness was directly involved in the event that was testified to. This was the case in respect of all these witnesses.

800. Taken as a whole, even if one leaves out of consideration (as one must) the evidence in respect of those implicated persons that have not been afforded a hearing, the balance of the evidence overwhelmingly establishes that Bosasa, its directors and some of the employees, along with persons and entities associated with it, were involved on an industrial scale in attempts to influence, through inducement or gain, members of the National Executive and office bearers and functionaries of, or employed by, state institutions and organs of state. This includes attempts at such influence, by way of inducement or gain, through Mr Mantashe, as secretary-general of the ANC, and the ANC as an organisation itself.

801. It is not established on the evidence whether any of the employees of SOEs who received illegal cash payments from Bosasa were directors of the organisations concerned. However, even if they were not directors, they would fall within the category of employees of organs of state.

802. The evidence in relation to inducements and gains alleged to have been provided to Mr Frolick, Mr Smith, Ms Ngwenya, Mr Magagula, Mr Zuma, Ms Mokonyane and Ms Myeni, is dealt with under TOR 1.4.

803. Based on the evidence, the following **directors and employees of Bosasa** were, at least on a balance of probabilities (and in several cases on their own admission and therefore on the basis of clear and convincing evidence), involved in attempts to influence public office bearers in the categories contemplated in TOR 1.1, through inducements or gain:

803.1 Gavin Watson (widespread involvement)

803.2 Angelo Agrizzi (widespread involvement)

803.3 Andries van Tonder (widespread involvement)

803.4 Carols Bonifacio and Jacques van Zyl (involved in the manipulation of documents; Mr Bonifacio was also involved in the authorisation of payments and Mr van Zyl was involved in the payment of inducements)

803.5 Carien Daubert (accounting staff involved in manipulation of company documents)

803.6 Rieka Hundermark (accounting staff involved in manipulation of company documents)

803.7 Gavin Hundermark (manipulation of the accounting system “Great Plains”)

803.8 Leon van Tonder (involved in the payment of inducements)

803.9 Richard le Roux (involved in the payment of inducements); and

803.10 Johannes Gumede, Papa Leshabane and Thandi Makoko (involved in agreeing to pay someone, in the payment and/or provision of inducements and authorising payments).

804. Based on the evidence, the following persons **who were either employees of, or associated with, Bosasa** were, at least on a balance of probabilities, involved in attempts to influence public office bearers in the categories contemplated in TOR 1.1, through inducements or gain:

804.1 William Daniel Mansell (widespread involvement)

804.2 Riaan Hoeksma (facilitated the generation of cash for Bosasa from Jumbo Liquor Wholesalers and the creation of fictitious lists of casual employees)

804.3 Gregory Lawrence (delivered cash to Bosasa from Equal Trade)

804.4 Greg Lacon-Allin (facilitated the generation of cash for Bosasa from Equal Trade)

804.5 Sesinyi Seopela (involved in the payment of bribes)

804.6 Richard Mti (involved in the payment of bribes)

804.7 Patrick Littler and Ryno Roode (involved in the payment of bribes)

804.8 Valence Watson (involved in the payments of bribes)

804.9 Reggie Nkabinde (involved in corruptly influencing the award tenders)

804.10 Sam Sekgota (involved in corruptly influencing the award of tenders); and

804.11 Petrus Venter (involved in the payment of bribes)

805. Based on the evidence, the following **juristic entities** were involved in attempts to influence public office bearers in the categories contemplated in TOR 1.1, through inducements or gain: Bosasa Operations; Sondolo IT; AA Wholesalers; Riekele Konstruksie; Jumbo Liquor Wholesalers; Equal Trade 4 and Equal Food Traders; and Lamozest.

806. Based on the evidence, there are reasonable grounds for suspecting that the following **persons** were involved in attempts to influence public office bearers in the categories contemplated in TOR 1.1, through inducements or gain: Mr Syvion Dlamini, Mr Trevor Mathenjwa and Mr Kevin Wakeford.

807. Based on the evidence and his own admission, Mr Venter was aware of the scheme between Bosasa, AA Wholesalers and Equal Trade to generate cash and, at a minimum, failed to report these schemes.

Analysis and findings with reference to TOR 1.4.

808. This Term of Reference is approached by assessing specific tender awards and then focussing on those implicated in facilitating them. The range of potential facilitators in respect of whom the question is asked, includes the President, members of the National Executive, including Deputy Ministers, public officials, and employees of SOEs.

809. The focus thus moves from those seeking to influence, discussed in relation to TOR 1.1, to those subject to the attempts at influence. The question raised is, in effect, whether the targets of the attempts responded by facilitating the unlawful award of tenders in the governmental or SOE sectors, for their own or another person or family’s benefit.

810. The analysis is best commenced with reference to the evidence of what took place in relation to the DCS tenders.

Contracts with the DCS

811. In the analysis that follows, the award of four contracts (and various renewals and an extension of these contracts) by the DCS to Bosasa and its affiliate companies is assessed for compliance with these requirements and to establish whether or not there was corrupt facilitation of the kind contemplated by TOR 1.4.

The catering contracts

812. Concerning the first catering contract, the evidence of Mr Agrizzi and Mr Vorster was that Mr Gillingham played an integral role in assisting Bosasa in corruptly being given the opportunity of developing the tender specifications for this contract and tailoring them to suit and advantage Bosasa as one of the tendering parties.

813. This evidence is corroborated by the findings in the SIU Report which records that during a search and seizure operation at Mr Gillingham's residence, a document containing the bid evaluation criteria and guidelines for evaluating this tender was found and this data was determined to have originated from Mr Agrizzi's computer. Although the SIU Report notes that the date of creation of this data could not be determined, its existence aligns with Mr Agrizzi's evidence that Bosasa was allowed to prepare the contract specifications. This is also evidence of Mr Gillingham's facilitation of the unlawful award of the tender. The evidence of Mr Agrizzi and Mr Bloem confirms that Bosasa was ultimately awarded the contract in and around July 2004.

814. That Bosasa was afforded the opportunity to draft the specifications for the tender and was later successful in being awarded the contract, establishes, at the very least on a balance of probabilities, that the specifications and tender-award process were skewed in favour of Bosasa. This would have had the effect of undermining the competitiveness and parity of the bid evaluation process and falls foul of the requirement that departments must implement supply chain management systems that are fair, equitable and competitive, thus rendering the award of the contract unlawful. Even if, notionally, the tender specifications had not been skewed in favour of Bosasa, the mere participation of Bosasa in preparing (or being involved in the preparation of) the specifications for a tender process in which it would participate, would violate the requirements of fairness, equity, transparency, and competitiveness.

815. In respect of the second catering contract, Mr Agrizzi's evidence that contract HK14/2008 was granted using the same specifications drafted for the first catering contract is undisputed. The second catering contract is a natural progression from the first contract (including the extension of the first contract referred to below). Consequently, the irregularities referred to above pervade the award of the second contract and are causally linked to it.

816. As a general observation in respect of the catering contracts, the undisputed evidence of Mr Agrizzi is that the benefits given to Mr Mti and Mr Gillingham were linked to the award of the catering tenders at the DCS. There is no evidence to suggest that there was a lawful basis for the benefits provided to Mr Mti and Mr Gillingham. Nor did they come forward to offer one. The extent of the benefits lavished on them, and the fact of the awards of the tenders, demonstrates that, at the very least on a balance of probabilities, they, as public officials, facilitated the award of tenders in the manner contemplated by TOR 1.4.

817. Given the scale of the illegalities in the procurement process in this regard, it would have been insufficient to ensure the ongoing corrupt award of the tenders, to have unlawful facilitation by Mr Mti and Mr Gillingham alone. It may safely be concluded on a balance of probabilities that other DCS officials officially involved in the procurement and implementation processes in respect of these contracts, were in receipt of corrupt payments from Bosasa and similarly facilitated the illegal award of the tenders. Those identified by Mr Agrizzi who failed to respond to Rule 3.3 notices or regulation 10(6) directives are listed below.

818. For these reasons, the procurement processes resulted in failures to implement supply chain procedures in compliance with regulation 16A of the Treasury Regulations which requires:

818.1 That a supply chain management system be fair, equitable, transparent, competitive and cost effective (regulation 16A.3)

818.2 That officials involved in supply chain management treat all suppliers and potential suppliers equitably (regulation 16A.8); and

818.3 That officials involved in supply chain management maintain the credibility or integrity of the supply chain management system (regulation 16A.8).

819. Furthermore, the procurement processes failed to comply with section 217 of the Constitution which requires that, when an organ of state contracts for goods or services, it must do so in accordance with a tendering system that is "fair, equitable, transparent, competitive and cost-effective".

820. There is also a *prima facie* case for statutory crimes having been committed in relation to the facilitation of this tender.

821. Considering the above, it is established at least on a balance of probabilities that the tenders giving rise to the award of these contracts were unlawfully awarded, that the awards of the tenders were facilitated by Mr Mti, Mr Gillingham and other officials of the DCS in breach of the Constitution and legislation and that they did so to benefit themselves, their families, Bosasa and its associates and the Watson family.

The access control contract

822. Mr Agrizzi testified that, following a meeting in November 2004, Bosasa was invited to attend a meeting of the DCS to inter alia showcase some of the other services Bosasa could provide. This meeting was attended by Mr Mti, Mr Gillingham and Mr Agrizzi, together with several Bosasa directors (excluding Mr Watson and Mr Mansell).

823. Following this meeting, Mr Agrizzi was informed by Mr Watson that he had received "very good feedback" from Mr Mti and that there was an access control contract in the pipeline. Mr Agrizzi states that he was then instructed by Mr Watson and Mr Mansell to prepare a specifications document for the access control system to be procured by the DCS. When doing so, Mr Agrizzi testified that he included security aspects which afforded Bosasa a clear advantage over the other bidders. This evidence remains undisputed. Further, the SIU Report corroborates the evidence that these specifications were prepared by Mr Agrizzi and sent to Mr Gillingham.

824. It is thus established, at least on a balance of probabilities that Bosasa was allowed to draft the specifications for the tender. The fact that it was subsequently awarded the contract demonstrates that the procurement process was unfair, inequitable and did not foster competitiveness. For these reasons, the award of the tender giving rise to the contract was unlawful. The evidence suggests that Bosasa's efforts to secure the access control contract were prompted by Mr Mti and the unlawful award of the contract was then facilitated by Mr Gillingham. Mr Mti, in prompting the involvement of Bosasa, facilitated the award to them. In addition, he must have been aware of Mr Gillingham's efforts in this regard. So too, on the probabilities, were the other officials that were involved in procurement and implementation that were receiving corrupt payments from Bosasa. In this regard, silence and a failure to report corruption by an official who knows it is taking place or has taken place in relation to a tender, amounts to facilitation as contemplated in TOR 1.4.

825. There is also a *prima facie* case for statutory crimes having been committed in relation to the facilitation of this tender.

826. It is therefore established, at least on a balance of probabilities, that there was facilitation of an unlawful tender as contemplated in TOR 1.4 in respect of the DCS access control tender. The facilitation was in breach of the Constitution and legislation and was aimed at benefitting the Bosasa officials who received the corrupt payments as well as their families in the case of Mr Mti and Mr Gillingham and the Watson family.

The fencing contract

827. Regarding the fencing contract, Mr Mansell has not responded to the Rule 3.3 notices issued to him on 2 April 2019 and 30 June 2020. Consequently, the evidence implicating him in the irregular award of the fencing contract is undisputed.

828. In this regard, Mr Agrizzi testified that Mr Mansell compiled the specifications for the contract before the tender was issued. This was corroborated by the investigative media report which appeared in the *Mail & Guardian* newspaper on 30 January 2009 with reference to evidence reviewed by the journalists. The fact that the tender specifications were weighted in favour of Bosasa is also confirmed in the SIU Report. This could only have come about with facilitation by officials within the DCS and, on the probabilities, this was provided by Mr Mti, Mr Gillingham and those others in the DCS that were in receipt of corrupt payments from Bosasa.

829. Apart from obtaining an advantage over other bidders by being integrally involved in the creation of the tender specifications, the evidence that Bosasa was afforded early access to the DCS sites to survey the area in preparing the specifications was undisputed, as was the evidence that an unreasonable amount of time was granted to Bosasa compared with other bidders, to prepare and submit bids for the contract.

830. For these reasons, the procurement process resulted in a failure to implement a supply chain procedure in compliance with regulation 16A of the Treasury Regulations. Furthermore, the procurement process failed to comply with Section 217 of the Constitution. There is also a *prima facie* case for statutory crimes having been committed in relation to the facilitation of this unlawful tender. The award of the tender was therefore unlawful.

831. In the light of the above, it is established at least on a balance of probabilities that the facilitation of the unlawful award of this tender was in breach of the Constitution and legislation as contemplated in TOR 1.4. This was done to benefit Mr Mti, Mr Gillingham, their families, the other officials involved, Bosasa, its associates and the Watson family.

The integrated computerised offender management system contract

832. Mr Agrizzi's evidence that Bosasa was, through Mr Gillingham, provided with the necessary documents and was involved in the preparation of the tender specifications for the integrated computerised offender management system, was undisputed. As with the catering contract, this would have resulted in the specifications being skewed in favour of Bosasa and the undermining of the competitiveness and parity of the bid evaluation process. Consequently, the award to Bosasa of the tender giving rise to this contract would have been unlawful for the same reasons as those listed in relation to the tenders discussed above. The role of Mr Gillingham in enabling this process amounted to the facilitation of the unlawful awarding of a tender as contemplated in TOR 1.4.

833. Moreover, the evidence shows that Mr Mansell and Mr Watson were aware from their discussions with Mr Mti and Mr Gillingham, prior to Bosasa preparing the tender specification and pricing their proposal, that the DCS had surplus funds that it needed to use. In this respect too, Mr Mti and Mr Gillingham played a facilitative role in enabling Bosasa to plan for and obtain the tender. On the probabilities, the other officials in receipt of corrupt payments were similarly involved in the facilitation of the unlawful award of this tender.

834. The flawed procurement process followed resulted in a failure to implement a supply chain procedure in compliance with regulation 16A of the Treasury Regulations for the same reasons as those given above in respect of other DCS tenders. Furthermore, the procurement process failed to comply with section 217 of the Constitution. There is also a *prima facie* case for statutory crimes as identified in Appendix 1, having been committed in relation to the facilitation of this tender. The award of the tender giving rise to this contract was thus unlawful.

835. In the light of the above, it is established, at least on a balance of probabilities, that the facilitation of the award of this tender was in breach of the Constitution and legislation. The corrupt payments and other forms of gratification benefitted Mr Mti, Mr Gillingham, their family members, and the other officials of the DCS who received the corrupt monetary payments. The facilitation of the unlawful

award of the tenders was also intended to benefit Bosasa, its associates and the Watson family. This amounts to conduct as contemplated in TOR 1.4.

The extension of the catering contract

836. Insofar as the 2004 extension of the catering contract to seven other satellite correctional centres is concerned, Mr Agrizzi's evidence that (i) the contract was extended without any tender process, following Bosasa's proposal in this regard to Mr Gillingham and subsequent approval from Mr Mti; (ii) the catering contract was extended without authorisation in terms of the original tender or a new tender; (iii) Ms Jolingana, then acting head of the bid adjudication committee of the DCS ensured that the contract was extended, and (iv) the contract was extended by Mr Mti, is uncontested. The alleged irregularities with this extension were corroborated by Mr Bloem who confirmed that the Portfolio Committee had, without success, called upon the DCS to account for the extension and the role Mr Gillingham had played in this process.

837. The fact that the extension was borne of a proposal from Bosasa that was directed to Mr Gillingham and approved by Mr Mti, both persons in receipt of corrupt benefits from Bosasa, renders the extension of the contract and its facilitation, unlawful.

838. Moreover, National Treasury Instruction Note 32, which prescribes that an extension of an existing contract that represents 15% or more of the original value of the contract or that has a value of at least R15 million, whichever is the lower amount, requires Treasury approval for a deviation from this threshold. According to Mr Agrizzi, the value of the extension was R14 million a month. On this basis too, the award of the extension was unlawful.

839. The procurement process also resulted in a failure to implement a supply chain procedure in compliance with regulation 16A of the Treasury Regulations.

840. Furthermore, the procurement process failed to comply with section 217 of the Constitution. Given that the officials involved were in receipt of corrupt payments and other benefits, there is also a *prima facie* case for statutory offences as contemplated in Appendix 1 having been committed.

841. In the light of the above, it is established, at least on a balance of probabilities, that:

    841.1 The award of this contract was in breach of the Constitution and legislation and was therefore unlawful

    841.2 There was facilitation of the unlawful award of this contract, on the part of Mr Mti, Mr Gillingham, Ms Jolingana and all those officials of the DCS involved in procurement and implementation who were receiving corrupt payments from Bosasa; and

    841.3 Those involved in the facilitation acted in breach of the Constitution and legislation and aimed to benefit themselves, in the case of Mr Mti and Mr Gillingham, their families, Bosasa and the Watson family.

842. TOR 1.4 refers to the facilitation of the unlawful award of tenders. On a purposive interpretation, this must include the extension of a contract concluded pursuant to the award of a tender (particularly a tender which had itself been awarded unlawfully).

843. The focus must now turn to the specific individuals named in the testimony of the various Bosasa witnesses as having facilitated the unlawful award of tenders, including the respects in which they benefitted from the corruption.

Mr Mti

844. Given that Mr Mti was implicated in the evidence of Messrs Agrizzi, le Roux, Vorster, van Tonder, Blake and Venter, he was issued with five notices in terms of Rule 3.3 as detailed above. He was also issued with a Regulation 10(6) directive. Mr Mti refused to comply with the directive, primarily because he alleged that it infringed his right to remain silent and his right to a fair trial. There is *prima facie* evidence that called for an answer from Mr Mti. Given his refusal to respond to such evidence,

it may be concluded, at least on a balance of probabilities, that the evidence is sufficient to make adverse findings against Mr Mti. The evidence includes the following:

844.1 Cash payments were made to Mr Mti in exchange for his facilitation of the unlawful award of tenders to Bosasa in the manner described above.

844.2 In addition, Mr Mti was provided with funds to purchase luxury clothing items. Mr Agrizzi's evidence on the amounts paid to Mr Mti and the type of goods purchased for Mr Mti was not superficial, and the level of detail provided presents a compelling basis for establishing, at the very least on a balance of probabilities, that Mr Mti received these benefits. This evidence is also supported by the copies of extracts from Mr Agrizzi's black book that were provided to the Commission and record that Mr Mti was paid cash by Mr Agrizzi and/or Mr Watson on several occasions. The extracts also suggest that Mr Mti was given cash to pay to other persons, including Adv Mrwebi, Adv Jiba, Ms Lepinka, Ms Jolingana, and Grace Molatedi. No findings may be made against Grace Molatedi as she was not issued with a Rule 3.3 notice. The evidence reveals that Ms Jolingana facilitated the extension of the catering contract. She was issued with a Rule 3.3 notice and failed to respond. Accordingly, an adverse finding may be made against her, given that she has failed to dispute the evidence against her.

844.3 Bosasa paid for the furnishing of Mr Mti's house through the Taverners' company.

844.4 Security upgrades were conducted at Bosasa's cost to Mr Mti's home. This evidence was corroborated by Mr le Roux in his further affidavit. Mr le Roux produced invoices for work done at Mr Mti's homes in Greenbushes Plot and Colchester in Port Elizabeth. The updated estimated cost of this project was R417,980.19. This compromised equipment, accommodation, labour, and vehicle travel.

845. Mr Vorster's evidence regarding the purchase of a Volkswagen Touareg V8 for Mr Mti demonstrated that it coincided with the timing of the award of the access control contract (April 2005) and the fencing contract (November 2005) to Bosasa. An inference can therefore reasonably be drawn that the vehicle was intended to be a quid pro quo for Mr Mti's facilitation of the securing of these contracts.

846. Mr Agrizzi testified that Mr Mti facilitated the award of 2010 FIFA World Cup security plan to Sondolo IT following receipt of his monthly R65,000 cash payment from Mr Watson. Mr Agrizzi had been requested by Mr Watson to prepare a security plan and to assist Mr Mti. Mr Agrizzi was present at the meeting when Mr Watson handed Mr Mti a grey security bag containing his monthly payment of R65,000.

847. Mr Agrizzi testified that Mr Mti received regular payments from Bosasa for as long as it maintained contracts with the DCS. Mr Agrizzi also testified that holiday costs, the education costs of Mr Mti's children and the fee for a security guard outside Mr Mti's residence were paid for by Bosasa. The holiday and travelling costs were paid for by Bosasa, through an account opened at Blake's Travel in the name of JJ Venter. Mr Blake confirmed that reservations were made for Mr Mti and his family through the "Venter", "Bosasa VIP", and "Mr Agrizzi" accounts. These bookings were predominantly paid for in cash by Mr Agrizzi or his wife. Mr Blake attached a spreadsheet to his affidavit, together with supporting invoices, reflecting the travel booked for Mr Mti and his family for the period October 2012 to January 2017 to a total value of R1,234,481.11.

848. In addition, the SIU Report records that Mr Mti received benefits following the award of the four contracts (the kitchens/catering, access control, fencing, and television contracts) and the extension of the catering contract.

849. Apart from the other evidence of facilitation, based on the inducements paid and gains provided to Mr Mti, the inference may be drawn that Mr Mti facilitated the unlawful awards and the unlawful extension of the catering contract. It would be most improbable that Bosasa and its officials would continue to lavish Mr Mti with payments and other substantial material benefits at considerable expense, if he was not facilitating the award of the tenders that formed a substantial part of Bosasa's business.

850. In the light of the above, there is undisputed evidence that Mr Mti breached the Constitution (section

217 and 195) and legislation (the PFMA and PRECCA) by facilitating the unlawful award of tenders by the DCS to benefit his own family, the Watson family, Bosasa and its associated business entities.

851. Mr Mti's conduct also involved the breach of the following obligations as an accounting officer: ensuring that the DCS maintains an appropriate procurement system which is fair, equitable, transparent, competitive and cost-effective; and taking effective and appropriate steps to inter alia prevent unauthorised and irregular expenditure.

852. Mr Mti's failure to comply with section 38 of the PFMA also amounts to a *prima facie* case of a criminal offence under section 86 of the PFMA. It can also be inferred from the evidence that Mr Mti was aware of the conduct of Mr Gillingham. Mr Mti also failed to manage the investigation and correction of financial misconduct in the DCS as required in terms of Regulation 4.1 of the Treasury Regulations.

853. In addition to the Constitutional and legislative breaches detailed above, the evidence reveals that Mr Mti facilitated the awarding of tenders to benefit himself and his family in contravention of section 3, 4, 12 and 13 of PRECCA and there is a *prima facie* case of a criminal offence against him in this regard.

854. Insofar as the commission agreement alleged to have been concluded between Mr Watson and Mr Mti, and witnessed by Mr Perry, is concerned, in the absence of this agreement having been produced before the Commission, Mr Agrizzi's failure to particularise the nature and purpose of the commission agreement, and the fact that Mr Perry was not issued with a notice in terms of Rule 3.3, there are insufficient facts to conclude that such agreement existed.

855. In many instances, the evidence suggests that, in his capacity as CFO, Mr Gillingham was more closely involved than Mr Mti in the management of the negotiation of contracts and preparation of tenders for various contracts with the DCS. Although Mr Mti may have delegated such duties to Mr Gillingham, in terms of section 44(2)(d) of the PFMA it did not divest Mr Mti of responsibility concerning the exercise or performance of that delegated power or assigned duty. Had Mr Mti come across unlawful conduct by Mr Gillingham (as he must on the probabilities have done), it was open to him in terms of section 44(3) of the PFMA to override and reverse any unlawful decisions made or steps taken by Mr Gillingham. There is no evidence that he did so.

856. Moreover, the probabilities are strong that Mr Mti was complicit with Mr Gillingham in the facilitation of the unlawful award of the tenders, given the extent to which inducements were paid and gains provided to Mr Mti by Bosasa. This complicity included providing Mr Gillingham with protection from investigation, discipline, and prosecution, at the highest level within the DCS.

857. Mr Mti facilitated the unlawful award of tenders in breach of the Constitution and legislation to benefit himself, his family, Bosasa and its associates and the Watson family. Mr Mti's conduct thus falls squarely within that contemplated by TOR 1.4.

858. Save in respect of criminal offences, the analysis in respect of Mr Mti has been based above on whether corrupt activities have been established on his part on at least a balance of probabilities. It must be noted, however, in many if not most respects, the level of certainty of the evidence of his corrupt activities has the status of clear and convincing evidence.

Mr Gillingham

859. Mr Gillingham was summonsed to appear before the Commission but has, to date, failed to do so. For the reasons given above, an adverse inference may be drawn from his failure to rebut the evidence that was given against him. In the absence of Mr Gillingham appearing before the Commission to dispute the evidence implicating him, there is undisputed evidence that Mr Gillingham breached the Constitution and legislation by facilitating the unlawful award of tenders by the DCS to benefit himself, his family, the Watson family, Bosasa and its associated business entities.

860. The evidence of illicit facilitation in return for inducements and gain has to some extent been set out above in the analysis of the successive tenders. The following evidence is also relied upon to reach these conclusions:

860.1 Bosasa purchased various vehicles for Mr Gillingham and members of his family. The timing of these benefits is sufficiently linked to the award of the first catering contract to substantiate his corrupt facilitative role. The SIU Report corroborates that Mr Gillingham received benefits from Bosasa after the award of this tender.

860.2 The integrated computerised offender management system and television contract was awarded in March 2006. Mr Vorster's evidence is that in April 2006, he assisted in negotiating a deal to purchase a vehicle for Mr Gillingham's son which vehicle was ultimately funded by Mr Mansell. The timing of this financial assistance is sufficiently linked to the award of this contract to justify an inference that it was a reward for the facilitation of the award of the contract.

860.3 Mr van Tonder corroborates Mr Agrizzi's evidence that Mr Gillingham offered his cooperation in arranging for Bosasa to be awarded the various tenders and tender extensions with the DCS in return for assistance in building a house. There is no evidence before the Commission to suggest that there was a lawful cause for this benefit to Mr Gillingham.

861. The assistance provided to Mr Gillingham to purchase vehicles for himself and his family has been confirmed by Mr Agrizzi, Mr Vorster and Mr van Tonder. Mr Vorster and Mr van Tonder's evidence on the conclusion of a sham loan agreement between Mr Vorster and Mr Gillingham to advance him an amount of R180,000 to purchase a vehicle is further corroborated by documentary evidence.

862. Mr Blake also confirmed that travel and vehicle hire were booked and paid for by Bosasa for Mr Gillingham and his family, and that Blake's Travel did not receive any direct payment from Mr Gillingham or his wife for any of the bookings. There is no compelling reason to reject this evidence, particularly considering Mr Gillingham's failure to refute the evidence before the Commission.

863. Mr Agrizzi testified that he was instructed to draft and conclude fictitious loan agreements between Mr Gillingham and various Bosasa employees for all the benefits that Mr Gillingham had received unlawfully. Mr Agrizzi was also instructed by Mr Watson to prepare an official declaration on behalf of Mr Gillingham, as a senior manager in the DCS, to "declare" such benefits. This was corroborated with a copy of the declaration in the form of a memorandum addressed to Mr Mti from Mr Gillingham and on the DCS letterhead. In the absence of Mr Mti or Mr Gillingham complying with the regulation 10.6 directives issued to them, the undisputed evidence before this Commission is that this declaration was a sham.

864. Mr Agrizzi's version that Mr Gillingham received a regular amount from Bosasa in lieu of his salary following his resignation from the DCS is borne out by the video recording of the conversation in Mr Watson's vault.

865. Apart from the above, the SIU Report notes in relation to each of the contracts referred to above that Mr Gillingham received financial benefits from Bosasa after the award of the tenders.

866. At the very least on a balance of probabilities, it is established that Mr Gillingham facilitated the unlawful award of tenders as contemplated by TOR 1.4.

867. Based on the evidence, Mr Gillingham breached the following obligations prevailing upon him as a senior official of the DCS:

867.1 Section 217 and 195 of the Constitution

867.2 The duty to ensure that the system of financial management and internal control established for DCS is carried out within his area of responsibility as CFO

867.3 The responsibility for the effective, efficient, economical and transparent use of financial and other resources within his area of responsibility

867.4 The obligation to take effective and appropriate steps to prevent irregular expenditure; and

867.5 The obligation to comply with the provisions of the PFMA.

868. In addition to the Constitutional and legislative breaches detailed above, the evidence reveals a *prima facie* case that Mr Gillingham facilitated the award of tenders to benefit himself and his family in

contravention of section 3, 4, 12 and 13 of PRECCA.

869. Mr Gillingham facilitated the unlawful award of tenders in breach of the Constitution and legislation to benefit himself, his family, Bosasa and its associates and the Watson family. Mr Gillingham's conduct thus falls squarely within that contemplated by TOR 1.4.

870. Save in respect of criminal offences, the analysis in respect of Mr Gillingham has been based above on whether corrupt activities have been established on his part on a balance of probabilities. It must be noted, however, in many if not most respects, the level of certainty of the evidence of his corrupt activities has the status of clear and convincing evidence.

Other officials

Mr Cedric Frolick

871. Mr Agrizzi testified that Mr Frolick assisted Bosasa in resolving an impasse with Mr Smith who was, at the time, chairperson of the Portfolio Committee on Correctional Services and Justice and considered "anti-Bosasa". He alleges that, in return for doing so, a payment was made to Mr Frolick at a meeting held with him and Mr Butana Komphela (then chair of the parliamentary Portfolio Committee on Sport) at the office park where Bosasa is situated, and that further monthly payments were made to Mr Frolick after that.

872. Save that he firmly denies having received any corrupt payments and disputes other aspects of the detail of events, Mr Frolick confirms important aspects of Mr Agrizzi's evidence, namely that:

872.1 He, Mr Frolick, had a longstanding relationship with the Watson family – Mr Frolick testified that this went back to the 1980s when he met Daniel 'Cheeky' Watson through non-racial sport and when he served as adviser to, and later the board of, Eastern Province Rugby, which Mr Daniel Watson chaired from 2006/2007, and which had led to his meeting the other Watson brothers.

872.2 He met with Mr Watson at Bosasa and was accompanied by Butana Komphela at this meeting - Mr Frolick however denied details of the meeting testified to by Mr Agrizzi, including the latter's presence at the meeting, and further testified that the meeting was organised between Mr Komphela and Mr Daniel Watson for purposes of viewing a youth sports facility for young offenders at Bosasa and he went along, as he often did, as a friend of Mr Komphela because of Mr Komphela's physical disability (also testified to by Mr Agrizzi).

872.3 Mr Watson was unhappy with the manner in which the Portfolio Committee treated Bosasa, and Mr Frolick was requested to facilitate a meeting with Mr Smith because he considered Mr Smith to be a colleague and friend and they stayed in the same parliamentary village - Mr Frolick however testified that the proposal of facilitating a meeting between Mr Watson and Mr Smith was that of Mr Komphela, after Mr Watson said that their written requests for such a meeting had not met with success.

872.4 Mr Frolick indeed facilitated a meeting between Mr Smith, Mr Agrizzi and Mr Njenje at Parliament, albeit that it was brief and not seen as successful at the time, this after Mr Watson had called Mr Frolick to say that he himself would not be able to attend.

872.5 He had lunch with Mr Agrizzi and Mr Njenje at Parliament, although he denies having provided a tour, save for pointing out the assembly where the apartheid government sat.

872.6 He was called by Mr Watson at the time when Bosasa was considering litigating against the DCS relating to the failure to award the full catering tender to Bosasa in 2016/2017 and he advised Mr Watson to consider the negative impact the contemplated litigation could have on their future business relationships with government. Mr Frolick said this advice was given to Mr Watson because he was a friend.

872.7 He received travel benefits to attend rugby matches, but states that he was under the impression that his travel was paid for by EPRU.

873. It is clear from the above that Mr Frolick sought to assist Bosasa resolve its impasse with Mr Smith and thereby improve its relations with a parliamentary oversight body that was concerning itself with allegations of irregularities in the award of contracts to Bosasa. It must have been known to Mr Frolick (as an MP and later House Chair of Committees, who must have kept himself well-informed about affairs within and beyond Parliament, and as a friend of the Watson family) at the time that:

    873.1 Parliamentary oversight committees have considerable powers in their capacity to expose malfeasance in public administration and dealings between the public administration and the private sector

    873.2 Exposing malfeasance on the part of a company benefitting from it could well result in the cancellation of contracts deriving from it or the non-renewal of such contracts

    873.3 Bosasa had contracts with the DCS and would inevitably have sought the renewal of those contracts in later tender processes from time to time

    873.4 There were allegations of corruption on the part of Bosasa in relation to the award of tenders to it - the *Mail & Guardian* had been reporting on the matter since 2007 and Mr Frolick on his own version records Mr Smith's response when he approached him about meeting with Bosasa officials as follows: I had a discussion with Mr Smith and he said: "Man, you know, there are big problems surrounding this company"

    873.5 Despite this response, Mr Frolick said to Mr Smith in response that "it is important just to hear the other side" and proposed either a private meeting or one before the committee

    873.6 As Mr Frolick conceded when questioned by the evidence leader, he was aware that the Rules governing members of Parliament would prevent them from being seen to be "batting for one company or one individual"; and

    873.7 On his own version, the intentions of Mr Watson at the meeting at Bosasa were not in good faith - assuming Mr Frolick's version is correct that they were called to the meeting to inspect a sports facility for youth offenders, the moment Mr Watson began instead to discuss and press him for a solution to his problems with the chair of the relevant portfolio committee and to inform him that they were not ready for a viewing of or discussion about the sports facility, Mr Frolick must have become aware that he and Mr Komphela had flown all the way to Johannesburg under false pretences; the appropriate response of an innocent parliamentarian thus mislead would have been one of anger and a desire to dissociate himself from what was happening, not accommodation by exploring and offering solutions to Bosasa's problem.

874. Taking all of this into account, on Mr Frolick's own version, there was conduct facilitating the unlawful award of tenders in breach of, at least, the oath sworn by members of Parliament in schedule 2 item 4 of the Constitution, not only to uphold the Constitution, but also to perform their work to the best of their ability, and clauses 4.1.1, 4.1.3, 4.1.4 and 4.1.5 of the code of conduct governing members of the National Assembly. That facilitation stood to benefit Bosasa, its associates and the Watson family. That is sufficient to establish conduct contemplated by TOR 1.4.

875. Of course, the averments made by Mr Agrizzi go much further than this, to include allegations of corrupt payments in return for the facilitation brought to bear by Mr Frolick. This must be considered because it determines the form that the conduct contemplated by TOR 1.4 took, and because it is relevant to the basis for any referral of the matter under Term of Reference 7 for prosecution or further investigation.

876. Mr Agrizzi's evidence is that (i) Mr Watson presented Mr Frolick with a security bag of money at the meeting at Bosasa; and (ii) Mr Frolick received regular payments of R40 000 often through Mr Valence Watson. Mr Frolick denies this. Mr Agrizzi and Mr Frolick therefore have irreconcilable versions.

877. Mr Frolick denies that Mr Agrizzi was present at the meeting with Mr Khompela, Mr Frolick and Mr Watson. He also disputes certain details of that visit, for example, the duration of the meeting and that Mr Khompela was driven around the Bosasa campus in a golf cart because of his disability. Mr Agrizzi found it difficult to pinpoint the year in which the meetings at Bosasa and at Parliament took

place. It is so that he cannot produce documentary evidence of the payments to Mr Frolick, although that is to be expected. There was also no detailed evidence of the ongoing payments allegedly made to Mr Frolick, save for the single instance where Mr Agrizzi saw monies being handed to Mr Frolick by Mr Valence Watson at the latter's home.

878. Despite this, there are significant features of Mr Agrizzi's evidence pointing to its reliability:

878.1 Save for the issue of whether Mr Frolick received payments from Mr Watson or Bosasa, the substantive aspects of Mr Agrizzi's evidence are not in dispute. Both the meetings that he alleged to have taken place were conceded by Mr Frolick to have taken place and Mr Agrizzi's evidence as to the subject matter of the meetings was, in the main, confirmed by Mr Frolick.

878.2 Mr Agrizzi's detail of having arranged a golf cart because of Mr Komphela's physical disability, although denied by Mr Frolick, is corroborated to a significant degree by Mr Frolick's evidence that he used to accompany Mr Komphela to meetings because of his disability and the assistance he needed.

878.3 Mr Agrizzi has not been offered a section 204 indemnity in return for his testimony. He nevertheless provided evidence against Mr Frolick, despite such evidence implicating himself in criminal activities.

878.4 Although not able to provide documentary evidence of specific payments allegedly made to Mr Frolick, Mr Agrizzi was able to produce substantial documentary and other evidence, including the evidence of other witnesses, corroborating his evidence of the systemic, organised, large-scale payment of bribes by Bosasa to secure and retain contracts with organs of State.

879. As far as Mr Frolick's evidence is concerned:

879.1 He did not present a compelling explanation why Mr Agrizzi would seek to implicate him, i.e., there is no suggestion of Mr Agrizzi's being biased towards him or having a motive to implicate him.

879.2 Whilst his evidence that the meeting at Bosasa was intended to deal with a sports facility for youth offenders enjoys some corroboration from the fact that he was accompanied by the chair of the Portfolio Committee on Sport and Recreation, his own version as to how he responded by going along with the request to set up a meeting with Mr Smith, is not the response expected from a busy parliamentarian finding that he has been brought to a meeting under false pretences.

879.3 Mr Frolick's version is self-serving. Unlike Mr Agrizzi, who is already facing charges of fraud and corruption, Mr Frolick has an interest in denying the allegations against him to avoid further scrutiny.

880. Given his admitted longstanding friendship with the Watsons, there is a reasonable basis to believe that Mr Frolick would shield them from allegations of wrongdoing and a foundation for Mr Watson to seek to persuade him to act corruptly in Bosasa's interests.

881. In the circumstances where Mr Frolick faces allegations of corruption, one would have expected more than a short, formulaic confirmatory affidavit from Mr Komphela. As a close friend and colleague, surely, he would have been willing to give oral testimony to corroborate Mr Frolick's evidence? At the very least one would expect an affidavit that provided a full account of events from Mr Komphela's perspective.

882. It is curious that Mr Frolick obtained a confirmatory affidavit from Mr Khompela but did not, despite the seriousness of the evidence against him, attempt to obtain one from his longstanding friend, Mr Valence Watson. Mr Frolick's explanation for not doing so was that Mr Valence Watson was upset by Mr Agrizzi's evidence. This explanation is unsatisfactory. It seems more likely than not that Mr Valence Watson would have seized the opportunity to discredit Mr Agrizzi if Mr Frolick's version is in fact the correct one.

883. Mr Daniel (Cheeky) Watson provided an affidavit to the Commission that confirmed the content of Mr Frolick's affidavit insofar as it related to him. Mr Daniel Watson confirms that from 2007 to 2016, he

was the president of Eastern Province Rugby and Mr Frolick became involved at the request of the late Minister of Sport. He confirms that Mr Frolick travelled on behalf of Eastern Province Rugby on several occasions and attended certain test matches at the cost of Eastern Province Rugby. According to Mr Daniel Watson, in 2014 Mr Frolick brought a cheque to his offices for a flight that was arranged by Eastern Province Rugby for an acquaintance to travel. He said that any flights or accommodation were arranged by himself or Eastern Province Rugby for Mr Frolick, and that was the only knowledge that Mr Frolick had.

884. Mr Frolick claims to have assisted Mr Watson in smoothing things out with Mr Smith because he had a general interest in assisting the public resolve complaints with government officials. This explanation is expedient given Mr Frolick's longstanding relationship with the Watsons and that there are no other examples of Mr Frolick assisting general members of the public resolve disputes with members of portfolio committees.

885. As discussed elsewhere, the evidence strongly suggests that Mr Smith was won over to Bosasa's cause and came to protect Bosasa pursuant to benefits corruptly conferred upon him by Bosasa.

886. Taking all his into account there are at least reasonable grounds for suspecting that Mr Frolick's conduct in assisting Bosasa in the respects set out above and in the summary of the evidence, was in return for payments corruptly made to him in contravention of section 3 and 7 of PRECCA.

Ms Jolingana and other DCS officials

887. According to Mr Agrizzi, during the period from 2007 until approximately 2016 monthly payments were made to the following DCS officials: Josiah Maako; Maria Mabena; Shishi Matabella; Mandla Mkabela; Dikeledi Tshabalala; Zach Modise; and Mollet Ngubo. These officials had been identified to look after Bosasa's DCS contracts and Ms Jolingana is alleged to have ensured the extension of the catering contract. All the officials are recorded in the extracts from Mr Agrizzi's black book.

888. Ms Jolingana failed to respond to the Rule 3.3 notice issued to her, with the consequence that the evidence against her is undisputed.

889. Regulation 16A.8 of the Treasury Regulations requires all officials and other role-players in a supply chain management system to comply with the highest ethical standards to promote mutual trust and respect, and an environment where business can be conducted with integrity and in a fair and reasonable manner.

890. The duties resting on Ms Jolingana as acting head of the BAC included:

    890.1 Recognising and disclosing any conflict of interest that may arise

    890.2 Treating all suppliers and potential suppliers equitably

    890.3 Not using her position for private gain or to improperly benefit another person

    890.4 Ensuring that she did not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act; and

    890.5 Assisting the accounting officer in combating corruption and fraud in the supply chain management system.

891. Further, regulation 16A.8.5 of the Treasury Regulations required an official in the supply chain management unit to immediately report any breach or failure to comply with any aspect of the supply chain management system to the accounting officer in writing.

892. The payments to Ms Jolingana recorded in Mr Agrizzi's black book were, at least on a balance of probabilities, quid pro quo for the extension of the catering contract. Such conduct is, in addition to the contraventions of the Treasury Regulations, *prima facie* in contravention of sections 3, 4, 12 and 13 of PRECCA for purposes of criminal liability. By receiving the corrupt payments, she benefitted herself and by facilitating the extension of the catering contract, she benefited Bosasa, its associates, and the Watson family. Her conduct falls squarely within TOR 1.4.

893. The remaining officials said to have received cash payments from Bosasa to ensure that they continued to "look after" its contracts with the DCS were issued with notices in terms of Rule 3.3. Save for Josiah Maako and Dikeledi Tshabalala, no official has challenged the evidence against them. There is therefore undisputed evidence establishing on a balance of probabilities that they facilitated the unlawful award of tenders in the DCS in return for corrupt payments, as contemplated in TOR 1.4.

894. In relation to Mr Maako and Ms Tshabalala, while they have, through an attorney's letter, denied the allegations against them, they have not made an application in terms of Rule 3.4. They have failed adequately to dispute the truth of Mr Agrizzi's evidence. On that basis it may be accepted, at least on a balance of probabilities, that they facilitated the unlawful award of tenders in the DCS in return for corrupt payments, as contemplated in TOR 1.4 and in *prima facie* contravention of sections 3, 4, 12 and 13 of PRECCA.

Ms Ngwenya

895. In Mr Bloem's evidence, he referred to a fellow Portfolio Committee member, Ms Ngwenya, having shown bias towards Bosasa during the deliberations of the Portfolio Committee on Correctional Services. According to Mr Bloem, Ms Ngwenya informed him that there was money involved in meeting with Bosasa.

896. Mr Agrizzi testified that Ms Ngwenya was paid cash monthly in return for keeping quiet and ensuring that the negative public press on Bosasa and scrutiny by the Portfolio Committee on Correctional Services would not prevent it from getting new business. According to Mr Agrizzi, Ms Ngwenya lived close to Bosasa's office and would collect her payments there when he did not make the payments to her personally, or through Mr Smith.

897. Ms Ngwenya was issued with a notice in terms of Rule 3.3 on 28 February 2019. She has not made an application in terms of Rule 3.4 to cross-examine either Mr Agrizzi or Mr Bloem, or to present evidence at the Commission. The evidence implicating her in corrupt activities and in failing to discharge her duties as a Portfolio Committee member in good faith is therefore unchallenged.

898. Her conduct, on at least a balance of probabilities, constitutes facilitation of the unlawful award of tenders in return for corrupt payments in breach of the Constitution (Section 217 and 195), the provisions of the code of conduct for members of the National Assembly and legislation (the PFMA and PRECCA). For her and the other members of Parliament referred to above, given that they were holders of a public office, "public official" includes within its ambit a Member of Parliament. Her conduct therefore falls squarely within TOR 1.4 and is *prima facie* a contravention of sections 3 and 7 of PRECCA.

Mr Vincent Smith

899. Mr Smith deposed to an affidavit on 3 August 2020 and testified before the Commission on 4 September 2020. Mr Smith's evidence was in response to evidence given by Mr Agrizzi, Mr Richard le Roux and Mr Blake. Initially, in response to a 10(6) directive, Mr Smith had relied on his right to remain silent and right to a fair trial as a basis not to respond to the directive issued by the Commission compelling him to answer certain evidence against him. Despite assurances from the Commission, Mr Smith initially failed to place his version before the Commission in response to Rule 3.3 notices dated 23 January, 28 March and 1 July 2020 (the latter was addressed to Mr Smith's daughter, Brumilda Doreen Smith), as well as the 10(6) directive. The Commission assured Mr Smith that:

    899.1 It respected his rights, including his right to approach the courts for relief where he felt that his rights had been or were being infringed or threatened

    899.2 It believed that the immunity that regulation 8 provided was applicable to Mr Smith and ensured that no statement or evidence Mr Smith placed before the Commission would be used against him in criminal proceedings and that the immunity was effective; and

    899.3 The judgment in Ferreria v Levin No and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) was clear that requiring a person to give evidence regarding a matter that may later form the basis of a criminal charge or trial against him did not infringe such a person's

right to remain silent or right to a fair trial where there was an immunity such as that which regulation 8 provides.

900. Ultimately, however, Mr Smith elected to file the affidavit referred to above with the Commission. In his affidavit Mr Smith provided a detailed account of how he interacted with the Commission from late January 2019 when he received the first Rule 3.3 notice until he filed his affidavit in August 2020.

901. Mr Smith also contended in his affidavit that despite his name being mentioned so many times before the Commission, there was no evidence presented to the Commission pointing to his involvement "in any activities where I facilitated the unlawful awarding of tenders for my benefit or the benefit of any other person, family and/or entity", and "in influencing the unlawful awarding or maintenance of any tender for my own or family interest, or the interest of any entity where I have an interest".

902. Mr Smith provided his account of the nature and evolution of the relationship between business and politics post-1990, as commencing when multitudes of individuals in exile or prison, including activists inside the country in hiding from the police, returned to their homes and started a process of rebuilding their personal lives. Mr Smith said that many businesspeople saw an opportunity (for good or bad motives) to provide financial and other assistance to politicians and activists who did not have the wherewithal to re-establish their personal lives. According to Mr Smith, so began a relationship "characterised by inherent conflict" between "business generally, government and individuals who are public representatives". Mr Smith identified the Watson brothers as members of the "patriotic bourgeoisie".

903. Mr Smith explained in his affidavit that it was in the early days, post-1990, that he first met Mr Watson while working on re-establishing ANC branches in the greater Johannesburg area. Mr Smith indicated that Mr Watson assisted with the financing of some of the community development projects and that he also, on a personal level, received financial assistance from Mr Watson from time-to-time, long before he was deployed to Parliament in 1999. For Mr Smith, it was not unusual to call on Mr Watson for assistance as and when he needed to, even after he had become a parliamentarian. According to Mr Smith, this was never in any way a quid pro quo exchange. Mr Watson indicated to Mr Smith that he should liaise with Mr Agrizzi when Mr Watson was unavailable to attend to Mr Smith's requests, which is when a line of communication was opened between Mr Agrizzi and Mr Smith.

904. Mr Smith acknowledged that he was aware of the various allegations of corruption against Bosasa. He was asked why, despite knowing these allegations, he still requested assistance from Mr Watson and Mr Agrizzi. His response was that his requests were since at the time he was no longer active in the Portfolio Committee on Correctional Services, that he always maintained a distinction between the company, Bosasa, on the one hand, and Mr Watson and Mr Agrizzi, on the other, and that the separation of powers doctrine did not allow a MP to influence the award of tenders and similar affairs within a government department.

905. This was not the only time that Mr Smith relied on the separation of powers doctrine as a reason for why he could not have influenced the workings of the DCS (specifically, the award of tenders) in his interactions with Mr Agrizzi. In theory, the doctrine of the separation of powers may assist in preventing corrupt activities. Mr Smith is correct that the doctrine encompasses the notion that legislative, executive, and judicial functions are separate and distinct, and do not operate in the realm assigned to the other. Parliament makes laws, but it is also entrusted with the onerous task of overseeing the executive. The doctrine assists in reducing the influence of one arm of government over another but is not a foolproof guard against corrupt activities by individuals with no respect for the Rule of law. Where Parliament fails to hold the executive accountable, whether deliberate or not, corruption can flourish. If Parliament itself is corrupt, it can actively exert corrupt influence over government departments or passively permit corruption to enter and establish itself within the executive.

906. Mr Smith acknowledged that relationships of corruption can endure beyond an official's term of office. He accepted the Chairperson's proposition that a company engaged in corrupt activities could be involved in making corrupt payments to persons after they had left their position in parliament, based on what they had done for the company at the time when they were able to do things to benefit the company.

907. Mr Smith denied ever being a recipient of cash payments from Bosasa. Mr Agrizzi testified that initially Mr Smith as a member of the Portfolio Committee would receive R45,000 monthly in exchange for keeping quiet and helping to manage the negative press concerning Bosasa, so as to ensure that it would not prevent Bosasa from receiving further business from the state. Mr Agrizzi testified that, at Mr Smith's request, the payments to him increased to R100,000 in 2016. Mr Agrizzi testified that he had personally handed the cash to Mr Smith on various occasions. Mr Smith did not deny meeting with Mr Watson and Mr Agrizzi but claimed that he did so on a social basis when he was in Johannesburg. He denied receiving payments at these meetings, frequent or otherwise. Mr Smith's name also appears in Mr Agrizzi's black book, as "Vincent Smith 100,000".

908. Mr Smith denied that the assistance he received from Mr Watson and Mr Agrizzi was ever on a quid pro quo basis. He relied on minutes of meetings of the Portfolio Committee, which in his view reflect his position as being consistently against outsourcing from 2009 to 2013. Mr Smith reasoned that it did not make sense that Bosasa would have paid him to be soft on them, in circumstances where he remained harshly against outsourcing. Whilst Mr Smith maintained that he held a strong view in this respect, he was not able to point to an instance where he singled out Bosasa for criticism.

909. Mr Smith was unable to provide an explanation for WhatsApp messages exchanged between Mr Watson and Mr Agrizzi, allegedly in late 2016 or early 2017, wherein:

    909.1 Both Mr Watson and Mr Agrizzi mentioned having received phone calls from Mr Smith

    909.2 Mr Watson referred to a meeting Mr Smith told him he was to have the next day with "ZM", in all probability Zach Modise, then National Commissioner, and Mr Smalberger, a senior manager in the DCS, the outcome of which Mr Watson should await "until Tuesday"

    909.3 Mr Agrizzi mentioned advice received from Mr Smith to "continue the prep meetings drafting documents" and that "we will convene on Tuesday at 14:00 then review our approach and adjust the three pronged strategy", but that Smith "didn't say should halt it"

    909.4 Mr Watson confirmed the three pronged approach as being "our approach, Vincent's approach and Cedrick's approach"; and

    909.5 Mr Watson explained "it is for the meeting on Tuesday to give us more information on how to approach this thing. This is why he is having a meeting with Smallburger to give us more information on what's taken place in DCS".

910. This evidence points strongly towards the giving by Mr Smith (and Mr Frolick) of assistance constituting a clear quid pro quo. Mr Smith said that at the time he was no longer Chairperson of the Portfolio Committee and that he was not privy to what Mr Agrizzi and Mr Watson were discussing. However, his long spell as chair of the Portfolio Committee and his senior position in the ANC would have given him access to the senior officials in the DCS. The provision of inside information about what was taking place internally within the department is a clear quid pro quo. Mr Smith claimed that he needed more context to respond in relation to this exchange of messages. However, a public official whose conduct was consistently beyond reproach would easily be able to explain away evidence of this nature.

911. Mr Smith admitted that Bosasa installed security upgrades at his residence, following a burglary that took place in 2014. He admitted that he did not pay for the installation. According to Mr Smith, he requested the invoice on various occasions so that he could make payment but that it was not forthcoming. Mr Smith also admitted that, after the installation, he would contact Mr Agrizzi or Mr le Roux if there was a fault with the system, which would be attended to. Mr Smith disputed that the value of the security installation was R200,000 as alleged by Mr le Roux.

912. In Mr Smith's affidavit, he stated that he had contacted Mr Watson for some advice after the burglary, given Mr Watson's businesses' involvement in the security industry. During his evidence, Mr Smith indicated that he had canvassed at least three organisations for quotations and that Mr Watson's company was one of them. Mr Smith did not see any conflict of interest in contacting Mr Watson because at that time he was no longer active in the Portfolio Committee and because he thought

that the separation of powers did not allow for such influence. Mr Smith's explanation of this as an innocent, legitimate transaction faces the following difficulties:

912.1 No evidence was put up of the other quotations that he had sought.

912.2 He remained an ordinary member of the Portfolio Committee of Justice and Correctional Services at the time and there can be no doubt that an ordinary member of the Committee who had for several years served as its chairperson and represented the majority party in Parliament would continue to wield a considerable amount of influence.

912.3 In any event, if there had been facilitative conduct during his time as chairperson, there is no reason why benefits would not continue after that time and there is no logical reason why the benefits would have to precede or coincide with facilitation.

912.4 The fact that Mr Smith testified that he requested an invoice for the installation on various occasions contradicted what he stated in his affidavit i.e., that he had received financial assistance from Mr Watson on various occasions and that it was not unusual, even after he became a parliamentarian, to call on Mr Watson's assistance as and when he needed to, although it was never a quid pro quo exchange.

912.5 In any event, as soon as there had been allegations of corruption against Bosasa in an official report of the SIU during the time when he was chair of the Portfolio Committee, which had been deliberated upon in the Committee, he should, from that time onwards, have been scrupulous in ensuring that he neither received, nor could be perceived to have received, any benefit in any form whatsoever from Bosasa or any of its senior office bearers or employees. A clean break was even more necessary where Mr Smith had a personal friendship and political association with Mr Watson. This would have required him not entering into any transaction of whatsoever nature with Bosasa, Mr Watson or Mr Agrizzi, whether or not quotations were sought from other security system service providers.

913. In September 2018 Mr Smith publicly responded to, amongst other things, the evidence that the security installation at his home had been paid for by Bosasa. A newspaper reported on his response, referring to the payment in respect of his daughter's university tuition, discussed below, and went on to quote Mr Smith as saying:

> I deny any further assistance, financial or otherwise, including the installation of CCTV cameras at my home from him [Mr Agrizzi] or any other person or company. The cameras that are at my home were paid for by myself.

914. The following comments are apposite in relation to this public statement:

914.1 On Mr Smith's own evidence before the Commission, the statement is dishonest.

914.2 Before the Commission, he volunteered that he received financial assistance from Mr Watson before and after he became a member of Parliament - the statement is not consistent with this.

914.3 He also admitted that he received assistance in the form of the hiring by Bosasa of a vehicle for his daughter on three occasions - the statement is not consistent with this.

914.4 The final sentence regarding the cameras at his home having been paid for by himself must be read in context with the preceding sentence. By not providing any detail or dates, it is intended both to reinforce the preceding sentence containing his denial of any benefit whatsoever (including any CCTV cameras) and to counter the allegation that a security system had been provided to him at no cost by Bosasa. The meaning intended to be conveyed to the reader is an emphatic denial of any such installation at any time. Yet on Mr Smith's own version before the Commission, Bosasa installed the security system in 2014 and removed it following a request to Mr Watson to do so, "end of 2017 beginning of 2018" because it had "become obsolete". The last sentence in the public statement is thus a classic example of a half-truth and, read in context, is dishonestly intended to deceive as to the true position.

914.5 If the installation was legitimate on the basis Mr Smith contended for in his evidence before the Commission, particularly in the face of a specific allegation of this illicit benefit, one would have expected Mr Smith in the public statement to have admitted that Bosasa had, sometime in the past, installed cameras at his home following his having obtained three quotations, that Bosasa's quote was the cheapest, that subsequent to installation he had requested an invoice on various occasions which was not forthcoming, that those cameras had subsequently been removed and that the cameras installed at his house since 2018 had been paid for by Mr Smith. What he said in the statement amounted to a complete denial of any such installation by Bosasa, which was untrue.

914.6 When the difficulties with his public statement were put to him by the Chairperson, Mr Smith said, "it's very difficult at this point" and conceded that what the Chairperson said made sense.

914.7 Mr Smith's dishonesty in the public statement undermines his assertion that he gave no quid pro quo in return - why deny the benefit it if was not tainted with corruptly having given something in return? It also undermines his assertion that he had canvassed quotations and had always intended to pay for the installation. If it was so, why not point this out in the public statement?

915. There was a brief debate on when the security installation was removed from Mr Smith's residence at his instruction, January or October 2018, and whether it was because of allegations that had been published in the media in September 2018. Mr Smith contended that the installation was removed in late 2017, early 2018 and it was accepted that the date reflected in the video that showed the removal could have been January 2018, and not October 2018. This does not, however, detract from the dishonesty of his public statement.

916. Mr Agrizzi testified that Bosasa paid for Mr Smith's daughter's university fees to study overseas at the University of Aberystwyth. Both in his public statement and in his evidence before the Commission, Mr Smith contended that this was a personal loan from Mr Agrizzi, to be repaid when an investment of Mr Smith's matured in 2023. Mr Smith did not dispute that:

916.1 Amounts of R267,667.90 and R395,076.00 were paid into Mr Smith's company (Euro Blitz) account in July 2015 and August 2016 respectively

916.2 These amounts were paid for purposes of payment of Mr Smith's daughter's university fees

916.3 No written loan agreement was concluded between Mr Smith and Mr Agrizzi

916.4 The first payment was made by cash deposit and the second payment was made through a law firm with the electronic payment referenced as "Car Accident Settlement"

916.5 The payments were made following an email from Mr Smith to Mr Agrizzi on 11 May 2015 under the subject line "daughter's study 2015 University of Aberystwyth", in which he referred to "discussions earlier this year" and conveyed inter alia that he was "in the process of sorting out the funding requirements for her and hereby request any assistance in this regard"; and

916.6 Mr Smith did not disclose the loan to Parliament but did disclose his interest in Euro Blitz.

917. Mr Smith testified that he had wanted the money to be paid into his company Euro Blitz's account for audit purposes and because the dividends that he would use to repay Mr Agrizzi, would be paid into the Euro Blitz account. He did so even though the loan from Mr Agrizzi was a personal loan. Mr Smith did not declare the alleged loan between himself and Mr Agrizzi and explained that at the time there was a debate in Parliament about whether one was obliged simply to disclose one's interest in a company or whether one was obliged to refer to "line-items", as he sought to characterise the loan.

918. Mr Smith's position was expressed as follows:

> ... by the time I had left, I have not reached any conclusion [on the debate], other than saying: Here is my company. And if somebody wanted to ... go and look at the transactions, they probably could have gone to look at the transactions.

919. Mr Smith's attempt to characterise this as a legitimate, arms-length transaction faces the following difficulties:

919.1 As Mr Smith conceded, the position in as far as Parliament is concerned is that there is nothing that Mr Smith did to disclose to Parliament that he had been given a loan personally and that there was nothing indicating that Mr Agrizzi had given a loan to Euro Blitz.

919.2 Mr Smith also accepted that a person inspecting the books of the lender, would see the name of an unknown company and would not have any reason to check whether it had been declared, in the same way that they would have done if they saw Mr Smith's name, a prominent person, on the books.

919.3 Initially, Mr Smith had testified that he had provided Mr Agrizzi with a copy of the valuation of his shares as security regarding Mr Smith's ability to pay Mr Agrizzi. However, when Mr Smith provided a copy of the valuation to the Commission (during a lunch break and after his evidence that he had given a copy to Mr Agrizzi in 2015), it was apparent that the valuation was dated 2017. Mr Smith admitted that he could not have shown the valuation to Mr Agrizzi and said that he had only shown the quantum of shares that he held to Mr Agrizzi. On Mr Smith's version, Mr Agrizzi thus advanced him a loan without any form of security or written assurance as to Mr Smith's ability to repay the loan and, specifically, without having seen the Rand value of the shares referred to.

919.4 Mr Smith admitted that R600,000 was a lot of money to request from an individual. Mr Smith was questioned by the Chairperson as to why he was not concerned that Mr Agrizzi, as a high-ranking official at Bosasa, a company that he knew to have faced allegations of corruption, was paying a large amount of money to him in cash. Mr Smith said that he did not register it that way at the time. He said that maybe it "should have rung a bell" but that at the time it "never registered either way".

919.5 Mr Smith refused to answer a question regarding his agreement with Mr Agrizzi on the interest to be paid on the loan because he said that he had been advised not to answer the question as it could potentially incriminate him. On two previous occasions when he had been asked about the terms of interest, Mr Smith did not answer the questions directly and merely stated that there had been no written loan agreement.

919.6 Mr Smith's use of his company for a personal loan contradicts his repeated emphasis on separating the individual from the institution/company. When specifically questioned about the fact that Mr Watson was seen as "Mr Bosasa" by various witnesses who had given evidence, Mr Smith said that he distinguished between Mr Watson and Bosasa but that, in hindsight, the lines were blurred.

919.7 Mr Smith was unable to provide a reason why Mr Agrizzi would say that the money paid for Mr Smith's daughters' university fees was paid as a bribe and not a loan. It is improbable that Mr Agrizzi would have said that such a large sum of money was paid as a bribe if it was in fact a loan to Mr Smith, particularly when considering that:

919.7.1 This evidence would deprive Mr Agrizzi of any basis for claiming repayment of the money; and

919.7.2 Mr Agrizzi's evidence implicated himself in criminal activities in circumstances where he was already facing criminal charges.

919.8 Mr Smith's email seeking assistance in the payment of his daughter's university fees makes no mention whatsoever of a loan.

919.9 There is no evidence that the money was paid as a loan. There is no evidence of an agreed interest rate. Mr Smith's evidence as to repayment terms is flimsy and is undermined by the failure to put up the written evidence of the value of the shares alleged to provide an assurance of his capacity to repay the loan.

919.10 In any event, if there was facilitation of the kind contemplated in TOR1.4, it would remain unlawful if the quid pro quo took the form of a loan on favourable terms. Absent any evidence regarding an arms-length rate of interest, on Mr Smith's own version, it was a favourable loan, not at arms-length.

920. Mr Smith admitted that his daughter made use of a rented vehicle that Bosasa facilitated and paid for on three occasions at an approximate cost of R26,000 and that he did not disclose this to Parliament. Mr Smith sought to justify this on the basis that it was a minor favour and remarked that, if he was receiving the monthly payments that were alleged, he would have paid for this himself out of those funds. The difficulties with his explanation are these:

920.1 The benefit is clearly one that was required to be disclosed in terms of the code of conduct governing members of the National Assembly.

920.2 It was clear from Mr Smith's evidence that he was aware that this benefit was coming from Bosasa, and not from either Mr Watson or Mr Agrizzi - this undermines his evidence that he drew a clear and consistent line between Mr Watson and Mr Agrizzi on the one hand and Bosasa on the other.

920.3 When faced with a complaint of having received a bribe, a *de minimis non curat lex* defence would not justify payment or receipt of a benefit to the value of R26,000.

920.4 His attempt to use his admission of the benefit in relation to the car hire as a basis for disputing the monetary payments is unconvincing and may well point the other way i.e., that Mr Smith was a person who was on the take in respect of whatever was on offer from Bosasa.

921. What emerges from the evidence is that Mr Smith clearly received benefits that were paid for by Bosasa, including money that was used to pay for his daughter's university fees and car hire as well as security upgrades at his home. Having regard to the many difficulties in his version in relation to these benefits listed above, his attempt to suggest that these were at arms-length and legitimate does not withstand scrutiny. The benefits were, at least on a balance of probabilities, corruptly conferred on him. This is so before one even gets to the alleged monthly cash payments of R45,000 and, later, R100,000, which Mr Smith disputes. These are addressed below.

922. On a consideration of the evidence, in the main Mr Smith does not dispute the receipt of illicit benefits other than the monthly payments, but that he facilitated the unlawful awarding of tenders by organs of state so as to benefit any family or individual. In this regard the following must be considered:

922.1 Most of Mr Agrizzi's evidence in relation to Mr Smith was corroborated by Mr Smith himself. Mr Agrizzi's evidence that Mr Smith was brought onside and dropped the hostility that was previously shown by him in his capacity as chair of the Portfolio Committee must therefore be taken seriously.

922.2 Mr Smith's main answer to this is that he was unrelenting in his opposition to outsourcing. However, notwithstanding his alleged stance in this regard, the reality is that, during his tenure as chairperson, Bosasa retained 60% of the catering contract (upon its renewal), while its other contracts remained intact, and, of particular importance, the SIU investigation which had earlier formed the subject matter of scrutiny in the Portfolio Committee, ground to a halt.

922.3 The evidence of Mr Frolick's intervention to enable a meeting between Mr Smith and Bosasa representatives was largely common cause, as was the evidence of the subsequent meeting at Parliament (less successful) and in Johannesburg (on the probabilities, more successful). It is odd that the chairman and members of a Portfolio Committee would agree to meet with a stakeholder in Johannesburg in a hotel where that stakeholder had, to the knowledge of the Committee, quite recently been accused of serious corruption. It does not appear to be justified even to have a meeting in a hotel. It is difficult to see why members of the Portfolio Committee would have had to go and meet a stakeholder accused of corruption in a hotel instead of dealing with such stakeholder in an official Portfolio Committee meeting in Cape Town. What legitimate purpose would there have been for members of a Portfolio Committee to meet a company al-

leged to be engaged in corruption in hotel rooms instead of calling them to a proper Portfolio Committee meeting and questioning them about such allegations.

922.4 Considering the non-cash benefits alone, it is unlikely that an organisation would spend several hundred thousand rand on one person, without expecting something in return.

922.5 Mr Smith conceded that he could not identify a single instance of his having singled Bosasa out for criticism after the meetings with Mr Watson and Mr Agrizzi. This too tends to point to a quid pro quo having been provided. In the main, what was expected of Mr Smith by way of a quid pro quo was not to act i.e., not to criticise Bosasa and not to scrutinise their activities or call them to account. It was therefore not difficult for him to respond in the manner expected by Bosasa.

923. In any event, the WhatsApp exchange between Mr Watson and Mr Agrizzi points to active involvement on the part of Mr Smith in the facilitation of the award of tenders. At the same time as the WhatsApp exchange, in late 2016, a tender was advertised for the catering contracts in the DCS. Zach Modise was the Commissioner at the time. Mr Agrizzi testified that he was concerned about the catering tender that Bosasa was trying to retain, that he had received information that Bosasa was the cheapest and should have been awarded all ten management areas but that two areas had been awarded to other companies. At the time, Bosasa only had received contracts for seven of the ten management areas.

924. At least on a balance of probabilities, it may be inferred that Mr Smith provided facilitation of the unlawful award of tenders as contemplated by TOR 1.4. The question then is whether Mr Smith in doing so breached or violated the Constitution or any relevant ethical code or legislation.

925. The offence of corruption requires that Mr Smith must have had the intention of acting in a certain manner in return for the gratification. The gratification must be accepted with a certain aim, which is broadly defined under PRECCA. It includes influencing another person to act in a manner that amounts to the biased performance of any powers or functions arising out of a constitutional, statutory or other legal obligation or that amounts to abuse of a position of authority or amounts to any other unauthorised or improper inducement to do or not to do anything. Based on the evidence before the Commission, read with the presumption contained in section 24(1) of PRECCA, *prima facie* gratification (in the form of the benefits identified above) was accepted by Mr Smith to achieve one or more of the aims set out in the definition. A reasonably diligent and vigilant person in Mr Smith's position (having the knowledge and experience expected of a member of parliament) would have known or suspected that the benefits that were conferred upon him by Bosasa were unlawful and were given to induce a certain result.

926. It is improbable that Mr Smith did not know that the assistance he received from Bosasa was on a quid pro quo basis because Mr Smith had, by his own admission, been shocked by the amount of corruption that the SIU alleged was associated with BOSASA and its relationship with DCS. When Mr Smith accepted the benefits from Bosasa as described above, he knew that he was receiving them from a company that faced serious allegations of bribery and corruption. Therefore, Mr Smith must have known that these benefits were probably being given to him for corrupt purposes.

927. It is also improbable that Mr Smith intended to pay for the security upgrades at his residence having regard to the following:

927.1 He had not done so for a period of four years

927.2 He was dishonest in a public statement about the security system; and

927.3 Mr Smith admitted that Mr Watson had assisted him in the past and he had no difficulty with such an arrangement, even when he was a Member of Parliament.

928. For the reasons set out above, on a balance of probabilities, Mr Smith came to protect Bosasa pursuant to benefits corruptly given to him by Bosasa and, from the perspective of any prosecution, a *prima facie* case of corruption under at least sections 3 and 7 of PRECCA has been established.

929. Mr Smith acted in breach of section 40(2) and 195 of the Constitution. He breached the oath sworn by

members of Parliament to uphold the Constitution and to perform their work to the best of their ability (read with section 48 of the Constitution). Mr Smith's conduct was also in breach of clauses 4.1.1 to 4.1.5 , 5.2.1, 9.3.6 and 9.3.7 of the code of conduct governing members of the National Assembly.

930. Mr Agrizzi's evidence that Mr Smith was one of the persons who received monthly payments, initially of R45 000 per month and later, R100 000 per month was disputed by Mr Smith. A finding in this regard is not required to bring his conduct within the ambit of TOR 1.4 or for there to be a *prima facie* case of corruption. His conduct in relation to the benefits admittedly received by him is sufficient to do so. However, the question whether he received such payments is relevant to the factual basis upon which TOR 1.4 is engaged and the basis upon which any referral is made in terms of TOR 7. The following considerations need to be weighed:

    930.1 Mr Agrizzi contradicted himself as to whether it was Mr Smith or Mr Watson that developed an antipathy towards Mr Seopela attending their meetings

    930.2 The extract from Mr Agrizzi's "little black book" received into evidence as an exhibit specifically records amongst other names "Vincent Smith R100,000"

    930.3 There is in Mr Smith's case documentary evidence to support Mr Agrizzi's allegation of receipt of cash payments

    930.4 There is no other written evidence of the cash payments, although this would obviously be the reason to make use of cash payments

    930.5 On the information before the Commission, Mr Agrizzi does not stand to gain anything by making the allegation, whereas Mr Smith benefits from his denial

    930.6 Mr Smith's own evidence corroborated that of Mr Agrizzi in respect of major components of the evidence against Mr Smith, including the security installation, the funding of his daughter's overseas education and the provision of a hired car to his daughter during university vacations; and

    930.7 Mr Smith's demonstrable dishonesty in the form of an almost blanket denial of the allegations against him when he made his public statement on 4 September 2018 renders his denial in relation to the cash payments unreliable.

931. In the circumstances and weighing the competing considerations, it may be concluded, at least on a balance of probabilities, that Mr Smith did indeed receive the cash payments testified to by Mr Agrizzi.

Mr Mnikelwa Nxele

932. The evidence before the Commission is that the Regional Commissioner of the DCS in KwaZulu Natal, Mr Nxele, received a monthly payment in exchange for ensuring that undue pressure was placed on Mr Petersen and the DCS to continue the DCS's association with Bosasa.

933. Mr Nxele's name is recorded in the extracts from Mr Agrizzi's black book. Mr Nxele was issued with a notice in terms of Rule 3.3 on 24 January 2019. He has not made an application in terms of Rule 3.4 to cross-examine Mr Agrizzi or present evidence at the Commission. This evidence implicating him in corrupt activities and in failing to discharge his duties as an official of the DCS in good faith is therefore unchallenged. He benefitted personally. His conduct is in breach of section 195 and 217 of the Constitution, section 45 and 57 of the PFMA and section 3 and 4 of PRECCA. This conduct is established on at least a balance of probabilities and at the level of a *prima facie* case for purposes of any referral for investigation and prosecution. His conduct too falls within the ambit of TOR 1.4.

934. The question of the further steps to be taken in respect of Mr Nxele is dealt with in the discussion under TOR 7 below.

935. There is also evidence of facilitation of the unlawful award of tenders by other government departments to benefit the Watson family, Bosasa and its associated business entities. These allegations of corrupt payments in return for the facilitation of the unlawful awarding of tenders by SOEs or government departments, as contemplated under TOR 1.4, are discussed below.

Contracts with the DOJCD

936. Mr Seopela, whose function Mr Agrizzi described as liaising with potential clients of Bosasa and getting involved with politicians, informed Mr Agrizzi that the DOJCD was looking to investigate the implementation of new security systems, including access control and surveillance equipment. Mr Seopela had told Mr Agrizzi that he was well-connected with high-ranking officials in the NPA and the Hawks and that Bosasa could benefit from his interactions, which went right up to ministerial level.

937. Mr Agrizzi testified that he was instructed by Mr Watson to make cash available to Mr Seopela for purposes of making payments to influential persons.

938. Mr Agrizzi testified that Sondolo IT was awarded the contract with the DOJCD for the installation of access control across courts nationally, that the award of this contract was irregular and that certain officials received payments as lobbying fees or bribes. However, save for Mr Thobane and Ms Nyambuse, no particulars were given as to the identity of these officials.

939. Mr Thobane and Ms Nyambuse were implicated in Mr Agrizzi's evidence as having received bribes. He testified that he had direct evidence of these payments. Ms Nyambuse and Mr Thobane's names appear in Mr Agrizzi's black book. Neither Mr Thobane nor Ms Nyambuse was issued with a Rule 3.3 notice informing them that Mr Agrizzi's evidence implicated them. No adverse findings may therefore be made against them. The matter ought however to be referred to the appropriate authorities for further investigation.

940. Sondolo IT was also appointed to undertake the security upgrades at the SALU premises, rented by the DOJCD, with no tender process having been followed and the consent to their involvement not having been secured from the owner of the building, Billion Group. The Billion Group as owner of the building was responsible for the improvements and preferred to involve their own supplier. Arrangements were then made with Mr Seopela to facilitate the transaction and, later, to secure payment from the Billion Group. Mr Agrizzi testified that he gave Mr Seopela R1.9m in cash, as a fee for arranging the contract. Mr Agrizzi testified that he did not know whether Mr Seopela paid the money over to anyone.

941. Mr Seopela was employed in Consilium as a consultant and was given access to the Bosasa VIP travel account, provided with a company credit and fuel card and access to Blake's Travel. Mr Seopela would also hire cars on the company account.

942. Mr Seopela's stance in response to his being implicated has been dealt with above. The upshot is that the evidence against him stands undisputed. For purposes of TOR 1.4, on a balance of probabilities, and having regard to Bosasa's business model, persons within the DoJ&CD must have facilitated the unlawful award of the tender in return for corrupt payments. Further investigation would be required to identify who they were. For purposes of TOR 1.1, it may be accepted on a balance of probabilities that Mr Seopela influenced the award of the tender by providing inducements or gain.

Contracts with the Department of Education

943. Mr Agrizzi testified that Mr Mathenjwa facilitated payments for Bheki Gina's sister at the Department of Education to secure the contract for the provision of CCTV and access control systems. On the one hand, Mr Agrizzi testified that approximately R1.25m was paid as bribe money to her, but on the other hand stated that he was "out of the loop" on this tender.

944. Mr Mathenjwa was sent a Rule 3.3 notice on 31 January 2019. Mr Mathenjwa filed an affidavit, dated 6 September 2020, with the Commission in response to a 10(6) directive. In his affidavit, Mr Mathenjwa denies that he approached Mr Agrizzi to solicit work from the Department of Education in the Northern Cape, or to make any bribe in that regard. According to Mr Mathenjwa, Mr Bheki Gina does not have a sister who works at the Department of Education. Mr Mathenjwa denies that there was no tender process for the work undertaken by Sondolo IT for the Department of Education, Northern Cape. Mr Mathenjwa denies having any knowledge of payments being approved for Mr Gina's sister, or that he managed any contract for the Department of Education.

945. In the absence of any particularity of the identity of the person implicated in this evidence, her position at the Department of Education and ability to influence its decision-making in the award of contracts, coupled with Mr Agrizzi's admission that he did not have detailed information on the award of the contract, there is insufficient evidence to make a finding on the lawfulness of the award of the contract or on the conduct of the unidentified person. The evidence is incomplete, and no findings are appropriate.

Contracts with USAASSA

946. The Universal Service Agency and Access of South Africa ("USAASSA") is a schedule 3A SOE. Its existence, functions, duties, and mandate are governed by sections 80 – 91 of the Electronic Communications Act, 36 of 2005. Sondolo IT was interested in a contract that had been awarded to USAASSA to provide iPads for schools in Gauteng.

947. Mr Agrizzi testified that, although the tender was subsequently cancelled or did not perform, an initial amount of R500,000 was paid to Mr Mzazi (director at Sondolo IT) for purposes of illegally paying procurement personnel at USAASSA for portions of the tender to be allocated to Sondolo IT. Mr Agrizzi testified that he was present in the vault when the cash was handed over to Mr Mzazi.

948. Mr Agrizzi also testified that the accounting officer of USAASSA agreed to work together with Bosasa, in return for the illegal payment of money to him, for the extension of existing contracts and other opportunities, during a meeting with Mr Watson. Mr Agrizzi stated he did not know what transpired with this contract subsequently.

949. Mr Mzazi failed to respond to the Rule 3.3 notice issued to him, with the consequence that the evidence against him is undisputed. That means that inducement is established at least on a balance of probabilities for purposes of TOR 1.1. However, absent the identification of the recipient or evidence of the conclusion of a contract, it is not possible to establish facilitation for purposes of TOR 1.4.

Contracts with the Department of Transport

950. The evidence presented before the Commission by Mr Agrizzi that payments were made to a certain "Mlungise" at the Department of Transport to secure the award of the contract for fleet management to Kgwerano, and to other officials in that Department to secure the extension of the contract, is dealt with above in discussing TOR 1.1.

951. From the perspective of TOR 1.4, there is a lack of evidence about the identity of the persons alleged to have received corrupt payments from either Mr Leshabane or Mr Seopela and therefore of persons responsible for facilitation of the unlawful award of tenders. Further investigation would be required to ascertain their identities.

Contracts with the Department of Health in the Mpumalanga Province

952. Mr Agrizzi's evidence in this regard has been dealt with above for purposes of TOR 1.1.

953. From the perspective of TOR 1.4, Mr Agrizzi's evidence was corroborated by Mr Vorster who testified that the cost of servicing Mr Netshishivhe's vehicle was booked against one of the Bosasa vehicles. Bosasa was awarded the contract. This is evidence of the facilitation of the unlawful award of tenders. In the absence of Mr Netshishivhe having been issued with a Rule 3.3 notice, no negative finding may be made against him.

Contracts with Randfontein Local Municipality

954. Mr Agrizzi testified that, although he had been opposed to it, an unnamed official at the municipality facilitated the award of the tender for the provision of CCTV access control systems to Sondolo IT in return for a proportion of the value of the contract being paid to him and the Dahua video surveillance system being installed at his residence. Mr Agrizzi also purported to provide the Commission's investigators with the home address of the implicated official, maintaining that one could still see the Dahua System installed at the house.

955. At the same time as dealing with this testimony, Mr Agrizzi testified that an employee of Sondolo IT, Riaan van der Merwe, approached him in March 2017 to arrange a meeting between the local CEO of Dahua, Mr Kwon, and Mr Andile Ramaphosa. Dahua was a Chinese company that manufactured these surveillance systems and was growing rapidly. Mr Agrizzi did not have faith in its products. He set up the meeting but did not attend it himself.

956. Mr Andile Ramaphosa filed an affidavit in response to a Rule 3.3 notice in which he denied:

    956.1 That the evidence of Mr Agrizzi implicated him in any corrupt or otherwise unlawful conduct; and

    956.2 Ever having been contacted by Mr Agrizzi in relation to or having attended any such meeting.

957. Mr Andile Ramaphosa is correct on the first point and for that reason alone, no finding or referral can be made against him on this score. There are the following additional difficulties in relation to this evidence:

    957.1 No particulars are provided on the identity of the municipal official or his scope of influence within the municipality. It would however be possible to trace him using the address provided by Mr Agrizzi if that information turns out to be correct.

    957.2 Mr Agrizzi testified that there were numerous irregularities committed at the municipality but did not provide any detail of these alleged irregularities.

    957.3 The incident occurred after Mr Agrizzi departed from Bosasa and his version is based on the hearsay evidence of an unidentified whistle-blower.

958. In the circumstances, it would not be appropriate to draw a conclusion as to whether or not there was facilitation as contemplated in TOR 1.4 on the part of any official of the Randfontein-Mogale City Municipality.

959. A finding against Mr Andile Ramaphosa on this aspect of Mr Agrizzi's evidence would not be justified, given that no conduct falling within the TORs is alleged against him.

Contracts with the Department of Social Development in the North West province

960. Mr Agrizzi testified that Ms Kgasi and Ms Mogale, officials at the North West Department of Social Services, agreed on a fictitious arrangement with Bosasa as a mechanism to generate money for electioneering purposes for the ANC. Invoices were raised by Bosasa for software that was never provided to the department, because the department already had it, or for software that was provided but which had no inherent value and had therefore not been paid for by Bosasa. Bosasa was paid R4.5 m by the department through this arrangement. The money was allegedly then handed back to be used for electioneering purposes. Mr Agrizzi testified that Mr Dlamini would raise an invoice for the software.

961. Ms Kgasi and Ms Mogale were both issued with Rule 3.3 notices but failed to respond to them. The evidence against them is therefore uncontested by them. However, the evidence against them is, to some extent, contested by Mr Dlamini. Mr Dlamini filed an affidavit, dated 14 September 2020, in response to a 10(6) directive, in which he denied any knowledge of the inflation of invoices or drawing of cash for purposes of bribery or ever taking any cash to or from anyone. Mr Dlamini avers that it could only have been Mr Agrizzi that was responsible for inflated invoices or bribing of officials. Only he had the authority to negotiate, sign for or authorise the costing in respect of the tendering for services in any Bosasa company. According to Mr Dlamini, as far as the information technology system was concerned, the Department of Social Development had purchased software and therefore owned it.

962. There is no suggestion by Mr Agrizzi that the conduct involved the unlawful awarding of tenders. The question therefore arises whether any of the terms of reference are engaged by the conduct alleged by Mr Agrizzi on the part of the officials in question. Clearly, if the alleged transaction had not been a sham one, and software was to be procured by the DSD, a tender process would have to have been followed. It would be absurd if corruption involving the abuse of procurement processes fell outside the TOR because the procurement laws were disregarded to such a flagrant degree. If the

word “tenders” is interpreted to include contracts that ordinarily flow from a tender process, then the conduct complained of here is included within TOR 1.4 (and TOR 1.9), even if the contract entered into is a sham for the misappropriation of public funds. Thus, on a purposive interpretation of TOR 1.4, the conduct, from the perspective of the officials involved, constitutes facilitation of the unlawful awarding of tenders.

963. As against the two officials, facilitation of the kind contemplated by TOR 1.4 is established at the level of reasonable grounds for a suspicion, for the reasons already given. The question then is whether the conduct of the officials in question was in breach or violation of the Constitution, any ethical code or legislation. Clearly the procurement requirements of section 217 of the Constitution would have been breached if the conduct of which they are suspected were proven. In addition, a sham contract for the provision of software concluded to generate money, whatever its intended use, falls within the definition of corruption.

964. Ms Kgasi and Ms Mogale’s conduct may also be in breach of the following obligations resting on department officials in terms of the PFMA:

    964.1 The responsibility for the effective, efficient, economical and transparent use of financial and other resources within their area of responsibility

    964.2 The obligation to take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure; and

    964.3 The obligation to comply with the provisions of the PFMA.

965. In the light of Ms Kgasi and Ms Mogale’s failure to respond to Rule 3.3 notices and their failure to make an application in terms of Rule 3.4, the evidence before the Commission is that there are reasonable grounds for suspecting that their conduct fell within the ambit of TOR 1.4. Their conduct should be subject to further investigation.

Members of the National Executive

Thabang Makwetla

966. Mr le Roux testified that Bosasa provided former Deputy Minister for Correctional Services Mr Thabang Makwetla, with a security installation and maintenance services to the value of more than R308,754.25. The installation was on the instruction of Mr Watson. Mr Agrizzi was not aware of the installation.

967. A Rule 3.3 notice was issued to Deputy Minister Makwetla on 18 March 2019. Mr Makwetla testified before the Commission on 19 March and 5 July 2021.

968. Mr Makwetla did not dispute that Bosasa had installed a security system at his residence while he was the Deputy Minister of the Department. Initially Mr Makwetla testified that he did not find it strange that Bosasa would provide him with a security installation in circumstances where it had a contract with the Department and had requested his intervention on its behalf regarding its rates in terms of its contract. Mr Makwetla justified his response on the basis that he had requested a service from Bosasa that he was going to pay for. He said that, as a result, there was no conflict of interest. He also testified that Mr Watson had requested his assistance on Bosasa’s contract rates before he had raised his problem with his home security with Mr Watson.

969. Mr Makwetla testified that at the time when Mr Watson advised him that he would not charge Mr Makwetla for the work, he was shocked because he thought that Mr Watson would appreciate that he could not make such an offer because Bosasa was doing business with the Department at the time. Mr Makwetla said that he had explained this to Mr Watson. At the time, Mr Makwetla was also alive to the previous negative reports in the media concerning Bosasa. According to Mr Makwetla, he was frustrated and worried and was caught in “an unfortunate situation” where a comrade said he would do him a favour that he rejected, and that Mr Watson did not want to understand his material conflict of interest.

970. At the end of his evidence, Mr Makwetla confirmed that in hindsight what transpired was regrettable. He also admitted that he knows now that doing so was a conflict of interest but that at the time, he did not know that a situation such as this would arise.

971. Mr Makwetla confirmed that he raised the matter regarding Bosasa's rates under its contract with the accountant general of the Department. He claimed not to see any difficulty or conflict of interest in him personally interfering in contractual affairs of the Department or that it may have amounted to the improper influence of a price to be agreed upon.

972. Under re-examination, Mr Makwetla did not dispute any material fact concerning the installation of the security system at his residence. He disputed the number of technicians that attended at his residence, the labour cost, and the number of days it took to complete the installation.

973. Mr Makwetla's evidence was problematic in the following respects:

973.1 Whilst one could perhaps understand the topic of a burglary at his private home might arise during a discussion about the previous festive season, it is strange that this would not come at the beginning of an official meeting during the exchange of pleasantries before the official business of the day came under discussion.

973.2 The fact that the topic was raised following Mr Watson's request for a change in rates under the contract, seems to make matters worse, not better for Mr Makwetla. Hard on the heels of Mr Watson's request for an increase in rates came the revelation that Mr Makwetla was struggling to find a service provider for an electric fence.

973.3 Mr Makwetla's protestation that the conflict of interest was not apparent to him because he said that he was going to pay for the service is unconvincing. The conflict was a glaring one. He was getting involved in private contractual arrangements with a company that was doing business with his department in circumstances where Mr Watson was seeking an increase in rates outside of any formal process for achieving this. If Mr Makwetla's evidence that he saw no conflict of interest in this situation is true, then, quite frankly, that is scary. Mr Makwetla is a Deputy Minister. Not only that, previously he was the Premier of Mpumalanga Province. What guidance would he have given to his Members of the Executive Council in the Province if he, as Premier, did not know that a situation such as this constituted a conflict of interest? Mr Makwetla has had about five years to reflect on this incident since it occurred. Yet, when he gave evidence before the Commission in March 2021, he still said that he saw no conflict of interest in this scenario. If this is true, it means that he should not be occupying such a senior position in government. It means that in the Department in relation to which he is Deputy Minister, he would advise the DG and others that there is no conflict.

973.4 It is also strange that he did not call an immediate halt to the installation when he returned from Cape Town to his residence and purportedly found that the installation had proceeded to an advanced stage before any quotation had been provided; instead, he had arranged for his son to give access to the inside of the house for the installation to be completed.

973.5 Mr Makwetla's explanation for his initial inaction on the basis that he did not wish to be seen to be "playing to the gallery and wanting to make [himself], you know, a better more disciplined person in terms of, you know, appearance, you, to procedure", is difficult to comprehend.

973.6 His explanation of the failure to meet then President Zuma because of a stance he adopted in relation to the MKMVA is both difficult to comprehend and unconvincing.

973.7 His evidence was unconvincing where he acknowledged knowing about reports about unethical conduct on the part of Bosasa in 2009, even down to the detail of which newspaper they appeared in and that it was "massive", yet, when asked by the Chairperson why he therefore did not completely dissociate himself from Bosasa, claimed that:

> I did not even technically understand exactly what were they saying was the problem with this BOSASA ... all I know is that there was reports that were negative at some point and that is where it ends.

973.8 When he purportedly sought to address the problem when knowledge of the installation became public, he only paid for what he claimed to have asked for but did not suggest that he tendered the return of the balance of the installation that he had received for free.

974. In the circumstances, Mr Makwetla's version suggesting innocent receipt does not withstand scrutiny and must be rejected. Mr Makwetla's supposed resolve to take the matter up with Mr Zuma and, later, President Ramaphosa does not detract from the fact that he had received a form of gratification from Bosasa in order to act or to exert influence on another to act and that amounts to the illegal or biased performance of a duty or amounts to the abuse of a position of authority or is designed to achieve an unjustified result. Mr Makwetla also did not disclose the outcome of his meeting with President Ramaphosa.

975. Mr Makwetla testified that Bosasa eventually provided him with an invoice for the security installation in the amount of R90,000 inclusive of VAT. The invoice was provided after the security installation by Bosasa had been made public. Mr Makwetla paid R25,000 for the security upgrades as he resolved to only pay for the items that he had requested be installed. The amount paid by Mr Makwetla is substantially below the amount quoted by Bosasa and that calculated by Mr le Roux.

976. Mr Makwetla was (and still is at the time of preparing this report) subject to the Constitution and his oath of office under the Constitution.

977. In terms of section 96 of the Constitution, a deputy minister may not expose him/herself to any situation involving the risk of a conflict between his official responsibilities and his private interests. Further, he must act in accordance with a code of ethics prescribed by national legislation, i.e., the Executive Members' Ethics Act and the Executive Ethics Code published in terms of section 2 of that Act.

978. In terms of the Executive Ethics Code, Mr Makwetla was not permitted to:

978.1 Use his position or any information entrusted to him, to enrich himself or improperly benefit any other person

978.2 Expose himself to any situation involving the risk of a conflict between his official responsibilities and his financial and/or personal interests; or

978.3 Solicit or accept a gift or benefit which (i) is in return for any benefit received in his official capacity; (ii) constitutes improper influence of him; or (iii) constitutes an attempt to influence him in the performance of his duties.

979. In respect of the benefits conferred upon him by Bosasa he was in breach of his constitutional, legislative and ethical duties, as contemplated in TOR 1.4.

980. Mr Makwetla was also under a duty not to solicit or accept a gift or benefit in return for any benefit given in an official capacity and the duty to seek permission to receive and to disclose a gift worth more than R1 000. Mr Makwetla failed to do so.

981. Even though Mr Makwetla's conduct in discussing the rates in terms of the Bosasa contract with the accountant general of the Department was not explored further during Mr Makwetla's evidence, the evidence establishes a *prima facie* case of corruption in terms of sections 3 and 4 of PRECCA against Mr Makwetla in respect of whom the institution of criminal charges and prosecution should be considered.

982. If Mr Makwetla were to be prosecuted for corruption under PRECCA, the presumption in section 24(1) would come into play, to the extent that there was no lawful authority or excuse apparent or suggested by Mr Makwetla for his receipt of the gratification conferred upon him by Bosasa. Unless he is able in criminal proceedings to introduce evidence to establish a reasonable doubt in this regard, the evidence of the benefits conferred upon him will be deemed by Section 24(1) to constitute sufficient evidence that the necessary quid pro quo was provided by him.

Former Minister Ngconde Balfour

983. Although Mr Bloem testified that Mr Balfour was aware of the Portfolio Committee's concerns with the catering contract and that Mr Balfour protected Mr Mti, there is no evidence that former Minister Balfour received any benefit from Bosasa in return for facilitating the award of unlawful contracts by the DCS. Mr Agrizzi testified that Mr Balfour did not receive any benefits.

984. It is significant, however, that Mr Bloem testified that both he and, later, Ms Vytjie Mentor raised their concerns personally with Mr Balfour on more than one occasion. When asked by the Chairperson whether he was able to give some factual basis for his statement that Mr Mti enjoyed the protection and support of Mr Balfour, Mr Bloem responded:

> Chairperson many a times when both of them appeared before the Portfolio Committee and we ask difficult questions to the Department, Mr Mti or Gillingham the Minister will interject and say he will answer such questions. When we - I meet with him personally one by one he will tell me that no Comrade Bloem you know this comrade is an experienced comrade. We must not harass this comrade. Let us treat him well. That is my conclusion. That is my observation. That is why I am saying that Chairperson (sic).

985. A Rule 3.3 notice was issued to Mr Balfour on 8 February 2019. He has failed to respond to the allegations made against him and the evidence before the Commission is therefore undisputed. Considering that Mr Agrizzi was clear that Mr Balfour did not receive corrupt payments and that the above extract from the evidence of Mr Bloem is insufficient, on any of the relevant standards of proof, to conclude that there was knowing facilitation of the award of unlawful tenders, the evidence of Mr Bloem does not provide a sufficient basis for any negative finding in respect of Mr Balfour.

Former President Jacob Zuma

986. Mr Zuma is the most senior public office bearer that Bosasa is alleged to have attempted to influence. Conduct falling within the Commission's TORs involving Mr Zuma is alleged to have occurred during his tenure as President of the Republic of South Africa.

987. Mr Zuma was issued with a notice in terms of Rule 3.3 on 30 January 2019. On 30 April 2019, Mr Zuma was invited to appear before the Commission from 15 to 19 July 2020. The purpose of this appearance was to address the evidence of witnesses who had implicated him and to answer questions from the Commission. Mr Zuma thereafter appeared at the Commission and testified for two and half days before declining to answer questions and objecting to being questioned in a manner that he said amounted to cross-examination. He then indicated that he would no longer participate in the proceedings of the Commission.

988. Following an agreement between the evidence leaders and Mr Zuma, he was furnished with a letter on 30 July 2019 outlining particular "areas of interest" in respect of which a response was required by affidavit. Mr Zuma did not meet the deadline for submitting his affidavit. Therefore, in December 2019, the Commission's legal team took a decision to invoke the Commission's powers of compulsion to force Mr Zuma to attend and testify. The Commission's secretary was later authorised to issue summons which was issued on 20 October 2021. The summons required Mr Zuma to appear before the Commission from 16 to 20 November 2020.

989. On 16 November 2020, Mr Zuma attended before the Commission, but his representative moved an application for the Chairperson's recusal. On 19 November 2020, the Chairperson issued his ruling dismissing the application for recusal. Following the ruling, Mr Zuma left the hearing without being excused. The Chairperson instructed the secretary to lay a criminal charge against Mr Zuma for this conduct and to launch urgent proceedings in the Constitutional Court.

990. The Constitutional Court issued an order in terms of which Mr Zuma was ordered to obey all summonses and directives lawfully issued by the Commission and appear and give evidence before the Commission on dates determined by it. The Court's order further declared that Mr Zuma did not have a right to remain silent in the proceedings before the Commission, although he was entitled to all privileges under section 3(4) of the Commissions Act, including the privilege against self-incrimination.

991. In its judgment *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture,*

Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others (CCT 52/21) [2021], the Constitutional Court held that a witness has an obligation to appear before the Commission on receipt of a duly issued summons and remain in attendance until the proceedings are concluded or the witness is excused by the Chairperson. A breach of this duty constitutes an offence under section 6 of the Commissions Act.

992. In a public statement issued after judgment was handed down by the Constitutional Court, Mr Zuma said:

> I. . . state in advance that the commission into allegations of state capture can expect no further cooperation from me in any of their processes going forward. If this stance is considered to be a violation of their law, then let their law take its course.
>
> In the circumstances, I am left with no other alternative but to be defiant against injustice as I did against the apartheid government. I am again prepared to go to prison to defend the Constitutional rights that I personally fought for.

993. The next date upon which Mr Zuma was required to attend the proceedings of the Commission was Monday 15 February 2021. Following similar public statements, his attorneys addressed a letter to the Commission shortly before the hearing was due to commence confirming that he was unwilling to attend.

994. Mr Zuma's unwillingness to attend at the Commission precipitated an urgent application by the Secretary of the Commission for direct access to the Constitutional Court seeking an order declaring him to be in contempt of court and sentencing him to a period of two years' imprisonment. This application was not opposed by Mr Zuma.

995. The majority of the Constitutional Court found that Mr Zuma was in contempt of court in that (i) there was an order of the Constitutional Court; (ii) which was served on Mr Zuma; (iii) Mr Zuma had subsequently failed to comply with the order by failing to depose to affidavits or appear and give evidence before the Commission; and (iv) Mr Zuma had failed to present evidence to establish a reasonable doubt that his non-compliance was wilful and mala fide. In respect of the sentence that should be applied against Mr Zuma, the Constitutional Court held:

> [128] Quantifying Mr Zuma's egregious conduct is an impossible task. So, I am compelled to ask the question: what will it take for the punishment imposed on Mr Zuma to vindicate this Court's authority and the Rule of law? In other words, the focus must be on what kind of sentence will demonstrate that orders made by a court must be obeyed and, to Mr Zuma, that his contempt and contumacy is rebukeable in the strongest sense. With this in mind then, I order an unsuspended sentence of imprisonment of 15 months. I do so in the knowledge that this cannot properly capture the damage that Mr Zuma has done to the dignity and integrity of the judicial system of a democratic and constitutional nation. He owes this sentence in respect of violating not only this Court, nor even just the sanctity of the Judiciary, but to the nation he once promised to lead and to the Constitution he once vowed to uphold.

996. Following the "Contempt Judgment", Mr Zuma began serving his 15-month jail sentence for contempt of court. He also applied for rescission of the Contempt Judgment. At the heart of the application was the allegation the order of the Court was erroneously granted in Mr Zuma's absence. The application was characterised by most of the Court as "nothing more than an attempt to re-open the contempt proceedings on the merits" and that Mr Zuma had not met the requirements of rescission either in terms of the Court's Rules or at common law. Most of the Court concluded that it would be contrary to the interests of justice to expand the legal grounds of rescission or reconsider its earlier judgment. The rescission application was therefore dismissed with costs.

997. Mr Zuma has at the time of writing been granted medical parole. He has not presented evidence before the Commission. The consequence of his stance is that the evidence before the Commission implicating him remains undisputed.

998. The evidence implicating Mr Zuma is summarised below. A significant portion of the evidence is

hearsay, but it is admissible in the Commission's proceedings. The evidence includes the following:

998.1 Mr Watson was introduced to Mr Zuma during 2009 by Ms Zukiswa Madonga, when he was president of the ANC, but not of the Republic. This took place at the Mr Zuma's home at Forest Town.

998.2 Later a second introduction to Mr Zuma was brought about by Ms Dudu Myeni, which Mr Agrizzi said resulted in several further meetings with former President Zuma at Nkandla.

998.3 Mr Watson openly used to tell Mr Agrizzi and others that he paid Ms Myeni R300,000 a month for the benefit of the Jacob G Zuma Foundation. Mr Agrizzi witnessed these payments being delivered to Ms Myeni on three occasions; twice delivered by Mr Watson and once delivered by Mr Mathenjwa.

998.4 One of the meetings following the second introduction was when Mr Watson and Mr Gumede met Mr Zuma at Nkandla. According to Mr Watson and Mr Gumede, at the meeting Mr Watson asked Mr Zuma to call Mr Dramat to tell him to shut down the Hawks investigation into Bosasa. Mr Watson informed Mr Agrizzi that at the meeting a "bag of R300 000 cash" was given to Mr Zuma. Mr Watson also wished to check with Mr Zuma at the meeting that Ms Myeni was "not taking a haircut of the money". Apparently, Mr Zuma said that she was not.

998.5 Mr Agrizzi attached to his affidavit a recording of a subsequent Bosasa EXCO meeting, in which Mr Gumede talks about this meeting that he and Mr Watson had held with Mr Zuma.

998.6 Mr Agrizzi testified that he was also present at a meeting at Mr Mti's house during which Mr Watson spoke to Mr Zuma on the telephone and then proceeded to hand the telephone to Mr Mti saying, "your boss wants to speak to you".

998.7 There was testimony that Mr Zuma visited Bosasa facilities on at least two occasions:

998.7.1 Mr Zuma visited the Bosasa office park with Ms Myeni and the then Minister of Health, spending some 4½ hours there on a Saturday morning; and

998.7.2 Mr Van Tonder recalled being formally introduced to Mr Zuma during a visit to the prawn production facility in Krugersdorp using artificial sea water operated by the Bosasa subsidiary, Bioorganics (Pty) Ltd.

998.8 Ms Myeni often called upon Mr Watson to arrange high-end functions for Mr Zuma including an occasion when Bosasa catered for a birthday dinner for him at short notice. Mr Agrizzi estimated the cost of these functions at approximately R3.5 million per year. These were treated as corporate social investment payments in the company's financial records. Ms Myeni confirmed Bosasa's involvement in arranging and funding birthday celebrations for Mr Zuma. Mr Agrizzi also attached to his affidavit a thank you letter from Ms Myeni in respect of the birthday celebrations.

998.9 Ms Myeni testified that donations from Bosasa for purposes of the Jacob G Zuma Foundation's events for the birthday of Mr Zuma, were deposited electronically to the relevant service providers after the Foundation had indicated to Bosasa what it would like to see done for the event.

998.10 On one evening Mr Agrizzi received a call from Mr Watson instructing him to drive to Café Mozart where he dealt with "Fritz" and designed a cake for then Mr Zuma's 72nd birthday. A photograph of the cake forms an annexure to Mr Agrizzi's statement. Although not clearly visible from the photograph, Mr Agrizzi was able to point out the Bosasa logo on the cake.

998.11 In around May/June 2016, Ms Myeni facilitated a meeting between then Mr Zuma, Mr Watson, Mr Philip O'Quigley, international chairman of the Falcon Oil and Gas Group, and Ms Liezl Oberholzer of the same company, to seek the President's assistance in advising the then Minster of Minerals and Energy, Mr Ngoako Ramatlhodi, to make certain amendments to what were considered to be restrictive regulations applicable to the oil and gas industry. Although Mr Agrizzi

himself did not attend the meeting, he was informed about it in independent accounts by Mr Watson, Mr Radhakrishna and Ms Oberholzer.

998.12 Following the meeting, the Minister of Minerals and Energy's legal advisors were instructed to meet with Ms Oberholzer to make the necessary amendments to the regulations. Mr Agrizzi was uncertain if such amendments were affected.

998.13 Ms Myeni, whilst denying that she had influence in respect of the issue pertaining to the oil and gas regulations, which pertained to amendments to certain regulations, which were required to facilitate fracking in the Karoo, admitted that she was party to a meeting that took place with then Mr Zuma at Nkandla in this regard.

999. The following observations are made regarding this evidence:

999.1 Whilst a significant part of the evidence is hearsay, it enjoys a level of corroboration in important respects.

999.2 The manifestly generous expenditure by Bosasa on Mr Zuma's birthday parties was confirmed in oral evidence by Ms Myeni and also evidenced by her thank you letter and the photographs attached to Mr Agrizzi's affidavit, including the photographs of the birthday cake with the Bosasa logo.

999.3 Whilst Ms Myeni did not confirm the detail of the meeting with Mr O'Quigley and Ms Oberholzer, the fact that the meeting took place at Nkandla is confirmed by her.

999.4 Ms Myeni 's email to Ms Oberholzer dated 20 July 2014 put up by Ms Oberholzer as an annexure to her affidavit is also corroborative evidence of Ms Myeni having arranged for the meeting to take place.

999.5 The recording of the Bosasa exco meeting arranged by Mr Gumede, is also corroborative evidence that a meeting with then Mr Zuma had taken place and further that the President had undertaken to help by making calls to two persons.

999.6 To the extent that the evidence includes hearsay, it is admissible in the Commission's proceedings for the reasons already given. Mr Zuma had every opportunity to come forward and dispute the evidence. He failed to do so.

999.7 There were aspects of Mr Agrizzi's evidence that may be criticised:

999.7.1 For example, it was not entirely clear whether the R300,000 monthly payments were, in truth, originally intended for the Foundation, or whether this was simply a guise for payments directly to Mr Zuma. Mr Agrizzi was clear, though, that his suspicion was that they were being applied by Mr Zuma for his personal use.

999.7.2 It may well be that the frequency of the meetings at Nkandla was exaggerated because the evidence that emerged focussed on two meetings at Nkandla.

999.7.3 There is no concrete evidence of any facilitation of the award of any unlawful tender or amendment of any regulations emanating from the President's meeting with Mr Watson, Mr O'Quigley and Ms Oberholzer.

999.8 TOR 1.4, part of terms of reference issued specifically requires the enquiry to focus on the holder of the office of the President and whether he facilitated the unlawful awarding of tenders. In those circumstances, given that South Africa is a constitutional democracy in which accountability and transparency are recognised as basic values of public administration, one would have expected the President to come forward voluntarily to provide a full accounting of all his dealings with Mr Watson and Bosasa.

1000. The upshot of the giving of the evidence by the witnesses referred to, particularly that of Mr Agrizzi, along with the failure by the former President Zuma to rebut it, is that the only version available to the Commission as to what transpired is that which is summarised above.

1001. In the circumstances, there are reasonable grounds for suspecting that these events took place. Even if the evidence of the R300 000 payments were to be ignored, there is clear and convincing, non-hearsay evidence, confirmed by Ms Myeni, that Mr Zuma received the benefit of lavish spending by Bosasa on his birthday functions. That on its own required Mr Zuma to come forward and explain publicly and on oath how that spending was justified, how it was dealt with in terms of the Executive Ethics Code and that it was not reciprocated with any form of quid pro quo. His failure to do so warrants an adverse inference.

Application to the terms of reference

1002. The abovementioned evidence must then be considered against the terms of reference, primarily those in TOR 1.4. As pointed out above, the range of potential facilitators contemplated by TOR 1.4 includes "the President".

1003. There is no evidence to suggest direct facilitation by Mr Zuma of the unlawful award of any of the tenders discussed above to Bosasa. Nor is there any evidence of his having facilitated the award of any other tenders. However, it is clear on a conspectus of the evidence that it was crucial for Bosasa's ability to retain its lucrative contracts and its continued ability to secure tender awards in its favour, that the criminal investigations against Bosasa should be brought to a halt. It is also clear that the achievement of this goal would be facilitated by the provision to Bosasa's leadership of confidential information about the investigation. This would mean that they could prepare to respond in Bosasa's best interests and those of its leadership.

1004. Both Mr Agrizzi's evidence and the recording of the Exco meeting arranged by Mr Gumede, confirm that there are reasonable grounds for suspecting that then Mr Zuma assisted Bosasa on this score. The relevant part of the transcript of the recording of the meeting reads as follows:

> [part of the transcript is marked as inaudible and then appears what follows] ... go and see the old man, the president, on this matter, when this matter was starting to brew again. We went to see him and he told me to say (sic), he was going to Russia, I remember when we had a chat with him he said, no, before I go, I will phone the two people, and we didn't phone them, because we got feedback and that's the reason why. Then the next thing, the guy from the Hawks, he even showed us, the meeting we were having, every month you were having a meeting, where he decides all those things. It's confidential information he showed us.

1005. The transcript of this recording goes on to refer to Mr Watson and Mr Gumede. Whilst Mr Gumede's words do not present a model of clarity (enhancing the probability that it is a genuine recording), they draw a clear causal link (*"the next thing"*) between the President's undertaking to *"phone the two people"* and the provision by a member of the Hawks of *"confidential information"*. From the discussion that followed, the confidential information, in the form of minutes, some of which Mr Gumede was able to "take . . . on my phone" provided inside information on what was developing in relation to the investigation and who specifically was envisaged would be charged. He also confirms that "I showed him [Mr Agrizzi] the minutes." Mr Gumede also refers to Mr Agrizzi's disappointment because "Gavin did not appear on the list of suspects."

1006. The probability of Mr Zuma having played a role in securing the disclosure of confidential information in the hands of the prosecuting authorities is enhanced by the fact that Mr Zuma's close associate, Ms Myeni, was also involved, providing confidential information emanating from the prosecuting authorities to Bosasa, as discussed in Part H and further analysed below.

1007. The Supreme Court of Appeal has recognised that the provision of confidential information in the hands of police pertaining to investigations into criminal conduct, constitutes a quid pro quo for purposes of the crime of corrupt activities relating to public officers in section 4(1)(a)(i)(bb) of PRECCA. That provision reads in relevant part -

> Any public officer who, directly or indirectly, accepts or agrees to or offers to accept any gratification from any other person . . . in order to act, personally or by influencing another person to act, in a manner . . . that amounts to the . . . misuse or selling of information or material acquired in

the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation.

1008. What can also not be ignored is the fact that there was a concrete result. The investigation and prosecution were, indeed, successfully brought to a halt. Again, Mr Zuma having failed to appear before the Commission and provide a full account, there are reasonable grounds to suspect that he was instrumental in preventing the investigation and prosecution from proceeding.

1009. That would certainly constitute the facilitation of the unlawful award of tenders by Organs of State. By playing a role in inhibiting a prosecution in respect of unlawful tenders already awarded, Mr Zuma would have both:

1009.1 Prevented, or assisted in preventing, the setting aside of the contracts flowing from the unlawful tender awards; and

1009.2 Enabled Bosasa to keep an ostensibly clean record, which would, in turn, have facilitated the further unlawful award of tenders from organs of State and SOEs.

1010. It follows ineluctably from the foregoing analysis that there are reasonable grounds to suspect that Mr Zuma provided the facilitation to benefit a corporate entity doing business with government and Organs of State, namely Bosasa; and to benefit himself and his Foundation as the recipients of Bosasa's material and monetary largesse.

1011. It is so that there was no evidence that the meeting with Mr Watson, Mr O'Quigley and Ms Oberholzer generated any concrete facilitation of unlawful tender awards or the amendment of any regulations. Nevertheless, it does serve as evidence of Mr Watson having developed, through Bosasa's spending on Mr Zuma, a relationship where he had easy access to the President and the ability to influence his decision-making.

1012. The question then is whether the conduct suspected of the Mr Zuma in facilitating the unlawful award of tenders in the manner described above, was in breach or violation of the Constitution, any ethical code or legislation.

1013. A President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and Head of the National Executive. Central to the President's duties is the obligation to uphold, defend and respect the Constitution as the supreme law of the country, and to promote the unity of the nation and advance the country.

1014. Section 96 (2) (b) of the Constitution provides that members of Cabinet (which includes the President) may not expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests. In addition, members of Cabinet, including the President, may not use their positions or any information entrusted to them, to enrich themselves or improperly benefit any other person.

1015. Section 96 (1) of the Constitution enjoins the President, as a member of Cabinet, to act in accordance with a code of ethics prescribed by national legislation. The national legislation and code of ethics contemplated in section 96(1) are, respectively, the Executive Members' Ethics Act and the Executive Ethics Code.

1016. Section 2(1) of the Executive Members' Ethics Act provides as follows:

> The President must, after consultation with Parliament, by proclamation in the Gazette, publish a code of ethics prescribing standards and Rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities.

1017. The Executive Ethics Code was published in terms of this subsection and prescribes that member may not use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person; nor may they expose themselves to any situation involving the risk of a conflict between their official responsibilities and their financial and/or personal interests.

1018. It follows from this that there are reasonable grounds to suspect that Mr Zuma's conduct was in breach of his obligations as President under the Constitution, in breach of his obligations under the Executive Ethics Code and in breach of legislation. Having regard to the nature of the relationship between Mr Zuma and Bosasa, as revealed by the evidence, Mr Zuma placed himself in a conflict of interest situation. In those circumstances there are reasonable grounds for suspecting that there was conduct on the part of Mr Zuma that falls within the ambit of TOR 1.4.

1019. With reference to TOR 1.1, Bosasa and its leadership clearly provided inducements and gain to Mr Zuma, aimed at gaining influence over him. The evidence in that regard is established at least on a balance of probabilities. Accordingly, based on the evidence presented in relation to Mr Zuma, there was also conduct falling within TOR 1.1.

1020. In the absence of any evidence from former President Zuma rebutting the evidence placed before the Commission, there is also a reasonable prospect that further investigation will uncover a *prima facie* case against Mr Zuma, at least on a charge of corruption in terms of section 3 of PRECCA, considering the effect of the presumption in section 24(1) of that Act. The presumption is relevant because of the absence of any lawful authority or excuse on the part of Mr Zuma placed before the Commission for the gratification bestowed upon him by Bosasa, particularly when regard is had to the fact that the evidence placed before the Commission reveals that BOSASA was engaged in massive corruption in relation to tenders and contracts with government departments and organs of state.

Ms Nomvula Mokonyane

1021. The evidence pertaining to Ms Mokonyane must be considered both from the perspective of TOR 1.1 and TOR 1.4. The evidence about the inducements is relevant to both TOR 1.1 and TOR 1.4. This is because the conferral of benefits on a public office bearer by a person or entity doing business with the State or SOEs, particularly when the benefits are substantial, leads ineluctably to the question of whether anything was expected in return. The question is relevant to Ms Mokonyane because there was evidence of substantial benefits having been conferred on her, some of which are not in dispute. Taking this into account, the evidence pertaining to Ms Mokonyane is dealt with under the rubric of TOR 1.4, whilst at the same time enquiring whether there was conduct as contemplated in TOR 1.1.

1022. Ms Mokonyane falls squarely within the lists of public office bearers in both TOR 1.1 and TOR 1.4. She served in various senior roles in the Executive at National and Provincial levels i.e., as the Premier of Gauteng, Minister of Water and Sanitation, Minister of Communications and Deputy Minister of Environmental Affairs respectively.

1023. In considering the other components of TOR 1.4 and TOR 1.1, it is appropriate to start with the evidence pertaining to the benefits received. There was extensive evidence of a wide range of benefits that were bestowed upon Ms Mokonyane and her family by Bosasa and its leadership. It is not necessary to repeat all the evidence here.

1024. To her credit, Ms Mokonyane responded to the Commission's regulation 10(6) directive and notice in terms of Rule 3.3 and presented both affidavit and oral evidence at the Commission. She denied any conduct on her part that was unlawful or might fall within the Commission's terms of reference. As regards:

    1024.1 The birthday party, Ms Mokonyane denied that she had ever celebrated any birthday party of hers at the Victorian Guesthouse or that any party had ever been funded or sponsored by Bosasa

    1024.2 The catering and other arrangements for many ANC functions, whilst she did not dispute this, this would not have fallen within her area of responsibility and no blame could be directed at her in this regard

    1024.3 The making available of its facilities for the ANC for elections, essentially the same applied

    1024.4 The cash payments in the amount of R50 000 per month, she denied this entirely

    1024.5 The provision of alcohol, beverages, and various kinds of meat for Christmas, she denied that the alcohol, beverages and meat was provided for her family. According to Ms Mokonyane, if

any food was provided at Christmas time it was provided by Bosasa for poor communities that were at times (once or twice) delivered to her home

1024.6 Annual birthday gifts, she denied knowingly receiving these

1024.7 The security installations, she denied these and indicated that such equipment would have been provided by the state

1024.8 Maintenance work provided at her home, she disputed this, said that the family had their own service providers and that, if any services were provided, this was something arranged by her late husband without her knowledge

1024.9 Having provided for expenses for her son's funeral, she denied this, asserted that the family had paid for these expenses and that, if a donation was made by Mr Watson, this was not at her request; and

1024.10 Car hire for her daughter, this was because Mr Watson knew her daughter well, made use of her services arising from the fact that she was fluent in Mandarin and would have made his own arrangements as between the two of them – Ms Mokonyane had no part in this.

1025. Further, Ms Mokonyane contended that Mr Agrizzi, whom she said she had never met either socially or professionally, was motivated by racism and retaliation for her not providing him with assistance he thought she had the capacity to provide.

1026. The following observations are made regarding the foregoing competing versions emerging from the evidence:

1026.1 As regards the evidence that Bosasa funded Ms Mokonyane's birthday party at the Victorian Guest House, Ms Mokonyane denied, more than once, that there had ever been a party (of any kind or at any time) for her at the Victoria Guesthouse in Krugersdorp. It was only upon being confronted with the evidence of the owner of the guesthouse, Mr Coetzee, that Ms Mokonyane admitted that her 40th birthday celebration was indeed held at the Victorian Guesthouse. Her explanation for failing to disclose this in her initial testimony was wanting. In this regard, she stated that she did not mention the 40th birthday party because she was "preoccupied" by Mr Agrizzi's assertions that it was her 50th birthday party with a "Break a Leg" theme.

1026.2 Birthdays marking the passage of a decade in one's life are invariably well remembered. Even more so where, on her version, she walked into the venue expecting a private family dinner and found that a surprise party with many guests had been arranged for her. It strains credulity that she would not have had this function foremost in her mind while dealing with the questions put to her by the Commission's evidence leader and the Chairperson.

1026.3 Ms Mokonyane disavowed any personal knowledge of most of the evidence regarding the booking and payment of the venue for her birthday party. She said that the event was arranged by her late husband. She later contradicted herself by stating that both she and her husband knew that they did not pay for the party because they did not arrange it.

1026.4 Ms Mokonyane later accepted that she could not dispute Mr Coetzee's evidence that the event was paid for by Bosasa. Ms Mokonyane initially claimed that she had not seen Mr Agrizzi at the birthday event, but later stated that she could not remember if Mr Agrizzi was there.

1026.5 Although she claimed that Mr Coetzee's version on the number of guests and the additional drinks at the event was an exaggeration, she provided no substantive evidence to contradict his evidence. She sought to explain her inability to recall the event because it was a dinner rather than a party. This is not so; it was a gathering of over 100 people.

1026.6 Ms Mokonyane's recollection of the event was unintelligible at times. For example, she initially stated that they did not have many people speaking at the event. When reminded of Mr Coetzee's evidence that the speeches at the event lasted for three hours, she responded by stating that she was not part of the preparation, and she did not know what the situation was "behind the scenes."

1026.7 The upshot is that Ms Mokonyane was shown to have been dishonest in her evidence when she initially denied that any party had ever been held for her at the Guesthouse. She was given more than one opportunity to think about her initial denials before persisting in them. The evidence leader pointed out in fairness to her that her denials would form the subject matter of further investigation. Yet she persisted in them.

1026.8 In the absence of Ms Mokonyane providing any objective basis to reject the evidence of Mr Coetzee, which was backed with documentary evidence, there is no basis for any finding other than that it is so that Bosasa paid for the event. Mr Agrizzi's evidence in this regard was corroborated by, and aligned with, that of Mr Coetzee. There was no suggestion that Mr Coetzee would have an ulterior motive for corroborating Mr Agrizzi's version. On the contrary, his evidence would probably not be good for business. Mr Agrizzi's presence at the party, along with his role in arranging it, is confirmed by Mr Coetzee and supported by the probabilities.

1026.9 Given that her late husband was responsible for keeping the secret to ensure that it was a surprise, there must have been a significant degree of involvement on his part in the arrangements. On the probabilities he must have been aware of Bosasa's involvement. Ordinarily a spouse would be responsible for hosting a surprise birthday party. Where another party assumed responsibility for this, it is probable that the responsible spouse would know who it was. Her evidence that she never enquired of her husband afterwards about the funding of the event is also not credible.

1026.10 Significantly, Ms Mokonyane agreed that it would be entirely inappropriate for Bosasa to have paid for her birthday party. Given her dishonesty about the dinner, the conclusion is unavoidable that she was well-aware of Bosasa's role in sponsoring and arranging the birthday party but did not wish to acknowledge it because she knew that it was corrupt in nature.

1026.11 Ms Mokonyane disavowed any responsibility for seeking and obtaining Bosasa's assistance in catering and other arrangements for ANC events and the making available of facilities during elections. She did not, however, deny that such assistance was provided to the ANC. It is seriously open to doubt that Ms Mokonyane was not involved in procuring such assistance, particularly given her dishonesty in relation to her birthday party function. President Ramaphosa acknowledged Bosasa's assistance to the ANC and that vigilant members of the ANC would have known Bosasa was helping the ANC through donations and benefits in circumstances where there was a concern regarding criminal elements of its conduct.

1026.12 The evidence that R50 000 in cash would be packed and delivered to Ms Mokonyane monthly was denied by Ms Mokonyane. In support of his evidence pertaining to the cash payments, Mr Agrizzi testified that he was able to describe Ms Mokonyane's two houses where the cash was delivered, first the one in Krugersdorp and later the one in Bryanston and proceeded to do so in considerable detail. Ms Mokonyane disputed this as the basis for Mr Agrizzi's familiarity with her home. In this regard, she claimed (i) someone may have given Mr Agrizzi a description of the house (she offered no explanation of who); (ii) the guardhouse could be seen on Google Maps (although this did not explain Mr Agrizzi's familiarity with the interior); (iii) representatives from Bosasa may have met with her husband or visited the house when she experienced a bereavement; (iv) Mr Agrizzi may have become familiar with some features of her house when her fence was being looked at (there was no evidence of Mr Agrizzi's involvement in attending to her fence; and this corroborates the evidence that Bosasa was involved in assisting her with maintenance of her security); and (v) Mr Agrizzi was "desperate" to tarnish Mr Watson's reputation and had not denied the fact that he hates black people or that he had complained about the relationship she had with Mr Watson. These explanations are speculative and do not provide an objective basis to reject Mr Agrizzi's ability to demonstrate his familiarity with Ms Mokonyane's house.

1026.13 Also supporting Mr Agrizzi's version was his ability to provide the code that was used for her payments - "NMR 50 CCY", with Watson as the "Distribution Person". The code NMR 50 CCY was recorded in documentary evidence in the form of a list of cash payments to recipients attached to Mr Agrizzi's initial affidavit.

1026.14 Counting against Mr Agrizzi in relation to this specific evidence is that an aspect of his evidence, when discussing the payments, may have been contradictory. Seemingly at the time of one of the payments, when he was in a car with Mr Watson outside Ms Mokonyane's house, he questioned the wisdom of the payments that were being made to her. In his subsequent evidence he seemed to contradict himself as to whether his concern was that there was no corrupt quid pro quo coming from Ms Mokonyane or whether his concern was Bosasa's continued reliance on corruption when the business no longer required it. In fairness to Mr Agrizzi, however, his original affidavit appears to have disclosed both concerns, and they are not incompatible. At the same time, Mr Agrizzi's attempts to cast himself in a less corrupt light must be treated with caution.

1026.15 The difficulty for Ms Mokonyane is that she was shown to be dishonest in relation the benefit constituted by the sponsorship and arranging of her 40th birthday party, including Mr Agrizzi's role in it. That has the effect of undermining the reliance that can be placed on her other denials pertaining to the receipt of benefits from Bosasa, including the alleged cash benefits.

1026.16 While Ms Mokonyane denied receiving Christmas hampers of alcohol, meat and other beverages from Bosasa, the evidence strongly suggests the contrary. In this regard, Ms Thomas confirmed that she would liaise with Ms Mokonyane's sister about the arrival of items destined for Kagiso. Ms Dube corroborated the evidence that "Christmas" deliveries were made to Ms Mokonyane on Mr Leshabane's instruction. She was able to recall a specific instance in 2017, the supplier of the meat and the approximate value thereof. Ms Mokonyane's suggestion that Bosasa supplied food and drink destined for the community may be true to a degree. But as was pointed out to her, parcels destined for the poor would not have included alcohol, particularly premium whisky and brandy.

1026.17 There was sufficient evidence to establish on a balance of probabilities that Ms Mokonyane and Ms Thomas received birthday gifts from Mr Watson and Mr Agrizzi. This was corroborated by Ms Pieters and Ms Thomas – the latter being an individual with a strong allegiance to Ms Mokonyane. Ms Pieters confirmed that Mr Agrizzi had requested her to stipulate that there should be no reference to Bosasa on the hampers, so that the persons could not be linked to Bosasa. The insistence on hiding the link with Bosasa points to the arrangement being a corrupt one.

1026.18 As regards the security installations and maintenance work at her homes, although Mr le Roux was unable to match the work done at Ms Mokonyane's residence in Krugersdorp with invoices as the work occurred in 2013 and the invoices from Regal Distributors are from 2014 onwards, he provided extensive detail about the nature of the work conducted and the cost thereof. This was not meaningfully disputed by Ms Mokonyane.

1026.19 Mr le Roux's claims that he received numerous callouts for maintenance issues at the premises was corroborated by a WhatsApp message from Ms Thomas requesting help with the house alarm. Ms Thomas confirmed that this was not her first contact with Mr le Roux. The WhatsApp message from Ms Thomas to Mr le Roux dated 1 June 2017 was an instance where Ms Mokonyane accepted that Bosasa's involvement had been sought by Ms Thomas, but she claimed that this was on a once-off basis. However, this could not be reconciled with the fact that, if this was a once-off item of work, why the premises were simply referred to as "the house" without giving the address. The implication is that Mr le Roux knew the address of the house. No explanation was provided for this. Mr le Roux's evidence was not unsatisfactory in any way and the probabilities are firmly against this having been a once-off request for assistance.

1026.20 Mr Charl le Roux was able to give significant detail of Ms Mokonyane's premises to support his claim of having assisted with the installation of security and maintenance work at the property. Ms Mokonyane confirmed his evidence in several respects. Ms Mokonyane denied, however, that the Aston Martin was black or blue. She said that the connections to the generator were not inside the garage, they were outside. She believed that this demonstrated that Mr Charl le Roux may have been misleading the Commission. This is not a justifiable conclusion. Mr

Charl le Roux's evidence was confirmed by Ms Mokonyane in several respects without an explanation of how he would be privy to this information without having attended at the premises. Ms Mokonyane later agreed that it appeared indisputable that Mr Van Biljon's company did do various items of work at her residence, that he, together with Messrs Charl and Richard le Roux, had all been to her house, which Mr Van Biljon's company had been paid by Bosasa and were there on Bosasa's instructions.

1026.21 No objective evidence was presented by Ms Mokonyane to refute Mr le Roux's evidence that the estimated the cost of the equipment installed at her house was in the region of between R100,000 and R130,000, and the cost for labour and travelling to undertake this work would have been approximately R58,080.

1026.22 A letter was produced from the Department of Public Works stating that the department did not have a record of a formal request for security measures in Ms Mokonyane's private residence either by the Gauteng Housing Department, the Gauteng Office of the Premier, the Department of Infrastructure Development, or the Department of Water and Sanitation. The department indicated that generally security measures are administered by the province and not the national department. Ms Mokonyane responded by pointing out that it was her assumption that security was done by the State and this letter simply refers the Commission to the provincial government.

1026.23 There is no reasonable basis to reject the credibility of Messrs Richard and Charl le Roux's evidence and that of Mr Van Biljon. If that is so, then the version that Ms Mokonyane asks the Commission to accept is that her husband never informed her of the arrangements with, and the work done on their private residence by, Bosasa. This proposition is far-fetched and inconsistent with the probabilities. It is also expedient that Ms Mokonyane claims that any knowledge of this arrangement was between her husband and Bosasa, given that one cannot test her late husband's version.

1026.24 Although she denied Mr Agrizzi's evidence that he signed off expenses such as the cost of hiring a marquee, air-conditioning, printing of memorial pamphlets, and refreshments for the funeral of her son, Ms Mokonyane did not unequivocally deny that Bosasa contributed towards her son's funeral. Again, Mr Agrizzi's evidence was detailed in this regard, and his evidence as to his role in signing off on this expenditure was consistent with the position that he held in Bosasa.

1026.25 Ms Mokonyane did not deny that Mr Watson assisted her daughter with the costs of car hire, although she claims to have played no role in relation to the rental of a car and asserted that there was a business justification for this, given that her daughter could assist Bosasa with her ability to speak Mandarin. Assuming that this is correct and that Ms Mokonyane's daughter arranged university holiday employment with Bosasa herself, it remains contrary to the probabilities that a student employee would be afforded the employment benefit of the expensive hire of a cabriolet vehicle, even if she could speak Mandarin. In any event there was no evidence of Bosasa's need for an employee fluent in Mandarin. The inference more reasonably to be drawn is that this was one of the many forms of inducement and gain provided to Ms Mokonyane and her family in order to buy Ms Mokonyane's influence.

1027. Considering the foregoing analysis with reference to TOR 1.1, there were clearly extensive attempts by Bosasa and its leaders, through various forms of inducement and gain, to influence Ms Mokonyane in her position as a member of the national executive, the provincial executive and office bearer in organs of state. These inducements are established on a balance of probabilities.

1028. TOR 1.4 then requires one to ask whether Ms Mokonyane was involved in the unlawful facilitation of tenders.

1029. Insofar as the facilitation of tenders is concerned:

1029.1 Mr Agrizzi testified that in approximately 2008/2009 when Ms Mokonyane was the Premier of Gauteng, Ms Mokonyane approached Bosasa with a request to do an analysis of security at Gauteng hospitals. Mr Agrizzi duly prepared a report at an expense to Bosasa of some R2 million. The idea was that, if Bosasa produced a good report, there would be a tender put out for

the provision of security services at such hospitals that it could be involved in. Ms Mokonyane denied this and stated that she never requested any such report; she was never furnished with one by Mr Agrizzi; and that she was not involved in hospitals at the time. No report has been placed before the Commission.

1029.2 In relation to this allegation, there is insufficient evidence to resolve this dispute of fact in favour of either party, and no finding can be reached. However, it may be that further investigation by the appropriate authorities would uncover a *prima facie* case of corruption or attempted corruption as contemplated in section 3 or 12 of PRECCA.

1029.3 Mr Agrizzi testified that in 2014, at the time that Ms Mokonyane was the Minister of Water Affairs, Bosasa was requested to do an analysis and report on the securing of the dams in South Africa for the Department of Water Affairs. Mr Agrizzi was also instructed by Mr Watson to recommend a consultant group who would assist the Department of Water Affairs in managing the award of the tender for securing the dams.

1029.4 Mr Agrizzi testified that a report was duly prepared at an estimated cost of R1.3 million. There was a tight deadline and Mr Agrizzi had to get the assistance of:

> ... official security people that understood dams and that type of thing to assist us. ... The report included the protection of dams with high security fencing, to prevent any ingress or any contamination of the dams. It included sensors to measure levels of dams, potential leaks, breakages in dam walls. It also included, if I recall correctly, camera systems that were integrated onto a singular platform, which to be viewed (sic) by the Minister at any one time.

1029.5 The instruction to recommend a consultant group resulted in Mr Agrizzi scheduling a meeting with Chiefton Consultants, represented by Paul Silver, whom Mr Agrizzi described as head of facilities management, and Raymond Moodley, whom Mr Agrizzi described as co-founder of Chiefton. The specifications of the contemplated project were discussed as well as their potential role as consultants and the expectation that they would be pro-Bosasa when evaluating the tender.

1029.6 According to Mr Agrizzi, Chiefton Consultants were never appointed due to a problem with their registration with the Private Security Industry Regulatory Authority. Nor did Bosasa bid for the tender, if indeed any tender was ultimately put out. Nothing came of the report and Bosasa was not paid for it.

1029.7 Ms Mokonyane denied these allegations on a blanket basis without further elaboration. Mr Agrizzi's evidence in this regard is, however, detailed and reasonably convincing. If one searches "Chiefton Consulting" on the internet it takes one to the website www.chiefton.co.za. On that website, reference is made to Chiefton South Africa as a holding company and one of the companies in the group as being Chiefton Facilities Management (Pty) Ltd which "was formed in 2003 with a key focus on Facilities Management and Consultancy." "Our team" refers to three persons, one of whom is Mr Raymond Moodley, who is described as "Group CEO". His LinkedIn profile describes him as "Chief Executive Officer and co-founder of Chiefton Facilities Management and goes on to say:

> We furthermore embark on Security by Design analysis and has (sic) saved clients millions in doing things differently and efficiently. Paul Silver heads this division with vast experience internationally and has co-authored correctional facility books and is a Professional Architect.

1029.8 This tends to bear Mr Agrizzi's evidence out. Chiefton and Mr Moodley were issued with a Rule 3.3 notice but did not respond to it.

1029.9 When contrasted with Ms Mokonyane's bare denial, there is a sufficient basis for a finding that the facts as testified to by Mr Agrizzi in this regard are established on a balance of probabilities.

1029.10 Had the tender proceeded, the facts testified to by Mr Agrizzi would have given rise to its being an unlawful tender process in breach of the relevant provisions of the Constitution, the PFMA and the Treasury Regulations. That process would have been facilitated by Ms Mokonyane's having assisted Bosasa in positioning themselves to have an unlawful and unfair advantage in securing the tender. This would have amounted to the unlawful facilitation of the tender. Does the fact that the unlawful facilitation was incomplete and unsuccessful change matters? There is no reason why it should. The initial steps were taken and were clearly unlawful. That is sufficient to bring the matter within the ambit of the unlawful facilitation component of TOR 1.4.

1029.11 The other aspect relevant to facilitation was what Mr Agrizzi ascribed to Mr Watson as the reason given by him for the conferral of extensive benefits by Bosasa on Ms Mokonyane. According to Mr Agrizzi, when he challenged Mr Watson as to the justification for continuing to make payments to Ms Mokonyane, Mr Watson responded that "she has a lot of clout" and "[w]e needed her support for the protection from the SIU investigation, the HAWKS and the NPA." Mr Agrizzi at that stage questioned whether they were indeed getting that protection. However, in the long run the fact of the matter is that, as pointed out earlier, the investigation and prosecution pursuant to the SIU report did indeed grind to a halt.

1030. What is also not in dispute is that Ms Mokonyane was at all material times a senior and influential person and office bearer within both the ANC and government. There is, however, no direct evidence of any particular steps taken by Ms Mokonyane towards stopping the investigation. However, the glaring question is what Bosasa was receiving in return for the multiple benefits bestowed upon Ms Mokonyane. The Watson family's long history with the ANC would have meant that they were well attuned to where best within the ANC and government, there was the greatest prospect of generating influence.

1031. All things considered, there are reasonable grounds for suspecting that Ms Mokonyane was instrumental, along with the President, in stopping the investigation and prosecution pursuant to the SIU report, from proceeding. For the reasons already given in discussing Mr Zuma's role, that amounts to facilitation as contemplated in TOR 1.4.

1032. In her various positions in the Executive, Ms Mokonyane was subject to terms of the Constitution, her oath of office under the Constitution, the Executive Members Ethics Act, and the Executive Ethics Code.

1033. In terms of Section 96 of the Constitution, a member of Cabinet may not expose him/herself to any situation involving the risk of a conflict between his/her official responsibilities and his/her private interests. Further, he/she must act in accordance with a code of ethics prescribed by national legislation, i.e., the Executive Members' Ethics Act and the Executive Ethics Code published in terms of section 2 of that Act. In respect of all the benefits conferred upon her by Bosasa she was in breach of her constitutional, legislative and ethical duties, as contemplated in TOR 1.4.

1034. The Code and the Handbook also required Ms Mokonyane to disclose her financial interests including shares and other financial interests in companies. Ms Mokonyane admitted that she was a shareholder of Dyambu Holdings. Therefore, she had an indirect interest in Bosasa's business given that Dyambu Holdings held 10% of the shares in Dyambu Operations, which later changed to Bosasa Operations (Pty) Ltd. The evidence does not identify the period of Ms Mokonyane's shareholding with certainty. However, Mr Agrizzi stated that it was during approximately 2002/2003 at a time when she was the MEC for Safety and Security in the Gauteng Province. There is no evidence that Ms Mokonyane disclosed her interests in Dyambu Holdings during her tenure as MEC for Safety and Security in Gauteng in compliance with the Code and the Handbook.

1035. The facilitation provided by Ms Mokonyane in relation to the report did not benefit Bosasa within the meaning of TOR 1.4. However, it did benefit Ms Mokonyane herself in that she continued to receive benefits from Bosasa and efforts such as this one would probably have given the impression that she was attempting to look after Bosasa's interests.

1036. To the extent that there are reasonable grounds for suspecting that Ms Mokonyane was instrumental

in bringing the investigation and prosecution arising from the SIU Report to a halt, she would have benefited Bosasa and the persons associated with it that were implicated in the report, within the meaning of TOR 1.4.

1037. Importantly, in the event that Ms Mokonyane was to be prosecuted for corruption under PRECCA, the presumption in Section 24(1) would come into play, to the extent that there was no lawful authority or excuse apparent or suggested by Ms Mokonyane for her receipt of the gratification conferred upon her by Bosasa. Unless she is able in criminal proceedings to introduce evidence to establish a reasonable doubt in this regard, the evidence of the benefits conferred upon her (even if they exclude the allegations of the monetary payments) will be deemed by Section 24(1) to constitute sufficient evidence that the necessary quid pro quo was provided by her.

Ms Dudu Myeni

1038. Ms Myeni was the Chairperson of SAA. Although this is likely to have been a non-executive director role, by all accounts the extent of her involvement in the affairs of SAA meant that in practice she exercised an executive role. This would bring her within the meaning of an "employee of an SOE" as referred to in TOR 1.4, particularly on a purposive interpretation. It would also not be a strained interpretation for a chairperson of an SOE to be considered a public official.

1039. The evidence pertaining to Ms Myeni is in certain respects also relevant to TOR 1.1. In this regard she is a director of the board of an SOE as contemplated in that TOR.

1040. Much of the evidence against Ms Myeni remains unchallenged, given her refusal to answer most questions from the evidence leader on the basis that she might incriminate herself. The decision of the Constitutional Court in Secretary, Judicial Commission of Inquiry into allegations of State Capture makes it clear that claiming privilege against self-incrimination is not there for the asking. Ms Myeni was required to demonstrate how an answer to the questions in issue would breach the privilege. This she failed to do.

1041. Even if she had properly claimed the privilege, the consequence would still have been that the evidence in question was left unanswered for purposes of the Commission's findings. It would not prevent the Commission from proceeding based on the unanswered evidence to make its findings with reference to the terms of reference.

1042. Given the evidence that according to Mr Agrizzi, Mr Watson said that Mr Zuma confirmed receipt of the monthly cash amounts, it must be accepted that Ms Myeni was not benefitting personally from these payments, but they would certainly have boosted her position as Chairperson of the Jacob G Zuma Foundation and her ability to have a significant degree of influence over Mr Zuma. If she was remunerated for her work as Chairperson of the Foundation, the payments would have benefitted her indirectly insofar as the funds would have gone into the payment of her remuneration and that of the staff of the Foundation. However, there was no evidence that she was remunerated for her work on the Foundation.

1043. Similarly, she would not have derived direct financial benefits from the spending on the Mr Zuma's birthday parties. However, she would certainly have benefitted insofar as it was clearly her duty as chairperson to ensure that lavish birthday parties were provided for Mr Zuma. Bosasa's contribution would have been invaluable to her in successfully carrying out that responsibility. It would also have been invaluable in ensuring her continuing ability to influence the Mr Zuma and to benefit from his decision-making insofar as she herself was concerned. In any event, Section 3 of PRECCA criminalises the corrupt receipt of gratification "whether for the benefit of ... herself or for the benefit of another person."

1044. The evidence in relation to the handbag filled with cash was disputed by Ms Myeni, but the denial was a bare one and she put up no evidence to expand upon or explain her denial. She also resorted to the privilege against self-incrimination to avoid further questions on the issue. In the circumstances the gift of the handbag filled with cash is established on a balance of probabilities.

1045. Ms Myeni was unwilling to answer questions pertaining to the installation of the valuable security

system at her home because of the privilege against self-incrimination. The evidence is uncontested, clear and supported by documentary evidence. The provision of this benefit is established at least on a balance of probabilities.

1046. Having regard to the foregoing, it is established in respect of Ms Myeni that there were attempts made through inducements and gain to influence both her, as chairperson of the Jacob G Zuma Foundation or as someone close to Mr Zuma and Director of an SOE and, through her, Mr Zuma, as contemplated in TOR 1.1.

1047. The evidence relevant to the enquiry into facilitation included the following:

1047.1 Mr Agrizzi testified about Ms Myeni's assistance in facilitating a meeting between Mr Zuma, Mr Watson, Mr O'Quigley and Ms Oberholzer to seek Mr Zuma's aid in advising the then Minister of Minerals and Energy to make certain amendments to what were considered restrictive regulations applicable to the oil and gas industry that impacted on the potential for fracking in the Karoo. Although Ms Myeni denied evidence that she had influence over Mr Zuma to bring about an amendment of the regulations in question, she admitted that the meeting took place at Nkandla in this regard and involved these persons. However, when given an opportunity to explain the basis of her abovementioned denial, Ms Myeni refused to answer questions on the basis that she might incriminate herself.

1047.2 Ms Oberholzer's evidence was that the meeting in question was arranged by Ms Myeni. In confirmation of this, she put up an email dated 20 July 2014 from dudumyeni@telkomsa.net, seemingly addressed to Mr Watson and later the same day forwarded by him to Ms Oberholzer, which conveyed that they should rest assured, all was under control and that Ms Myeni was trying to set up the meeting for the 27th. Despite being faced with this evidence corroborating the allegation against her, Ms Myeni again refused to answer any questions on the email as she said that she did not want to risk incriminating herself.

1047.3 Mr le Roux confirmed Mr Agrizzi's evidence that Ms Myeni attended meetings at Bosasa's premises. He explained that he was instructed to delete security footage of Ms Myeni's visit to the premises together with Mr Zuma and Mr Bheki Cele.

1048. There was also important evidence pertaining to Ms Myeni's involvement in providing confidential documentation in relation to the investigation and potential prosecution of Bosasa, and persons associated with it, arising from the SIU report. The evidence before the Commission can be summarised as follows:

1048.1 Mr Agrizzi testified that Mr Mathenjwa was given primary responsibility for dealing with Ms Myeni on Bosasa's problems with the investigation and prosecution. Nonetheless, Mr Agrizzi said he was present at meetings where the investigation and contemplated prosecution of Bosasa was discussed with Ms Myeni and this led to the involvement of Mr Zuma directly.

1048.2 Mr Watson asked Mr Agrizzi to attend a meeting with Ms Myeni at the Sheraton Hotel in Pretoria regarding information on the Hawks investigation and discussions she had with the NPA. Mr Watson prepared the R300,000 in cash. When they arrived at the Sheraton Hotel, they were escorted to a private lounge area with stringent access control on a member's only basis.

1048.3 During this meeting, Ms Myeni indicated that she was trying to arrange that the investigation be terminated. She produced a police case docket that had purportedly been obtained from the NPA. She provided Mr Agrizzi with sight of it but insisted that Mr Agrizzi could not make copies. Mr Agrizzi, therefore requested that he be excused to study it and make notes in his journal.

1048.4 Despite the admonition from Ms Myeni not to take any photographs of the docket, Mr Agrizzi took a few photographs of the docket on his cell phone. The docket was placed on the carpeted hotel floor when Mr Agrizzi took the photographs.

1048.5 Mr Dutton confirmed that Mr Agrizzi had a series of photographs of documents which appear to be photographs of confidential documents of the South African Police Service's Anti-Corruption

Task Team relating to the progress of the police criminal investigation into corruption allegations against Bosasa. These photographs were taken at the Sheraton Hotel.

1048.6 Mr Dutton explained Mr Agrizzi's description of the layout of the 6th floor of the Sheraton Hotel where he was alleged to have met Ms Myeni. Mr Dutton visited the Sheraton Hotel on 21 December 2018 and Mr Agrizzi's description of the 6th floor aligned closely to what Mr Dutton observed. In addition, he observed that the pattern on the carpet was identical to that featured in Mr Agrizzi's photographs.

1048.7 A document thus photographed by Mr Agrizzi was titled "ACTT Monthly Progress and Audit Report", which was generated by the police providing monthly reports on the status of the Bosasa investigation.

1048.8 An examination of the metadata of the photographs taken by Mr Agrizzi by the Commission's digital forensics team revealed that the photographs on Mr Agrizzi's phone were taken on 23 September 2015 at 10:37:06. The longitude and latitude co-ordinates of the location of the photograph are within the vicinity of the Sheraton Hotel.

1048.9 The hotel's general manager, Pascal Foquet, confirmed through hotel records that Ms Myeni had booked into the hotel on 22 September 2015 and there were no further transactions on her invoice after 24 September 2015. She had been accommodated in Room 616. From that the general manager had deduced that she had checked out on the date. The account was settled on 5 October 2015.

1048.10 Mr Dutton confirmed that the account for Ms Myeni's stay was paid off from the FNB account of one Nicole Stone and on top of the customer registration card it stated, 'Account Jacob Zuma Foundation'. Nicole Stone is a travel agent from either Richards Bay or Empangeni.

1048.11 The Commission's investigation team showed Mr Agrizzi's photographs to both General Moodley and senior State Adv De Kock who was originally the prosecutor assigned to the matter and they both advised that the documents appeared to be an ACTT progress report dated 24 August 2015. They confirmed that these documents were not publicly available and were confidential documents and correspondence between the police and the NPA.

1049. Despite facing the allegations and corroborating evidence referred to above and despite appreciating the implications of her refusal to answer questions on her evidence, Ms Myeni refused to answer questions regarding (i) the meeting of 23 September 2015 (ii) Mr Blake's evidence regarding payment in respect of her earlier stay at the Sheraton between 4 and 6 May 2014; (iii) handing over a police docket containing information regarding the investigation into Bosasa, all on the basis that she did not want to risk incriminating herself.

1050. The final evidence against Ms Myeni was that she arranged a meeting at ORTIA to enable Bosasa officials to meet the then CEO or acting CEO of SAA, Nico Bezuidenhout. It was stated that, during the pre-meeting, a tender for security services was discussed and Ms Myeni wanted Bosasa to investigate the possibility of taking over the security contract and the catering contract for SAA.

1051. Confirmation that the meeting took place at the Intercontinental Hotel at ORTIA and details of the meeting were provided in an affidavit from Mr Bezuidenhout. Despite this, Ms Myeni refused to answer any questions put to her because of his affidavit because of her concern that she could incriminate herself.

1052. There is more than sufficient evidence to support a finding on a balance of probabilities that Ms Myeni facilitated the meeting with Mr Zuma in relation to the oil and gas regulations. The question, however, is whether that amounts to the facilitation of the unlawful award of a tender as contemplated in TOR 1.4. There is insufficient evidence to sustain such a finding. The incident serves rather as evidence of the influence that Ms Myeni was able to exert over Mr Zuma and of the closeness of her association with him.

1053. Similarly, the evidence of Ms Myeni's and Mr Zuma's visit to the Bosasa office park is not a sufficient basis to find that Ms Myeni facilitated the award of unlawful tenders. However, the evidence pertaining

to Ms Myeni making available to Mr Agrizzi confidential information belonging to the Hawks or the NPA in connection with the investigation and prosecution:

1053.1 Is compelling and, given the strong documentary and photographic corroboration, warrants a finding that these facts were established on at least a balance of probabilities

1053.2 Amounts to the corrupt provision by Ms Myeni of a *quid pro quo* for the inducements and gain provided to her; and

1053.3 Indirectly facilitated the unlawful award of tenders by ensuring that existing contracts were retained by Bosasa and an ostensibly clean record was maintained by it to secure further tenders from the state and SOEs.

1054. The evidence pertaining to the meeting with Mr Bezuidenhout is corroborated by him and is established on at least a balance of probabilities. Although nothing came of the meeting, had the contracts been concluded there would have to have been a tender process. By arranging the meeting long before any such tender process had commenced, Ms Myeni was giving Bosasa an unfair advantage. The conduct accordingly amounts to the facilitation of unlawful tenders, even if the facilitation was incomplete and did not bear fruit. As pointed out earlier, section 21(a) of PRECCA recognises the offence of attempted corruption.

1055. Based on the foregoing analysis, there was indeed the facilitation of the unlawful award of tenders by Ms Myeni as contemplated in TOR 1.4. That facilitation was intended to benefit Bosasa, a corporate entity doing business with government, and, potentially, SAA, which is an Organ of State. Ms Myeni benefitted as an individual, given the benefits she received. That requirement of TOR 1.4 is, accordingly, also satisfied in respect of Ms Myeni.

1056. Section 217 of the Constitution binds all organs of state. SAA is an Organ of State. In relation to both the unlawful giving of access to confidential documentation at the Sheraton Hotel and the meeting with Mr Bezuidenhout, Ms Myeni acted in conflict with section 217(1) of the Constitution insofar as it requires a system of procurement which is fair, equitable, transparent, competitive and cost effective.

1057. In addition, in sharing the information with Mr Agrizzi, her conduct frustrated the police and prosecution authorities in investigating and prosecuting corruption in relation to tender processes.

1058. Accordingly, the facilitation by Ms Myeni of the unlawful awarding of tenders constituted breaches of the Constitution and legislation.

1059. The evidence in relation to the giving and receipt of gratification by Ms Myeni in the form of receipt of the benefits found to have been provided, and the facilitation provided both in relation to the provision of confidential information pertaining to the investigation and the incomplete attempt to facilitate security and catering contracts with SAA, give rise to a *prima facie* case of corruption in terms of section 3 of PRECCA along with other statutory and common law crimes, including defeating the ends of justice.

1060. In engaging in the facilitation of the unlawful award of tenders in the respects identified, Ms Myeni clearly sought to benefit Bosasa and its associates and directors or employees potentially facing prosecution. She also sought to benefit herself insofar her work as chairperson of the Foundation was facilitated by the benefits conferred by Bosasa and to benefit Mr Zuma who was the beneficiary of Bosasa's lavish spending.

1061. In the circumstances, there was conduct on the part of Ms Myeni falling squarely within TOR 1.4.

Beneficiaries of the facilitation

1062. Returning to the analysis at a more general level, it is of course so that the persons identified in all the foregoing analysis as having facilitated the unlawful award of tenders in return for inducements and gain, sought to benefit themselves. However, that is not the only question raised by the latter part of TOR 1.4. The question also requires asking whether the facilitation benefitted any family, individual (in addition to the facilitator) or corporate entity that was doing business with government or any organ of state.

1063. Clearly, Bosasa and the entities falling within the Bosasa group were the primary beneficiaries of the facilitation and they fall within the description of a corporate entity doing business with both government and organs of state. The facilitators and other individuals who benefitted have generally been identified during the preceding analysis.

1064. The question must, however, be asked whether the Watson family, as distinct from Bosasa, benefitted from the facilitation. Mr Agrizzi testified that Mr Watson made decisions which ultimately benefitted Bosasa, Mr Watson and his family. He also testified that Mr Watson was Bosasa.

1065. Mr Agrizzi testified that Mr Valence Watson and Mr Ronnie Watson would be present at various Bosasa meetings. Watsons' siblings (Mr Valence Watson, Mr Ronnie Watson, and Mr Daniel Watson) and his daughter Lindsay Watson were involved in Bosasa's affairs in one way or another including by:

1065.1 Facilitating the provision of various gratifications to public officials and employees of SOEs (which included the payment of cash, the use of a desktop computer, clothing, and the provision of the use of Mr Ronnie Watson's game farm)

1065.2 Arranging travel and accommodation for public officials

1065.3 Preparing fictitious documents and agreements to conceal the true situation; and

1065.4 Negotiating to conclude retention and similar agreements as well as intimidating, and, placing pressure on, Mr Agrizzi and other Bosasa employees to prevent them from reporting Bosasa's various unlawful activities. Jared and Roth Watson were also involved in various attempts to silence Bosasa employees.

1066. On a balance of probabilities, these family members' participation in conduct that was supportive of Bosasa's corrupt activities, suggests that they must have had an incentive through the derivation of benefits from Bosasa and its various enterprises.

1067. However, there was also evidence of specific benefits conferred on particular family members:

1067.1 There is evidence that houses constructed for Lindsay and Roth Watson were paid for by companies within the Bosasa group.

1067.2 Various interests were held by the Watson family in companies that were also alleged to have benefitted from the corrupt relationships established by the Watsons with various public officials, including Vulisango (Pty) Ltd, Inyanda Energy Projects (Pty) Ltd, Laidback Investments (Pty) Ltd, and O'Feh Investments (Pty) Ltd.

1067.3 Mark Taverner, Watson's brother-in-law, was also involved in various activities related to Bosasa. His companies not only supplied Bosasa (for which a benefit must have been received in return) but would also facilitate unlawful transactions for Bosasa.

1067.4 Mr Agrizzi described Mr Watson as the godfather of Bosasa. The evidence reveals that the Watson family was involved in Bosasa's affairs at a high-level, at times in the day-to-day activities as well as in exerting various forms of pressure or influence on others, to their and Bosasa's benefit.

1067.5 It was also clear from the evidence that the Watson family had established numerous personal relationships and friendships with Mr Zuma, members of the National Executive, public officials, parliamentarians and employees of SOEs. Usually, these relationships were used to leverage unlawful benefits for Bosasa and the Watson family.

1068. Accordingly, on a balance of probabilities, the Watson family benefited from the facilitation of the unlawful awarding of tenders, as contemplated in TOR 1.4.

Conclusion and findings in relation to TOR 1.4

1069. Overall, the evidence shows that Mr Zuma, at least one member of his National Executive, public officials and the chairperson of an SOE breached the Constitution, legislation and ethical codes by facilitating the unlawful award of tenders by SOEs and organs of state to benefit the Watson family, Bosasa and its associated entities, the recipients of monetary and other illicit benefits in return for the facilitation, and the families of the recipients, particularly where family members were directly provided with benefits, as in the case of Mr Mti, Mr Gillingham, Mr Smith and Ms Mokonyane.

Analysis and findings with reference to TOR 1.5

1070. The focus of the enquiry required by TOR 1.5 is on whether there is evidence of corruption in the award of contracts and tenders by a particular category of public entities, being those listed in Schedule 2 to the PFMA, and, if so, its nature and extent. The entities in question are the "major public entities".

1071. This TOR is best analysed with reference to the evidence pertaining to the contracts concluded by Bosasa and its associated entities with ACSA and SAPO. The three questions raised may be considered together.

Contracts with ACSA

1072. Bosasa was awarded a tender in 2001 to provide protection and guarding services at ORTIA. Mr Agrizzi understood Bosasa still to have the contract when he testified at the Commission in 2019.

1073. According to Mr Agrizzi, various persons at ACSA were paid a cash amount monthly in return for facilitating the contract and its renewals. These persons included Thele Moema, head of risk at ACSA, Siza Thanda, head of security for ACS, and Reuben Pillay, 'Joe' Serobe and Mohammed Bashir (procurement officers).

1074. The payments were made over a period of a few years and would cease when the person left the employment of ACSA. Mr Agrizzi testified that he often visited ORTIA with Mr Gumede and that they would take grey security bags filled with money to give to certain people at ORTIA. Mr Agrizzi also testified that he had packed some of the money bags and had kept a record in this regard. The payments were still being made when Mr Agrizzi left Bosasa.

1075. Mr Agrizzi recorded some of the payments made to ACSA officials in his black book. Those parts of the black book which Mr Agrizzi was able to provide to the Commission reflected payments made through Mr Gumede to the following persons/entities, Bongi Mpungose – ACS, Jason Jason Tshabalala, and Mohammed Bashir.

1076. Mr Agrizzi's evidence implicating these persons is supported by his recordal of payments in the black book. Thele Moema, Reuben Pillay, and Johannes Serobe were each sent a Rule 3.3 notice by the Commission and failed to respond to it. Consequently, the evidence implicating them in the receipt of monies is not disputed.

1077. Bongi Mpungose, Jason Tshabalala and Mohammed Bashir were not sent Rule 3.3 notices by the Commission. In the circumstances, no adverse findings may be made against them.

Contracts with SAPO

1078. Mr Agrizzi testified that Bosasa made regular payments to the former head of security at SAPO, Siviwe Mapisa, and the former CEO, Maanda Manyatshe on a basis like that in respect of other recipients of cash inducements.

1079. In addition to the cash payments, Mr Agrizzi testified that Bosasa also provided them with premium gifts including pens, cufflinks, and watches. Mr Mapisa was also taken on hunting trips at Mr Ronnie

Watson's game farm in the Eastern Cape. The cash payments and gifts were provided in exchange for their facilitation of the award of the SAPO security contract.

1080. Both Siviwe Mapisa and Maanda Manyatshe were sent Rule 3.3 notices by the Commission and failed to respond. Consequently, the evidence implicating them in the corrupt receipt of monies and gifts is not disputed.

Conclusion and findings in relation to TOR 1.5

1081. None of those persons implicated in the evidence in this section of the memorandum, who were issued with Rule 3.3 notices, responded to those notices. In the circumstances, the evidence in relation to them remains undisputed.

1082. Although the evidence is based on the single witness testimony of Mr Agrizzi, it is corroborated in some instances by the recordal of names in Mr Agrizzi's black book. The evidence also implicates Mr Agrizzi in criminal activity and is to his detriment, and it is unlikely that he would lie to prejudice himself. His evidence is also supported by the video evidence pertaining to the vaults and the safes where cash was stored and packaged for purposes of corrupt payments.

1083. The evidence establishes that, at least on a balance of probabilities, there was corruption in the award of contracts or tenders to Bosasa by Schedule 2 SOEs. The undisputed evidence was that the ACSA contract was unlawfully awarded in 2001 and was believed still to be in effect in 2019. The evidence of corruption was both for the facilitation of the original contract and the various extensions of the contract.

1084. Based on the evidence, the following employees of ACSA were, at least on a balance of probabilities, involved in the corrupt awarding of contracts or tenders to Bosasa. They are Thele Moema, Reuben Pillay, and Johannes Serebe.

1085. Further investigations should be undertaken to determine whether Bongi Mpungose, Jason Tshabalala, Siza Thanda and Mohammed Bashir were involved in the corrupt awarding of ACSA contracts or tenders to Bosasa. There is a reasonable prospect that further investigation will uncover a *prima facie* case.

1086. Based on the evidence, the following employees of SAPO were involved in the corrupt awarding of contracts or tenders to Bosasa. They are Siviwe Mapisa and Maanda Manyatshe.

1087. Returning to the questions arising from TOR 1.5, the evidence establishes, at least on a balance of probabilities, that:

1087.1 There was corruption in the awarding of tenders in two SOEs that Bosasa had dealings with ACSA and SAPO; and

1087.2 The corruption involved the payment of unlawful gratification by way of ongoing monthly payments to various persons to ensure the grant and extension of the contracts to provide security services.

1088. An assessment of the extent of the corruption must await further investigation of the persons that did not receive Rule 3.3 notices. A total of five implicated employees have received Rule 3.3 notices and have not responded.

Analysis and findings with reference to TOR 1.9

1089. The focus of the enquiry required by TOR 1.9 is on corruption in the award of tenders by government departments, agencies and entities, as distinct from the major public entities. It also focuses on whether the relevant office bearers sought to benefit themselves, their family members or entities in which they had an interest.

1090. To a significant degree, the questions whether there was corruption in the award of contracts and tenders by government departments, agencies and entities and whether the corruption involved office-bearers seeking to benefit themselves, their family members, or entities in which they held a personal interest, have already been answered in the analysis with reference to other terms of reference, particularly TOR 1.1 and TOR 1.4. That already establishes the existence and very substantial extent of the phenomenon of corruption in relation to the awarding of contracts and tenders by government departments involving office bearers in the categories concerned.

1091. The analysis in this section will therefore focus on the nature and the extent of the corruption. The evidence reveals that that there was widespread corruption in the awarding of contracts and tenders to Bosasa and its associated business entities or organisations, by Government departments, SOEs, agencies and entities. Members of the National Executive, public officials and functionaries of various organs of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.

1092. Mr Agrizzi's evidence suggested that the aggregate value of contracts awarded to the Bosasa Group of Companies by various public departments and entities between 2000 and 2016 was at least R2,371,500,000.00. Mr Agrizzi estimated that approximately R75,700,000 was paid out in bribes. These values do not include the value of houses built, fixtures and fittings as well as furnishings, motor vehicles purchased and travel expenses incurred. Mr Agrizzi's estimations must be treated with a measure of caution. However, even on that basis, there was systemic corruption on what is described above as an industrial scale in the forms contemplated in TOR 1.9. Corruption was central to Bosasa's business model.

1093. Mr Agrizzi, along with other witnesses, testified and demonstrated that Bosasa (and the Watson family) established a reasonably well-organised network of well-placed, well-connected and powerful people whose loyalty was secured with financial and other material incentives and bribes. It was through this network that they were able to promote and protect the private interests of Bosasa by irregular procurement and practices to extract money from the state in very substantial amounts. In Mr Agrizzi's experience, every one of the contracts in which Bosasa was involved was tainted with bribes and corruption. Where contracts were not awarded because of corruption, corruption would creep in once they had been awarded, to ensure their retention and their extension or renewal. These contracts spanned, at least, a 17-year period.

REFERRALS IN RELATION TO EACH OF THE TOR

1094. TOR 7 provides that the Commission shall, where appropriate, refer any matter for prosecution, further investigation or the convening of a separate inquiry to the appropriate law enforcement agency, government department or regulator regarding the conduct of a certain person(s).

1095. This section contains an overview of the findings according to the relevant TORs and identifies matters or persons for referral for prosecution, further investigation or the convening of a separate enquiry.

1096. It should be borne in mind that the primary standard of proof employed in the foregoing analysis was whether the evidence established the facts on a balance of probabilities. Where possible offences were considered, this was done based on whether or not a *prima facie* case existed or might be revealed through further investigation.

1097. Prosecutions, restraint and confiscation proceedings under Chapter 5 of POCA, preservation and forfeiture proceedings under Chapter 6 of POCA, and proceedings before regulatory bodies, each bear their own standards of proof, which may not align with those employed in the Commission. Additionally, self-incriminating evidence given in the Commission is inadmissible in other fora in terms of Regulation 8(2). Where a matter is referred below for prosecution or investigation, further investigation will obviously be required to ensure that sufficient evidence is gathered to meet the requisite standard of proof.

1098. It may be that where a matter is referred for prosecution or investigation, one is already under way. Nevertheless, for the sake of completeness, such persons are included in the referrals.

1099. Related to the referrals for investigation and prosecution, the Asset Forfeiture Unit within the Office of the National Director of Public Prosecutions should in each case investigate, and, where sufficient evidence exists, proceed in terms of chapter 5 or 6 of POCA, as may be appropriate.

1100. This would not apply where a special investigation unit has been established terms of the Special Investigating Units and Special Tribunals Act 74 of 1996 ("SIU Act") in respect of the particular matter in question. Where a special investigation unit has been established, proceedings should, where appropriate, be investigated and brought in the Special Tribunal established in terms of section 2(1)(b) of the SIU Act, for appropriate relief, including the recovery of damages or losses suffered by the relevant organ of state.

1101. The Secretary of the Commission, who is in a position akin to chief executive officer, must report knowledge or suspicion of an offence under Part 1, 2, 3 or 4, or Sections 20 or 21 of PRECCA, or the offence of theft, fraud, extortion, forgery or uttering a forged document, to the DPCI in terms of Section 34 of PRECCA. The making of a report in terms of section 34 is not a substitute for laying a charge with the SAPS.

1102. In addition, any offences or unlawful activities relating to serious, high profile or complex corruption cases arising from the work of the Commission should be reported to the Investigating Directorate of the NPA.

1103. On this basis, all referrals for further investigation or prosecution are made to the SAPS, the DPCI and the Investigating Directorate, whether or not this is expressly stated below. Referrals for prosecution are only made in instances where the evidence reveals strong prospects of a successful prosecution. Express reference is made to prosecution where this forms part of the referral. All other matters are referred for further investigation.

1104. Where a matter is referred to the SAPS, DPCI or the Investigating Directorate for investigation or prosecution, the referral is subject to regulation 8(2), so that self-incriminating evidence given in the Commission is not admissible in any criminal proceedings brought against that person. This will mean that in every matter that is referred to the SAPS, DPCI or the Investigating Directorate further investigation of their own will need to be done. It is therefore important that time and space be afforded the DPCI, the Investigating Directorate and the SAPS to complete these further investigations. Public clamour for immediate prosecutions will not be of assistance in the cause of bringing the Rule of Law to bear on past corruption. Rapid, poorly prepared prosecutions will not succeed and will undermine the achievement of the goal of a corruption-free society. Where a matter is referred for prosecution in this Part, it is recognised that the discretion in relation to the decision to prosecute will remain vested in the NPA. It must make its own assessment as to whether it has gathered sufficient evidence of its own to enjoy a reasonable prospect of a successful prosecution.

TOR 1.1

1105. The evidence reveals that Bosasa, its directors, employees and associates over an extended period of time made attempts through various inducements and forms of gain, including money and other forms of gratification as defined in section 1 of PRECCA, to influence office bearers in the categories contemplated in TOR 1.1.

1105.1 The evidence establishes a *prima facie* case of money laundering in terms of Section 4 of POCA against the following persons in respect of whom the matter is referred for further investigation and prosecution: Mr Angelo Agrizzi, Mr Andries Johannes van Tonder, Mr Carlos Bonifacio, Mr Jacques van Zyl, Mr Riaan Hoeksma, Mr Gregg Lacon-Allin, as well as the entities AA Wholesalers, Riekele Konstruksie, Jumbo Liquor Wholesalers, Lamozest, and Equal Trade 4 and Equal Food Traders.

1105.2 The evidence establishes a *prima facie* case of corruption in terms of section 3 of PRECCA read

with section 4 to 16 of PRECCA as relevant against the following persons in respect of whom the matter is referred for further investigation and prosecution: Mr Angelo Agrizzi, Mr Andries Johannes van Tonder, Mr Jacques van Zyl, Mr Johannes Gumede. Mr Papa Leshabane, Mr Thandi Makoko, Mr Leon van Tonder, Mr Richard le Roux, Mr Petrus Venter, Mr William Daniel Mansell, Mr Sesinyi Seopela, Mr Linda Mti, Mr Frans Vorster, Mr Carlos Bonifacio and Mr Riaan Hoeksma.

1106. Having regard to the evidence pertaining to the "war room" facilities to assist the ANC in the elections, the evidence establishes a *prima facie* case of corruption in relation to contracts in terms of Section 12(2) of PRECCA against Messrs Gumede, Leshabane and Louis Vorster. In respect of them, the matter is referred for further investigation and prosecution.

1107. The investigation should include the identification of the officials of the ANC that were involved in arranging the war room and further investigation of their conduct. There is a reasonable prospect that further investigation in that regard will uncover a *prima facie* case.

1107.1 The evidence establishes a *prima facie* case of fraud against the following persons in respect of whom the matter is referred for further investigation and prosecution: Mr Angelo Agrizzi, Mr Andries Johannes van Tonder, Mr Carlos Bonifacio, Mr Jacques van Zyl, Mr Greg Lacon-Allin, and Mr Riaan Hoeksma.

1107.2 The evidence establishes that there is a reasonable prospect that further investigation will uncover a *prima facie* case of money laundering, corruption and/or fraud against the following persons and the matter is accordingly referred for further investigation: Ms Carien Daubert, Ms Rieka Hundermark, Mr Gavin Hundermark, Mr Cedric Frolick, Mr Patrick Littler, Mr Danie van Tonder, Mr Ishmael Dikane, Mr Syvion Dlamini, Mr Trevor Mathenjwa, and Mr Ryno Roode.

1108. This must not, however, be taken as a finding by the Commission against any persons that did not receive Rule 3.3 notices.

1108.1 The evidence establishes a *prima facie* case of the failure to report suspicious or unusual transactions, in contravention of section 52 of FICA, against the following persons in respect of whom the matter is referred for further investigation and prosecution: Mr Angelo Agrizzi, Mr Andries Johannes van Tonder, Mr Carlos Bonifacio, Mr Jacques van Zyl, Ms Carien Daubert, Ms Rieka Hundermark, Mr Gavin Hundermark, Mr Johannes Gumede, Mr Papa Leshabane, and Ms Thandi Makoko.

1109. The evidence establishes a *prima facie* case of assisting another to benefit from the proceeds of unlawful activities, in contravention of section 5 of POCA, against Gregory Lawrence and in respect of whom the matter is referred for further investigation and prosecution.

1110. The evidence establishes that Mr Petrus Venter was aware of the illegal transactions taking place at Bosasa and failed to report them. Further investigations should take place for a failure to comply with Section 34 of PRECCA and other relevant legislative requirements. The matter is referred to the SAPS for this purpose. The matter is also referred to SARS and the SA Institute of Tax Practitioners ("**SAIT**") for further investigation.

1111. The evidence establishes *prima facie* instances of various tax offences. These matters are referred to SARS for further investigation in conjunction with relevant law enforcement agencies.

1112. Messrs Agrizzi, van Tonder and Bonifacio are facing pending charges of corruption, fraud and conspiracy to commit fraud. The matter is nonetheless referred to the SAPS, the DPCI and the Investigating Directorate, to ascertain whether those charges cover all instances of corruption revealed in the evidence before the Commission and, if not, for the charges to be expanded accordingly.

1113. The matter of forms of inducement or gain being paid to persons in the NPA for Bosasa to have been able to gain possession of confidential documentation is referred for investigation.

1114. Insofar as Messrs Wakeford and Papadakis are concerned, the evidence discussed in the analysis pertaining to TOR 1.1, particularly the email correspondence and the arrangements for communi-

cation with Mr Papadakis through Ms Engelbrecht, gives rise to reasonable grounds for suspicion that:

1114.1 Gratification as defined in section 1 of PRECCA, whether in the form of free cement deliveries or otherwise, was offered by Messrs Watson, Agrizzi and Wakeford on behalf of Bosasa, and accepted by Mr Papadakis, as contemplated in Section 3(a) of PRECCA, dealing with the general offence of corruption; and

1114.2 That this was done in order to influence Mr Papadakis to act in a manner that amounted to the misuse or selling of information or material acquired during the exercise, carrying out or performance of his powers, duties and functions arising out of his contractual and statutory obligations to SARS and the abuse of his position of authority at SARS, as contemplated in Section 3(i)(bb) and 3(ii)(aa) of PRECCA.

1115. In the circumstances, there is a reasonable prospect that further investigation will uncover a *prima facie* case against Messrs Wakeford and Papadakis in respect of the offence of corruption in terms of Section 3 of PRECCA, and the matter is referred for investigation accordingly. Section 4 is also of potential application because Mr Papadakis would have fallen within the definition of a public officer in terms of the definition of that term in Section 1 of PRECCA, by virtue of his position in SARS.

1116. Insofar as Mr Wakeford is concerned, the email correspondence of 16 and 20 June 2011, alleged to pertain to a corrupt payment to the advisor to the then Minister of Correctional Services, must also be considered in the investigation. No findings are made in respect of the said advisor as no Rule 3.3 notice was issued to him.

1117. Insofar as Mr Mantashe is concerned, there is no evidence that, as Secretary-General of the ANC, he acted upon the inducement provided to him to influence public office bearers in the listed categories. However, the question arises whether the presumption in Section 24 of PRECCA could nevertheless be applied to him so as to justify an investigation or prosecution.

1118. In that regard there are reasonable grounds for suspecting that Mr Mantashe accepted or agreed to accept gratification as contemplated in Section 24(1)(a).

1119. With reference to Section 24(1)(b)(i), there are reasonable grounds for suspecting that Mr Mantashe did so from a person who sought to obtain contracts from public bodies. However, Section 24(1)(b)(i) requires that the person charged was serving in one or more of the public bodies concerned, so it would not apply to Mr Mantashe.

1120. With reference to Section 24 (1) (b) (ii), there are reasonable grounds for suspecting that Mr Mantashe received the gratification from a person concerned in business transacted by various public bodies, but he did not serve in any of them. Section 24 (1) (b) (ii) however also includes as the provider of the gratification a person who "is concerned . . . in any proceedings or business transacted before or by . . . the . . . political party . . . in which the person charged was serving as an official".

1121. Mr Vorster testified that in 2014 (this is while Mr Mantashe was serving as Secretary-General of the ANC) he was instructed by Mr Leshabane, amongst others, to set up the vacant half of the Kgwerano call centre for the ANC to run its war room prior to and during the national elections and that all related expenses were covered by Kgwerano. It was accepted by President Ramaphosa in his evidence that war rooms had been provided for the ANC by Bosasa. The question is whether this conduct falls within the quoted part of Section 24(1)(b)(ii). "Business" is defined in section 1 of PRECCA as "any business, trade, occupation, profession, calling, industry or undertaking of any kind, *or any other activity* carried on for gain or profit by any person within the Republic". The provision of the war rooms falls within the meaning of "any other activity" (emphasis added). Mr Leshabane in his capacity as Director of Bosasa did so to derive profit and gain for Bosasa in its contracts with various Departments and Organs of State. The word "proceedings" is not defined. However, setting up and operating a monitoring facility for elections would seem to fall within the meaning of the term "proceedings".

1122. That provides a sufficient statutory platform for the presumption to be engaged. It would then be

incumbent upon the State in terms of the second part of Section 24 (1) to "take reasonable steps" to see whether or not it is "able with reasonable certainty to link the acceptance of ... the gratification to any lawful authority or excuse on the part of the person charged." Based on the earlier analysis, the Commission was not able to find a lawful authority or excuse for the security installations for Mr Mantashe. If the State's steps give rise to a similar conclusion, then proof of receipt of the gratification (in the form of the security installations) in terms of paragraphs (a) and (b) of Section 24 (1) becomes, in the absence of evidence raising a reasonable doubt as to the absence of lawful authority or excuse, proof of a quid pro quo on the basis set out in paragraphs (aa) to (dd) of section 24 (1).

1123. Section 25 of PRECCA is also of relevance in assessing the possible referral of the matter. In the circumstances, there is a reasonable prospect that further investigation will uncover a *prima facie* case against Mr Mantashe in respect of the offence of corruption in terms of Section 3 of PRECCA, and the matter is accordingly referred for investigation.

1124. As far as Dr De Wee is concerned, it is not possible based on the evidence available at this stage to apply the presumption in Section 24 of PRECCA against him, because the evidence of gratification is uncorroborated hearsay.

1125. However, if the prosecution authorities were able to obtain admissible evidence of the gratification alleged by Mr Agrizzi to have been received by Dr De Wee, then there was, forthcoming from the documents referred to in the course of his oral testimony, evidence of his having acted in a manner that amounts to the illegal, dishonest, unauthorised, incomplete or biased exercise and carrying out of his powers, duties and functions arising out of a constitutional, statutory or contractual legal obligation. In plain language, there is some evidence of his possibly having provided a quid pro quo. This is so having regard inter alia to his having *prima facie* failed to alert the Bid Adjudication Committee to the two legal opinions, his involvement in the conclusion of a problematic contract with Bosasa or Sondolo IT that undermined its underlying tender process, and his involvement in continuing to transact with them after he had been confronted with their corruption by the relevant Parliamentary portfolio committee.

1126. In the circumstances, there is a reasonable prospect that further investigation will uncover a *prima facie* case against Dr De Wee in respect of the offences in Sections 3, 4, 12 and 13 of PRECCA, and the matter is referred for further investigation accordingly.

1127. Insofar as Mr Nair is concerned, as pointed out above, there is no evidence that he acted upon the inducement provided to him. However, the question arises whether the presumption in Section 24 of PRECCA could nevertheless be applied to him to justify an investigation or prosecution.

1128. In that regard there is a reasonable basis for suspecting that Mr Nair accepted or agreed to accept gratification as contemplated in Section 24 (1) (a).

1129. With reference to Section 24 (1) (b) (i), there is a reasonable basis for suspecting that he received the gratification from a person, Sondolo IT, who holds a contract from a public body or institution, the DOJCD. However, Section 24 (1) (b) (i) has a further requirement that the person charged was serving as an official in the public body or institution – here the DOJCD. Does a magistrate serve as an official in the Department of Justice? As appears from the obiter remarks of Wallis JA in Reinecke, that is not a simple question, but it would appear that, notwithstanding the increased independence and severance from the public service brought about by the Magistrates Act No. 90 of 1993, magistrates remain employees of the DOJCD. It is not necessary for that determination to be made here. If referral for further investigation is appropriate, that aspect could be part of the investigation.

1130. That provides a sufficient statutory platform for the presumption to be engaged. It would then be incumbent upon the State in terms of the second part of Section 24(1) to "take reasonable steps" to see whether or not it is "able with reasonable certainty to link the acceptance of ... the gratification to any lawful authority or excuse on the part of the person charged." On the basis of the earlier analysis, the Commission was not able to find a lawful authority or excuse for the security installations for Mr Nair. If the State's steps give rise to a similar conclusion, then proof of receipt of the gratification (in the form of the security installations) in terms of paragraphs (a) and (b) of Section 24(1) becomes, in

the absence of evidence raising a reasonable doubt as to the absence of lawful authority or excuse, proof of a quid pro quo on the basis set out in paragraphs (aa) to (dd) of Section 24(1).

1131. Section 25 of PRECCA is also of relevance in assessing the possible referral of the matter.

1132. In the circumstances, there is a reasonable prospect that further investigation will uncover a *prima facie* case against Mr Nair in respect of the offence of corruption in terms of Section 3 of 8 of PRECCA, and the matter is referred for investigation accordingly.

1133. There is no need for the matter to be referred to the Magistrates Commission for investigation or any other steps as these are already underway. However, it is important that those responsible for the taking of any steps pursuant to this report draw the attention of the Magistrates Commission to its content insofar as it pertains to Mr Nair.

1134. Insofar as Mr Gingcana is concerned, there is also no evidence that he acted upon the inducement provided to him. However, the question arises whether the presumption in Section 24 of PRECCA could nevertheless be applied to him so as to justify an investigation or prosecution.

1135. In that regard there is a reasonable basis for suspecting that Mr Gingcana accepted or agreed to accept gratification as contemplated in Section 24(1)(a).

1136. With reference to Section 24 (1) (b) (i), there is a reasonable basis for suspecting that he received the gratification from an entity, Sondolo IT, who holds (or seeks to obtain) a contract from a public body or institution, PRASA. Section 24 (1) (b) (i) has a further requirement that the person charged was serving as an official in the public body or institution – here PRASA. Mr Gingcana was seconded as the acting Chief Procurement Officer of PRASA at the time.

1137. The presumption is thus engaged. It would then be incumbent upon the State in terms of the second part of Section 24 (1) to "take reasonable steps" to see whether or not it is "able with reasonable certainty to link the acceptance of ... the gratification to any lawful authority or excuse on the part of the person charged." Based on the earlier analysis, the Commission was not able to find a lawful authority or excuse for the security installations for Mr Gingcana. If the State's steps give rise to a similar conclusion, then proof of receipt of the gratification (in the form of the security installations) in terms of paragraphs (a) and (b) of Section 24 (1) becomes, in the absence of evidence raising a reasonable doubt as to the absence of lawful authority or excuse, proof of a quid pro quo on the basis set out in paragraphs (aa) to (dd) of Section 24 (1).

1138. Section 25 of PRECCA is also of relevance in assessing the possible referral of the matter.

1139. In the circumstances, there is a reasonable prospect that further investigation will uncover a *prima facie* case against Mr Gingcana in respect of the offence of corruption in terms of Section 3 of PRECCA, and the matter is referred for investigation accordingly.

TOR 1.4

1140. Various office bearers in the categories contemplated by TOR 1.4 breached the Constitution, ethical codes and legislation by facilitating the unlawful awarding of tenders by SOEs and organs of state, in order to benefit Bosasa, its affiliates and individuals employed by or associated with it, the Watson family and the persons responsible for the facilitation.

1140.1 The evidence establishes a *prima facie* case of corruption in terms of section 3 of PRECCA, ready with sections 4 to 16, against the following persons in respect of whom the matter is referred for further investigation and prosecution: Mr Linda Mti, Mr Patrick Gillingham, Mr Vincent Smith, Mr Mnikelwa Nxele, Ms Nontsikelelo Jolingana, Mr Josiah Maako, Ms Dikeledi Elizabeth Tshabalala.

1140.2 In addition, the following individuals from DCS must be further investigated: Kaslutho Maria Mabena; Shishi Matabella; Jeptha Mandla Mkabela; Dikeledi Tshabalala; Zach Modise; Mthokozeni Mollet Ngubo; and Winnie Ngwenya.

1141. Section 24 (1) of PRECCA creates a presumption facilitating the task of the state to prove that the gratification was received to achieve one or more of the aims as set out in the Act. These aims have also been characterised as the "quid pro quo". The presumption provides that, if it is proved that the gratification was accepted from another person who sought to obtain a contract, licence etc., it is presumed that the gratification was accepted in order to achieve one or more of the aims set out in the definition of the crime, provided:

1141.1 The State can show that despite having taken reasonable steps, it was not able with reasonable certainty to link the acceptance of the gratification to any lawful authority or excuse on the part of the person charged; and

1141.2 There is no evidence to the contrary which raises reasonable doubt.

1142. Based on our analysis above, there is sufficient evidence to establish that Mr Zuma, Ms Nomvula Mokonyane and Mr Makwetla (i) accepted gratification; (ii) from another person, i.e., Bosasa (or its directors or employees), which held and sought to obtain contracts with government.

1143. The same reasoning applies to the evidence against Ms Duduzile Myeni, who similarly (i) accepted gratification for herself and for the benefit of another, being the Jacob G Zuma Foundation, (ii) from another person, i.e., Bosasa or its directors or employees, who held and sought to obtain contracts with government.

1144. The state can likely show that, despite having taken reasonable steps, it was not able to link the acceptance of the gratification by Mr Zuma, Ms Nomvula Mokonyane, Ms Duduzile Myeni and Mr Makwetla to any lawful authority or excuse for receiving the gratification. This is because neither Mr Zuma, nor Ms Nomvula Mokonyane, Ms Duduzile Myeni nor Mr Makwetla provided evidence to the contrary to show a lawful authority or excuse for receiving the gratification, either at all or at a level that could give rise to a reasonable doubt.

1145. Section 24 (1) of PRECCA would, in the Commission's view, deem there to be sufficient evidence to establish that Mr Zuma, Ms Nomvula Mokonyane, Ms Duduzile Myeni and Mr Makwetla accepted the gratification from Bosasa and in doing so breached their Constitutional and legislative duties as well as ethical obligations in order to act in one or more of the "manners" in paragraphs (aa) to (dd) of the PRECCA, being the different statutorily recognised forms of quid pro quo.

1146. The matter is referred for further investigation of Mr Zuma (on the basis that there is a reasonable prospect that further investigation with uncover a *prima facie* case), and for further investigation and prosecution of Ms Duduzile Myeni, Ms Nomvula Mokonyane and Mr Makwetla on charges of corruption in terms of Section 3 and/or 4 and/or 19 of PRECCA. Section 19 of PRECCA relates to interference in the investigation arising from the SIU Report.

1147. The evidence against Ms Duduzile Myeni is clearer in that she provided more than one quid pro quo in return for the gratifications provided to her by Bosasa and its directors or employees, as required by section 4 (1) (a) (i) of PRECCA. The identified quid pro quos included not only access to Mr Zuma but also providing Mr Agrizzi with confidential documents of the SAPS's Anti-Corruption Task Team relating to the progress of the police criminal investigation into corruption allegations against Bosasa.

1148. This evidence was corroborated with independent verification of the meeting at the Sheraton Hotel, its location, metadata of the photographs and nature of the documents. This was not challenged by Ms Duduzile Myeni in any meaningful way. On the evidence the conclusion is unavoidable that the only person who could have shown the document to Mr Agrizzi is Ms Duduzile Myeni. As to the purpose of being shown the document, there is a reasonable basis to conclude that this was to facilitate and assist in stopping the prosecution of Bosasa, its directors and employees. The matter is therefore referred for further investigation and prosecution of Ms Duduzile Myeni on charges of corruption and defeating the ends of justice or hindering or obstructing an investigation in terms of Section 19 of PRECCA.

1149. Messrs Vincent Smith, Linda Mti and Patrick Gillingham are facing pending charges of corruption, fraud and conspiracy to commit fraud. The matter is nonetheless referred to the SAPS, the DPCI

and Investigating Directorate, to ascertain whether those charges cover all instances of corruption revealed in the evidence before the Commission and, if not, for the charges to be expanded accordingly.

1150. The evidence establishes that there is a reasonable prospect that further investigation will uncover a *prima facie* case of corruption against the following persons in terms of Sections 3 and/or 4 and/or 7 and/or 12 and/or 13 of PRECCA, and the matter is accordingly referred to the SAPS, DPCI and Investigating Directorate for this purpose:

1150.1 Mr Norman Thobane and Ms Mamsi Nyambuse (DOJCD)

1150.2 M.S. Netshishivhe (Mpumalanga Department of Health)

1150.3 Mr Cedrick Frolick (MP); and

1150.4 Ms Lindile Mathshediso Kgasi and Ms Matshadisa Cordelia Mogale (North West DSD).

1151. Where any of the persons mentioned in the preceding paragraph did not receive Rule 3.3 notices, this must not be taken as a finding against them by the Commission.

TOR 1.5

1152. There was substantial corruption in the awarding of tenders and contracts to Bosasa by ACSA and SAPO. The corruption took the form of Bosasa through its directors and employees providing gratification in the form of cash payments to employees of ACSA and SAPO in exchange for the unlawful award of security contracts to Bosasa.

1153. In this regard, the evidence establishes a *prima facie* case of corruption against the following persons in respect of whom the matter is referred for further investigation and prosecution:

1153.1 Messrs Thele Lesetsa Moema, Reuben Pillay, and Mohapi Johannes Serobe (employees or former employees of ACSA); and

1153.2 Messrs Siviwe Luthando Bongani Mapisa and Maanda Benjamin Manyatshe (employees or former employees of SAPO).

1154. The evidence also establishes that there is a reasonable prospect that further investigation will uncover a *prima facie* case of corruption against the following persons for the facilitation of the unlawful award of a contract or tender and the matter is referred for this purpose: Ms Bongi Mpungose, Mr Jason Tshabalala, Mr Siza Thanda and Mr Mohammed Bashir (all employees of ACSA).

1155. Save in respect of Mr Siza Thanda, these individuals did not receive Rule 3.3 notices and this should not be taken as a finding against them.

TOR 1.9

1156. There was massive corruption in the awarding of tenders and contracts to Bosasa and its affiliates by government departments, agencies and entities. The corruption took the form of Bosasa through its directors and employees providing gratification in the form of cash payments and other material benefits to State office bearers as contemplated in TOR 1.9, in exchange for the unlawful award of tenders and contracts to Bosasa and its affiliates.

1157. The referrals pursuant to TOR 1.9 are all covered by TOR 1.1 and 1.4.

Instances not covered by TORs 1.1, 1.4, 1.5 and 1.9

1158. The evidence reveals unlawful activities not directly covered by the TORs detailed above. Those instances are detailed below and where appropriate, are referred for prosecution, further investigation or the convening of a separate enquiry to the appropriate body regarding the conduct of certain persons as contemplated in TOR 7.

1159. There is also a reasonable prospect that further investigation will uncover a *prima facie* case of corruption against the following persons:

1159.1 Mr Simon Mofokeng, former General Secretary of CEPPWAWU for the acceptance of grocery items monthly to the value of R12,000 to R15,000 (for the offence of corrupt activities relating to the procuring and withdrawal of tenders in terms of section 13 of PRECCA); and

1159.2 Mr Sydney Mantata, who purchased and delivered the grocery items to Mr Mofokeng.

1160. Mr Agrizzi's evidence about the alleged participation of Adv Jiba, Adv Mrwebi and Ms Lepinka is hearsay. Adv Mrwebi did not dispute the allegations against him, but they remain hearsay. Adv Jiba resolved not to persist with her Rule 3.3 and 3.4 application and Ms Lepinka filed an affidavit in which she denied having received any money from Bosasa. However, it remains probable that some form of inducement or gain was paid to a person or persons in the NPA for Bosasa to have been able to gain possession of confidential documentation which they were not lawfully entitled to have in their possession. This matter is referred for further investigation on the basis that such investigation may uncover a *prima facie* case.

1161. There was evidence suggesting that Adv Simelane may wrongfully have assisted in closing the investigation into Bosasa. Adv Simelane was not issued with a Rule 3.3 notice. It is therefore important to note that no finding may in these circumstances be made against him. There is, however, a reasonable prospect that further investigation will uncover a *prima facie* case. The matter is accordingly referred for further investigation.

1162. There was evidence to suggest that several persons were involved in:

1162.1 The destruction of electronic data and files, as well as computer hardware, and documentation to prevent this evidence being seized by the SIU

1162.2 The destruction of computers and invoicing books from Blake's Travel

1162.3 The destruction of files through the faked server crash

1162.4 The deletion of files due to the SIU investigation

1162.5 The intimidation of potential witnesses.

1163. The persons implicated in this conduct were the following: Mr Angelo Agrizzi, Mr Johannes Andries van Tonder, Mr Leon van Tonder, Mr Matthew Robert Leeson (referred to by Mr Agrizzi as Max Leeson), Mr William Brander, and Mr Brian Blake.

1164. Mr Brian Blake disputes that computers were removed from Blake's Travel, destroyed and later replaced. Mr Blake's version is improbable considering the corroborating evidence of Messrs Agrizzi, van Tonder and van der Bank. This is particularly the case as Mr Agrizzi and Mr van Tonder implicate themselves in criminal activity, to their own detriment. It is unlikely that they would lie to prejudice themselves. Matthew Leeson and William Brander failed to respond to Rule 3.3 notices issued by the Commission in February and March 2019, respectively and the evidence against them is undisputed.

1165. Accordingly, there are reasonable grounds for suspecting that the above conduct occurred and that the persons implicated are guilty of defeating or obstructing the course of justice; the intentional interference with, hindering or obstruction of the investigation of an offence in terms of section 19 of PRECCA; unacceptable conduct relating to a witness, to coerce a person to testify in an untruthful manner or to withhold information in terms of section 18 of PRECCA; and/or fraud.

1166. There is a reasonable prospect that further investigation will uncover a *prima facie* case. These matters are accordingly referred for further investigation or prosecution.

1167. Having regard to the evidence pertaining to them, there is a reasonable prospect that further investigation by the relevant professional bodies will reveal a *prima facie* case of professional misconduct on the part of the following persons or firms:

1167.1 Mr Brian Biebuyck, through an investigation by the Legal Practice Council (LPC).

1167.2 Mr Petrus Venter, through an investigation by the SAIT

1167.3 The various attorneys whose trust accounts were used by Bosasa to make various unlawful payments, through an investigation by the LPC; and

1167.4 D'Arcy-Herrman, through an investigation by the Independent Regulatory Board for Auditors (IRBA).

1168. The Commission report must be made available to SARS so that it may exercise its investigative powers derived from the provisions of the Tax Administration Act to determine whether any tax offences were committed by Bosasa or its associates. In particular, the following issues are referred to SARS for further investigation:

1168.1 Whether Mr Papadakis breached his obligations in terms of the Tax Administration Act as a former official of SARS

1168.2 The failure to disclose income and false invoicing deriving from the various cash accumulation mechanisms developed and used by Bosasa, including the cost of benefits provided to various individuals and State functionaries through the "Special Projects Team" as operational costs to be deducted from income in Bosasa's tax returns

1168.3 The deduction of the invoices issued by Mr Mansell for "work" done as expenses

1168.4 Bosasa's utilisation of SeaArk's assessed loss, the existence of the assessed loss in BSCM and Bosasa Operations and the equipment write-offs; and

1168.5 Phezulu Fencing in respect of receipts being hidden under contingent liabilities in the balance sheet instead of the income statement to avoid paying tax of R10.3m.

CONCLUSION

1169. The foregoing evidence pertaining to Bosasa demonstrates vividly that its leadership, employees and associates were able to gain illicit control over the procurement processes of the DCS, other government departments and Organs of State, through the systemic and aggressive targeting of public officials with offers of gratification in the form of bribes and a range of other material benefits. As part of its strategy, it sought out officials across the different levels and Organs of the State, ranging from President Jacob Zuma at one end of the spectrum, to municipal officials and SOEs at the other end of the spectrum. Within that range it sought to identify individuals that wielded the greatest influence within the ruling party.

1170. Bosasa also set up a system whereby the gratification could be provided on an ongoing basis through the regular payment to numerous officials within a department or entity of cash bribes. This had the effect of sustaining the influence in a way that maintained an advantage in fresh tender and contract extension processes. It sought to eliminate the risk of whistleblowing. And it ensured the early provision of confidential information that would enable it to have an advantage in any tender process. It also targeted the investigative and prosecution processes, so that where its conduct came to the knowledge of the authorities, it would be able to snuff out the progression of any investigation or prosecution.

1171. A disturbing component of Bosasa's corrupt activities was its provision and operation of sophisticated war rooms to assist the ANC in the running of elections. This was clearly aimed at assisting the ANC in retaining its position as the majority party. The reason that it is a matter of grave concern is that it goes to the heart of the democratic process.

1172. The corruption-based business model developed by Bosasa also involved drawing in the entire leadership of Bosasa along with a wide number of senior and junior employees and influential associates and professional consultants of the company. That too eliminated or at least very substantially reduced the risk of whistleblowing.

1173. A tragic component of the system of corruption-based business developed by Bosasa, and in particular the late Mr Gavin Watson and Mr Agrizzi, is that they traded on the Watson family's "struggle credentials". There can be no doubt that the Watson family were a beacon of hope during the apartheid era. They bravely crossed the racial divide to play non-racial sport in a society aggressively focused on building impenetrable and oppressive legislative, social and economic barriers between the race groups in every walk of life. For their stance, the Watson family gained justifiable admiration.

1174. Sadly, however, it has become clear from the evidence herein, that the late Mr Gavin Watson perceived the potential for illicit economic gain to be derived from the influence the family had come to wield in the post-apartheid era. The evidence of Mr Vincent Smith is revealing in this regard. It demonstrated how a relationship forged in the struggle for democracy, could be manipulated and transformed into an instrument for corrupt gain. The influence derived from the family's role in the struggle also meant that they enjoyed a competitive advantage in knowing who within the ruling party wielded the greatest levels of influence and where optimal opportunities for gain were to be found.

1175. The answer to the first question as to whether State Capture ever existed, as far as the Bosasa evidence is concerned, is an unequivocal **yes**.

1176. As regards the second question as to whether State Capture still exists in South Africa, the Bosasa group of companies has been liquidated and is no longer operational. Prosecutions have commenced against several of the leaders and other employees involved. Mr Gavin Watson died tragically in an accident. Mr Agrizzi has cast his lot with the Commission and faces prosecution. All this will no doubt have impacted dramatically in eliminating much of the corrupt economic activity that was previously underway. However, it is unlikely that all the corrupt networks that supported the Bosasa empire have ground to a halt. Corruption skills and tactics will have been developed and are likely to be deployed again by some in the future. Many of the players will not have forgotten the influence that they are able to wield and the benefits that they can enjoy because of exerting that influence.

1177. That brings one to the third question as to the means of eradication of State Capture. Focusing on those that formed part of the criminal network associated with Bosasa, the only way of addressing this is through the widest possible investigations and prosecution of those involved. It is clear that a massive upscaling of the human and financial resources of the investigating and prosecuting authorities will be required to achieve this.

1178. However, the Bosasa evidence also provides a case study for considering interventions at the legislative, policy and governance levels aimed at addressing the phenomenon of corruption. The Commission's comprehensive recommendations in this regard must await the completion of the reports in respect of all its different work streams. Nevertheless, it is appropriate to make preliminary recommendations based on the Bosasa evidence. These include:

    1178.1 The draft National Implementation Framework towards the Professionalisation of the Public Service published by the National School of Government on 8 December 2020 presents a helpful start. It Advs for a responsive, meritocratic and professional public administration in the service of the people and is a step in the right direction in addressing corruption in the public service. It is imperative that this document is acted on and implemented with all due urgency. The Minister for the Public Service and Administration and the National School of Government ("NSG") should seriously consider the various contributions and recommendations made by stakeholders and interested parties in the finalisation of the national implementation framework. Specifically, the Minister and NSG should further develop the identified issues that the framework does not adequately address in consultation with stakeholders.

    1178.2 It is essential that every member of the national or a provincial legislature, every councillor in a municipality elected for the first time, and every manager in any government department, Organ of State or SOE appointed for the first time must within the first year after election or appointment, complete an accredited course in ethical governance and procurement law (accredited either by the Public Service Commission, the National School of Government or other relevant accreditation body). This should become a legislated requirement, with the penalty that failure to complete such a course will result automatically in the election or appointment to the position

falling away as a matter of law. However, there is no need to await legislation to commence implementation.

1178.3 Appropriate refresher training at regular intervals, like continuing professional education in other professions, should also be legislatively provided for, with appropriate sanctions where the training is not completed.

1178.4 Regular integrity and competency tests must be implemented across the public service (like the regular integrity testing practice of the Asset Forfeiture Unit in the NPA) and this requirement must be supported by the introduction of legislation that makes the testing obligatory and provides the necessary legislative underpinning for it.

1179. Legislation must be introduced that prohibits any political party from operating a policy or system of deployment to any positions, managerial or otherwise, in government departments, organs of state or SOEs. The Bosasa evidence demonstrates that the system of deployment by a governing party creates targets for influence peddling and undermines the appointment of appropriately qualified personnel with values that arm them to resist corrupt approaches. The guiding criteria for appointments in these sectors should be confined to competence, a demonstrable commitment to excellence, an employment record that reflects unblemished integrity and the transformation of these sectors.

1180. As regards Bosasa's corrupt influence in respect of the electoral process in providing the election war rooms to the ANC, this may be addressed through the implementation of the Political Party Funding Act 6 of 2018 that came into effect on 1 April 2021. This Act regulates private and public funding of political parties and now makes it possible to know the sources of funding of political parties. The potential effect of this legislation would be to strengthen public confidence in South Africa's democratic political processes and improve transparency in relation to funding of political parties. The legislation should, however, be scrutinised to ensure that it would not allow the provision of facilities like the election war rooms to political parties by private parties benefitting from state contracts.

THE NATIONAL TREASURY

INTRODUCTION

1. This part of the report deals with the various attempts that were made by President Zuma, Minister Joemat Pettersson and Ms Dudu Myeni, the then Chairperson of the Board of South African Airways (SAA), to get the National Treasury to approve certain transactions that were not in the interests of the country or that were not financially affordable for the country or that might not have been objectionable in principle but were rendered objectionable by reason of certain terms and conditions to which the National Treasury was urged to agree.

2. The National Treasury, under, initially, Minister Pravin Gordhan as Minister of Finance from May 2009 to May 2014, under Minister Nhlanhla Nene as Minister of Finance from May 2014 to 9 December 2015 and, once again, under Minister Gordhan as Minister of Finance in his second term from 13 December 2015 to 31 March 2017 put up great resistance to repeated attempts by President Zuma, Ms Dudu Myeni and others to get them to engage in wrongdoing concerning various transactions.

3. The important features of the attempts to capture the National Treasury were:

   3.1 The offer of the position of Minister of Finance and money to Deputy Minister Mcebisi Jonas by the Guptas in return for him working with them

   3.2 The dismissal of Minister Nene as Minister of Finance on 9 December 2015

   3.3 The appointment of Mr Des Van Rooyen as Minister of Finance on 9 December 2015 to replace Mr Nene

3.4 The appointment by Mr Des Van Rooyen of advisors linked to the Guptas or their associates

3.5 The transfer of Mr Des Van Rooyen to the Ministry of Co-operative Governance and Traditional Affairs and the re-appointment of Minister Gordhan as Minister of Finance

3.6 The harassment of Minister Gordhan by the Hawks during his second term as Minister of Finance; and

3.7 The dismissal of Minister Gordhan and Deputy Minister Jonas on 31 March 2017 and Mr Gordhan's replacement by Mr Malusi Gigaba.

4. The transactions in respect of which Minister Gordhan and Minister Nene showed their resistance to wrongdoing were, collectively, the following:

4.1 The Nuclear Deal

4.2 the Airbus transaction at SAA

4.3 The Khartoum Route for SAA

4.4 The Petro SA transaction; and

4.5 The Denel Asia Venture.

MR FUZILE'S EVIDENCE

5. During at least part of the period of the attempts to capture the National Treasury, the Director-General of National Treasury was Mr Lungisa Fuzile. As Mr Fuzile's evidence was undisputed except in the respects in which it was disputed by Mr Des Van Rooyen, it is convenient to let Mr Fuzile tell the story through his statement submitted to the Commission which he confirmed under oath to be true and correct.

6. In his statement to the Commission, Mr Fuzile stated that, as the former DG of the National Treasury, "I have knowledge of projects and events, discussions and decisions that occurred during my tenure that have implications for the country or that impacted certain persons in consequential ways."

7. During his tenure as DG at the National Treasury, he witnessed the growing dissatisfaction by President Zuma with the National Treasury – in particular Minister Gordhan and Minister Nene. There were several issues that were central to this dissatisfaction. All of these issues either involved significant spending by the government or would place the fiscal and financial integrity of the government at risk. When these events are viewed together, they build a picture of how:

8. The Ministry of Finance and the Treasury became a stumbling block to the erosion (corruption) of due process in policy and decision making in the state:

8.1 The Ministry of Finance and Treasury (sometimes with support from some members of Cabinet and officials in relevant departments) played a role in stopping or delaying some of the (poor or bad) decisions that would have had dire consequences for South Africa, fiscally and otherwise, including by elevating the debt burden on future generations; and

8.2 In selected cases, processes of making decisions of government were changed or manipulated deliberately to get specific outcomes or decisions which were not in the national interest or the interest of the institutions concerned (in the case of SOEs). Had some of the decisions been taken and executed the country would most likely have been bankrupt at some point in the future.

The Role of the National Treasury

9. The Constitution sets out the role of the National Treasury in driving the budget process, procurement, borrowing, treasury norms and standards, the management of the National Revenue Fund, the division of revenue between the three spheres of government and overseeing financial management in all three spheres of government, including state-owned and public entities.

10. Whilst it is expected to provide objective and critical assessment of government proposals, and assess for any fiscal or long-term sustainability impact, it defers to the policies adopted by Cabinet, where such policies are legal.

11. Of direct relevance is section 217 of the Constitution which directs that organs of state must contract for goods and services ". . .in accordance with a system which is fair, equitable and transparent, competitive and cost-effective."

12. The Public Finance Management Act, 1999 (PFMA) is the law that sets out legal requirements on matters such as government guarantees and procurement. both of which are relevant to this submission.

13. The effect of the legislative framework that governs National Treasury is that it is required to oversee financial matters and fiscal sustainability of all organs of state to ensure that they comply with all relevant prescripts.

The budget process

14. According to Mr Fuzile, potentially the most important function of the Treasury is to produce an annual budget and to ensure that government always has money to deliver on its promises.

15. Over the years, concerted and deliberate effort went into developing mechanisms for ensuring alignment of the budget to the priorities as set by government as well as to ensure the necessary buy-in and ownership of this very important process.

16. Mr Fuzile indicated in his statement that there were problems unique to President Zuma's administration. What was unique was that:

    16.1 President Zuma's era was characterised by protracted constrained economic growth and poor revenue performance.

    16.2 The period was largely characterised by an unwillingness to face up to the realty that budgeting is about making hard choices. Treasury was repeatedly expected to just find the money to fund more and more new programmes. It became harder and harder to add new programmes without stopping others, and this caused resentment towards Treasury.

    16.3 What was largely a macroeconomic problem affecting the country was conveniently made out to be the fault of a few individuals, particularly the Treasury and those who served in it.

    16.4 Masked by the rhetoric of promoting transformation was an insidious objective of repurposing of the state to enable rent seeking.

Attempts to move the budget to the Presidency

17. Mr Fuzile indicated in the statement to the Commission that, in the second half of 2015, he began to hear rumours that President Zuma was very unhappy with the budget process and the budget, and that the budget process was not giving expression to the National Development Plan (NDP). In November 2015, he met Mr Khulekani Mathe who was working at the National Planning Commission (NPC) at the time. He told Mr Fuzile about discussions that had taken place at the Presidency and in the NPC about the budget process. In summary, it emerged that:

    17.1 There was wide sharing of sensitive budget documents with persons "outside" government and not involved in the budget process.

    17.2 The Minister of Finance's permission was never sought before sharing his department's information beyond the members of the Ministers' Committee on the Budget (MinComBud).

    17.3 These documents which were intended for MinComBud were inappropriately used to show misalignment between the budget and the NDP.

18. According to Mr Fuzile, in his statement to the Commission, Mr Mathe said that in the discussions that had taken place where President Zuma was involved, he had suggested that the Treasury was failing to align the budget to the NDP. Mr Mathe said the President asked the NPC to present him with evidence that confirmed that Treasury was failing him. Apparently, he used the metaphor that he "will shake the tree, if it fall, so be it".

Nuclear procurement

19. Mr Fuzile included a discussion of events around nuclear procurement in his statement to the Commission. Around September 2014, he received a call from the then DG of Energy, Ms Nelisiwe Magubane, asking for his advice on how to handle a part of a draft agreement between South Africa and Russia relating to nuclear cooperation that included proposed tax exemptions for the nuclear programme. Mr Fuzile's response to her was in two parts:

    19.1 First, Mr Fuzile gave her a preliminary view, namely that as a country South Africa did not like giving such exemptions as they compromise the integrity of the tax system.

    19.2 Second, Mr Fuzile expressed misgivings about the extent to which the process that was being followed was compliant with relevant South African legal prescripts and regulations of which Treasury is the custodian.

20. Having raised these concerns, Mr Fuzile asked that Ms Magubane to send a formal request for the advice or approval sought. Around 21 August 2013, the Department of Energy officials shared the draft agreement with officials at the National Treasury in order to get their inputs, specifically on the proposed tax exemption. However, when the detail of the agreement was reviewed, the National Treasury's concerns extended far beyond just this matter. Consequently, Mr Fuzile sent a detailed letter to Ms Magubane 13 October 2013 setting out all the issues, which included highlighting the requirement that the Department of Energy must adhere to the provisions of the Constitution, PFMA, Treasury Regulations, PPPFA, Broad Based Black Economic Empowerment (BBBEE) Act and Electricity Regulation Act when undertaking any procurement. Moreover, the importance of ensuring a proper public consultation process was underlined.

21. According to Mr Fuzile, from records that later emerged, it appears that the Minister of Energy went on to conclude the agreement with Russia despite the serious concerns raised.

The meeting with the President and the advisor

22. Mr Fuzile's then refers to events related to a meeting with the President. According to Mr Fuzile, one Friday during the second half of 2013 he received a call from Mr Dondo Mogajane. who was Mr Gordhan's Chief of Staff at the time, or Mr Gordhan to go to the then President's residence. Mr Gordhan and Mr Fuzile arrived at about the same time, as did Mr Senti Thobejane, who later introduced himself as advisor to the Minister of Energy and the President on energy matters. Mr Gordhan started to ask Mr Thobejane whether he knew why they were all there. The latter explained that he thought it was about nuclear procurement. That led to a conversation on the subject. The essence of that discussion was about:

    22.1 The fact that SA had technical capacity to operate nuclear reactors as reflected in the good record of Koeberg.

    22.2 The appropriateness of nuclear as a technology for SA in light of our country's rich endowment with uranium.

    22.3 The new generation nuclear reactors, and which country is the world leader in that kind of technology.

23. Mr Thobejane also explained the approach to procurement that was being contemplated by the Department of Energy which would entail a two stage process: 1. Stage one would be about deciding

which countries would compete to supply reactors and that South Africa would sign bilateral agreements with those countries; and 2. Stage two would entail the evaluation of competing bids from the countries selected in the first stage.

24. According to Mr Fuzile he and Mr Gordhan had some reservations about the procurement approach that was contemplated and they signalled these concerns and the need to be meticulous in designing the process for procuring something as big as nuclear reactors.

25. When the President arrived, Mr Gordhan advised him that they had been there for some time and had discussed aspects of nuclear technology. The President retorted that he had wanted just that because the process had to move forward with urgency. Mr Gordhan then went on to make the following points:

    25.1 That if SA were to proceed with nuclear it would have to follow every rule in the book: Section 217 of the Constitution and all relevant laws and regulations governing procurement. He went on to caution that failure to follow due process would "... turn the arms deal problems into a Sunday school picnic"; and

    25.2 That Mr Thobejane and Mr Fuzile should exchange numbers so that they – and other relevant officials from Treasury and the Department of Energy – could meet soon to go through the nuclear procurement process in detail.

The Technical Task Team on Nuclear Procurement and the meeting of 8 December 2015

26. Mr Fuzile's statement then referred to the events following the establishment of a National Nuclear Energy Executive Coordinating Committee (NNEECC) in November 2011. The NNEECC was initially chaired by Deputy President Motlanthe. Later the Committee was converted into a sub-committee of Cabinet and President Zuma took over the chairing of the reconstituted Committee.

27. The NNEECC was supported by the Nuclear Energy Technical Committee (NETC). The technical committee had sub-committees whose composition depended on the work they were assigned and the relevance of this work to each department. National Treasury chaired a committee that dealt with finance and procurement matters, which had the Department of Public Enterprises (DPE) as the Deputy Chair. The Constitution and the PFMA together with its regulations prescribe a central role for National Treasury in these areas.

28. In December 2013, the Department of Energy submitted a draft feasibility study for the nuclear programme to the National Treasury for review. Following a review by the responsible officials, they informed Mr Fuzile that this did not constitute a proper, fully-fledged feasibility study, which still needed to be undertaken, and that amongst other aspects, the procurement strategy still needed to be clarified.

29. In June 2015, the Department of Energy presented Cabinet with a proposal to procure 9.6GW of nuclear energy. Given Eskom's inability to fund the programme, it was proposed that the South African Nuclear Energy Corporation (NECSA) replace Eskom as the implementing agent and the Department of Energy take responsibility for the procurement. Cabinet approved that NECSA become the implementing agent.

30. Although National Treasury was aware that nuclear procurement was being contemplated by government, it had not had prior sight of the memorandum on nuclear procurement. So, there had been no detailed work done by Treasury to estimate the affordability of the project and how it would be funded. This is in spite of the stipulated requirement that all Cabinet memoranda must have a section titled "Financial Implications". Under this heading Cabinet memoranda ought to state the cost of implementing what they are proposing and how the cost would be financed.

31. Consequently, Cabinet required that the Department of Energy and Treasury should undertake detailed work to estimate the cost of 9.6GW nuclear build, assess whether South Africa could afford it and how it could be funded.

32. Around mid-July 2015, Minister Nene returned from Ufa, Russia. and gave Mr Fuzile a report of what had transpired there between him, his colleague Ministers and President Zuma. It became clear that National Treasury needed to detail their concerns regarding the financial and fiscal feasibility of the nuclear programme more clearly.

33. Accordingly, Mr Fuzile asked Mr Dondo Mogajane (who headed the Public Finance Division which deals with the allocation of funding among national departments) to be the lead person for the discussion and Mr Michael Sachs (who headed the Budget Office which is responsible for settling the overall fiscal framework) to support him.

34. In September 2105, the technical team prepared a presentation to put before the two Ministers and to take to the sub-committee and ultimately Cabinet. The key aspects were the following:

    34.1 Given the very high upfront cost of nuclear (estimated to be between R576 billion to R1 trillion), the weak fiscal position of government, it was abundantly clear that SA could not afford 9.6GW worth of nuclear reactors at one go.

    34.2 If South Africa were going to go ahead with nuclear, National Treasury should instead recommend a phased approach to procurement whereby only 2.4GW would be procured in the first phase and that no public commitment should be made to procure 9.6GW because such a public pronouncement could be misconstrued to suggest that the country was about to buy something it could not afford.

    34.3 That construction should only begin once the fiscal position of the sovereign showed improvement, through the stabilisation of the national debt.

    34.4 That Cabinet needed to decide which entity would be the procurer and operator of the nuclear reactors.

    34.5 That a detailed procurement process/approach that was consistent with the Constitution and all relevant laws and regulations should be agreed upon upfront and all relevant documentation developed.

    34.6 The team also identified a number of risks that could hamper nuclear procurement.

35. While the Department of Energy colleagues had started the negotiations firmly believing that SA should make an upfront commitment to procure 9.6GW, in the end, National Treasury believed that they had come to accept the logic of Treasury's recommendation.

36. From that point onwards, things went quiet on nuclear for about two and half months until December 2015. On Monday 7 December 2015 Mr Nene, Mr Mogajane, Mr Sachs and Mr Fuzile went to brief President Zuma on national departmental allocations for the 2016 MTEF. The budget did not make any provision for nuclear build except for an allocation of R200 million to fund the technical work that was necessary to prepare for nuclear procurement.

37. A meeting of the Energy Security Cabinet Sub-committee that was chaired by President Zuma was scheduled to take place in the afternoon of 8 December 2015 at the President's official residence in Pretoria. The Department of Energy led with a presentation of what they claimed to be a joint Energy and Treasury recommendation to the meeting. This was not true. According to Mr Fuzile.

38. After the Department of Energy had finished the presentation, Mr Nene pointed out that the assumptions in relation to the exchange rate were very optimistic. It was presented as R10.00 to the dollar when in fact the exchange rate at the time was R14.57 to the dollar. He also pointed out that the concerns expressed by Treasury had not been included in the presentation. He then looked to Mr Fuzile to provide further input.

39. Mr Fuzile indicated that National Treasury's job was to advise, and members of the executive have the authority to decide. They can take the advice, modify it or ignore it. Before Mr Fuzile could say anything further. the Ministers across the table lamented that he was wasting the time of the meeting and that a decision had already been made.

40. President Zuma directed that Mr Fuzile should be allowed to respond to the questions Cabinet had previously asked. Mr Fuzile summarised his comments as follows:

    40.1 He pointed out that National Treasury was disappointed that what was presented by the Department of Energy was not exactly what they had discussed and agreed.

    40.2 In particular, he highlighted the following discrepancies:

        40.2.1 First, the modelling National Treasury had done led them to the firm conclusion that SA could not afford 9.6GW

        40.2.2 Second, while the cost could not be known with absolute certainty before financial close (that is, before a contract had been signed with a supplier), Mr Fuzile pointed out that the presentation had grossly understated the cost of nuclear by about 40%

        40.2.3 Third, informed by the above considerations, National Treasury had proposed that nuclear procurement should be undertaken in a phased manner, only committing to 2.4GW at a time; and

        40.2.4 Fourth, National Treasury had recommendations about how procurement would best be run to mitigate the risk of litigation.

41. At that point the President turned toward Mr Fuzile and commented inter alia that "in other countries of the world Finance Ministers don't tell the President that there is no money. Their job is to find the money, so that what has been decided can be implemented, but alas this was not the approach of Finance Ministers in South Africa".

42. The meeting resolved to take the recommendation of the 9.6GW as presented by the Department of Energy to Cabinet the following day.

After the removal of Minister Nene

43. Mr Fuzile's statement to the Commission then deal with events after the removal of Minister Nene. During the course of 2015 a number of engagements took place with the Department of Energy (DOE) regarding the process for procuring the nuclear programme, which culminated in the Chief Procurement Officer (CPO) writing to the DOE setting out National Treasury's view on the proposed approach.

44. The DOE intended to undertake a government-to-government procurement via a two-stage approach: prequalification of bidders followed by a competitive closed bidding process. This implies that competition would be among the pre-selected bidders. According to the DOE, the prequalification was being done through vender parade workshops and the signing of intergovernmental agreements.

45. However, this approach was not in line with the principles of Section 217 of the Constitution, which requires a state institution to procure goods or services using a system that is fair, equitable, transparent, competitive, and cost-effective.

46. During 2016, a number of engagements took place between the DoE, the National Treasury and the CPO's office. In addition, two legal opinions were obtained. After initial resistance from the DoE, the Department shifted its approach towards an open competitive bidding process. Nevertheless, there were still concerns raised, which had not been addressed. These were:

    46.1 The legal competency and basis for the DOE to carry out the procurement on behalf of other SOEs that were to be implementing agents was not properly established.

    46.2 The DOE's procurement strategy lacked specificity around the requirement of localisation.

47. Using the funding that had been allocated in the 2015 MTBPS, the DOE had appointed advisors to assist them in developing a Request for Proposals (RFP). Although the advisors as well as National Treasury highlighted numerous gaps and weaknesses in the RFP documentation that the DOE had developed, it appeared determined to proceed regardless.

48. The engagements with the DOE came to an end, when in November 2016, Cabinet approved that Eskom be the owner, operator and procurer of nuclear energy. Shortly afterwards, the DOE gazetted a Section 34(1) determination providing for the procurement of 9.6GW of nuclear power by Eskom. Eskom indicated that they intended to issue the RFP. This was stymied by the legal challenge launched by Earthlife Africa, on which the courts eventually ruled in their favour, setting aside the determinations and intergovernmental agreements which had been entered into, as they were found to be unlawful and unconstitutional.

49. Mr Fuzile made the following conclusions with regard to the nuclear procurement process in his statement to Cabinet:

    49.1 It was the biggest ever financial commitment that the SA government was about to make, with an estimated cost of around R1 trillion. Yet there was a rush to sign the contract with the potential supplier even before SA had determined how to pay for it. Had it proceeded, nuclear would have led to excessive increases in electricity process for all users and would have further elevated the cost structure of the SA economy and eroded the competiveness of SA firms.

    49.2 The process had serious flaws which risked causing several government institutions and persons working for it to make an irrational and illegal decision with very serious consequences for their reputations.

    49.3 Even when there was a genuine effort to follow proper and due process, deliberate derailment and manipulation of the process was brought to bear.

    49.4 National Treasury's efforts were in vain, and the nuclear programme was adopted the next day at the last Cabinet meeting of the year. Coincidentally it was also the day that Mr Nene was fired.

The Engen-PetroSA deal

50. Mr Fuzile's statement then turned to the Engen-Petro SA deal. From about 2012, the Department of Energy had been exploring the possibility of having PetroSA acquire a substantial share or 100% of Engen. The rationale was that this would be in the strategic interest of SA. Engen was owned by a Malaysian company called Petronas.

51. As some of the correspondence between the Ministers of Finance and Energy show, this potential transaction had been a subject of discussion during a visit by former President Zuma to Malaysia during 2013. The processes pertaining to the transaction appear to have gathered some momentum following that visit.

52. During the first quarter of 2014, National Treasury received an application for a guarantee amounting to R13.4 billion from the Department of Energy to enable PetroSA to raise money to pay for an acquisition of 100% of the shares in Engen. The structure of the transactions was as follows:

    52.1 PetroSA was to acquire 100% of the Engen shares for a total enterprise value of R18.67 billion

    52.2 Petronas had accepted PetroSA's offer subject to a letter of guarantee being provided for 100% of the offer price and a fully committed funding plan being in place prior to executive definitive transaction agreements by 31 March 2014. This date was later extended to 18 April 2014

    52.3 A government guarantee of R13.42 billion was requested to cover the full purchase consideration, less PetroSA's equity contribution. It was envisaged that this guarantee would step down as the funding was secured. Should the envisaged funding not be secured, Government would remain liable for the shortfall. This would allow PetroSA to fulfil the condition set by Petronas

    52.4 PetroSA had identified SONANGOL as a potential equity partner which would acquire a 49% shareholding in a joint venture company that would hold 100% of the shares in Engen. The amount that SONANGOL was to contribute would be determined after a due diligence had been completed; and

    52.5 At the time PetroSA had not yet secured any of the funding.

53. According to Mr Fuzile, some of the concerning matters about the proposed acquisition were that:

    53.1 PetroSA's balance sheet was relatively small with revenue stream neither buoyant not large enough to enable it to pay for Engen.

    53.2 From the correspondence received there was no evidence that a due diligence exercise had been done to allow PetroSA to ascertain the status of the business they were about to acquire.

    53.3 There had been a significant increase in the offers made by PetroSA to acquire the business from R17.38 billion to R18.67 billion, which was not economically justifiable. None of these offers was underpinned by a robust valuation based on a due diligence process.

    53.4 There was no support for PetroSA's ambitions to become a National Oil Company in the National Development Plan (NDP) or the Industrial Policy Action Plan.

    53.5 PetroSA asserted that there was a risk that the independent oil companies would divest from the market thereby creating a need for government to invest in order to ensure security of supply. However, the retail market was well serviced by existing, privately owned petroleum companies and there was little indication that they intended to divest.

54. On 31 March 2014, several officials of National Treasury and the Minister Gordhan joined colleagues from SARS to prepare for the press conference on the revenue collected for the financial year ending that day.

55. Minister Gordhan called Mr Fuzile aside and advised him that he had had a telephone conversation with former President Zuma about the Engen-PetroSA transaction. Mr Zuma was enquiring about the progress with the guarantee application lodged by Minister Martins. They repeated National Treasury's views about the transaction: that it would not be judicious to proceed with in the face of the risks National Treasury had identified.

56. A delegation comprising representatives from the CEF and PetroSA, including Mr Senti Thobejane, advisor to Minister Martins, Mr Tseliso Maqubela, the responsible DDG at the Department of Energy, Mr Sizwe Mncwango, the CEO of CEF and Ms Nosizwe Nokwe-Macamo, the CEO of PetroSA, met National Treasury on 7 April 2014 to explain the rationale for the deal and how it would be funded. The Treasury was represented at the meeting by Mr Thuto Shomang, who was the DDG responsible for Asset and Liability Management, Ms Avril Halstead who was responsible for overseeing the SOEs among others, and Mr Fuzile.

57. Some of the documentation that the delegation led by the Department of Energy brought included:

    57.1 Several letters mainly from international banks that were signalling willingness to fund the transaction subject to certain conditions. Contrary to the delegation's assertions, these did not construe an irrevocable commitment to fund the transaction.

    57.2 A letter from SONANGOL of Angola confirming that it would buy the 49% share as described above, subject to a due diligence being done.

58. With all of the above, National Treasury was not convinced that the deal was workable. It appeared extremely risky, and they communicated the same to Minister Gordhan.

59. Subsequent to that, several meetings and discussions took place between officials of Treasury and those of the Department of Energy to further examine the contemplated transaction in greater detail. Following these meetings, Minister Gordhan wrote to Minister Martins approving the guarantee to the total amount of R9.5 billion with several conditions intended to safeguard the national revenue fund and the interests of SA.

60. Just like the nuclear deal, this transaction reflects:

    60.1 The lack of due care when dealing with matters involving substantial sums of state funds and exposing the state to potentially huge fiscal risks.

60.2 A cavalier attitude to due process. Why was a transaction that ought to begin with a thorough and proper due diligence taken to the point of a near financial closure without a due diligence being undertaken?

60.3 The pressure brought to bear on Minister Gordhan (and possibly Minister Martins) to provide the guarantee was inappropriate, especially at a time when there was going to be a new Cabinet constituted after the elections on 7 May 2014, less than a fortnight after the guarantee was issued.

Matters relating to South African Airways

61. Mr Fuzile's statement then turned to the events during his tenure as DG of Treasury where he helped successive Ministers deal with issues related to SAA.

62. Mr Fuzile assisted the Ministers in evaluating the various applications from SAA in terms of section 54 (2) of the PFMA. National Treasury would undertake the analysis required to assess, amongst other things, the ability of SAA to honour its obligations as they pertain to transactions. This became increasingly important as the guarantee exposure to SAA was rising and any failure by the airline to meet its own obligations would have triggered a cross-default on the Arline's other obligations and a call on the government guarantees. It would also have had wider implications for the entire government by triggering some kind of "contagion" for other SOEs and government itself, including pushing up borrowing costs, making it more difficult to secure funding, etc.

63. National Treasury's monitoring of SAA intensified further after the executive authority (shareholder) responsibility was transferred from the Minister of Public Enterprise to the Minister of Finance through a Presidential minute of gazette on 19 December 2014 ostensibly because the business was experiencing financial challenges and needed to be under a department that better understood finance.

64. The assignment of SAA to the Minister of Finance meant that the Treasury was responsible for approving everything for which the airline needed shareholder approval. Two matters warrant special mention: 1. the application for the leasing of Airbus aircrafts; and 2. the appointment of the SAA board.

The application for the leasing of the Airbus aircrafts

65. In July 2015 SAA applied to the then Minister of Finance Mr Nene for approval to enter into operating leases on five A330 aircrafts instead of purchasing ten A320 aircraft. The aircraft purchase related to a contract concluded in 2002 and which, in the intervening period, had resulted in the purchase price becoming extremely onerous: having acquired the aircraft, SAA would have immediately had to write off an amount in the order of R1 billion because the purchase price far exceeded the market value of the aircraft. Treasury evaluated the deal and found it to be beneficial to the airline. The Minister duly approved the transaction.

66. On 29 September 2014, the Minister received a letter from the chairperson of SAA, Ms Dudu Myeni, seeking approval to pull out of the original deal and to enter into a new deal for a sale and lease-back of the aircraft through a local supplier.

67. The only explanation Mr Fuzile remembers was that this would prevent foreign exchange from flowing out of SA, which did not make sense at all: the local lessor would still have needed to purchase or lease the aircraft that were supplied to SAA, which would have resulted in a foreign currency outflow from the country.

68. The Minister decided not to approve the proposed amendment. If Airbus walked away from the swap transaction, then SAA would have been forced to pay the outstanding pre-delivery payments – something they were not in a position to do. This would have triggered a default by the airline on its government guaranteed obligations, requiring that government immediately repay the debt on SAA's behalf. Almost immediately after the Minister declined the amendment, he was removed on 9 December 2015.

69. For a very short time Mr Des van Rooyen was the Minister of Finance, but he too was removed and replaced by Minister Pravin Gordhan on 13 December 2015. On his reappointment Mr Gordhan had to take over from where Mr Nene had left. He decided to allow SAA one more opportunity to demonstrate the benefit of the alternative deal they had been proposing. Airbus had reluctantly agreed to allow additional time for consideration of the deal, but a decision had to be made by 21 December 2015.

70. On Wednesday 16 December, a group from National Treasury (including Mr Ismail Momoniat, Ms Avril Halstead and Mr Fuzile) met a team from SAA including the then acting CEO, Mr Musa Zwane, and the Acting CFO, Ms Phumzeka Nhantsi, to discuss the Airbus matter. After a detailed comparison of the two options that SAA had and taking due regard of the possibility that Airbus could have reverted to the original transaction to the disadvantage of SAA and SA, they agreed that the new deal had too many unknowns and was thus inappropriate.

71. On around 21 December 2015, Mr Fuzile received a call from Minister Gordhan. He told Mr Fuzile that he had received a call from then President Mr Zuma earlier asking him about the Airbus deal. Mr Gordhan and Mr Fuzile reflected that people were trying everything to push through something that did not make financial/business sense.

72. Around the same time there had been a threat that one member of the board (Ms Yakhe Kwinana) had resigned because Treasury was not agreeing to the deal.

The appointment of the Board of SAA

73. In October 2014, the Minister of Public Enterprises appointed what was intended to be an interim SAA board comprising of four non-executives.

74. The non-executive board members were Ms Dudu Myeni, the chairperson, Ms Yakhe Kwinana who was chairing the Audit Committee, Dr Tambi (an international aviation expert) and Mr Anthony Dixon. Mr Dixon resigned in November 2015. Treasury was concerned about the board being fully capacitated to execute its fiduciary duties.

75. When SAA was transferred to Treasury the board's term was due to expire in March 2015. One of the immediate tasks Treasury set out to do was to assist Minister Nene to appoint a full and competent board. This task proved very hard to execute. Treasury was agreeing with the Minister that unless the new board members were respected; with impeccable credentials it was going to be very hard to raise funding for SAA even with government guarantees. Treasury also emphasised that the lenders had lost all confidence in the remaining four and later three non-executive members of the board. Most credit facilities of SA were granted in anticipation and almost on condition that a new board would be appointed.

76. However, Mr Fuzile's understanding from Minister Nene was that the President was determined that Ms Myeni should continue to serve on the board.

77. A Cabinet Memorandum was to be tabled by the Minister Nene in Cabinet on 8 December 2015. In the Cabinet Memorandum, a new board for SAA was proposed which did not include Ms Myeni or any of the existing board members. Immediately after the Cabinet meeting where this proposal was to have been discussed Mr Nene was removed.

78. Minister Gordhan had to pick up from where Minister Nene had left the process. He had one or more discussions with the President on the matter of the SAA board. On one of those occasions he returned with what was a very firm indication that President Zuma was not going to agree to remove Ms Myeni from the board of SAA. The Minister Gordhan then instructed Mr Fuzile to liaise with Ms Lakhela Kaunda to compile a list of names from which a board could be constituted.

79. A series of meetings took place involving Mr Mogajane, Ms Kaunda and Mr Fuzile where various proposals of names for the SAA Board were made by both National Treasury and the Presidency. In the Cabinet Memorandum they recommended that the new board members be appointed for a three-year period, subject to annual review. However, in Ms Myeni's case, she had already served on

the SAA board for seven years at that point; so, serving for a further three years would have resulted in her exceeding the nine-year threshold stipulated in the King Code of Corporate Governance. On this basis, Treasury motivated that her appointment be limited to only two years. The Board was appointed on 2 September 2016, with a clear decision from Cabinet that Ms Myeni would only serve one year on the board.

The social security grant contract

80. Another issue dealt with in Mr Fuzile's statement is the social security grant payment contract, which had been a subject of litigation over many years. It culminated in a number of court judgments, including one by the Constitutional Court in 2014 which declared the contract invalid.

81. At about the end of November, beginning December, 2016, the then Deputy Minister of Finance Mr Jonas and later the Minister of Finance Mr Gordhan alerted Mr Fuzile to what he understood to be a looming crisis; namely, that there was no firm arrangement made to take over the payment of social security grants when the invalidity of the contract resumed on 1 April 2017.

82. Mr Fuzile understand that this might have been brought to their attention by Mr Zane Dangor who was either DG of the Department of Social Development (DSD) or Advisor Minister Bathabile Dlamini herself. Mr Fuzile set up a meeting with Mr Dangor and the Deputy Governor of the Central Bank Mr Francois Groepe. From the Treasury's side, Mr Fuzile included Mr Dondo Mogajane (DOG: Public Finance) and Mr Momoniat (DDG: Tax and Financial Sector Policy) in the meeting. One if the options that had appeal was the option of getting most beneficiaries paid directly through banks rather than via an agent or a service provider. This option had appeal for two key reasons:

    82.1 About 60% or so of the recipients of grants had accounts with one of the banks.

    82.2 It also seemed highly feasible to negotiate a reasonable uniform fee or a special dispensation for SASSA card holders with the banks to enable the payment of grants through the national payment system (and the SARB was open to requests aimed at the enabling this).

83. There was always the very difficult part which related to the cash payments to people who do not have any account with any bank.

84. Treasury was clear that the final decision rested with relevant persons at SASSA.

85. Not very long after the meeting, the Minister Gordhan received a letter from Minister Dlamini which suggested by Treasury in what was the business of her portfolio.

86. The key areas of disagreement between National Treasury and Social Development related to the following:

    86.1 The appointment of a "committee of experts" separate from SASSA administration in a way that was subsequently found to be irregular

    86.2 The recommendations arising from this committee were very expensive and problematic, seemed to involve SASSA taking on the functions of banks, and did not seem feasible to implement by the time the CPS contract ended as legally required

    86.3 The reluctance to accept a significant role for the banking industry in the payment model despite the central role of the National Payment System in making payments

    86.4 The reluctance to seriously consider alternate practical payment options to take over from CPS which had been developed jointly with Treasury

    86.5 Criticism that the OCPO was finding SASSA procurement processes irregular

    86.6 Failure by SASSA to take sufficient practical steps to put a new payment system in place led by default to the extension of the contract with CPS; and

    86.7 The absence of a Board of SASSA and weaknesses in the SASSA Act which made it substantially dependent on the Minister was a key underlying governance problem.

87. At the beginning of 2017, three months before the expiry of the CPS contract's validity, there was no alternative in place to take over payment of social security grants. A real crisis was looming.

88. SASSA wrote to Treasury requesting approval to deviate from procurement processes and to extend the "soon to be invalid" contract with CPS. Treasury explained that it did not have the power/authority to override a Constitutional Court decision that rendered the contract invalid and had suspended its invalidity until March 2017. Treasury advised them to approach the Court and make a plea to extend the contract.

89. As the 31 March drew closer there was panic in government. Minister Gordhan and Mr Fuzile were under immense pressure to grant the exemption to SASSA to extend the contract with CPS for a further year. They made it clear that they would not act illegally and outside the powers and the authority of their positions. On 28 February 2017 SASSA instituted an urgent application with the Constitutional Court for an extension.

90. When asked by a journalist what would happen if grants were not paid after the 31 March 2017, then President Zuma said the journalist should watch what would happen to the persons who were supposed to ensure that grants were paid.

91. Needless to say, the Constitutional Court reluctantly extended the contract on the same terms and grants were paid. It was around the same time that Mr Gordhan and Mr Jonas were removed from their positions.

The closure of the Gupta bank accounts

92. In April 2016, Oakbay Investments (Pty) Ltd, controlled at that time by the Gupta family, announced that its bank accounts had been closed. In a letter dated 17 April 2016, the CEO of Oakbay Investments, Mr Nazeem Howa, wrote to the Minister Gordhan stating that his only intention in his letters was "to hearing from you about any possible assistance you are able to offer".

93. The Minister and Mr Fuzile met with Mr Howa and Ms Ronica Ragavan (who he introduced as the CFO) on 24 May 2016 at National Treasury. Mr Fuzile pointed out to him that banks operate in a highly regulated environment, and a range of factors (including money laundering) could give rise to a bank's decision to close an account. Treasury pointed out that there are legal impediments to any registered bank discussing client-related matters with the Minister of Finance or any third-party, and that the Minister of Finance "cannot act in any way that undermines the regulatory authorities".

94. It became clear to Mr Fuzile that Oakbay (and the Gupta family) were afraid to go to Court as they did not want to be cross-examined on their suspicious transactions, and instead preferred to lobby the ruling party and the Presidency to force the banks to open their accounts.

95. It was clear to Mr Fuzile after the President set up the inter-Ministerial Committee (IMC) that the process was calculated to produce one outcome: the reinstatement of banking relationships for the Gupta family and their business. This disregarded the fact that the banks were enforcing the law. As Treasury pointed out to Mr Howa, the right place to ventilate his concerns were the courts of law. Indeed, the matter ended up there.

The Denel-VR laser deal

96. According to Mr Fuzile, another example which demonstrates the flouting of rules and manipulation of processes was where Denel (the 100% state owned arms manufacturer) entered into an arrangement with VR Laser Asia to form Denel Asia.

97. In October 2015, the National Treasury (through the Minister of Finance) received correspondence from the Denel Board Chairman, Mr Mantsha, which was couched as a pre-notification of the intention of forming a partnership between Denel and VR Laser Asia to form Denel Asia.

98. In December 2015, around the time of Minister Nene's dismissal and his replacement with Mr van Rooyen, the Chairman of Denel submitted a formal application for the approval of Denel Asia deal.

Toward the end of January, Treasury was surprised to learn via the media that Denel had formed Denel Asia without obtaining the requisite approval and the conditions of the guarantee. Subsequently:

98.1 A series of meetings were held between Denel officials and officials of the National Treasury. The meetings did not yield any positive outcome as they appeared determined to prove that they had complied with legal requirements and that Treasury was wrong.

98.2 Letters were also exchanged where National Treasury set out in detail the legal advice that it had received by way of explaining its position.

98.3 There were also some public spatswhich included an unprecedented attack by the Chairperson of Denel on the Minister of Finance.

MR JONAS'S MEETING WITH MR TONY GUPTA

99. Mr Mcebisi Hubert Jonas testified as follows regarding the circumstances surrounding an alleged bribe offered by a member of the Gupta family to him on 23 October 2015. Mr Jonas was appointed as Deputy Minister of Finance by President Jacob Zuma on 26 May 2014. Mr Nhlanhla Nene was appointed the Minister of Finance at the same time. Mr Jonas occupied the position of Deputy Minister of Finance until 31 March 2017 when he was dismissed together with Mr Pravin Gordhan. Mr Nene's term of office as Minister of Finance under President Zuma ended abruptly on 9 December 2015 under circumstances which caused much economic chaos in the country and reverberated throughout many parts of the world. Mr Nene's dismissal and the circumstances surrounding it are well known.

100. As at October 2015 Mr Jonas and Mr Fana Hlongwane had been friends for many years. Mr Fana Hlongwane was also a friend to Mr Duduzane Zuma (Mr D Zuma), one of President Zuma's sons.

101. Mr Jonas testified that on or about 27 or 28 August 2015 he received a call from Mr Hlongwane who told him that Mr D Zuma wanted to invite him to a certain awards ceremony. Mr Jonas met with Mr Hlongwane sometime in October 2015. Mr Jonas testified that on this occasion Mr Hlongwane told him that Mr D Zuma wanted to meet him. During that conversation, Mr Hlongwane told him that the Guptas were important to him. Mr Jonas testified that he told Mr Hlongwane that he would not like to be associated with the Guptas. Mr Jonas told the Commission that, nevertheless, he asked Mr Hlongwane to give him Mr D Zuma's number.

102. Mr Jonas said that on 17 October 2015 he and Mr D Zuma had their first conversation. Mr Jonas said that during that conversation Mr D Zuma invited him to the South African of the Year Awards hosted by ANN7 which was to be held on 18 October 2015. ANN7 was a television station that was owned or controlled by the Guptas. Mr Jonas testified that he informed Mr D Zuma that he would not be able to attend the function.

103. According to Mr Jonas, he and Mr D Zuma had further communication with each other on 19 October 2015. Mr Jonas testified that Mr D Zuma called him "about arranging a meeting". He told Mr D Zuma that he would be in Johannesburg later that week and that they could meet then.

104. Mr Jonas says that on Friday 23 October 2015 he received a call from Mr D Zuma and in that conversation, he told Mr D Zuma that he was going to be attending a meeting in Rosebank and they could meet briefly later in the afternoon before he flew out to Port Elizabeth. Mr Jonas testified that they then agreed to meet at the Hyatt Hotel in Rosebank.

105. Mr Jonas testified that when Mr D Zuma arrived at the Hyatt Hotel for their meeting, the two had a brief discussion, but Mr D Zuma "appeared quite nervous and spoke in very vague terms". Mr D Zuma said that the place was crowded and that he had important matters to discuss but that he wanted other people to join the discussion and that he wanted to drive to a more private place.

106. Mr Jonas and Mr D Zuma drove in Mr D Zuma's motor car to the Gupta residence in Saxonwold. Mr Hlongwane arrived at the same time as Mr Jonas and Mr D Zuma at the Gupta residence. Mr Jonas said that he, Mr D Zuma and Mr Hlongwane went into a lounge where they sat down and started

chatting. Mr Jonas said that the three of them had not spoken for very long when one of the Gupta brothers walked into the room and sat down. Mr Jonas had not met any of the Gupta brothers before that day.

107. In his affidavit of August 2018 submitted to this Commission Mr Jonas said that it was Mr Ajay Gupta who was in that meeting but said that he could not exclude the possibility that it was Mr Rajesh Gupta. Mr Rajesh Gupta was the only Gupta brother who would have attended the meeting with Mr Jonas on 23 October 2015 if on that day there was a meeting attended by a Gupta brother, Mr Jonas, Mr D Zuma and Mr Hlongwane.

108. Mr Jonas related the discussion thus: Mr Gupta opened the conversation by saying that "we know you" and that he had been informed that Mr Jonas was being blackmailed by Mr Hlongwane. Mr Jonas responded by telling him that that was not true. Mr Gupta went on to say that they had been gathering intelligence on Mr Jonas and those closest to him. Mr Jonas said that Mr Gupta then said that, as far as he was concerned "this meeting never happened" and, if Mr Jonas were ever one day to suggest that that meeting ever took place, they would destroy his political career.

109. Mr Jonas also pointed out that Mr Gupta went on to suggest that he (Mr Jonas) was part of a faction or process within the ANC which sought to undermine the then President of the ANC, Mr Jacob Zuma. Mr Jonas said that at this stage he interjected and disputed that view and pointed out that he was nothing more or less than a part of the ANC and that his activities in the ANC and his work in Government had nothing to do with Mr Gupta.

110. Mr Jonas testified that he then asked Mr Gupta directly what the purpose of the meeting was. Mr Gupta, according to Mr Jonas, went on to say that the "old man" seemed to like him (i.e., Mr Jonas) and that they had called Mr Jonas to "check [him] out" and see "whether you can work with us". Mr Jonas told the Commission that Mr Gupta then told him that President Zuma was going to fire Mr Nene because he (i.e., Mr Nene) would not work with them (i.e., the Gupta family). Mr Jonas testified that Mr Gupta told him that "you must understand that we are in control of everything" and that "the old man will do anything we tell him to do". Mr Jonas said that Mr Gupta then told him that "the old man" intended appointing him as the Minister of Finance. Mr Jonas testified that he was "shocked and angered by this statement" and he told Mr Gupta that he was not interested in becoming the Minister of Finance.

111. Mr Jonas told the Commission that instead Mr Gupta emphatically said that Mr Jonas had to become the Minister of Finance because they wanted this. Mr Gupta told Mr Jonas that, if he worked with them, he would become very rich. Mr Gupta then told him that he could immediately offer him R600 million. He then pointed at Mr D Zuma and said that they had made him a billionaire and that he had bought a house in Dubai.

112. Mr Jonas stated that the Gupta brother went on to say that they worked closely with a number of people, including Ms Lynn Brown and Mr Brian Molefe and that, as a result of this, those people were protected. Mr Jonas went on to say that the Gupta brother said nobody would touch Mr Brian Molefe and he (i.e., Mr Jonas) would be safe if he agreed to work with the Guptas. Mr Jonas told the Commission that at that stage he said that he was going to leave and stood up to leave. He said that he was not interested in being the Minister of Finance.

113. Mr Jonas testified that Mr Gupta said that they had determined that the National Treasury was a stumbling block for their growth and that they wanted to "clean up Treasury".

114. Mr Jonas testified that the Gupta brother told him that when he was the Minister of Finance he would have to remove the then DG, Mr Lungisa Fuzile, the Head of Tax and Financial Sector Policy, Mr Ismail Momoniat, DDG, Mr Andrew Donaldson and the then Chief Procurement Officer, Mr Kenneth Brown from the National Treasury. Mr Jonas also said that Mr Gupta told him that they (i.e., the Guptas) would provide him with replacements for all the people he wanted to be removed and they would provide Mr Jonas with the necessary support including advisors.

115. Mr Jonas testified that he told Mr Gupta that he was under pressure in terms of time and encouraged Mr Gupta to set out "precisely what they did as that would enable him to take an informed decision".

He testified that he did this "as a provocation to seek to draw [Mr Gupta] out in the context of the unfolding state capture phenomenon that we were, at that point in time, trying to make sense of and to determine who was involved".

116. Mr Jonas told the Commission that Mr Gupta said that they were serious about offering him the R600 million and it would be deposited into an account of his choice or that they could open an account for Mr Jonas and he could "stash it in Dubai". Mr Jonas said that Mr Gupta then said that, to show that they were serious, he could "give [Mr Jonas] R600 000 now" and he asked Mr Jonas: "Do you have a bag or can I give you something to put it in". Mr Jonas said at this stage Mr Gupta seemed to want to show him the cash. Mr Jonas told Mr Gupta that he did not want money and that he had thought that Mr Gupta was going to tell him what it was that they were doing.

117. Mr Jonas testified that he then told Mr Gupta that he was in a rush to catch his plane but would be returning from the Eastern Cape on Sunday the following week and Mr Gupta could provide him with a list of what the Guptas did. Mr Gupta then told Mr D Zuma to make arrangements for Mr Jonas to come back to the Gupta residence the following Tuesday and that Mr D Zuma should tell Mr Jonas to bring a bag. Mr Jonas testified that at the end of the meeting Mr Gupta repeated his statement that they had information on him and that, if he suggested that the meeting had occurred, they would "kill" him. Mr Jonas was then driven to the airport.

118. Mr Jonas said that, due to the sensitive and threatening nature of what had transpired at the meeting, and because of the uncertainty of the events that were playing themselves out on nationally, he decided that he would discuss what had occurred with people he could trust. Later that day, Mr Jonas contacted Mr Nene and advised him that he had something serious to talk to him about. He stated that he also spoke to Mr Pravin Gordhan and asked if he could see him to seek his advice and guidance.

119. Mr Jonas testified that on Sunday 25 October he met with Mr Gordhan at the latter's official residence in Pretoria. Mr Gordhan confirmed in his testimony that they had met on Sunday 25 October 2015 at his home in Pretoria.

120. In the statement Mr Gordhan did not say that Mr Jonas told him that he had had a meeting at the Gupta residence and a member of the Gupta family had offered him the position of Minister of Finance if he would work with them and had offered him R600 million. Nor did Mr Gordhan say that Mr Jonas told him that a member of the Gupta family had said to him that if he worked with the Gupta family as Minister of Finance he would have to get rid of certain officials within National Treasury. Mr Gordhan also did not state that Mr Jonas told him that the Gupta family member told him that Mr Nene would be removed from the position of Minister of Finance.

121. In his statement of August 2018 Mr Jonas said that, given that Mr Gordhan's wife was present, he decided to provide Mr Gordhan with a high-level outline of what had happened. He also testified that he told Mr Gordhan that he thought that he should submit his letter of resignation the following day. Mr Jonas mentioned in his statement that Mr Gordhan suggested that he should not resign at that stage.

122. In his statement of 1 October 2018 and his oral evidence Mr Nene confirmed that on Sunday 25 October 2015 he and Mr Jonas agreed to meet on Monday, 26 October 2015 and that they did meet in the morning at National Treasury.

123. Mr Jonas testified that in the meeting he briefed Mr Nene as to what had happened at the Saxonwold meeting of 23 October 2015, including that he had been told in clear terms that he (Mr Nene) was going to be removed from office.

124. Mr Jonas testified that Mr Nene responded to this by saying that maybe he should resign. Mr Jonas said that, given the advice of Mr Gordhan he should not resign and they could "fight on" if only to hold the line for the finance department.

125. In his affidavit and evidence before the Commission, Mr Nene said that he heard for the first time that he would be removed from office when he met with Mr Jonas on the morning of 26 October 2015.

Mr Nene revealed that Mr Jonas told him about the offer made to him at the Saxonwold meeting, including the amounts of R600 million and R600 000 – and that he had rejected the offer. Mr Nene testified that Mr Jonas informed him that the Guptas were aware of an imminent Cabinet reshuffle about which there were rumours circulating in the media, which included names of certain Ministers, including Minister Nene.

126. Ms Mosilo Mothepu, former CEO of Trillian Advisory, disclosed information regarding misconduct on the part of the company, as well as its executives. The CEO of Trillian, Mr Eric Wood, and other employees allegedly had prior knowledge of the dismissal of Mr Nene as Minister of Finance and the appointment of Mr Des van Rooyen by President Zuma. Ms Mothepu testified that on 26 October 2015 Mr Wood informed her that Mr Nene would be dismissed as Minister of Finance. He informed her "that the new Minister would be more pliable, and he would approve various transactions that the old Minister was not approving", one being the Nuclear Deal.

127. Later that morning, Mr Wood sent an email to Ms Mothepu to which was attached a document which essentially outlined the initiatives that the new Minister of Finance was going to approve. There were about ten initiatives in the document as well as the potential fees that Regiments at the time was going to earn.

128. According to Ms Mothepu, Mr Tebogo Leballo, who was the financial director (more precisely CFO) of Regiments, told her a few weeks later that Mr Mohamed Bobat (then a "principal" at Regiments, reporting to Mr Wood) was going to be the new Minister's special advisor. According to Ms Mothepu, the purpose of placing Mr Bobat at the office of the new Minister of Finance was that Mr Bobat could provide Trillian with inside information on tenders, including pricing and technical specification.

129. Ms Mothepu stated that six weeks after Mr Wood had informed her that a new Minister would be appointed, Mr Van Rooyen was appointed as the new Minister of Finance.

130. There are at least four things that Mr Jonas told the Commission were said to him by Mr Gupta at the meeting of 23 October 2015 that seem to have subsequently been shown to be true. First, he said that the Gupta brother told him that President Zuma was going to fire Mr Nene as Minister of Finance. Mr Nene was fired about six weeks after the meeting. Second, Mr Jonas said that the Gupta family had made Mr D Zuma a billionaire. Mr D Zuma did not deny that as of 23 October 2015 he had been made a billionaire by the Gupta family. Third, Mr Jonas said that the Gupta brother told him that Mr D Zuma had already bought a house in Dubai. Mr D Zuma did not deny this in his oral evidence although he had denied it in an affidavit earlier on when he applied for leave to cross-examine Mr Jonas. Mr Jonas testified that the reason that the Gupta brother gave as the reason why President Zuma was going to fire Mr Nene as Minister of Finance was that he would not work with the Guptas which would have been an illegitimate and illegal reason for President Zuma to fire Mr Nene.

131. The reason advanced by President Zuma for firing Mr Nene did not make sense. He said that Mr Nene had been performing very well as Minister of Finance, but he had decided to dismiss him because the ANC Top 6 had decided that he should be deployed to a position in the BRICS Bank that did not exist yet, had not been advertised and which he had no authority to offer to anybody on behalf of the BRICS Bank.

132. Fourth, Mr Jonas testified that at that meeting the Gupta brother told him that "the old man will do anything we tell him to do", which has played out in many instances investigated by the Commission.

133. Furthermore, Mr Jonas told the Commission that Mr Gupta had told him that one of the people with whom the Guptas were working was Minister Lynn Brown. This Commission has already found that Ms Lynn Brown was working with the Guptas.

134. One of the things that Mr Maseko testified Mr Ajay Gupta had told him is that, if there was a Minister who was not co-operative, he would call President Zuma and the latter would "sort" them "out". In his interview with the Public Protector, Mr Maseko inter alia said that, after he had told Mr Ajay Gupta that things did not work the way he (i.e., Mr Ajay Gupta) wanted them to be done, Mr Ajay Gupta said: "No that is how the system works now. If there is a Minister who is not cooperative, I tell him, he sorts them out." The reference to "him" was a reference to President Zuma. What Mr Maseko told

the Commission Mr Ajay Gupta said amounts to saying that the former President would do anything they wanted him to do.

135. It is accepted by all concerned that a meeting did take place at the Gupta residence attended by Mr Jonas. There are two disputed issues. The one is whether a Gupta brother attended that meeting. The second is what was discussed in that meeting. On the issue of what was discussed at the meeting, Mr Hlongwane and Mr D Zuma testified that the meeting was to discuss a rumour that Mr D Zuma had become aware that Mr Jonas was going around telling people that Mr Hlongwane was blackmailing Mr Jonas. Mr Hlongwane testified that he had heard about these allegations from Mr D Zuma and he had asked Mr D Zuma to convene a meeting involving the two of them and Mr Jonas to discuss the allegations. Mr Hlongwane said that at the Gupta residence Mr Jonas denied the allegation that he was telling people that Mr Hlongwane was blackmailing him. That is the only thing that Mr Hlongwane testified Mr Jonas said at the meeting. On Mr Hlongwane's and Mr D Zuma's version it appears as if the meeting must have lasted for only a few minutes because neither Mr Hlongwane nor Mr D Zuma was able to give any other details of what was discussed during the meeting. Why would they have taken the trouble to go and hold the meeting away from the Hyatt Hotel if all it was about was whether Mr Jonas admitted or denied the allegations?

136. So, the question arises: how long did the meeting last? If Mr Hlongwane's version is true, that means that for a long time the three sat in the meeting without talking. On Mr Jonas' version the meeting lasted as long as it did which was not a matter of a few minutes – but more than an hour because he and Mr Gupta had a lengthy discussion.

137. On the probabilities Mr Jonas' version is the truth. Mr D Zuma and Mr Hlongwane's versions are rejected as a fabrication.

138. Accepting Mr Jonas' version does not mean that his evidence was perfect. It was not. When one has regard to the evidence he gave before the Public Protector, it is clear that there are certain discrepancies between what he told the Public Protector and what he told the Commission; but the discrepancies do not affect the main pillars of his version. He had no reason to lie about what was discussed at that meeting whereas Mr Duduzane Zuma and Mr Hlongwane had a reason to lie because, if they admitted Mr Jonas' evidence, they would implicate not just Mr Tony Gupta in criminal conduct but possibly themselves, too.

MINISTER NHLANHLA NENE'S RESISTANCE

The nuclear deal

139. During Mr Nene's first term as Minister of Finance, President Zuma wanted the South African government to conclude a nuclear deal with Russia. Mr Nene said that preparations for a nuclear build programme had begun in 2011 when the Cabinet approved and implemented an Integrated Resource Plan (IRP 2010) which provided for nuclear power to contribute an additional 9.6 GW to the energy mix by 2030. The first new plant was to come online in 2013.

140. Mr Nene testified that, after the Department of Energy had provided National Treasury with a draft feasibility study for the new programme and that when National Treasury reviewed the feasibility study, it became apparent to him that, regardless of the underlying policy rationale for developing nuclear energy capacity, the costs associated with the programme were astronomical.

141. Mr Nene said that the funding model for the nuclear programme was central to the determination of affordability. He said that key issues were the fiscal affordability of the funding or guarantees to secure borrowing that would be required to finance the project and the impact on the economy of the electricity tariff required to repay the debt used to finance the project.

142. On 22 September 2014 the Minister of Energy, Ms Joemat-Petterson announced that Russia and South Africa had signed an intergovernmental framework agreement. Mr Nene said that that agreement laid the foundation for nuclear programme procurement. On 10 June 2015 the Minister of

Energy tabled in Parliament five inter-governmental nuclear cooperation agreements that had been concluded with the Russian Federation, France, the People's Republic of China, the USA and South Korea for approval. On the same day the Cabinet took a decision that required the Minister of Energy, in consultation with the Minister of Finance and the NNEEC, as a matter of urgency, to present a memorandum to Cabinet that would deal with the financial implications, proposed funding model, risk mitigation, strategies for the nuclear build programme and the contributions by countries as contained in the inter-governmental agreements.

143. A BRICS Heads of State or government summit took place in Russia from the 8 - 9 July 2015. By the time of this summit the Minister of Energy and Mr Nene as Minister of Finance had not produced the memorandum that Cabinet had asked them to produce.

144. Ms Joemat-Petterson presented Mr Nene with a draft letter addressed to the Russian authorities for him to consider and sign. Mr Nene refused to sign the letter because he took the view that it would provide Russia with some form of guarantee on the nuclear programme. Ms Joemat-Petterson revised the letter and presented it to Mr Nene again. Mr Nene rejected the letter again. He did this because the financial and fiscal implications that he was concerned about remained.

145. Mr Nene testified that, as a result of his refusal to sign the letter, he was seen as the person standing in the way of the nuclear deal. He told the Commission that he was accused of insubordination, not only by President Zuma but also by some of his Cabinet colleagues. Mr Nene said that, as Minister of Finance, he was "responsible for ensuring the secure, accountable, sound, transparent, effective and efficient management of the country's public finances, sovereign debt and the economy." He pointed out that section 66 of the Public Finance Management Act provided that only the Minister of Finance had the power to enter into a transaction that would bind the National Revenue (i.e., the fiscus) to any future financial commitment.

146. This means that President Zuma expressed his dissatisfaction with Mr Nene about three months before the meeting that Mr Jonas attended at the Gupta residence on 23 October 2015 when he was told by a Gupta brother that Mr Nene was going to be fired.

147. Mr Nene testified that later he asked the DG of Treasury, together with other senior officials of Treasury, to form a joint task team with officials from the Department of Energy. Mr Nene stated that in September 2015 the joint task team provided him with its preliminary report on the fiscal and financial implications, funding model and risk mitigation for the nuclear build programme. In essence, the conclusion of the preliminary report was that, even under optimistic assumptions regarding the cost of the programme the government debt would grow exponentially. Mr Nene said that this would be "absolutely fiscally unsustainable".

148. Mr Nene told the Commission that, as a way of moderating the risks, the Treasury team recommended spreading the construction over a longer period of time, maintaining flexibility by not entering into any legally binding commitment beyond two units of nuclear power stations upfront and making 'stop-go' decisions based on an assessment of the progress in implementation, the economic environment, fiscal position and affordability. He said that the Treasury team managed to convince the officials from the Department of Energy that this was the way to go.

SAA

149. Another matter that may have been a factor in President Zuma's decision to remove Mr Nene is how Mr Nene had handled SAA's requests for guarantees and how he handled the Airbus contract.

150. Mr Nene testified that on 21 November 2014 the Minister of Public Enterprises at the time wrote to him requesting Mr Nene's concurrence for the issuance of a R6,488 billion perpetual going concern guarantee in favour of SAA. Mr Nene testified that at that time SAA's cash flow forecast showed that it would run out of cash by mid-January 2015 unless additional guarantees were provided. He said that this would have triggered a default by SAA on its guaranteed debt, requiring government to meet the obligations on SAA's behalf as well as negative economic impact and loss of jobs.

151. Mr Nene testified that on 22 December 2014 he issued the guarantee in favour of SAA in his new capacity as the Executive Authority for SAA. He said he did so after taking into account the recommendations of the Fiscal and Liability Committee of National Treasury. He said that in August 2015 – that is about nine months after Mr Nene had issued the guarantee – SAA once again applied for an additional guarantee of R5 billion in order for the airline to be able to finalise its financial statements.

152. Mr Nene stated that the Fiscal and Liability Committee recommended that he should not approve the issuance of that guarantee because of concerns that there was no financial case to support the issuance of the guarantee and that the governance challenges at SAA did not provide a basis for confidence that the airline would turn around within the projected timeframes.

153. Mr Nene testified that against the above background he wrote to Ms Dudu Myeni, the chairperson of the SAA Board, requiring that certain outstanding matters be finalised by 18 September. Concluding, those matters would have assisted in improving the financial performance of SAA. One of the matters was the conclusion of the Airbus contract. Mr Nene did not receive any response from Ms Myeni by 18 September 2015. Accordingly, on 28 September 2015 Mr Nene wrote again to Ms Dudu Myeni requiring that the outstanding matters be finalised the following day. Mr Nene was to table SAA's financial statements in Parliament by 30 September as prescribed by the PFMA. On 29 September 2015, Ms Myeni responded to Mr Nene's letter.

154. In 2002, SAA and Airbus had concluded a contract in terms of which SAA would purchase fifteen A320 aircrafts (A320s) from Airbus which was later (in 2008) amended to twenty. Ten had already been delivered between 2013 and 2015. The other ten were to be delivered between 2015 and 2017. However, SAA had subsequently concluded a new contract with Airbus with regard to the remaining ten in terms of which the agreement to purchase the remaining ten was cancelled and SAA would enter into operating leases of five long haul A330-300 carriers from Airbus. Airbus was going to refund SAA an amount of R1,3 billion which was made up of pre-delivery payments that SAA had already made in respect of the ten A320s. This refund would reduce the financial pressure on SAA's tight liquidity position. On 30 July 2015 Mr Nene had approved this agreement between Airbus and SAA.

155. Mr Nene testified that, after he had approved the operating lease in respect of the remaining ten A320s, Ms Myeni changed her position. She now proposed in effect that the operating lease transaction should not be proceeded with but that, instead, SAA should purchase the A330s from Airbus and then enter into a sale and lease-back agreement of the aircrafts with a local leasing company. Mr Nene responded to Ms Myeni's letter on 30 September 2015. Mr Nene testified that in that letter he told Ms Myeni that he would need an assurance that any such amendment would leave SAA in a better financial position than would otherwise have been the case if the swap transaction that he had approved had been proceeded with. He also testified that he told Ms Myeni in the letter that steps would have to be taken to mitigate any risks that could arise from the original swap transaction not being proceeded with.

156. Mr Nene also told Ms Myeni that, if there was a material amendment to the swap transaction he had approved, SAA would need to resubmit an application for approval in terms of section 54(2) of the PFMA. He required that the rationale for reconsidering the application as well as a comprehensive business case and the financial implication of the alternatives that were being considered be provided for his consideration.

157. Mr Nene testified that in October 2015 he became aware that Airbus was threatening to walk away from the swap transaction because of delays in its finalisation. He testified that if Airbus walked away from that transaction, it would have reverted to the original purchase agreement because that agreement was still in place. Mr Nene said that the consequence would have been that SAA would have had to pay the pre-delivery payments for which funds had not been secured. He said that SAA would also have had to recognise impediments that would negatively impact the financial performance of the airline – something that would not happen if SAA continued with the swap transaction.

158. Mr Nene testified that, following repeated entreaties, SAA submitted a "business case" on 9 November 2015. He said that, after reviewing the "business case", he wrote to Ms Myeni on 12 November 2015 indicating that the business case provided little in the way of concrete information that would be

required to make an informed decision and requested additional details.

159. Mr Nene stated that during November 2015 it became evident, in the light of the National Treasury's review of the sale and lease-back proposal of SAA, that SAA had not demonstrated that there was certainty that the proposed amendments to the transaction structure would leave SAA in a better financial position than would have been the case under the swap transaction structure. In fact, there was even a significant risk that it would leave SAA in a materially worse off financial position. There was also a high probability of SAA defaulting on its government guaranteed debt which would have had severe consequences for the fiscus and the economy.

160. On 2 December 2015, Mr Nene decided not to approve the sale and lease-back proposal sought by SAA. Mr Nene publicly announced his decision in a statement on 3 December 2015.

The Khartoum route

161. Mr Nene testified that, by way of a letter dated 17 June 2015, Ms Myeni asked him to consider the outcome of a business case for SAA to open a new route from Johannesburg to Khartoum via Entebbe, Uganda. He said Ms Myeni's letter made it clear that President Zuma knew about the idea. He stated that the proposal was made in circumstances where the executive management of SAA did not agree with the proposal. Mr Nene decided not to support the proposal because a review of the letter from Ms Myeni and the business case showed that, if the proposal was accepted, SAA would incur losses in the first two years of operating such a route which was money that SAA simply did not have.

162. Mr Nene stated that his decision not to approve the Khartoum route and "other similar decisions frustrated Ms Myeni and President Zuma. He told the Commission that he suspected that this and other decisions he made contributed to President Zuma's decision to fire him.

Mr Nene's meeting with President Zuma and Ms Myeni

163. Mr Nene testified that he was extremely concerned by the leadership instability at SAA. He said that his concern increased from August 2015 when several senior executives were either replaced or resigned citing a breakdown of trust with the board.

164. Mr Nene testified that some time in November 2015 he was called to a meeting with former President Zuma and Ms Myeni. Mr Nene testified that he told President Zuma and Ms Myeni that he was of the view that Ms Myeni should be removed from the Board. He pointed out that under Ms Myeni's leadership the airline had persistently been in crisis and reckless action by the Board had repeatedly exacerbated rather than averted the crisis. Mr Nene told President Zuma and Ms Myeni that on a number of occasions this had meant that there was a material threat that the airline would default on its government guaranteed obligations which would have had negative consequences for the fiscus and the economy.

President Zuma's meeting with selected cabinet ministers on the nuclear deal On 8 December 2015

165. A meeting of all the Cabinet members whose portfolios were relevant to the nuclear deal was called by President Zuma for 15h00 on 8 December 2015. Mr Nene said that he and the Treasury officials were later advised that the meeting would take place at 16h00. He testified that, when he and Treasury officials arrived for the meeting just before 16h00, they found that a consultation had already taken place between President Zuma and Mr Nene's Cabinet colleagues, including Minister David Mahlobo, Minister Maite Nkoana-Mashabane, Minister Lyn Brown and Minister Tina Joemat-Petterson from which Mr Nene and his officials had been excluded.

166. During the part of the meeting attended by Mr Nene, officials from the Department of Energy presented the proposed nuclear programme to the President and other Ministers. Mr Nene stated that the presentation did not reflect the input from Treasury regarding the concerns with the feasibility

of the programme and the possible escalated approach. He said that the Energy Department's assumptions were extremely optimistic with respect to the assumed construction cost and exchange rate implications.

167. Mr Nene testified that, after the presentation, President Zuma asked him whether he had anything to say in response. Mr Nene testified that he pointed out that the concerns of the National Treasury were not included in the presentation. He then suggested that the officials from the Department of Energy and from Treasury should finalise the presentation for the Cabinet meeting the next day.

168. Mr Nene testified that Mr Fuzile expressed serious concerns, at length, regarding the cost implications of the proposal and the failure by the Department of Energy to phase the construction over a longer period of time. Mr Nene testified the meeting of 8 December 2015 ended with a decision to proceed with the nuclear programme proposal by the Department of Energy despite the contrary views of National Treasury.

The cabinet meeting of 9 December 2015

169. The Cabinet minutes revealed that in short, and subject to some alterations, the Cabinet approved a proposal from the Department of Energy regarding the nuclear deal. Nothing was mentioned about a phased approach, or any compliance with the PFMA or a feasibility study. Cabinet decided that the Department of Energy should issue a RFP for the nuclear build programme, with the final funding model to be informed by the responses received.

170. The situation immediately prior to Mr Nene's removal from office was that the proposal was largely in the hands of the Department of Energy, and that to an extent and consistent with a pattern, that the concerns of Treasury had been ignored. In addition, notwithstanding Treasury's concerns, it was proposed to Mr Nene that he should enter into a binding agreement involving Russian supplies for the nuclear deal.

171. Mr Nene testified that on his way home from the Cabinet meeting he received a call from the President's office informing him that the President wanted to see him. He went back to the Union Buildings. He testified that in their brief meeting, President Zuma said to him that the ANC Top 6 had decided to deploy him to the Africa Regional Centre of the BRICS New Development Bank.

172. Mr Nene said that his response was to ask President Zuma as from when that decision would be effective, and President Zuma said that he was going to be making the announcement shortly. On his way home, Mr Nene sent Mr Fuzile a message which said: "the axe has fallen".

The impact of Mr Nene's dismissal on the financial markets

173. Mr Gordhan testified that the announcement of Mr Nene's dismissal resulted in a widespread public outcry. Civil society, organised labour and organised business groups criticised the decision, and demanded urgent corrective action by President Zuma.

174. According to Mr Gordhan, the devastating impact of the unexpected announcement on the South African economy is estimated to be approximately R500 billion. As commentators and market analysts had described, over two days the market value of the country's biggest financial and property shares fell by R290 billion. This figure excluded the remainder of the equities market that also was hard hit by the decision. South African bonds lost 12% of their capital value (R216 billion). The Rand depreciated sharply from R13.40 to R15.40/USD overnight.

175. Mr Mogajane testified that "the National Treasury had calculated, recognising all variables and noting pre-conditions that the so-called 'Nene Gate' cost 1.1% of GDP by the end of 2017, 148 000 jobs lost, and a reduction of R378bn JSE market capitalisation."

The true reasons for Mr Nene's dismissal

176. Mr Nene was dismissed in the early evening of Wednesday 9 December 2015 after a cabinet meeting. According to President Zuma the reasons were as follows:

    176.1 Mr Nene was removed as Minister of Finance because he was to be deployed to the position of the Head of Africa Regional Centre of the New Development Bank/BRICS Bank, which was to be based in Johannesburg.

    176.2 Nominations for the position referred to above had to be sent urgently to Shanghai and that is why Mr Nene had to be removed urgently from the position of Minister of Finance.

    176.3 Mr Nene had performed excellently as Minister of Finance.

    176.4 Mr Nene was the South African Government's candidate for the position of Head: Africa Regional Centre of the BRICS Bank.

    176.5 President Zuma and his National Executive fully supported Mr Nene's candidature for the position and they knew full well that he would excel and make the nation proud in that position.

177. Mr Nene stated in his affidavit dated 10 October 2018 and in his oral evidence that President Zuma's reasons for removing him were a "fabrication" because "the President had no authority to offer me a position or to deploy me to a position in BRICS Bank, nor could such an appointment be considered at that stage at least without due process, which also involves other member countries." Mr Nene went on to testify that no offer was ever made to him concerning the position of Head: Africa Regional Centre.

178. Mr Riaz "Mo" Shaik, who was GCEO of the BRICS Bank based in Johannesburg at the time of giving evidence before the Commission, gave evidence that corroborated Mr Nene's evidence that there were due processes that had to be followed before appointments were made at the BRICS Bank. Mr Shaik's evidence also reflected that President Zuma could not have had any power to deploy Mr Nene to the position in question.

179. In December 2015, Mr Gwede Mantashe, the Secretary-General of the ANC, Dr Zweli Mkhize, the Treasurer-General of the ANC, and Ms Jessie Duarte, the Deputy Secretary-General of the ANC, deposed to affidavits stating that at no stage did President Zuma ever discuss with them nor did the Top 6 ever agree that Mr Nene be removed as Minister of Finance and be deployed to the position of Head: Africa Regional Centre. President Ramaphosa also stated in his affidavit he furnished to the Commission that the Top 6 officials of the ANC never held a discussion to the effect that Minister Nhlanhla Nene should be removed from the position of Minister of Finance and be redeployed to the BRICS Bank.

180. The reason given by President Zuma for Mr Nene's dismissal must be rejected. The reasons why President Zuma dismissed Minister Nene is that he was not co-operating or working with the Guptas and he was resisting President Zuma's and Ms Dudu Myeni's attempts to get National Treasury to approve transactions or projects or measures that were not in the interests of the country.

APPOINTMENT OF MR DES VAN ROOYEN

181. On 9 December 2015 after President Zuma announced the removal of Mr Nene Mr Fuzile received a call from Mr Enoch Godongwana who said: "You are now going to get a Gupta Minister who will arrive with advisors".

182. Prior to his appointment as Minister of Finance, in his affidavit furnished to the Commission, Mr Van Rooyen said that on 9 December 2015 he met with President Zuma in Pretoria. President Zuma expressed an intention to appoint Mr van Rooyen to the position of Minister of Finance. On the same day former President Zuma announced the removal of Minister Nene from the position of Minister of Finance and Mr van Rooyen's appointment to that position. Mr Van Rooyen added that:

Prior to meeting the President, I had met no other individual who conveyed to me any information involving the decision to appoint me to the position of Minister of Finance. To be clear, I met no one from the Gupta family in which my potential or actual appointment to the position of the Minister of Finance was discussed. The allegation that I was appointed by the Guptas, or at their instance, is simply false.

183. In her "State of Capture" report the Public Protector wrote that her investigation revealed that Mr Des van Rooyen could be placed in the Saxonwold area on at least seven occasions, including on the day before he was appointed as the Minister of Finance. In his evidence before the Commission, Mr van Rooyen admitted that he visited the Gupta residence in Saxonwold on several occasions before his appointment, including on 8 December 2015. In fact, Mr van Rooyen testified that there were other meetings there that "went beyond just what is recorded in the Public Protector report."

184. Mr Van Rooyen maintained that he and Mr Tony Gupta had never discussed his appointment as Minister. What is interesting is that Mr Tony Gupta was the Gupta brother with whom Mr Jonas had had a meeting (together with Mr Duduzane Zuma and Mr Fana Hlongwane) at the Gupta residence on Friday 23 October 2015. He is the Gupta brother who had offered Mr Jonas the position of Minister of Finance and a bribe if he agreed to work with the Guptas.

185. Quite clearly, the discussion between Mr Jonas and Mr Tony Gupta on 23 October 2015 reveals that Mr Tony Gupta was looking for a person who would replace Mr Nene as Minister of Finance and, since Mr Jonas rejected his offer, it is logical to think that he would move on and look for someone else. The objective facts are that:

    185.1 On 23 October 2015 Mr Tony Gupta met with Mr Jonas, Mr Duduzane Zuma and Mr Fana Hlongwane and told Mr Jonas that Mr Nhlanhla Nene was going to be fired as Minister of Finance and asked him to agree to be Minister of Finance and to work with the Guptas which Mr Jonas rejected

    185.2 Mr Nhlanhla Nene was fired by President Zuma as Minister of Finance six weeks later and Mr Van Rooyen was appointed as Mr Nene's replacement; and

    185.3 Mr Van Rooyen visited the Gupta residence several times, including on 8 December 2015 which was one day before Mr Nene's dismissal and Mr Van Rooyen's appointment as Minister of Finance.

186. Given the above facts there is no way that it can be said that Mr Tony Gupta would not have discussed Mr Van Rooyen's appointment as Minister of Finance with him. It would make no sense. The probabilities are overwhelming that Mr Tony Gupta spoke to Mr Van Rooyen about his possible appointment as Minister of Finance.

Appointment of Mr van Rooyen's "Advisor" and "Chief of Staff"

187. By 11 December 2015 Mr Van Rooyen had decided that he would have Mr Mohamed Bobat as his advisor and Mr Whitley as his Chief of Staff. Mr Van Rooyen testified that his first encounter with Mr Bobat was in 2009. He said that he met Mr Bobat in a restaurant and they exchanged business cards.

188. According to Mr Fuzile, until a Minister is sworn in, s/he is a Minister-designate and cannot legally exercise the powers associated with the job. It goes without saying that no one can be an advisor to a Minister who is yet to take up his or her role formally.

189. Mr Fuzile also referred to the Dispensation for the Appointment and Remuneration of Special Advisors which directs that the Executive Authority must ensure that Special Advisors obtain the necessary security clearance before appointment. Any deviation from this must be submitted to the President. Ministers first have to consult with the department to determine whether there are funds to appoint an advisor. According to Mr Fuzile, failure to go through this step risks creating unauthorised expenditure.

190. It is clear that none of the above steps were taken into account when Mr Bobat was "appointed" as the advisor to Mr van Rooyen.

191. At the time of his appointment as advisor to Mr van Rooyen, Mr Bobat held a senior position at Regiments, which was headed by Mr Eric Wood. In his evidence, Mr van Rooyen said that he was unaware that Mr Bobat worked for Regiments until he met him at the Union Buildings and Mr Bobat brought this fact to his attention. If this is true (which is unlikely), then not only did Mr van Rooyen have no CV of Mr Bobat at the time of his decision to appoint him, but he had not even bothered to establish beforehand where Mr Bobat worked. Mr van Rooyen may or may not have known that Mr Bobat was employed at Regiments, but it is Mr Tony Gupta or one of the Gupta brothers who must have arranged for him to appoint Mr Bobat.

192. Mr van Rooyen testified that Mr Whitley was first introduced to him by Mr Malcolm Mabaso, who at the time was support staff to Minister Mosebenzi Zwane in a breakfast meeting that was held at Melrose Arch on 11 December 2015. Mr. Mabaso informed Mr Van Rooyen that Mr Whitley was looking for work and could be an asset in government if there were opportunities. Mr Van Rooyen testified that, after having a brief interview with Mr Whitley and on the strength of his qualifications and experience as set out in his CV he was content to offer Mr Whitley the position of Chief of Staff.

193. In his evidence before the Commission, Mr van Rooyen stated that he made the appointments of Mr Bobat and Mr Whitley because he was entitled to do so as the executive authority of a national Department in terms of section 12A of the Public Service Act 103 of 1994. Mr van Rooyen further testified that the legal and policy position governing the appointment of special advisors and Chief of Staff did not require the Minister to personally or intimately know the people that they were appointing.

194. Mr Whitley was informally appointed as Mr van Rooyen's Chief of Staff on 10 December 2015. Mr Fuzile, as the accounting officer, had not signed any papers appointing Mr Bobat to the position of advisor.

195. Although it needs to be determined whether or not Mr Van Rooyen's advisors were properly appointed or whether proper procedures were followed in their appointment, it emerged during Mr Fuzile's evidence that the real issue was not this but whether it was proper or lawful for them to start performing duties before they were properly appointed. The answer is, of course simple. It was not lawful or proper that Mr Van Rooyen's advisors started performing duties or started working before they were properly appointed. In fact, as it happened, the evidence heard by the Commission revealed that they unlawfully sent out of National Treasury some documents that were confidential. In the circumstances Mr Van Royeen's "advisors" were not supposed to start working until they were properly appointed.

Engagement by Mr van Rooyen with National Treasury after his appointment

196. Mr Fuzile testified that, on the morning of 10 December 2015, he observed that the Rand was taking a serious pounding and the stock market was shedding value at a pace he had not seen in a long time. Mr Fuzile said he called Mr van Rooyen and encouraged him to consider doing two things. The first was to come to the department early so that he could meet Mr Nene and they could address staff together so that the out-going Minister could say his goodbyes to the staff at National Treasury and the Minister-designate could introduce himself and essentially calm the staff down. The second was for Mr van Rooyen to seriously consider issuing a media statement as soon as he could because it was evident that the markets were reacting adversely to the untimely removal of Mr Nene.

197. Mr Fuzile testified that Mr van Rooyen turned down the suggestions and he sternly warned Mr Fuzile that the Treasury officials' tendency to issue statements had to come to an end. Put succinctly, Mr Fuzile was perturbed that the new Minister seemed oblivious to the near catastrophic consequences that had been triggered by the developments of the previous day and appeared not to appreciate that he, among others, had to do something to stave this off.

198. Mr Fuzile testified that at the swearing-in ceremony of the new Minister, the first person he found standing at the door was a person who introduced himself as Mr Bobat, the "advisor to Mr van Rooyen", whose appointment he had not approved. According to Mr Fuzile, Mr Bobat wasted no time

in issuing instructions to him. Mr Bobat told Mr Fuzile to draft a statement that Mr van Rooyen would release after being sworn in. It was at this point that Mr Fuzile realised that Mr Bobat did not care about protocol and civilities and he appeared determined to assert some "authority" over him.

199. Mr Bobat also told the Communications Head, Ms Macanda, that from then onwards all communication would go through him. Mr Fuzile stated in his evidence that the communication policy of the Department did not provide for an advisor issuing instructions to officials on matters of communication.

200. Mr Fuzile said that Mr Bobat felt such a sense of authority and empowerment that he could issue instructions to anyone without first checking with the person on whose behalf he purported to act. Mr Fuzile said that Mr Bobat gave him an impression of being a law unto himself.

201. On 11 December 2015, Mr van Rooyen had an introductory meeting with the staff at National Treasury. According to Mr Fuzile, at this meeting, Mr van Rooyen stated that the officials had to work through his advisors. Thus, for the first time, to Mr Fuzile's knowledge, National Treasury officials would not have direct access to the Minister.

202. As already stated, Mr Bobat was employed by Regiments Capital and Trillian. In the brief time that Mr Bobat was at National Treasury, he shared classified information with people outside Government such as Mr Eric Wood.

203. No Minister would behave like this, arriving with advisors they did not know. The position is simply that the Guptas wanted Mr Van Rooyen to appoint Mr Bobat as his advisor. Mr Van Rooyen – himself having got the position of Minister through the Guptas or with their blessing – had to appoint advisors chosen by them. There is simply no doubt that Mr Van Rooyen was a Gupta Minister.

THE REAPPOINTMENT OF MR GORDHAN AS MINISTER OF FINANCE

204. In the evening of Sunday, 13 December 2015, Mr Gordhan met with President Zuma at Mahlamba Ndlopfu. At the meeting, President Zuma said that he believed that Mr van Rooyen was suitable for the Finance Minister position, but others held a different view and believed that, when markets re-opened on Monday, 14 December 2015, if Mr van Rooyen was still the Minister of Finance, the destruction already experienced on the previous Thursday and Friday would continue or could possibly even worsen. He indicated that he wanted Mr Gordhan to take up the position of Minister of Finance in order to calm the markets.

205. Mr Gordhan responded that there were other qualified individuals that President Zuma could consider for the post, such as Messrs Mcebisi Jonas and Jabu Moleketi. President Zuma indicated that neither of these suggestions was acceptable to him and he thought that Mr Gordhan should accept the position.

206. Mr Gordhan accepted his re-appointment as Minister of Finance. In agreeing to serve again as Minister of Finance, Mr Gordhan indicated to President Zuma that there were three matters at that time which concerned him. The three matters were:

    206.1 The ongoing dire financial predicament of SAA and, specifically, the role of the Chair of the Board, Ms Dudu Myeni

    206.2 The proposed nuclear procurement deal; and

    206.3 Mr Tom Moyane's role at SARS as its Commissioner.

207. Mr Gordhan then assisted with the drafting of a media statement that was issued by the Presidency later that evening, which announced his re-appointment to the position of Minister of Finance.

MR GORDHAN'S CONTINUED RESISTANCE

208. Mr Gordhan dealt with a number of incidents or events which he said appeared aimed at forcing him to resign as Minister of Finance so that another Minister could be appointed who would allow the National Treasury to be captured.

209. Mr Gordhan saw this "set of events, combined with what is set out below"," as the beginning of what appeared to be a campaign to force" him "to resign as Minister of Finance and continue the efforts to capture the National Treasury thereafter". Mr Gordhan believed that his "re-appointment had thwarted these efforts" and that "Mr Nene was removed from the national executive for the same reason – to obtain full control of the Treasury."

210. Most of the evidence that was given by Mr Gordhan in regard to what he called the campaign aimed at forcing him to resign so that another Minister of Finance would be appointed was not disputed except to a limited extent by Mr Tom Moyane, dealt with in another Volume.

211. In his statement of 11 October 2018 to the Commission, Mr Gordhan said that shortly before his budget speech in Parliament, Major General Mthandazo Berning Ntlemeza, head of the Directorate for Priority Crime Investigation, known as the "Hawks", requested and attended a brief meeting at the Treasury. Gen Ntlemeza advised Mr Gordhan that two investigations were ongoing: into SAfA and SARS. No details as to the substance, scope or progress of either investigation was shared with Mr Gordhan by Gen Ntlemeza in this short conversation.

212. Mr Gordhan added in his statement that he believed

> that the capture of the Hawks under Gen Ntlemeza was central to the state capture project. This capture enabled the Hawks to be abused for political objectives through malicious law enforcement action and without regard for the impact that abuse of power would have on the integrity of the country, the economy or personally in the individuals, such as myself, who were targeted in this orchestrated campaign.

213. On or about 19 February 2016, in the week before the Budget speech, an envelope was hand-delivered to the Treasury at Gen Ntlemeza's insistence. This envelope contained 27 questions addressed to Mr Gordhan from the Hawks and demanding that they be answered by 2 March 2016. The questions related to the High Risk Investigation Unit within SARS, formed years earlier. Charges against Mr Godhan relating to that unit had been filed by Mr Moyane on 15 May 2015.

214. Mr Gordhan "arranged to visit the then President late that day to present the correspondence and questions from the Hawks to him and to ask him whether he was aware of, and agreed with, this law enforcement action against me." During that meeting, Mr Gordhan objected strongly about this persecution and asked former President Zuma whether political activists like him must now prepare to be eliminated during the democratic era even though they had survived the oppression of the Security Police in the apartheid era. In response, President Zuma merely flipped through the pages of the letter. He said he would discuss the matter with the then Minister of Police, Mr Nkosinathi Nhleko. Mr Gordhan received no further information from the former President in this regard subsequent to this meeting.

215. However, on Monday 22 February 2016, Mr Gordhan was requested to attend a meeting with Mr Gwede Mantashe, Ms Jessie Duarte and Mr Zweli Mkhize of the ANC. The 27 questions and this abuse of law enforcement for political objectives was discussed with them. The 27 questions were leaked to the media the day after the Budget speech. Mr Gordhan added in his statement that Minister Mahlobo and Minister Nhleko held a joint press conference on 2 March 2016, defending the investigation and the timing of the questions posed to him by the Hawks.

216. Following an extension on the deadline, Mr Gordhan answered all 27 questions and provided his responses to the Hawks.

217. In his statement Mr Gordhan referred the Commission to the contents of subsequent media reports that revealed that shareholders in Gupta-linked consultancy group Trillian, allegedly were warned in

advance that Mr Nene would be fired as Finance Minister, and that Trillian planned to exploit access to the Treasury under Mr Nene's replacement, Mr Van Rooyen. Mr Eric Wood, Trillian's Chief Executive Officer at the time, denied the allegations, and suggestions that he, Trillian and other Gupta-connected individuals had profited from the market turmoil that followed Mr Nene's removal. Evidence provided by a Trillian whistleblower to the parliamentary inquiry into Eskom established that Mr Wood may have profited thanks to his prior knowledge of the removal of Mr Nene.

218. According to Mr Gordhan, Messrs Whitley and Bobat also were reported to have been present with Mr Van Rooyen at the Gupta family compound located in Saxonwold, in the days immediately preceding his appointment as Minister of Finance. A third individual, Malcolm Mabaso (said to be associated with the Guptas through former Minister of Mineral Resources, Mr Zwane) was also present with Mr Van Rooyen, though his precise role was unclear. Mr Gordhan pointed out that media report also revealed that Whitley and Bobat shared a confidential Treasury document with Gupta associates and executives, on or about 12 December 2015, prior to Mr Van Rooyen's removal.

219. According to Mr Gordhan, another decision which may have contributed to his eventual removal as Minister of Finance in March 2017, was revealed on 21 February 2016, when the Sunday Times newspaper reported that National Treasury had cancelled the Gupta-owned The New Age newspaper's sponsorship of, and participation in, the post-Budget breakfast briefing. This event was set to take place the morning following delivery of the Budget speech in Parliament (i.e., 25 February 2016). Ultimately, the broadcast rights for the breakfast briefing were allocated to two other media institutions.

220. Mr Gordhan also noted in his statement to the Commission that, on 16 March 2016, former Deputy Minister Jonas issued a statement confirming media reports that, in October 2015, he had been offered the position of Minister of Finance to replace Mr Nene, prior to Mr Nene's removal December 2015. Former Deputy Minister Jonas stated that the offer was made at a meeting at the Gupta family's Saxonwold compound by a member of the Gupta family, accompanied by Mr Duduzane Zuma and Mr Fana Hlongwane.

221. In this regard Mr Jonas contacted Mr Gordhan on Friday, 23 October 2015, requesting a meeting. He was visited by Mr Jonas on or about Sunday, 25 October 2015, at his Pretoria home. Mr Jonas appeared extremely distraught, upset and emotional. He seemed unable or hesitant, to disclose specific detail about had caused this ("perhaps due to the presence of my wife"). Mr Jonas told him that he wanted to resign. Mr Gordhan managed to dissuade Mr Jonas from resigning, advising him that it would not be in the best interests of the country for him to leave his position.

222. Mr Gordhan noted in his statement to the Commission that 2016 was a year marked by ongoing harassment and attempted distraction by law enforcement agencies, some media houses and a persistent social media campaign of fake news and personal attacks that appeared antagonistic towards him and the work being done by Treasury. He stated that he was the target of an orchestrated campaign that appeared aimed at forcing him to resign as Minister of Finance. The role of the public relations agency Bell Pottinger was central to this orchestrated campaign.

223. Mr Gordhan added that this orchestrated campaign against him and the National Treasury caused immense stress for him, former Deputy Minister Jonas, senior officials and their families. In response, they were repeatedly advised that they should not resign and to "hang in there." The sentiment seemed to be that they should not "make it easy for them" to get rid of those who were seen as obstacles to the state capture project and the looting of public resources.

224. In his statement to the Commission, Mr Gordhan drew attention to the blatant refusal by Mr Moyane to account to him as Minister of Finance on material issues (such as the operating model of SARS). He even refused to acknowledge Mr Gordhan's authority on what may appear to be petty issues, such as submitting his applications for personal leave to the Ministry (although during Mr Nene's time as Minister they were).

225. Mr Gordhan added that Mr Moyane made serious allegations against him and continued to refuse to accept that as Minister of Finance, he was accountable and answerable to Mr Gordhan for the

performance of SARS. However, the former President did nothing to intervene in this deteriorating relationship, to facilitate adjudication of the dispute, or to resolve it in any other less formal way. It festered for many months, with Mr Moyane writing further letters about Mr Gordhan to President Zuma.

226. According to Mr Gordhan he faced further ongoing personal and institutional attacks, antagonism and an evident lack of accountability from Mr Moyane. Included here was the declaration of an inter-governmental dispute in terms of section 41 of the Inter-Governmental Relations Framework Act, 13 of 2005, by Mr Moyane at SARS against Mr Gordhan as a Minister of Finance on or about 14 April 2016.

227. Second, in or about 12 June 2016, the Minister of Social Development, Bathabile Dlamini wrote a lengthy letter to Mr Zuma seeking his intervention with regard to National Treasury's scrutiny of, and objections raised regarding the various systems for the payments of social grants and the implementation of policy by the DSD.

228. In addition, Mr Gordhan pointed out the important work that National Treasury was doing to amend the Financial Intelligence Centre Act caused acrimonious and personally insulting attacks on him and the officials of the Department from those opposed to the amendments. Most controversially, the amendments introduced additional scrutiny of the personal finances and transactions of so-called Politically Exposed Persons (and their families and associates), as well as a requirement to record the Beneficial Owners (the natural persons) of bank accounts.

229. Former President Zuma also delayed signing the amendments into law until litigation was commenced to force him to do so. No meaningful engagement occurred between the Presidency and National Treasury regarding any reservations that the former President may have had regarding the Bill. Media reports noted that he was lobbied to not sign it into law by critics and those that seemed opposed to National Treasury at the time. Eventually it was referred back to Parliament by the President in November 2016.

230. According to Mr Gordhan media outlets owned by the Gupta family (ANN7 in particular) launched several determined attacks on the FICA amendments. Commentators such as Mr Mzwanele Manyi and Mr Tshepo Kgadima of the Progressive Professionals Forum and Ms Danisa Baloyi of the Black Business Council were vocal critics of the amendments, and the provisions relating to PEPs in particular. At the Parliamentary hearings held in January 2017, these same critics objected to the Bill. Cabinet members in the Security Cluster also met with officials from National Treasury to raise their objections to the amendments as well. The Amendment Bill was eventually passed in May 2017 under Mr Gordhan's successor.

231. Mr Gordhan drew the Commission's attention to the announcement made on 11 October 2016 by the former National Director of Public Prosecutions, Adv Shaun Abrahams, that charges were to be brought against him, as well as former SARS Commissioner, Mr. Oupa Magashula, and former deputy SARS Commissioner, Mr. Ivan Pillay. The charges alleged fraud relating to Pillay's early retirement, which had been approved by Mr Gordhan and Mr Magashula in 2010. According to Mr Gordhan, subsequent media reports revealed that Adv Abrahams had met President Jacob Zuma, Mr Mahlobo, Justice Minister Michael Masutha and Social Development Minister Bathabile Dlamini at Luthuli House the day before his announcement, Adv Abrahams explained the meeting as being held to discuss student protests with ANC leaders, but, Mr Gordhan, added in his statement, it is unusual that the ministers of higher education, finance and police were not present if that was the subject of discussion.

232. Mr Gordhan pointed out in his statement to the Commission that the markets reacted to the announcement of Adv Abrahams in several ways, including: the Rand weakened by 3.9% against the US Dollar; yields on South African government bonds due rose to their highest level since 2 September 2016; the cost of insuring against non-payment of debt for five years using credit-default swaps, rose to the highest since July 2016; and banks stocks fell, wiping off almost R34 billion in value on the FTSE/JSE Africa Banks index.

233. In an about-turn days later, Adv. Abrahams announced the withdrawal of all of the charges on 31 October 2016, stating that he was then satisfied that the three accused did not have the intention to act unlawfully. This was a few days before Mr Gordhan's first scheduled court appearance. Various civil society organisations had mobilised in protest against the charges and in support of the accused. Both announcements were made amid allegations in the public domain that political motives were at play in the decisions to question and charge Mr Gordhan and his fellow accused, in what appeared to be yet another attempt to force him to resign, to create uncertainty and instability and ultimately, to enable the capture of the Treasury.

234. Another issue Mr Gordhan included in his statement to the Commission was the closure of the Gupta bank accounts. According to Mr Gordhan, in or about April 2016, Oakbay Investments (Pty) Ltd, controlled at that time by the Gupta family, announced that its bank accounts had been closed. At around the same time, Mr Nazeem Howa, the CEO of Oakbay, began to correspond with Mr Gordhan seeking his intervention to reverse these account closures. Mr Gordhan obtained legal advice that confirmed that it would be unlawful and improper for him to intervene in the private contractual relationship between a bank and its client. He conveyed this advice to Mr Howa, but he appeared undeterred and continued to request a meeting with Mr Gordhan. This meeting was held on or about 24 May 2016 in which it was explained to Oakbey the highly regulated environment in which banks operate and the requirements that they closely monitor and report on suspicious transactions in order to combat money laundering. An explanation was also given of the legal impediments to Mr Gordhan, or anyone else, intervening in the private contractual relationship between a bank and its clients. Mr Gordhan urged Mr Howa to approach the courts for relief.

235. Following a Cabinet meeting on 13 April 2016, at which Mr Gordhan was not present, a Ministerial task team was established to look into the issue of the closure of the Gupta bank account. Mr Zwane, Labour Minister Mildred Oliphant and Mr Gordhan were nominated for this task. Mr Gordhan questioned the purpose and seeming aim of the task team with his colleagues who were nominated to it. He explained the extensive global and domestic legal regulatory framework that governs the financial sector and cautioned that this framework needed to be understood and considered prior to any engagements with the banking institutions. His concerns were not addressed by the members of the task team. Mr Gordhan chose not to attend the meetings of the task team nor to participate in its actions. According to Mr Gordhan, Mr Zwane had the full backing and support of former President Zuma in pursuing the task team's objective of undermining and maligning the stance adopted by him and National Treasury to the closure of the bank accounts.

236. According to Mr Gordhan in his statement to the Commission, on or about 1 September 2016, Mr Zwane issued a media statement, purportedly on behalf of the task team announcing that it, through Cabinet, would recommend to former President Zuma that a judicial inquiry be established into the closure of the bank accounts of several Gupta companies by the major commercial banks in South Africa. This statement was effectively abandoned in the days that followed, with a statement issued by the Presidency to clarify that no such decision had been endorsed by Cabinet.

237. Mr Gordhan added in his statement that, on or around 14 October 2016, he launched a court application to seek declaratory relief regarding the limitations of his available powers to intervene in various decisions taken by several commercial banks to close the accounts held by Gupta-related firms. This application attracted further hostility towards him from supporters of the former President and the Guptas. Attached to the application was a certificate issued by the Financial Intelligence Centre certifying that it had received 72 Suspicious Transaction Reports from the various banks relating to suspicious account activity and transactions conducted using the bank accounts that had been closed.

238. Mr Gordhan's statement to the Commission then deals with the Nuclear Deal. Following Cabinet's decision on 9 December 2015 that the Department of Energy may issue the RFP for the nuclear programme, the engagements between National Treasury and the DoE during 2016 largely centred on the procurement process to be followed.

239. In June 2014, Eskom had written to the DoE indicating that the Board had decided not to provide

funding for any new build projects beyond Medupi, Kusile and Ingula power stations due to the funding constraints Eskom was facing. As a consequence, the DoE had sought Cabinet approval for the South African Nuclear Energy Corporation SOC (NECSA) to replace Eskom as the implementing agent, i.e., the institution that would own and operate the nuclear power plants, with the DoE serving as the procuring agency.

240. Despite the fact that Eskom was experiencing severe financing challenges, its then CEO, Mr Brian Molefe, indicated its willingness and commitment to participate in the nuclear build programme. In November 2016, Cabinet approved that Eskom assume responsibility for procuring, owning and operating the nuclear power stations. In December 2016, Eskom issued a watered-down and non-binding general request for information (RFI) instead of the originally intended RFP.

241. Around the same time, the NGOs Earthlife Africa and the Southern Africa Faith Communities' Environment institute launched legal proceedings against the Minister of Energy, the President and Eskom (among others) challenging the determinations in terms of Section 34 of the Electricity Regulation Act that had been made by the Minister of Energy in 2013 and 2016, and the constitutionality of the tabling by the Minister before Parliament of three intergovernmental agreements during 2015. This stalled progress on the nuclear programme.

242. Shortly after Mr Gordhan was replaced as Minister of Finance, the Cape High Court ruled that the nuclear cooperation agreements with the USA, Russia and South Korea were unconstitutional and unlawful, and that the ministerial determination for a 9.6 GW nuclear new-build in South Africa was invalid.

243. Mr Gordhan's statement then turns to his removal as Minister of Finance. According to Mr Gordhan, he, former Deputy Minister Jonas and the DG, Mr Fuzile, were in London on a business trip when, on the morning of Monday, 27 March 2017, he received an SMS from Dr Cassius Lubisi, the DG in the Presidency. The message requested that he, former Deputy Minister Jonas (who had not left South Africa yet) and Mr Fuzile return to South Africa immediately.

244. On the same day, former President Zuma reportedly informed senior leaders of the South African Communist Party (SACP) that he intended to remove Mr Gordhan and former Deputy Minister Jonas and referenced a purported "intelligence report" accusing Mr Gordhan and others of conspiring with foreign forces against him as President. Mr Gordhan flew back to South Africa that evening, arriving back on Tuesday morning, 28 March 2017.

245. Tuesday, 28 March 2017 was the day that the court application regarding the closure of the Gupta businesses' bank accounts in South Africa by several of the major banking institutions was set to commence argument in the Pretoria High Court. On the same day, Mr Fuzile and Mr Gordhan met with the former Secretary-General of the ANC, Mr Mantashe, at Luthuli House to obtain clarity about their positions. None was forthcoming. During that meeting with Mr Mantashe, he informed Mr Gordhan that former President Zuma had met with the ANC's Top 6 officials on the previous day, Monday, 27 March 2017. The same fake "intelligence report" had been presented to them, but it had been rejected by those in the meeting. Mr Mantashe then told Mr Gordhan that Mr Zuma told them that, regardless of the "intelligence report", his relationship with him had irretrievably broken down. Mr Mantashe recounted that Mr Zuma had indicated that it was unusual that the Minister, Deputy Minister and DG were all out of the country at the same time. Mr Mantashe indicated to Mr Gordhan that Mr Zuma would prefer it if he would resign, rather than him having to fire Mr Gordhan.

246. According to Mr Gordhan on Thursday, 30 March 2017 the SACP issued a media statement recording that it had been informed by Mr Zuma that Mr Gordhan was to be replaced as Minister of Finance. The statement recorded that the SACP objected to this intended reshuffle. That evening, former President Zuma announced that both Mr Gordhan and former Deputy Minister Jonas, and several others, including Ministers Hanekom and Ramatlhodi, were removed from their positions. Mr Gordhan became aware of his removal when the President made his announcement of the reshuffle, which was broadcast on television. Mr Gordhan had no contact with the former President regarding his decision to remove him as Minister of Finance.

247. According to Mr Gordhan, the global ratings agencies expressed their immediate concern at these developments. For example, on Monday, 3 April 2017, Moody's Investors Services announced that it had placed the Baa2 long-term insurer and senior unsecured bond ratings of the government of South Africa on review for downgrade, that review was said to be prompted by the "abrupt change in leadership of key government institutions" and would "allow Moody's to assess these risks and if the changes in leadership signal a weakening in the country's institutional, economic and fiscal strength". On the same day, Standard & Poor's downgraded South Africa's ratings to 'BB+' from 'BB-' and the long-term local currency rating to 'BBB-' from 'BBB' in a reflection of their "view that the divisions in the ANC-led government that have led to the changes in the executive leadership, including the finance minister, have put policy continuity at risk. This has increased the likelihood that economic growth and fiscal outcomes could suffer". On 7 April 2017, Fitch Ratings also downgraded South Africa's Long-Term Foreign- and Local-Currency Issuer Default Ratings to 'BB+' from 'BBB'. These downgrades were made in light of its view that "the cabinet reshuffle, which involved the replacement of the finance minister, Pravin Gordhan, and the deputy finance minister, Mcebisi Jonas, is likely to result in a change in the direction of economic policy."

248. Following his removal as Minister of Finance, Mr Gordhan was a member of the parliamentary Portfolio Committee on Public Enterprises that held an inquiry into state capture at various SOCs, including Eskom, Transnet, PRASA and Denel. His experience in the Portfolio Committee's inquiry into Eskom, in particular, revealed the extent of the manipulation of the Boards of the SOCs, their management, and the abuse of the contracts and procurement processes for corrupt and unlawful ends. This pillage was replicated and became prevalent in other SOEs as well. Mr Gordhan stated in his statement to the Commission that he believed

> that this hollowing out of the governance structures of SOCs was a direct consequence of the state capture project and was aimed at facilitating their plunder. One can observe how the methodology was perfected at one SOC and then replicated at others as the state capture project was rolled out.

249. Mr Gordhan returned to Cabinet on 26 February 2018 as Minister of Public Enterprises under President Cyril Ramaphosa.

250. What has been done above is to provide Mr Gordhan's evidence as he set it out in his statement or affidavit without analysis. What follows hereunder is the analysis of that evidence and other evidence in so far as it relates to Mr Gordhan's resistance to wrongdoing, his dismissal and the determination of President Zuma's reasons for Mr Gordhan's dismissal.

THE DISMISSAL OF MR GORDHAN AND MR JONAS AND MR GORDHAN'S REPLACEMENT BY MR MALUSI GIGABA

251. Mr Gordhan's evidence indicates that he was told that on either 27 or 28 March 2017 there had been a meeting of the ANC's top 6 officials and that at this meeting President Zuma had told the other officials that he intended to drop him from his Cabinet. In the affidavits provided by Mr Gwede Mantashe, Ms Jessie Duarte and Dr Zweli Mkhize to the Commission about that meeting, these officials stated that President Zuma told them that he was in possession of an intelligence report which was to the effect that Mr Gordhan and Mr Jonas were undertaking or were going to undertake the overseas trip in order to lobby international bodies against the South African government and economy.

252. The three ANC officials referred to above stated in their affidavits that President Zuma did not share the intelligence report with them. In his affidavit to this Commission President Ramaphosa said that President Zuma showed them the intelligence report on which he was relying to fire Minister Gordhan and Deputy Minister Jonas. President Zuma said that in any event, irrespective of the reliability or otherwise of the intelligence report, his relationship with Mr Gordhan had irretrievably broken down.

253. Mr Zuma fled the Commission before he could give evidence about his dismissal of Minister Gordhan and Deputy Minister Jonas and before he could be questioned on his reasons for the dismissals,

including on whether he did say to the ANC Top 6 that his relationship with Minister Gordhan had irretrievably broken down. Therefore, he has not substantiated any allegation that his relationship with Mr Gordhan had irretrievably broken down. President Zuma may well have been using that as an excuse to get rid of Minister Gordhan as Minister of Finance or as Minister so that he could appoint a Gupta associate in his place.

254. The question remains: why did President Zuma dismiss Minister Gordhan at the time he did and, in the manner in which he did?

255. In their affidavits to the Commission, Mr Gwede Mantashe, Ms Jessie Duarte and Dr Zweli Mkhize confirmed that President Zuma informed the Top 6 of the ANC that he intended to appoint Mr Brian Molefe as Mr Gordhan's replacement. These three officials said that the Top 5 rejected the idea that Mr Molefe should be appointed as Mr Gordhan's replacement and they asked Mr Zuma to reconsider the matter.

256. Ultimately President Zuma dismissed Mr Gordhan and appointed Mr Malusi Gigaba as Minister of Finance. President Zuma also dismissed Mr Jonas at the same time as Deputy Minister of Finance. A day or two after Mr Gordhan's dismissal, the then Deputy President of the ANC and of the country, Mr Ramaphosa, was interviewed by journalists and asked to comment on the dismissal of Mr Gordhan and Mr Jonas by President Zuma. President Ramaphosa told the media that President Zuma had told the officials of the ANC that he intended to remove Minister Gordhan and Deputy Minister Jonas from their positions because he had obtained an intelligence report to the effect that they were going to use their trip overseas to lobby foreign governments against the South African government. President Ramaphosa explained to the journalists that he had strongly disagreed with President Zuma on the dismissal of the Minister and Deputy Minister and had rejected the intelligence report on which President Zuma relied.

257. Mr Zuma did not place before the Commission any evidence that could have shown that, indeed, he had an authentic and credible intelligence report on which he relied to dismiss Mr Gordhan and Mr Jonas. Nevertheless, the Commission heard evidence from Dr Dintwe, who was the Inspector-General of Intelligence at the relevant time and who investigated the existence of this alleged intelligence report after he had received complaints from the Democratic Alliance (DA) and the South African Communist Party (SACP).

258. Dr Dintwe testified that President Zuma was apparently the only person who was in possession of the intelligence report. Dr Dintwe said that he made numerous requests to President Zuma for a copy of that intelligence report. He testified that, despite President Zuma promising to provide Dr Dintwe with a copy of such report, he had not done so by the time he resigned as President of South Africa on 14 February 2018 and never thereafter provided Dr Dintwe with a copy of the report.

259. The question that arises is: why would President Zuma have relied on a fake intelligence report to fire Minister Gordhan and Deputy Minister Jonas? The answer is: because he had to find a pretext to get them out of the way so that his and the Guptas' agenda, including the capture of the National Treasury, could be pursued. The Guptas were very determined to capture the National Treasury before President Zuma's second term of office expired and there was by then more or less just over a year left before the expiry of his second term. There was no time to waste. They knew, too, that he was not going to stand for the position of President of the ANC in the ANC's elective conference in December 2017.

260. The position is, therefore, that President Zuma had to rely on a fake intelligence report because he needed an excuse to get rid of Minister Gordhan and Deputy Minister Jonas. The purpose of his decision to remove these two was to pave the way for the appointment of a Minister of Finance who would cooperate with the Guptas in the corrupt agenda that they were all pursuing. In that agenda the capture of the National Treasury was central. All the evidence points to this reason and this reason alone for Mr Gordhan's and Mr Jonas' dismissal.

261. In substantiation of the conclusion in the preceding paragraph the following can be said:

261.1 President Zuma and the Guptas must have been really under pressure to have agreed that Mr

Gordhan be re-appointed as Minister of Finance to replace Mr Des Van Rooyen and must have wanted him out of that position as soon as possible.

261.2 President Zuma had intended to replace Minister Gordhan with Mr Brian Molefe who, by his own admission before the Commission, was a friend of the Guptas.

262. President Zuma was prevented by the ANC officials from appointing Mr Brian Molefe as Mr Gordhan's replacement but, when he realised that he could not appoint Mr Brian Molefe, the Guptas must have told him to appoint another friend of theirs because he then turned to Mr Malusi Gigaba and appointed him as Mr Gordhan's replacement. So, if the ANC officials thought that they would prevent President Zuma from appointing a friend of the Guptas by preventing the appointment of Mr Brian Molefe as the Minister of Finance, they were mistaken. The Guptas gave President Zuma another one of their friends to appoint, namely, Mr Malusi Gigaba and he appointed him. Although Mr Gigaba was also a Gupta associate, it does not appear that he was able to do much for the Guptas as Minister of Finance.

263. Had it not been for the fact that at the end of 2017 the ANC would have an elective conference where Mr Ramaphosa would stand as a candidate to take over from Mr Zuma, more damage could have been done to the National Treasury under Mr Gigaba than may have been done. Mr Gigaba was dropped from Cabinet and President Ramaphosa returned Mr Nhlanhla Nene to the position of Minister of Finance.

264. To summarise, President Zuma dismissed Minister Gordhan because of his resistance to wrongdoing and because he wanted to appoint a Minister of Finance who carried the blessings of the Guptas. Mr Gordhan was not his preferred choice. He was forced by circumstances to appoint him. He still wanted to please the Guptas by appointing someone that they were happy with. That is why he wanted to appoint Mr Brian Molefe as Minister of Finance. When President Zuma was prevented by the ANC's Top 5 from appointing Mr Brian Molefe as Minister of Finance, he appointed another friend of the Guptas as Minister of Finance. That was Mr Malusi Gigaba.

265. In conclusion on the topic of the attempted capture of the National Treasury it is appropriate to say that the fact that the Guptas and President Zuma failed to capture our National Treasury even after relentless attempts to do so over a long period of time is due largely to the Ministers of Finance that South Africa had during those years, namely Minister Nhlanhla Nene and Minister Pravin Gordhan, the men and women at National Treasury, including Mr Fuzile who was the Director-General ,and his team of senior officials who, in the interest of the country, put up serious resistance to President Zuma's and the Guptas' attempts. The country should be grateful to all of them.

266. Civic organisations, journalists, NGOs, the opposition political parties in Parliament and the people of South Africa in general who staged marches and demonstrations to protest against the Guptas and President Zuma's role in state capture must all be commended and the country must be grateful to all of them. Certain individuals within the ANC also made their voices heard and they played an important role as well.

267. South Africa's National Treasury nearly fell into the wrong hands, particularly during the difficult four days in December 2015 following Minister Nene's dismissal and Mr Des Van Rooyen's appointment as Minister of Finance. Mr Des Van Rooyen, Mr Bobat and Mr Whitley were already inside the country's National Treasury. Mr Bobat and Mr Whitley had begun to send National Treasury's confidential documents to the Guptas and their associates outside of National Treasury. It is almost a miracle that the National Treasury was saved from the tentacles of the Guptas.

RECOMMENDATIONS

It is recommended that the National Prosecuting Authority should give consideration to instituting criminal prosecutions against Mr Rajesh Tony Gupta for bribery/corruption arising out of his conduct in offering Mr Mcebisi Jonas millions of Rands if he agreed to be Minister of Finance and to work with the Gupta family.

EOH HOLDINGS AND THE CITY OF JOHANNESBURG

INTRODUCTION

1. EOH is a unique case. Among all the companies that have been mentioned in the proceedings of the Commission, EOH alone proactively approached the Commission to be given the opportunity to disclose publicly what wrongdoing had taken place within its ranks. It sought also to explain what it has already done, and what it proposes to do, to make reparation for such wrongdoing and to prevent similar wrongdoing occurring in future.
2. Since the appointment of Mr Stephen van Coller as CEO of EOH in September 2018, Mr van Coller and the Board of EOH have presided over a process where ENS Forensics have been appointed to conduct independent and unfettered investigations into EOH's historical involvement in irregular and corrupt procurements practices. EOH has committed itself to making the results of these investigations public and to assist regulatory and law enforcement authorities with their investigations into matters that were revealed by the ENS Forensics investigations.
3. Primary credit for the attitude taken by EOH must be given to Mr van Coller. At the time of his appointment in 2018, he was aware of adverse media reports relating to EOH. His response to these reports was to investigate whether they were substantiated. When it became clear that there was substance to several of these reports, he put in place a wide range of measures:
    3.1 To investigate the full extent of wrongdoing within the ranks of EOH
    3.2 To draw the wrongdoing to the attention of the authorities
    3.3 To engage the affected organs of state so as to reach agreement on the payment of compensation by EOH to make good the harm that they had suffered as a result of wrongdoing by EOH executives; and
    3.4 To make appointments and establish structures within EOH that would provide safeguards to prevent future repetition of the wrongs committed by individuals associated with EOH.
4. This chapter focusses only on the historical facts concerning EOH's involvement in irregular procurement practices. Before addressing these facts, it is important to emphasise that all of the cases EOH supplied ongoing assistance to the Commission in its investigations of these matters. No other company has been of greater assistance to the Commission.
5. The Commission commends EOH, Mr van Coller and the Board of EOH for taking the approach that they have taken in this regard. The Commission also emphasises the importance of distinguishing:
    5.1 On the one hand, between EOH as a company and the individuals who historically controlled EOH and engaged in corrupt and irregular procurement processes; and
    5.2 On the other hand, the need for EOH to make full reparation to affected organs of state, and the need for appropriately targeted punitive measures by the NPA and regulatory authorities.
6. EOH should not be allowed to retain the benefits of historical corrupt and irregular procurement practices. Under the leadership of Mr van Coller and its current Board, EOH does not seek to do so.
7. The following is examined:
    7.1 The recurrent themes shown by EOH's investigation into corrupt or irregular public procurement
    7.2 Two specific City of Johannesburg contracts which EOH irregularly influenced through improper payments and donations; and

7.3 The attempt by Mr Jehan Mackay to manipulate his relationship with Mr Zizi Kodwa, currently Deputy Minister of State Security who was not directly involved in government at the time, to distort public procurement practices.

THE ENVIRONMENT IN WHICH WRONGDOING WAS FACILITATED AT EOH

8. In his evidence, Mr van Coller elaborated on the general environment in which wrongdoing was allowed to thrive at EOH. He identified six broad features in this regard:

   8.1 Opaque delegations of authority (DOA) with significant responsibilities granted to a few executives

   8.2 Artificial/ inflated software licence sales

   8.3 A succession of apparent tender irregularities

   8.4 the use of politically connected "intermediaries" who are suspected to have been used as introducers and sales agents

   8.5 Payments made to subcontractors in circumstances where there was no evidence that work was done by these subcontractors; and

   8.6 Inappropriate gifting, sponsorships and donations.

9. The absence of an appropriate delegation of authority framework meant that several key executives of EOH were effectively given a free hand to take significant executive decisions without any oversight or check on their authority.

10. A recurrent feature of the irregular procurement in which EOH had been involved was the over-invoicing of public sector clients and the inflation of prices to those clients with the collusion of individuals within the relevant organs of state. To illustrate this theme, Mr van Coller referred to two Microsoft licensing deals with the Department of Defence and an SAP licensing agreement with the Department of Water Affairs. In these cases, with the collusion of individuals within the relevant organs of state, EOH was able to bypass procurement procedures of the State Information Technology Agency (SITA) and to sell directly to Departments. It then charged for more licences than it delivered at a rate per licence that was significantly higher than it would have been able to charge had it been subjected to competitive procurement processes administered by SITA.

11. Other repeated tender irregularities which Mr van Coller identified were:

    11.1 A succession of sole source public procurement contracts of which EOH was the beneficiary

    11.2 Cases where EOH employees were allowed to frame the terms of a tender and thus to tailor those terms to the advantage of EOH; and

    11.3 Cases where EOH put in bids for tenders at below cost so that it could win the tender and be appointed in the expectation that, once it was in place, it would be allowed to change the terms of its appointment and inflate the contract.

12. Another familiar theme to which Mr van Coller testified was the use of politically connected intermediaries and sub-contractors as conduits for kickbacks. EOH's public sector contracts regularly involved commission payments to "introducers", substantial payments to sub-contractors who appeared to have performed no material work on contracts and "teaming agreements" that were not linked to any particular work, but which served as the justification for multi-million Rand payments out of the proceeds of public sector contracts. EOH was able to identify R865 million that it spent on arrangements of this nature.

13. The last general theme named by Mr van Coller in relation to irregular procurement was EOH's payment of donations to the ANC, suspicious personal and organisational sponsorships and excessive entertainment amounts to influence procurement practices.

14. The evidence of Mr van Coller in relation to donations and sponsorships was amplified by that of Mr Powell. Mr Powell showed that EOH and its former executive, Mr Jehan Mackay, had paid tens of millions of rands in:

    14.1 Direct payments to individuals holding office within the ANC

    14.2 Direct donations to the ANC; and

    14.3 The payment of ANC expenses through intermediaries and "sub-contractors".

PART A: THE IMPROPER RELATIONSHIP BETWEEN EOH AND MR GEOFF MAKHUBO

15. Tactical Software Solutions Managed Services (Pty) Ltd (TSS Managed Services) is a company acquired by EOH in 2011. TSS Managed Services was renamed EOH Afrika (Pty) Ltd. Prior to the EOH acquisition, TSS Managed Services was owned by Mr Jehan Mackay and his father, Mr Danny Mackay. Mr Jehan Mackay was the Managing Director of TSS Managed Services when it was acquired by EOH and he remained in that position after the acquisition.

16. Mr Patrick Makhubedu had been employed within the TSS Group prior to the EOH acquisition in 2011. His employment was transferred to EOH on 1 March 2014. From that date, Mr Makhubedu was employed by EOH as a Business Development Executive focusing on the public sector and working closely with Mr Jehan Mackay. Mr Makhubedu had a close personal relationship with the late Mr Geoff Makhubo who became the Mayor of Johannesburg. He and Mr Makhubo were partners in several private companies with Mr Reno Neil Barry, a former Group Financial Manager at Tactical Software Solutions (Pty) Ltd, a company owned by Messrs Jehan and Danny Mackay but not acquired by EOH. Mr Barry also supplied accounting services to entities in which Mr Makhubo and Mr Makhubedu were interested.

17. Mr Makhubedu aided EOH to procure several contracts worth hundreds of millions of rands from the City of Johannesburg. Mr Makhubedu resigned from EOH on 11 March 2019, the day before he was called to an interview with ENS Forensic Services about some of the public sector contracts he had assisted EOH to procure.

18. The entities in which Mr Makhubedu, Mr Makhubo and Mr Barry had interests were:

    18.1 Molelwane Consulting CC (Molelwane), an entity owned by Mr Makhubedu and his mother. It received payments from TSS Managed Services and loans from Mfundi Mobile Networks (Pty) Ltd (Mfundi Mobile), an entity whose directors were Mr Barry and Mr Mongezi Duma, a former Tactical Software Solutions Group Financial Analyst.

    18.2 Mfundi Mobile which concluded a "teaming agreement" with the SAP Services Business Unit of EOH Mthombo (Pty) Ltd (EOH Mthombo). As shown below, this "teaming agreement" appears to have been a cover for Mfundi Mobile to make payments for the benefit of Mr Makhubo and the ANC in return for the grant of contracts to EOH by the City of Johannesburg.

    18.3 Prime Molecular Technologies (Pty) Ltd (Prime Molecular), an entity whose directors were Mr Makhubedu and Mr Barry. It apparently served as a conduit for EOH by paying R70 000 to Molelwane.

19. Prior to its acquisition by EOH, TSS Managed Services entered into a "teaming agreement" with Molelwane. The agreement appointed Mr Makhubedu as the contact person for TSS Managed Services in relation to the agreement. It had an effective date of 1 October 2009 and described a range of services that Molelwane was to provide for TSS Managed Services: business advisory services, business development services, advisory services and change management services. At the time of the conclusion of the teaming agreement, Mr Makhubo was not yet an executive of the City of Johannesburg, but he was Treasurer of the Greater Johannesburg Region of the ANC. He took office

as MMEC for Finance in the City of Johannesburg in May 2011 and occupied that position until the ANC lost control of the City after the municipal elections in August 2016.

20. In the course of 2012 EOH paid R1.35 million to Molelwane.

21. Over the period of the "teaming agreement" with Molelwane, EOH concluded the following agreements with the City of Johannesburg:

    21.1 COJ A387, a contract awarded to TSS Managed Services for ICT LAN and WAN services with a tender award value of R38.4 million and to EOH Mthombo for ICT Security Services with a tender award value of R26 million. The tender was awarded for a two-year period from December 2010 to November 2012 but was thereafter irregularly extended on several occasions.

    21.2 COJ A472, a contract awarded to EOH Mthombo for SAP Support Services. The tender was awarded for 4-year period from 2012 to February 2016 but was thereafter irregularly extended on several occasions. It appears that Mr Makhubo was involved in preventing a new SAP Support Services tender being advertised to replace COJ A472 when its term expired. In the context of the contract a range of suspect payments were made by EOH to third parties who appear to have performed no work on the contract.

22. In addition to the above contracts, the Commission heard detailed evidence in relation to two contracts in respect of which Messrs Makhubo, Makhubedu, Barry and Mackay appear to have conspired corruptly to procure the appointment of SAP by the City of Johannesburg:

    22.1 The first was a contract awarded to SAP without any competitive procurement process on the basis of an unsolicited proposal for the upgrading of the City's Network and Security Infrastructure.

    22.2 The second was the contract awarded to SAP under tender COJ A647, an upgrade contract for the period June 2016 to June 2019.

PART B: 2014 NETWORK AND SECURITY INFRASTRUCTURE UPGRADE CONTRACT

23. The detailed chronology in relation to the Network and Security Infrastructure Upgrade project is as below:

    23.1 On 16 April 2014, EOH submitted an unsolicited proposal for the upgrading of the City's Network and Security Infrastructure.

    23.2 The price in the unsolicited proposal was R106 185 395.36 inclusive of VAT. 23.3. On the same day EOH Managed Services donated R3 million to the Greater Johannesburg Region of the ANC. A letter acknowledging receipt of the donation and thanking EOH Managed Services was addressed by Mr Makhubo to Mr Makhubedu.

    23.3 On 6 August 2014, Mr Makhubo emailed Mr Makhubedu asking for a donation to cover the accommodation costs related to the Regional ANC Youth League relaunch that was due to take place that weekend. An accommodation invoice issued to the ANC for R582 100 was attached to the email of Mr Makhubedu.

    23.4 On the same day, Mr Makhubedu forwarded the email to Ms Rene Jonker who was one of the divisional finance directors within the EOH Group, who replied that she would make the payment the following day.

    23.5 On 7 August 2014, TSS Managed Services transferred the amount of R R582 100 into the bank account of the ANC Greater Johannesburg Region.

    23.6 On 8 August 2014, Mr Makhubo, in his capacity as Regional Treasurer of the Greater Johannesburg Region of the ANC addressed a letter to Mr Jehan Mackay in his capacity as Executive

Director of EOH Mthombo soliciting a donation to the ANC Greater Johannesburg Region. A detailed breakdown of expected expenses aggregating to R6 180 000was attached to the letter.

23.7 On 20 August 2014, Mr Makhubedu paid R20 527.30 to the Sandton Convention Centre on behalf of the ANC. The payment was made from the account of Prime Molecular and proof of payment emailed to Mr Makhubo on the same day.

23.8 On 22 August 2014, Mfundi Mobile paid R70 000 to the ANC and Mr Makhubedu emailed proof of payment to Mr Makhubo.

23.9 On the same day, Mfundi paid Molelwane R80 000. Prior to the payment the credit balance in the account of Molelwane was only R621.45.

23.10 In his internal management accounts for Mfundi, Mr Barry reflected the payments to the ANC and to Molelwane a "costs of sales" on "sales" by Mfundi to EOH.

23.11 Another "cost of sales" on "sales" by Mfundi to EOH was a R1 200 000 payment by Mfundi to Mr Makhubedu in August 2014, which payment corresponded exactly with a "special invoice" issued by Mfundi to EOH in June 2014.

23.12 On 27 August 2014, Mr Makhubedu emailed to Mr Makhubo the EOH unsolicited proposal, 16 April 2014, for the upgrading of the City's Network and Security Infrastructure.

23.13 Mr Makhubo had no business involving himself in procurement matters, particularly not unsolicited proposals from an entity from which he had recently solicited substantial donations for the ANC.

23.13.1 Mr Makhubo did not deny receiving the unsolicited proposal from Mr Makhubedu but could provide no explanation for why it was sent to him.

23.13.2 Mr Makhubo was aware from the evidence of Mr Powell that he would be questioned on his receipt of the unsolicited proposal from Mr Makhubedu. Yet in the six months after the evidence of Mr Powell and before his own evidence, he claimed not to have raised this issue with Mr Makhubedu. He could provide no explanation for his failure to do so.

23.14 On 29 August 2014 Mr Makhubedu emailed to Mr Makhubo an invoice issued by TSS Managed Services to the City for R106 185 395.36 for the Upgrading of Network and Security Infrastructure.

23.15 Once again Mr Makhubo:

23.15.1 Did not deny receipt of the invoice

23.15.2 Could provide no explanation as to why the invoice had been emailed to him by Mr Makhubedu; and

23.15.3 Could provide no explanation for his failure to confront Mr Makhubedu on the issue of the invoice either in 2014 or in the 6 months before his evidence at the Commission when the evidence of Mr Powell would have refreshed his memory in relation to the invoice.

23.16 On 1 September 2014 at the instruction of Mr Makhubedu Mr Barry transferred R100 000 into the account of Molelwane providing for the funds to be cleared immediately.

23.17 On 9 September 2014 Mr Makhubedu reminded Mr Makhubo of the donations made by EOH to the ANC by emailing Mr Makhubo drafts of donation receipt letters to be placed on an ANC Greater Johannesburg Region letterhead, signed and returned to EOH Managed Services. The letters were dated 19 June 2014 although they were still in draft form on 9 September 2014. They reflected the following donations:

23.17.1 A donation of R151 000 made on 11 November 2013

23.17.2 A donation of R2 million made on 13 December 2013; and

23.17.3 The donation of R3 million, discussed above, which was made on 16 April 2014, the date of the unsolicited proposal.

23.18 On 12 September 2014 the City issued a payment order directing immediate payment to TSS Managed Services of the amount of R109 737 278.52 in respect of ICT Infrastructure Network WAN and LAN services.

23.19 The amount of R109 737 278.52 was slightly over the price of R106 185 395.36 in the unsolicited proposal and the invoice emailed from Mr Makhubedu to Mr Makhubo.

23.20 On 15 September 2014 Prime Molecular paid R70 000 to Molelwane.

23.21 Also, on 15 September 2014 Mr Makhubedu emailed to Mr Makhubo a draft of a letter of award from the City to TSS Managed Services referring to the (unsolicited) proposal from TSS Managed Services for the provision of Network Infrastructure and Security Services. The draft letter was framed as a letter from the City addressed to Mr Makhubedu on behalf of TSS Managed Services. It stated the following:

> We have pleasure in advising you that after careful consideration of the proposals received and the evaluation thereof, your proposal has been successful and that you have been nominated as the preferred supplier for the Upgrading of the City of Johannesburg Network and Security Infrastructure. Your participation in this tender process is highly appreciated.

23.22 Mr Makhubo did not deny receiving this blank letter of award, but could provide no explanation as to why Mr Makhubedu, being an EOH executive and not a City official, would have drafted such a letter, still less as to why Mr Makhubedu would have emailed the letter to him. He also could not explain why he had not confronted Mr Makhubedu in relation to the prima facie improper blank letter of award.

23.23 On 18 September 2014 Mr Ebrahim Laher of EOH emailed Mr Makhubedu to brief him as to the needs of EOH in relation to City of Johannesburg IT contract issues in advance of Mr Makhubedu's "meeting now with Geoff". "Geoff" appears to be a reference to Mr Makhubo.

23.24 On the same day Mr Makhubedu sent to Mr Jehan Mackay and Ms Rene Jonker a request from the Tshwane ANC Regional Secretary for a donation of R300 000.

23.25 On 19 September 2014 Mr Makhubo emailed to Mr Makhubedu a request for financial assistance in relation to the ANC Greater Johannesburg Region regional conference. His request included a breakdown of conference costs aggregating to R4 300 000. Mr Makhubedu sent the request to Mr Jehan Mackay and Mr Ebrahim Laher on 20 September 2014. Mr Jehan Mackay responded by asking by when the required funds were needed.

23.26 On 20 September 2014 TSS Managed Services paid R570 000 to Molelwane.

23.27 On 2 October 2014 TSS Managed Services transferred R1.5 million into the bank account of the Greater Johannesburg Region of the ANC. Mr Makhubedu emailed Mr Makhubo proof of payment of this amount on the same day.

24. The evidence described above leads inexorably to the conclusion that Mr Makhubedu, Mr Barry and Mr Makhubo conspired to ensure acceptance by the City of the 16 April 2014 unsolicited proposal from TSS Managed Services for the provision of Network Infrastructure and Security Services to the value of over R100 million.

    24.1 The improper process involved repeated payments to Mr Makhubo's entity, Molelwane, from EOH entities or indirectly through Mfundi or entities of Mr Makhubedu to whom Mfundi had paid R1 200 000 as a cost of sales on an Mfundi EOH special invoice.

    24.2 It also involved regular donations to the ANC from the same sources, both in the form of direct donations to the ANC and in the form of payment of expenses on behalf of the ANC.

25. There is reason to believe that Mr Jehan Mackay and Mr Ebrahim Laher were also party to this improper process.

26. Mr Makhubo is now deceased. However, the EOH parties to the prima facie corrupt arrangements between the City and TSS Managed Services are not. The Commission accordingly recommends that:

    26.1 The law enforcement agencies investigate the City's 2014 award to TSS Managed Services of a contract for the Upgrading of the City of Johannesburg Network and Security Infrastructure with a view to the prosecution of Mr Makhubedu, Mr Barry, Mr Jehan Mackay, Mr Ebrahim Laher and any other suspects identified in the investigation on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted.

PART C: THE CITY OF JOHANNESBURG A647 SAP UPGRADE CONTRACT

27. The detailed chronology in relation to the award to EOH of the COJ A647 SAP upgrade contract is as follows:

    27.1 On 2 November 2015, Mr Nyiko Mutileni of EOH emailed Mr Jehan Mackay to inform him that the City had issued a tender for the relevant services. In his email, Mr Mutileni said: "I have also notified Mr Makhubedu because of Geoff's influence". "Geoff" appears to be a reference to Mr Makhubo.

    27.2 On 13 November 2015, Mr Mutileni forwarded to Mr Jehan Mackay an email from Lerato Ngwenya of the City of Johannesburg soliciting donations from EOH in relation to a promotional campaign run by the City.

    27.3 On 20 November 2015, Mr Laher emailed Mr Asher Bobot, the Group CEO of EOH, to inform him that the tender was now out. He wrote:

        > Am meeting with Parks people tomorrow afternoon. Have spoken to Pat and Jehan and will manage that angle separately. Am hopeful we will know more after tomorrow.

    27.4 The references to "Parks", "Pat" and "Jehan" appear to be references to Mr Parks Tau (the then Mayor of Johannesburg), Mr Makhubedu and Mr Jehan Mackay.

    27.5 On 1 December 2015, Mr Laher wrote to the team working on the tender to give an update on the talks relating to the consortium that EOH was seeking to establish. In his email, he said: "I have asked Ashley to contact KPMG as per Pat's conversation with Geoff". Once again, the references to "Pat" and "Geoff" would appear to be references to Mr Makhubedu and Mr Makhubo.

    27.6 Mr Laher responded on 2 December 2015. He wrote with self-conscious euphemism: "Ebs/Pat we need a number urgently that can be allocated for goodwill :) to the organisation".

    27.7 On 1 February 2016, Mfundi paid R200 000 to Molelwane. Prior to the payment, the balance on the Molelwane bank account was R63.19.

    27.8 On 2 February 2016, Mr Laher emailed the EOH team expressing his concerns in relation to the pending tender. He wrote:

        > COJ - am very concerned about the City allowing people to reprice - seems to be a way to catch us out on scope. We need to be careful here. Actions - I will meet with Geoff.

    27.9 On 25 April 2016 Mfundi paid Molelwane R50 000. Prior to the payment, the balance on the Molelwane bank account stood at R617.77.

    27.10 On 30 April 2016, Molelwane invoiced TSS Managed Services for R500 000 plus VAT in respect of LAN and WAN services. The ENS Forensics team that has been given unfettered access to the records of EOH has not been able to find evidence of any work that was done by Molelwane for EOH that could relate to the invoice.

27.11 On 17 May 2016, Mr Mutileni sent to Mr Laher a request for sponsorship of a project run by Ms Pilisiwe Tau, the wife of the then Johannesburg Mayor, Mr Parks Tau, which project would take students on a trip to New York.

27.12 On 19 May 2016, Mr Makhubo emailed Mr Bobot, copying Mr Makhubedu, with a request for donations for the ANC Greater Johannesburg Region municipal election campaign. Attached to his letter was a budget of R50 million.

27.13 On 25 May 2016, Mr Makhubedu emailed Ms Jonker instructing her to pay the R500 000 Molelwane invoice as soon as possible.

27.14 On 26 May 2016, the invoice was queried by Mr Rob Godlonton, an EOH Executive, in an email to Mr Peter Wynne of EOH. Mr Wynne responded: ED [enterprise development] for City of Joburg. It was budgeted for in the financial year 16 numbers. I asked Rene for a schedule at the time of ED payments budgeted when we compile the budgets then if the amount is in the budget I do not ask any further questions.

27.15 On 26 May 2016, Mr Makhubo emailed Mr Makhubedu, Mr Laher and Mr Jehan Mackay to ask for feedback in relation to his ANC donation requests.

27.16 On 30 May 2016, TSS Managed Services paid R570 000 (R500 000 plus VAT) to Molelwane. Prior to the payment, the balance on the Molelwane account stood at R268.48.

27.17 On 31 May 2016, Mr Makhubo transferred R200 000 of the TSS Managed Service payment out of the Molelwane account and into his personal account.

27.18 On 2 June 2016, the Executive Adjudication Committee addressed a letter to EOH Mthombo informing them that their bid for the A647 Contract had been successful. The letter of award provided for an aggregate contract price of R404 million.

27.19 On 27 June 2016, EOH Mthombo ordered (ostensibly for itself) R204 095 worth of computer equipment from its Infrastructure technologies division.

27.20 On 30 June 2016, a delivery note was issued in respect of the computer equipment. Although the delivery note reflected that the equipment was going to be delivered to EOH Mthombo, the delivery address was the address of the ANC Greater Johannesburg Region and the note showed that it was for the attention of “Geoff or Justice”. The cell phone number given on the note for “Geoff or Justice” was the cellphone of Mr Makhubo.

27.21 On 29 June 2016, EOH Mthombo issued a purchase order for R 512 000 for payment to Serendipity Tours of New York travel expenses related to the project of Ms Tau in respect of which the City had solicited funds from EOH.

27.22 On 19 July 2016, Mfundi issued invoices to EOH taken together amount of R16 million plus VAT. Mfundi accounted for the R16 million in its internal accounts as income from “Sales - COJ SAP Support Special” .

27.23 Mfundi then went ahead to spend at least R15 439 068 of the R16 million to pay election expenses incurred by the Greater Johannesburg ANC on its municipal election campaign. On 6 July 2016, Mr Barry emailed Mr Makhubedu a detailed reconciliation of the expenditure of the R15 439 068. The reconciliation was headed “Mfundi Mobile Expenses ANC - GM”. It appears that the reference to “ANC – GM” is a reference to Geoff Makhubo. This can be inferred from the fact that the majority of the expenses reflected on the reconciliation can be linked to emails sent by Mr Makhubo to Mr Makhubedu requesting EOH to pay the ANC expenses in question, and the list also includes travel expenses for Mr Makhubo himself.

28. The evidence described above suggests that Mr Makhubedu, Mr Barry, Mr Makhubo, Mr Jehan Mackay, Mr Laher and Mr Mutileni conspired to procure the improper award to EOH Mthombo by the City of the COJ A647 SAP contract worth R404 million.

28.1 The improper process involved repeated payments to Mr Makhubo's entity, Molelwane, from EOH entities or indirectly through Mfundi out of amounts which Mfundi accounted for as income from "Sales - COJ SAP Support Special".

28.2 It also involved regular donations to the ANC from the same sources, both in the form of the direct donation of computer equipment to the ANC by EOH Mthombo and in the form of payment of election expenses of the ANC by Mfundi out of the R16 million paid to Mfundi by EOH Mthombo and accounted for by Mfundi as income from "Sales - COJ SAP Support Special".

29. Mr Makhubo is now deceased. However, the remaining parties to the prima facie corrupt arrangements between the City and EOH Mthombo are not. The Commission accordingly recommends that the law enforcement agencies investigate the City's 2016 award to EOH Mthombo of the COJ A647 SAP contract with a view to the prosecution of Mr Makhubedu, Mr Barry, Mr Jehan Mackay, Mr Laher and Mr Mutileni and any other suspects identified in the investigation on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted. PART D The Attempt by Mr Jehan Mackay to manipulate his relationship with Mr Zizi Kodwa to Distort Public Procurement Practices.

30. Mr Ncediso Goodenough "Zizi" Kodwa has been Deputy Minister in the Presidency responsible for State Security since 5 August 2021. At the time of the events covered herein, Mr Kodwa was not a public official but was an employee of the ANC and its spokesperson.

31. Over the period 28 April 2015 to 2 February 2014, EOH related entities and Mr Jehan Mackay made aggregate cash payments in the aggregate amount of R1 680 000 to Mr Kodwa and another R30 000 for his benefit.

32. Included within this aggregate amount was an amount of R1 million which, according to Mr Kodwa, was loaned to him by Mr Jehan Mackay for the purposes of buying a Jeep motor vehicle which was bought on 6 June 2015. Although Mr Kodwa is clear that this amount was a loan, the transaction reference on the Tactical Software Solutions statement for the account from which it was paid, described the R1 million payment as "NG KODWA (ANC DONA-JM)". This suggested that Tactical Software Solutions had been informed that the million Rand payment was a donation to the ANC, or possibly to Mr Kodwa himself.

33. In addition, Mr Jehan Mackay and EOH related companies paid hundreds of thousands of rands for luxury rental accommodation for Mr Kodwa. Mr Kodwa testified that he was unaware that the accommodation in question was rental accommodation and that he believed that the properties in question were owned by Mr Jehan Mackay.

34. Mr Kodwa testified that all of the aggregate R1 710 000 payments were made at his request, by or on behalf of Mr Jehan Mackay, at times when he was in financial difficulties. On his own version, Mr Kodwa has never been in a position to repay Mr Jehan Mackay the amounts of the loans advanced to him and has not repaid any of these amounts. However, he insists that they were not payments made as a quid pro quo for any assistance on his part. In particular, he denies that the payments and the luxury accommodation were in any way related to the procurement of government contracts by EOH or related companies.

35. Alongside the benefits Mr Jehan Mackay provided to Mr Kodwa, he also regularly engaged with Mr Kodwa in relation to substantial donations to be made to the ANC by the EOH group. Thus Mr Jehan Mackay and his PA, Charze Gordon, addressed emails to Mr Kodwa:

35.1 On 5 August 2015 inviting Mr Kodwa to send a letter to EOH requesting a R1 million donation in the form of a sponsorship "whatever the purpose"

35.2 On 11 and 12 August 2015, in connection with the payment by EOH Mthombo of R1 million to the Elections Agency apparently on behalf of the ANC

35.3 On 30 September 2015 and 1 October 2015, asking Mr Kodwa's views in relation to a request for a R704 250 donation by way of direct payment of accommodation costs incurred by the Eastern Cape ANC; and

35.4 Between 8 December 2015 and 18 January 2016 in connection with an EOH donation to the ANC in the form of 2500 printed ANC T-shirts.

36. Whatever the subjective intentions of Mr Kodwa, it is clear that Mr Jehan Mackay was attempting to buy influence by making the "loans" that he made to Mr Kodwa and by providing Mr Kodwa with luxury accommodation. Mr Mackay repeatedly attempted to engage Mr Kodwa in relation to pending EOH Group tenders:

36.1 On 14 July 2015 Mr Jehan Mackay addressed an email to Mr Kodwa in relation to a Department of Home Affairs tender. He wrote as follows:

> I hope you good. If it's possible please can you ask the chair to look into DHA RFB 1303/2014 there are games being played. Initially we were number 1 then Pandelani and the head of procurement decided to re-evaluate the bids and now it seems we are disqualified. The total value is about R360million. Also please don't forget to talk to the regional funding coordinator to understand what their funding requirements are.

36.2 This request to "as the chair to look into" the disqualification of EOH from the tender was made barely a month after Mr Kodwa had bought his Jeep with the R1 million loan from Mr Mackay. It also insinuated that Mr Mackay might be holding out the prospect of a large donation to the ANC as a quid pro quo for Mr Kodwa's requested intervention.

36.3 When the offending tender was later cancelled, thus freeing up EOH to compete for the work again, Mr Mackay forwarded the letter of cancellation to Mr Kodwa by email on 2 November 2015.

36.4 Mr Mackay also forwarded to Mr Kodwa internal EOH correspondence of 30 September 2015 to clarify whether the Eastern Cape ANC request for the R704 250 donation discussed above, was a request for a quid pro quo against grant of a pending EOH tender in joint venture with ELCB for an Eastern Cape Provincial Government document management contract.

36.5 Mr Mackay billed R656 200 spent on luxury accommodation for Mr Kodwa as an expense relating to "Project Ingrid" which was the "enterprise development" contribution linked to the SASSA EOH Oracle tender.

36.6 Mr Mackay's R1 million loan / donation to Mr Kodwa was also billed to "Project Ingrid" suggesting that it was an expense relating to the SASSA EOH Oracle tender.

37. Mr Mackay's apparent attempts to induce Mr Kodwa to interfere with procurement processes in the interests of EOH appear prima facie to contravene section 3(b) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

38. Although the Commission has seen no evidence to show impropriety on the part of Mr Kodwa in relation to the attempts by Mr Jehan Mackay to induce him to interfere with procurement processes in the interests of EOH, it is important to point out that the Commission was not able, due to time constraints, to investigate what Mr Kodwa may or may not have done. It would not be difficult for an influential or important figure in a political party that is the majority party in a municipality to influence either officials within such a municipality or councillors of such municipality to influence relevant officials within the municipality. This point is made here in general, not necessarily suggesting that the Commission is aware of any evidence that Mr Kodwa did or did not influence anybody to do anything improper or unlawful. However, as Deputy Minister for State Security, Mr Kodwa now finds himself in an impossible position.

38.1 Mr Kodwa is beholden to Mr Mackay to whom he owes more than R1.7 million rands. On his own version, this is a debt which he cannot immediately repay.

38.2 If the recommendations of this Commission are implemented, Mr Mackay will be the subject of multiple criminal investigations.

38.3 It is untenable for the Deputy Minister of State Security to find himself in a position where he is beholden to a suspect in multiple criminal investigations.

39. The Commission accordingly recommends that:

    39.1 The law enforcement agencies investigate the attempts of Mr Jehan Mackay described above to induce Mr Kodwa to interfere with procurement processes in the interests of EOH with a view to the prosecution of Mr Jehan Mackay and any other suspects identified in the investigation on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted.

    39.2 The President reconsiders the position of Mr Kodwa as Deputy Minister of State Security having regard to the fact that Mr Kodwa appears to find himself in a position where he is beholden to Mr Jehan Mackay.

ALEXKOR

INTRODUCTION

1. Various allegations have been made of state capture at Alexkor Ltd (Alexkor) and its associated entities. Only two witnesses testified before the Commission in relation to Alexkor, namely: 1. Mr Gavin Craythorne, a marine mining contractor and a founding member and office bearer of the Equitable Access Campaign (EAC); and 2. Mr Albert Torres, a director of Gobodo Forensic and Investigative Accounting (Pty) Ltd (Gobodo), which was appointed by the Department of Public Enterprises in July 2019 to investigate the relationship of Alexkor and its marine mining contractors.

2. During the course of its investigation into state capture at Alexkor, the Commission issued several Rule 3.3 notices and requests for information to various implicated and interested parties in relation to the evidence presented. This resulted in the Commission receiving more than twenty statements, requests for additional information, applications for specific directives and applications to cross-examine witnesses, amounting in total to about 8000 pages of documentary evidence. Unfortunately, the constraints of time and resources made it impracticable for the Commission to formally admit this voluminous information to the record and to afford all the implicated and interested parties an opportunity to testify or to cross examine any witness. As a consequence, the Commission is not in a position to make definitive findings with regard to all relevant matters concerning state capture at Alexkor. There is however sufficient evidence in relation to certain matters that give rise to reasonable suspicion of wrongdoing that justifies recommendations for further investigation by the law enforcement agencies and the board of Alexkor and its associated companies.

BACKGROUND

3. In 2003 the Constitutional Court[6] held that the Richtersveld Community had been in exclusive possession of the land related to this matter before the Commission prior to and after its annexation by the British Crown in 1847 and had the indigenous rights to use its water, to use its land for grazing and hunting and to exploit its natural resources above and beneath the surface. The relevant colonial legislation, the Crown Lands Acts of 1860 and 1887 did not extinguish the land rights of the Richtersveld Community. The Precious Stones Act, however, provided that all occupants of the land except registered surface owners lost their right to occupy and exploit the land. This legislation accordingly did not recognise indigenous ownership. The Constitutional Court held that Richtersveld Community was entitled to restitution of ownership of the land and to the exclusive beneficial use and occupation thereof.

4. Subsequent to the decision of the Constitutional Court a settlement agreement was concluded between the Richtersveld Community, Alexkor and the government on 22 April 2007 and made an order

[6] See Alexkor Limited and Another v Richtersveld Community and Others 2004 (5) SA 460 (CC).

of court. In terms of clause 8.3 of the settlement it was agreed that a joint venture would be pursued between Alexkor and the Richtersveld Community, styled the Pooling and Sharing Joint Venture Agreement (PSJV). It was agreed that Alexkor would retain its marine mining rights, but would transfer its land mining rights to a company formed by the Richtersveld Community, the Richtersveld Mining Company (RMC), to be exploited by them jointly. Alexkor would hold 51% of the shares in PSJV and that RMC would hold the remaining shares (49%).

5. The PSJV was established in April 2011 and mandated to conclude marine mining contracts on behalf of Alexkor and land mining contracts on behalf of RMC. The PSJV does not itself conduct mining operations and all its land, beach and marine mining operations are conducted by contract miners.

6. The joint operations of the PSJV are conducted by an executive management team under the control of a joint board, with three directors representing Alexkor and three directors representing the RMC. The deed of settlement was later supplemented by a further agreement referred to as "the unanimous resolution". In terms of paragraph 6.1 of the resolution, the joint board is responsible for: i. the prospecting and mining for precious stones in the pooled operations area; ii. the "carrying out of the recovery and sale, at the highest prices possible, of precious stones produced from the pooled operations areas.; and iii. carrying out all ancillary and incidental activities for those purposes. The chair of the joint board of the PSJV is always the chair of Alexkor. The CEO of the PSJV reports to the CEO of Alexkor.

7. In his submission to the Commission, Mr Craythorne alleged that there was state capture at Alexkor and the PSJV by the Gupta racketeering enterprise and persons associated with it. The Commission accordingly conducted a preliminary investigation into the allegations of state capture pursuant to its Terms of Reference 1.1 and 1.6.

8. Mr Craythorne's submission was supported in some respects by the forensic investigation conducted by Gobodo and the investigation conducted by Mr Dekker, who is employed by the Commission as a forensic accountant. Mr Dekker performed an analysis of the business and trading activities of Alexkor, the PSJV and Scarlet Sky Investments 60 (Pty) Ltd (SSI), which in 2018 changed its name to Alexander Bay Diamond Company (Pty) Ltd (ABDC). SSI was appointed by the PSJV in 2015 to market and sell all the diamonds produced by the PSJV. The evidence reveals that SSI had links to the Gupta enterprise through its main shareholder, Mr Kuben Moodley. It was a dormant company with no diamond licence or track record in the diamond industry.

9. The DPE also commissioned Fundudzi Forensics (Fundudzi) to conduct an investigation in 2018 into numerous allegations levelled against the DPE and in particular into the appointment of Mr Trevern Haasbroek as a non-executive director to the Alexkor Board by Ms Lynne Brown when she was Minister of Public Enterprises. In addition, the CEO of the PSJV, Mr Mervyn Carstens contracted Mr James Allan to conduct an independent review and audit of the process from sourcing (mining) the diamonds through to the sale point. This investigation was finalised in May 2019. Neither Fundudzi nor Mr Allen testified before the Commission.

THE THESIS OF STATE CAPTURE AT ALEXKOR

10. The thesis advanced by Mr Craythorne is that there was an orchestrated plan of state capture of Alexkor and the PSJV with two specific aims. The first was to implement a plan to diversify the mining operations of Alexkor, which had hitherto been restricted to diamond mining, to include coal and lime mining in order to supply coal to Eskom pursuant to contracts from which the Gupta enterprise could benefit. This would have excluded the Richtersveld Community from the business of Alexkor as its joint venture with Alexkor in terms of the settlement agreement is limited to its diamond assets. The second objective was for SSI to assume exclusive control of the sale of the diamonds of the PSJV, allegedly for the illegitimate benefit of the Gupta enterprise.

11. The process for the repurposing of Alexkor to coal mining was commenced with the assistance of the two Ministers of Public Enterprises appointed by former President Zuma, Mr Malusi Gigaba and

Ms Lynne Brown, who both made significant appointments to the boards of Alexkor and the PSJV after they took office, and then announced the new strategic direction for Alexkor to diversify from a diamond mining concern into the production of coal and lime to supply Eskom. Subsequently there was engagement between executives of Alexkor with Regiments Capital (Pty) Ltd (Regiments), the company aligned with the Gupta enterprise that played a key role in state capture at Transnet and Eskom discussed in other volumes of this report. However, no firm contractual arrangement appears to have been concluded between Alexkor and Regiments. SSI, as just mentioned, was then appointed to control the valuation, sale, beneficiation and marketing of the diamonds of Alexkor and the PSJV.

12. The investigators of the Commission have established by means of cell phone records that the key executives and senior employees of Alexkor and the PSJV had links or contact with associates and role players of the Gupta enterprise in the relevant period.

13. Former President Jacob Zuma appointed Mr Gigaba as Minister of Public Enterprises on 1 November 2010 after he dismissed Ms Barbara Hogan as Minister for opposing the appointment of Mr Siyabonga Gama as the GCEO of Transnet. Mr Gigaba appointed Mr Rafique Bagus as chairperson of the board of Alexkor in September 2012. He was previously the Chief Executive of Trade and Investment, South Africa and DDG of the Department of Trade and Industry. Mr Bagus' cell phone records reflect that he made regular telephonic contact with associates of the Gupta enterprise. He had contact with: i. Mr Iqbal Sharma 60 times between the periods between 2008 and 2013; ii. Mr Ashu Chawla eight times between 2008 and 2013; iii. Mr Ajay Gupta 26 times between July 2015 and March 2016; and iv. Mr Rajesh Gupta seven times between May 2015 and March 2016. Mr Bagus also attended the notorious Gupta wedding at Sun City in May 2013.

14. On appointment as chairperson of Alexkor, Mr Bagus immediately began with the new strategic direction of diversification of Alexkor into coal mining. He was also instrumental in awarding the tender to SSI.

15. On 7 September 2012, at a Special General Meeting with the newly appointed board, Mr Gigaba mandated the board to prioritise the recruitment of a new CEO and ensure that the matter was finalised within three months. The board appointed Mr Percy Khoza as CEO of Alexkor on 4 March 2013. Prior to his appointment at Alexkor, Mr Khoza was a General Manager at Optimum Colliery. The corrupt purchase by Tegeta of Optimum, a company associated with the Gupta enterprise, is the subject of investigation before the Commission. Mr Khoza was evidently recruited in order to pursue Mr Gigaba's agenda to diversify Alexkor into coal mining.

16. Mr Mervyn Carstens was appointed as CEO of the PSJV by the PSJV board in August 2012. Mr Carstens was a mining executive with over thirty years' experience in the mining industry, working for De Beers, Anglo American and Trans Hex. He played an important part in the irregular appointment of SSI. His cell phone records reflect at least 107 calls with Gupta associates He was in contact with Mr Kuben Moodley 97 times between September 2015 and May 2017. Mr Carstens was also in contact with Mr Shane, another Gupta associate, approximately 10 times between February and July 2016.

17. Ms Zarina Kellerman was appointed on 1 October 2013 as the Chief Legal Officer of Alexkor and remained in the position until 2 November 2015. It was during her period at Alexkor that SSI was awarded the contract to be the sole agent to sell and market Alexkor's diamond production. Despite the fact that SSI had no diamond license and Mr Kuben Moodley, the majority shareholder in SSI, had no diamond industry background, Ms Kellerman verified the bid of SSI as being compliant with the legal requirements. Ms Kellerman's cell phone records indicate that she had regular contact with Mr Moodley. She made 479 calls to Moodley with a total call duration of 24 112 minutes between August 2015 and April 2018. After Ms Kellerman resigned from Alexkor on 2 November 2015, she was appointed as an adviser to the Minister of Mineral Resources, Mr Mosebenzi Zwane from April 2016 to March 2018 and acted as secretary to Zwane's Inter-Ministerial Committee Inquiry into the closure of the Gupta bank accounts by various commercial banks. Ms Kellerman has confirmed that she assumed the position with Minister Zwane at the suggestion of Mr Moodley.

THE ROLE OF REGIMENTS AT ALEXKOR

18. Shortly after the announcement by Mr Gigaba that Alexkor would be expanding into the coal business to supply Eskom, Regiments (a key player in the Gupta enterprise) started engaging with Kellerman and Khoza at Alexkor. On 1 October 2013, Mr Jonathan Loeb of Regiments sent an email to Mr Khoza, which in relevant part read:

> Please see attached for your review a draft NDA [Non-Disclosure Agreement] between Regiments and Alexkor. Please distribute to your team as I did not receive email addresses. If you're comfortable with the document as is, please fill in the blank spaces, sign and scan back to me for counter-signature. Should you have any comments or proposed edits, please mark these up on the document. Once finalised, we would be in a position to receive and review the master coal supply agreement.

19. On the same day, Mr Khoza forwarded the email with the attached NDA to Ms Kellerman. On 3 October 2013, Ms Kellerman corresponded with Mr Loeb and copied to Mr Wood and Mr Gebreselasie of Regiments, and Mr Khoza, about amendments to the NDA and provided him with the proposed Master Coal Supply Agreement between Alexkor and Eskom, the receipt of which Mr Loeb acknowledged and undertook to keep confidential.

20. Both parties signed the NDA on 3 October 2013. Paragraph 2 of the non-disclosure agreement reads:

    20.1 The parties are in discussion regarding the potential provision of financial and advisory and other services to Alexkor by Regiments.

    20.2 It is inevitable that in relation to the above each party will disclose confidential information to the other party. The parties thus herein agree on the terms and conditions of disclosure of confidential information.

21. On 7 October 2013, Mr Gebreselasie of Regiments sent an email to Ms Kellerman, which he copied to Mr Khoza, Mr Wood, and Mr Loeb which reads:

> As promised, we are in the process of preparing the RFP document for the panel of financial services providers. We will be able to send it to you before close of business today. Can you please forward me your standard adjudication template and standard scorecard if you have any? Your prompt response is highly appreciated.

22. Ms Kellerman responded at once by attaching a RFP for the Land Rehabilitation Plan, intended to serve as a template or prototype to assist Regiments in drafting the RFP for the Financial Services Panel.

23. Two days later, on 9 October 2013, Mr Gebreselasie sent an email to Ms Kellerman, copied to Mr Khoza of Alexkor and Mr Mohohlo, Mr Pillay and Mr Wood of Regiments, attaching the RFP for the Financial Services Panel.

24. On 14 January 2014 Ms Kellerman sent an email to Mr Wood and Mr Loeb of Regiments stating the following:

> I trust that you are well and that 2014 will be a blessed year for you. I have left a message for you at the office. We will be putting out the tender shortly for financial advisors but for now, I am advised that we require your assistance on something specific. As a result, I attach a standard consulting agreement. Have a look at it and we can hopefully finalise this by email. But you are welcome to contact me on my mobile. We will require you to tender in the normal course and if you are successful, a more detailed agreement will follow. Let me have your comments.

25. The next day, 15 January 2014, Loeb sent an email to Mr Wood, Mr Pillay and Mr Gebreselasie of Regiments about a fee proposal for Alexkor. The standard rates table referred to in the email included hourly rates as follows: i) Analyst R3333; ii) Senior Analyst R4167; iii) Corporate Financier R3333; iv) Senior Corporate Financier R4167; v) Due Diligence Analyst R3000; vi) Senior Due Diligence Analyst R4167; and vii) Mining Expert R5000. The Department of Public Service and Administration (DPSA)

issues guidance on hourly fee rates to be used when contracting contractors. The hourly DPSA rates recommended for consultants, with effect from 1 April 2013 until 31 March 2014, prescribed a maximum fee of R3156 per hour. Most of the rates proposed by Regiments thus exceeded the maximum DPSA rates and were questionable.

26. On the same day Mr Wood emailed Mr Salim Essa (a key associate of the Gupta enterprise) attaching a fee proposal for Alexkor. Evidence discussed in other volumes of this report has proven that Mr Essa had an arrangement with Regiments in which he or shell companies forming part of the Gupta enterprise received up to 50% of fees paid to Regiments by state owned companies. The email read: "Hi Salim, Fee proposal as discussed, please give me a ring once you have gone through the contents."

27. Later that day, Mr Wood sent an email to Ms Kellerman stating:

> Post our meeting with Humphrey and the team yesterday, we have put forward our thoughts on the fee structuring as detailed below. It does appear difficult to fit this approach into the consulting agreement you sent me yesterday, but would be happy to discuss and expedite in the most efficient manner.

28. Ms Kellerman replied by email on 16 January 2014 stating:

> Thank you for your email and our discussion yesterday. We have now had an internal meeting on this and from our side, we would like to engage you on the valuation and DD [due diligence] at this time only. This will give us time to work through the tender and will assist in curbing Board approvals. In this regard, we can then look at a general consultancy agreement. I would just need to get an indication from you on anticipated man hours. If you are happy with this, could someone from your legal team send a marked-up consultancy agreement for consideration and finalisation? Looking forward to your urgent response on this.

29. Mr Wood responded immediately to Ms Kellerman stating that Regiments was happy to proceed on this basis and undertook to get the team to "mark-up" the consultancy agreement.

30. On 16 January 2014, Mr Loeb sent an email to Ms Kellerman including a copy of Regiments' standard consultancy agreement and stating:

> Please see attached our mark-up to the consultancy agreement including our best estimates of fees per transaction. Please note that our internal legal is still reviewing the agreement and will revert with comments during the course of tomorrow. In the interim, we can proceed based on the attached.

31. The unsigned consultancy agreement attached to Mr Loeb's email provided that Regiments was to be appointed for the period 13 January 2014 to 31 March 2014 or until such time as the contractual duties of Regiments were fulfilled. The contract made provision for renewal and extension by agreement at the discretion of Alexkor. The remuneration payable under the contract was in terms of the fee proposal put forward by Mr Loeb and Mr Wood in the preceding email correspondence. The expected total fee payable was R986 668. It is not clear from the consultancy agreement whether the envisaged contractual performance related to the refocusing of Alexkor into coal and lime mining.

32. There is no evidence before the Commission showing that the contract was eventually concluded between Regiments and Alexkor or of the work performed by Regiments under this contract or of any fee paid to it for such work.

33. After Alexkor advertised the tender for the Financial Services Panel in January 2014, Regiments prepared and presented its own proposal to Alexkor. There is an unsigned letter on record dated 31 January 2014 from Mr Wood addressed to Ms Kellerman attaching a proposal for Regiments to be appointed to the Financial Services Panel of Alexkor.

34. Several companies tendered to be on the panel. It seems Regiments could have been successfully nominated with a number of other bidders. However, it is not clear from the presentation document if

Regiments was in fact at any point appointed to the panel. On 21 August 2014, the board decided to place a moratorium on tenders for the Financial Services Panel.

35. While there is no evidence that a consultancy contract was in fact concluded with Regiments or about the nature of the services (if any) provided by or fees paid to Regiments, there were evidently regular engagements between Regiments and Alexkor. Mr Bishop has examined cell phone records which indicate that executives at Alexkor had ongoing contact with staff at Regiments and other well-known Gupta associates over a sustained period of time. However, there is no evidence about the content of these calls or if they were contemporaneous with any relevant transaction involving Alexkor or any company associated with the Gupta enterprise.

36. In the final analysis, the role actually played by Regiments in the attempted state capture of Alexkor has not been sufficiently clarified. The relationship between Regiments and Alexkor requires further investigation and no finding of any specific wrongdoing can be made in that regard.

THE IRREGULAR APPOINTMENT OF SSI

37. In early 2016, the Audit and Risk Committee of Alexkor (ARC) conducted a review of the appointment of SSI as the marketing agent for the PSJV's diamonds. The report sets out the following timeline of events leading to the appointment.

    37.1 On 21 October 2013, the PSJV technical committee raised a concern with management regarding the manner in which diamonds were marketed and the prices obtained in the market by the then service provider, Diamond Marketing Consultants (DMC), which had been appointed before the land claim. During 2013, the PSJV's marine diamond production traded on average at 30.2% below the market. The committee advised management to request approval from the board to appoint a new service provider on a trial basis to decide whether there would be an improvement in pricing. On 23 October 2013, the PSJV management team obtained approval from the PSJV joint board to appoint a new service provider on a trial basis. On 1 January 2014 management appointed Diamond Realisations t/a Fusion Alternatives (Fusion) and cancelled the marketing and sales agreement with DMC. On 16 April 2014, the PSJV joint board gave approval for the management team to begin a tender process for the appointment of a permanent service provider to take the place of DMC.

    37.2 An RFP was published on 31 October 2014. The RFP invited qualified parties to present innovative proposals for enhancing the revenue of the mine through the marketing and post extraction treatment, processing and beneficiation of diamonds extracted in the Richtersveld. The RFP indicated that post the land restitution claim, the PSJV planned to produce in excess of 70 000 carats per annum and that it was necessary to develop and implement a strategy to introduce viable and economically sustainable activities in the Richtersveld that extend beyond primary minerals extraction activity. The RFP aimed at post-mineral extraction services contributing to additional economic benefit for the members of the Richtersveld community that rely on the primary extraction activity for their economic survival. The PSJV intended to leverage its position as primary producer of diamonds to participate in post extraction treatment, processing and beneficiation of its produce that would deliver added benefits to the PSJV and the Richtersveld community.

    37.3 In terms of the RFP, the bidders were required inter alia to implement processes that would achieve continuous improvements of prices for the PSJV produce. To that end the bidders had to show an ability to provide all resourcs including inter alia "legal entities including permits and licences to conduct the business of trading in and/or processing of rough diamonds and/or polished diamonds". Interested bidders were required to formally submit an expression of interest by 7 November 2014, to attend a compulsory briefing on 10 November 2014 and to submit a formal written proposal by 24 November 2014.

    37.4 Nine interested companies, including SSI, submitted written expressions of interest to participate in the tender. SSI's expression of interest dated 6 November 2014 indicated that the directors

of SSI were Mr Daniel Nathan and Mr Kuben Moodley, an associate of the Gupta enterprise. At that date, the sole director of SSI was Ms Hazel Ammann, a shelf company stand-in. Company records show that Mr Nathan and Mr Moodley in fact only became directors on 4 December 2014. SSI's own company structure shows that they became shareholders on 20 November 2014 through their respective companies Daniel Nathan Trading (DNT) and Kimomode (Pty) Ltd. Hence, until 4 December 2014, the date upon which Mr Moodley and Mr Nathan officially became directors, SSI was a shelf company. The date upon which they became directors was eleven days after the official closing date of 24 November 2014 for formal written proposals. Mr Moodley, the purported 60% BEE shareholder of SSI, had no diamond industry background at all.

38. Even though there were only seven bids, Mr Carstens, the CEO of the PSJV, outsourced the short-listing of bids to Gamiro Advisory Services, a company controlled by Ms Heather Sonn. Ms Sonn, together with Mr Christo Wiese of Trans Hex later played a part in Alexkor's plans to diversify into coal.

39. Gamiro shortlisted three companies, namely SSI, CS Diamonds and Diamond Realisations (Fusion), who were all invited to make further presentations to the tender committee. Fusion, the incumbent service provider, scored the highest with 75 points; SSI came in second with 71.5 points; and CS Diamond third, with 67 points. SSI was shortlisted although it held no diamond license and Gamiro had awarded it zero points for the licence requirement. Mr Nathan's company, DNT, however, did have a diamond licence, but this could not legally be used by SSI.

40. Various licences are required by players in the diamond industry in terms of the Diamonds Act. Section 19 prohibits the sale of unpolished diamonds and provides that no person shall sell any unpolished diamond unless he or she is: i. a producer; ii. has manufactured that diamond if it is a synthetic diamond; iii. is a dealer; or iv. is the holder of a permit referred to in section 26(h). Section 20 prohibits the purchase of unpolished diamonds and provides that no person shall purchase any unpolished diamond unless he or she is a licensee or is the holder of a permit referred to in 40(1)(b). Section 44 prohibits the utilisation of unregistered premises as a diamond trading house and provides that no person shall use any premises as a diamond trading house unless he or she holds a diamond trading house license and those premises are registered in terms of the Diamonds Act.

41. Mr Bishop and Mr Dekker both maintain that SSI did not comply with these provisions. Any person convicted of contravening section 19 or section 20 of the Diamonds Act is liable to a fine not exceeding R250 000, or to imprisonment for a period not exceeding ten years, or to both such fine and imprisonment. A contravention of section 44 of the Diamonds Act carries a penalty of a fine not exceeding R50 000, or to imprisonment for a period not exceeding two years, or to both such fine and imprisonment. The South African Diamond and Precious Metals Regulator (SADPMR) has confirmed that SSI had no licences and instead improperly relied on the licence of DNT.

42. Gamiro was aware that SSI had no diamond licences as evident from the fact that it awarded it no points for diamond licences. SSI should have been disqualified at this stage as a diamond licence was a minimum requirement of the RFP.

43. The final selection was conducted on 11 December 2014, at Alexkor's office in Johannesburg by a tender committee comprising: Mr Bagus, Mr Duncan Korabie and Dr Roger Paul. All three scored SSI the highest. Despite all three adjudicators awarding SSI the highest points, there was a significant lack of clarity about its proposal and what exactly SSI had committed to in terms of funding, pricing, beneficiation and community investment.

44. SSI's original proposal was to procure rough diamond production through an outright purchase of production at the price determined by an independent diamond valuer. This was curious in that the RFP was intended to introduce a new system different from the outright purchase arrangement that had hitherto prevailed under Diamdel (De Beers), the erstwhile service provider. The SSI proposal also indicated no cost for handling the rough diamonds as it was an outright purchase. This model was not the preferred model of the PSJV which should have resulted in disqualification. SSI was at some stage allowed to change its proposal to the selling of rough diamonds through an auction

process to the highest bidder and to include 1.5% handling fee for handling the rough diamonds. This is a sign that SSI was favoured. There are accordingly reasonable grounds to believe that the outcome of the tender process was a foregone conclusion and not in accordance with section 217 of the Constitution requiring a fair, equitable, transparent, competitive and cost-effective tender process.

45. The PSJV awarded the tender to SSI on 27 February 2015 notwithstanding that it failed to meet the specified minimum requirements of the tender, more particularly in that SSI had: i. no track record in the diamond industry; ii. no experience in trading in diamonds or in cutting and polishing rough diamonds; iii. no cutting or polishing factory; iv. no licence to buy rough diamonds; v. no licence to sell rough diamonds; vi. no licence to cut and polish rough diamonds; vii. no diamond trading house licence; and vii. no BEE certificate. These were all minimum requirements for the tender; thus, to repeat, SSI's bid was non-responsive and should have been disqualified at the outset.

46. Having won the tender, SSI went from being a dormant shelf company to suddenly appearing on the local diamond trading scene as the PSJV's new marketing and sales service provider, taking delivery of its first tranche of multi-million rand rough diamonds on 15 March 2015. The business address of SSI is the physical address of Mr Nathan's company, DNT and Knox Titanium Vault Company (Knox). Mr Moodley and his wife, as well as other Gupta associates such as Mr Anoj Singh, the former GCFO of Transnet, had personal safety deposit boxes at Knox, which were subject to search and seizure orders by the Commission in 2019 and in respect of which there is a reasonable suspicion that they were used to deposit cash bribes received from the Gupta enterprise.

47. The agreement to sell the diamonds and the eventual sale of them (at a value of almost R2 billion) by the PSJV and the purchase of them by SSI probably constituted criminal offences in terms of sections 19, 20 and 21 of the Diamond Act punishable by a fine not exceeding R250 000, or to imprisonment for a period not exceeding ten years, or to both such fine and imprisonment.

48. As mentioned, the SADPMR has confirmed that SSI has never applied for a diamond trading house licence. It instead used the licence of DNT to trade the PSJV diamonds from inception of the contract. The decision of the three members of the tender committee, Mr Bagus, Dr Paul and Mr Korabie, to award the tender to SSI committed the PSJV to a course of criminal conduct. There are accordingly reasonable grounds to conclude that they were in breach of their fiduciary duties as contemplated in section 76 of the Companies Act to advance and protect the interests of the PSJV. Likewise, there are also reasonable grounds to believe that in making the recommendation to the board of the PSJV, the members of the tender committee deliberately made a misrepresentation to the actual or potential prejudice of the PSJV and thereby committed fraud. Similarly, it must follow that there are strong grounds to believe that SSI may have been unlawfully in possession of rough diamonds and each sale by the PJSV to SSI was in contravention of the Diamonds Act. It will therefore be recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of these persons on a charge of fraud and contraventions of the Diamonds Act.

49. Mr Dekker pointed to other possible irregularities by SSI. He alleged that ABDC (the erstwhile SSI) acquired a back-dated diamond trading house licence on the pretext of a name change when no licence was ever conferred to or in the name of SSI and without having to satisfy the requirements of legislation. Mr Nathan is alleged to have informed the SADPMR that the name of his company DNT (which had a licence) was changed to ABDC and thus in this manner he was able to obtain a licence for ABDC (SSI). This information was false in that SSI (which had no licence) and not DNT was the company that changed its name to ABDC. There are therefore reasonable grounds to believe that Mr Nathan, or other employees of SSI (ABDC) an/or DNT wilfully furnished information to the SADPMR or made a statement which was false or misleading and thus contravened section 86 of the Diamonds Act. Accordingly, it is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution for contravention of this provision.

50. The award of the tender to SSI was perhaps illegal for another reason. About five months prior to the award of the tender to SSI, on 4 September 2014, just before the publication of the RFP, the Western

Cape High Court declared that certain persons (Dr John Bristow, Mr Duncan Korabie, Mr Willem Vries and Mr Dennis Farmer) purporting since 22 November 2013 to be the directors of RMC (Alexkor's partner in the PSJV), had been unlawfully appointed directors of RMC. The court reinstated Mr Craig Matthews as the sole director of RMC. On the same day, Mr Matthews wrote to Alexkor and the CEO and secretary of the PSJV informing them that Dr Bristow, Mr Korabie, Mr Vries and Mr Farmer were not directors of the RMC and could not serve as representatives of RMC on the PSJV.

51. On 11 September 2014, Mr Bagus replied to Mr Matthews claiming incorrectly that as neither Alexkor nor the PSJV were party to the litigation the court order was of no consequence to them and that an appeal had been lodged against the order. Ms Kellerman reiterated that position in a letter dated 7 November 2014. Subsequent correspondence shows that an appeal was not prosecuted and had lapsed in early 2015. Despite the clear illegality, Mr Bagus, Mr Korabie and Dr Paul (the members of the tender committee) recommended the award of the tender to SSI. In consequence, when the PSJV concluded the contractlwith SSI on 4 March 2015, its board was in all probability improperly constituted and thus the validity of the contract is in question. There are also reasonable grounds to believe that some of the board members of the PSJV acted in breach of their fiduciary duties and Mr Bagus, Mr Korabie and Dr Paul possibly acted in contempt of the court order. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of these persons on a charge of contempt of court.

52. In addition, there is a debate about whether Ms Kellerman and Mr Carstens misrepresented to the board that a due diligence was conducted prior to the award of the tender to SSI.

53. Some months after the contract was concluded with SSI, on 11 September 2015, RMC submitted a complaint to the Public Protector about the irregular awarding of the contract to SSI. The author of the complaint on behalf of RMC was Mr Korabie, one of the directors who had sat on the tender committee and scored SSI 100 points. In the complaint, Mr Korabie referred to a conversation he had with Mr Bagus on 17 December 2014 in which he was requested to approve the conditional appointment of SSI. Mr Bagus later confirmed to the ARC that the reason he sought conditional approval was to ensure that all concerns of the tender committee were addressed even though SSI had attained the highest score. Mr Korabie maintained in his complaint that it was a condition of the award that a due diligence be done, but that this appears not to have been done. SSI was a shelf company and there was insufficient information about who its directors were. Mr Korabie concluded that SSI had been created specifically for the purposes of the tender and the condition of its approval had not been fulfilled as it was not subjected to a proper due diligence process.

54. In November 2015, following a meeting with the Minister of Public Enterprises, RMC agreed not to proceed with the complaint to the Public Protector and for the matter to be investigated internally by the ARC.

55. The ARC report (dated 29 February 2016) records that on 18 December 2014 SSI was informed that the tender was conditionally awarded subject to a due diligence and verifications process. It noted that the due diligence was done by the CEO, Mr Carstens, and the verification was done by Ms Kellerman, the Chief Legal Officer. According to the ARC report, the due diligence report ("Annexure S" of the ARC report) was finalised and circulated to the board members on 29 January 2015 and the tender was awarded to SSI on 27 February 2015 subsequent to the completion of the due diligence and verification process. The ARC concluded that the CEO of the PSJV, Mr Carstens, did "a proper due diligence on all the technical aspects and submitted the report to members of the tender committee in an email dated 29 January 2015".

56. The document referred to as Annexure S, the email of 29 January 2015, is short email and addressed a handful of issues. It is doubtful that it constituted an adequate due diligence for a tender to market diamonds valued in excess of R2 billion.

57. The issue of the adequacy of the due diligence was not explored meaningfully during Mr Craythorne's testimony. He testified that he had seen no evidence of a proper due diligence report and suggested that the ARC report was trying to pass off the perfunctory email of 29 January 2015 from Mr Carstens as a due diligence report. He added that the due diligence appears to have been restricted to a

few technical aspects and this was insufficient especially in the absence of SSI having the relevant diamond licences.

58. The ARC report does not deal specifically with the question of licences, presumably because that issue was not raised in the complaint to the Public Protector. The ARC appears to have relied simply on the assurance that Ms Kellerman had done the necessary verifications, which, given that there were no valid licences, she clearly had not.

59. The Gobodo investigation concluded that no due diligence had been performed and that Mr Carstens had misled the board in that regard. Mr Torres of Gobodo confirmed in his testimony to the Commission that the award to SSI was conditional upon the performance of a due diligence. Gobodo interviewed Mr Carstens who told it that a due diligence had been done and that he had informed the board accordingly. Gobodo then repeatedly requested a copy of the due diligence report and was unable to obtain one. This suggests that beyond the email, no proper due diligence was performed. This position is corroborated by what Mr Raygen Philips, the company secretary, told Mr Torres during the course of the Gobodo investigation. In his evidence before the Commission, Mr Torres stated:

> Well Mervin Carstens the CEO actually wrote an email to Board members confirming that he had conducted a due diligence and based on that they accepted it and awarded the contract to SSI... Right from the beginning of our investigation the due diligence report was one of the things that we asked them for. Eventually right at the end they confessed and said, the company secretary actually, Raygen Phillips, said look no due diligence was done... but the email said I have conducted the due diligence.

60. This evidence is prima facie evidence, giving rise to reasonable grounds to believe, that Mr Carstens and Ms Kellerman may have made a significant misrepresentation to the board and possibly have committed the offence of fraud. Ms Kellerman and Mr Carstens in affidavits filed with the Commission strongly deny that and put up the email of 29 January 2015 in support of their claim that a due diligence was in fact done. Accordingly, it will be recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to determining whether fraud was committed in this instance.

61. The insufficiency of the due diligence and verification exercise, if only the absence of the relevant licences, also brings into question whether the members of the ARC (Ms M Lebhobye, Mr T Haasbrook and Mr V Bansi) conducted their investigation with the required diligence and fidelity in accordance with their fiduciary duties.

62. Moreover, the ARC did not thoroughly investigate all the allegations made in the complaint to the Public Protector. The RMC specifically challenged the regularity of the appointment of SSI. Yet in its report the ARC recorded that it had "no response" to this key allegation. It likewise failed to deal meaningfully with the allegations that SSI: 1. was a shelf company without any history in the diamond industry; 2. provided no beneficiation of the diamonds for the benefit of the community; and 3. did not comply with BBBEE legislation. On the basis of its incomplete and unsatisfactory investigation, the ARC concluded that there had been no fundamental breach of procurement procedures in the award of the contract to SSI. The conclusions of the ARC on the basis of its wholly inadequate investigation are mostly unsustainable.

63. The award of the tender to SSI, according to the ARC report, was ratified via a round robin resolution by Mr Bagus, Dr Paul, Ms Z Ntsangula, Mr W Vries and Mr J Bristow. In the complaint to the Public Protector, RMC maintained that Mr Bristow was never appointed by it to the tender committee. His appointment as a director of the board of the RMC, like Mr Korabie's appointment, according to the judgment of the Western Cape High Court, was unlawful and invalid.

64. The contract with SSI was extended shortly after the ARC report was finalised in February 2016 following a tender process conducted in March-June 2016, which according to Gobodo was also attended by irregularities in relation to the short-listing and scoring of bidders that favoured SSI. The contract with SSI was eventually terminated by the PSJV on 11 August 2020 and the parties remain in a contractual dispute. There is no evidence that SSI supplied any meaningful beneficiation services,

a key aim of the contract which was intended to benefit the Richtersveld Community.

The allegations regarding the valuation of the diamonds sold to SSI

65. The contract between the PSJV and SSI provided that all diamonds produced by the PSJV were to be marketed and sold by SSI at the highest prices obtainable. The diamonds were sold from the premises in Houghton, where Knox Vaults is situated. According to Mr Craythorne, after the involvement of SSI in the value chain, the price received for the Alexkor diamonds decreased significantly to the detriment of the members of the joint venture, the private mining contractors and the Richtersveld community. He claimed that during 2015, the PSJV's marine diamond production traded at 47.1percent below the market. However, it should be kept in mind that during 2013, prior to the appointment of SSI, the PSJV's marine diamond production traded at 30.2% below the market.

66. The valuation process for the Alexkor diamonds when SSI was the marketing agent was evidently problematic for several reasons. The gravel mined by the private contractors was delivered to two diamond recovery plants at Alexander Bay for batch processing by the contractors with officials from the PSJV. The diamonds recovered by each contractor were counted, weighed and documented. After being sorted into parcels of equal size diamonds, they were sent to Johannesburg where they were cleaned, sorted and valued by Mr Nathan and Mr Horne of SSI. Valuation of the smaller diamonds was not done on an individual basis. The diamonds were sorted by taking a sample divided into categories and a valuation placed on each category. Mr Nathan would then arrive at a weighted average value for the sample and a weighted average for the category. The diamonds were then sold in mixed and single parcels. After the sale, each producer would receive the average price per carat for the contributions they made towards the total weight of each of the various assortments/lots. The special stones over 6.8 carats were sold individually and producers only received price information on the special stones they produced.

67. Mr Craythorne alleges that the PSJV diamonds have been undervalued over the years to the detriment of Alexkor, the Richtersveld community and the private diamond contractors. This he alleges was achieved by: i. undervaluing the diamonds mined by the private contractors at the mine; ii. undervaluing the diamonds sold to the SDT and for beneficiation; and iii. manipulating the tender process to ensure that the diamond parcels are sold to the local diamond traders at reduced prices for on-sale to international buyers at substantially higher prices. He referred also to four corrupt methods used to deprive the producers of fair diamond prices: 1. switching - which involves the swapping out of high-grade stones and replacing them with low grade stones of the same weight; 2. cherry picking - which involves the removal of the highest quality diamonds from the various categories of mixed diamonds prior to the auction, which brings down the price of tender bids dramatically; 3. sawn kap theft - which involves the theft of diamond offcuts, known as "sawn kaps," which arise when the shape of a diamond is such that it would be more profitable to saw a diamond in two and the smaller offcut is written off as waste and then sold as a cut (but not polished) stone; and 4. tender collusion - which involves collusion between the buyers who attend the diamond auctions and the auction service provider.

68. Prior to the dispatch of diamonds by the PSJV to SSI, the quantity of diamonds (carats) to be dispatched were determined by an inexperienced valuator, Ms Adams, who calculated the carat weight of the diamonds from which she estimated the value of diamonds sent to SSI for insurance purposes. Ms Adams did not take into consideration the colour, clarity and cut of the diamonds, which are crucial elements in ascertaining the value of the diamonds produced.The value of a diamond is influenced by four factors, i.e. a diamond of better colour, clarity and cut will obtain a higher value than a diamond with a lesser colour, clarity and cut of the same size or carat.

69. On receipt of the diamonds by SSI, processes were in place to ensure that the total weight in carats dispatched from the mine by the PSJV coincided with the weight in carats received by SSI. There was no similar mechanism to determine that the value of the diamonds dispatched, in terms of carat, colour, clarity and cut, were the same as those received. This is because it was only on receipt of the diamonds in Johannesburg by SSI that the diamonds underwent a process of cleaning. The diamonds were valued by Mr Nathan (diamonds larger than 2.5 carats) and Mr Horne for the smaller

diamonds, only after the diamonds had been cleaned. There was no independent valuation by a person representing the PSJV at this stage, leaving the determination of value solely to Mr Nathan or SSI.

70. As the diamonds were not properly valued prior to their dispatch from the PJSV, there was a risk that the diamonds could be undervalued by Mr Nathan to his advantage or that of the buyers and to the prejudice of the mining contractors. This is the nub of Mr Craythorne's complaint. There was also the risk of the diamonds being substituted with lesser value diamonds of the same carat weight, but of inferior quality, prior to their valuation. The PSJV had no control over the profitability of its own business as it relinquished control of the valuation of its produce to an outside party with conflicting interests.

71. Following cleaning and valuation, the diamonds were sorted for sale according to the contract with SSI which required 10% to be set aside for sale to the State Diamond Trader (SDT), 5% be made available for beneficiation purposes and the remainder (85%) be set aside for sale in a closed tender process, the integrity of which Mr Dekker regarded as questionable. The auction process on line allegedly put Mr Nathan in a position of knowing the top three bidding prices and the true value of the diamonds (having himself valued them) and thus he could inform potential bidders of high value diamonds being sold at below market prices. It was further alleged that SSI did not market the diamonds aggressively thus allowing for possible abuse, which Mr Nathan denies.

72. Mr Craythorne maintains that in his opinion the Alexkor diamonds were marketed by SSI at between 30-40% of their true value between 2015 and 2018. Mr Craythorne was not qualified as an expert witness before the Commission and given his financial interests cannot fairly be considered as independent. However, Gobodo performed a comparison of the USD selling price per carat between SSI and two price indexes, the Zimnisky and Bloomberg Prices Indexes. It concluded that for the period 2015-2017 the Zimnisky average USD selling price for the period was 12.27% higher than the SSI selling price and the Bloomberg average USD selling price for the period was 9.47% higher than the SSI selling price. For the period 2017-2018 the Zimnisky average USD selling price for the period was 22.08% higher than the SSI selling price.

73. In view of the incomplete evidence before the Commission, it is not possible at this point in time to offer a full explanation for the price differentials or to make a definitive finding of any wrongdoing on the part of SSI and Mr Nathan in the sale and marketing of the diamonds. Nonetheless, it remains incumbent on the board of Alexkor and the PSJV to decide if true and fair value was received for the sale of diamonds to SSI in the period 2015-2019.

74. Mr Dekker also performed an analysis of the monthly registers of SSI, required in terms of section 57 of the Diamonds Act. The registers reflected that several different names were entered as the diamond trading house licence holder, namely Daniel Nathan Trading CC; Daniel Nathan Trading House; Alexander Bay Diamond Company Trading House; and Alexander Bay Diamond Company. This gives rise to reasonable suspicion of a misrepresentation having been made to the SADPMR by the executives or employees of SSI, as the diamonds were in fact traded by SSI, an unlicensed trader. The incomplete evidence does not permit the making of a definitive finding in this regard, but the matter requires further investigation with a view to possible prosecution by the law enforcement agencies for a contravention of section 86(c) of the Diamonds Act, which provides that any person who falsely gives himself (sic) out to be a holder of a licence under the Act shall be guilty of an offence.

75. Mr Dekker also compared the purchases of diamonds declared by SSI in its registers to the diamonds delivered to SSI by the PSJV in the PSJV registers between May 2015 and July 2019. The PSJV recorded sales to SSI of 253 507.78 carats, with a value of approximately R1.737 billion. The SSI register however recorded a purchase of 253 311.63 carats, with a value of approximately R1.732 billion. Thus, the SSI register failed to account for 196.15 carats valued at R5.136 million. Mr Dekker accordingly recommended that this difference should be further investigated to determine if any crime was committed and to establish whether the PSJV had a cause of action for recovery of the alleged underpaid amount.

76. Mr Nathan, in an affidavit filed with the Commission, but which was not admitted on the record,

disputes Mr Dekker's calculation. He maintains that Mr Dekker ignored the fact that SSI was entitled to 1.5% commission on the sales price of the diamonds sold on auction and that DNT (notably not SSI) bought a portion of the diamonds from the PSJV for beneficiation purposes which was paid separately (presumably by DNT) to the PSJV. He maintained that if the commission payable by the PSJV to SSI is subtracted and the amount paid by DNT for the diamonds to be beneficiated was added back there was no shortfall. Mr Nathan provided no arithmetical calculations or relevant documentation in support of this particular contention. There is no sign in the registers of any purchases made by DNT from the PSJV. Moreover, because of the time constraints facing the Commission, Mr Dekker was not afforded an opportunity to respond to the allegation that he had made a miscalculation and neither Mr Dekker nor Mr Nathan testified before the Commission. Nevertheless, given the serious nature of the alleged theft or fraud, further inquiry into the matter is needed and it will be recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to a possible prosecution.

77. Mr Dekker also alleged that SSI underpaid the PSJV an amount R1.718 million in relation to a sale of parcel 248. Mr Nathan denied this in his affidavit. He maintained that 86.94 carats of the shipment were removed and sold to DNT for beneficiation purposes. In support of his version he annexed an invoice from the PSJV to SSI (not DNT) in the amount of approximately R2.368 million, which does not correspond with the alleged missing value. This matter too requires the law enforcement agencies to conduct such further investigations as may be necessary.

78. In its report Gobodo indicated that SSI had failed to disclose to it the full identity of the buyers of the rough diamonds sold by it in the auctions. There has been some suggestion (though no clear evidence) that some of the buyers may have had links with the Gupta enterprise. Gobodo consequently recommended that further investigation be conducted to identify the buyers of the rough diamonds and the related prices for the rough diamonds to ensure that the buyers had the required licences and that the sales had been registered with the relevant authorities in accordance with the provisions of the Diamonds Act.

79. It will accordingly be recommended that the SADPMR conduct an inquiry in terms of section 79 of the Diamonds Act to determine if all the buyers to whom SSI sold rough diamonds were in possession of the requisite licences as contemplated in Chapter IV of the Diamonds Act; and, where appropriate to refer any possible contraventions of sections 18, 19, 20 and 21 of the Diamonds Act to the law enforcement agencies for any further investigations as may be necessary with a view to the possible prosecution of such persons for offences under the Diamonds Act or any other law.

THE PROPOSED DIVERSIFICATION OF ALEXKOR INTO COAL MINING

80. On 13 September 2013, the Deputy Minister of Public Enterprises, Mr Bulelani Magwanishe made the following media statement:

> I'm pleased to announce today, that the board has responded with a game changing strategy that has a well-crafted compelling value proposition that . . . positions Alexkor as a world-class mining company with aspirations to respond to the immediate needs of the country.
>
> Our own analysis shows that Eskom will start experiencing coal supply shortages by 2018. The state has to move fast to avert an energy crisis. Electing to enter coal mining, will fundamentally change the value proposition of Alexkor to the people of South Africa.
>
> Alexkor's new strategy provides the state with a significant lever in engaging with coal majors, who are mainly multinationals, with a narrow responsibility to the country's economy. Alexkor is expected to be a vanguard for transformation in the coal mining sector, as the government's call for transformation in the sector has effectively gone unheeded.
>
> Black emerging miners are still battling to gain a footing in the sector. Alexkor will partner emerging black, women, youth-owned miners through offering the necessary technical and business

expertise to enable graduation of these miners from emerging to established, realising the objectives of the Eskom Emerging Miners Strategy, which as a department we have championed.

The repositioning of Alexkor satisfies another policy imperative. The Minister of Public Enterprises (Mr Gigaba) mentioned during his 2013 Budget Vote speech: the push for SOC-to-SOC collaborations. A year ago an Alexkor-Eskom collaboration at such a strategic level was inconceivable. Now we are at the threshold of shaping the future of this country; and Alexkor is on the verge of finding its place into South Africa's future sustainable growth story. Alexkor is also looking at high grade limestone supply to assist Eskom with its flue gas desulphurisation plants, and transportation cost is a major component of the price of burnt lime and leveraging SOC infrastructure will provide a cost advantage. The company's diversification strategy will ensure that it explore mining opportunities on the African continent.

81. *Business Day* reported on 16 September 2013 that Alexkor, which at that stage did not have any coal prospecting or mining properties, appeared to be duplicating the mandate of state-owned coal mining company, African Exploration Mining and Finance Corporation (AEMFC), which produced coal for Eskom from the Vlakfontein mine near Wltbank, and was planning expansion. Answering questions at a press briefing after Alexkor's Annual General Meeting on 13 September 2013 in Pretoria, Mr Magwanishe denied that there was a potential conflict between Alexkor and AEMFC.

82. Alexkor's new coal strategy was a radical departure from the past and was supposedly aimed at transforming Alexkor into a diversified mining company that would ensure the long-term sustainability of mining operations.

83. Corporate documentation produced by Alexkor during 2013-2016 in relation to its strategic objectives and business development discuss the plan to exit diamond mining and to diversify to coal mining. However, no evidence was presented to the Commission of any practical steps taken by Alexkor or other interested parties to give effect to those objectives and plans during that period. As discussed earlier, some attempt was made to on-board Regiments as a financial adviser on the project in 2014, but the evidence is insufficient to determine what role (if any) it played in effecting the new strategy.

84. A few years later, on 8 May 2017, a memorandum of understanding (MOU) between IPC Beneficiation (Pty) Ltd (IPC) and Alexkor was signed. The MOU stated that a new company would be established and that the shareholding would be Alexkor- 55% and IPC- 45%. It was provided that a new company (Alexcoal) would enter into logistics and supply agreements with WesCoal and Nungu Mining, for the supply of washed coal to Eskom. On 20 October 2017, Ms Hantsi Matseke, the then chairperson of Alexkor and the PSJV wrote a letter about the establishment of Alexcoal to Ms Lynne Brown, the Minister of Public Enterprises, in which she acknowledged the Minister's conditional approval to proceed with the negotiations with IPC.

85. The Commission's investigating team maintain that the entire coal deal was a strategy of the Gupta enterprise to position itself to control Alexkor coal business, which consisted of IPC, WesCoal and Nungu Mining. This is clear from a bulletin, dated 27 January 2015,l released by a company associated with the Gupta enterprise, namely Centaur Holdings Ltd based in Dubai. The company states on its website that it has interest in developing coal properties in South Africa. Its key shareholders are Mr Aakash Garg Jahajgarhia, who is married to the daughter of Mr Anil Gupta. Centaur claimed to have signed a $100 million (R1.4 billion) revolving credit facility with an anonymous Dubai based family (possibly the Guptas) to expand its natural resources projects in South Africa. It also contributed towards the R2.15 billion purchase price of Optimum Coal Holdings by Tegeta Exploration & Resources, a subsidiary of Oakbay Investments, part of the Gupta enterprise.

86. The Centaur bulletin announced that Centaur had completed a funding package for IPC. Under the terms of a cooperation agreement, Centaur agreed to provide secured capital to expand IPC's existing opencast mining operations at the Nungu Colliery. Evidence before the Commission reveals that plans were already afoot in August 2014 to acquire the Nungu concessions that would form part of the new Alexcoal. An email to Mr Tony Gupta from Mr Ravindra Nath of Oakbay on 28 August 2014 indicates that the Gupta enterprise was involved with Nungu and there was a plan to conclude a coal supply agreement with Eskom.

87. In his evidence before the Commission Mr Craythorne raised another possible dimension and rationale for the plan of Alexkor to diversify into coal. He maintained that with the appointment of Mr Gigaba as Minister of Public Enterprises in late 2010, "a process of twin state capture began". At the same time SSI was appointed and the Minister announced the diversification into coal, other companies Trans Hex, and Questco, a corporate adviser, devised a plan to persuade Alexkor to dispose of its diamond assets in the region and to diversify into coal. He claimed that these persons, aligned with executives in Alexkor and the PSJV, intended to: 1. take management control of Alexkor's marine diamond operations; 2. construct a false narrative about the future mining potential of the marine mining rights, by telling all stakeholders that the diamond resource would be depleted within five to ten years, while simultaneously stripping the assets of Alexkor; and 3. purchase Alexkor's marine diamond operations and take over the 51% stake in the PSJV.

88. This plan, Mr Craythorne said, was given traction when Mr Gigaba repurposed the Alexkor board in order to implement his "Emerging Black Coal Miner Exit Strategy." Mr Craythorne claims the plan led to Alexkor diverting significant and vital financial resources away from the operations of the PSJV in order to diversify into coal - a mandate that he contends was irrational (given the lack of funding) and extremely harmful to the Namaqualand economy. It was also contrary to the true mandate of Alexkor and the PSJV. Mr Craythorne provided no evidence of the nature and value of the resources that were diverted for this purpose. 89 The evidence upon which Mr Craythorne relied to advance this particular thesis consists of a document prepared by Questco for a presentation to Alexkor in August 2014. The document begins with the following statement:

> Questco understands that Alexkor has recommended that the Government... exits from all diamond mining interests and pursue opportunities relating to strategic minerals. This presentation proposes mechanisms by which this exit may be achieved in an orderly manner and sustainable value created for all stakeholders. This presentation follows initial meetings with Percy Khoza and his team, and provides more detail in respect of the concepts discussed at this meeting. The concepts set out in this presentation are high level in nature and assumptions made are subject to further discussion and verification – we look forward to further engagement in this regard.

89. The document found the mechanics of the plan to be the winding up of the PSJV and the exit by government from Alexkor in exchange for cash and shares. Alexkor and RMC would receive shares in Trans Hex in exchange for winding their diamond interests into Trans Hex, which would hold 100% of Alexkor land and marine assets.

90. According to Mr Craythorne, the central aim of the Questco/Trans Hex plan was to acquire Alexkor's' marine diamond assets at a reduced value by: i. winding up the PSJV and populating the executive management structure with Trans Hex proxies; ii. understating the true value of the marine diamond assets; and iii. ensuring the costs of acquisition of the assets are minimal by creating "a false sense of low value regarding the assets and a high level of owner fatigue."

91. There is no evidence before the Commission of any practical steps that were taken between 2014 and 2017 to implement the Questco proposal. However, the plan to diversify into coal was discussed by the Parliamentary Portfolio Committee on Public Enterprises on 16 November 2016 when Alexkor presented its 2015/16 Annual Report, where scepticism was expressed about the plan and its financial viability.

92. Mr Craythorne seems to have taken up the Questco issue in 2017 and this generated a letter dated 9 March 2017, addressed to the marine contractors (including Mr Craythorne) by Ms Matseke, the chairperson of Alexkor and the PSJV, which in relevant part reads:

> It has come to the attention of Alexkor that certain rumours are being spread... which are without any factual basis and devoid of truth. These untrue rumours are: a) that Alexkor intends to sell off its marine assets; b) that Alexkor is negotiating with two potential purchasers for the marine assets; and c) that the potential purchasers will take over all mining activities in the marine area, with the result that all the current marine mining contracts would be terminated.
>
> On behalf of Alexkor, I state categorically that these rumours are false and without any factual

basis.

93. There is no coherent evidence before the Commission confirming that the Questco plan, conceived eight years ago in 2014, has been implemented in any way or that any person associated with it acted illegally or improperly. Mr Craythorne states in his affidavit that the plan is "for all practical purposes is a reality, as the entire Northern Cape is under the direct control of Trans Hex, or its proxy management team in the PSJV – a situation which has enabled Trans Hex and Alexkor to deny the longstanding mining contractors access to all the Northern Cape shallow water concessions.." The statement is short on details, but also reveals Mr Craythorne's partisan concern to advance the interests of his constituency.

94. Given the insufficiency of the evidence, and the fact that those who proposed the Questco plan have not had an opportunity to present evidence about it, the Commission is not in a position to make any findings about its legitimacy or of any wrongdoing or impropriety related to it.

95. In 2018 the Minister of Public Enterprises, Mr Gordhan placed a moratorium on the coal acquisition plans by Alexkor and the proposed coal strategy came to a halt. In the final analysis nothing material came of the plan.

96. While the information regarding the proposed diversification is revealing in some respects of the modus operandi and intentions of the Gupta enterprise in relation to Alexkor, and adds to the overall picture of state capture, the limited investigation which the Commission was able to conduct and the evidence in relation to the proposed diversification of Alexkor did not disclose any specific offences on the part of the executives and board members of Alexkor in relation to the plan to diversify into coal mining. The available information nonetheless adds to the body of evidence that some at Alexkor had aligned themselves with the project of the Gupta enterprise. A fuller investigation may well reveal criminal conduct on the part of those involved.

CONCLUSIONS AND RECOMMENDATIONS

97. On 12 September 2019, an Administrator of Alexkor was appointed to assume the positions of executive chairperson of Alexkor and the PSJV and inter alia to undertake an extensive review and analysis of the events that took place.

98. In the light of the preceding discussion and analysis the following recommendations are made:

    98.1 It is recommended that the board of Alexkor conduct a full investigation into any contract with and fees paid to Regiments to determine the precise nature of any services rendered by Regiments and whether Alexkor received full consideration and value.

    98.2 It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, ABDC, Mr Daniel Nathan and the directors and employees of SSI, ABDC or any associated company on charges of contravening sections 18, 19, 20, 21, 44 or other relevant provisions of the Diamonds Act.

    98.3 It is recommended that the board of Alexkor and the PSJV investigate whether Mr Bagus, Dr Paul and Mr Korabie (the members of the tender committee) were in breach of their fiduciary duties as contemplated in section 76 of the Companies Act by making a misrepresentation to the board regarding SSI's compliance with the tender requirements with a view to an application to declare them delinquent in terms of section 162(5)(c) of the Companies Act.

    98.4 It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Bagus, Dr Paul and Mr Korabie (the members of the tender committee) for fraud or a contravention of section 214(1)(b) of the Companies Act by deliberately making a misrepresentation regarding SSI's compliance with the tender requirements.

    98.5 It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any director, executive or employee

of SSI (ABDC) an/or DNT for a contravention of section 86 of the Diamonds Act by wilfully furnishing false information to the SADPMR or making a false or misleading statement in relation to the right of ABDC to obtain a diamond licence.

98.6 It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Carstens and Ms Kellerman for fraud or a contravention of section 214(1)(b) of the Companies Act for making a misrepresentation to the board that a proper due diligence was performed prior to the award of the tender to SSI.

98.7 It is recommended that the board of Alexkor and the PSJV investigate whether Mr Carstens and Ms Kellerman were in breach of their fiduciary duties as contemplated in section 76 of the Companies Act by making a misrepresentation to the board regarding the performance of a due diligence on SSI with a view to an application to declare them delinquent in terms of section 162(5)(c) of the Companies Act.

98.8 It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Bagus, Mr Korabie, Dr Paul and other persons who purported to function as board members of the PSJV for contempt of the court order issued by the Western Cape High Court on 4 September 2014.

98.9 It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, Mr Daniel Nathan Trading CC, Daniel Nathan Trading House, Alexander Bay Diamond Company Trading House, Alexander Bay Diamond Company, and the directors, executives or employees of these companies, for a contravention of section 86(c) of the Diamonds Act, by falsely giving out in the registers of SSI that such persons were holders of the required licence when the diamonds were in fact traded by SSI, an unlicensed trader.

98.10 It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, or any director, executive or employee of SSI, on any relevant charge in relation to diamonds of 196.15 carats valued at R5.136 million allegedly not accounted for in the SSI register.

98.11 It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, or any director, executive or employee of SSI on any relevant charge in relation to an alleged underpayment to the PSJV of an amount of R1.718 million in relation to a sale of the diamonds in parcel 248.

98.12 It is recommended that the SADPMR conduct an inquiry in terms of section 79 of the Diamonds Act to determine if all the buyers to whom SSI sold rough diamonds were in possession of the requisite licences as contemplated in Chapter IV of the Diamonds Act; and, where appropriate to refer any suspected contraventions of sections 18, 19, 20, 21 or other provisions of the Diamonds Act to the law enforcement agencies for any further investigations as may be necessary with a view to the possible prosecution of such persons for offences under the Diamonds Act or any other law.

FREE STATE ASBESTOS PROJECT

INTRODUCTION

1. The Commission has heard evidence and considered documentation relating to a project in the Free State Province that came to be known as the “Asbestos Audit and Eradication Project”, which claimed to audit the presence of asbestos in housing yet failed to provide any benefit to any resident of that Province other than two businessmen and certain high-ranking government officials.

2. The conceptualisation and implementation of this project suggests that it was a scam of considerable complexity from its inception. There is every indication that this asbestos audit was always intended to unlawfully benefit a business consortium and that those financial benefits were extended to at least the relevant senior provincial officials and the Director-General (DG) of the National Department of Human Settlements.

3. Preliminary investigations suggest that at least one of these businessmen engaged in financial transactions with politically connected individuals, although investigation has not revealed what reciprocal benefits, if any, were rendered or anticipated in return by these individuals.

4. Because of the apparently irregular and possibly criminal transactions identified during the investigation by the Commission, a full examination of the evidence is undertaken in what follows below before conclusions and final commentary are offered.

OVERVIEW OF THE FREE STATE ASBESTOS CONTRACT, BUDGET AND WORK

5. The following facts are undisputed and provide an outline of how a contract was concluded during 2014 between the Free State Department of Human Settlements (the Department) and the Joint Venture (JV) entity known as Blackhead Consulting (Pty) Ltd (Blackhead) and Diamond Hill Trading 71 (Diamond Hill) (the JV), its implementation and associated costs.

6. Out of the blue, an unsolicited commercial proposal, dated 28 May 2014 and emanating from the JV, was received at the offices of the Department. The proposal was titled “Audit, Handling of Hazardous Material, Removal and Disposal of Asbestos-Roofed Houses”. The Proposal from the JV attached a “scope of work” which included “physical door to door counting, safe removal and disposal of Asbestos-Contaminated Building Rubble and asbestos sheets from various townships across the Free State Province”.

7. Mr “Tim” Mokhesi, Head of Department (HOD), wrote to Mr Thabane Zulu, the DG of the National Department of Human Settlements (the National Department), Ms Mary-Anne Diedericks, the Acting HOD of the Gauteng Department of Human Settlements (the Gauteng Department) and the Free State Provincial Treasury (FS Treasury) to obtain approval and authorisation in terms of Treasury Regulation 16A6.6 for Blackhead to conduct the “Asbestos Audit and Eradication Project” in the Free State.

8. Ultimately, on 1 October 2014, Mr Mokhesi wrote to Mr Edwin Sodi, Director and CEO of Blackhead, appointing “Blackhead Consulting (Pty) Ltd Joint Venture” to perform “the audit and assessment of asbestos, handling of hazardous material, removal and disposal of asbestos-contaminated rubble and replacement with SABS approved materials in the Free State Province”.

9. The Service Level Agreement (SLA) entered between the Department and the JV described the “Project” as an appointment to “assess/audit houses roofed using asbestos material, handling and disposal of asbestos sheets to an approved, designated disposal site”.

10. The Instruction to Perform Work (IPW) was signed by Mr Mokhesi on behalf of the Department on 2 December 2014. It was divided into Phase 1 and Phase 2 and specified the price to be R850.00 (excluding VAT) per housing unit for the JV to “Audit, Assess and GPS all pre-1994 government housing units in the Province”. The duration of the performance of the job was from 1 December 2014 to 31 March 2015.

11. Payment was to be made in four tranches:

    11.1 Forty% of 50% of the total project cost (R51 million excluding VAT) was payable on commencement (1 December 2014) subject to submission of a valid tax invoice and valid tax clearance certificate

11.2 Sixty% of 50% of the total project cost (R76 million excluding VAT) was payable “as progress certificate No. 2 on or before the 1 March 2015”

11.3 Sixty percent of 50% of the total project cost (R51 million excluding VAT) was payable per progress certificate No. 3 on or before 1 May 2015; and

11.4 Sixty percent of 50% of the total project cost (R76.5 million excluding VAT) was payable per progress certificate No. 4 subject to submission of the final project report on or before 1 June 2015.

12. It appears to be common cause that the role of Diamond Hill was to “unlock opportunity” through networking with politicians and state officials in the Free State to procure business opportunities and contracts; that the role of Blackhead was to act as a “middleman” and that the work itself was outsourced in the following way: the JV subcontracted to Mastertrade, Blackhead to Zenawe; and Mastertrade to the Ori Group.

Project reporting

13. Four reports were submitted to the Department – 1. a preliminary report dated 4 December 2014; 2. a Final Audit Report dated 2 February 2015 (with a later version of the same Final Audit Report dated 13 February 2015); 3. the Report of Houses to be Prioritised dated 25 February 2015; and 4. a Remedial Report dated 2 September 2016, and a presentation was made to the Department giving an overview of the Project.

14. The first Final Audit Report (Final Report) submitted by the JV to the Department on 2 February 2015 purports to have been prepared by Mr Mpambani of Diamond Hill. The Final Report stated that the JV was appointed to “assess and quantify the entire stock of low density residential housing roofed with asbestos in the Free State Province with the ultimate aim of eradicating these roofs” and that their assessment “would enable the Department to formulate a plan to replace the affected roofs”. The Final Report claims to have “walked” 617 093 stands in five district municipalities of which +/- 302 000 stands were captured electronically, and of which 36 344 units were found to contain asbestos. The Final Report further quotes the costs for the removal of asbestos roofs, demolition and reconstruction of houses and renovation of houses in the region of R3.8 billion excluding VAT.

Project implementation

15. Inspections and approvals were meant to have been conducted. A representative of the Department’s Project Management Unit (PMU) should have conducted spot checks but, in the case of this Project, these inspections were done visually and there was no testing of or on the asbestos itself. The Chief Engineer for the PMU, Mr Thabiso Makepe, would have confirmed whether or not the work had been done. Mr Makepe confirmed that the Finance Unit would not pay an invoice if there had been no verification of such work by the PMU. Mr John Matlakala, Head of Procurement for the Department, stated that the CFO, Ms Nyana Leuna, was the person who approved the JV’s invoices.

16. The SLA was to the effect that the sum of R850.00 was to be paid for each housing unit; the total sum claimed was R255 million.

17. Several invoices were submitted and paid. The Department paid the total sum of R230 million into the First National Bank account in the name of the JV. From this JV bank account, funds were transferred to:

17.1 Blackhead Consulting (Pty) Ltd in the total amount of R70 863 000.00

17.2 606 Consulting Solutions (an entity owned by Mr Mpambani) in the total amount of R112 955 500.00; and

17.3 Mastertrade (one of the subcontractors) in the total amount of R36 483 597.90.

The Auditor-General

18. The Auditor-General (AG) prepared a report on the Department, which was released on 1 July 2015. Firstly, the AG noted that he was "unable to obtain sufficient appropriate audit evidence for commitments disclosed in Note 20 to the financial statements as the Department did not maintain accurate and complete records of the contractual information used to determine commitments". Secondly, the AG found that he could not obtain "sufficient appropriate audit evidence that all contracts were awarded in accordance with the legislative requirements". The AG continued "... the department incurred irregular expenditure of R80 965 000 (2014: R858 934 000) during the year under review as the department did not design and implement a policy relating to housing contracts that will address the constitutional requirement of fair, equitable and transparent procurement processes."

The Report of the Public Protector

19. A complaint was lodged with the Public Protector, then Adv Thuli Madonsela, on 22 October 2015 by Ms L Kleynhans, a Democratic Alliance Party Member of the Free State Provincial Legislature, concerning the contract between the Department and the JV (the Service Provider). The PP summarised the complaints as follows: "In the main, the complaint was that the contract for the eradication of asbestos roofed houses in the Free State was irregularly awarded to the Service Provider as it was contrary to Regulation 16A6.6".

20. The Public Protector investigated, firstly, whether or not the Department followed proper procurement processes in awarding the contract to the Service Provider and whether such conduct was improper and unlawful, and constituted maladministration. Secondly, whether the services provided were cost-effective and whether the Department received value for money in the execution of this contract. Thirdly, whether the advance payment made to the Service Provider was irregular and whether the invoices in respect of which the Department made payment complied with the legislative prescripts.

21. The full Report of the Public Protector was issued on 30 March 2020. The Report dealt with the issues set out below.

Whether the Department failed to follow proper procurement processes

22. The Public Protector found that there were irregularities and improprieties in the awarding of the contract for the eradication of asbestos roofs in the Free State Province to the Service Provider as:

    22.1 The Department participated in an expired contract of the Gauteng Department and did not conduct a due diligence investigation before participating in this contract. The Department was in possession of the Gauteng Department's SLA, which had clearly expired. This amounted to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994.

    22.2 The Department created the impression that they participated in a contract concluded by another state institution (the Gauteng Department) while the services were not the same as specified in the existing contract and the price was also higher. This was in contravention of Treasury Regulation 16A6.6 and amounted to improper conduct and maladministration.

    22.3 Further, the submission made by the Service Provider was in fact an unsolicited proposal that should have been dealt with in terms of Treasury Practice Note No. 11 of 2008/2009. The Practice Note required the Department to issue a Request for Qualification (RFQ) to test the market for the existence of other private entities capable of providing the product or services. The failure to issue an RFQ was in contravention of the Practice Note and the Department's SCM Policy. It was further in contravention of Regulation 16A.9 and amounted to abuse of the procurement system, and improper conduct and maladministration.

    22.4 The discrepancies between the services to be provided in the unsolicited proposal, the SLA and the letter of appointment created the impression that the appointment was for the assessment, removal of the asbestos material and replacement of asbestos roofs, while the SLA referred

only to assessment and removal. The IPW (Instruction to Perform Work) was issued only for the assessment. The SLA was in contravention of the Department's SCM policy as it was not an accurate reflection of the terms and conditions reflected in the unsolicited proposal or appointment letter. This was in contravention of Treasury Regulation 16A6.6 and amounted to improper conduct and maladministration.

22.5 In addition, the PP found that Mr Mokhesi as the Accounting Officer (AO) did not comply with section 38 of the of the Public Finance Management Act (PFMA). He failed to execute his fiduciary duties in terms of the PFMA and the Department's SCM Policy, and his conduct amounted to gross negligence in terms of section 86 of the PFMA. This conduct amounted to improper conduct and maladministration.

Whether the services provided were cost-effective and whether the Department received value for money in the execution of this contract

23. The Public Protector found that the allegation that the services provided were not cost-effective and that the Department did not receive value for money was accurate.

24. The HOD told the PP that he was unaware that the Service Provider had subcontracted the contract. However, if the HOD had acted on the AG's Report released on 31 July 2015, the further payments of R139 million would have been avoided. The omission by the HOD to act on the AG's report amounted to gross negligence in terms of section 38 read with section 86 of the PFMA.

25. He failed to execute his fiduciary duties in terms of the PFMA and the Department's SCM Policy. This conduct amounted to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the PPA.

Whether the advance payment made to the service provider was irregular and whether the invoices which the Department made payment on complied with legislative prescripts

26. The Public Protector found that Treasury Regulations do allow for advance payments on contract amounts if required by the contractual arrangements with the supplier. The contract signed between the Service Provider and the Department clearly provided for an advance payment of 40% of 50% of the contract price.

27. However, as the contract was irregularly concluded, the advance payment was irregular, which confirmed the AG's finding.

28. The invoices submitted by the Service Provider to the Department did not comply with the legislative prescripts and the payment of these invoices by the Department was therefore irregular. This conduct amounted to improper conduct and maladministration.

Remedial action of the Public Protector

29. Adv Madonsela took the remedial action described below in accordance with the provisions of section 182(1)(c) of the Constitution:

29.1 The Premier of the Free State (Mr Ace Magashule) was directed to take appropriate steps to ensure that the conduct of the AO/HOD and the Director: SCM were investigated in terms of Section 84 of the PFMA, and that the conduct was reported in terms of Section 86 of the PFMA to the SAPS and to the Directorate for Priority Crime Investigation (DPCI or "Hawks").

29.2 The HOD (Mr Mokhesi) was directed to take the appropriate steps to ensure that the conduct of the Director: SCM (Mr John Matlakala) is investigated in terms of Section 84 of the PFMA; to take the appropriate steps to ensure that the Department's SCM Policy is amended to correctly reflect the legislative prescripts; and to take appropriate steps to ensure that officials are properly trained in the SCM legislative prescripts.

The work of the Commission

30. After studying the Report, Findings and Recommendations of the Office of the Public Protector, the Commission arranged for further investigations of the various interactions, transactions and payments prior to and pursuant to this contract between the Department and the JV. In the course of these investigations, statements and affidavits were obtained from, among others, Mr Mokhesi, the HOD; Mr Thabiso Makepe, Acting Chief Director of the Department's PMU; Mr John Matlakala, Director: SCM in the Department; Ms Margaret-Ann Diedericks, Acting HOD: Gauteng Department; Mr Peane Edwin Sodi, Director and CEO of Blackhead and also a Director of the JV; Mr Thabane Wiseman Zulu, DG: National Department; Mr Abel Manyike, Director of the Ori Group and of Ori Services; and Mr Sydney Radebe, Director of Mastertrade.

31. Thereafter, evidence was heard from several of the individuals involved in or with knowledge of the contract, namely, Mr Mokhesi; Mr Zulu; Mr Sodi; Mr Manyike; and Mr Jacobus Carel Roets, Occupational Hygienist.

32. This Report relies on the affidavit and evidence of Mr Roets, the Occupational Hygienist, who identified himself as an expert for purposes of assisting the Commission in understanding, not only the dangers of asbestos, but also the outcomes of this asbestos audit and assessment by providing a detailed critique in his written affidavit and giving evidence to the Commission.

33. Mr Sodi informed the Commission that Mr "Igo" Colin Mpambani was murdered in 2017 and was, therefore, unable to give evidence to the Commission on the background to the Proposal which bears his name, as also all other documents that apparently or allegedly emanate from him.

34. This report by the Commission examines the evidence, apparent anomalies, irregularities or improprieties, and comments on that evidence with regard to the conclusion of the contract, its implementation and payments made in terms of the contract. This Report also examines the evidence concerning certain payments made to 'secret' beneficiaries. Finally, it comments on the overall implications for good governance, compliance with the precepts of the South African Constitution, and the responsibility of this Commission in establishing whether or not there have been instances of state capture, corruption and fraud or other irregularities contemplated in the TORs of the Commission.

NETWORKING FOR OPPORTUNITY

35. Mr Sodi had been involved in an asbestos audit project in Gauteng province, and it was agreed that Mr Mpambani would use his network of contacts in the Free State province to try to unlock a similar opportunity in the Free State.

36. Mr Sodi and Mr Mpambani established the JV. In terms of the JV agreement, each party would perform their own work and profits would be shared on a 50-50 basis between them. Mr Sodi said that he knew that Mr Mpambani had never done this type of work before and had no expertise and, accordingly, Mr Sodi "did not anticipate that he was going to bring any meaningful resources to the project". Mr Sodi explained that he understood Mr Mpambani's role was to engage with the relevant officials and ensure that the JV was awarded the contract.

37. The Proposal was submitted to and subsequently accepted by the Department. Mr Mokhesi's attitude suggests that he had prior knowledge of the arrival of the written Proposal and saw no need for any investigation or discussion on the need for or the value of the proposed project. It also suggests that Mr Mokhesi had no concern as to the costs involved, where funds might be found and what other projects would have to be abandoned or discontinued. Thus, merely on receipt of the Proposal and without further ado, Mr Mokhesi already had a view that monies should be paid over to the JV for the purposes set out in the Proposal, and Mr Mokhesi's only interest was in finding the method for implementation of the project. Mr Matlakala's response to the Proposal was similar to that of Mr Mokhesi.

38. It is clear that the initiative for this project came not from the communities, Legislature, or other

governing bodies in the Free State, but from Mr Sodi and Mr Mpambani who were "highly networked" and able to "unlock opportunity".

The unplanned project

39. An Occupational Hygienist, Mr Roets, submitted an affidavit (as an expert) and gave evidence to the Commission. His evidence is that there are serious health hazards arising from the presence of asbestos in the structures, fittings and furnishing of many houses in South Africa. These dangers were reflected upon by all witnesses and confirmed by various officials.

40. The Free State Government had not chosen to allocate funds in 2014 (or before then) for the eradication of asbestos from state-erected or -financed housing in the Province. It would appear that there were other more urgent demands to which taxpayer funds were to be allocated. Accordingly, no projects had been contemplated, discussed, approved, budgeted or organised either to audit and assess the presence of asbestos in the Free State as at 2014, or to remove and dispose of this hazardous substance.

41. It should therefore have come as a surprise to officials employed in the Department when a Proposal arrived from a JV for the "Audit, Handling of Hazardous Material, Removal and Disposal of Asbestos-Roofed Houses".

42. Despite the absence of any provision for such a project, this Proposal was approved, although this was subject to Blackhead securing the necessary funds for this project. Mr Sodi identified the lack of funds as one of the obstacles that needed to be overcome. The solution to the immediate lack of funds was to be found in the basis on which the JV offered to fund the Project, in that the Proposal stated, "we have pleasure in submitting our request to be appointed on risk basis. . . .". The response from Mr Mokhesi, indicating a desire to make the appointment, was to state that the appointment of the JV "will be subject to your company securing funds to roll out the project in line with your proposal".

43. The JV never did any work or utilised any resources "on risk", however. It was paid from the outset. The SLA provided for a prepayment of some R51 million on signature. Mr Mokhesi's intention was to implement the Proposal within weeks, without investigations, discussions or negotiations. Mr Mokhesi tried to defend his determination to fund this project on two grounds. Firstly, that the Matjhabeng Local Municipality had already requested the Department to do an assessment of housing roofed with asbestos and that this had been done and the asbestos removed. However, this explanation was contradicted by the inclusion of this same housing in the Matjhabeng Municipality in the contract which Mokhesi ultimately concluded with the JV. Secondly, Mr Mokhesi claimed that the Department had already advertised for qualified asbestos removal contractors to register on the database of the Department. He said that, thereafter, information from the JV audit was made available to the Department to obtain donor funding to implement the removal of the offending material. However, this claim was contradicted by his statement that "the Department will at the right time advertise for [the removal phase] of the project to be undertaken."

44. Furthermore, Mr Thabiso Makepe, Chief Engineer at the Department's PMU, and Mr Matlakala of the PMU stated that, before the contract was concluded with the JV, no enquiries were conducted with local municipalities to find out if there were any records of houses containing asbestos.

45. In short, no attempt was ever made by any officials in the Department to ascertain whether or not the national and international health concerns surrounding asbestosis were of practical or overwhelming significance in the Free State Province that needed immediate and costly attention.

46. The absence of funds was corroborated by Mr Sodi who testified that Mr Mpambani had told him that the Department wished "to implement this programme, however it was not in their budget for that financial year". Mr Mokhesi was clear that there was no allotted budget for this project but described how the funds would be found from "within the very same budget, projects not performing". This is the reason why it was necessary for him to approach Mr Zulu at the national Department with a motivation for a revised business plan. Mr Zulu confirmed that "there was no provision in the (Free State) budget for the execution of this particular business plan."

47. Mr Sodi explained that the JV had received feedback that it "will be appointed". However, in his testimony to the Commission, he was unable to explain what the result would be if the JV had used its own funds to render services.

48. Mr Zulu told the Commission that the money for the Project was to come from the Free State Department, but he gave no indication that he was ever advised which other projects or programmes were to be abandoned or have their budgets reduced to accommodate this unexpected new project costing some R253 million. Mr Mokhesi suggested that the monies might have come from other underperforming projects„ but gave no indication of which projects were underperforming, how selection would be made between projects to be deprived of funds, or which projects did eventually have their budgets reduced or discontinued. There was no indication that any such consultation, discussion, assessment or evaluation took place. Finally, there is no suggestion that, even if this asbestos audit was thought to be of value, consideration was given to postponement of the project which could then take place in another financial year or budget cycle.

49. In addition, there was no consideration of what the scope of the task would be - how many municipalities, houses, units would be included, what distances would have to be travelled, what records already existed indicating the extent or otherwise of the problem of asbestos, what other similar projects had been undertaken in any other provinces and with what result, and with what further endeavour and cost. This Proposal existed in a total vacuum as to need, current approved projects and budgets, extent, outcome or value to the Province.

50. It was up to the AO/HOD to process this Proposal. Section 36(2)(a) of the PFMA provides that the HOD must be the AO for a department. Mr Mokhesi was at all relevant times the HOD and the AO for the Department.

51. Mr Matlakala made it clear that he "did not participate in any way, shape or form in recommending the appointment of the Joint Venture, as such recommendation was not even solicited from me". He did, however, state that he was "responsible for putting all the necessary documents in place for the eventual appointment" of the JV.

No competitive bidding process

52. The unsolicited Proposal emanating from the JV had not resulted from an open and competitive bidding process. Nevertheless, on presentation of the Proposal, there were already indications that it was favourably received and that efforts were being made to ensure its acceptance and implementation.

53. An "unsolicited proposal" is defined in National Treasury Practice Note No. 11 of 2008 (the Practice Note) issued in terms of the PFMA as "a proposal/concept received by an institution outside its normal procurement processes that is not an unsolicited bid."

54. If an unsolicited proposal is received, the Department, is required to issue a Request for Qualification (RFQ) to test the market. Only if there is no response to the RFQ may an institution enter into direct contractual negotiations with a proponent outside of a tender process. Should there be a response from the private sector to the RFQ, then the ordinary competitive bidding process must be followed by the Department.

55. In fact, the Department's SCM Policy prescribes that, if the Department decides to proceed with the unsolicited proposal, the AO must negotiate an unsolicited proposal agreement, the sole purpose of which is to guide the process in terms of the Practice Note.

56. The Department did not issue an RFQ. It made no enquiries to test whether or not "the market", i.e., the private sector, contained other businesses capable of providing either or both of the audit and assessment of asbestos, and the removal and disposal of asbestos as proposed in the JV's Proposal. That would have meant going public and entering the light of day with a competitive bidding process known to all, where service providers, the scope of work and the costs involved would all have been subject to scrutiny and evaluation. Instead, a means was found by Mr Mokhesi, to conclude a contract

for the audit and removal of asbestos without opening up the Project to competitive bidding in a transparent manner.

Purported reliance upon Treasury Regulation 16A6.6

57. In certain circumstances and subject to certain conditions, processes are lawfully available to circumvent the requirement for open and public competitive bidding for State contracts. Treasury Regulation 16A6.6 provides:

> The accounting officer or accounting authority may, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractor.

58. Essentially, this regulation allows one state body to participate in a contract arranged by another state body with similar needs.

59. Mr Mokhesi entered into a series of approaches purporting to procure the participation of the Department in a contract concluded by the Gauteng Department. All this was done in terms of the supposed authority of Treasury Regulation 16A6.6.

60. Mr Mokhesi sought to rely upon an earlier appointment of Blackhead to the Gauteng Panel of Professional Resource Teams (PRT) in the Gauteng Department, which appointment had been confirmed by the national Department in April 2014. This contract had been extended by the Acting HOD: Gauteng Department, Ms Diedericks, to 31 August 2014. The correspondence by which Mr Mokhesi sought to both ensure and confirm this extension of the Gauteng contract to the Free State was all initiated after Mr Mokhesi advised Mr Sodi on 19 June 2014 that the Free State wished to "extend" the Gauteng contract to the Free State.

61. On 15 July 2014 Mr Mokhesi wrote to Ms Diedericks asking for approval, in terms of Treasury Regulation 16A6.6, for the Free State Department to participate in the Gauteng contract to which Blackhead had been appointed. That contract had been for the assessment of the prevalence and existence of asbestos in low cost housing in the Gauteng Province and did not include the removal and disposal of asbestos. In her letter dated 4 August 2014, Ms Diedericks confirmed that she had granted "approval for the Free State Department to participate in the contract arranged by means of a competitive bidding process from the database of the Gauteng Department for Professional Resource Teams where Blackhead Consulting Pty Ltd was appointed from." Ms Diedericks thus granted approval for the Free State to participate in the Gauteng contract to which Blackhead was a party. She did, however, alert Mr Mokhesi that the Gauteng Department's "data base will lapse at the end of August 2014".

62. The approach by Mr Mokhesi of 19 June 2014 to the DG of the national Department regarding the "Appointment PRT to Departmental Panel", and Mr Zulu's response of 3 August 2014 under a similar heading, was not the approach and response which purported to or sought to trigger implementation of Treasury Regulation 16A6.6.

63. Rather, this was the process purportedly utilised by the Free State Department to overcome both the behind-the-scenes negotiations of Mr Mpambani, which precluded a competitive bidding process, and the absence of allocated funds in the Department's budget. However, even a cursory examination of the documents shows that the sub-regulation was not applicable and could not assist Mr Mokhesi in his endeavours to confirm the appointment of the JV to a contract as envisaged in their Proposal.

64. It was suggested to the Commission that one organ of state or department is permitted to participate in the contract of another department or organ of state that has been produced by means of a competitive bidding process. A new contractual relationship is not formed. It is no more than an expansion of an existing contract, done by way of addendum, enabling participation of an additional department or organ of state in the existing contract, which therefore must presuppose that the same parties, services, price and terms continue.

65. The Public Protector was, however, persuaded that this was "an unsolicited proposal and not a participation contract". A participation contract (utilising Treasury Regulation 16A6.6), according to the Public Protector, "requires the same service provider, the same services and the same price. The Department could also not demonstrate any benefit as required by Treasury Regulation 16A6.6".

66. Perusal of the documentation alone indicates that Treasury Regulation 16A6.6 could not be utilised by the Free State Department to participate in an existing contract in Gauteng. The contract in Gauteng had lapsed and was no longer available for participation by the Free State. The proposed Free State service provider was not and never had been an approved service provider on any database. Neither was Diamond Hill. The agreed contract price in Gauteng was R650.00 per house, while the proposal in the Free State was for R1 350.00 per house. The service to be provided in Gauteng was for only the assessment of asbestos in houses, while the Proposal in the Free State was for both audit and assessment, and removal and disposal of asbestos. So, on the face of the documentation alone, it was never permissible for the Department to attempt to utilise Treasury Regulation 16A6.6 to enter into a contract with the JV for which there had been no competitive and transparent bidding process.

Was this incompetence, negligence or deliberate malfeasance?

67. Officials involved in this project sought to explain their reliance upon the applicability of Treasury Regulation 16A6.6 by asserting that they, at all times, believed that it was appropriate to exercise the provisions of this Regulation so as to render this unsolicited and private Proposal, and the resulting contract, regular and lawful. They stated on oath that they knew of the relevant legislation, regulations and practice arising from their knowledge of the Constitution, the PFMA, the Treasury Regulations, as well as their own experience. None claimed to have been unaware of the procedures to be followed. In fact, the use of, and reference to, the relevant legal provisions governing their conduct, the reliance upon earlier appointments and approvals, the phrasing of documents and the existence thereof, all point to knowledge and experience and competence in the process being undertaken.

68. Neither competence nor negligence are in question. However, the context within which the 'errors' were committed and the overwhelming nature thereof lead inexorably to the view that an agenda was being pursued which saw Treasury Regulation 16A6.6 as a ruse behind which to operate, rather than a legitimate lawful procedure.

69. At each stage of the process there was deceit. There was the obfuscation as to the identity of the parties, unconcern whether correspondence dealt with appointment to a Panel or participation in a contract, disregard for the lapse of, and, therefore, absence of any contract in Gauteng in which the Free State could legitimately participate, and officials' neglect of the different terms and conditions of the separate contracts. All this suggests more than mere inattention, incompetence and negligence on the part of those who purported to rely upon Treasury Regulation 16A6.6.

    69.1 Firstly, there was selective misinformation as to the identity of the party to the contract with the Department. When there was no need to rely upon Treasury Regulation 16A6.6, the JV was named and referred to, but on the two occasions when there was a need to comply with the requirements of the Regulation, the existence of the JV was concealed and reference was made only to Blackhead. Both Mr Matlakala and Mr Mokhesi knew, at all times, that a JV was involved.

    69.2 Secondly, it is indisputable that Mr Mokhesi knew the procedures that would have to be followed if he were to ensure a speedy conversion of this Proposal into a contract. He contacted Ms Diedericks for approval in terms of the Regulation and Mr Zulu for approval for deviation from the Provincial budget.

70. The undated SLA was entered into by "Blackhead Consulting (Pty) Ltd Joint-Venture" (represented by its CEO, Mr Sodi), which agreement defines the "service provider" as "Blackhead Consulting (Pty) Ltd and Diamond Hill Trading 71 (Pty) Ltd Joint-Venture". Though not signed by Mr Mokhesi or any representative of the Department, Mr Mokhesi did not deny this SLA and reliance was placed on it to process payments by the Department.

71. The subcontractors who did the work, Mastertrade and the Ori Group, knew from the outset, as early

as August 2014, that it was the JV that had been appointed by the Department. Mr Mokhesi made an important admission before the Commission. He agreed that the reason why the JV was introduced so late in the process was that, had it been introduced upfront, there would have been no question of any transfer or extension of a contract from Gauteng to the Free State. Mr Zulu was adamant that the proposed participation of the Free State Department in the Gauteng contract had nothing to do with the national Department. He pointed out that "the HoD Free State possessed the locus standi ...".

72. Mr Zulu was not concerned that it was he, in his capacity as DG, who had also given permission for the Free State Department to participate in the Gauteng contract. He interpreted his subsequent comments regarding procedures and costing as providing advice. However, he was obliged to agree that one "cannot extend membership of a panel [one can] only extend a particular contract".

73. Throughout this time, there can be no doubt that Mr Mokhesi, Mr Matlakala and all those involved in concluding this contract and implementing it, knew that the JV was involved. Accordingly, by the time Mr Mokhesi was asking the DG for approval of the deviation from the business plan and also professing to seek approval of the participation of the Department in the Gauteng contract, neither the membership of Blackhead in the PRT nor the contract itself was still operative. Thus, by the time Mr Mokhesi appointed the JV on 2 December 2014, the membership of Blackhead on the Gauteng PRT database had already lapsed.

74. The only conclusion that can be drawn from the undisputed facts, documented in correspondence and confirmed in the evidence of Mr Mokhesi and Mr Sodi, is that these two persons, one contracting on behalf of the Department and the other on behalf of the JV, both knew at all times that Treasury Regulation 16A6.6 was not available as a means to legitimise the contract that they both wished to secure without any competitive bidding process, and that they both took steps to conceal the inconvenient facts when they used that Regulation. This was neither incompetence nor negligence, but knowing, deliberate and planned circumvention of lawful processes requiring competitive bidding.

Deviation from the Free State budget

75. Approval had to be obtained for funds to be reallocated from the Provincial budget for this new and unplanned project. Changes to the existing and approved business plan and budget of the Free State Department required the approval of Mr Zulu, DG in the national Department. As Mr Zulu explained in his evidence,

> before any project can proceed at provincial level, it requires the approval of its business plan by the national department" and "should there be a deviation, ... you will require the approval of the national department. ... All business plans approved first at a provincial level and then submitted at national level for confirming the availability of the budget are aligned with the existing budgets.

76. In the absence of any information on the urgency of the project, needs analysis, projects to be financially affected and future plans, it would not be possible for the Free State budget and this particular business plan to be reviewed by the DG.

77. Against this background, Mr Zulu wrote back to Mr Mokhesi on 12 August 2014. His letter has a similar title "Reference appointment PRT to Departmental Panel" and reminds the Free State HOD that Treasury Regulation 16A6.6 allows the Free State to participate in the Gauteng contract. Mr Zulu adds the cautionary note that "This will however mean that the said company was properly appointed having followed the due procurement processes". He also cautioned "that the Free State Department ... will be held liable for any financial implications or operations of the service provider. If need be you may have to revise your current business plan accordingly, so as to be in line with National Treasury Regulations in order to achieve the objective".

78. However, in November, Mr Mokhesi wrote again to Mr Zulu, forwarding a supposedly revised business plan and requesting a most urgent response, asking for "priority" attention and even setting a date by which approval had to be granted. On receipt of the revised business plan on 26 November 2014 by email, Mr Zulu requested Mr Mokhesi to provide his office with a motivation "why his request should

receive priority". Mr Mokhesi submitted the motivation the next day, asking for authorisation by close of business that same day. The motivation laments the plight of poor persons living in dilapidated houses containing asbestos, refers to the Constitution, suggests global warming is relevant, and states there had been an informal study in the Free State on asbestos and housing. The motivation also stated that the objectives of the project were twofold – to audit and assess houses in the Free State, and to remove and dispose of asbestos. He provided the cost of the project as being R850 per house, which is represented as including all costs associated with the removal and disposal of asbestos. Nowhere did Mr Mokhesi indicate why he had asked for "priority" attention and response. Mr Mokhesi failed to indicate the number of houses to be assessed, that the sum of R850 covered only one part of the project which he claimed to have two objects (both audit and assessment, and removal and disposal), or even to indicate the total cost of the project.

79. In the absence of any mention of the total cost of the project (whether for audit and assessment only (R850 per house), or audit and assessment, and removal and disposal of asbestos (R850 plus R32 760 per house) no-one would have any idea of the funding required for this Project, the adjustments which would be needed to be made in the Free State budget, where the money could or would be found, what other programmes or business plans had or were to be abandoned, and what needs analysis could be done. The sum of R255 million was not mentioned anywhere in correspondence with the DG.

80. Mr Mokhesi gave Mr Zulu no reason why this unexpected project should be addressed as a matter of urgency, what it would cost, whether there were funds available and what the impact would be of utilising those funds.

81. Mr Mokhesi's conduct was deceitful. He suggested that the Project was two-fold and that both phases of the Project would (supposedly) cost R850 per unit in their entirety. There was no mention of the total cost. Mr Mokhesi failed to indicate that he had already appointed the JV to perform only one portion of the Project – the audit and assessment – and that he and the JV knew the total cost was R255 million. There was no motivation to secure approval for deviation from the allocated budget. This supposed procedure was all about ticking boxes to secure some correspondence that appeared to permit a deviation from the provincial budget already allocated.

Recording of reasons for deviation from competitive bidding process

82. It is only when "it is impractical to invite competitive bids" that Treasury Regulation 16A6.4 can be applicable (emphasis added). The Regulation provides:

> If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.

83. The AO is granted this discretion to deviate from inviting competitive bids only when the precondition of the impracticality of so doing is met and when there has been compliance with the compulsory requirement of having had the reasons for deviating from competitive bids "recorded and approved".

84. Since the Department had not invited competitive bids and apparently had no intention of following a competitive bidding process Mr Mokhesi, was required by the Regulation to submit to Mr Zulu the reasons why it was not practical to invite competitive bids for the proposed Project. Mr Zulu, as DG, had to record and approve such deviation. Although Mr Mokhesi sought approval in terms of Regulation 16A6.6, he did not refer to Regulation 16A6.4. He did not mention the absence of a competitive bidding process. He did not state that it was impractical to invite competitive bids or attempt to explain or justify why it was impractical. In short, Mr Mokhesi did not even pretend to comply with Treasury Regulation 16A6.4 and Mr Zulu ignored the requirements of a competitive bidding process.

85. On a full consideration of all the evidence, there can be no doubt that this asbestos contract was not entered into in a regular or lawful manner. Reliance on Treasury Regulation 16A6.6 was always

misplaced and the requirements of Treasury Regulation 16A6.4 were not fulfilled. No justification has been offered why there could be no public, transparent and open competitive bidding process. It can only be concluded that the breaches and omissions of lawful procedure were deliberate and intentional.

86. The value of competitive bidding for the state was completely ignored in pursuit of this one opportunity that Mr Mpambani had 'unlocked' for himself and Mr Sodi.

THE CONTRACT AND ITS TERMS

Identity of the service provider

87. It is undisputed that the service provider in this SLA was the JV. As already noted, no-one in the Department had done any investigation of the existence, experience or registration of Diamond Hill, or whether it was a service provider on any database in any province. There was not even any attempt to ascertain whether or not Diamond Hill existed or had ever done any work in any field at all. There was no proof of SARS registration or provision of a tax clearance certificate. The tax clearance certificate of Blackhead had been attached to the Proposal and it was current. However, Mr Matlakala admitted that he had not conducted any due diligence on Diamond Hill.

88. As noted earlier, there was also no due diligence enquiry at all into the JV as the Service Provider by anyone in the Department.

Capacity, experience, qualifications and accreditation of the service provider

89. The Commission's investigators made enquiries with the South African National Accreditation System (SANAS) and ascertained that none of those who did any of the work and certainly not Blackhead, or Diamond Hill or their JV was ever accredited by SANAS, let alone accredited for testing for the presence of asbestos.

90. There was no enquiry into whether or not Blackhead or Diamond Hill had qualifications, accreditation, or expertise in the Scope of Work which the JV proposed. While the Instruction to Perform Work (IPW) of 2 December 2014 was in respect only of "Phase 1 – Audit and Assessment of Asbestos of Housing Units", there was no enquiry concerning how or by whom or with what skills or experience this audit and assessment would be carried out.

91. The JV had offered to perform several activities which, according to the Proposal itself, necessitated dealing with a highly dangerous material, asbestos. Knowledge of the hazards and the need for compliance with legislation and regulations are to be found in the Scope of Work set out in the Proposal, which refers to the Occupational Health and Safety Act and Regulations 85 of 1993 (OHSA). It further specifies that the cost quoted would include submissions, notifications, contracting, supply of documentation, personnel and equipment pertaining to legislation and regulations.

Mr Roets on accreditation

92. In his evidence, Mr Roets highlighted that he had never heard of or come across entities called Blackhead Consulting (Pty) Ltd, Diamond Hill Trading 71 Pty Ltd, Mastertrade 232 Holdings or the Ori Group in the assessment and quantification of asbestos industry.

93. Mr Roets explained that business entities that handle asbestos-contaminated materials (ACMs) should be accredited in terms of SANS/ISO 17020. To obtain and maintain this accreditation, an accreditation body performs tests in accordance with the said standard on a regular basis. Such entities should also be approved by the Approved Inspection Authority (AIA) registered with the division within the Department of Employment and Labour specialising in occupational hygiene. In terms of OHSA, it is required that anything in the workplace that can cause ill-health or adverse health effects to humans needs to be assessed by an AIA who can assess and quantify hazardous chemical substances in the workplace, including the existence of asbestos.

94. Mr Roets explained further that "if renovation, demolition and/or removal is planned on ACMs the law requires that a Registered Asbestos Contractor (RAC) be contracted to do the asbestos work. The RAC must remove asbestos in accordance with the Regulations and in line with an Approved Plan of Work". An AIA must be involved in air monitoring and have oversight of any asbestos maintenance or removal activities.

95. The SLA specifically stated that:

> The SERVICE PROVIDER undertakes that: 4.2.2 they have all the necessary experience skill and capability to render the services in accordance with the requirements and expectations of the DEPARTMENT.

96. However, the officials contracting the JV never bothered to verify that the Service Provider did indeed possess the necessary skills and expertise to undertake the work. On the contrary, it is undisputed that they had no training, qualifications, expertise, accreditation, experience or knowledge of working with asbestos. The discrepancies in official documents attempt to confuse. For example, the appointment letter of 1 October 2014 clearly included the "removal and disposal of asbestos" and the undated SLA also includes "removal and disposal of asbestos". However, the Instruction to Perform Work (IPW) of 2 December 2014 was only in respect of what was called "phase 1 – the audit and assessment" and did not include what became known as phase 2 – the removal and disposal of asbestos.

97. It would appear to be on the basis that 'phase 2' was not implemented, that Mr Sodi and Mr Mokhesi suggest that skill, expertise, training and accreditation for the removal and disposal of asbestos never became a requirement for either Blackhead or Diamond Hill. However, the JV proposed to do the "removal and disposal of asbestos", and they accepted instructions and appointment to do so. They seek to rely upon the one aberration – the IPW of 2 December 2014.

98. There can be no doubt that Mr Sodi and Mr Mpambani knew that they were offering to do a task requiring their JV to work with hazardous materials, as their Proposal clearly indicated. Mr Sodi made no pretence before the Commission that he conducted business by purporting to have the capacity, expertise, skills to perform a task and only then to procure "specialists" to do the work. He was simply a 'project manager' who added his cost to that of the specialist. Ultimately, Mr Sodi conceded the wrongdoing in failing to disclose the JV's lack of skill, qualification or accreditation.

Mr Roets on audits and assessments of ACMs

99. According to Mr Roets, the phrase "audit and assessment" in the JV's Proposal and in other documents was not clearly defined. This meant that the deliverables from the Project were also not defined. Legally, assessing asbestos is defined as identifying where asbestos is, estimating the quantity, assessing the form of the asbestos, assessing the potential exposure risk, and evaluating the control measures in place to minimise the risk of asbestos fibre release. The JV's Proposal proposes to "Audit and Assess" ACMs in low-cost housing in the province, while under the heading "Objective" all that is mentioned is counting houses with asbestos roofs. These are clearly two different activities.

100. As regards the scope of work, Mr Roets noted that the IPW clearly calls for the JV to audit and assess houses for asbestos in the whole of the Free State Province. Audit and assess, in terms of legislative requirements, means an inventory, which includes information such as where, what, quantity, type, condition and potential exposure risk of the asbestos products in each house. A document like this would have served as a Bill of Quantities and guidance for future tenders / contractors to submit a costing for the eradication phase of the project, where they could have had a clear picture of what exactly needed to be done to eradicate asbestos in the Province.

Scope of work

101. The JV's Proposal was titled "Request for Appointment on Risk: Audit and Assessment, Handling of Hazardous Material (Removal) and disposal of Asbestos-Contaminated Rubble in the Free State

Province". The JV requested to be appointed for the following: "Assessment/Audit of houses roofed using Asbestos material. Handling and disposal of Asbestos sheets to an approved, designated disposal site". The next paragraph read: "The scope of the work entails the physical door to door counting, safe removal and disposal of Asbestos Contaminated Building Rubble and asbestos sheets from various townships across the Free State Province." The Objective of the project was stated to be two-fold: "Quantify the number of houses roofed with asbestos sheets, and Remove and Dispose [of] asbestos to an approved and accredited site."

102. Thereafter, correspondence, memoranda and contractual documents continued to repeat that this was an "Asbestos Eradication Project". Notably, there were only three departures from this approach. First was the letter from Mr Mokhesi to Ms Diedericks, which sought approval for the Free State to participate in the Gauteng project (which was only that of audit and assessment) in terms of Treasury Regulation 16A6.6. Second was the correspondence to and from Mr Zulu, which referred only to the appointment of a Professional Resource Team. Third was the IPW of 2 December, which work was now identified as "audit, asses and GPS all pre-1994 Government issued housing".

103. The Commission found that it was not only the substance of the work to be done which chopped and changed depending on audience; it was also the amount of work to be done that appears somewhat uncertain. The IPW referred to a sum of money (R255 million) and that "up to" 300 000 housing units were to be accommodated within this sum. However, the JV instructed Mastertrade to audit only 150 000 units. Mastertrade instructed the Ori Group to audit 300 000 units

The budget and costing – "Total project cost"

104. The JV's Proposal set out the rates to be charged for the work proposed to be done. These were specified as "R1 350 per house ex[cluding] VAT for door-to-door assessment, R32 760 ex[cluding] VAT for removal and disposal". There is no correspondence indicating the basis upon which the quoted rate was reduced, but it appears from the Letter of Appointment of 1 October 2014 that the rates for both audit and assessment, as well as for removal and disposal of asbestos, had been reduced to the sum of R850 per house. The same scope of work appears in the SLA. The motivation to the DG of 28 November 2014 advised that the rate was R850 per unit to audit and assess for asbestos, and to remove and dispose of the asbestos. Mr Mokhesi said the reason for the reduction in rate was that the "Department found [the proposed rate] to be unaffordable".

105. However, the IPW specified that the price would be R850 excluding VAT for the JV to "audit, assess and GPS all pre-1994 government housing units in the Province". In short, the reduced rate of R850 was sometimes intended to cover the cost of both audit/assessment and removal/disposal of asbestos, whilst on one other occasion the documentation indicated R850 for the audit and assessment only.

106. The total sum of R255 million was never mentioned to the national Department when the deviation from budget was under discussion. However, the IPW of 2 December 2014 made it clear that work was to be done within this total sum up to a maximum of 300 000 units.

"On risk"

107. The JV proposed that it be appointed "on risk" to carry out the project. This arrangement was confirmed by Mr Sodi to the Director: SCM in the Department. Mr Sodi explained the concept of requesting to be appointed on a risk basis. He was told by Mr Mpambani that although the Free State Department desired an asbestos audit to be conducted in their province, there was no budget within the Department to perform an audit of this nature. Mr Mpambani also said that, in order to have some funds allocated, the Department would have to include the asbestos audit in their business plan in order to make provision for it in the budget. This process would take time. Ultimately, the budget was made available, the JV was appointed to conduct the asbestos audit and the JV was paid, albeit not the full amount. The JV was, however, prepared to start the work, and did in fact do so, working on

a risk basis until the business plan was approved and provision had been made in the budget for the asbestos audit.

108. In short, Mr Mpambani and Mr Sodi as the members of the JV seemed to feel that this "at risk" offer was merely a means of waiting out the period until funds were allocated or made available.

109. In his affidavit, Mr Mokhesi claimed that the Department had advertised for donor funding for the removal of asbestos and he thought that the JV would be able secure donor funding for the Asbestos Eradication Project. However, no such advertisement or approach to donors was ever provided to the Commission and there is no indication why any donor would wish to fund the work of Blackhead or Diamond Hill, which were commercial enterprises.

110. However, within weeks, Mr Mokhesi had approached Mr Zulu seeking approval for funds to be reallocated from the Provincial budget for this new and unplanned project, because to find the funds for this Asbestos Project proposed by the JV, changes would have to be made to the Department's existing and approved business plan and budget.

111. Mr Mokhesi wrote to the Free State Provincial Treasury in September 2014 informing it of the Department's intention to procure a contract currently secured by the Gauteng Department. The only request made of Treasury was that "your guidance and approval is hereby sought to ensure that the Free State Department ... has observed all Treasury Regulations before it enters into [an SLA] with the company, Blackhead Consulting Pty Ltd JV". No information was provided or questions asked regarding funds or budgets, and no financial issues were raised.

112. The response from the Provincial Treasury was no more than a handwritten note to the effect that "the accounting officer [AO] has the power of approval provided that he has satisfied himself/herself that the SLA processes were duly followed and they comply with the legislation". Since the AO, Mr Mokhesi, had made no substantive request, there was no substantive answer that Treasury could give.

113. Accordingly, by the time the Letter of Appointment dated 1 October 2014 was sent to the JV, there was no mention of any need for the JV to find funding or for it to commence the project "on risk". The Letter of Appointment referred to the need to sign an SLA and that the JV would be issued with an IPW.

114. The cost per unit fluctuated. The lack of care in clarifying the cost of the Project suggests that cost per unit was not that important and, furthermore, that it was the transfer of funds on any basis that was the purpose of the enterprise. The costing given from time to time was merely a moving target of "opportunity". No one appears to have scrutinised the costing at all.

115. This complete disregard for the need to undertake a due diligence exercise to ascertain the identity, expertise and capacity of the service provider, coupled with lack of concern about the task which the service provider was to implement, plus the haphazard costing, suggests that this entire Asbestos Eradication Project was a mere façade to provide a conduit for funds to be transferred from the taxpayer and the Department to Mr Sodi and Mr Mpambani.

116. Since there was obviously no provision in the Provincial budget for the R255 million that this project would cost the fiscus, the first strategy adopted was for the JV to propose that it would undertake the Project on an "on risk" basis. Mr Mokhesi furthered this pretence by immediately confirming his interest in appointing the JV on condition that it would take responsibility for sourcing funds and covering the costs of the project. No one was capable of explaining why or how or from whom the JV would source funds for a Provincial project. It would appear that "on risk" were no more than two useful words to provide cover for the absence of an allocated, approved and official budget until such time as Mr Mokhesi had been able to secure deviation from that budget and simply transferred funds from one project to this new Asbestos Eradication Project. The money was always going to be found.

117. The fault line running throughout the conception, negotiation, grant (and eventually implementation) of this contract is the avoidance of a competitive bidding process. This Project was conceived and arranged in secrecy. There was similar secrecy in the allocation of the contract. There was no

publication of the details of the Project and request for quotations. Businesses and entities involved in this type of work had no knowledge of the existence of the Project. As the subcontractors told the Commission, they had no opportunity to put in competing bids. Similarly, the Department avoided any opportunity to test the market to ascertain the variations in costing of such a Project.

118. What the JV did was to act as middleman and add its "mark-up" as Mr Sodi described it. The Project was always going to cost more than it should have because the JV could add no value but existed to take a cut out of taxpayers' money. From beginning to end, the Asbestos Eradication Project in the Free State was inimical to and designed to avoid and subvert the provisions of Section 217 of the Constitution, that, when an organ of state "contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

Execution of the Asbestos Eradication Project

119. The JV itself did not perform any of the work on the Asbestos Project but outsourced to subcontractors. Mastertrade appears to have been the main subcontractor which, in turn, subcontracted the Ori Group. Another entity, Zenawe, provided some technical services.

120. The evidence of those who actually did the work that was carried out is instructive because it reveals the true costs of this Asbestos Project, the extent to which there was no interrogation of costing by the officials in the Department, the use of 'middlemen' and 'project managers' to increase the cost of taxpayer-funded projects that are carried out under the supposed authority of state officials. This evidence also pertains to the need for and the value of any work actually done in this Asbestos Eradication Project.

121. All documents including the SLA are silent on the fact that the JV always intended to and did use subcontractors to perform the work on this Project.

Work done

122. Both Mr Radebe (Mastertrade) and Mr Manyike (Ori Group) set out in detail in their affidavits what work was entailed when an asbestos audit and assessment, and an asbestos removal process, was conducted. Mr Radebe made it clear that the remedial work involved in the asbestos removal process required the "expertise of an engineer" and other specialists.

123. The details of the work done in this Free State Asbestos Project can be briefly summarised. Aerial photographs of relevant areas in the Free State were viewed in order to identity areas where asbestos roofed houses were located; thereafter, on-site verification was needed to confirm this desktop analysis. One hundred and eighty-four fieldworkers were hired from local communities to do physical inspections of houses; more senior staff, such as quality assurers, assistant, district and senior project managers and a GIS specialist were hired. The fieldworkers were trained over a period of four hours on how to identify asbestos, how to identify cracks, type of material used to build walls, if a house was plastered, type of roofs, and type of house. Fieldworkers were supplied with Samsung or Huawei tablets to enable them to take pictures, geo-reference and fill in questionnaires.

124. A software programme with several applications for management and business purposes was used to assist the field workforce to improve accuracy and currency of spatial data.

125. Fieldworkers audited 302 644 houses over the period November 2014 to February 2015, taking images and completing questionnaires. These were all then synchronised and processed, and quality-controlled. Individual reports were processed for each house. GPS coordinates for houses containing or suspected of containing asbestos were logged.

126. Fieldworkers did not enter a house suspected of being roofed with asbestos, but recorded, from outside the house, observations on the physical condition of the house, whether linked to asbestos or otherwise. The audit was not to identify houses which might contain asbestos inside (fascia boards, pipes, etc.) because that is the responsibility of municipalities and not of the Department.

127. The fieldworkers were matriculants who could read and write and could “demonstrate understanding”. It was estimated that these fieldworkers would take no more than five minutes to audit one house and each fieldworker would be paid R6.50 per house.

128. The procedure for the audit was for the fieldworkers to take a photograph of the house, record the GPS coordinates, record the structural damage to the house and upload the information to the cloud via their iPads. This information was then to be analysed by project managers and incorporated into a report for the Department.

129. The Final Report presented by Mr Mpambani on behalf of Blackhead dated either 3 or 15 February 2014 contains many annexures (photographs and maps), and the value thereof will be discussed later hereunder.

Competitive bidding and cost

130. Fundamental to this Free State Asbestos Project from the outset was the need to avoid any open or transparent process to conclude the contract and implement it. The impact of this fundamental flaw in the entire Project is to be found in the evidence of both Mr Radebe and Mr Manyike.

131. Mr Radebe described how Mastertrade had acted as a sub-contractor for another company performing asbestos audits. At the time - 2012/2013 – Mr Radebe said that Mastertrade had “audited about 280,000 houses/units”. Mastertrade never received contracts from Government and, as a general rule, Mastertrade “normally act as a sub-contractor on Government contracts”.

132. Mr Manyike told the Commission that this was the third or fourth such project in which he had been involved. Had the Department invited open bids, he would have tendered for the job but, as a medium-sized company, he would have “partnered with someone with financial muscle” because Government looks at the financial position of those who tender and Ori Group could meet every requirement “but the down payment and guarantee”. His experience is that medium-sized companies “like us . . . somehow we get squeezed out”.

133. Mr Manyike said that, although he was aware of how much “consultants charge to get this” and he “was aware of the rate which was offered by Gauteng”, he would “always charge 10% of their amount – for me it is fair and then it is profitable”. Mr Manyike said that he could charge “between ten to 50% of what Gauteng paid [f]or the Free State. . . . [and] I will still make a profit”. He told the Commission that he was paid R147.36 per house to conduct the audit and assessment and “I was comfortable with that R21 million”.

134. Avoidance of an open competitive bidding process enables exactly that which appears from this Asbestos Contract between the JV and the Department. Not only is no careful consideration given to the need for, or outcomes or value of such a project, but the cost to the taxpayer balloons to the greatest extent possible without regard to any real expense or value.

135. Both Mr Mokhesi and Mr Sodi conceded that the use of “middlemen” who added their “mark-up” added no value and only increased the cost of the project.

136. Mr Manyike reckoned that the actual work he did cost him about R10 or R11 million. He was to be paid R21 million, which left him with what he considered to be a “fair” profit of about R11 million. Mr Radebe was paid R44 million, of which he says his expenses were R27 million, leaving him with a profit of R17 million. Mr Radebe included the cost of Mr Manyike in his calculations, which means that the total expended between the two of them (via Ori Group and Mastertrade) is claimed to be a total of about R27 million. It should be noted that no or insufficient documentation exists to support any such total expenditure.

137. The JV was to be paid R255 million by the Department, from which it paid the subcontractors R44 million to execute the project. Their total profit would be in the region of about R210 million.

138. When it was pointed out to Mr Mokhesi that the company which tenders for government work and then subcontracts it out at a much lower price makes a huge profit merely for intervening as the contracting

party, even he was obliged to admit to the Commission that “contractors are becoming very creative”.

Oversight

139. The Commission was told of certain of the procedures which are required to be followed by the Department. They involve inspections, approvals, invoices, verification of such invoices, and payments. It does not appear that all, or any, were followed as required.

140. Mr Matlakala stated that it was the CFO, Ms Leuna, who approved the invoices submitted by the JV, but that she was not the one who certified that the work had in fact been performed. He stated, “the end-users for each Project Management Unit [PMU] are the ones who must confirm ... whether the work has been done” and stated that he thought the person involved in the Asbestos Audit was Mr Makepe.

141. Mr Makepe, Chief Engineer for the PMU, stated that the

> PMU staff monitors projects undertaken by the Department .... These are mainly the construction of houses (RDP houses) and installation of water and sewer networks, etc. The PMU handles the execution of projects by reviewing/inspecting the work done by service providers for compliance with technical standards and specifications as well as programme (delivery times) and budgets.

142. A representative of the PMU should conduct spot checks of the work being done. It appears that these were done only visually and there was no testing of or on the asbestos itself. It cannot, therefore, ever be stated that any or no asbestos was ever found on those units identified as being roofed with asbestos.

143. Mr Makepe believed that there may have been four or five feedback meetings with project managers from the JV, but the dates, times, attendance, documentation submitted, or discussions which ensued, are not apparently recorded in any minutes. There is thus no proof at all that such meetings ever occurred, or the outcomes thereof.

Schedule of payments

144. The IPW dated 2 December 2014 from Mr Mokhesi to the JV set out the period of appointment as 1 December 2014 to 31 March 2015, the requirement for a completion report and details as to when and in what amount the percentages of the total project cost would be payable.

145. Mr Makepe confirmed that the Finance Unit would not pay an invoice if there had been no verification of such work by the PMU. The PMU had to first certify or verify the work for compliance and milestones achieved. Only then would the Finance Unit consider effecting payment. Every claim for payment had to be accompanied by a report and detailed verification.

146. The JV relied upon the documentation submitted by the Ori Group to Mastertrade, which then passed it on to the JV. However, the documentation does not always tally. In fact, the costing by Mastertrade of expenses of some R27 million has not been substantiated. Moreover, VAT returns have not been furnished.

147. Blackhead submitted a tax clearance certificate when it submitted the Proposal. Diamond Hill and the JV did not. However, by the time that invoices supposedly from the JV were being presented and payments were flowing from the Department, it appears that not even Blackhead was in possession of a valid tax clearance certificate – the certificate attached to the Proposal was dated 26 January 2014 and expired on 28 January 2015, and no new or valid certificate appears in the documentation.

148. Reports were seldom, if ever, prepared and presented. When they were prepared, they provided insufficient detail to establish the justification for payment; the information contained in them did not always correlate with the amounts claimed. There is therefore doubt as to the veracity of the claims of work done and the cost thereof.

149. The Department's CFO, Ms Leuna, furnished payment documents to the Public Protector, Adv Madonsela. The Public Protector found that the invoices submitted to the Department and on which payments were made were completely deficient in every respect.

150. Mr Mokhesi's response to the OPP was merely to state "being not responsible for the accounting side of things it should surely have been the responsibility of the Finance Department to identify the irregularity in the invoices." It would appear from this response that Mr Mokhesi was either completely ignorant of his duties as HoD or chose to deliberately ignore his responsibilities as the Department's AO. Mr Matlakala stated that the CFO was the person who approved the invoices submitted by the JV and that he did not as a general rule become involved in payment of vendors.

151. On 31 July 2015 the AG released his report for the 2014/2015 financial year. The AG declared that the contract concluded by the Department with the JV was irregular. Notwithstanding this decision and public advice that the contract for the Asbestos Eradication Project had been irregularly procured, the Department continued to make further payments. A total of R139 million was paid by the Department after the Free State AG had stated that the contract was irregularly procured.

The prepayment

152. Treasury Regulation 15.10.1.2(c) provides that

> sound cash management includes – (c) avoiding prepayments for goods or services (i.e. payments in advance of the receipt of the goods or services) unless required by the contractual arrangements with the supplier.

153. The issue of payments was not addressed by Mr Mokhesi at all. There is no indication why it was ever necessary or considered advisable to make an advance payment in any amount at all, let alone R51 million, to the JV before they had even supposedly commenced work on the project.

154. Mr Mokhesi told the Commission that there were no prepayments and that "all payments made were effected after services has been rendered in the project. This also applies to the initial payments that were made to the JV". His view is that where a contract mandates payment in advance of work being done, then such payment is not an advance payment but compliance with the terms of the contract.

Invoices, certification and payments

155. There were invoices apparently not linked to payments, and some payments were made without the required progress report or certificate, or the required signatures. Other irregularities included invoices submitted by the JV without provision for VAT, numbering of invoices was not properly sequenced, and contained only one-line 'descriptions' with no evidence of detailed cost breakdowns or any other support justifying submission of the invoice and payment thereof. Mr Makepe certified only some R142.5 million of the R230 million paid by the Department to the JV. In respect of even those payments that were certified by Mr Makepe, there is inadequate documentation indicating the basis for such certification.

156. Mr Manyike claimed that four reports were submitted to the Department: a preliminary report dated 4 December 2014, a Final Audit Report dated 2 February 2015, a Report of Houses to be Prioritised dated 25 February 2015, and a Remedial Report dated 2 September 2016, as well as a presentation made to the Department on 23 June 2015.

The final report

157. The Final Audit Report was submitted by the JV to the Department on 2 February 2015 with a later version of the same report dated 13 February 2015. This latter report claims to have been prepared by Mr Mpambani. The Final Report of 2 February 2015 is 55 pages in length and includes illustrative photographs of houses and maps. The purpose of the Report is stated to be to make information available to the Free State Provincial Government regarding the number of houses that contain asbestos roof sheeting and to give an indication of the structural status of the units per stand.

158. Costs of replacing asbestos roofed houses with concrete tiles or with roof sheets are given, with budget allocations per district municipality. The Report concludes with advice where it will be best to commence implementation, which would take place over a period of four financial years.

159. The Final Report of 25 February 2015 purports to provide information on the foundations of housing structures, defects on walls and roofing. This Report then continues with the advice on the construction of foundations, the differential settlement and excessive movement of foundations, the danger of walls collapsing, structural cracks and the number of houses presenting a possible danger to occupants. Unsurprisingly, the recommendation which follows is to remove asbestos sheeting, demolish certain houses and replace them with structures of a certain quality.

160. The JV quoted in the region of R3.8 billion excl. VAT for removal of asbestos roofs, demolition and reconstruction of houses, and renovation of houses.

161. It is undisputed that no asbestos has been removed from the roofs of houses in the Free State. Indeed, the opinion was expressed that no asbestos had been removed from any houses anywhere in South Africa by any Provincial or National Department.

162. As there has been no actual removal and disposal of asbestos from homes in the Free State, it is necessary to examine the audit and assessment carried out in this R255 million Asbestos Eradication Project to determine whether value is to be found in various reports presented to the Department.

163. Having considered the details of Mr Roets' analytical report, the evidence established that the audit and assessment had been undertaken without the requisite knowledge and skill, and had therefore produced little information of practical value upon which the Department could take action. As a result, at most 10% of the funds paid by the Department had secured any value for money for the Department.

164. Much of the information in the reports was either inaccurate, irrelevant or already publicly available. No details were provided on the condition of the asbestos and potential risk of exposure. No accurate information was given on how much asbestos is in each dwelling or in total. In order to proceed to the eradication phase of the project, the audit and assessment process will need to start again from scratch. In this regard, even R20 million for the work conducted would not have given the Department value for money.

165. Mr Manyike was given the opportunity to study the report prepared by Mr Roets and respond to it, but he did not ultimately contest Mr Roets' evidence.

Assessment of the evidence

166. The origins of this contract between the JV and the Department were reliant upon the complete absence of a competitive bidding process. The outcome in the implementation of the contract is that the service providers, the scope of work, the execution, the cost and the payments are all equally and fatally compromised.

167. There was no due diligence by the Department. This was a project entered into in secrecy and without transparency and consultation. It was also a contract concluded and implemented in great haste. There was thus no deliberation on the purpose of, the need for or the outcomes expected from such an asbestos project. There was no regard for the identity, skills and capacity of the service provider. There was no real interest in or care for the terms of the contract, the actual work to be done or its cost. There was no oversight of the implementation of the work purported to be done.

168. The disregard for the most important substance of the contract - the need and purpose, the work to be done, the cost of the work - all suggests that the officials did not have real interest in any outcomes to be gained by the Department from this contract.

169. With such lack of interest in the contract and lack of oversight of its implementation, it is unsurprising that the Department failed to enquire or chose not to notice the arithmetical discrepancies in the actual cost of the work and the various amounts paid to all those who benefited from the contract.

170. The actual cost of the work done appears to have been no more than about R15 million, while the Department handed over R230 million in taxpayers' money and was prepared to pay R255 million.

171. Profits were pocketed by all concerned. That the calculations of payments and profits are only approximations is an indictment of the Department. Full records of all estimated costings and budgets do not apparently exist for any party. There is apparently neither documentation nor proof of all expenditure from or by any party. The invoices reveal nothing. This suggests that this project was, from beginning to end, not intended to be one for proof of value and expenditure in production of value, but merely a project for extraction of and payment of money to the JV by the Department.

172. It should be mentioned that the demise of Mr Mpambani and his inability to assist the Commission either with documents or personal testimony is not the source of the problem. Mr Mpambani was only one individual in a JV comprising a registered company doing billions of Rands in business. That JV and all its constituent parts had a duty and obligation to keep full and proper records of all business dealings and financial transactions.

173. Mr Sodi's protestations of reliance upon Mr Mpambani and ignorance about detail are unconvincing. His explanations are not persuasive and his excuses do not ring true. Mr Sodi lacked credibility and was dishonest in his evidence in a number of respects.

174. The Department continued upon its pursuit of failure when there was no regular and documented inspection of work done, no scrutiny of reports presented, no demand for information when incomplete invoices were presented. Instead, payments were made almost upon demand.

175. That payments continued to be made months after the office of the AG had flagged this Asbestos Project on 1 July 2015 and had attempted to curtail further expenditure of taxpayer's money on it, speaks to more than just lack of care and incompetence. It is a clear expression of deliberate disregard for instruction by the office of the AG.

176. Such conscious and calculated avoidance and flouting of all legislation, regulations, protocols and procedures from the moment of receipt of the Proposal to these final payments made to the JV suggests malfeasance on the part of officials in the Department in collusion with the JV.

COST OF BUSINESS SCHEDULE - SECRET BENEFICIARIES

177. A spreadsheet entitled "Cost of Business" contains a schedule of payments to various entities or persons some of which or whom are identified only by initials. Against each name is recorded a sum of money in Rands ranging from R1 million to R10 million. The "Total Cost of Business" amounts to the sum of R82 608 567.90. The Project Value is recorded as R235 000 000 against which this Total Cost of Business amount as scheduled is set off, resulting in "Project Value-Cost of Business" of R172 391 432.10. From this "Project Value" amount, R86 195 716.05 is allocated to Blackhead and Diamond Hill.

178. The schedule continues with three columns entitled "1st payment", "2nd payment" and "3rd payment". Against all but three of the names, sums are identified under one or more of those columns.

179. Mr Sodi explained that he and Mr Mpambani discussed the preparation of this document, which was to set out the costs of the Project. After the discussion, Mr Sodi left his office for another meeting in the boardroom and, in his absence, Mr Mpambani then prepared this "Costs of Business" schedule on Mr Sodi's computer. The purpose of the spreadsheets, says Mr Sodi, was to indicate "how much the project is going to bring in revenue". Mr Mpambani then told Mr Sodi that he had emailed the spreadsheet from Mr Sodi's computer to his own because he had further work to do on the document.

180. On 28 March 2015, Mr Mpambani sent an email to Mr Sodi, asking him to note that the payments highlighted in yellow are the ones for Sodi to "take care of" and the rest would be dealt with "as discussed". Mr Mpambani said that he had "effected the payments in two batches". In his evidence to the Commission, Mr Sodi said that he recalled receiving this email.

181. Mr Sodi told the Commission that he had no knowledge of this spreadsheet and had learned about the schedule only during discussions with the Commission's investigators. Mr Sodi said that he was surprised to see that he was getting the sum of only R86 million when he had expected to receive R103.5 million.

182. The "Cost of Business" spreadsheet indicates payments made to Mastertrade (R44 million), Zwane (R1.5 million) and Mr Steve Motau (R1.2 million).

183. Mr Sodi denied any knowledge of the other payments reflected on this "Cost of Business" schedule. He stated that "no money should have gone to any other person" and that there was "no-one else who was paid from the funds that went into our account, not a single individual. There's no payments that were paid from the Joint Venture because I was the signatory to the account."

184. The identities of the people who were paid because of their legitimate contribution in the Asbestos Audit were revealed in the Schedule. However, there were also payments that were made to individuals or entities that were identified only by initials, such as "TZ", "TM", "AM", "JT" and others.

185. It was put to Mr Sodi that a businessman such as himself would have been interested in the costs incurred by the business, but he merely responded, "I didn't pay attention".

186. In response to the proposition that, as a businessman, the revenue minus costs and ultimate profits were an important calculation and to see to it that they had been properly done, Mr Sodi agreed that the calculations were important to him. He repeated that all costs were going to be deducted from profits, expanding that "in accordance with the JV agreement we had signed, that we would subtract the cost and the expenses of the project and whatever then remained would have been split equally between Blackhead and Diamond Hill".

187. When asked why those payments were not paid out of the bank account of the JV if such payments related to the cost of the business, Mr Sodi could respond only that "I did not pay attention to that email, I did not see the part where he said the one[s] highlighted in yellow must be paid by you". Mr Sodi stated, "I did not look at the spreadsheets", but did not explain when it was put to him that it was improbable that he would not scrutinise the very document containing income, expenses and profits of the JV.

188. Mr Sodi told the Commission that he knew of no person with a legitimate claim to any payment. Unfortunately, his business partner appeared to know several people who were to be paid more than R25 million from their JV business about whom Sodi supposedly knew nothing. It was pointed out to Mr Sodi that the only persons whom he knew were those persons whose payments appear to be legitimate business expenses, but that he did not know even one of those whose payments were suspect. Mr Sodi responded that "maybe this guy had his own arrangements which he did not disclose to me". The difficulty with this response, as pointed out to Mr Sodi, is that it appears that Mr Mpambani did not intend to conceal these other payments from Mr Sodi. After all, Mr Mpambani had discussed the schedule with him, prepared the document on Mr Sodi's computer, returned the completed schedule to Mr Sodi and an accompanying email with advice regarding responsibility for the payments. Mr Sodi agreed that it would seem that there was no attempt at concealment by Mr Mpambani. Mr Sodi also agreed that that there was an intention on the part of Mr Mpambani to conceal the identity of persons to whom payments were being made [by the use of initials only], and reasonable to conclude that Mr Mpambani contemplated illegitimate payments to people involved in the project.

189. The Commission concludes that Mr Mpambani, representing one party to the JV, prepared the schedule setting out the Costs of Business to the JV and that this schedule was sent to, received by and known and understood by Mr Sodi, representing the other party to the JV.

Beneficiary "TZ"

190. One set of initials are those of "TZ" against whom the spreadsheet schedule of the "Cost of Business" records the sum of R10 million. The additional sum of R1 million is also recorded under each of the

three payment columns.

191. The only conclusion which the Commission can reach is that Mr Sodi's explanation of his indebtedness to Mr Thabani Zulu in the amount of R604 000 by reason of purchases of alcohol at Mr Zulu's TZ Lounge is pure fabrication. That fabrication was tendered on a haphazard and facile basis to attempt to explain the payment by Mr Sodi of R600 000 to the SMD motor dealership on behalf of Mr Zulu. The need to justify the payment is in order to try to remove this payment from the ambit of the granting of the Asbestos contract in the Free State between the JV and the Department.

192. Mr Sodi agreed that the involvement of Mr Zulu in the Asbestos contract was necessary because he needed to approve the budget adjustment and that he knew that the role of Mr Zulu was to make sure that the contract obtained approval and that the funding for the contract became available. In short, Mr Sodi agreed that the approval of Mr Zulu was essential for the JV to obtain both the Asbestos contract and the R250 million the JV was to be paid.

193. Both Mr Sodi and Mr Zulu admitted that they had known each other for several years before the contracting of the JV. They agreed that they had become friends. It is notable that Mr Zulu saw no impropriety in agreeing to Mr Mokhesi's proposals concerning Blackhead although he was both a supplier of alcohol to Mr Sodi and considered them to be friends. Yet, when questioned by the Commission's investigators, Mr Sodi denied any knowledge of any person with the initials "TZ", although at the Commission hearing he agreed that he knew someone with those initials who had been involved in facilitating the Asbestos project and to whom he had made payment.

194. The payment of some R600 000 supposedly to settle a debt for alcohol purchases is without doubt a fiction. Mr Sodi and Mr Zulu asked the Commission to accept that Mr Sodi purchased alcohol of a superior quality and price from a township lounge that is said to operate on an informal basis. The alcohol was either delivered by Mr Zulu or taken away by Mr Sodi, depending on who gave evidence, but neither provided details or any evidence that such purchases were ever made.

195. No explanation was ever offered as to why the DG of the national Department, based in Pretoria, always managed to be at the TZ Lounge in a Pietermaritzburg township when Mr Sodi passed by and wanted to purchase alcohol.

The Maserati - R1 million

196. On 26 May 2015 the sum of R1 million was transferred from Blackhead's bank account to the bank account of SMD Trading Group. The credit description of the recipient is referenced as "Thabani Zulu". SMD confirmed that the payment was made for a Maserati for a Mr Mabheleni Ntuli.

197. Mr Sodi was not asked at any hearings of the Commission about this payment of R1 million by Blackhead to SMD for and on behalf of Mr Ntuli. However, the chain of connections between Messrs Ntuli, Sodi and Zulu was slowly and reluctantly revealed to the Commission by Mr Zulu. Regrettably, neither Mr Sodi or Mr Zulu revealed more about their connections with Mr Ntuli and why Mr Ntuli received the benefit of R1 million under the rubric of a payment involving Mr Zulu. One cannot help but strongly suspect that this may well have been another kickback/payback for Mr Zulu's benefit but further investigation will be necessary. The Commission's investigators tried to locate Mr Ntuli over a long period, but without success.

Beneficiary "TM"

198. One set of initials are those of "TM" against whom the spreadsheet schedule of the "Cost of Business" records the sum of R5 million. The additional sum of R1 million is also recorded under the 1st and 2nd payment columns and R500 000 under the 3rd payment column.

199. On 2 April 2015 the sum of R650 000 was transferred from Blackhead's bank account to a trust account that belongs to a firm of attorneys in Bloemfontein carrying out conveyancing work. A conveyancer from the firm transferred a residential property situated in Bloemfontein to the Likemo Family Trust. The transfer was registered on 29 January 2016. The purchase price of the property was R1

640 000. The sum of R650 000 from Blackhead was paid as the deposit and the balance was funded by a mortgage registered over the property for the sum of R1 million.

200. Mr Nthimotse "Tim" Mokhesi is the founder, a Trustee and a beneficiary of the Likemo Family Trust, which was formed on 4 May 2015. Mr Mokhesi signed the offer to purchase the property and all conveyancing documents on behalf of the Family Trust.

201. On examination of the evidence and the testimony, the explanation offered by both Mr Mokhesi and Mr Sodi for the payment of this sum of money is so incomprehensible that it must be rejected as false.

202. Despite the sworn statements of both Mr Sodi and Mr Mokhesi that they had neither procured nor received any benefit or advantage for Mr Mokhesi as the Department's HOD by reason of or any way linked to the grant of the Asbestos contract, the inevitable conclusion is that Mr Mokhesi is the "TM" identified in the Cost of Business Schedule.

203. Every effort was made to conceal this transaction because it so clearly constitutes a benefit given by Mr Sodi to Mr Mokhesi. The efforts at concealment ranged from formation of the family trust, departure of Mr Mokhesi from the Trust as a trustee, and preparation of a fake document pretending to be a record of a commercial investment opportunity rather than merely a gift to a senior government official.

204. That both Mr Sodi and Mr Mokhesi knew that what was being done was irregular and unlawful is found in their initial denials of any financial benefit to Mr Mokhesi. When confronted with the documentation made available to the Commission, they hastily and unwisely colluded in the concoction of the commercial investment opportunity document. Mr Sodi had to agree that Mr Mokhesi was an essential cog in the JV Project, while Mr Mokhesi conceded before the Commission that he had made no disclosure of this benefit. It is recommended that Mr Sodi, Blackhead and Mr Mokhesi be criminally charged for corruption regarding this transaction.

THE "COST OF BUSINESS" SCHEDULE – FURTHER SECRET BENEFICIARIES

205. Included in the payments identified as a "cost of doing business" are other individuals whose identities are sometimes concealed and who do not, on the face of it, appear to be persons or entities who provided goods or services for the Asbestos Eradication Project.

206. The Commission examined the evidence of Mr Sodi and others to ascertain why such payments were made by Mr Sodi and Mr Mpambani to these persons. These payments can be examined and evaluated only from the perspective of Mr Sodi and Mr Mpambani, since the recipients of these funds have not had the opportunity to confirm receipt, the purpose they each had in receiving such payments, their understanding of the reason for the transfer of funds to them, whether or not they did or did not consider themselves indebted to Mr Mpambani or Mr Sodi in any way, and whether or not they reciprocated before, during or after the lifetime of the Asbestos contract by providing services to Mr Mpambani or Mr Sodi in any way.

Beneficiary "AM"

207. One set of initials is "AM" against whom the spreadsheet schedule of the "Cost of Business" records the sum of R10 million, and the additional sum of R1 million is recorded under each of the three payment columns. Mr Mxolisi Dukwana, former MEC of Economic Development in the Free State, informed the Commission that Mr Mpambani was in constant communication with persons in the office of Mr Ace Magashule, then Premier of the Free State, and that, each time payment was advanced to the JV, requests were forwarded to Mr Mpambani "resulting in the latter making payments as requested or instructed by Magashule".

208. Mr Dukwana said that Mr Mpambani paid various monies for and on behalf of university students at the behest of Mr Magashule.

209. Mr Sodi told the Commission that he was unable to confirm these payments and he again stated that he could not have "guessed" who the person was identified only as "AM" and that he would not speculate that the initials "AM" referred to the Premier of the Free State.

210. Mr Dukwana identified payments made at the request of Ms Refiloe Mokoena who had been an acting judge of the High Court in the Free State Province.

211. Ms Mokoena confirmed two requests for financial assistance were made to Mr Magashule, that she received the funds, and that she was an acting judge during the period when she sent an email regarding the funding and when the payments were received from Mr Mpambani and from Bombanero Investment.

Beneficiary "MEC"

212. The initials or title "MEC" was found in the Cost of Business Schedule. There is no indication which of several positions of MEC in the Free State Province may or may not be associated with this reference in the schedule prepared by Mr Mpambani and approved by Mr Sodi. However, one MEC in the Free State province is linked with another payee on the Mpambani schedule, namely, Kingdom Impact General Trading.

213. Payments to Kingdom Impact do not appear on the Cost of Business Schedule prepared by Mr Mpambani and approved by Mr Sodi, but investigations have discovered some payments in the books of their companies.

214. Kingdom Impact, having received funds from 605 Consulting, then transferred funds to a firm of conveyancers for the purchase of a property in Welkom for the sum of R950 000, which property was sold four months later for a greatly reduced price of R650 000 and registered in the name of "Beyoboss", an entity of which Ms Mathatho Leeto, former MEC for the Free State Department of Sports, Arts, Culture and Recreation, was a member. Mr Sodi was not asked about this payment to Kingdom Impact and he denied any knowledge of any MEC to whom any payments were made.

215. The sum of R100 000 was also transferred from 605 Consulting to Evolution Pot described as "school fees donation", which Ms Leeto identified as a donation to her foundation by Mr Mpambani.

Beneficiary "JT"

216. The initials "JT" appear in the Cost of Business Schedule. There are payments totaling R3 858 159.70 recorded in respect of entities or an individual with such initials and Mr Sodi gave evidence to the Commission that payments were indeed made to Mr Jimmy Tau by Blackhead.

217. There are several difficulties in accepting the explanation by Mr Sodi for any payments made to Mr Jimmy Tau that were included in the "Cost of Business" expenses of the Asbestos Audit.

218. Payments were made through a number of corporate entities controlled by Mr Tau. Such payments were identified by Mr Sodi and Mr Mpambani as a cost of the business of the Asbestos Audit, but every effort was being made to conceal the connection between Tau and the Asbestos Audit. Even before the Commission, Mr Sodi was still determined to distance Mr Tau from the Asbestos Audit. All these factors suggest that both Tau and these entities were no more than conduits for payments to an entity or individual with a real but illicit connection to the Asbestos Audit.

219. Scrutiny of records revealed that in September 2015 the sum of R200 000 was paid by El Jefe to Hotel and Tourism Investments (Pty) Ltd with the transaction described as "NPM". Two days later on 16 September 2015 there was a further payment of R200 000 to Hotel and Tourism.

220. The SIU advised the Commission's investigators that these payments were made towards the travel costs of Ms Nomvula Paula Mokonyane (the former Minister of Water Affairs and Sanitation) and her daughter. Ms Mokonyane had been the MEC for Human Settlements in Gauteng Province when Mr Sodi was granted the Asbestos Audit contract for Soweto.

SECRET BENEFICIARIES – POLITICALLY CONNECTED PERSONS

221. Investigations revealed that there were more individuals who or entities that were recorded in the financial records of the JV and in the records of Blackhead and of Diamond Hill as having been paid monies during the financial years under investigation. On the face of it, they did not appear to be persons or entities that provided goods or services towards the Asbestos Eradication Project, or where the motivation or reasons for such payments are surprising.

222. Amongst the many individuals or entities to whom such payments were made or whose names are recorded against certain payments, are those discussed briefly below. The identity of the payee or the notation in financial records indicating reference to such person was recorded by the payor – i.e., Mr Sodi or Mr Mpambani through Blackhead or 605 Consulting, respectively.

223. The extent to which investigations have uncovered all such payments is unclear. The Commission was unable to investigate all bank accounts, all payments that appear to be inadequately substantiated or unsubstantiated and pursue all payments that may have been to third party intermediaries or to politically connected persons.

224. Mr Sodi was asked to explain some of the payments and he did so while giving evidence. As already indicated, those persons have not had the opportunity to explain to the Commission whether or not they know of their receipt of the funds, why they received such funds, their understanding of their relationship between themselves and Mr Sodi, and whether or not there were any obligations placed upon them arising from their receipt of the funds.

225. Questions immediately arise in respect of the motivation of Mr Sodi or Mr Mpambani in making payment to these individuals or entities, and the motivation of such persons in receiving these funds. There are also questions as to any reciprocal contribution made by each one of these individuals or entities to either Mr Mpambani or Mr Sodi or their business enterprises in relation to this Asbestos project or any other commercial endeavour.

226. The Commission has not heard evidence from any one of these beneficiaries. Although the Commission issued section 3.3 notices to each of them inviting them to give an explanation to the Commission, none of the recipients of these funds have provided any information. Therefore, no findings can be made in respect of their receipt of the funds. The Commission has not made any enquiry as whether or not disclosure has been made by these persons to SARS or any ethics authority in respect of these receipts.

227. The Commission can have regard only to the stated position of Mr Mpambani and Mr Sodi as businessmen whom, it is common cause, believed it was necessary to "unlock opportunity" by going "to the decision makers". The Commission must examine the evidence of Mr Sodi and others to ascertain why such payments were made by Mr Sodi and Mr Mpambani to these persons, particularly when their contribution to the Asbestos Project is unclear.

228. Some of these persons to whom payments were made or whose names were identified by Mr Sodi or Mr Mpambani as being connected with such payments, are "politically exposed persons or entities" or government officials.[7]

Kingdom Impact General Trading: R1 990 000.00

229. The evidence before the Commission is that Mr Mpambani was not engaged in any engineering business of any sort. There is no evidence that Kingdom Impact provided any services or performed any work for the JV in connection with the Asbestos Audit. Yet, two payments were made from 605 Consulting to Kingdom Impact: R1 million for "consulting services" in December 2014 and R990 000 for "professional engineering services" in August 2016.

[7] A 'politically exposed person' or PEP is the term used for an individual who is or has in the past been entrusted with prominent public functions in a particular country. See https://www.fic.gov.za/Pages/FAQ.aspx?p=3#:~:text=A%20politically%20exposed%20person%20or,functions%20in%20a%20particular%20country

230. A former director of Kingdom Impact, Ms Thulisiwe Kareli, used to work in the procurement division of Centlec. Other board members of Centlec were Mr Mokhesi (HOD of the Department), Mr Kenosi Moroka (Chairperson of the "Ace Magashule Foundation") and Mr Isaac Seoe (a director of Samba, of which Ace Magashule was also a director).

231. Mr Sodi gave no information to the Commission as to the nature of the professional engineering services provided by Kingdom Impact to the JV in respect of the Asbestos Audit or in respect of which the payments were made.

Collin Pitso: R6 505 250.00

232. Mr Sodi eventually confirmed that Mr Pitso was Chief of Staff to former Gauteng MEC Nomvula Mokonyane and then to her as Minister, but was quick to add that "that is not the case anymore". Mr Sodi was uncertain about several details of the payments to Mr Pitso; he undertook to check, but failed to provide any further details. What may be relevant is that Mr Sodi made payments of a great deal of money to the chief of staff of the MEC in Gauteng who enabled Mr Sodi to enter into an asbestos audit in that province.

Bongani More: R7 492 806.13

233. Mr Sodi avoided answering the question why payment of about R7.5 million was made to Mr More, providing only vague and unconvincing responses.

Diane / Anoj Singh: R10 000.00

234. Mr Sodi told the Commission that he had "no idea" why any payment had been made to Mr Anoj Singh.

Linda Ngcobo: R2 079 627.00

235. Mr Sodi explained the payment to Ms Ngcobo on the basis that she "is a friend of mine" and dismissed her employment in administration of Gauteng Housing as "used to be but not anymore". He explained to the Commission that this was "a loan to Linda, after she left, she was struggling". Not only was she a friend, but "we are exploring business opportunities together".

236. Mr Sodi was not pressed on details of the loan, whether or not it was secured by a loan agreement or any security, or the terms of repayment of such loan, but it is strange that a loan should be in such a specific, and not a rounded, amount as was identified by the Commission's investigators.

Paul Mashatile: R371 553.37

237. Mr Sodi told the Commission that these were payments "made directly to the ANC" and speculated that this "could be to pay for a venue, to assist with payment for salaries".

238. Mr Sodi offered no explanation why donations to a political party were not made through the official channels and administrative structures of the party. The ANC has an office of the Treasurer-General, bank accounts, offices and staff who would receive donations, provide receipts in respect thereof, record such donation in the accounts of the organisation and deposit the funds into the appropriate bank account of the organisation. He did not suggest any reason why payment had been made to one specific individual.

Pinky Kekana: R170 000.00

239. Mr Sodi described Ms Kekana as "someone I consider a sister" but offered no reason why he should be making payments to her.

Thulas Nxesi: R45 000.00

240. Mr Sodi told the Commission that there were two payments, one of which was paid to a school and one was for accommodation "for underprivileged kids".

241. Should Mr Nxesi, a former school teacher and subsequently a national Minister, have been soliciting donations for schools or children, then it is surprising that Mr Sodi did not establish the identity of the school and its bank account or the relevant provincial departmental account for the funds to be appropriately deposited therein.

Zizi Kodwa: R174 760.00

242. Mr Sodi informed the Commission that "Zizi is a friend I have known for a number of years" and acknowledged that "he is currently deputy minister of intelligence". The explanation given by Mr Sodi was that

> this was payment that I made for him as a friend where he requested assistance on a number of times, he will say we have not been paid on time this month from Luthuli House or there is delays in payment... he would ask for assistance because maybe he has got debit orders that have to go through...

Zweli Mkhize: R6 500 000.00

243. Mr Sodi told the Commission that these were payments to the ANC and, according to Mr Sodi, "went directly to the ANC account". He went on to say that "that particular individual was the Treasurer-General of the ANC at the time ... he was the one who approached me at the time to ask for assistance and that is why his name is used as a reference".

244. Mr Sodi told the Commission that a total sum of a little more than R3.5 million was paid for and on behalf of the ANC, with "some payments made directly to the ruling party and some [of] it to service providers". The payments, all made from Blackhead's bank account, were used to purchase ANC T-shirts or to pay volunteers and other such expenses. Mr Sodi elaborated that "from time to time I have made donations to the ANC" and that these were "substantial amounts".

Doing business or concealed business with politically connected persons

245. Mr Sodi informed the Commission that, during the period 2014/2015, Blackhead had a turnover of over a billion Rand and agreed that this company had received payments from the Department of Human Settlements in excess of a billion Rand up to 2019.

246. On Mr Sodi's own version, Blackhead is heavily invested in conducting business with government at a provincial level. The Commission has no information of business interaction with government at a municipal or local level. Mr Sodi asserted his loyalty to the ANC and so justified his purported generosity to that political organisation, whether his donations were made to the organisation's official and administrative structures, or to individuals or in cash.

247. There are many difficulties in comprehending the nature of the open-handed assistance given by Mr Sodi to this political party. Firstly, he does not identify the funds as going to the political party but to individuals who are members or office bearers thereof, or who occupy government positions. Secondly, there is no indication that the political party ever received these payments or acknowledged such receipt.

248. Mr Sodi's method of bookkeeping and financial records therefore mean that Mr Mashatile (R370 thousand), Mr Nxesi (R45 thousand) and Mr Mkhize (R6.5 million) are all tarred with the possibility that they received funds not intended for themselves, failed to obtain full records from the ANC or the schools, and failed to furnish these to Mr Sodi. Alternatively, Mr Sodi's method of record-keeping exposes Messrs Mashatile, Nxesi and Mkhize to the suspicion that they may have received these

funds in their personal capacity and that could lead to the question what each may have offered Mr Sodi in return.

249. Mr Sodi's generosity to friends is also problematic. These payments are made from business accounts in the name of business entities controlled by Mr Sodi. Where he made payments to friends such as Bongani More (some R7.5 million), Linda Ngcobo (some R2 million), Pinky Kekana (R170 000), Zizi Kodwa (R170 000), they are not distinguished as personal loans to friends, which cannot therefore be deducted from business income as business expenses. These payments supposedly fall into the category of personal income of Mr Sodi himself, which he can freely dispose of as loans to friends.

250. The issue is not merely one of tax compliance. The difficulty is that no reliance whatsoever can be placed upon Mr Sodi's business records. He has no records worth the paper on which they may have been written. Accordingly, Mr Sodi was unable (despite being given the opportunity by way of postponements) to produce written agreements, invoices, schedules of payments or other financial documentation that would even begin to explain any of the payments made to any of the beneficiaries named above.

251. Such accounting and administrative disarray has several results. Not only is there great possibility for mismanagement of the businesses and even greater likelihood of being unable to be tax compliant, but there is also every opportunity to conceal payments, whether or not legitimate.

252. Furthermore, as Mr Sodi has acquired his great wealth and ability to make such loans or donations to "friends" by reason of his business interests, which include extremely lucrative contracts with government departments, there can only but be great concern over such "loans" or assistance given to "friends" who occupy influential positions in government. These payments were made to persons who were sometimes directly involved in the geographical area, the political domain and the business arena in which Blackhead, Sodi and Mpambani were operating. Mr More (housing in Gauteng), Mr Ngcobo (housing in Gauteng), Mr Kekana (Limpopo roads) are amongst those who had and may still have great influence over the award or facilitation of government contracts, especially when fair and transparent processes are not followed.

253. The payments supposedly made to Mr Jimmy Tau are one example. The Tau entities received monies from the payments made by the Department, and transfers to the Tau entities are supposedly dependent upon the Asbestos Audit. The transfers to the Tau entities are identified by Mr Mpambani as being a "cost" of the Asbestos Audit and Mr Sodi has not only seen that "Cost of Business" schedule but has also authorised payments from the bank accounts of his businesses to the Tau entities. There can be no doubt that there is a connection between these transfers to the Tau entities and the Asbestos Audit. Yet Mr Sodi is determined to distance Mr Tau from the Asbestos Audit. He claims that Mr Tau is retained as a business consultant but can produce no agreement to that effect. He claims that Mr Tau provided services on another project but is unable to identify that project, provide any invoices from Mr Tau or explain why the transfers were made from the Asbestos Audit funds and not those of the other project.

254. Through a maze of various entities and bank accounts, payments turn out to have been made to a third party to meet costs incurred by the former MEC for Housing in Gauteng and subsequently Minister of Water and Sanitation, Ms Nomvula Mokonyane. The evidence before the Commission is that Ms Mokonyane was personally involved in deciding upon the Asbestos Audit in Gauteng, the contract for which was given to Mr Sodi and his business. Ms Mokonyane has not had the opportunity to respond to this information, but Mr Sodi has been questioned on this matter. His answers have been unconvincing. His financial records fail to assist; in fact, they are the source of his own undoing.

255. Furthermore, payments identified as being connected to Mr Collin Pitso, former chief of staff to Ms Mokonyane, are rather desperately sought by Mr Sodi to be characterised as in respect of payments to a construction company. Questions arise whether or not the construction company is a cut-out or intermediary for payments between Mr Sodi and Mr Pitso, or between Mr Sodi, Mr Pitso and another unidentified person, such as Ms Mokonyane. Again, neither Mr Pitso nor Ms Mokonyane have had the opportunity to respond to any suspicions. Further, the Commission's investigators have not examined

the banking records of either Mr Pitso or Ms Mokonyane or of their relatives to ascertain whether or not any of Mr Sodi's or Mr Mpambani's generosity was received by them. However, Mr Sodi business methods and accounting records may have exposed irregular or corrupt business practices and may have unfairly raised suspicions about innocent and uninvolved persons. At the very least, Mr Sodi and his companies and Mr Mpambani and his companies are not compliant with either tax or accounting practices as required by the law.

256. Similarly, Mr Sodi attempts to explain away transfers of funds to persons such as Mr Bongani More (some R7.5 million) because Mr More is a business partner but fails to indicate the identity of or the nature of the business, the reason for the transfer of funds to Mr More, or what business purpose was achieved by such payments. No partnership agreements or corporate documentation was forthcoming, no business plan, no budget, no record or business activity.

257. Likewise, when Mr Sodi identifies funds as being linked to Mr Pitso (R6.5 million) and then says that he was using the services of a construction company with quite another name, it is unlikely that there is a business relationship with that other construction company. No invoices, contracts or receipts were produced indicating any lawful cause for payment to the construction company. Sodi said he merely used Mr Pitso's name as a reference when paying millions to Mr Pitso's father for construction work.

258. Both Mr More (Housing in Gauteng) and Mr Pitso (Housing in Gauteng and chief of staff to Ms Mokonyane) may have influence over policy and administrative processes and decisions. There is every possibility that payments of funds directly to such persons or through third parties would lead to allegations of improper relationships between a businessman such as Mr Sodi, and government employees such as Mr More and Mr Pitso. Mr Pitso and Mr More have not had the opportunity to explain how they viewed their relationship with Mr Sodi. This Commission can examine the evidence on transfer of funds only in the light of the explanations offered by Mr Sodi. These explanations are singularly unconvincing and, in the absence of any supporting evidence, cannot be believed.

259. The result is that the Commission is left with the view that Mr Sodi made generous payments through his business bank accounts to obtain access, secure influence and retain connections with a number of individuals at provincial and national levels of government. Whether or not such payments were intended by Mr Sodi to obtain an immediate direct benefit in return, or to create obligations for the future, this would unquestionably indicate an appetite on the part of Mr Sodi for some form of state capture. Such a consistent course of action would indicate that a business person made payments to persons who occupied political leadership positions or were employed as government officials with both the intention and the result of obtaining private benefit for himself or his businesses.

Mr Edwin Sodi and Mr Thabani Zulu: The payment of R600 000

260. The evidence presented before the Commission is such that Mr Sodi and Mr Zulu, who was the DG of the national Department of Housing, may well be guilty of corruption in that the amount of R600 000 that Mr Sodi or his company, Blackhead, gave to Mr Zulu by paying for his motor vehicle at SMD Trading Group in Ballito, KZN. It may well have been a bribe or a reward to Mr Zulu for his role in facilitating the award of the asbestos contract by the Free State Department to his company or to the JV.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

261. What is of particular relevance to the work of the Commission is the questionable way in which the services of the JV were procured, at grossly inflated cost, and for little benefit to the Province and particularly its poorer inhabitants. Rather, a few private individuals benefited from the transaction. The evidence presented further indicates that these individuals included government officials as well

as private individuals, some of whom in turn may have made payments to the ANC. In particular, the following pattern of state capture can be identified.

An approach is made by private individuals to a government department

262. In this instance, the approach was unsolicited and the work to be done was not part of the Department's budgeted business plan. Legislative frameworks support public-private partnerships and provides for access to government funds for implementation of innovative ideas that solve societal problems. This participation is guided by the Constitution, applicable legislation, primarily the PFMA, and Treasury Regulations. In this matter, the private individuals who approached the Department, together with the responsible government officials, failed to implement the policies and regulations for fair participation in competitive bidding processes. Their unlawful and unethical conduct has been to the detriment of the Department and the poor people of the Free State who depend on government housing provision.

Through unlawful and unethical conduct, officials undermined the relevant procurement prescripts to facilitate procurement opportunities for personal gain

263. Officials in collusion with private individuals utilise their good understanding of key Treasury Regulations (Regulation 16A6.6 and Regulation 16A6.4) to intentionally circumvent competitive bidding processes and use deceit to enable approval of project budgets. This corrupted environment caused serious financial losses for the state and negatively impacted on smaller actors in the industry. Competitive bidding is necessary for enabling South Africa to realise its National Development Plan (NDP) goals, including "inclusive development".

The Department did not receive value for money from the supplier

264. Poor project management in the Department allowed the service provider to manipulate the scope of work and the pricing of the project. The price charged was more than ten times the actual cost of the work contracted for, and the outcome of the work will require that the audit be implemented again in order to generate, among others, an accurate and complete bill of qualities, before the removal of asbestos-containing materials can take place. Since the Department evaded the standard requirement to test the market for available skills and capacity in this industry, government missed the opportunity to engage the most productive service provider for its needs.

Money was paid by the service provider to officials in provincial and national departments in suspicious-looking payments and gratuities around the time of the transaction

265. In this case, money was paid by Mr Sodi to a dealership for a vehicle for Mr Zulu, ostensibly in discharge of a debt owed to a business owned by Mr Zulu's wife. Mr Sodi also paid money directly to a conveyancer as a deposit for a house to be bought by Mr Mokhesi's family trust. Such deposit was paid prior to the deed of sale being signed and prior to the coming into existence of the trust, and ostensibly as part of a business transaction from which Mr Mokhesi would benefit. These transactions show the ease with which gratuities / inducements / rewards paid to officials may be concealed. They also show how unaccountable private agencies such as banks, estate agents and motor dealerships were used to conceal questionable transactions. Addressing such malfeasance and other manifestations of state capture require a coordinated response by the government and private business.

The service provider made further payments to the ruling party and to politically exposed persons around the time of the transaction

266. In this case, Mr Sodi paid in excess of R10 million to the ANC between 2013-2018 and made several other payments to politically exposed persons (PEPs). Mr Mpambani also made various payments on request from the Office of the Premier of the Free State. Although the Commission's investigation focused on one province in South Africa, the transactions permeated several provinces in the country.

267. Different levels of leadership in the country have been either directly involved or implicated. South Africa will benefit from a public service culture that is based on an ethical and principled code of conduct applicable across different spheres of government, to elected representatives and public servants, and to the public and private sectors. Further, members of the ruling party have been identified as direct beneficiaries of questionable transactions, and the ruling party itself as a recipient of forms of sponsorship and support by the service provider to government. The ruling party and all political parties that may hold power at some stage in one or more sphere of government need to implement sustainable measures that will insulate themselves from such malfeasance.

Recommendations

268. It is recommended that the law enforcement agencies should conduct further investigations into whether or not the payment made by Mr Sodi or his company, Blackhead, to SMD Trading Group in connection with the purchase of a Maserati, was a bribe or reward for Mr Zulu, through Mr Ntuli, for Mr Zulu's role in the facilitation of the award of the Asbestos contract to the JV. The Commission has a suspicion that this may well have been the case but ran out of time and did not finalise its investigation in this regard.

269. It is recommended that the NPA seriously consider preferring criminal charges of corruption against either or both Mr Sodi and his company Blackhead, as well as against Mr Mokhesi, who was the HoD of the Free State Department of Human Settlements, in connection with the payment by Blackhead or Mr Sodi of an amount of R650 000.00 towards the purchase of the property situated in Bloemfontein. The Commission is satisfied that this payment was made as a reward or inducement or both to Mr Mokhesi in connection with his role in facilitating the award of the Asbestos contract to the JV, or as a reward for or inducement for the payment by Mr Mokhesi's Department to the JV.

FREE STATE R1 BILLION HOUSING PROJECT

INTRODUCTION

1. As stated in the introduction of the Terms of Reference (TOR) of this Commission, the Commission was appointed to investigate matters of public and national interest concerning allegations of state capture, corruption, and fraud. TOR 1.9 provides for an expansive interpretation of the nature and extent of corruption in the award of contracts and tenders by government departments, agencies, and entities. The second question posed is "whether any member of the National Executive (including the President), public official, functionary or any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest".

2. The overwhelming number of cases/issues brought before the Commission dealt with allegations of the corrupt awarding of contracts to the Gupta family businesses by government entities, and other corrupt activities of organs of the state and state officials. However, the Public Protector (PP) investigation that gave rise to this Commission also gave rise to investigations into the alleged improper conduct of members of the executive, thus invoking the Executive Members' Ethics Act 82 of 1998 and the Executive Ethics Code read with section 6 of the Public Protector Act 23 of 1994. Other allegations of corruption were investigated in terms of the provisions of the Prevention and Combatting of Corrupt Activities Act 12 of 2004, such as the alleged offer of ministerial positions by the Gupta family. The Free State R1-billion housing issue properly fits into the category of "alleged improper conduct in state affairs" because of evidence of the illegal awarding of contracts and the potential for corruption that might have existed because of this illegal activity.

3. This matter refers to the illegal advance payments made by the Free State Department of Human Settlements to building contractors and suppliers of material for a project to build houses from the R

1.42 billion it had been allocated for the construction of low-cost housing in the Free State during the 2010/2011 financial year.

4. At that time, although the national norm for a low-cost house was R 50 000 to build a 40 square metre house, in the Free State the norm had been increased to a house of 45 square metres for the same fixed price. A settlement was reached with the contractors to the effect that those contactors who had already been appointed would automatically qualify for contracts to build the larger houses for R 72 000, while other contactors could also submit bids for a new tender to build the larger 50 square metre houses at the same cost per house.

5. After the public tender closed on 16 April 2010 and the Bid Adjudication Committee (BAC) had met on 28 July 2010, it was discovered at this meeting that the validity period of the tender had lapsed, and the tender was cancelled. A decision was taken by the BAC to establish a database of contractors which included all those who had submitted bids or tenders, including compliant and non-compliant and even disqualified bidders, instead of putting out another tender.

6. The Department's Exco took a resolution on 30 July 2010 that construction of houses should begin, and on 10 September 2010, an allocation list of 106 contractors drawn from this database was signed by the Free State MEC for Human Settlements.

7. A threat early in 2010 from the National Department of Human Settlements to withdraw unspent money from Provincial Departments that was earmarked for the delivery of houses to indigent people and to renovate badly constructed RDP houses was followed on about 14 October 2010 by the raising of an alarm by the National Department about significant problems with the expenditure and housing delivery in four provinces, including the Free State, against their monthly delivery targets.

8. The situation in the Department in October 2010 was that no houses had been built at that stage and no contractors had been appointed as service providers.

9. The first response of the Free State Department was to initiate a so-called Expenditure Recovery Plan (ERP) in October 2010. This consisted of no more than setting out management processes and targets. Unfortunately, these were later deemed to be unduly optimistic and unrealistic and were never actually achieved. The ERP was rejected at a meeting of TechMinMec on 29 October 2010 and a MinMec meeting on 19 November 2010.

10. The second response was to introduce an Advance Payment Scheme (APS) from late October 2010 and implement it from November 2010. This Scheme involved payments by the Free State Department of Human Settlements to suppliers of materials who effectively then channelled funds to those contractors who were to build housing in the Free State.

11. Both these programmes – the ERP and APS – were to be implemented by entities and persons who were not placed on a Provincial database after an open and transparent process of advertisement and application, evaluation and selection. Instead, this cohort of contractors consisted of entities which had been successful and others that had failed the original selection process, had never applied to be on the official database or had no experience in building. Political considerations are openly acknowledged to have played a major role in their appointment as contractors.

12. A Memorandum on the APS was produced on 25 November 2010, and, according to the Auditor-General (AG), approximately R 500 million was paid by the Free State Department of Human Settlements to service providers between November 2010 and February 2011 pursuant to this scheme. However, despite claims to the contrary, there is very little evidence before the Commission that any significant number of houses were built during this period.

13. On 9 December 2010, the Minister of Human Settlements addressed a letter to the MEC for the Free State Department informing him that the Department had achieved a spending rate of 21%, which was below the benchmark of 58%, at the end of October 2010, and as a consequence the Minister was giving notice of the intention to withhold the sum of R 263 million from the Department's 2010/11 allocation and to reallocate it to other provinces that were in need of additional funding and had demonstrated a good spending performance.

14. On 12 January 2011, the Provincial Department was informed by the National Department of Human Settlements that a portion of its allocated budget would be re-allocated, to which the Department responded with a media statement on 20 January 2011 to the effect that it had spent 78% of its budget and was on track to spend 100% by the end of the financial year.

15. In February 2011, the Minister of Human Settlements instructed officials of the Free State Department to cease making advance payments, but these payments continued. The AG investigated the APS and concluded that the money spent resulted in fruitless and wasteful expenditure.

16. The Special Investigations Unit (SIU) investigated the issue of advance payments in 2013/2014 and reported its findings in 2015, which included unauthorised expenditure made through this scheme, contravention of the Constitution and of sections of the PFMA by entering into agreements with service providers under this scheme, and the commission of criminal offences arising from these.

17. Disciplinary procedures were instituted in the Department and several officials were placed on suspension in 2012, before being formally charged with misconduct on 21 January 2013. The Disciplinary Hearing was chaired by Advocate E S J Van Graan SC, whose written judgement dated 30 April 2015 resulted in six officials being dismissed. These were Ms D Y D Mokhele (Chief Director, Housing Programmes), Mr Mphikeleli Kaizer Maxatshwa (Chief Director, Housing Development, Planning and Research), Mr Kabelo William Koloi (Director Project Management and Technical Services), Mr L S Ndenze (Director, Informal Settlements and Land Tenure), Mr M C Twala (Director, Housing Special Programmes), and Ms N D Makhaotse (Director, Housing Subsidy and Development), while the then Free State MEC, Mr Mosebenzi Zwane, was promoted to further positions of political leadership and the HOD, Mr Mpho Mokoena, transferred from the Department of Human Settlements to a position within a municipality.

18. The evidence before this Commission is neither contentious nor disputed in any real sense. The proposal for such an APS, and the design and implementation thereof owe everything to an incompetent MEC and senior officials.

19. All witnesses were determined to lay blame for non-compliance with policy, unlawful expenditures, irregular procedures, and total departmental failures at the door of either the MEC or senior officials in turn. Each is to blame.

20. The MEC openly proclaimed his ignorance and failure to acquaint himself with the barest of understanding of the work of the Department under his political leadership. The DG was supine in the extreme and chose to blame the MEC and his alleged fear of the MEC for his own professional and occupational incompetence. Other officials at the level of DDDG were equally pathetic in their lack of spine in relation to the DG.

21. It is unfortunate that those persons who were disciplined and whose employment was terminated were staff who were not able to challenge the DG or the MEC. The sharks got away while the small fish have been devoured.

HOUSING PROVISION

The regulatory framework for the provision of housing

22. A number of those who deposed to affidavits summarised the principles of the Division of Revenue Act (DORA) insofar as this pertains to funding of housing and the process of compiling provincial and national business plans for housing.

23. Municipalities identify their low-cost housing needs, prepare a business plan for such and then apply to the Provincial Department of Human Settlements (DOHS) for necessary funding. The Provincial Department then performs a needs-analysis and development readiness in respect of the application by the municipalities, which results in the compilation of a housing allocation list, which records the number of low-cost houses to be constructed in the area of jurisdiction of each municipality, approved by the DOHS. The housing allocation list forms the basis of the business plan which, once approved,

forms part of the National Housing Subsidy Scheme ('the HSS') established in terms of the Housing Act 107 of 1997.

24. Included in the provincial business plan would be information such as the number of units to be constructed, the identity of those responsible for title deeds and training which would be conducted, and whether or not funds would be transferred to municipalities should they have capacity to perform the work themselves. This provincial business plan is then forwarded to the National Department of Housing and consolidated with all other plans for approval by National Treasury. Organs of state involved in government housing projects are obliged to feed information about their housing projects into the HSS and to use the scheme as a project management tool to record milestones against which contractors are entitled to receive part payment (dependent upon completion of those milestones) of the agreed contract price.

25. These milestones for payment in respect of government housing projects are completion of the foundations (phase 1), completion of the wall plate (phase 2), and completion of the housing unit (phase 3). They correspond with the agreed payment plan in terms of the standard building contract used by the Free State Department of Human Settlements.

Execution of the provincial and national low-cost housing plan

26. The South African Constitution determines the standard against which all processes and policies relevant to the procurement of housing must be evaluated and against which administrative action pursuant thereto must be judged. Section 217 of the Constitution deals with "Procurement" and states that:

    (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

    (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for— (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

    (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented. [Sub-s. (3) Substituted by s. 6 of the Constitution Seventh Amendment Act of 2001.]

27. Contractors are appointed after a tender has been published and applications from prospective service providers are received. The then Free State Chief Director: Housing Development, Planning and Monitoring, Mr Maxatshwa, explained that the tender process mainly focused on selecting and approving building contractors who satisfied the compliance criteria and had proven track records for building low-cost housing (i.e. contractors who complied with functionality requirements) – so-called "'experienced building contractors" – while the Head of Department, Mr Mokoena stated that the Free State Department of Human Settlements utilised a system "whereby we graded our contractors in terms of competency/performance", which "made sure that those contractors who always delivered on their contracts were the ones that received the big allocations for the constructions of houses."

28. The materials to complete the various milestones are provided by the appointed contractors, whose work is then inspected by the Free State Department of Human Settlements. Inspections are carried out by an engineer appointed by the contactor, a technical official from the Department, a building inspector of the relevant municipality and often a representative of the National Home Builders Registration Council.

29. All contractors' work must be certified as complete before information can be fed into the HSS so as to trigger an interim payment obligation. When the construction work is of the required standard, the official of the Department of Human Settlements certifies the claim form and issues it to the contractor (also known as a Technical Analysis System Report, TASR), which entitles the contractor to receive

the agreed payment for the milestone which has been completed. The contractor submits that TASR to the Financial Unit of the Department of Human Settlements which processes the payment request against the information recorded on the HSS.

30. As Mr Maxatshwa confirmed to the Commission, "there is an elaborate system of checks and balances for the proper expenditure of payment for low-cost housing on the one hand and for the proper construction under supervision of low-cost housing on the other hand".

31. Funding is allocated to Provincial Departments of Human Settlements each financial year for construction of low-cost housing by National Treasury. The process of allocation takes place in terms of the Division of Revenue Act (DORA).

32. This allocation is subject to the satisfaction of conditions, which include delivery targets. Where allocated funding is not spent by a province during a financial year, then the National Department notifies this province that further transfers of funds will be withheld and that funds will be re-allocated elsewhere. Such re-allocation of funds might also reduce the allocation of funds to the underspending province in the following year.

33. This process was explained to the Commission by officials such as the HOD, Mr Mokoena, and Mr Maxatshwa, Deputy DG, within the Free State Department of Human Settlements who both understood the policy and the practice thereof.

THE CREATION OF A DATABASE OF SERVICE PROVIDERS

34. The Free State Department of Human Settlements was allocated a budget of R 1.42 billion in the 2010/2011 financial year for the construction of low-cost housing in the Free State.

35. Mr Mmuso Tsoametsi, DDG in the Free State Department of Traditional Affairs and alleged former Advisor to the MEC, Mr Zwane, at the time, gave an overview of the problems which emerged at the beginning of the 2010/2011 financial year. However, it is possible that he misstated the years in which these events occurred. He stated that there were elections in April 2009 and that "normally during the transitional period between the old regime and the new regime is when problems with the underspending of DORA funding happens. This is exactly what happened in 2009/2010". He explained that the "old regime" had a business plan for RDP houses but when the new Premier (Mr Ace Magushule) took over in 2009 he had to implement his election manifesto which included, inter alia, the construction of bigger RDP houses. Accordingly, an announcement made by the Premier during the 2010 State of the Province Address, according to Mr Tsoametsi, "changed the whole landscape of RDP houses in the Free State" and the old business plan could no longer be implemented.

36. In his State of the Province Address on 26 February 2010, then Premier Magashule announced that RDP houses would now be 50 square metres in size. Mr Maxatshwa stated that it was this announcement by the Premier which led to disputes with contractors who had already been appointed to build houses of 40 square metres at a fixed price of R 50 000 and who were now expected to build larger houses for the same contract price. According to Mr Tsoametsi, the upshot of the new specifications announced by the Premier was that new contractors had to be appointed and the Department had to come up with a new strategy as to how the DORA funding would be spent.

37. A settlement was subsequently reached with contractors where it was agreed that contractors could tender to build the larger 50 square metre houses at the cost of R 72 000 per house. Those contactors who had already been appointed to build 40 square metre houses for R 50 000 would automatically qualify for contracts to build the larger houses for R 72 000.

38. It became necessary for a new tender to be published. The public tender closed on 16 April 2010 and the BAC met on 28 July 2010. However, it was discovered at this meeting that the validity period of the tender had lapsed. The minutes of the BAC record the recommendation that "different databases be consolidated and used as a source of service providers". The minutes specifically state that, amongst the databases to be consolidated is "the list of suppliers who tendered for this tender". Mr Maxatshwa

stated that this resolution was approved by the HOD, Mr Mokoena, who was also the accounting officer of the Free State Department of Human Settlements.

39. It would appear that this database had over 300 names and was confirmed by the MEC, Mr Zwane, to include bidders who were qualified, bidders who had been disqualified and bidders who were unable to continue with the process. This means that anyone who applied to be appointed as a contractor, irrespective of whether or not they were tax compliant, experienced in building, or financially viable would be placed on this "consolidated database" even though he or she or it may be totally incapable of building houses for the Department. The only requirement for being placed on the database would be the submission of an application pursuant to the advertising of the public tender.

40. In fact, what is recorded is that 105 bidders were disqualified for basic bid compliance, and 104 were disqualified because they did not meet the minimum functionality threshold; while 28 bids from established contractors and 81 bids from emerging contractors qualified to be evaluated on price.

41. A comparison between the record of the Bid Evaluation Committee (BEC) and the list of respondents to the 2016 High Court application of the Free State Department of Human Settlements to set aside contracts shows that some contractors who later received contracts in this matter indeed were deemed to be disqualified by the BEC. For example, Jore Construction CC was disqualified because its National Home Builders Registration Council (NHBRC) registration had expired but was clearly awarded contracts as it is listed as the 2nd Respondent, as well as in National Urban Reconstruction and Housing Agency (NURCHA) reports mentioned below.

42. In a version put forward in Mr Zwane's second appearance before the Commission, he confirmed that there were previous contractors appointed to a database. Then the dispute with the contractors arose, and they began the processes that would give them a new list. Mr Zwane confirmed that that new process was the same process as the one that gave them 361 bids (according to the minutes). He also confirmed the sequence of events that led to a consolidated list of qualified and disqualified bidders and those from other databases and that the tender process continued until 28 July when it was finally abandoned.

43. In other words, Mr Zwane's version on his second appearance was that the tender process described above, which ran from April to July 2010, would have been for the creation of a database, and not for specific work to be allocated. On this version, the open tender process that took place in April-July 2010 was meant to facilitate a new database that could be used by Mr Zwane for the following five years. Mr Zwane's version on this appearance was that officials had assured him that it was lawful to award contracts to those on the database after the tender process had collapsed.

44. According to Mr Mokoena, the purpose of the database from the Department's perspective was to keep a list of qualified contractors who may be alerted to relevant tender advertisements as and when they appeared. Tenders were advertised around four weeks prior to the closing date, and there was a risk that the Department would not receive bids from qualified contractors. The database was introduced to alert qualified contractors when tenders were open in order to ensure high quality bids were received from qualified contractors.

45. The benefit to a contractor of being on the database was therefore that they would receive communication from the Department when a tender relevant to their skills was advertised. But those contractors would still need to submit a bid and have that bid evaluated against all other bids to be eligible to have the work allocated to them. According to Mr Mokoena, it would have been irregular for a contractor on the Department's database to be allocated projects without going through the further tender process which involved submitting a bid for a specific housing project in terms of section 38(1)(a)(iii) of the Public Finance Management Act 1 of 1999 (PFMA).

46. After the Chair probed him for clarity, Mr Zwane said that his understanding is that a list/database is compiled after a competitive bidding process, and that list would be used until it expires after five years. Mr Zwane claims that he questioned this process when he arrived in the Department, and he was told that this process is used to "save time".

47. On the 1 August 2010, the Exco of the Free State Department of Human Settlements took a resolution

that construction of houses should begin. The "allocation list" of 106 contractors was signed by Mr Zwane, the MEC, on 10 September 2010.

THREATS OF BUDGET RE-ALLOCATION

48. The Free State Department of Human Settlements failed to meet delivery targets with the result that budgeted funds were not expended. The pending consequences were that there would be withholding of funds, reallocation of the budget in the 2010/2011 financial year and a reduction of the budget in the succeeding financial year.

49. The then HOD of the Free State Department of Human Settlements, Mr Mokoena, told the Commission that by October 2010 they had not built any houses, and that only a few sites had foundations because they did not have service providers appointed yet as contractors. The result was that no more than 10% of the housing budget had been spent.

50. Mr Zwane confirmed that in 2010 there was a threat from the National Department of Human Settlement to withdraw the unspent money that was earmarked for the delivery of houses to indigent people and to renovate the RDP houses that were badly constructed and unsuitable for human occupation.

51. Mr Zwane states that "on and about the 14th October 2010 the National Department of National Housing raised an alarm about significant problems with the expenditure and housing delivery in four provinces including Free State against their monthly delivery targets".

52. Mr Zwane told the Commission that on 18 October 2010, the Minister of Housing held a conference with all MECs of the nine provinces "to raise lack of delivery and under-expenditure and the under-performing provinces were asked to submit recovery plans showing how they intend to prove expenditure and delivery."

53. According to Mr Mokoena, the National Department of Human Settlements informed them that they were being down-scheduled in terms of their performance and will as a result receive notice that a particular amount will be withdrawn from their budget and given to other provinces that are performing, unless they present a plan.

54. Mr Mokoena stated that the National Department had already withheld an amount of R 263 million that was due to the Free State in terms of the allocated budget, but the National Department was now threatening to withdraw the entire allocated budget if it was not spent on housing.

55. Both Mr Maxatshwa and Mr Zwane confirmed that the National Department had requested the Provincial Department to come up with a recovery plan to spend the unspent budget before the new financial year and to build houses during the remaining months of December 2010 to March 2011.

THE EXPENDITURE RECOVERY PLAN

56. Pursuant to queries from the National Department, what came to be known as the "Expenditure Recovery Plan" (the ERP) was designed and implemented in response to correspondence from the then National DG, Mr Thabane Zulu, and from then Minister Mr Tokyo Sexwale, demanding action.

57. The MEC told the Commission that his understanding of the Recovery Plan was "how we are going to recover from the slumber that we are in as a province". Mr Zwane told the Commission that he arranged a meeting with all officials and requested them to come up with a recovery plan to submit to the Minister. He did not take any part in development of this plan. Mr Zwane recalls no meetings in respect of the ERP Plan but told the Commission that "we had two, three meetings on the suggested opinion".

58. The content of this Plan was set out in a presentation containing a "10 Point Plan on Expenditure". The presentation notes are undated. The document was apparently created after a "war room" had been set up to monitor and implement expenditure on this ERP which was nothing more than simple

outline of a normal programme to ensure delivery on a project. In addition, in October 2010, a set of cash flow projections was also prepared, which supposedly represented the completion of several thousand houses at a total cost of R1 billion (one billion Rand). These projections identified milestones of foundations, wall plates, and the completions of units.

59. Mr Mokoena commented that the projections were made with the understanding that they were going to speed up in terms of "getting our capacity". He further stated that the cash flow projections were no more than an impractical map of how the budget could be spent, rather than a realistic set of targets for completion before the financial year end. He further described the expenditure of some R500 million on supply of materials to contractors as "unfocused", "impractical" and "unrealistic" and stated that it was not ever believed that it would result in the building of the units set out in these cash flow projections. The Plan was only ever about making payment to suppliers of material without expecting any milestones of completed foundations, wall plates and actual units to be delivered. This was confirmed by Mr Tsoametsi, which he blamed on capacity shortages and the fact that the department was "in transition".

60. Mr Zwane conceded to the Commission that the ERP presentation and the cash flow projections were ambitious and that he would have preferred one which was more specific. He also confirmed that in hindsight he could see that the ERP had "loopholes": He claims to have asked officials if the plan was realistic and whether he could hold them accountable for it, and they agreed. He did not ask how it would be achieved, only for their assurance that it would be achieved. Mr Zwane saw the ERP document as pushing officials and everybody harder to achieve.

61. The ERP was first presented at the Technical Ministerial Member Executive Council meeting on 29 October 2010 by Mr Maxatshwa on behalf of the HOD, Mr Mokoena, who had tendered his apologies. They were instructed to revise the plan and present a revised ERP to the November technical MINMEC. The ERP plan was subsequently presented to the Technical Ministerial Member Executive Council meeting of 18 November 2010. Again, Mr Mokoena tendered his apologies.

62. The aim of the ERP was to dissuade the National Department from removing funds from the Free State Department. Mr Mokoena conceded to the Commission that this was a misrepresentation but was unable to explain why such misrepresentation was made.

63. It is apparent to the Commission that the ERP presented to TechMinMec and MinMec and the National Department and former Minister Tokyo Sexwale, was an attempt by the Free State Department of Human Settlements to resolve its non-delivery and underspending challenges. However, it operated in parallel with the undisclosed scheme of advanced payments of which the National Department and the Minister were not informed and which was not publicly presented by the Free State Department as the real solution to the underspending problem.

THE ADVANCE PAYMENT SCHEME

64. It would appear that there is agreement from all concerned that the Advanced Payment Scheme (APS) was first discussed by the MEC and officials in the Department at a departmental meeting in their Bloemfontein offices in October 2010. Present at this meeting were Mr Gift Mokoena, Head of Department, Mr Seipati Dlamini, Chief Financial Officer, Local Government and Human Settlements, Ms Mamiki Mokhele, Chief Director, Mr Mmuso Tsoametsi, Deputy Director General, Mr Kaizer Maxatshwa, Deputy Director General, Mr Kabelo Koloi, Director Project Management and Technical Services, and Ms Innocentia Motaung, personal assistant to the MEC.

The content of the advanced payment scheme

65. The Advance Payment System (APS) was supposedly based upon existing National and Provincial protocols and requirements. Mr Mokoena, the HOD, explained that the process involved the Department entering into a contract with the contractor, who then contracted with a supplier of material who would provide him or her with a quote/invoice for the material. The contractor would then present this

quote or pro forma invoice to the Department, which would then advance the monies to the contractor based on this quote or invoice. The contractor would then settle his debt with the supplier of materials once the Department had paid the contractor. These contracts, the tripartite agreement and the supply cession agreement, plus the invoice from the supplier to the contractor, would be handed to the New Material Cession Milestone Management branch of the Free State Department of Human Settlements, who would capture the beneficiaries, the contractor and the suite of documents. The documents would then be handed to the financial branch for payment.

66. Since the very nature of this system involves payments made in advance prior to completion of any of the Housing Subsidy System milestones, according to Mr Maxatshwa, the payment would have to be recorded on the system against one of the milestones notwithstanding that work had not been completed or "without the material having in fact been supplied to the contractor". Mr Zwane told the Commission that the plan did indeed involve buying material for building projects from suppliers and paying for those in advance (as stated by Mr Maxatshwa) but pointed out that the background of the plan was clear: that "advance payment will [only] be made where necessary" and that his interpretation was there would be instances where there was no advance payment.

The creation of the Tsoametsi memorandum

67. An internal memorandum dated 25 November 2010 was prepared and purports to emanate from Mr Tsoametsi as Deputy Director General and is titled "Approval for entering into material supplier agreement to support contractors".

68. Mr Tsoametsi stated that the result of the meeting in Welkom with contractors and suppliers and the Builders Market with officials from the Department was that it was his responsibility to "give meaning to the decisions taken at the Welkom meeting". He claims that the memorandum is "a combination of the outcome of the Welkom meeting, my own research and because of my interaction with the Contractors and Suppliers".

69. Firstly, he went into the website of the National Department and looked at policy issues and took note that it was said that, since 1994, well-resourced and well-capacitated contractors have pulled out of providing support for government with the result that this creates opportunities for small, medium and micro enterprises (SMME) contractors lacking capacity. Mr Tsoametsi took the view that "in my mind the same statement that was said by the contractors is now contained in a government policy". Secondly, Mr Tsoametsi investigated "contractor development or contractor support" and came across a "partnership established by Human Settlement Department of Gauteng" with whom he made contact. He was referred to the Gauteng legal section who explained the tripartite agreement which they utilised and which was forwarded to him. Thirdly, Mr Tsoametsi told the Commission that he contacted the entity known as NURCHA, who referred him to a Mr Coetzee who explained that NURCHA managed such a programme through a "partnership with material suppliers".

70. Mr Tsoametsi explained to the Commission that he felt he had "three outcomes" – support for contractors, partnering with material suppliers and a tripartite agreement. This resulted in Mr Tsoametsi preparing his memorandum for consideration by the HOD. He described how he approached a material supplier in Bloemfontein to find out if they would be interested in "my suggested model" and thereafter discussed the memorandum with the legal advisor of the Department, the late Mr Gordon Taka. He did not discuss the memorandum with any other legal advisor or legal department. Once the memorandum was prepared, Mr Tsoametsi addressed it to Mr Mokoena, who approved it. He knows that the MEC saw the document and that it was shown "to all officials in the DHS tasked with coming up with a solution to the underspend".

The purported reason for the advanced payment scheme – the Christmas holidays

71. One of the reasons the MEC, Mr Zwane, gave for the advance payments and the cession agreements was the pending Christmas shutdown by contractors. Yet, this is clearly incorrect. The Advance Payment Plan was presented by Mr Zwane to his officials in October. It was revealed to TechMinMec

and MinMec during October and November. it was revealed to the National Department in December. It was not a response to the Christmas holiday closure. It was a response to the year-long failure of his Department to do the required work and produce results.

The purported reason – "Saving time"

72. Mr Mokoena explained that the APS meant that "we should start buying material from suppliers for projects". According to Mr Mokoena, Mr Zwane held the opinion that "by doing this, the contractors would save a lot of time and that this would enable them to concentrate on the construction of the houses". It is difficult to understand that the saving of time was of paramount importance to the MEC. What was under threat was the underspending of the budget of the Free State Department of Human Settlements. Funds had already been withheld, there were threats that funds already allocated to the Free State would be reallocated elsewhere and this would impact upon allocation of funds in the forthcoming financial year. This was a budgetary, not a delivery problem.

The ostensible reason for the advance payment scheme

73. The Commission was told time and again of the lack of expertise within this "new" Department. The Bid Evaluation Committee (BEC) and the Bid Adjudication Committee (BAC) had found the entire process of proceeding with the housing programme by way of public tender would affect the ability of the Department to build houses in the financial year. The solution was one born of desperation because if the Provincial Department failed to build houses and spend the monies allocated to it by the National Department then the MEC would have political egg on his face, the HOD would be seen to be incompetent and all the officials within the Department would be seen to be ineffectual.

74. The result was an advance payment plan to spend money so that the Department would seem to be using the budget allocated to it and thus would be presumed to be building houses. This was a fraud perpetrated upon, at the very least, the National Department of Human Settlements, designed to deceive then Minister Sexwale that the Free State Department was doing its job and getting houses built when that was certainly not the case.

IMPLEMENTATION OF THE ADVANCE PAYMENT SCHEME

Briefing sessions and signing of contracts

75. Mr Maxatshwa described the process during which the MEC led "briefing sessions" district by district with contractors to whom the process was explained. According to him, contractors wanted the department to come and sign the first contract that allocates them work, and the second contract, tripartite and a cession agreement at the same time for this scheme to happen in any way. According to Mr Maxatshwa, the tripartite agreements with contractors and suppliers were signed on behalf of the Free State Department by the then HOD, Mr Mokoena, and sometimes by Mr Tsoametsi, Deputy Director General in the Free State Department of Traditional Affairs and alleged Advisor to the MEC at the time, while the cession agreements were signed by Mr LS Ndenze (Acting Director of Legal Services) or Mr Tsoametsi.

Exemplars of contracts with contractors, suppliers, cessions and payments

76. During November and December 2010, several contracts were signed with contractors. The contractors then visited municipalities to obtain details of where houses were to be constructed. Thereafter, the contractors provided the Department with invoices/quotes from the suppliers of materials. The Department then paid, in advance, for the materials which were to be sourced by the contractor from the supplier of materials based on these invoices.

77. Mr Mokoena states more than once in his affidavit of 11 November 2019 that he had his doubts or reservations about the authenticity of the invoices provided. In his evidence to the Commission, he

said that he had reservations "because I knew when it comes to invoices you can never be sure about any invoices that we are getting because some invoices will be inflated, the prices will be changed from area to area, from region to region" with the result that "I had a fear that we were not going to be able to control that because if we have enough stuff [sic] we have enough technical people".

78. According to Mr Mokoena, leave for most of the employees in the Department was cancelled over the December 2010 holiday season "as per the instruction of the MEC". However, Mr Mokoena had booked a holiday on a cruise ship and had appointed Mr Maxatshwa as the acting HOD of Human Settlements during his absence. This appointment did not please the MEC and so, according to Mr Mokoena, the MEC appointed Ms Mokhele as acting HOD of Human Settlements with the result that there were two acting HODs during Mr Mokoena's absence.

79. There is a paucity of reliable evidence revealing the full nature of implementation of this Advance Payment Scheme. However, certain information is available which enables assessment of the implementation of the scheme. This is addressed by two witnesses below.

Hardware Mecca – Mr Duart Valks

80. Mr Duart Valks is a shareholder in Hardware Mecca (Pty) Ltd. Mr Valks apparently caused an affidavit to be prepared in response to certain questions from investigators pertaining to payment of the amount of some R 4 million received by Mecca Hardware from Robs Bricks (Pty) Ltd. This affidavit is neither signed nor sworn.

81. Valk set out that he was approached by contractors over the period November to December 2010 to supply material and was requested to provide a "quote/pro-forma invoice for the material they would require for the constructing of their allocated houses/units or certain phases of their allocated houses". Since the financial system of Hardware Mecca could not issue pro-forma invoices, quotes were issued and invoices were specially created for "stock purposes because once I issue an invoice, the system will record the transaction as stock leaving my business which was not the case".

82. Mr Valks was then approached by Mr Koloi of the Free State Department of Human Settlements to go to Bloemfontein where Mr Ndenze, Acting Director of Legal Services of the Department at the time, presented him with building supply agreements and cession agreements prepared by the Department, which he signed. After such signatures, the Department made advance payments to Hardware Mecca in respect of Group Two Business Enterprise, GT Molefi Construction, Mgiftana Trading Enterprise, Harakisha Building Construction, Momoxa Business Enterprise, Ntoloane Construction, and Abuja Construction. The details of the amounts of such payments are set out at paragraph 11 of the unsigned affidavit.

83. Mr Valks stated that he had known Mr Blacky Seoe from Robs Bricks as a client of Hardware Mecca, that Hardware Mecca had purchased Seoe's brick-making factory in about 2012, and that Robs Bricks had an account with Hardware Mecca which received numerous payments from Robs Bricks. Mr Valks understood that Robs Bricks had obtained a contract with the Department of Human Settlements for the construction of one hundred RDP houses. Similarly, Hardware Mecca also engaged with Robs Investment Holdings (Pty) Ltd for which an account was opened. Since the liquidation or insolvency or placement into business rescue of the Seoe enterprises, Hardware Mecca has lost a considerable sum of money by reason of non-payment for materials supplied.

GT Molefe – Ms Mofedi Nkabinde

84. Ms Nkabinde is the owner of a building contractor, GT Molefe, which had been operated by her late father and had previously been appointed as a service provider for large building projects. In 2009, G T Molefe was appointed for the delivery of 500 units in QwaQwa; but subsequently this appointment was changed to 300 units in QwaQwa and 200 units in Harrismith. Ms Nkabinde was subsequently informed telephonically by Mr Maxatshwa that the Free State Department of Human Settlements would be making advance payments to suppliers for delivery of material. Mr Maxatshwa requested Ms Nkabinde to obtain a pro forma invoice from a supplier to that effect. Ms Nkabinde obtained such

a document from Mr Valks of Hardware Mecca, and when this was produced both she and Mr Valks were required to sign contracts. She advised that she asked Mr Valks to make payments to certain of the suppliers of G T Molefe on her behalf with the advance payments which Hardware Mecca had received.

85. In oral testimony, Mr Mokoena went further and alleged that three contractors – Allitory, Koena Property Developers and Raloto Properties – were close to Mr Zwane because they were from Mpumelelo where he comes from. When the Premier would sporadically announce allocations for "Operation Hlasela", the programme of action of the Free State government at the time, they would be allocated to these three contractors, for example in Harrismith, Senekal and Vrede, and he thinks these three contractors were also allocated the restitution housing project. According to Mr Mokoena, he and his team did not know most of the contractors on Mr Zwane's 106 list. He confirmed further that there were 40-45 names on the list that he had never seen before, and the list included some contractors who had been judged as incompetent in the bidding process. When he raised his concerns with Mr Zwane, Mr Zwane allegedly told Mr Mokoena that he would go to ground to speed up the process. He was not amenable to changing names on the list.

The number of contractors, the number of houses built

86. The Free State Department of Human Settlements furnished a list to the Commission in February 2020 indicating that 112 building contractors entered into agreements with the Department.

87. Mr Mokoena told the Commission that over the period November 2010 to February 2011 an amount of approximately R500 million was paid out by the Department in pursuance of this ERP. Anything between 21, 23 and 33 suppliers of building materials were paid.

88. Between 21,050 and 14,769 RDP houses were to be constructed by the appointed contractors. A further schedule indicates 20,950 RDP houses were to be built in the 2010/2011 financial year. The average cost per unit was in the region of R72 000.00. From the information supplied there is neither consistency nor accuracy in respect of the number of units per municipality or per contractor or per supplier, nor is there any certainty in respect of the cession amounts per supplier or contractor. Data available to the Auditor General reveals that some R7 million was paid by the Free State Department of Human Settlements to Robs Bricks. Mr Seoe confirmed that this sum of R7 million was for the supply of material to the Free State Department of Human Settlements. Although payment was made on 20 December 2010, Mr Seoe confirmed that Robs Bricks only commenced with work in 2012.

89. Particular attention was paid by the Commission to Robs Bricks and Robs Construction which appear to be in association with Robs Investments Holdings of which Mr Blackie Seoe was the sole director. Robs Construction received allocations although that company had not participated in the open tender process nor was it on the database. Mr Zwane confirmed that he knew Mr Seoe. Mr Maxatshwa told the Commission that, on various occasions, he observed that "nothing is happening on site". He said that the war room had knowledge that "material had not been supplied and payment has been advanced already." Mr Maxatshwa told the Commission that the MEC, Mr Zwane, "knew it was not working because of the reports" received by the war room.

90. Without giving exact figures, then MEC Zwane continued, even in September 2019, to claim in his affidavit that he was "overseeing the construction of these houses" and that he "saw positive steps taken by the contractors". He believes that he handed over approximately fifty houses and there were, according to him, "many structures which were on foundation stages, wall level milestones and roof level milestones which would have been completed had they been further two to three months". In the statement made by the Department on the 26 January 2011, it was claimed that it had expended 78% of its budget, a claim Mr Zwane disassociated himself from, but also claimed that he had no reason not to believe it. Evidence, however, indicate that the provision of housing in the Free State was singularly unsuccessful under Mr Zwane's leadership.

91. The former DDG, Mr Maxatshwa, states that materials were not supplied. As of 23 April 2012, little of the advance payments had been converted into certified progress in the construction and

completion of built houses. For instance, Robs Bricks had been given R7million while only 27.5% or R 1,922,922.52 had been converted into certified progress. Similarly, Dumansi Trading CC had been given R72,876,947.95 while only 54.9% of the value had been converted into progress. Rich Reward (Pty) Ltd had been given R 72,876,947.95 while only 41% had been converted into certified progress. Hardware Mecca had been given R 46,237,855.48 of which only 56.5% had been converted into certified progress. It is estimated that only 64.8% of the R 531,552,897.22 the Department had paid to suppliers had been converted into certified progress.

92. The NURCHA [8] Report indicates that Mob Business left the site with only 301 of 400 units completed in Bloemfontein; Allitori had left the site with 80 of 135 units completed in Senekal; Koena Property Developers had left the site with only 200 units completed; Koena had left the site with none of 94 units completed in Warden. Contracts with Makana Women Construction for over 600 units were terminated with no replacement contractors appointed.

DEVELOPMENTS

93. Notwithstanding the introduction and implementation of the Advance Payment Scheme, the National Department of Human Settlements nevertheless reallocated an amount of R 263 million from the Free State Department. It was also pointed out that this reallocation would have affected the ability of the Free State Department of Human Settlements to honour its financial commitments. Such reallocation occurred after disclosure of the APS.

Interventions and remedial consequences

Provincial and National Treasury

94. Mr Maxatshwa told the Commission of a meeting with the Provincial Treasury attended by himself, Mr Mokoena and the then CFO, Mr Danny Hattingh. There, Mr Mokoena "presented the monitoring of expenditure" and it was clear "the department was in serious trouble". Mr Maxatswha said that Mr Mokoena reported on expenditure and the Advanced Payment System and "National Treasury said: look, we are not for the idea". Absent minutes of any meeting, the Commission cannot know if Mr Maxatshwa's reference to a meeting with National Treasury is confused or conflated with Mr Mokoena's meeting with former Minister Sexwale. It is probably a separate meeting since Mr Maxatshwa is unlikely to have forgotten the attendance of either MEC Zwane or Minister Sexwale. There were thus likely to have been two meetings on a national basis – the one with the Treasury and the other with the Minister.

The Minister of Human Settlements

95. On 12 January 2011 the then Minister of Human Settlements, Mr Sexale, advised the HOD of the Provincial Department, Mr Mokoena, that the period provided for the Province to respond to the Minister's letter of 9 December 2010 and to "furnish ... reasons as to why the allocation should not be withheld" had expired with the result that the relevant sections of DORA would be applied and R263 million was being removed from the Free State 2010/2011 allocation and would be reallocated to other provinces. As a result, "no transfers will be made to your province during the months of February and March 2011". A media statement dated 18 January 2011 headed "R483 million in low-cost housing grants to be removed from under-performing provinces" was issued by the office of the Minister.

96. The response of the Free State Department of Human Settlements was to issue its own media statement on 20 January 2011 which stated that "the Free State Department of Human Settlements will not underspend funds allocated for human settlement development in the current year", advising that there had been challenges but that "this was corrected in November last year through the Expenditure Recovery Programme (ERP)".

[8] National Urban Reconstruction & Housing Agency.

97. During February 2011, then Minister Sexwale, and the National DG, Mr Thabane Zulu, called a meeting with the Free State Department seeking an explanation for the advance payments which had been made. Present were Mr Zwane, Mr Mokoena, Mr Tsoametsi, and Ms Debbie Hattingh who had been appointed as CFO of the Free State Department Human Settlements. Mr Mokoena initially told the Commission that the Minister wanted to talk about "this delivery model that we were implementing," but later amended this to "the prepaying of material". He recalls that the Minister "said that he heard that we were paying in advance and that same must be stopped as it is illegal and it could not happen while he is the Minister of HS." The MEC said that they had a document showing that it was legal to make the advance payments, but the Minister insisted that payments be stopped. In his evidence to the Commission, Mr Mokoena was specifically asked if the MEC referred to any document in his engagement with the Minister and Mr Mokoena replied in the negative. Only when prompted did he say that he had "inferred" that the MEC was referring to the Tsoametsi memorandum.

98. Mr Mokoena gave an undertaking to the Minister that "we would stop with the advance payments" by the end of February 2011. Mr Maxatshwa was not present at this meeting, but told the Commission that Mr Mokoena briefed the staff on what had happened at the meeting with the Minister. However, he stated that payments continued "because on the HSS system they were still running those particular payments."

Disciplinary proceedings

99. Resulting therefrom, six officials in the Free State Department of Human Settlements were investigated and dismissed whilst others were 'redeployed'. Those persons who were disciplined and dismissed included Ms DYD Mokhele, Mr Mphikeleli Kaizer Maxatshwa, Mr Kabelo William Koloi, Mr LS Ndenze, Mr MC Twala, and Ms ND Makhaotse.

100. Many of those involved in the design and execution of the APS in the Free State Department directly ascribed responsibility to others, speculated on the motivations of those persons whom they blamed for the scheme, and accused certain persons of deliberate acts of malfeasance. Mr Maxatshwa has continued to assert that the findings of the disciplinary enquiry were unfair and stated that he is challenging his dismissal. Mr Koloi also asserts that his dismissal was unfair and is being challenged.

101. The Commission has been provided with the transcript of the disciplinary enquiry and copies of all documentary evidence. The written judgment of Advocate Van Graan SC, Chairperson of the Disciplinary Hearing, dated 30 April 2015 deals with the allegations against each of the employees and the evidence against them, which included details of the ERP and the APS. The nine charges against these employees included allegations of a process of facilitation of advance payments to material suppliers contrary to legislation and the Housing Code, cession agreements with the object of facilitating irregular advance payments, signing or verification of contractor claim forms contrary to legislation and policy, manipulation of HSS data, and receipt of monies into private banking accounts (Mr Twala only).

102. Mr Zwane, and the HOD, Mr Mokoena, escaped any adverse consequences, while it was their subordinates who were subjected to lengthy and gruelling disciplinary proceedings and ultimately suffered the sanction of dismissal. Mr Zwane was promoted while Mr Mokoena was transferred from the Department of Human Settlements to a position within a municipality.

Auditor-General

103. The Auditor-General investigated and concluded that the Free State Department of Human Settlements had made payments to contractors under this APS in the sum of R 481,466,806. The AG concluded that the money spent "resulted in fruitless and wasteful expenditure". It was pointed out that houses to the value of approximately R 597 364 could not be physically verified while an amount of R 217 399 was paid for housing units not completed.

Open Waters report

104. Open Waters Advanced Risk Solutions (Pty) Ltd was approached by the Free State Department of Human Settlements in 2012 to conduct a forensic investigation into housing contracts. The Open Waters report concluded that the cessions between contractors and material suppliers created over-payments "as the full contract amount and material costs were paid for the same site. The claim would be processed and negative payments made against the beneficiary and milestones where the over-payment took place", and "the cession agreements resulted in bulk payments being made to Material Suppliers and goods or services being supplied and required manipulation of several administrative, financial and procurement processes".

NURCHA Finance Company

105. The NURCHA Finance Company (Pty) Ltd was contracted by the Free State Department of Human Settlements to investigate and analyse the Department's housing projects. Its report, dated May 2013, categorises projects according to their performance. Of the listed categories, Category C represents contractors who have performed poorly, while Category D represents contractors who have vacated their sites without completing their work. Notable inclusions in the Category C table include Friedshelf/ Ubuhlebethu JV, Jore Construction, Raloto CC, Rob's Construction and Thotelo Bogolo.

Special Investigations Unit

106. The Special Investigations Unit (SIU) investigated irregularities in respect of advance payments made by the Free State Department of Human Settlements. Amongst the findings of the SIU in its report published in 2015 were that:

    106.1 The Free State Department of Human Settlements paid R 831,836,048 as advances during both the 2010/2011 and 2011/2012 financial years. These advance payments were made in contravention of sections 15(2), 16(2) (c) and 33(1) (a) of the Division of Revenue Act (DORA)

    106.2 The accounting officer, Mr Gift Mokoena, acceded to the cancellation of Tender LGHB01/10/11 on 30 July 2010 and entered into agreements with service providers in contravention of the provisions of section 217 of the Constitution and section 38(1)(a)(iii) of the Public Finance Management Act (PFMA); and

    106.3 Mr Mokoena had committed a criminal offence in terms of section 86(1) of the PFMA by reasons of his contravention of sections 38(1)(a)(iii), 38 (1)(c) (ii), 38 (1) (g) and 38(1)(i) of the PFMA and recommended that the matter be referred to the National Prosecuting Authority.

Litigation

107. The Free State Department of Human Settlements brought a review application against 106 respondents in the Bloemfontein High Court (case number A 241/2016) to set aside the agreements entered into between the Free State Department of Human Settlements and the respondents on the grounds of the unlawfulness of those agreements. The relief sought was granted on 26 August 2019. Mr Nthimotse Mokhesi, successor to Mr Mokoena as Head of Department, deposed to the founding affidavit and gave evidence to the Commission on the content of that affidavit. His founding affidavit relied upon the Report prepared by the SIU and the evidence presented at and the results of the disciplinary proceedings.

108. The judgement of Loubser J and Pohl AJ was handed down on 28 August 2019 and sets outs that the allocation made by the National Treasury to the Free State Province for low-cost housing in terms of the Division of Revenue Act (DORA) could only be used for that purpose. The Judgment refers to the APS as "this illegal scheme" and went on to conclude that "the impugned agreements are clearly and indisputably unlawful and the payments made in lieu thereof, must be declared unlawful by this Court."

109. It appears that a total of R631,447,607.19 has been reclaimed by the Free State Department of Human Settlements. It is unknown to the Commission how much money has actually been recovered from contractors or suppliers.

WHO IS TO BLAME?

No tender process or competency grading of contractors

110. As indicated above, the Free State Department of Human Settlements did not go out on tender on this housing project and, in the absence of a tender process, contractors were not graded in terms of competency or performance and large allocations were sometimes awarded to contractors with little or no experience. Mr Mokoena did not recognise the first six contractors as having been previously used by the Department, but who according to him, had been allocated between 500 and 600 houses. He claims that he asked the MEC, Mr Zwane, why so many units or houses were being allocated to "contractors we do not even know". However, he states that the MEC was adamant that these were the contractors to be used.

111. In his supplementary affidavit, Mr Mokoena states that the housing allocation list should be compiled through "proper procurement processes" by officials in the Department and then "forwarded to the MEC for final approval only since the MEC did not (normally) take part in the allocation of housing projects to contractors. However, in his evidence to the Commission Mr Mokoena said that the MEC did have the power to allocate because "it is the executive authorities' power". He explained that a list of contractors would be prepared, and the departmental officials would make recommendations to the MEC who would then make final allocations. However, this practice which was followed under the previous MEC was not followed with Mr Zwane as MEC "because he said he was going to do it himself" and he "came with his own list". The result was that the appointment of contractors did not follow proper procurement processes and resulted in the Department awarding contracts to contractors who had never constructed an RDP house "based on the instruction of the MEC."

112. Mr Mokoena believed that at least three of the contractors, Allitory, Koena Property Developers and Raloto Properties, were close to Mr Zwane because Mr Zwane called Mr Mokoena personally to ensure that payments to these contractors were expedited. None of these three contractors had previously submitted bids for low-cost housing. Mr Mokoena also suggested that Mr Zwane was close to these contractors because they came from the same geographical area and because Mr Zwane would announce allocations under other projects to these contractors. However, there was little detail in these claims to be able to base any findings thereon.

113. Mr Maxatshwa states that the reasons for publication of the new tender included that "the preferred contractors of the Premier and the MEC" had to be accommodated on the list or database of approved contractors but gave no basis for this allegation. However, Mr Maxatshwa told the Commission that it should have been the HOD who would tell the MEC that the appointment of contractors was an operational matter dealt with by the department's officials.

114. Mr Zwane told the Commission that the list of 106 contractors was approved "'at the end of June" and was at pains to stress that "EXCO approved and requested that building of houses should start in earnest". It was quite difficult to extract a clear narrative from his attempt at explaining the existence of this list. However, he did say "when I arrived at the department there was a list that was there and that list was not developed by me. To my best recollection ... that list was supposed to be used for 2010/2011". It was stated by Mr Zwane that this was not the list of 361 people/entities which emerged from the incomplete tender process. It appears that Mr Zwane confused the list from July 2010 of 361 contractors with the 10 September 2010 list of 106 persons/entities signed by himself.

115. However, the one clear answer given by Mr Zwane to the Commission concerning the list dated 10 September 2010 was that this list was an outcome of these processes that they had talked about and that he did not, to his recollection, instruct anybody how to compile a list. In part, he explained that this was a list from the past, in part it was a list he sent to the EXCO on 30 June 2010, and that it

was a list created pursuant to a process followed up to 28 July 2010. At best, "the list was brought to me by the accounting officer. So I approved, yes." It appears that the continued reference to EXCO having seen this list was because "it will give me comfort that we have done accordingly with what we needed to do."

116. In the course of his evidence to the Commission, Mr Zwane was confronted with the fact that the list which he had taken to the EXCO was a different list from that resulting from the open tender process which had closed on 16 April 2010. It was suggested to Mr Zwane that this could perhaps be called a "parallel process" with which he did not disagree. Ultimately, in response to a question from the Commission – "did you go to EXCO with a list of contractors at a time when the open tender process was still ongoing and said to EXCO here is a list of companies that I want you to approve who must construct houses?" – Mr Zwane was able to respond with a simple "yes Chair". He then explained that there was "overlapping of allocations." He remained adamant that his list was "a product of a database formulated by my predecessor".

117. Ultimately, for Mr Zwane what was important was neither the open and transparent tender process nor the experience or competence of the contractors but that "we had all agreed . . . that we must try and transform the patterns of economy in the Free State and . . . open up for new entrants, women, young people, those who were disabled. . . ".

118. Mr Zwane denied the evidence of Mr Mokoena that he, Mr Zwane, had said "this is my list and I have the power to allocate," and the evidence of Mr Mokoena and Mr Maxatshwa that Mr Zwane made allocations of contracts to contractors and suppliers.

119. Mr Tsoametsi alone appeared to comprehend the distinction between "leadership and direction that will come from an MEC" and "administrative implementation" which would be provided by the HOD and "which under normal circumstances will . . . develop a database". He stated at his disciplinary enquiry that it was the MEC who would make allocations and to the Commission he elaborated that this was done "after the HOD has consulted with the MEC and then there is this list that has been approved. . . ".

The advance payment scheme

120. Both Mr Mokoena and Mr Maxatshwa explained that the then MEC, Mr Zwane, stressed that the plan would lead to more speedy building of houses. According to Mr Mokoena, Mr Zwane held the opinion that "by doing this, the contractors would save a lot of time and that this would enable them to concentrate on the construction of the houses" because "service providers cannot be held up in terms of getting on the ground, getting on site to start working faster". This was confirmed by Mr Maxatshwa who said stated that "Mr Zwane expressed the opinion that the scheme would save a lot of time for the contractors and would enable them to concentrate on the construction of the low-cost housing and enable them to work throughout the builders' holidays".

121. Both Mr Mokoena and Mr Maxatshwa claim that the APS was entirely the brainchild of the MEC who would brook no discussion of the scheme nor opposition thereto. According to Mr Mokoena, Mr Zwane introduced the scheme as one that would "prevent the National Department of HS from reclaiming the unspent DORA-funding for housing units money". Mr Maxatshwa stated that "the MEC advised those present that he had come up with a plan to prevent the National Department of Human Settlements from reclaiming the unspent DORA-funding for housing units". This was confirmed by Mr Koloi, that it was the MEC who "introduced" the plan to make advance payments, although he does not elaborate that the MEC would entertain no debate thereon.

122. According to Mr Zwane, the issue of advance payments arose as a result of a meeting with contractors in Welkom in late October 2010 where the contractors pointed out that the builders' holiday was approaching and work would have to stop because there was no material. A suggestion was made that contractors would work over weekends and during the holidays, suppliers should supply the material during the December/January holidays and then the Department should "bring its part". The details were not finalised at the meeting. Mr Zwane told the Commission that he had not properly

"processed" the implications of the suggestions made at the Welkom meeting before the meeting in Bloemfontein. He thus asked raised the question: "why can we not help the contractors by availing the material to them"? One way of so doing would be by purchasing the materials while another way would involve the Department negotiating and standing as guarantor for the contractors. Mr Zwane accepted that whichever option was implemented would involve the Department incurring a financial obligation to enable the supply of materials. He told the Commission that "somebody raised an issue that the issues of advanced payment has been done by NURCHA in one of their projects" at this meeting.

123. Mr Zwane says that he then requested two officials, Mr Mokoena and Mr Tsoametsi, to "go and develop a document that I called an opinion". He says he called this document "a legal opinion" because Mr Tsoameti has a legal background. Mr Zwane told the Commission that the reasons given by Mr Mokoena and Mr Mxatshwa for the creation of the APS, namely, to avoid forfeiting money to the fiscus was "never brought to my attention." He claimed that "our main aim as a politicians seated here – my main concern was not money. My main concern was the people who were promised houses and money was there for them to at least have a shelter and those people are going to lose. And in so saying I thought that officials would do their best to achieve what we could achieve".

124. Mr Zwane explicitly disputed the evidence of both Mr Mokoena and Mr Maxatshwa that the plan for advance payments originated from himself. He then elaborated that there were "lawyers, people who have done masters in urban planning", "people who are responsible as accounting officers", who are all the people who "are supposed to advise me" and questioned how such people could tell the Commission that they had acted on the basis of a proposal by himself, "a layman". At most, he asked a question whether contractors could be helped with materials. He conceded to the Commission that it was possible that his question as conveyed may have appeared to the officials as a proposal.

125. Mr Tsoametsi confirmed events at the meeting with contractors in Welkom and as a result of which he told the Commission that "the MEC asked the question: why can we not support contractors and get material for them? Because it is clear that if we are able to meet them halfway, they would be able to participate in this or that. And we will be able to go a long way in delivering on the commitments that we have made". Mr Tsoametsi stated that he now had the responsibility to give meaning to the decisions taken and thus he produced the memorandum dated 25 November 2010.

126. Mr Tsoametsi explained to the Commission that his brief was specifically to "go and to investigate this advanced payment and not to determine its legality ... it was not said that I should go and investigate whether it should be right". Mr Tsoametsi appears to have disavowed the task of exploring the lawfulness or otherwise of such a plan. However, when questioned at the Commission he did say that his mandate was to investigate whether this scheme would be "within the policy" and answered in the affirmative when asked whether he was to ascertain whether it was "a wise thing to do."

127. Mr Mokoena stated that immediately after the meeting convened by Mr Zwane at which the Advance Payment Plan was proposed, he requested a private meeting with the MEC in the boardroom where he claims to have pointed out among others that policies and procedures do not provide for advance payments and that it was illegal. According to him, Mr Zwane responded by threatening him with termination of employment if Mr Mokoena refused to implement the plan.

128. Mr Mokoena described the cession agreements with contractors as being needed to "legitimise the advance payments". Mr Maxatshwa agrees that the Advance Payment System emanated from Mr Zwane, was designed in detail by Mr Tsoametsi and was approved by the HOD, Mr Mokoena. Mr Maxatshwa is determined to exonerate himself from all blame in this scheme. As he says in his affidavit, Mr Mokoena "implicated me of wrongdoing, which is without merit", and he is challenging termination of his employment by the Department.

129. Mr Zwane stated in his September 2019 affidavit that a legal opinion was sought with regards to the APS from the Legal Department of the Provincial Human Settlement and had been advised positively to this effect. However, he did not provide the Commission with a copy of such legal opinion and did not provide the name of the person or persons in the Legal Department who authored the opinion or the manner in which the "legal opinion" was given.

130. Mr Bertus Venter, Legal Advisor in the Office of the Premier deposed to an affidavit in which he stated that neither he nor any of the other State Law Advisors in the Office of the Premier provided a legal opinion on the issues of the initial transfer of the money to the building material suppliers nor were they ever requested to do so.

131. Mr Zwane attached a document, identified as MJZ04, to his affidavit which he stated, "is the memo from Directorate of Legal Services of the Department of Human Settlement". Since this document is dated 25 November 2010, this memorandum was obtained after Mr Zwane made the proposal to his officials and staff and after there were supposedly objections or hesitancies regarding his proposed scheme on the grounds that it would be illegal. Mr Zwane did not accept that there was any disagreement with the proposed advance payment scheme save that there was concern about the legality of the process. He denied that he threatened that Mr Mokoena should tender his resignation if he did not agree with the plan. He suggested that if Mr Mokoena was so "scared of me" he would not have gone on holiday when no one else was permitted so to do.

132. Mr Zwane did not receive reports that the Tech MinMec meeting felt that the APS was non-compliant and that the province was therefore advised not to enter into a tripartite agreement with beneficiaries. Insofar as the existence of risks intrinsic to any scheme of advance payments, Mr Zwane was only prepared to concede that such risks became known to him when the existence of such risks "'was brought to me at some stage". Mr Zwane claimed that, prior to receipt of the Tsoametsi memorandum dated 25 November 2010, he had no appreciation or notion of any risk, financial or legal or otherwise, to the Department should this Scheme be implemented.

133. That Mr Zwane, entrusted with overall responsibility for ensuring that houses were built and lives improved through responsible use of taxpayers' money, gave no attention to the risks inherent in an advance payment scheme is extraordinary. Either he has no concept of business or management or finance and was therefore completely unsuited to occupy the position of an MEC. Or he was blithely unconcerned with the manner in which taxpayers' money was spent and the services which might or might not have been forthcoming and was therefore reckless in occupation of the position of MEC.

134. It is possible that Mr Zwane is correct in saying that a broad mandate to Mr Tsoametsi on the feasibility of the APS would necessarily involve consideration of the risks – financial and legal - of such a scheme. However, if he had asked for and expected such an opinion, then he would immediately have noticed that the memorandum presented to him did not comply with his instructions and that there is no reference to the Housing Act, housing policy, DORA, or the interactions and engagement with the National Department.

135. The Department employs legal advisors, but these were not consulted because "it was not my task as an MEC to go and get the details and things of the research that I said must take place." In this approach, Mr Zwane is probably correct. It was not for the MEC to procure a comprehensive legal opinion from the relevant personnel in his Department. But he failed to instruct his HOD, Mr Mokoena, to obtain a 'legal opinion' and gave no satisfactory reason for this failure.

136. Before the Commission, Mr Zwane disputed the lawfulness of this advance payment scheme and referred to the PFMA or other legislation to that effect. He abandoned that line of argument and reverted to "it will be unfair of this Commission to want to say now as a layman politician there I should have taken responsibility" when the Accounting Officer had signed this document. When it was pointed out to him, yet again, that he exercised oversight over the Accounting Officer, he responded that he would have been berated by the Commission had he employed external persons to advise him on the exercise of his oversight.

137. In his first affidavit, Mr Maxatshwa makes it clear that the HSS policy framework did not provide for advance payments and that the contractor was ordinarily responsible to source and pay for his [or her] own building materials and would only be paid on completion of the agreed milestones. Mr Maxatshwa told the Commission that, Mr Zwane, in answer to the objections raised, "responded that he was advised of the lawfulness of his plan, because of the fact that an advance payment system had been used in other provinces".

138. Mr Tsoametsi disputes Mr Mokeona's recollection of events at this meeting that Mr Zwane had referred to practices in other provinces, particularly Gauteng because the Gauteng experience only came about as a result of his desktop research after the meeting. Mr Tsoametsi did not recall any challenges to the legality of the scheme being raised at this meeting, nor the MEC stating that he had been advised that the scheme would be legal. However, Mr Tsoametsi did confirm that he had contacted NURCHA whom he understood had implemented such a programme in the Free State and the Gauteng department who had confirmed such a programme and had a copy of their contracts that were sent to him.

139. Mr Zwane contends that he was the one who had said legal soundness of advance payment should be investigated and when the opinion dated 25th November was brought to him and he saw it had been signed and approved by the Accounting Officer, he assumed that it was legal.

The Tsoametsi memorandum

140. Mr Mokoena alleges that Mr Zwane similarly threatened him with termination of employment when he refused to sign the memorandum presented to him by Mr Tsoametsi. Mr Mokoena effectively relies upon his own ignorance and lack of spine to explain away his signature on a document which he acknowledges he should never have signed.

141. Mr Mokoena's evidence as to the reason for the creation of the Tsoametsi memorandum does not really bear scrutiny. This was quite clearly never intended to be a document advising anyone on the lawfulness of the APS. Mr Tsoametsi was not a legal advisor. The memorandum makes no reference to legislation, regulations or housing policy. This is a purely technocratic description of the means whereby the scheme will be implemented. The evidence of Mr Tsoametsi as to his research and reasons therefore is clear and should not be disbelieved. Mr Mokoena's protestations that he was alert to issues of lawfulness and that his interjections querying legality gave rise to the Mr Tsoametsi memorandum are unsupported by the evidence. The only reason why Mr Mokoena would wish to disavow his signature to the memorandum is because the memorandum is only concerned with implementation of the APS. There is no record whatsoever that Mr Mokoena disagreed with the scheme.

142. Mr Mokoena was HOD and should he have had any doubts about the lawfulness of the proposed advance payment scheme then he would have been perfectly within his rights to have contacted the legal advisor to the department and required a legal opinion to be prepared and furnished to him. As Mr Tsoametsi pointed out to the Commission: "If the HOD had issues with Legal Service, the opportunity that availed it could have requested the head of legal or requested the office of the Premier to provide him with that".

Reporting to TechMinMech and MinMec

143. Neither Mr Zwane nor Mr Mokoena were present at the meetings in October or November 2010. Mr Maxatshwa presented the APS to the meeting, and it was he who learnt of the view that advance payments would be unlawful. Mr Maxatshwa belabours the absence of Mr Zwane and Mr Mokoena at the TecMinMec and MinMec meetings. This is immaterial as he was prepared to attend the meeting on behalf of the department where he spoke and made presentations. There is no basis on which Mr Maxatshwa can suggest dereliction of duty or deliberate attempts to avoid being party to any presentation or discussion of the plight of the Free State Department of Human Settlements because they were "together at the NCOP which was held in QwaQwa" at the time".

144. Mr Maxatshwa claims that after the TecMinMech meeting in October where he was advised that advance payments as contemplated by the MEC would be unlawful, he immediately telephoned Mr Mokoena "in order for him to discuss this with Mr Tsoametsi and Mr Zwane on whose instructions the Advance Payment System was being researched and designed." In his affidavit, Mr Maxatshwa does not indicate whether he contacted Mr Mokoena or has any knowledge whether or not anyone else was advised of the TechMinMech response to the proposed scheme. He also fails to give any indication of the response of Mr Mokoena (or anyone else) to this news. However, to the Commission,

Mr Maxatshwa made it clear that he did speak to Mr Mokoena and that his expectation was that Mr Mokoena will relay the information to the MEC.

145. Mr Maxatshwa does, however, state that Mr Mokoena was fully informed of the view of the National Department regarding the intended advance payments, but that Mr Tsoametsi nevertheless went ahead to produce the memorandum which was approved by Mr Mokoena as HOD.

Absence of controls and certification of work done or materials supplied

146. In the normal course, the standard arrangement between the Department and building contractors contained the safeguard that a contractor would source materials for which he or she would have to pay as the contractor proceeded with each stage of the building process. There would thus be an incentive on the part of the contractor to ensure that all materials had been delivered and in the correct quantities because the contractor would only recover his or her expenditure from the Department upon completion of each of the agreed and inspected and certified milestones. This safeguard did not exist under the APS since materials were supplied and invoiced and payment made by the Department without any need for any milestone to be achieved at all.

147. Interestingly, Mr Mokoena, in justifying his concerns about the existence or accuracy of invoices, told the Commission "because we were still a new department. . . . we did not have sufficient staff, sufficient capacity that could...." verify delivery of materials. This suggests that he feels vindicated in his claimed opposition to this ERP or APS because absence of capacity meant that there were inadequate checks and supervision emanating from the Department.

Implementation and payments

148. Mr Maxatshwa was appointed one of the Acting Heads of Department in December 2010 but suggests that this was done by Mr Mokoena to escape responsibility for implementation of the scheme. Mr Maxatshwa, like Mr Mokoena, also seems to have entered into the realms of conspiracy theory. Mr Mokoena suspected that others conspired behind his back with the MEC to plot the introduction of the APS, while Mr Maxatshwa suspected that Mr Mokoena took leave in December to make him responsible for that which took place during December 2010. Notably, the bulk of the payments to contractors were made during the absence of Mr Mokoena while he was away on cruise in December 2010 and were approved by the other Acting HOD, Ms Mokhele.

Continuing with the advance payment scheme

149. Mr Mokoena states that he had given then Minister Tokyo Sexwale an undertaking that the advance payments would cease by the end of February 2011. However, he claims that some two weeks after the meeting with the Minister, Mr Zwane insisted that Mr Mokoena continue with the advance payments and Mr Mokoena speculates that this is because the MEC had made promises to certain contractors from whom he was expecting kickbacks. However, Mr Mokoena did not comply with the instruction of the MEC and the MEC took the matter no further.

150. When challenged at the Commission hearing that all other officials were perhaps awaiting direction and leadership from himself as HOD, Mr Mokoena conceded this was "a possibility" but immediately pointed out that the CFO knew more about supply chain management and issues of procurement and "even from that side I didn't get any support". To the end, Mr Mokoena portrays himself as the lone upholder of the regulations and the law and a victim. When Mr Maxatshwa was questioned at the Commission hearing about Mr Mokoena's version that it was only he who said that the advanced payments would be illegal, Mr Maxatshwa stated that the majority of those present at the meeting were not in agreement with the MEC. This was confirmed by Mr Tsoametsi who told the Commission that other people raised issues of legality in the meeting, and that Mr Mokoena did not actually challenge the legality of the proposed APS but "raised the view that the legalities need to be look into."

151. Mr Maxatshwa stated that the APS continued under the new HOD, Mr Tim Mokhesi, when he replaced Mr Mokoena as Head of Department. Mr Zwane told the Commission that he did not recall the February 2011 meeting with the Minister of Human Settlements. He denied that he had told Mr Mokoena to continue to make the advance payments pointing out that he left the Free State department in the second week of February 2010.

The responsibilities of the MEC

152. Mr Zwane informed the Commission that he only learnt of the existence of the Housing Act 107 of 1997 in about June-August 2010 when he had been MEC for Human Settlements for about a year. He was adamant that he had familiarised himself with the provisions of the PFMA and thus informed the Commission that "I had gathered sufficient information that will make me be able to lead effectively and do what I was supposed to do." Mr Zwane also stated that he was not aware of the procurement policy in 2010 and that he was unaware that he was obliged in terms of section 7(4)(a) of the Housing Act to establish a panel of persons (including experts) to advise him on any matter relating to housing development.

153. It would seem that Mr Zwane had never occupied any position of responsibility as an employee or official which required skill or knowledge or expertise of him in that salaried position. His career was based on political connections or influence which enabled him to advance through the ranks of political deployees. Mr Zwane's evidence to the Commission is very clear that in his own view he was not required to have any understanding of the details of the work being undertaken by the Department of Human Settlements or comprehension of the implications of that which is being done by the Department under his political control. He repeats his reliance upon officials to do what needs to be done in accordance with protocols and the law, and his expectation that those with experience and education will know what to do and will act in accordance with policy, protocols and the law. His was not an administrative function. In this he is partially correct.

154. Mr Zwane perceived his role as being that of a political master who relayed political considerations and concerns to and from EXCO where the Premier and other MECs met. In this perception he is also partially correct. However, the relevant legislation dictates that the MEC who must know the National Housing Policy and must ensure that the Provincial Housing Programme is consistent therewith. It is the MEC who must know the Housing Code and must be familiar with its prescripts. Only with that knowledge and comprehension can an MEC approve any projects undertaken by the Provincial Department of Human Settlements, determine Provincial Housing Development Priorities, apply procurement policy and administer the assets of the Department.

155. Mr Zwane does not seem to have understood that the position of MEC is also a job with responsibilities and duties and summarised his understanding of his own position for the Commission when he stated: "... I was an MEC that followed the prescripts of the law as much as I could understand them and it is clear that I could not read this law because at that particular time I did not know about it".

The "capacity gap" of a department in transition

156. Mr Mokoena told the Commission that the Free State Department had failed to perform because it was trying to do that "with less capacity because we're only about one year old". He further stated that they had advertised the tender, closed the tender, followed all the processes only to find out it had taken too long and the validity period had expired. Other reasons were that some contractors had taken the department to court, resulting in additional delays, as well as the fact that they had too many tenders coming in that had to be processed, causing further delays. Mr Tsoametsi similarly told the Commission that the Department was "a department in transition and not well-capacitated department". He also cited the litigation initiated by contractors against the department.

157. Mr Zwane told the Commission that at the time the Department was facing a crisis as contractors and material suppliers were about to close down for their annual shutdown. In order "... to alleviate this problem we had to negotiate with the contractors to work throughout their shutdown period and

this was during this discussion that most of the contractors had raised the issue of lack of capacity especially in regard to the finances to fund material of acquisition".

Incompetence

158. The Free State Department of Human Settlements was staffed by persons who were supposedly qualified according to their curriculum vitae, yet their manner of doing their jobs and performing the duties for which they were paid salaries was appalling. Each person who gave information to the Commission relied upon "lack of capacity" for what was identified as a complete absence of work actually carried out on the ground.

159. One instance of such myopia is the media statement issued by the Free State Department of Human Settlements on 20 January 2011 in response to the notification of cessation of funding from the Minister. In hoping to "set the record straight", the Department's media statement is replete with jargon and wishes and gives no indication of comprehension of the nature of the problem indicated by the National Department or any real and concrete means of resolving the problem.

160. The solutions announced by the Free State Department are the introduction of the Expenditure Recovery Programme which is nowhere actually detailed or explained. The content thereof might be those actions claimed in the media statement as set out below:

    160.1 First, "a dedicated call centre was set up to deal with daily monitoring of progress and strict adherence to delivery schedules and project plans by contractors and material suppliers". This appear to be no more than a substitute for boots on the ground implementing delivery and planning.

    160.2 Second, "blockages and challenges were reported to the Head of Department and the MEC on a daily basis." Nowhere is there any indication that the Head of Department or the MEC had managed to deal with such blockages or challenges and how this was done and why it could not have been done before.

    160.3 Third, the establishment of high-level teams, which were dubbed "The War Room", consisting of people with skills, capacities and responsibilities. The tasks they carried out and how this had enabled new solutions to the continuing problems is never identified.

    160.4 Fourth, although "a decision was taken to continue with the work of building houses during the December holidays including on weekends", no detail is given as to what each official was doing and why their presence meant that more houses were constructed.

    160.5 Fifth, "During a meeting with representatives of the National Department, the Free State Department committed to report on the expenditure on a fortnightly basis, which was honoured." The media statement promises dedication and lack of holiday breaks, but little else.

161. The only basis on which any blame can attach to the Premier for the failures of the Department of Human Settlements is that there appears to have been an absence of consultation and discussion with the Department and no regard to the impact the announcement in the State of the Province address would have on processes already underway for the provision of housing. Clearly, the Department was taken unawares and that led to abandonment of the process of appointment of contractors and delays in the commencement of the building programme. However, it is also clear that the absence of any leadership from an MEC who was out of his depth, had no regard for his legislated duties, was totally ignorant of his entire portfolio and chose to remain so uninformed, played an important part in this debacle and was damaging for the Department.

162. Those officials who deposed to affidavits or who gave evidence in person to the Commission chose to present themselves as passive and supine persons without any backbone or ability to stand up for their professional status or the Department for which they worked.

163. To the extent that there were claims of threats of losing jobs there is nothing to support such allegations. Any threat of termination of employment could easily have been countered by lodging a

grievance internally, or should such threats materialise, approaching the courts or the CCMA.

164. It is difficult to comprehend that Mr Mokoena did not approach the legal advisors in the Department for a legal opinion. No other opinion had been produced. It was the responsibility of the HOD to procure one.

165. When Mr Mokoena signed the memorandum dated 25 November 2010 which had been prepared by Mr Tsoametsi, he either did not read the document or he knew that the document did not explore the legalities of the plan which had been proposed. Instead, Mr Mokoena simply signified his approval of the memorandum. Mr Mokoena was either very lazy indeed or very stupid or quite eager to see the APS implemented.

166. Mr Maxatshwa understandably is distressed that Mr Mokoena escaped any sanction while he was dismissed from his employment. Similarly, Mr Tsoametsi continues to work in the Free State government. One must therefore view Mr Maxatshwa's averments against Mr Mokoena with some caution. However, it is not unlikely that Mr Maxatshwa did contact Mr Mokoena to inform him that the APS had been met with disapproval at the Tech MinMech meeting. His task was to inform the meeting of the ERP; but he also informed the meeting of the APS. The response of the meeting was of great importance. This was of such moment that it should have followed that Mr Maxatshwa made immediate contact with Mr Mokoena. His evidence is that of a single witness only. But, subsequent to the meeting, it is hardly possible that the response of the meeting was not brought to the attention of Mr Mokoena. And the minutes of meetings support Mr Maxatshwa's version.

Politics

167. Paid employees who have since been penalised for their involvement in the Advance Payment Scheme feel that they were merely following the instructions of their political masters who appear to have escaped being penalised. Mr Mxatshwa states in response to questioning that "I have no doubt that the concept and design of the Advance Payment System was approved by and implemented with full knowledge of Mr Magashule, Mr Zwane and Mr Mokoena."

168. If then MEC Zwane was not as ignorant as he claimed then it must be that he did indeed propose the APS, that he did claim to have a legal opinion which stated such a scheme to be lawful, and that he did place names on the database and instruct these persons or entities to be given contracts without going through the public tender process.

Policy, legislative and procedural compliance

169. None of the witnesses who gave evidence to this Commission suggested that the process whereby this Advance Payment Scheme was envisaged or implemented in the Free State met the prerequisites of section 217 of the Constitution.

170. The creation of and use of a list of persons or entities to be the recipients of the housing programme did not meet any requirements for the introduction of a database or tender system which was "fair, equitable, transparent, competitive and cost-effective". Other than the say-so of the MEC that persons who were disadvantaged in some way or another were included on the list, no "procurement policy" as envisaged in subsection (2) was ever developed and certainly not a policy which was implemented in accordance with national legislation.

171. There was no compliance with the Division of Revenue Act 1 of 2010 ('DORA") section 15(1) that stipulates that an allocation made by National Treasury "may only be utilised for the purpose stipulated in the Schedule concerned . . . ". The Commission has not been furnished with the relevant schedule.

172. All the Commission has been informed is that an allocation was made by National Treasury to the Free State Department of Human Settlements to build houses. Payments were made to materials suppliers. The Commission does not know if the allocation from National Treasury ever specified or would ever specify that it was building contractors who were to be paid and not materials suppliers.

173. The Commission cannot conclude that the prescriptions in respect of advance payments are of application. First, there is no evidence that the advance payments which were made by the Free State Department were made to entities not envisaged or specified by the National Treasury when making the allocation to the Free State. Second, there is no evidence that the advance payments made by the Free State were not consistent with the budget.

174. Only if the above requirements are satisfied would it have been necessary for the receiving officer to certify, in terms of subsection (c) (i), to the National Treasury that the transfer "is not an attempt to artificially inflate its spending estimates and that there are good reasons for the advance payment. . . " and then for the "National Treasury to approve the advance payment. . . " as provided for in subsection (c) (ii).

175. Where it was put to various of the witnesses that procedures and policy were not followed and that there had not been compliance with legislation, the questions were generally phrased as a failure to observe the requirements of the legislation, procedure or policy. Witnesses may sometimes have agreed to a failure to comply with legislation, policy or procedures. However, the level of ignorance of the witnesses as to the most basic of their departmental duties and their apparent lack of knowledge of the legislation, policy and procedure coupled with their confusion, fuzziness and fumbling of even the most basic of questions and propositions, suggest that it would be unwise for the Commission to accept the agreement of these witnesses to the propositions put to them when they were in the witness box.

SECRET BENEFICIARIES OF THE ADVANCE PAYMENT SCHEME

176. The beneficiaries of the work of the Free State Department of Human Settlements were intended to be those living without or in inadequate housing in the Free State. Instead, building contractors and suppliers of materials have received payments from the Department without delivering either materials or completed homes.

177. In addition, those involved in the APS speculate or allege that other persons, civil servants or politicians, have received benefits by reason of their involvement in this scheme. Furthermore, investigations by the Commission have revealed benefits accruing to employees or politicians. Necessarily, all allegations and suppositions must be viewed with great caution. Sometimes what has been claimed is no more than speculation.

Mr Ace Magashule

178. Mr Mokoena believes that Mr Magashule must have been aware of the advance payments because Provincial Treasury would normally brief the Premier of the Province on expenditure and programmes of this nature. Furthermore, Mr Mokoena alleges that Mr Zwane was very close to Mr Magashule and that Mr Zwane was involved in the entire project.

179. Mr Mokoena refers to one Rochelle Ells who received a number of contracts to build houses in Kroonstad and believes that she was close to Mr Magashule, which view he holds because Mr Zwane, according to Mr Mokoena, told Mr Mokoena that Mr Magashule told Mr Zwane that Else should be appointed and her claims for payment expedited.

180. The late Mr Mohlouoa Isaac Seoe of Robs Investment Holdings (Pty) Ltd was a co-director with Mr Magashule in Sambal Investments (Pty) Ltd. Mr Seoe apparently prepared an affidavit on certain of his business dealings to be prepared before his death. But that affidavit has not been deposed to by himself. In this unsigned affidavit, Mr Seoe sets out that he was the sole shareholder in Sambal and that "Mr Magashule used to be a director of Sambal". He states "in this regard it should be mentioned that I have known Mr Magashule for a very long time and as a result I approached him to become a director of Sambal. After a short stint as a director of Sambal, Mr Magashule decided to rather pursue a political career which he did. The latter being the reason for Mr Magashule's resignation as a director of Sambal"."

181. Mr Seoe's unsigned statement is incomplete. However, there is information on properties owned by Sambal as well as Robs Properties and the existence of lease agreements with the Free State Provincial Government. Mr Seoe, in his unsigned and incomplete statement, states that "from time to time I will get a phone call and it could possibly also be emails from the Premiers office . . . requesting me to provide funding for student fees. I cannot remember the exact details but I think I made an amount of R200,000.00 available in this regard for various students".

182. Mr Seoe also referred to having been shown a document where Mr Mtwentula on behalf of Robs Investments sent a proof of payment to the personal assistant of the Premier, Ms Cholota, confirming proof of payment to Sedtrade. Mr Seoe was asked to comment thereon and stated that he had discussed the document with Mr Mtwentula who could not explain why this email "landed up in the Premiers office".

183. A payment was apparently made from Rob Investment Holdings to an entity identified as SUD Trade and proof of such payment was copied to Ms Cholota in the office of the Premier who acknowledged such payment. The details of such payment and the details of the proof of payment have not been furnished to the Commission.

184. Mr Mtwentula confirmed that Mr Seoe, the CEO of Robs Investment Holdings (Pty) Ltd, furnished him with the email address of the PA to the Office of the Premier as well as "a specific gmail account" on a piece of paper and instructed Mr Mtwentula to "send the email to those addresses". Mr Mtwentula's affidavit does not detail the content or nature of this email. However, by reference to the preceding two paragraphs it may be inferred that he is referring to "a specific proof of payment that was sent to the PA of the previous Premier of the Free State, Mr Ace Magashula" because he states that "I have been requested to make comment" thereon. According to Mr Mtwentula, he did not know the recipient of the email address and this was the only occasion such a request was made of him.

185. The difficulty with Mr Mokoena's speculation about Premier Magashule is that he also states that he "tried everything in my power to discuss the matter with the Premier, to no avail", in that he was unable to meet with Mr Magashule despite several attempts. In other words, the HOD and Accounting Officer never briefed Mr Magashule on the APS which then begs the question on what basis Mr Mokoena can speculate that Mr Magashule had knowledge of the scheme.

186. Furthermore, Mr Mokoena seeks to rely on that which he claims he was told by Mr Zwane concerning Rochelle Ells. He has no first-hand knowledge thereof and is merely repeating hearsay and gossip which he claims comes from Mr Zwane.

187. Mr Mokoena stated to the Commission that the APS was raised in a meeting of the EXCO, the Executive Cabinet Meeting of the MECs, with the Premier. He claims to have been present at that meeting. but gives no date, no time, no written minutes. Mr Mokoena conceded that he had not written reports on the ERP.

Mr Mosebenzi Zwane

188. Mr Mokoena alleged in his evidence that Mr France Mokoena from Koena Property Developers is close to Mr Zwane, both being from Phumelela (the spelling of the name of property company is dubious). Koena received a contract under another entirely different scheme from the Free State Department of Human Settlements to construct 500 houses in Matjabeng. However, Koena did receive a contract under this APS to build 1400 houses.

Mr Mmuso Tsoametsi

189. Mr Tsoametsi was asked at the Commission about the Trans-Makwena and Makwena Property Developers and explained that, while he was in the Department of Agriculture in 2011, he learnt that the company was looking for assistance with implementation of a project. He, Mr Tsoametsi, made a proposal to Makwena Properties to the effect "we will bring together a pool of capacity with different knowledges and then implement your project".

190. Mr Tsoametsi registered a family trust, the Kopana Family Trust, which acted as a sub-contractor to build 500 RDP houses for Makwena Property Developers. According to Mr Tsoametsi, at the time the contract was terminated, the Kopana Family Trust "had 300 foundations" and "on the ground we have 128 completions". In addition, "we had material that we had bought that were onsite to the value of R 600,000". Mr Tsoametsi told the Commission he perceived no conflict of interest in doing business with an entity which had been awarded contracts to build houses by the Free State Department of Human Settlements. It was put to Mr Tsoametsi that the concern was his conflict of interest because he was operating on both sides of the fence in that he was dealing with the principles governing procurement and expenditure of public monies on the one hand and yet benefitting from it on the other hand. Mr Tsoametsi responded that he had not been involved in the selection of contractors, that by the time of implementation of contracts he had left the Department of Human Settlements and was employed in the Department of Agriculture and that the contract with which he was involved did not receive any advance payments.

191. There is no evidence before the Commission that Mr Tsoametsi was involved in the allocation of any contracts and the evidence is that Mr Tsoametsi had left the Free State Department of Human Settlements by February 2011. He was a subcontractor to an entity which had been allocated one or more contracts. There is no evidence that Mr Tsoametsi utilised any knowledge or influence obtained during the course of his employment to prefer or benefit the contractor, Makwena Property Developers. It is difficult to see what conflict of interest existed at the time that Mr Tsoametsi approached the contractor or performed work for them.

CONCLUSION AND RECOMMENDATIONS

192. The substratum to all evidence before the Commission has been the announcement by the Premier of the Free State Province that the Department of Human Settlements would build bigger houses, which decision resulted in increased costs of building, adjustments to Departmental budgets, rendering nugatory the specifications of the tenders which had been advertised and in respect of which applications by contractors had been made. The result was that the work of the BEC and BAC could not proceed as, inter alia, the tenders had expired.

193. The MEC and the officials within the Department appeared incapable of taking the decision to publicly extend the validity of the period of the tenders or of the tenders themselves, of informing the National Department and the Minister of the situation and seeking agreement for an extension of the period within which funds allocated to the Free State Department could be expended. The MEC, HOD and all officials appear to have been taken by surprise by the announcement of the Premier and then flummoxed by the response of the contractors.

194. In the absence of strong leadership by the MEC and firm management by the HOD, the process of open and public tenders, creation of a properly assessed database and allocation of contracts to qualified and experienced contractors was simply abandoned. Instead, a database of disqualified, non-compliant, incompetent entities was created and utilised to implement the advance payment scheme.

195. Responsibility for the conception of the advance payment scheme must lie with both the political head of the Department, Mr Zwane, and the administrative head of the Department, Mr Mokoena.

196. Mr Zwane claims total ignorance of procedures and process and reliance upon others for all functions entrusted to himself as MEC. He exhibited no shame or embarrassment in presenting himself to the Commission as a person ignorant of the basic responsibilities of an MEC. Mr Mokoena claims total subservience to the will of the MEC and inability to take management responsibility or action when appropriate.

197. The truth probably lies somewhere in between. Mr Zwane wanted to please all political masters – from the Free State Premier and all political committees within the Free State to the Minister at national level. He was prepared to do anything to achieve this while failing to understand or implement even the most basic of responsibilities entrusted to him in his capacity as MEC. Mr Mokoena wanted to

please the MEC and, failing to carry out basic management or technical duties, sought to blame the MEC for all that was done by himself and others.

198. Both Mr Zwane and Mr Mokoena were incompetent and showed themselves to be utterly without concern for relevant legislative and policy provisions as well as fundamental management practices.

199. Disciplinary action was taken against the least responsible officials, whilst the MEC was transferred to other political positions within the Free State and then to the National level and the HOD continued in Free State government.

200. It may well be that persons and entities who were placed on the database ultimately utilised for execution of the APS were friends, cronies, relatives, benefactors, business or other associates of persons within the Free State Department of Human Settlements. But no clear or proven information to this effect has been furnished to the Commission.

201. Speculation by dissatisfied or aggrieved personnel is no more than that. There is no evidence before the Commission to implicate any of those persons involved in the APS in any criminal or civil wrongdoing. That all are guilty of flouting regulations and policy is undeniable. But there is no evidence that the Premier, the MEC, the HOD or any other official benefitted from the APS.

202. At the end of the day there has been a total failure of proper administration in the Free State Department.

203. That Mr Zwane should ever have been selected to serve in the position of MEC in a provincial department of such importance is both surprising and unfortunate. He made it quite clear to the Commission that he had no real intention of understanding his role, learning his duties, becoming informed of the full nature of his responsibilities. He was unashamed of his ignorance and brazen in his determination to allocate full responsibilities to educated persons surrounding him.

204. The calibre of personnel employed in senior positions in the Free State Department is disquieting. Many of them hold relevant qualifications for the positions in which they were employed. Others hold qualifications which should have enabled competency to emerge. Instead, from the HOD to those DDGs who gave evidence, there has been no indication of professionalism.

205. The HOD, Mr Mokoena, failed in every respect. From the initial failure to build houses and expend funds, the abandonment of a properly functioning database for contractors, the introduction and then implementation of the APS his performance was abysmal. He presented a nonsensical series of stories of threats from the MEC to justify his own incompetence. He was a senior civil servant who could not give direction to his political leader. He did not even try to take any of several available steps to avert disaster. He could have contacted the DG in the National Department. He could have contacted National Treasury. He could have sought and obtained a legal opinion.

206. The DDGs, Mr Maxatshwa and Mr Tsoametsi, observed what was happening with the silence of the lambs. All merely followed orders.

207. That these officials had all worked mainly (only in one case is there indication of work outside the province) in the Free State suggests that each knew well the power of political patronage, the need to never rock any boats, and the requirement to satisfy political and government masters in a small pond. None gave any indication of the ability to, or the experience of making independent decisions or taking an independent view of affairs. Certainly, none challenged wrongdoing when they saw it or were asked to participate therein.

208. The apathy is remarkable. Obedience to elders, subservience to the more powerful, and meekness in meetings are apparently the hallmarks of senior employees in the Free State government. Witnesses exposed themselves as obsequious to all above them.

209. Lack of real expertise, commitment to a taxpayer funded life in government employment, dependency upon political networks, and reliance upon more senior officials in all departments for employment are all factors which contribute to a lack of confidence and professional self-esteem. These are amongst the reasons for simply following orders as appears to have been the case.

210. No real evidence of personal enrichment has been exposed. The only enrichment has been in the receipt of monthly salaries by the many persons with grand job titles and few real responsibilities who failed to implement them with honesty, competence or integrity.

211. The following recommendations are made:

    211.1 Comprehensive written records should be kept of all instructions issued in relation to procurement, and in relation to the execution of government projects

    211.2 Detailed and accurate minutes should be kept of all meetings held by executive and administrative committees within provincial government, and these should be properly preserved. Technology allows minutes to be stored in an environment which is tamper proof

    211.3 In all cases of procurement, a legally qualified official should be required to provide advice on the legality of the procurement process, and any amendments thereto or deviations therefrom; and

    211.4 The absence of comprehensive consequence management should be corrected.

ESKOM

INTRODUCTION

1. As per the TOR of the Commission, this section deals with evidence and findings regarding Eskom Holdings SOC Limited (Eskom) and certain of its subsidiaries and divisions.

2. The report begins by outlining the scope of evidence and by presenting the evidence of Mr Jabu Mabuza. It proceeds to deal with the appointment of the 2014 Eskom Board, the suspension of four Eskom executives, the appointment of Mr Mosebenzi Zwane as Minister of Mineral Resources, the acquisition of Optimum Coal Mine by Tegeta, the Brakfontein Colliery, Huarong Energy Africa, and Eskom and McKinsey-Regiments-Trillian. The presentation of key findings and recommendations concludes the report. Reference is made to the Public Protector's report ("State of Capture") and to the Commission's Terms of Reference (TOR), while throughout there is discussion and evaluation of the evidence presented.

The scope of the evidence

3. The evidence can be determined from the contents in the SoCR, and that of Eskom's Chairperson during 2018, Mr Jabulane Albert Mabuza, through submission of a written statement sworn on 16 January 2019, and oral testimony to the Commission.

Evidence of Mr JA Mabuza

4. Eskom is a major public entity in terms of Schedule 2 of the Public Finance Management Act 1 of 1999 (PFMA). The main business and objective of Eskom is to provide electricity and related services including its generation, transmission, distribution, and retail sale.

5. Eskom is a public company as per the terms of the Eskom Conversion Act 13 of 2001 and the Companies Act 71 of 2008. The sole shareholder of Eskom is the government. Under Eskom's Memorandum of Incorporation, the Government as the sole shareholder, acting through the Minister of Public Enterprises, has the exclusive power to appoint Directors of Eskom pursuant to the provisions of s 66 (4) (a) (i) of the Companies Act and s 63 (2) of the PFMA.

6. On 19 January 2018, a largely new Board of Eskom was constituted. Several challenges faced this Board. Many of these challenges had been identified in the qualified audit presented in relation to

operations at Eskom for the financial year ending 31 March 2017 as having been due to incompleteness of the irregular expenditure information in terms of PFMA requirements; the many allegations of financial mismanagement and corruption against executives and senior management; and a myriad of other issues related to lapses in governance processes and other internal controls.

7. These factors, amongst others, led to deteriorating levels of confidence of financial markets in Eskom, resulting in constrained access to funding. Eskom suffered a liquidity crunch, giving rise to serious concerns regarding the entity's long term financial viability. Eskom needed to raise loans of R20 billion for the period 1 February 2018 to 31 March 2018 after having had no access to funding since July 2017. The Going Concern status required Eskom to be both liquid and solvent to avoid the risk of triggering defaults on existing funding facilities.

8. Many of the challenges within Eskom arose from the corruption perpetuated by Eskom's own executives and managers, most notably in procurement processes. In Mr Mabuza's graphic phrase, he learnt that "the name is corruption, but the game is procurement".

9. Taking the above into account, Eskom committed to probity checks, which required the disclosure of potential conflicts of interest and evaluations of potential conflicts in relation to specific large value transactions by Eskom's assurance and forensic department, as well as a wide-ranging requirement of disclosure by executives and employees. Board members and employees may not be involved in bidding for Eskom tenders and Eskom employees were subjected to lifestyle audits.

10. Furthermore, numerous employees were subjected to disciplinary action where it was possible. In many instances, disciplinary action was frustrated by the employee resigning before or during the disciplinary process. Where it was considered appropriate, Eskom laid charges with the SAPS.

11. Eskom's procurement policy allowed for contracts for various services and products which had been concluded, to be modified or expanded without adequate oversight and scrutiny. By 28 August 2018, 1 049 cases of allegedly improper modifications or expansions had been identified and reported to the 2018 Board. Most of these cases have been finalised. The overhaul of Eskom's procurement policy was underway when Mr Mabuza made his statement.

12. Mr Mabuza identified the following transactions as warranting the attention of the Commission. These are:

    12.1 The contracts with New Age Media (Pty) Limited

    12.2 Eskom's business dealings with Tegeta from approximately 2013, as well as Tegeta's acquisition of Optimum Coal in 2015/2016 and Eskom's further dealings with companies in the Optimum group

    12.3 The propriety of the dealings of Mr Matshela Koko, Mr Anoj Singh, Ms Ayanda Nteta, Mr Edwin Mabelane, Ms Susan Daniels, Ms Maya Bhana (Naidoo) and Mr Brian Molefe, all erstwhile Eskom employees in relation to dealings between Eskom and Tegeta, Optimum Coal and their associated companies

    12.4 The contracts between Eskom and McKinsey and Company Africa (Pty) Limited and Trillian Management Consulting (Pty) Limited and their associated companies

    12.5 The contracts between Eskom and its subsidiary ERI and Impulse International (Pty) Limited

    12.6 The appointment of accountants Nkonki Inc as a subcontractor by KPMG

    12.7 The contracts between Eskom and Huarong Energy Africa Limited relating to funding from Huarong Asset Management

    12.8 The propriety of the dealings of the late Dr Baldwin (Ben) Ngubane, a former Chairman of the Eskom Board, then Minister of Public Enterprises Lynne Brown, Mr Sean Maritz and Mr Anoj Singh, both erstwhile Eskom employees in relation to Huarong; and

    12.9 The contract between Eskom and Dongfang for the Duvha Unit 3 Recovery Project.

THE APPOINTMENT OF THE 2014 ESKOM BOARD

13. The Commission obtained cell phone records of Mr Salim Essa and Minister Lynn Brown. These showed that from November 2014 to March 2015 there had been several calls made between Mr Essa and Minister Lynn Brown. November 2014 was the month prior to the appointment of a new Board of Directors for Eskom.

14. On 10 December 2014, Cabinet approved the appointments of the following Non-Executive Directors to the Eskom Board: Mr Zola Andile Tsotsi (reappointment as Chairperson); Ms Chwayita Mabude (reappointment); Mr Norman Tinyiko Baloyi; Dr Pathmanathan Naidoo; Ms Venete Jarlene Klein; Ms Nazia Carrim; Mr Romeo Kumalo; Mr Mark Vivian Pamensky; Mr Zethembe Wilfred Khoza; Dr Baldwin Sipho Ngubane; and Ms Devapushpum Viroshini Naidoo. Mr Giovanni Michele Leonardi and Ms Mariam Cassim were appointed on 25 May 2015. These two board members were appointed to replace Mr Zola Tsotsi and Mr Norman Baloyi, who both lost their places on the board.

15. Some of these newly appointed board members were serving for the first time on a board and / or an SOE board and indicated that they had become aware of the call for nominations either through a newspaper advertisement of the DPE or through a nomination from someone they knew. The names of these persons were not on the database of the DPE for suitable persons to be considered for appointment on SOE boards. Minister Brown failed to consider persons on the DPE database and preferred instead to have an advertisement published calling for nominations.

16. During her evidence before the Commission on 19 March 2021, Ms Brown seemed unsure about what course she had taken in this regard but proffered an explanation that she "thought the advert was a good idea to add to the database" as, in her view, the database did not give the desired effect. This is ironic given the concern raised by Mr Simphiwe Makhathini that the proposed persons essentially lacked the necessary skills to address the challenges faced by Eskom at the time.

17. On the conspectus of all the evidence Ms Lynn Brown's posture of innocence must be rejected. The evidence clearly shows that she was part of a scheme to capture Eskom. Her responses above are inconsistent with the contents of her affidavit that she signed on 9 August 2020 In that affidavit she sought to create the impression that she followed a DPE process when appointing board members of SOEs and that her appointment of the December 2014 Eskom Board would have followed the same process and not deviated from it.

18. In the Fundudzi report, reference was made to Ms Lynn Brown's written response in which she said: "the administration of Boards was managed by the Legal and Governance Unit in DPE. They had procedures and manuals for the appointment of Boards. I inherited the procedure and simply adhered to it." Based on her responses referred to above, Ms Lynn Brown clearly did not follow that DPE procedure, which she criticised as failing to yield the desired effect. Accordingly, she has given contradictory versions on what procedure or process was followed to appoint new members of the Board of Eskom.

19. The former Public Protector's "State of Capture" report stated that the Board of Eskom appointed in December 2014 consisted predominately of individuals with direct or indirect business or personal relations with Mr Duduzane Zuma (former President Zuma's son), the Gupta family and their related associates, including Mr Salim Essa.

Members of the 2014 Board

Mr Roman Khumalo

20. Mr Roman Khumalo was appointed to the Eskom Board on 11 December 2014. He resigned on 12 April 2016. During the period 11 January 2013 to 15 February 2016, Mr Kumalo was in communication with Mr Tony Gupta fifty-eight times and eighty times with Mr Essa. In addition, there is evidence of at least four mobile communications between him and Mr Atul Gupta between 3 November and 2 December 2015. Mr Khumalo admitted the communications with Mr Tony Gupta but maintained that no mention was made of Eskom or any other matter relating to Eskom during those communications.

He denied ever speaking to Mr Atul Gupta. He said that he may have telephoned Mr Essa but does not recall having a meaningful discussion with him.

21. Mr Kumalo, CEO of Vodacom Africa at the time, had never served on an SOE board prior to his appointment to the Eskom Board. Despite numerous attempts made by the Commission to get him to testify, he did not do so, but submitted an affidavit, in which he explained that he was the CEO and a full-time employee of Vodacom at the time, running all of Vodacom business in Africa. He said that he was not allowed to sit on any other boards because Vodacom was a listed entity. He had to obtain approval from Vodacom to serve on the Eskom board.

Mr Zola Tsotsi

22. Mr Zola Tsotsi was the Chairperson of the 2011 Eskom Board. On 10 December 2014 he was re-appointed as a member and Chairperson of the 2014 Board of Eskom.

23. Mr Tsotsi described three occasions on which he was summoned by Mr Tony Gupta to the Gupta home, twice in Saxonwold and once in Constantia, where Mr Tony Gupta asked him to use his influence to get certain things done in Eskom. On one of those occasions Mr Tsotsi went to the Guptas' compound in Saxonwold and Mr Tony Gupta showed him transcripts of a chat group of Eskom board members talking about Eskom matters. Mr Tony Gupta said that he was showing Mr Tsotsi the transcripts to demonstrate to him that the Guptas had their sources of information.

Dr Ben Ngubane

24. Dr Baldwin Sipho "Ben" Ngubane was a board member of Eskom from 11 December 2014 until 12 June 2017 when he resigned as a member of the Eskom Board.

25. Once at Eskom, Dr Ngubane seems to have kept his connection with Mr Salim Essa. Insofar as Mr Salim Essa is the person behind the email address infoportal1@zoho.com, referring to himself as "Business Man". This is detailed later in this summary.

Mr Zethembe Khoza

26. Mr Zethembe Khoza was a board member of Eskom from 11 December 2014 until 19 January 2018, when he resigned as a member of the Eskom Board.

27. Mr Khulani Qoma, a former Eskom General Manager: Office of the Chairman, provided the Commission with an affidavit. In his affidavit, Mr Qoma proffers that on 17 June 2017, during a meeting at Mr Khoza's Durban residence, Mr Khoza shared with him that Minister Brown was captured and that she took instructions from the "G-brothers", which Mr Qoma understood to be the Gupta brothers. Furthermore, Mr Khoza also stated in relation to the new Eskom board announced on 23 June 2017, that they were "... abantwana besikole", meaning that they were "... school children" and had been appointed by the G-brothers. He stated that:

    27.1 Dr Ngubane had called a Board meeting to discuss allegations against Mr Koko with the Board, who were ready to suspend him, during which Mr Khoza claimed that he (Mr Khoza) snuck out of the meeting and alerted a Gupta brother of the impending suspension. After this, Dr Ngubane received a telephone call from Minister Lynn Brown, who instructed him to cancel the suspension of Mr Koko, to which Dr Ngubane obliged; and

    27.2 During a subsequent meeting between Dr Ngubane, Ms Daniels and Mr Qoma, Dr Ngubane confirmed to them that he had received a call from Minister Lynn Brown the evening he met with the Board to discuss Mr Koko's suspension and that she had instructed him not to suspend Mr Koko.

28. During the period 28 March 2015 to 5 November 2016, he communicated six times with Mr Salim Essa and twice with Mr Tony Gupta, although he denied making these calls.

Mr Norman Baloyi

29. Mr Norman Baloyi was on the Eskom Board from 11 December 2014 until 22 April 2015, when he was removed by Minister Lynn Brown. Mr Baloyi is not listed in the director's profiles for either the 2015 or 2016 reports.

30. From the evidence before the Commission, in the meeting of the Board of Eskom on 11 March 2015, it seems that Mr Baloyi expressed opposition to the suspensions of the four executives. A month later he was removed from the board in very unusual circumstances.

Ms Chwayita Mabude

31. Ms Chwayita Mabude served on the Eskom Board from June 2011 until 23 June 2017.She was one of two members of the 2011 Bard who were re-appointed to continue in the 2014 Board.

32. According to the Shadow World Investigations report, Ms Mabude was the owner of Innova Management Solutions (Innova), an entity that appeared to have been managed by Mr Salim Essa and Mr Ashok Narayan; and monies received from the Free State Department of Agriculture were laundered onto Innova, which then laundered the monies through to Aerohaven and Gateway Limited, both Gupta entities.

Ms Nazia Carrim

33. Ms Nazia Carrim was a board member of Eskom from 11 December 2014 until 1 July 2016. During the period 24 May 2012 to 30 June 2017, she communicated six times with Mr Tony Gupta and twenty-two times with Mr Salim Essa.

34. Ms Carrim does not deny the communications in relation to Mr Salim Essa and offered possible reasons for those communications, which reasons range from Mr Essa conveying condolences to her on one occasion, and, on another, her congratulating Mr Essa on his birthday. During 2014 she invited by either Mr Essa and/or his wife to occasionally have dinner at Mr Essa's house, and on another occasion, Mr Essa calling to obtain legal advice for Mr Duduzane Zuma. Ms Carrim has also confirmed that her husband is related to Mr Salim Essa.

Ms Venete Jarlene Klein

35. Ms Venete Klein was a member of the Eskom Board from December 2014 until 2017.

36. The Commission identified that R150 000.00 had been paid by Saamed Bullion (Pty) Ltd (Saamed), an entity identified by the Commission to have been used by the Guptas or entities associated with the Guptas as a money-laundering vehicle for funds derived from corruption to Centuria 400 (Pty) Ltd (Centuria 400), an entity owned by Ms Klein.

37. In her response to questions put to her by the Commission regarding the above payment, Ms Klein responded by way of a statement that Centuria 400 was an entity she used in running her consulting services. She stated that Mr Riaz Abu approached her entity regarding consulting work where her advice and expertise was required. She said that she had no knowledge of any links Saamed had with the Guptas.

Ms D Viroshini Naidoo

38. Ms Devapushpum Viroshini Naidoo was a board member from December 2014 until 2017.

39. It has been independently confirmed by the Commission that Ms Viroshini Naidoo is the spouse of Mr Kuben Moodley, a known Gupta associate and former advisor to Minister Zwane.

Dr Pat Naidoo

40. Dr Pat Naidoo was a member of the Eskom Board from 11 December 2014 to 21 January 2018.

Mr Mark Vivian Pamensky

41. Mr Pamensky was a member of the Eskom Board from 11 December 2014 until 25 November 2016. He shared a common directorship with Mr Salim Essa in Yellow Star Trading 1099 (Pty) Ltd briefly during 2005.
42. During his concurrent directorships of ORE and Eskom, ORE owned Tegeta Exploration and Resources (Pty) Ltd (Tegeta), which acquired Optimum Coal Holdings (OCH) from Glencore.
43. During the period 31 January 2008 to 21 June 2017, he communicated 1169 times with Mr Essa, 106 times with Mr Atul Gupta, twice with Mr D Zuma and 43 times with Mr Rajesh Gupta. Many of these communications were confirmed in the #GuptaLeaks.
44. Mr Pamensky responded as follows to the above:
    44.1 He admitted his relationship and association with Mr Salim Essa, which he said commenced in 2003
    44.2 Although he attended the Gupta wedding in Sun City on 02 May 2013 as a Blue Label Telecoms representative, he had not met the Guptas before then, until he was invited to Saxonwold by Mr Rajesh Gupta in June 2014
    44.3 He later became a non-executive director of ORE at the request of Mr Atul Gupta
    44.4 The calls between him and Mr Salim Essa would have related to their association and friendship
    44.5 The calls between him and the Guptas would have been confined to his role at ORE and "possibly mooting business prospects that however never materialised"
    44.6 Mr Duduzane Zuma was a director of Shiva Uranium (Pty) Ltd (Shiva Uranium), which owned ORE, and Mr Pamensky would have "had limited interactions with him, in that capacity"
    44.7 He admitted to having "had associations with each of the people identified in Mr Nombembe's affidavit"; and
    44.8 He admitted to email correspondence above and referred to affidavits to which he previously deposed and his evidence led at the Commission in this regard.

Mr Geovanni Michele Leonardi

45. Mr Leonardi, a Swiss national, was appointed to the Eskom board on 25 May 2015. He resigned on 19 January 2018.
    45.1 Mr Leonardi's CV was sent by Ms Kim Davids, personal assistant to Ms Brown.
        45.1.1 There is no evidence that Mr Giovanni was subjected to a shortlisting, screening and vetting process as required by the DPE processes for the selection of members of Boards of state-owned entities.
        45.1.2 It is evident that Mr Giovanni's CV was sent to Ms Kim Davids in connection with his possible appointment to the Eskom board.
        45.1.3 Given what this Commission has uncovered about Ms Lynn Brown and her interactions with the Guptas and their associates, there is no doubt that Ms Brown knew about Ms David's interaction with Mr Salim Essa via the "infoportal" email address.
        45.1.4 In her response to questions relating to Mr Giovanni's appointment on the Eskom board, Minister Lynn Brown indicated that "Like other names, Giovanni Leonardo's name came to

me as part of a list in the normal course of the process. I had some doubts, but after looking at the CV, I thought international electrical expertise would be valuable."

45.1.5 Mr Giovanni's appointment as an Eskom board member did not follow the Department's procedures as indicated by Minister Lynn Brown, also confirmed by Fundudzi's investigation.

Ms Mariam Cassim

46. Ms Cassim was appointed to the Board on 25 May 2015 and she resigned in 2017.

47. Ms Cassim was not called to give evidence before the Commission. However, there is considerable evidence of telephone calls between Ms Cassim and Messrs Ajay Gupta and Tony Gupta during the period 13 March 2015 to 19 December 2015. In all, there were ten such conversations, eight of which were initiated by Ms Cassim.

48. Ms Cassim has admitted the calls. Her explanation is that she was networking with these persons by means of brief calls asking them how they were doing and congratulating them on developments in their business and so on, merely in order to stay in contact.

49. This explanation is implausible. On 13 March 2015, just two days after the four executives were suspended, Ms Cassim had two conversations with Mr Ajay Gupta, at 15h05 and 15h45, for 60 and 30 seconds respectively. On 28 November 2015, which was at a time when Tegeta was arranging to use Eskom money to pay for Tegeta's purchase of Glencore's coal interests, Ms Cassim called Mr Tony Gupta twice without connecting. Then Mr Tony Gupta called Ms Cassim back and they spoke for 254 seconds. On 30 November 2015 Ms Cassim called Mr Ajay Gupta and then Mr Tony Gupta. She spoke to them, respectively, 233 and 263 seconds. On 19 December 2015 Mr Ajay Gupta called Ms Cassim and they spoke for 27 seconds. Thereafter, there were no calls at all between Ms Cassim and the Guptas.

50. Once one rejects Ms Cassim's explanation for her calls to the Guptas, there is strong correlation between Ms Cassim's contact with the Guptas and the timing of transactions that were initiated to benefit the Guptas.

The composition of the committees of the 2014 Board

51. In May 2014 Ms Lynne Brown was appointed as the Minister of Public Enterprises. A new Board of Directors was appointed in December 2014. Mr Zola Tsotsi had been appointed as Chairperson of the Eskom Board that served from 2011 to 2014. When the next Board was appointed in December 2014. Mr Tsotsi was re-appointed as the Chairperson of the Board. Ms Chwayita Mabude was the only other member of the 2011-2014 Board reappointed to the 2014 Eskom Board.

52. Mr Zola Tsotsi as the Chairman of the 2014 Eskom Board was responsible for the composition of the committees of the Board and was busy with it in December 2014 when he engaged Minister Lynne Brown, as she was responsible for the statutory committees, namely, Audit & Risk and Social & Ethics.

53. Mr Tsotsi testified before the Commission that in December 2014, after the appointment of the 2014 Board of Eskom, he received an email from Mr Salim Essa, whom he knew, which contained Mr Salim Essa's proposed composition of various committees of the Board. In other words, this email had names of which members of the Board should be members of the various committees of the Board. Mr Tsotsi testified that Mr Salim Essa asked him to send that list to Minister Brown. In his initial evidence Mr Tsotsi testified that he ignored Mr Essa's list. However, when shown, during his subsequent testimony before the Commission, the spelling errors on some of the names that could not have been made by a person familiar with the names, Mr Tsotsi suddenly changed his version and said that he did send Mr Essa's list to Minister Brown. Asked whether he sent it to Minister Brown as his list or as Mr Essa's list, he conceded that he did not inform Minister Brown of anything that would have suggested to her that the list was not his list. This means that Mr Tsotsi did what Mr Essa

had asked him to do, namely, to send Mr Essa's list to Minister Brown as if it was Mr Tsotsi's list. Mr Tsotsi testified that later he sent a revised list of his own to Minister Brown.

54. Minister Brown was provided with Mr Tsotsi's affidavit of 13 February 2020 and was requested to offer her own version in respect of Mr Tsotsi's evidence that she colluded with the Guptas' and Mr Essa in the appointment of the Board committees. Minister Brown vehemently denied any association with Mr Essa and the Guptas and categorically stated that Mr Essa and Mr Tony Gupta were never at her residence either individually or together, but she did not deny that she had a meeting with Mr Tsotsi.

55. Minister Lynn Brown maintained this version when she gave evidence before the Commission. She elaborated that her official residence had a security register or control point that would have information of all guests and persons attending her residence. However, interestingly, Minister Lynn Brown did not provide any evidence of these registers or control access which could have contradicted Mr Tsotsi's evidence about having found Mr Salim Essa and Mr Tony Gupta at Minister Lynn Brown's residence. Instead, she stated that Mr Zola Tsotsi should provide the date as to when he attended at her residence and then the information could be retrieved.

56. Mr Tsotsi seems to have been a weak person who did not stand up for proper governance when he ought to have done so. After realising the interference of Mr Essa and Minister Brown regarding the allocation of the 2014 Eskom Board members to Committees of the Board, he not only acquiesced in it but actually facilitated the implementation of Mr Essa's interference in the affairs of the Eskom Board.

The Fundudzi report on the composition of the 2014 Eskom Board

57. In the Fundudzi report titled "Forensic Investigation into various allegations at DPE" and dated July 2019, the following is stated in relation to the appointment of the 2014 Eskom Board and the composition of the various Eskom board committees:

    57.1 Ms Cassim and Mr Leonardi were only appointed to the Board on 25 May 2015. As a result of these appointments, the composition of the Board committees would be revised. There is evidence that infoportal1@zoho.com recommended individuals for various positions on Eskom Committees.

    57.2 Based on their review of the Eskom draft resolution and the infoportal1@zoho.com email dated 6 March 2015, the Fundudzi report determined that at least three members recommended by infoportal1@zoho.com were appointed to various committees as reflected in the draft resolution

    57.3 The individuals proposed on the Eskom committees by infoportal1@zoho.com were communicated to the Eskom board for implementation.

    57.4 Dr Ngubane was recommended by infoportal1@zoho.com to be the Chairperson of the Board Tender Committee. This means that he was recommended by Mr Salim Essa. According to a memorandum dated 9 April 2015 from Ms Motsoai to Minister Lynn Brown, Dr Ngubane was removed from the Board Tender Committee by virtue of his appointment as the interim Chairperson of the Eskom board.

THE SUSPENSION OF THE FOUR ESKOM EXECUTIVES

58. On 26 February 2015, former President Zuma intervened in Eskom's corporate governance through giving a direction to an official in the Department of Public Enterprises (DPE) whose political head at the time was then Minister of Public Enterprises, Ms Lynne Brown. President Zuma directed the official in the DPE to instruct Mr Tsotsi, the then Chair of the Eskom Board, to postpone a Board meeting called for the following day:

    58.1 The official conveyed the instruction to Mr Tsotsi, who obliged and postponed the Board meeting to 9 March 2015.

58.2 On 6 March 2015, Ms Dudu Myeni called Mr Linnell, a trained Zimbabwean lawyer turned consultant who she had consulted before, to a meeting on the same day at official residence of President Zuma in Pretoria. This is known as the "Pretoria Meeting".

58.3 At the Pretoria Meeting, Ms Myeni asked Mr Linnell about the possibility of holding an inquiry into Eskom's internal affairs and suspending certain top executives for the duration of the proposed inquiry.

58.4 Mr Linnell informed Ms Myeni that the inquiry could be held and the executives could be suspended. Furthermore, he indicated that that he was prepared to manage the suspension process and the inquiry.

58.5 Ms Myeni then called Mr Linnell and Eskom Chair, Mr Tsotsi, to a meeting at the residence of President Zuma in Durban on 8 March 2015. This is known as the "Durban Meeting".

58.6 Ms Myeni, Mr Linnell and Mr Tsotsi discussed the proposed inquiry and the suspension of certain Eskom executives at the Durban Meeting. President Jacob Zuma joined the meeting at a later stage and the discussions continued. It was decided that three Eskom executives would be suspended. These executives were the CEO, Mr Matona, the Group Executive: Group Capital, Mr Marokane, and the Group Executive: Technology and Commercial, Mr Koko.

58.7 Mr Tsotsi was instructed to seek Board approval for the scheme. President Zuma undertook to garner support for the scheme from Minister Brown.

58.8 On 9 March 2015, at the Eskom Board Meeting, Mr Tsotsi put the scheme for the inquiry and the suspensions of, at that stage three, executives before the Board. Mr Tsotsi said that the scheme had the support of President Zuma.

58.9 The Board declined approval for the proposed inquiry and suspensions without more information and deliberation. The Board meeting was adjourned to 11 March 2015 for further discussion and for the Board to receive the views from Minister Brown.

58.10 The Board reconvened on 11 March 2015, where Minister Brown addressed the members. She then left the meeting but waited at Eskom's offices in case there was further need for her. The Board discussed the proposed inquiry and the suspensions of the three executives. Although there were concerns around the rationale of the proposed inquiry and the suspensions, in the end all the Board members present approved the inquiry in principle and directed that the suspensions proceed.

58.11 The suspension procedures were implemented by a Committee of the Board called the People and Governance Committee (P&G) on the same day. During this Committee's deliberations, the name of a fourth executive to be suspended, CFO Ms Molefe, was included.

58.12 The P&G Committee approved the suspension of the four executives on that day and prepared "pre-suspension" letters for signature and delivery to the executives. Through the pre-suspension letters, the four executives were invited to provide reasons as to why they should not be suspended.

58.13 P&G interviewed the four executives to be suspended, confirmed their suspension, and by close of business on 11 March 2015 the four executives were suspended.

59. While the events described above were in play, a separate process also played out. Herein there is a dispute on the evidence:

59.1 Three Eskom officials described how Mr Koko called them to attend separate meetings at Melrose Arch. The three officials said that they attended such meetings on 9 and 10 March 2015. Mr Essa, a Gupta associate, had offices in Melrose Arch.

59.2 According to the three Eskom officials, Mr Koko and Mr Essa had advance notice of the suspensions, including Mr Koko's own suspension. Two of them described how they were taken to meetings in Mr Essa's office, made to relinquish their cell phones and were questioned by Mr

Essa with the apparent acquiescence of Mr Koko about, respectively, the procedure at Eskom regarding suspensions and whether the Eskom official being interviewed would be prepared to act in the place of one of the executives to be suspended.

59.3 Mr Koko denied the interviews, although he admitted meeting one of the three witnesses at Melrose Arch, and another at a different place.

60. There is no direct evidence of the origin of the scheme to suspend the executives. The first act demonstrated in furtherance of the scheme was the intervention of President Zuma on 25 February 2015, when he called then acting DDG in the DPE, Ms Matsietsi Mokholo, and instructed her to direct the then Chairperson of the Eskom Board, Mr Tsotsi, to postpone the Board meeting scheduled for the following day.

61. The weight of this evidence is reinforced by the conduct of then Minister of Public Enterprises, Ms Brown as testified to by Ms Mokholo: in the manner in which Minister Ms Brown submitted to the direction to meddle in Eskom's operational affairs when told by Ms Mokholo what had transpired between herself and President Zuma; and in the manner in which Minister Brown then actively engaged herself in shaping Board opinion on the topic, refusing to leave the Board meeting after being advised twice by Ms Mokholo to do so and then staying at Eskom to be there "if needed".

62. Ms Mokholo was an impressive witness. In short, she came to the Commission to tell the truth and succeeded in doing so, with clarity.

63. A second such act was the conduct of Ms Dudu Myeni in taking an active role in first recruiting Mr Nick Linnell, a legally trained corporate consultant, to coordinate the inquiry, which ultimately led to the suspensions.

64. It is unclear whether Mr Linnell took steps to achieve the precautionary suspensions for a legally improper motive. He seems to have equated these suspensions with the kind of suspension imposed on a person facing disciplinary charges. It also seems that the provisions within Eskom's policies, referred to in passing in the evidence, were framed to cater for the situation where an employee is to face charges. Those involved in the decision-making in this regard at either the Durban or Pretoria meeting, as well as at Eskom, did not appreciate the internal policy prescriptive, and as such this was not elucidated in the evidence.

65. Mr Linnell sought to obtain legal advice at every step in the work of the Commission. His attitude was demonstrated by the evidence he gave when asked if he had any concerns about the Durban meeting, its venue and who was at the meeting. His evidence demonstrated a lack of concern with proper conduct, most notably the presence of the then President Zuma at the meeting.

66. A third such act is the Durban meeting held on 8 March 2015. Mr Linnell may well be mistaken about the presence of Mr Jabu Maswanganyi (although this is not wholly relevant), however the most important question is whether President Zuma was there. We have Ms Myeni's statement that President Zuma was not there. I think that this evidence must be characterised as a lie. Not only did Mr Linnell and Mr Tsotsi both say that President Zuma was present, but their evidence is powerfully corroborated by the documents that were generated almost contemporaneously by Mr Linnell, the conduct of Mr Tsotsi in the Board meetings that followed and the proven conduct of President Zuma in his telephone conversation with acting DDG Mokholo on 26 February 2015.

67. The emphasis on the suspensions at the two meetings organised by Ms Myeni - the Pretoria and the Durban meetings - is extraordinary. If these two highly placed state actors, Ms Myeni and President Zuma, were motivated in the first instance by the desire to correct what was wrong in Eskom, there would not have been such emphasis on suspensions. Why was it necessary to target top executives, against whom there was no evidence of complicity in what had gone and was going wrong at Eskom? Mr Linnell said that experience had taught that such executives could thwart the proper conduct of the inquiry or subordinates could be reluctant to come forward. But that justification (flimsy in the present context) does not explain the haste with which these suspensions were decided upon and executed. Surely the first thing to do is set up an inquiry.

68. Why Ms Myeni and President Zuma acted as they did in early March 2015 can only be explained by the two of them. Ms Myeni is an unreliable witness. She must have denied the presence of President Zuma at the Durban meeting to shield him from the consequences of the plot. Furthermore, it is indicative of the impropriety of the plot: why else would she falsely deny that he was there? As for President Zuma, it is highly unlikely that a credible explanation would have been forthcoming from him even if he had testified.

69. Given the relative status and political power residing in President Zuma and Ms Myeni respectively, the only reasonable inference is that Ms Myeni was doing President Zuma's bidding. She summoned Mr Linnell to meetings first at President Zuma's Pretoria residence and, thereafter, to the President's Durban residence. She reported to President Zuma the progress of her discussion with Mr Tsotsi and Mr Linnell shortly before and in preparation for President Zuma's joining the meeting. She lied about the presence of President Zuma at the Durban meeting. It made no sense to involve President Zuma in the discussion unless the plot Ms Myeni proposed was one of which President Zuma approved. The call to acting DDG Mokholo shows that President Zuma was driving the plot at government level. Why else would President Zuma intervene in something as relatively inconsequential as the date of an SOE Board meeting?

70. Eskom Board Chairperson at the time, Mr Tsotsi, is seemingly a weak person who did not stand up for proper governance when he ought to have done so. After voicing weak objections to the suspension regime, he not only acquiesced in it, but actively facilitated its execution. He did not seek independent legal advice, even though that would readily have been available to him. Although the evidence in this respect is vague, he seems to have implied at the Board meeting on 11 March 2015 that the Board would be justified in suspending the four executives on the ground of misconduct, although no Board member could say what the nature of this misconduct was.

71. It is also remarkable that no Eskom Board member or official considered whether it was permissible to suspend an executive just because of a generalised, speculative fear that the executive might somehow interfere with the proposed inquiry or, if the suspensions were for misconduct, suspend otherwise than in contemplation of disciplinary proceedings against the executive.

72. In the first instance, only three executives were to be suspended, namely those individuals identified at the Durban Meeting. The fourth person to be suspended was identified at a meeting of the People and Governance committee (P&G) of the Eskom Board. This happened immediately after the Board meeting on 11 March 2015, which then Minister Brown attended. There is some evidence that Minister Brown identified the fourth individual, the CFO Ms Molefe for suspension during this P&G meeting. The evidence, however, is not consistent and there are no reliable contemporaneous documents in this regard.

73. None of the Eskom decision makers opposed this extraordinary addition to the list of those to be suspended. Although Directors Baloyi, Klein and Naidoo voiced their concerns, they went along with the majority in the end. In addition, Director Klein took an active role in the charade by which the executives were invited to advance reasons why the committee should not do what they had already decided to do.

74. Except for Mr Koko, the other three executives were paid substantial sums of money to leave quietly rather than demand their reinstatements. This reinforces the proposition that there was a faction within Eskom which wanted those executives removed and out of the proverbial way.

75. A key question is thus also, with what purpose did President Zuma and Ms Myeni devise and execute the plot to suspend the four Eskom Executives? This is answered below.

Mr Molefe and Mr Singh

76. Mr Brian Molefe and Mr Anoj Singh were parachuted into Eskom from Transnet. Although in all comparable appointments a process was followed, in the case of Mr Molefe and Mr Singh, no such process was followed. The evidence is consistent that Mr Molefe particularly was regarded by those in the decision making class as something of a prodigy and that there was a belief in those circles that,

if anybody could fix Eskom, Mr Molefe was the person who could do so. At the time load-shedding and Eskom's very bad financial state and the very poor level of maintenance of Eskom's power plants was big news and the government was facing heavy criticism from the public.

77. There is, however, other evidence which demonstrates both that Mr Molefe and Mr Singh took decisions to the advantage of the Guptas and that under Mr Molefe's leadership, Eskom's fortunes appeared on the face of it to be on the rise as load-shedding was reduced. It is quite possible that both narratives are true: that many of the decision-making elite believed that Mr Molefe was the right, indeed the only, man for the job, and, that others saw that this was an opportunity to get a man who they thought would favour the Guptas into the job. It is also possible that Mr Molefe himself made decisions which favoured the Guptas.

78. It is necessary to refer to the evidence of five further witnesses. These are Ms Suzanne Daniels, Ms Nonkululeko Dlamini (formerly Veleti) Ms Tsholofelo Molefe, Mr Abram Masango and Ms Nonhlanhla Kraai.

79. Ms Daniels testified that on 9 March 2015 she was called to a meeting with Mr Koko at Melrose Arch, where Mr Essa, a prominent Gupta associate, had offices. She said she told Mr Koko that she had waited for a long time in a restaurant at Melrose Arch for him to arrive. When he arrived, he paid her bill and took her to a suite of offices where she was required to hand in her cell phone for safekeeping. Thereafter, Mr Essa introduced himself to her as the advisor to Minister Brown. A short meeting followed at which Ms Daniels, Mr Essa and Mr Koko were present. Ms Daniels said that Mr Essa asked her how one would go about suspending executives at Eskom. She said that Mr Essa proceeded to say that four executives namely Mr Matona, Mr Marokane, Ms Molefe and Mr Koko (who was present at the meeting between Ms Daniels and Mr Essa) would be suspended and that some of the executives to the suspended would not return to Eskom at the end of their suspension.

80. Mr Koko admitted that he met Ms Daniels at Melrose Arch but did not take her to meet Mr Essa. Ms Daniels was an unimpressive witness. She was subsequently dismissed from the employ of Eskom for what was found at a disciplinary inquiry against her to be four counts of gross impropriety in a corporate sense. Had her evidence stood alone, one would not have formed a view adverse to Mr Koko's version. However, her evidence does not stand alone. There is powerful corroboration for her version.

81. Ms Nonkululeko Dlamini is a chartered accountant. In 2015 she was employed at Eskom in the position of General Manager: Finance for the Group Capital Program, reporting to Ms Molefe, the CFO of Eskom. She testified that during the week of 9 March 2015 the group of nine or ten Eskom employees reporting to Ms Molefe held a finance strategy session at an Eskom facility in Midrand, which was scheduled for two full days. She further testified that on the first day of the session, 9 March 2015, Ms Dlamini walked back from lunch with Ms Molefe and others when she received a call from Mr Koko. Mr Koko asked Ms Dlamini to meet him urgently at Melrose Arch. Ms Dlamini asked Ms Molefe if she could leave the strategy session and attend the meeting with Mr Koko. Ms Molefe declined this request because Ms Dlamini was needed at the strategy session. Ms Dlamini then told Mr Koko that she was unable to join Mr Koko's meeting because she was in a meeting herself. Mr. Koko requested her CV and asked to meet her between 17h30 and 18h30. They met that evening at a KFC or a McDonald's. Mr Koko said that he had still not received her CV. He gave Ms Dlamini an alternative email address. Ms Dlamini asked Mr Koko why he wanted her CV. He said that he wanted it because there was a possibility that she could be asked to act as Financial Director. He did not say who had requested her CV. At the time, she was not aware of the issues around the proposed inquiry and the suspensions. The meeting lasted about twenty minutes. Mr Koko did not tell her whom she would have met if she had gone to the meeting in Melrose Arch and she did not ask.

82. Mr Koko's version was put to Ms Dlamini. His version held that Ms Dlamini was a colleague and a family friend. Mr Koko said that he called her on 10 March 2015, and they met for dinner in the evening in Midrand. Mr Koko denied that he called her to come to Melrose Arch. According to Mr Koko, both Ms Dlamini and he were very surprised when she was appointed as acting CFO / Financial Director after Ms Molefe's suspension.

83. Ms Dlamini denied that she met Mr Koko for dinner. On 12 March 2015, Ms Dlamini was appointed acting CFO/Financial Director. She acted in that position until she resigned from Eskom on 1 May 2015 with effect from the end of her notice period on 31 July 2015.

84. Ms Dlamini submitted an affidavit from Ms Molefe. In this affidavit, Ms Molefe confirmed Ms Dlamini's version of what took place on 10 March 2015. Ms Dlamini was an impressive witness. Her evidence, corroborated by that of Ms Molefe, shows that Mr Koko did indeed invite Ms Dlamini to meet him at Melrose Arch. Where Mr Koko's version conflicts with the version of Ms Dlamini, Mr Koko's version must be rejected as false.

85. This conclusion is supported by Mr Masango's evidence. He, too, testified that Mr Koko called him to a meeting at Melrose Arch. Mr Masango stated that at this meeting Mr Koko disclosed the ploy to suspend four executives. Mr Masango, too, was required to hand in his cell phone before the meeting with Mr Essa began. Mr Masango testified that his meeting with Mr Koko and Mr Essa was on 10 March 2015. As was the case with previous meetings of this nature, the purpose of the meeting was to inform Mr Masango of what was to happen, and to elicit Mr Masango's consent to act in the place of one of the executives to be suspended. Mr Koko denied that he called Mr Masango to a meeting at Melrose Arch and that he and Mr Essa met with Mr Masango. Mr Koko accused Mr Masango of fabricating this story of a meeting. However, Mr Koko failed to give a reason why Mr Masango would have fabricated this story against him specifically, because, in Mr Koko's own version, he and Mr Masango were close and on good terms. Mr Koko sought to say that Mr Masango falsely implicated him the meeting because he (Mr Koko) had laid a criminal complaint against Mr Masango relating to corruption. However, when questioned about this in detail, Mr Koko indicated that this only occurred in 2017, two years later.

86. Mr Masango's evidence is also strongly corroborated by the evidence submitted by Ms Nonhlanhla Kraai, who testified convincingly that Mr Masango did not arrive for a meeting she was to hold with him on that day. He could not be contacted, and his phone was on voicemail. This statement corroborates Mr Masango's evidence that he was required to hand over his cell phone before he went into the meeting with Mr Koko and Mr Essa. Ms Kraai went on to concur with Mr Masango's explanation for his failure to make the meeting with Ms Kraai. Ms Kraai testified that Mr Masango said that he had been at a "strange meeting with a short Indian man" at which he was told that he was going to be made the Acting General Executive: Group Capital.

87. The evidence of Ms Daniels, Ms Dlamini and Mr Masango proves two things conclusively. Firstly, that there was a ploy to remove from Eskom certain executives who occupied strategic positions, whom the Gupta family believed would not co-operate in their plan to capture Eskom and loot its coffers, and to replace them with officials who would co-operate with them. Secondly, that Mr Koko was an integral component of the Guptas' strategy to capture Eskom. President Zuma and Ms Myeni were witting participants in the ploy to oust the four Eskom executives and, thus, witting participants in the Guptas' larger scheme to capture Eskom.

88. On the evidence, this was not the only time that Mr Essa knew in advance what personnel changes were to be made in the Eskom executive. There is the evidence of Mr Henk Bester, who testified that in 2014 Mr Essa told him that Mr Molefe was going to become the Eskom CEO. According to Mr Bester, Mr Essa's motive in disclosing this to him was that he wished to demonstrate to Mr Bester the reach and extent of the Guptas' power or influence in state affairs.

89. Viewed in the correct context, either the suspension of Mr Koko was a ruse or the Gupta family agreed to allow Mr Koko to keep his job in return for the services he was to render. What the Gupta family hoped to achieve by having Mr Koko suspended is not elucidated by the evidence. In December 2015, Mr Koko and Mr Singh played a crucial role in obtaining the approval of the Eskom Board to a substantial pre-payment to Tegeta. The Guptas must have known that the money they would have to pay out to obtain the control of Optimum Coal Mine would leave them short of liquid cash. Even without the benefit of hindsight, it is probable that the Gupta family would have known that Eskom was their best source of cash in the short term to fund Tegeta's purchase of Glencore's South African coal interests.

90. A key component from the onset was the suspension of executives. The primary purpose was to install Mr Molefe in Eskom as its CEO. This is because those who devised and implemented the scheme believed that Mr Molefe would favour the Gupta family and channel Eskom resources to them.

THE APPOINTMENT OF MR MOSEBENZI ZWANE AS MINISTER OF MINERAL RESOURCES

91. Prior to September 2015 Mr Mosebenzi Joseph Zwane had been confined to local and provincial government. From May 2009 to March 2011 Mr Zwane was MEC for Human Settlements. From March 2011 to April 2013, he was MEC for Agriculture and Rural Development. From April 2013 to June 2015, he was MEC for Economic, Small Business, Tourism and Environmental Affairs. From June 2015 to September 2015, he was MEC for Agriculture and Rural Development. Mr Zwane not distinguish himself as an MEC, he in fact performed very badly. When he was MEC for Agriculture, he initiated and oversaw what has since become known as the Estina or the Vrede farm debacle. Despite this, he joined the National Assembly in September 2015 as an ANC Member of Parliament. Within two weeks or just after two weeks of becoming an MP, Mr Zwane was appointed as Minister of Mineral Resources after President Zuma had moved Minister Ngoako Ramatlhodi from the Department of Mineral Resources to the Ministry of Public Service and Administration.

92. The question that arises about President Zuma's decision is why he chose Mr Zwane above all the eligible ANC Members of Parliament for this position. The answer is that there was nothing and there could not have been anything that President Zuma could possibly have thought Mr Zwane could do better than all the other 200 ANC Members of Parliament in terms of performing the legitimate, constitutional and legal duties of Minister of Mineral Resources. Instead, there was every reason to believe that Mr Zwane should not have been allowed to continue as an MEC after the Vrede Farm / Estina debacle that he oversaw. The ANC ought not to even have allowed him to be a Member of the Provincial Legislature, after that dismal performance. Yet, the ANC allowed him to not only continue as a member of the Provincial Legislature and as an MEC but they allowed him to be made MEC for Human Settlements after he had performed as poorly as he did as MEC for Agriculture. As MEC for Human Settlement, he performed even worse than he had done as MEC for Agriculture.

93. Out of all evidence heard by the Commission that may be relevant to Adv Ramatlhodi's removal as Minister of Mineral Resources and the appointment of Mr Zwane as Minister of Mineral Resources the only reason that presents itself as the most probable reason is that the Guptas wanted Mr Zwane for Minister of Mineral Resources and President Zuma also wanted somebody that had the blessing of the Guptas and who would co-operate with the Guptas. Minister Ramatlhodi had consistently refused to have anything to do with the Guptas and was not prepared to do any favours for the Guptas. President Zuma and the Guptas wanted someone who would advance the Guptas' business interests and those of Mr D Zuma.

94. The evidence before the Commission reveals that there was a strong connection or relationship between Mr Zwane and the Guptas. This is dealt with below.

    94.1 During or about October 2011, when Mr Zwane was the MEC for Agriculture and Rural Development, his department concluded a contract with Nulane Investments 204 (Pty) Ltd (Nulane), a company whose sole director was Mr Iqbal Sharma (Mr Sharma), a known associate of Mr Salim Essa and the Guptas.

    94.2 During or about June 2012, in the same capacity, Mr Zwane admittedly promoted and initiated the establishment of a mega Vrede Integrated Dairy Project, with Estina (Pty) Ltd (Estina) as the service provider, a company whose sole director was Mr Kamal Vasram, an IT salesman with no farming experience, with a cost to the Free State government of approximately R280 million, from which the Guptas benefited.

    94.3 Mr Zwane was instrumental in at least the first prepayment of R30 million to Estina, an amount

believed to have been used to pay the R30 million bill for the Guptas' wedding at Sun City in April / May 2013; not long after the conclusion of the contract with Estina, Mr Zwane and his local Gospel choir undertook a trip to India in October 2012 which was paid for by the Guptas or their entities or associates. The choir's itinerary included a lunch at Mr Gupta's house on 16 October 2012.

94.4 During or about March 2013, again as MEC for Agriculture and Rural Development, Mr Zwane provided an official invitation to a Minister in India that was used to facilitate the landing of an aircraft at the Waterkloof Air Force Base, in Pretoria, with guests for the Gupta wedding at Sun City; during 2013 and 2014, Mr Zwane undertook overseas trips to India, Dubai and Switzerland with, *inter alia*, Mr Tony Gupta and Mr Salim Essa.

94.5 Prior to his appointment as a Member of Parliament, Mr Zwane was invited to several meetings with Mr Tony Gupta in the period 2012 to 2014; also prior to his appointment by President Zuma as Minister of Mineral Resources on 23 September 2015, Mr Zwane seems to have been vetted by the Guptas, as a copy of his CV was sent to Mr Tony Gupta on 1 August 2015 who then forwarded it to Mr D Zuma, President Zuma's son.

94.6 As the Minister of Mineral Resources, Mr Zwane appointed Gupta associates as his special advisors, namely Mr Kuben Moodley and Mr Malcolm Mabaso; Mr Zwane abused his position by intervening in negotiations to secure the acquisition of Glencore's OCH/OCM by the Gupta-owned company, Tegeta; and on his watch as the Minister of Mineral Resources, Mr Zwane's special advisors have according to Mr David Msiza, the Chief Inspector of Mines at the DMR, acted on his instructions to cause notices to be issued against Glencore-owned mines to suspend their mining licences, thus hampering mining operations and putting the mines under financial strain; Additionally, Mr Zwane was assisted by the Guptas and their associates in preparing his media statements and responses to questions raised by journalists; those who assisted him include Mr Tony Gupta, Mr Howa, D. Zuma and the Gupta-hired PR firm, Bell Pottinger.

94.7 During 2016, after the banks had closed the bank accounts of the Guptas, Mr Zwane as chairperson of the Inter-Ministerial Committee, played an active role in seeking to put pressure on the banks to reopen the bank accounts of the Guptas and issued a media statement in which he misrepresented what Cabinet had decided.

94.8 When Mr Zwane met with Mr Glasenberg in Switzerland at the beginning of December 2015, he introduced Mr Salim Essa to Mr Glasenberg as his advisor when this was not true and the only reason he did so is that he sought to assist the Guptas to conclude a deal with Glencore with regard to their acquisition of OCM.

95. In the light of the above it can safely be concluded that Mr Zwane was a "Gupta Minister" in the sense that he must have been appointed at their instance or request or with their blessing.

TEGETA'S ACQUISITION OF OPTIMUM COAL MINE

96. Optimum Coal Holdings (Ltd) (OCH) was formed on 15 March 2006 as a BBBEE coal mining and exploration company and acquired control of Optimum Coal Mines (Pty) Ltd (OCM) which by then owned the Optimum Mine. In the period 2011 to 2012, Glencore acquired control of OCH and, accordingly, OCM.

97. Apparently, there had been disputes between Eskom and Glencore's predecessors on the quality of coal. Following Glencore's acquisition of its interest in OCH, these differences, particularly in relation to sizing and quality of the coal supplied to Hendrina, persisted between OCM and Eskom.

98. During this period, approximately half of OCM's coal was supplied to Eskom. The price at which OCM sold coal to Eskom pursuant to the CSA was significantly below the cost of production.

99. The CSA contained a "Hardship Clause", which provided for arbitration in certain specified circumstances which defined the concept of hardship. OCM considered that its obligation to supply Eskom

at prices below its cost constituted hardship as contemplated by the CSA. On 12 December 2013 the parties concluded an arbitration agreement, under which they submitted the issue around pricing to arbitration.

100. The mine made a significant loss under Glencore's control. This was because Glencore had become party to the CSA with Eskom, which obligated Glencore to supply coal to Eskom at its Hendrina power station at prices far below the market rate.

101. Optimum Mine's supply of coal was commercially vital for Eskom because Optimum's coal could simply be loaded on conveyers at the mine and directly unloaded at the power station. Eskom would be forced to pay for road haulage if coal was sourced from alternative providers, which would significantly raise the price to Eskom.

102. Prior to the events of 2015, Eskom and Glencore were caught in a protracted dispute over coal pricing. However, the dispute was eventually settled and the coal supply from the Optimum Mine to Hendrina power station continued without interruption.

103. A substantive dispute about whether the coal price should increase (and by how much) developed between the parties. By early 2015 it appeared that significant progress had been made toward resolving the dispute. Glencore provided confidential information to Eskom for this purpose. This enabled Eskom to evaluate the commercial worth and production capacity of the Optimum Mine with far greater accuracy than, say, one of Glencore's competitors could have done. The parties to the CSA had from time to time modified the terms of the CSA by addenda. They had concluded three addenda and had cooperated in drawing up a draft fourth addendum. The terms of the proposed settlement were approved by Eskom's executive procurement committee. This level of approval was subject to the consideration of Eskom's Board's procurement committee, which was scheduled to meet on 15 April 2015.

104. On 17 April 2015, then Minister Brown, announced that Mr Brian Molefe was seconded from Transnet to Eskom as CEO. He became the CEO of Eskom three days later on 20 April 2015. Following his appointment as CEO, the terms of the settlement negotiations between Glencore and Eskom changed drastically. Mr Molefe insisted that Eskom would hold Glencore to the terms of the CSA and would not agree to an amendment thereof. Mr Molefe terminated the negotiations with Glencore. There is a dispute between the Glencore witness, Mr Ephron, on the one hand and the Eskom witnesses, Mr Molefe and Mr Koko, on the other hand. Glencore argued that Eskom's intransigence led to the breakdown in the negotiations. The Eskom officials argued that Glencore was unreasonable in its demands. It is not part of the Commission's TORs to decide who was right and who was wrong in this regard.

105. Glencore continued to fund the Optimum Mine and supplies to Hendrina were not interrupted, even though the standoff with Eskom continued.

106. The Gupta family, through their company Oakbay, started negotiating with Glencore to buy the Optimum Mine from 1 July 2015 onwards. Glencore initially showed no interest in Oakbay's propositions.

107. Given that the negotiations with Eskom had broken down, Glencore put its subsidiaries Optimum Coal Mine (Pty) Ltd (OCM), which directly owned the Optimum Mine, and Optimum Coal Holdings Ltd, (OCH) into business rescue on 31 July 2015. OCH held the shares in Glencore's South African coal interests and was thus the immediate holding company of OCM. At the end of July and August 2015, Eskom withheld payment for coal delivered that month from OCM. The business rescue practitioners (BRPs) threatened to terminate the coal supply. This sharply focussed the commercial limits of Eskom's strategy, whatever might have been its legal strengths: without coal from the Optimum Mine, Eskom would be put to enormous additional expense at a time when it was in financial peril and load-shedding was a constant threat. Eskom was acutely aware of the political pressures that the governing party would face if it allowed the situation to develop.

108. Eskom's commercial predicament was identified in a memorandum dated 17 November 2016 and signed by the General Manager: Coal Operations, Mr Mazibuko, and the Chief Procurement Officer: Group Commercial on behalf of Mr Koko to which the Commission was referred by the witness, Mr

Opperman. The memorandum concluded in paragraph 10 that if Eskom decided to implement the existing agreement, the entity would have to charge Optimums shortfall, and as such, there is a high probability that this would cripple the company and lead to liquidation. Therefore, it made business sense to keep Optimum afloat and supply Eskom at current terms and conditions.

109. On 3 September 2015, after Mr Molefe and Mr Koko met the business rescue practitioners, Eskom undertook to negotiate further with Glencore, which for its part, undertook to fund OCM and the supply of coal resumed.

110. Negotiations between Glencore and Oakbay resumed. On 22 September 2015 President Zuma appointed Mr Mosebenzi Zwane as Minister of Mineral Resources, replacing Mr Ramatlhodi. The evidence given by Mr Ramatlhodi reveals that he was a Minister who had repeatedly refused to have anything to do with the Gupta family. The evidence led in this Commission demonstrated overwhelmingly that Mr Mosebenzi Zwane was a Gupta associate, and, in all probability, he was appointed to the position of Minister of Mineral Resources because former President Zuma and the Gupta family wanted a Minister in that position who would facilitate the implementation of the Gupta agenda.

111. Mr Joel Raphela, a DDG in the Department of Mineral Resources and Energy (DME), contacted Mr Ephron in November 2015 to request a meeting at Melrose Arch. At this meeting Mr Raphela indicated that the sale of all OCM and certain other affiliate companies of OCM should be considered, as opposed to just OCM. At that stage, the deal on the table was confined to OCM. While it was not unusual for the DME to take an interest in transactions in the mining industry that were subject to their approval, Mr Ephron found it surprising that Mr Raphela appeared to have detailed knowledge of Glencore's negotiations with Oakbay.

112. On 24 November 2015 a progress meeting was called with Eskom. This meeting was attended by Mr Blankfield on behalf of Glencore, the Business Rescue Practitioners (BRPs), Mr Howa, Mr Chawla and Ms Ragavan on behalf of Oakbay and Mr Koko, Ms Suzanne Daniels, Mr Edwin Mabelane and Ms Ayanda Nteta on behalf of Eskom. Mr Koko chaired the meeting and minutes of the proceedings were taken. Mr Koko stated that Eskom expected OCM to honour the CSA until 2018 and that Eskom would not waive any penalties. Mr Koko further stated that Eskom would not provide consent to any transaction with Oakbay unless the transaction extended beyond OCM to include all assets of the OCH Group, including OCH's interest in the Richards Bay Coal Terminal and Koornfontein. Mr Koko required Glencore to state by the end of that weekend whether this would be acceptable.

113. Mr Koko's stated reason for insisting on a sale of OCH's interest in the Richards Bay Coal Terminal and Koornfontein was that, without such a sale, OCM would not be a viable business. Mr Ephron considered that Mr Koko's position had some merit, but noted it was the same message that he had received from the DME earlier that month. Since a transaction with Oakbay appeared to be the only option at that stage, Glencore agreed to engage further with Oakbay in respect of a transaction for all the assets of OCH.

114. A representative of Minister Zwane contacted Mr Glasenberg on 24 November 2015 to arrange a meeting between them. The meeting was scheduled for 1 December 2015.

115. Mr Ajay Gupta met with Mr Ephron on 25 November 2015 and made a third offer on behalf of Oakbay to acquire all the shares held by OCH in OCM and OCH's other subsidiaries for a purchase price of R1 billion. As this would result in a shortfall of some R1.5 billion, which Glencore would have had to fund, Glencore declined the offer. Mr Ephron conveyed the rejection of the offer to Mr Ajay Gupta at a meeting on 26 November 2015. On the same day a section 54 notice was issued by the DME to Koornfontein Mine (controlled by Glencore), directing the withdrawal of all employees from the underground mine and terminating of the use of certain equipment. Between 25 and 30 November 2015, further s 54 notices were issued to other mines in which Glencore had an interest.

116. These s 54 notices effectively halted all mining operations at the affected mines. The notices flagged issues that were not serious and that could have been easily addressed without any negative impact on mining operations. It was not common practice for multiple s 54 notices to be issued to a single operator over such a short period of time.

117. A credible body of evidence shows that Eskom officials provided Mr Essa with confidential information, thus giving him, and therefore the Gupta family, an unfair advantage that enabled them to adjust their dealings with Glencore. Email was one means through which information was transferred. An email address infoportal1@zoho.com, belonging to an alias "Business Man" existed to which Ms Daniels, Dr Ngubane and Mr Koko, among others, sent confidential documents. While there is some degree of certainty that the person with the alias "Business Man" was Mr Essa, there were also suggestions that "Business Man" was not a single individual. This, however, is improbable and the evidence is contradictory.

118. Eskom officials who conceded that they had sent Eskom's confidential information to "Business Man" maintained that it was indeed Mr Richard Seleke, and as such, there was no breach of confidentiality as Mr Seleke was a DG of the Department of Public Enterprises. However, it is important to note that some of the emails received by Eskom officials from this email address or sent by certain Eskom officials to this email address were sent before Mr Richard Seleke became the DG.

119. Mr Koko (representing Eskom), Mr Marsden (representing the BRPs), Mr Blankfield and Mr Ephron (representing Glencore) met on 1 December 2015 at Eskom's offices. Mr Ephron informed Mr Koko that Glencore had rejected Oakbay's offer and would continue to support OCM, resulting in both OCM and OCH being discharged from business rescue. Mr Koko was asked if he was pleased with the decision, to which Mr Koko replied that he was as OCM would be honouring the CSA. Mr Koko informed Mr Anoj Singh, Eskom's CFO of the outcome of the meeting.

120. Then Minister Mosebenzi Zwane travelled to Zurich, Switzerland to meet Mr Glasenberg. They met on 1 December 2015, where Mr Zwane urged Glencore to sell Optimum Mine to the Gupta family. Mr Zwane stated that he had used government resources to advance the interest of these private individuals as he feared that OCM would go into liquidation and thousands of jobs would be lost. However, he must have known that Glencore had by the time of this meeting decided to fund OCM. Mr Glasenberg informed Mr Zwane of this at their meeting.

121. Following the meeting with Eskom on 1 December 2015, Mr Ephron and Mr Blankfield were in the Eskom parking lot, when Mr Ephron received a phone call from Mr Glasenberg to inform him that Minister Zwane had indicated that Mr Tony Gupta wanted to meet on 2 December 2015 in Switzerland and that Mr Ephron had to join the meeting. Accordingly, Mr Ephron travelled to Zurich, Switzerland that day.

122. On 2 December 2015, meetings regarding OCM were held. The first part of the meeting was attended by Minister Zwane, Mr Essa, Mr Tony Gupta, Mr Glasenberg, and Mr Ephron. Minister Zwane opened the meeting, stressing the importance of job security in the mining sector and highlighting a concern that the mines should not enter a liquidation process. For Minister Zwane, the best outcome was for Glencore and Oakbay to reach an agreement. He then left the meeting. It is important to note that by this stage there was no serious risk of liquidation for OCM as Glencore had decided to continue funding the mine. Minister Zwane was informed of this on 1 December 2015, a day prior to the meeting. There was no need at all for Minister Zwane to spend an extra day in Switzerland and attend a further meeting to make the same point. The reason Minister Zwane attended the meeting on 2 December 2015 was to emphasise to Glencore that the South African government supported the Oakbay offer to Glencore.

123. The rest of the meeting addressed the terms on which the Gupta family would acquire Glencore's coal interest in South Africa. Glencore and Oakbay agreed in principle that Tegeta would buy Glencore's South African coal interest, including its rights in relation to the Richards Bay coal terminal for R2.15 billion cash. This was a much higher offer by Oakbay than previous offers.

124. Mr Koko engaged with the DDG of the DME, Mr Raphela to "persuade" the DME to pressurise Glencore to sell to Tegeta between 2 and 8 December 2015. Mr Koko drafted a formal letter dated 7 December 2015. An informal email exchange between Mr Koko and Mr Raphela showed that Mr Raphela was given a draft of the letter Mr Koko intended to send to the DME. Mr Koko asked Mr Raphela to approve the contents of the letter. As per the letter dated 7 December 2015, Mr Raphela, formally wrote as the DG of the DME to Mr Koko to commit the Department to fast tracking the nec-

essary mining licences to Tegeta to enable it to mine OCM's mines and invited Eskom to provide for a pre-payment to Tegeta to assist it with "financial provision ... estimated at R1.7 billion".

125. After a little more than a week, after Eskom refused to negotiate meaningfully with Glencore, senior executives managed to secure a telephonic meeting with the Investment and Finance Committee of the Eskom Board on the evening of 9 December 2015. Mr Molefe, Eskom CEO, was off ill. Mr Singh, and Mr Koko made a written submission which was signed on 8 December 2015 and presented to the committee.

126. The Board was asked to urgently authorise a "pre-purchase" to the value of R1.68 billion by "Optimum Coal Mine (Pty) (Ltd)", as represented by the "proposed owners of OCM". Ms Klein, Mr Khoza, and Dr P Naidoo, as members of the IFC considered this proposal. Mr Pamensky, the Chair of the IFC Committee recused himself.

127. All members of the IFC were confused as to whether the pre-payment was to benefit Glencore or the proposed new owners. It is also telling that nowhere in the submission document was there any reference to Tegeta or Oakbay or the Guptas, who by that stage had achieved a great measure of notoriety in the eyes of the South African public.

128. On 9 December 2015 the IFC approved a resolution authorising CEO Brian Molefe, CFO Singh, and Group Executive: Generation, Mr Koko, to negotiate and conclude a pre-purchase agreement with the "proposed owners of OCM". In fact, if what was meant in the submission document was a long-term coal supply agreement, and the prepayment against coal committed to be delivered from Optimum, this never materialised. Instead, Eskom provided Tegeta with a guarantee for the sum expressed in the submission document, i.e., R1.68 billion. ABSA issued a guarantee to Tegeta against the risk that Eskom would not make the proposed R1.68 billion pre-payment. It seems that Tegeta did not ever use the guarantee, probably because of the way events turned out.

129. The facts are that Eskom approved the issue of the guarantee against the risk that Eskom defaults on the pre-payment. The contractual framework between Eskom and Tegeta for the issue of the guarantee is yet to be found. The pre-payment was in fact never made although those responsible for the payment of some R700 million to Tegeta in April 2016 claimed that the latter payment was justified by the authorisation in December 2015 to affect a pre-payment of R1.68 billion.

130. The BRPs approved the sale to Tegeta and on 10 December 2015 a written sale of shares and claims agreement was concluded between OCH (OCM's direct holding company), Tegeta, Glencore International AG and Oakbay. On 6 January 2016, the BRPs confirmed the sale of OCH's shares and requested regulatory consent to the transaction from the DME. The conditions in the agreement were fulfilled on 8 April 2016 and the transaction was implemented. On 31 March 2016, the business rescue plan for OCH was published and then approved on 8 April 2016.

131. Mr Essa called Mr Ephron to inform him that Tegeta was short of R600 million to pay the purchase price of R2,15 billion under the sale of shares agreement during the week of 4 April 2016. He asked that Tegeta be allowed to pay the balance of R600 million from the revenue derived by Oakbay from coal sales to Eskom. Glencore declined this request. On 11 April Mr Howa, the Tegeta CEO, repeated that Tegeta was R600 million short. He asked Mr Marsden, one of the BRPs, to approach the banks which funded OCM with the request that these same banks finance the Gupta family's purchase of Glencore's South African coal interests. The banks declined to provide finance.

132. It is thus proven that Minister Zwane, Mr Molefe, Mr Koko and Mr Anoj Singh made themselves complicit in knowingly assisting the Gupta family to acquire the Optimum Mine, and ultimately, all of Glencore's coal interests in South Africa. What has occurred demonstrates an act of state capture. What follows shows that substantial moneys were then misappropriated from Eskom to enable the Guptas to implement the sale of shares agreement.

133. The suggestion that the April 2016 payments to Tegeta constituted pre-payments against coal supplies is untenable. The money was, to the knowledge of all the executive actors concerned, not intended to be used procure coal for delivery to Eskom. Instead, the money was intended to be used,

and was used, to pay for the shares in the companies holding Glencore's South African coal interests, which the Gupta family had bought but were financially unwilling or unable to pay in full.

134. The unlawful conduct of Eskom officials is confirmed and aggravated by their behaviour thereafter in swiftly settling the dispute which had so bedevilled relations between Eskom and Glencore for a fraction of the sum for which Eskom had been holding out against Glencore. Although Eskom had strenuously demanded and held out for some R2.1 billion in penalties from Glencore, this claim was settled with Tegeta, the new Gupta-controlled owner of Optimum Mine for R577 million, of which Tegeta only had to pay R255 million on 14 March 2017. Furthermore, although Tegeta was obliged to provide Eskom with a guarantee for amounts which might be owed under the assigned CSA to Eskom, no guarantee of any commercial value was supplied.

135. A central question arises as to how the Gupta family raised the shortfall in the purchase price that they needed to take control of the Optimum Mine. The following explanation shows that they got the monies from Eskom.

136. Mr Snehal Nagar is a chartered accountant, who had been employed by Eskom as a Finance Business Partner: Primary Energy since about 2008. On 12 April 2016, he received an email from Ms Ayanda Nteta, the Head of the Fuel Sourcing, part of Eskom's primary energy division, entitled "As discussed". Mr Nagar could not recall any relevant discussion. Attached to the email was a pro forma invoice for coal dated 12 April 2016, referring to order number 194 and addressed by Tegeta Exploration and Resources (Pty) Ltd (Tegeta) to Eskom, in the sum of R659 558 079,38. Eskom did not customarily make any payments on a pro forma invoice.

137. On 13 April 2016, Mr Nagar received a phone call from Ms Maya Naidoo (formerly Bhana), his line manager at the time. Ms Naidoo told Mr Nagar that payment of the invoice was urgently required by 14h00 that day. She further stated that the invoice had been approved by Eskom's Board Tender Committee (BTC). She told Mr Nagar that Eskom's Treasury and Shared Services Teams were "on board or would be on board" to enable payment. Mr Nagar asked Ms Bhana for the necessary documentation. Mr Nagar had never known of any payment on such an urgent basis.

138. Further to this, on the same day, Mr Nagar received documents via email from Ms Naidoo, which included an extract from the agreement between Eskom and Tegeta regarding coal supply. On the face of it, that agreement had been concluded on the same day, i.e., 13 April 2016. Mr Nagar also received a copy of a resolution of the shareholders of Tegeta pledging its shares to Eskom as security for the pre-payment. The pledge of shares was manifestly worthless, in commercial terms. The email from Ms Naidoo requested payment of the amount mentioned as well as two other Tegeta invoices. She further informed Mr Nagar that the necessary resolution of the BTC would be provided by Ms Susan Daniels from Eskom's Legal Department. Ms Daniels supplied a copy of a resolution of the BTC. The request to Mr Nagar amounted to an instruction.

139. The extract from the BTC minutes held on 11 April 2016 at 21h00 via teleconference was signed by Ms Daniels as the Eskom company secretary and provided approval for the pre-purchase.

140. Procedurally, Eskom's systems require that a purchase request be made and signed by a purchase requester within Eskom. The purchase request would go to the requester's manager and then to the management accountant. Therefore, Eskom's systems necessitated a purchase requisition for the transaction to be created against the contract in question. There was not enough time before the deadline imposed by Ms Naidoo to load this new contract onto their accounting system. The payment was processed against another contract with Tegeta relating to the Koornfontein Mine after Ms Naidoo's signature on the payment control sheet had been obtained. Mr Nagar and his assistant then loaded the correct contract onto their system and amended the transaction details on the system a few days later to reflect the correct position.

141. The BTC resolution was, therefore, designed to approve Eskom's conclusion of short-term contracts with, amongst others, Tegeta, to supply coal to Arnot Power Station and to make pre-payments to secure the supplies. Mr Koko was authorised to give effect to the resolution. Eskom paid Tegeta the amount of R728 281 861.16 in respect of the three invoices.

142. The large amount was presumably a pre-payment. While Eskom had previously made such pre-payments as an investment in the financial stability of the supplier, those had been made in respect of long-term supply contracts only. In comparison, the Tegeta contract was for five months only. The circumstances of the pre-payment to Tegeta were therefore unusual. Nevertheless, Mr Nagar effected the payment on the strength of the invoice, the approval form signed by Ms Naidoo and the supporting contract.

143. One can conclude that the characterisation of the payment as a pre-payment for coal supplies was a sham. The context in which it was made, its timing, and the urgency with which it was processed all demonstrate that the payment was not made with the purpose of furthering the interests of Eskom. It was made with the purpose of ensuring that the Gupta family's deal to acquire the Glencore coal interests did not fall through due to lack of finance on their part. All those Eskom officials who were party to or facilitated the acquisition by bringing pressure to bear on Glencore to dispose of its coal interests to the Guptas and were party to or facilitated payment of this very large sum of monery are prima facie guilty of theft and ought to face criminal charges.

144. Excluded from the roster of Eskom officials who ought potentially to face criminal charges on this count is Mr Nagar who, on the evidence before the Commission, can legitimately claim that he was following what he regarded as lawful instructions.

145. An issue emerged from the affidavits and testimonies of Minister Ramatlhodi and DG Ramontja, of the DME on the one hand, and Dr Ngubane and Mr Molefe on the other. This relates to a meeting held between these four men where the question of Glencore's mining licenses was discussed. The Minister and DG say that Dr Ngubane called the meeting to persuade Minister Ramatlhodi to suspend all Glencore's mining licenses. Dr Ngubane and Mr Molefe, however, said that Minister Ramatlhodi had suspended Glencore's licenses and the purpose of the meeting was to persuade Minister Ramatlhodi to withdraw the suspensions.

146. The background to this issue is that a stoppage was imposed at Glencore's coal mines arising from a dispute over retrenchments. The issue might very well turn on what precisely the official act was that resulted in the stoppage, when the meeting took place and when the stoppage was lifted. Two versions regarding the lifting of the stoppage were presented in evidence: 7 August and 11 November 2015. If the stoppage was lifted before the meeting took place, then the Ramatlhodi version might well be the more probable. If the stoppage was lifted after the meeting, the Ngubane and Molefe version might be more probable.

147. Dr Ngubane's evidence shows that the entire Eskom Board subordinated their fiduciary duties. The Board attacked Mr Tsotsi who, although he displayed weakness and lack of leadership, was similarly doing President Zuma's bidding against his better judgment. The grounds on which they attacked Mr Tsotsi were that he had proposed Mr Linnell to conduct the enquiry without following procurement processes, advocated for the four executives to be suspended or to step aside and had unilaterally nominated the people to act in the place of the four executives after their suspension.

148. However, these grievances do not address the heart of the matter: that the entire Board chose to subordinate their fiduciary duties to the wishes of government officials. It seems likely that the Board chose to make Mr Tsotsi a scapegoat to mask their own contumacious dereliction of duty. It seems likely that some of the Board members actively sought to promote the interests of the Gupta family, rather than those of Eskom. However, the quality of the evidence is such that it is very difficult to say which of the Board members, with the exception of Dr Ngubane, actively worked against Eskom and which just through ineptitude failed to protect Eskom's interests.

The evidence of Mr Brian Molefe

149. When Eskom fell into crisis in 2014-2015, it was clear that the elite who controlled the public entity regarded Mr Molefe as an exceptional talent. Mr Molefe, a complex character, must have been aware of the esteem in which he was held. When he testified, his political views on economic matters, which he was eager to divulge publicly, put him sharply in the camp of those who condemn the perceived

dominance of so-called white companies (a phrase Mr Molefe used in his evidence) in our economy. There is no reason to doubt his sincerity when he said he believed that Eskom's plight could have been solved, and the country's woes alleviated, by placing Eskom's coal requirements in the hands of numerous small black suppliers. His hostility to President Ramaphosa and to Mr Pravin Gordhan was manifest.

150. However, it seems that Mr Molefe really is, as he believes, a competent executive. His evidence of the improvement of Eskom's fortunes while he was its CEO and thereafter was not disputed. It is hard to believe that a man with so much self-belief was simply, as others were, a mere proxy of the Gupta family. He believes, with some justification, that his career path was not contingent upon anybody's patronage and that his own abilities and reputation had carried him to the heights on which he stood in 2015.

151. Mr Molefe saw Glencore as a malevolent influence on the broader politics of the country and Eskom specifically. Mr Molefe maintains that Glencore funded a press campaign to promote a 'mythical' narrative of state capture to distract attention from the true case of state capture disclosed before the Commission. He quite crudely used the Commission as a public platform to air his views and, possibly to detract from his own involvement in the coordinated action to loot state coffers.

152. It is factually correct to state that Mr Molefe and the Gupta family, specifically Mr Atul Gupta, are friends. He often visited their family home in Saxonwold. It is not necessary to examine the Public Protector's evidence of telephone records, which Mr Molefe claims are inconsequential, to reach this conclusion. We have Mr Molefe's own admission that he and the Gupta family were friends.

153. Considering Mr Molefe's fierce ideological hostility towards Glencore, it is not surprising that he viewed Glencore's predicament with the coal price at which they were supplying the Hendrina power station from the Optimum Mine as Glencore's own fault and not necessarily something which justified an increase in the coal price under the hardship provisions in the Coal Supply Agreement. This hostility potentially clouded his judgement when he concluded that Glencore's "fault" meant that it was not going to be awarded an increase in the pending arbitration. However, it is difficult to believe him when he said that Eskom had contingency plans in place to eliminate adverse consequences flowing from a cessation in supply from the Optimum Mine.

154. Optimum Mine and Hendrina are uniquely connected by a conveyor belt system which moves coal directly from the mine to the power station. If that supply stopped, Eskom would not only have to source new supplies on the open market but would also have to absorb a component of transport costs for every ton of material purchased. Mr Molefe's assertions to the contrary can be dismissed as mere bluster.

155. To further support this conclusion, one only needs to consider the urgent request to approve the pre-purchase of coal from OCM (as controlled by Tegeta) made under the signatures of Mr Singh and Mr Koko, or his representative, in their submission dated 8 December 2015 to the Eskom Board. There, the risks are described as an "erratic display of business instability [which] has compromised the security of supply to the Hendrina Power Station in the short to medium term". Therefore, the risk was serious enough for it to be brought to the attention of the DME. Both Mr Singh and Mr Koko described the prospect of Optimum ceasing to supply coal to Hendrina as having potentially grave consequences for Eskom.

156. As indicated above, Mr Molefe was away from work for medical reasons at this juncture. There is, however, a suggestion that, when he returned to work, he reprimanded those who had authorised the pre-payment to Tegeta or took any steps to deploy the other resources which he had insisted in his evidence justified his heavy-handed approach to the negotiations with Glencore.

157. Upon Mr Molefe joining Eskom in 2015, the Optimum Mine penalty dispute was close to settlement. He proceeded to take immediate steps to end all meaningful settlement negotiations. It can be reasonably concluded that his meetings with Glencore officials were for form alone. He testified, without contradiction, that he had legal advice that he could compel Glencore to continue delivering at the uneconomic R150 per ton. At a purely contractual level this may be correct. However, any

commercial lawyer would have told Mr Molefe that OCM could escape any such liability to deliver by recourse to winding up or business rescue.

158. There is no suggestion that Mr Molefe, or anyone at Eskom, warned the Gupta family that they would be subjected to the same inflexible standards imposed on Glencore. Mr Molefe claims that he only learnt of Oakbay's approach to Glencore in November 2015, when negotiations were at an advanced stage.

159. While audacious, it not implausible that Mr Molefe's assertion that Glencore did business with the Gupta family because, strategically, Glencore chose to do business with them rather than anybody else. Its motive, according to Mr Molefe, was to bring the Guptas into Eskom's orbit and, by so doing, infect Eskom with the public opprobrium the alleged "myth" that the state capture narrative would bring. This must be nonsense. Firstly, Mr Molefe himself effectively eliminated Pembani from the contest to acquire OCM. Secondly, because the state capture narrative has been shown by the evidence led before this Commission not to be a myth, but firmly grounded.

160. One cannot conceive that the Gupta family would not have discussed their plans to take over OCM with their friend, Mr Molefe. Firstly, they were friends with common interests. Secondly, and most importantly, any rational basis for the acquisition would be destroyed unless, after they had taken over OCM, Eskom sharply reduced its penalty claim and accepted a sharply increased coal price. That is exactly what happened.

161. Before Tegeta took over OCM, a reduction in coal price materialised. In due course, the penalty all but evaporated. There is insufficient evidence to link Mr Molefe directly with either the payments or the agreed reduction in penalties. However, the point is that the Gupta family could not have risked the substantial funds needed for the acquisition unless they had received the requisite assurances before they committed themselves.

162. This effectively constitutes an act of state capture, despite Mr Molefe's added motive to wrestle control from OCM, whom he saw as proverbial medieval robbers, and place it in the hands of those he believed, at some stage, to have South Africa's interests at heart.

163. This begs the question: Is Mr Molefe guilty of criminal offence? As the law stands, there is doubt that it does. Mr Molefe was not shown to have had any part in the payments of the more than R700 million to Tegeta in the circumstances described. He was not even examined on the question. One can conclude that there is no ground on which Mr Molefe can be held criminally liable for the payments. However, what society can hold him liable for is that he enabled the Gupta family to capture Eskom. In doing so, he disregarded Eskom's interests and advanced those of the said family.

The evidence of Mr Pamensky

164. There is no direct evidence that Mr Pamensky was appointed to the Eskom Board to serve the interests of the Gupta family. The Gupta "familial" relationships with others can be described as entirely transactional; therefore, the probability that Mr Pamensky was brought into Eskom to provide the Gupta family with inside information is high. There is no evidence to that effect, but it is not improbable that a man with Mr Pamensky's qualifications would be appointed to the Eskom Board unless through powerful influence to get him appointed. He was appointed to the Board in December 2014.

165. The only real evidence that bears upon this topic is the two emails Mr Pamensky wrote to Mr Atul Gupta on 22 November 2015 and 10 December 2015.

166. The first, dated 22 November 2015 is curious: "...[P]lease ensure that a condition precedent [in the agreement] is that the R2bn claim from Eskom is withdrawn or it becomes the seller's problem". It is strange that Mr Pamensky would presume to give his Chairman an instruction related to something that did not concern him. (Mr Pamensky said he had only read about this in the press). Therefore, a central question is why Mr Pamensky would assume that the Gupta family would not have considered the enormous, deal-breaking issue of the penalty claim when they entered their deal. The explanation that this transaction would come up in the investment committee to which Mr Pamensky had been

appointed is unconvincing. A discussion about the deal and its parameters within the committee would perhaps have been appropriate; but not an instruction out of the blue by a subordinate to the chairperson. The likely explanation is that Mr Pamensky knew much more about the OCM deal than he would admit.

167. To substantiate this conclusion, is the email dated 10 December 2015, in which Mr Pamensky wrote: "Congratulations (Mazeltov) on a brilliant and well thought out, planned and strategised acquisition of the Optimum Group of companies". Mr Pamensky could not have known that the acquisition had these attributes; unless he had been privy to the machinations by which it was set up and executed.

168. The opinion on Mr Pamensky's character as a witness is torn. It is unclear whether Mr Pamensky was a true insider who falsely portrayed himself at the Commission as a genial, disinterested Director of ORE and Eskom; and an individual anxious to cooperate with the Commission to the best of his ability. Alternatively, he might merely have served as a sycophant, seeking to advance a not very distinguished corporate career by associating himself with people he thought were powerful, well-connected, and shrewd. It is unclear whether he made a strategic decision to distance himself from the Gupta family and portray himself as a victim because he saw that it had all gone wrong. Perhaps there is other evidence which bears upon this question.

The evidence of Minister Lynn Brown

169. Ms Lynne Brown's testimony was characterised by her inability to remember pertinent facts and to pass the decision-making buck to officials in the DPE or to the Eskom Board. If it is true that she left the decision-making to others, it might show that, while she might have been a less than conscientious Minister, she was not captured by the Guptas.

170. When asked about the Board meeting of 11 March 2015, where the plan for an inquiry into Eskom's affairs was mooted, Minister Brown admits that she was in favour of such an inquiry, if it was independent. While the Board members saw her address to the Board as support for the idea that the executives should be suspended, they for their parts concede that Minister Brown did not actually say that the executives should be suspended. One Board member said that Minister Brown implied that Board members should read between the lines. As such, there was a perception that she was advocating for the suspensions. It appears that all concerned in that decision, including Minister Brown, were trying to read between the lines of everyone else's remarks to support the majority position, whatever that turned out to be.

171. However, there is evidence to support the assertion that Minister Brown was complicit in the ploy to replace four executives with Gupta nominees. Before the Board meeting Minister Brown and President Zuma had a telephone discussion on the topic of Eskom. She owed her Ministerial job to President Zuma and a reading of her character revealed she would have wanted to give President Zuma what he wanted and would certainly not have taken any position she understood to be contrary to his wishes. However, the evidence does not go far enough. There is no evidence of the contents of that discussion, and one cannot say it is proved that President Zuma conveyed to Minister Brown his wish that the executives should be suspended. It might have suited President Zuma not to tell her that part of the plan and to leave the implementation of the suspensions to Mr Tsotsi and such other Board members who knew that the suspensions were part of the plan.

172. In short, the evidence does not justify the conclusion that Minister Brown was proven to have expressly advocated for the position that the executives should be suspended. There is no evidence to show that Minister Brown received money which Mr Tony Gupta described as being paid to all those that helped his family. This counts in her favour. However, it is important to note that the Gupta family did not use the influence they undoubtedly had to replace her with another more willing advocate to misuse the position and powers to advance their interests. The mere fact that a captured person was left in his or her position might be adequate reward in certain instances.

173. The decisive factor in determining whether Minister Brown was a conscious agent of state capture is the analysis of her cell phone records.

174. On 12 March 2015, Minister Brown and Mr Howa or Mr Atul Gupta had a conversation for 48 seconds. Minister Brown initiated the call. She suggested that the conversation might have been about a certain breakfast event. This conversation took place on the day after the Eskom executives were suspended. It would have been an extraordinary coincidence if Mr Howa or Mr Atul Gupta discussed a breakfast event with Minister Brown during this crucial phase of the plan to capture Eskom.

175. The evidence of telephone conversations between Minister Brown and the user of the cell phone belonging to Mr Salim Essa, and, therefore, probably between Minister Brown and Mr Essa, is of a different calibre. The evidence of Ms Brown before the Commission was unequivocal: she did not know Mr Salim Essa and had never spoken to him. However, the records show that she had a total of eight telephone conversations with the user of Mr Essa's cell phone, and therefore Mr Essa, totalling more than 23 minutes. Each of these calls was probably initiated by Mr Essa. Furthermore, Mr Essa probably tried to initiate twelve additional calls, but was unsuccessful. The telephone conversations between Minister Brown and Mr Essa are recorded as having taken place during the period 24 November 2014 to 19 March 2015, after which no more attempts were made from Mr Essa's cell phone to contact Minister Brown.

176. In response, Ms Brown, in an affidavit signed 20 July 2021, stated that she did not know Mr Salim Essa and cannot recall the telephone conversations. She does not dispute that she had conversations with Mr Essa. There is not an innocent explanation for the fact that Ms Brown talked on the telephone with Mr Essa while she was Minister of Public Enterprises on eight occasions. These conversations took place during the period that the Gupta family were affecting their ploy to capture Eskom. This necessitated establishing a Board which would not resist the Guptas' capture initiative and removing those officials who might resist the Gupta capture. That was the period during which the cell phone conversations between Minister Brown and Mr Essa took place. Four such conversations took place on 24 November (two conversations within less than half an hour), 29 November and 1 December 2014, when the appointments to the new Board were being made.

177. One can therefore reject Ms Brown's assertion that she cannot remember the conversations. This can be construed as a deliberate untruth. A key question is thus why she would lie about her cell phone conversations with Mr Essa? The only reasonable conclusion is that she was a witting participant in the Guptas' schemes to capture Denel and Eskom.

The evidence of Ms Daniels

178. It is unclear how early Ms Daniels became embroiled in state capture. Undoubtedly, she knowingly advanced the project to capture Eskom. She did so by sending confidential Eskom material to "Business Man" at the email address infoportal1@zoho.com. She abused her position to cause Eskom to pay substantial legal fees for Dr Ngubane, amounting to R806 425.71, relating to a matter which took place well before Dr Ngubane became associated with Eskom and, as such, had no bearing on Eskom's interests. She allowed herself to be used to enable payments to Trillian, which she knew to be legally unjustified. She motivated the appointment of McKinsey and Company, pursuant to a sole source process when she ought to have known that an open competitive process was required. She was party to the approval of a payment by Eskom of R134 million that she knew to be unlawful. She was party to the creation of documents which created the cover for paying Tegeta R700 million ostensibly as pre-payments for coal supplies to Eskom. This was to enable the Guptas to raise the shortfall in their resources which they needed to pay the purchase price on their transaction by which they bought Glencore's South African coal interests

179. It is therefore dangerous to rely on her uncorroborated evidence to make any factual finding, unless such a finding is supported by strong probabilities. One can corroborate Ms Daniels evidence regarding her meeting with Mr Koko and Mr Essa at Melrose Arch in March 2015. Two impressive witnesses, Ms. Dlamini and Mr Masango support this, and in turn, these two witnesses are supported by other credible witnesses.

180. Professor Louwrens, an IT expert, analysed metadata associated with the pre-suspension letters sent to the four suspended executives. Professor Louwrens' evidence demonstrates that Ms Suzanne

Daniels and Mr Salim Essa worked on these letters. While it is possible that some malicious person altered the metadata to reflect these names, it is a small probability. One can therefore conclude that Ms Daniels probably drafted the letters. It was her function to do so and the metadata records that she was the creator of all four letters. It is probable that Mr Essa worked on the documents created by Ms Daniels.

181. Thus, one can conclude that Ms Daniels allowed herself to be enlisted in the Gupta family ploy to capture Eskom.

The evidence of Mr Koko

182. Mr Koko was exceptionally argumentative, verbose, and repetitive. He used the Commission as a platform to air his grievances against the media. He repeatedly insinuated that Glencore was in league with President Ramaphosa to advance their interests to the detriment of Eskom and South Africa. He continually attacked persons and institutions critical of him. He regarded the opportunity given to him to testify as a proverbial duel between himself and the evidence leader.

183. There are established considerations that can be used to judge Mr Koko's evidence. Firstly, at the conclusion of the Durban meeting attended by, amongst others, President Zuma, and Ms Myeni, they had accepted the strategy of the proposed enquiry into the affairs of Eskom and the immediate suspension of Eskom executives. Secondly, between 9 and 10 March 2015 Mr Koko called Ms Dlamini, Mr Masango and Ms Daniels individually to a meeting at Melrose Arch with the purpose to meet Mr Essa at his offices there. They were required to hand over their cell phones. In the presence of Mr Koko, the inquiry into the affairs of Eskom and the suspension of four Eskom executives was disclosed to the attendees. Ms Dlamini and Mr Masango were each asked if they would take up an acting appointment in the place of one of the persons to be suspended. Ms Daniels was asked about the procedure for suspending executives at Eskom. Mr Koko denied that there were any such meetings with Mr Essa, or about the forthcoming suspensions. As there are three witnesses to the Melrose Arch meetings, one cannot believe Mr Koko's testimony.

184. It is important to establish whether Mr Koko received a reward for his actions in advancing the Gupta family's ploy. Between December 2015 and January 2016, Mr Koko and his family travelled abroad, first to Bali, Indonesia, and then at least some of his family went to Dubai before returning to South Africa. However, the documentation in this regard is equivocal. It seems as if Mr Essa was at pains to create a paper trail linking Mr Koko's travel financially to Sahara, a Gupta business.

185. What is not of concern is whether Mr Koko and his family travelled; rather it is whether the Gupta family and Mr Essa paid for Mr Koko and his family's travel. Mr Koko produced evidence that he and his family paid for their travel. The evidence in this regard was contained in an email dated 3 March 2021 from Vanessa De Stefano of Thompsons t/a The Travel House to Khomotso Koko in which she recorded having received two payments from FNB from someone on behalf of Mr or Mrs Koko for R113 000 on 17 November (2015) and R270 800 on 25 November (2015). It is an extraordinary coincidence that Mr Koko could take his whole family overseas after being so helpful to the Gupta family. The air tickets alone cost over R300 000. However, the evidence does not justify the conclusion that the Gupta family paid for the tickets or indeed for any part of the excursion.

186. One may allege that the apparent duplication of payments is evidence of money laundering. However, it is not established that Mr Koko was a conscious party to any such criminal conduct.

187. One also needs to consider the evidence of the emails linked to the infoportal1@zoho.com email address. It is established that Mr Essa used this email under the alias he gave himself or used, namely "Business Man", Businessman, business man, or businessman. The username is user generated and may be changed by the user at will. A correspondent writing to infoportal1@zoho.com could on his or her system choose to link any display name chosen to this or any other email address. This is so well known that I think the Commission can take "judicial" notice of it.

188. However, it was not established whether Mr Essa was the only person who used this email address. Any person who knew the email password in the server to which it was associated could open an

email account on his or her own device using the email address infoportal1@zoho.com and assign his or her own username to the account. That account could as easily be “Business Man” as any other username. What is certain, however, is that the address was not used by Dr Ngubane, Ms Daniels, or DG Seleke.

189. Mr Koko maintained that Ms Daniels deceived him into believing that when he wrote to “Business Man” at the email address infoportal1@zoho.com, he was, in fact, writing to Dr Ngubane. Considering Mr Koko’s proven participation in the ploy to oust the four executives, one cannot believe Mr Koko’s evidence in this regard. Mr Koko, consistent with his decision to become a Gupta agent, was feeding Mr Essa with information to enable the Gupta family to advantageously position themselves in relation to Eskom’s affairs in general, and, specifically, to take over of Glencore’s coal interests. Email evidence demonstrates this.

190. Mr Koko’s participation in the ploy to capture Eskom through removing four executives and installing Molefe and Mr Singh is, however, different. Mr Koko might have seen this scheming as a campaign in which he enlisted the Gupta family rather than the other way around. But in that regard, one can conclude that Mr Koko has been proved to have been complicit in the capture of Eskom by the Guptas.

191. Mr Koko denied ever having telephonic communication with Mr Essa or any of the Gupta brothers. The Commission obtained records as evidence of calls passed between cell phones used by Mr Koko and his wife, on the one hand, and Mr Essa and Mr Atul Gupta, on the other hand. This evidence was put to Mr Koko in a directive issued in terms of Reg 6 (10) of the Regulations of the Commission. In response to this, on 28 July 2021 Mr Koko, in an affidavit, repeated his denial of any telephonic communication with Mr Essa or any of the Gupta brothers and added: “The same applies to my wife”. Between 30 March 2015 and 16 May 2016 there were calls between Mr Koko’s and Mr Essa’s cell phones.

192. Mr Koko’s 6th affidavit signed on 27 July 2021 repeats old evidence, but also presents new information. It is exceptionally argumentative and difficult to summarise:

    192.1 Mr Koko alleges that President Ramaphosa exerted pressure on the Eskom Board and was captured by third parties.

    192.2 Furthermore, he denies the Gupta family’s or their associates capture of Eskom. Mr Koko states that he was unaware of anything in relation to state capture at Eskom. He maintains that he acted in the best interests of Eskom, referencing five instances where he refused to agree to arrangements that might have been in the Guptas’ interests.

193. Mr Koko pointed to the draft suspension letters created by Ms Daniels on 10 March 2015 and saved by Mr Essa on the same day. He denies any involvement in the suspension letters but cannot explain how one of the predecessors to the suspension documents, relating to the Sekhasimbe suspension, was found on his computer. No conclusions adverse to the witness were drawn from this evidence.

194. He further asserts that Mr Linnell’s evidence contradicts the “narrative" of conspiracy to suspend four executives. This is because Mr Koko was “central to Mr Tsotsi’s thinking regarding who had to be suspended”. Furthermore, Mr Matona and Mr Marokane “were suspended for their association with [Mr Koko]”. However, Mr Tsotsi merely implemented an instruction from President Zuma as to who had to be suspended.

195. Mr Koko devoted considerable time and energy to making the case that Glencore received preferential treatment as a coal supplier to Eskom. He attempted to cast doubt on Mr Ephron’s version that Glencore had only publicly available information regarding the OCM CSA with Eskom. He produces no evidence in support of that argument, merely asserting that Mr Ephron’s version is so highly improbable that it must be false.

196. Mr Koko further argues that Eskom legitimately refused to settle with Glencore in relation to the penalty and coal price increase issues. It is not possible to determine to what extent, if at all, Eskom was justified in its decision not to settle with Glencore. What is clear is that the decision to hold out for the full penalty and to refuse any coal price increase was not adhered to once the Guptas, through

Tegeta, took control of the Optimum Mine.

197. Mr JA Bester, who was involved in the Glencore negotiations as an Eskom representative, contradicts much of what Mr Koko says in relation to Glencore's alleged preferential treatment received. It is futile to analyse their points of disagreement.

The evidence of Mr Anoj Singh

198. Between 2014 and 2017, Mr Singh appears to have travelled to Dubai, often with his partner, now wife, Ms Naik on seven occasions. One of these trips, he said, was on official business for Transnet, and as such the public entity paid. The others were private trips, all booked through Travel Excellence. In each case, Travel Excellence charged the ticket to the account of Mr Essa and the fee due was thereafter paid in cash. It is accepted that one of the journeys was made on behalf of Transnet. The issue was whether Mr Singh paid for the other tickets booked for him from his own funds.

199. Mr Singh admitted that he, and occasionally Ms Naik, were beneficiaries of the other tickets booked. He stated, however, that he did not know why the tickets were charged to Mr Essa's account. He said he always paid for these tickets in cash or in some other electronic form. He could not produce any records to substantiate his version. He claimed that he no longer had access to his accounts because of SARS interventions. This is an inadequate excuse for not producing proof. He could easily have brought the records to the Commission under subpoena, but his legal representative, so vociferous in other aspects, was curiously supine in this regard.

200. Questions of affordability of these trips, given Mr Singh is an employee in the public sector is crucial. This is especially so, as Mr Singh had paid cash for these trips, there needs to be a record of where this cash came from. Mr Singh was not examined on these questions. Furthermore, why were the tickets charged to the account of Mr Essa unless Mr Essa was to be responsible for the payments?

201. There is sufficient evidence to conclude, on the balance of probabilities, that Mr Essa funded the tickets. If that is so, then the tickets must have featured as rewards for services rendered, i.e., for promoting the Gupta family's interests in relation to Transnet and Eskom.

202. The April 2016 payments of R700 million is a cause of concern. One cannot accept that these were pre-payments for coal to be delivered. Once it is accepted that Messrs Molefe, Koko, and Singh were Gupta agents, prepared to do the Guptas' bidding when called to, then the possibility that any of them did not know that the money was required to complete the purchase of shares transaction is small. There is no suggestion that any of them was misled as to the true purpose for which the money was needed.

203. One can therefore only conclude that Mr Singh was guilty of the theft of this money from Eskom by false pretences. He led Eskom, through the officials who processed the payments, to believe that the payments were pre-payments for coal, when in fact they were needed to enable the Guptas to complete and save the share transaction.

The evidence of Mr Zwane

204. Many emails submitted as evidence demonstrate that Mr Zwane had an improper relationship with the Gupta family. One can only infer that that he was an agent in their state capture schemes. The broad difficulty with this evidence is that while inferences may be drawn from the content of emails, there is little or no direct evidence of Mr Zwane's improper involvement in their schemes. For example, regarding the inference properly arising from an email that Mr Zwane attended a Gupta wedding in December 2013, Mr Zwane denied that he attended any Gupta wedding. The emails in that regard certainly show that the Gupta family invited and wanted Mr Zwane to attend the wedding. But they do not show that Mr Zwane attended the wedding, and no witness came forward to say that Mr Zwane was in fact there.

205. Mr Zwane invited Mr Yadav, a minister in the government of Uttar Pradesh, to visit South Africa in March 2013. The invitation was extended after the South African Minister of Defence did not authorise

an aircraft bringing guests to the Gupta wedding from India to land at the Waterkloof Air force Base. Through untoward dealings, the Gupta family received permission from the Chief of State Protocol, Mr Koloane, for the aircraft to land at the base. Mr Yadav was apparently a Sun City wedding guest. The suggestion is that the presence of this personage and perhaps other Indian officials on the flight was part of the ploy to get the flight landed at Waterkloof Air Base.

206. As demonstrated through an email exchange on 11 March 2015 between two employees of Sahara Computers, the letter of invitation to Mr Yadav was settled by Sahara Computer officials. This letter was sent to Mr Zwane for reproduction on his official letterhead and sent to Mr Yadav. The difficulty is that two drafts of the letter of invitation were presented with this evidence, one dated 8th and the other dated 11th March 2015. There is no evidence identifying the letter that was sent by Mr Zwane. If Mr Zwane's letter predated 11 March 2015, then the force of this contention will be much diminished.

207. Email evidence also shows that Mr Zwane travelled to Dubai and Delhi in September 2014, and that Sahara Computers arranged and paid for this trip. An itinerary was put to Mr Zwane showing that his tickets were booked for the same trip as undertaken by Mr Tony Gupta, Mr Essa, and Mr Rajesh Gupta. Mr Zwane said that he did not remember seeing Mr Tony Gupta on the flight. All these people followed the same itinerary, from Dubai to India to Dubai to Zurich to Dubai to South Africa.

208. Some context is also needed regarding the purpose of Mr Zwane's travels to Zurich, Switzerland in December of 2015.

209. On 1 August 2015, a businessman, Mr Oupa Mokoena of Koena Consulting and Property Developers, emailed Mr Tony Gupta the CV of Mr Zwane. Tony Gupta forwarded the email, with the attached CV, to Mr Duduzane Zuma. Mr Zwane was sworn in as a member of the National Assembly on 2 September 2015. Although he had virtually no experience in national government and none in mining affairs, President Zuma appointed Mr Zwane as Minister of Mineral Resources on 22 September 2015. Given Mr Zwane's proven track record of receiving largesse from the Gupta family, the inferences are irresistible that the Gupta family persuaded President Zuma to appoint Mr Zwane to this ministerial portfolio. It must have been clear to Mr Zwane that he was required to use this influential portfolio to help the Gupta family capture Glencore's coal interests.

210. The choice of his advisors further reinforces this. Mr Zwane appointed Mr K Moodley and Mr M Mabaso, both with proven business links to the Gupta family, but with little or no qualification to serve as advisors to the Minister of Mineral Affairs.

211. It is important to remember that in this context a proven technique the Gupta family uses is to have highly placed public and government officials on hand when seeking to enlist support for their schemes, and so that they can demonstrate their power and reach. This is evident in that Mr Tony Gupta often brought Mr Duduzane Zuma to meetings with third parties, even though Mr Duduzane Zuma did not contribute much value to these meetings.

212. One can thus conclude that the evidence proves that Mr Zwane improperly promoted Gupta interests while he was an MEC in the Free State and as Minister of Mineral Affairs was a willing and conscious participant in the Guptas' capture of Eskom.

BRAKFONTEIN COLLIERY

213. On 10 March 2015, Eskom concluded a Coal Supply Agreement with Tegeta for the supply 13,950,000 tons of a blend coal, from Tegeta's Brakfontein Colliery (the Brakfontein Colliery). The agreed contract price was R3.7 billion for a ten year period (1 April 2015 – 30 September 2025). Of relevance is the fact that the mine was owned by Tegeta, a Gupta-owned entity, whose directors were, amongst others, Ms Ragavan, Mr Ravindra Nath and Mr Ashu Chawla.

214. From around 2011, Tegeta (and its predecessor, Idwala Coal Crypts [Pty] Ltd) approached Eskom several times to get coal supply contracts; first from their Vierfontein Colliery (Vierfontein) and later from their Brakfontein Colliery. According to Mr Johann Bester, the then General Manager for Fuel

Sourcing within the Primary Energy Division (PED) at Eskom, Vierfontein was considered an unsuitable supplier due to environmental compliance issues. Furthermore, Eskom's coal procurement team were wary of how they dealt with Tegeta. This was because they were aware the company was linked to the Guptas, and there was political pressure to engage with them that "may have come from above."

215. Around 2012 initial approaches were made to Eskom to contract for coal from the Brakfontein mine. However, Tegeta's name was not used, but rather entities using the names "Goldridge", "Arctos" and "Idwala Crypts". Mr Johann Bester termed these entities as "frontmen". Eskom was unable to continue negotiations with Brakfontein, due to non-compliance with water licence requirements. However, on 22 December 2014 a water use licence was signed off for Brakfontein.

Internal pressure on Eskom officials

216. In March 2014, Mr Johann Bester was required to urgently call the entire Primary Energy Division (PED) team together to meet the then Eskom Board Chairman, Mr Tsotsi. This was in spite of some of his team members being located across Mpumalanga which meant that they would struggle to get there that day. Mr Tsotsi apparently berated the team for 20 minutes, complaining about two issues: (1) they were frustrating black-owned transporters and putting Eskom at risk, and (2) they were frustrating emerging miners.

217. Mr Bester testified that, when they exited the meeting, the then Head of PED, Ms Kiren Maharaj, informed him that there was a lot of toxicity amongst the Executive team at that stage and that they had to be very careful. Mr Bester mentioned that Ms Maharaj was very principled and would not soften her demands for coal transport cost savings, which made for many enemies. She would later be pushed out of Eskom, with none other than Mr Koko as the driving force behind her forced exit.

218. Mr Bester stated that Ms Daniels informed him that Mr Tsotsi was unhappy with the progress on the Coal Supply Agreement for Tegeta / Brakfontein as well as the cost savings that Ms Maharaj wanted to secure on coal road truck transporting. Mr Bester described that he and his colleagues were "gobsmacked as to the complete lack of respect for proper protocol" and that it was abnormal for a chair to address staff directly.

219. Mr Koko testified that Ms Daniels also came to him and said that the contract that Mr Tsotsi told staff they were delaying was the Tegeta-Brakfontein contract. Mr Bester recalled that, when Mr Vusi Mboweni took over as Acting Head of PED, he attempted to interfere with the progress of technical teams in coal sampling and site visits. Mr Bester had counselled him that the teams should be allowed to do their job and was concerned about the impact of applying such pressure on them.

Eskom's Primary Energy Division

220. Critical responsibilities of Eskom's PED include, inter alia, coal sourcing which falls under the Coal Operations division (Coal Operations). Within Coal Operations there is a division known as Fuel Sourcing, which is responsible for coal procurement. Once coal has been procured and the contracts signed, the said contracts are handed over to Coal Operations for management.

221. Coal Operations is responsible for managing coal contracts. By way of example, Coal Operations ensures that the coal procured and delivered at the relevant power stations meets the specifications for the said power stations as per the coal contracts signed between Eskom and the service providers. PED was then a division of Group Technology and Commercial, headed by Mr Koko from 2014.

222. In 2011, Ms Maharaj was appointed the Divisional Executive of PED. Following her suspension in July 2014, Mr Koko asked Mr Mboweni, then Senior General Manager: PED, to act in her position. Mr Matjila, the then-acting Group CEO telephoned Mr Mboweni with the same request Mr Mboweni accepted, effective 07 August 2014.

Tegeta's offer and negotiations with Eskom in 2014

223. Following numerous failed attempts 2012 to secure coal supply contracts, Tegeta approached Eskom in 2014 with an unsolicited offer to supply coal. Various meetings ensued between Eskom's officials and representatives of Tegeta, in the name of Goldridge Trading (Pty) Ltd, who had advised that Goldridge was the owner of the Brakfontein mine through Tegeta. Tegeta later explained that Goldridge was not the owner of the mine, but a contractor at Brakfontein.

224. About six meetings were convened between May 2014 and January 2015 before concluding the Coal Supply Agreement on 10 March 2015.

225. Dr Ayanda Nteta chaired the meetings on behalf of Eskom that took place in 2014. She was accompanied by various Eskom officials at each meeting. Mr Nath and Mr Satish Mudaliar represented Goldridge / Tegeta. These meetings focused principally on the evaluation and assessment of Tegeta's documentation relating to its unsolicited offer to supply coal to Eskom in order to determine what Tegeta's coal service entailed and whether it was aligned with Eskom's coal quality and quantity. The 2014 negotiations led to a formal offer letter from Tegeta, submitted to Dr Nteta, on 23 September 2014. The 2014 meetings and negotiations, including the formal offer Tegeta made in September 2014 (which is more fully considered below), all took place in circumstances where the Eskom officials were failing to comply with Eskom's policies.

Procedural flaws

226. The procurement of the coal supply from Brakfontein Colliery was secured by means of an unsolicited offer outside of a competitive tender process. This process, although permissible in terms of the Eskom Procurement and Supply Management Procedure: 32-1034 (the procurement procedure), had to comply with clause 3.4.5.8 of the Procurement Procedure which required unsolicited offers to be referred to the Supplier Development and Localisation (SDL) Department for supplier pre-qualification and registration. Only once evaluated and pre-qualified would the supplier be given a vendor number confirming registration on the Eskom supplier database allowing it to be considered for any future tenders/enquiries.

227. Further, the procurement procedure enjoined Eskom employees approached with an unsolicited offer to immediately refer the supplier to the SDL Department within the Group Commercial Division to engage in this registration process without further representation, engagement or commitment.

228. Dr Nteta and team did not comply with these Eskom policy requirements were as she and her team failed to refer Tegeta's unsolicited offer to the SDL Department for supplier pre-qualification and supplier registration, without making any further representation, engagement or commitment to Tegeta. Dr Nteta and her team engaged Tegeta, ultimately committing Eskom to Tegeta's unsolicited offer with referral for pre-qualification and registration.

229. Eskom officials asserted that the Tegeta offer was negotiated and accepted pursuant to a mandate to negotiate and conclude contracts on a medium-term basis for the supply and delivery of coal to various Eskom power stations for the period October 2008 to March 2018, dated 11 September 2008 (2008 Medium Term Mandate), as well as the Board Tender Committee decision on 03 December 2010 to extend and expand that mandate to contract for the life of the mine, extend current contracts and confer powers on the Divisional Executive, PED, with powers to sub-delegate and to execute the Board Tender Committee decision (2010 Medium Term Mandate Extension).

230. In terms of the above position, Eskom introduced a "medium-term mandate" in 2008 that allowed coal to be procured until 2018 on a one-to-one basis, as opposed to an open tender process. In 2010 the term was extended to apply to the remaining life of the mine, in certain cases. The Board Tender Committee essentially gave upfront approval to do this after there were coal shortages in 2008 that contributed to load-shedding. This apparently led to blanket emergency procurement provisions being instituted.

231. The Mid-Term Coal Supply Strategy and the 2010 Medium Term Mandate Extension specified Contracting Principles and Standards for the negotiating teams and coal supply agreements and standards for the processing of contracts in the areas of, inter alia, legislative compliance, coal quantities, coal qualities, price and contract price adjustments. In terms of these principles, Eskom was precluded from contracting with suppliers who did not operate legally. Suppliers were required to give warranties that they had sufficient coal reserves to meet contractual quantities. A supplier's stockpiles needed to be pre-certified and its coal had to comply with the coal quality requirements specific to the power station. Suppliers had to commit to Eskom's Coal Quality Management Procedure (CQMP) and Eskom had the right to monitor and audit compliance with the CQMP on a monthly basis. An Eskom-appointed independent laboratory would do an analysis of the contractual samples.

232. During the negotiations, the Eskom officials raised concerns regarding Tegeta's mining activities taking place in close proximity to a stream that was a sensitive environmental area. Eskom officials requested Tegeta to provide an authorisation from the relevant authorities allowing mining to take place through a wetland and diversion of a stream. Tegeta acknowledged that mining was taking place very close to a stream and that it had been fined for contravening environmental regulations. However, Tegeta subsequently sought to change this position by explaining that the mine referred to was Vierfontein and not Brakfontein.

233. Eskom engaged Tegeta until 22 December 2014 on their proposal and subsequent written offer in September 2014. At this time, Tegeta did not have a water use licence and could therefore not conduct mining activities. The Department of Water and Sanitation determined that Tegeta had failed to comply with certain conditions of their water license after the Water Use License was issued. When Eskom requested a recently mined sample for quality testing, Tegeta officials explained that the mining was suspended to sell the existing stockpile before recommencing any mining. Its explanation for the suspension of mining was questionable.

234. The size of Tegeta's stockpile was estimated at 70,000 to 75,000 tons. Eskom officials expressed concern with Tegeta's coal quality throughout the negotiations. Eskom required the supply of a total quantity of 65,000 tons of a blend of Seam 4 Lower (S4L) and Seam 4 Upper (S4U) coal for its Majuba Power Station. Eskom's chemical test results of Tegeta's coal samples showed that both S4U and the blended product (of S4U and S4L) did not meet specifications. Only S4L was compliant, but for other Eskom power stations and only marginally for the Majuba Power Station. However, if only S4L could be used, the resource estimate was insufficient to sustain the quantity required for the Majuba Power Station over the life of the contract.

235. Despite the above issues, Eskom officials negotiated a price with Tegeta for both S4L and the blended product, even though the blended product was not suitable for Eskom's Majuba Power Station. Tegeta had initially requested R17 per Gigajoule (GJ) for S4L and R15/GJ for the blended product, which Mr Bester regarded as too high when compared to other coal suppliers for similar specification coal. Tegeta's revised offer was R13.50/GJ on a five-year contract, supplying 65 000 tons per month from Brakfontein. This revised offer was made at the meeting of 30 January 2015 to which Eskom agreed, with a proposed start date of 01 April 2015, but subject to a successful combustion test. Tegeta never passed the test.

236. The final conclusion of the agreement was on 10 March 2015, with different terms regarding contract price, contract duration and coal quantity.

Tegeta's first written offer to Eskom

237. On 23 September 2014 Tegeta submitted what it called a commercial offer to Eskom, by email from Mr Mudaliar to Dr Nteta (also referred to by her previous surname "Ntshanga"). This offer followed the meeting held on the same day, 23 September 2014, and was in a letter signed by Mr Nath.

238. During October 2014 Tegeta made a last-ditch attempt to have S4U coal samples accepted by Eskom. The alleged new samples still failed the chemical analysis test. On 06 November 2014 Mr Nath sent an email to Dr Nteta in which he inquired if Eskom had finalised reviewing the master Coal Supply

Agreement. Dr Nteta replied the next day, on 07 November 2014, providing Tegeta with a template of a Coal Supply Agreement for its input, and explaining that the provision of the template did not in any way create an obligation on Eskom's part to purchase the coal from Tegeta, either then or in the future. Dr Nteta maintained this position before the Commission and explained that she provided the template to Tegeta "so that they could familiarise themselves with it as new suppliers to Eskom". However, Ms Daniels said that it was irregular for Eskom to provide an editable version of the template to a supplier for input. Ms Daniels said that a Coal Supply Agreement could be shared only after it had been finalised and in a PDF format.

239. Mr Bester explained that the Brakfontein contract was a relatively small medium-term contract of 10 years or less. He said that ordinarily, the managers themselves would be able to conclude negotiations for such a contract but in this case the negotiations apparently proved difficult and protracted. This apparently moved Mr Mboweni to instruct Mr Bester to intervene and conclude the negotiations with Tegeta by the end of the week ending 30 January 2015, the previous negotiations meeting having taken place on 23 January 2015.

240. Dr Nteta arranged for Mr Bester to meet with Mr Nath on Friday 30 January 2015. The meeting was convened at Eskom. Mr Bester said that he found it unusual for PED to meet suppliers in the Executive Suite when there was no Eskom executive involved. This suggested to him that "Tegeta was clearly getting special treatment" and that "the stakes were high". Mr Mboweni had told Mr Bester not to agree to a price higher than R15 a GJ; and in the meeting Mr Bester offered the Tegeta representatives R12.50 a GJ. In response to Mr Bester's offer, Mr Nath and his team excused themselves from the meeting to make a call to Tegeta's board of directors to obtain a mandate to adjust their initial coal price of R17.00 p/GJ. Mr Bester went back to his office.

241. Before the meeting could reconvene, Dr Nteta informed Mr Bester that there had been "a lot of shouting" at the Executive Suite between senior Eskom management, and that "people were very upset". At resumption of the meeting, Tegeta made a counter-offer of R13.50 per GJ, which Mr Bester accepted, for a five-year contract to commence on 01 April 2015.The conditions included BEE compliance, compliance with technical coal requirements and a combustion test, compliance with all Eskom policy and procedures (including Vendor registration) and Eskom having a right of first refusal to additional coal from Tegeta's adjacent property (called Brakfontein Extension Colliery) that was still being developed. All this was confirmed in Mr Bester's letter to Mr Nath dated 12 February 2015.

Tegeta's increased offer

242. Email exchanges between Mr Nath and Mr Rajesh "Tony" Gupta show that they were not happy with Eskom's stance in refusing to commit to a 10-year contract and responded by email dated 13 February 2015, addressed to Dr Nteta. In the said email, Mr Nath made certain statements and proposals to have the offer amended. He explained that Tegeta required a 10 year contract in order to satisfy its funders, as Tegeta's loan period was going to be for more than seven years; that Tegeta would in the initial five years of the Coal Supply Agreement supply 65,000 tons from Brakfontein Colliery and in the remaining five years, supply coal from Brakfontein Extension Colliery. He proposed, inter alia, the following changes to Mr Johann Bester's offer of 12 February 2015, which were all later accepted by Eskom:

    242.1 Changing the Coal Supply Agreement term from 5 years to 10 years (clause 10.4 of the Coal Supply Agreement).

    242.2 Supplying coal from both the Brakfontein Colliery and Brakfontein Extension Colliery (clause 2.1.37 of the Coal Supply Agreement).

    242.3 Keeping the coal quantity at 65 000 tons p/m from April 2015 to September 2015 but increasing it to 100 000 tons p/m from October 2015 to September 2020, when the Brakfontein Extension became operational. Eskom increased the quantity to 113 000 tons p/m (clause 10.4 of the Coal Supply Agreement); and

    242.4 Deleting one of the conditions in Mr Bester's letter requiring compliance with Eskom's technical

requirements and confirmation that Brakfontein Extension could produce saleable tons prior to the contract being extended to 10 years (under clause 14 of the Coal Supply Agreement).

242.5 Mr Bester relented and agreed to all the changes proposed by Tegeta and, in fact, offered more.

243. On 10 March 2015, Mr Mboweni signed the Coal Supply Agreement on behalf of Eskom and Mr Nath signed it on behalf of Tegeta.

244. Mr Bester testified that Eskom's coal supply agreements were long and complex, and that normally he would not expect a new counterparty to sign within three months because they were not experienced with the contracts. Mr Johann Bester believed that the pressure on Mr Mboweni was coming "from above".

245. The Coal Supply Agreement was thus concluded despite the following:

245.1 No financial assessment had yet been done on Tegeta when the contract was signed on 10 March 2015. In fact, KPMG compiled a financial assessment just a month later in April 2015, which stated that Tegeta: "is not relatively sound enough financially to be awarded a contract of R4.3 billion for the supply of coal to Majuba Power Station over a period of ten years". Mr Mashigo, former Acting Head of PED, confirmed that the assessment should have been done beforehand, and had that been done, the contract would "definitely not" have been entered into. It is notable that Tegeta did indeed stop supplying coal to Eskom in February 2018, as it was placed under business rescue, only three years into the 10-year contract.

245.2 In addition, the mining right for Brakfontein (not the extension) was due to expire in October 2020, well before the expiry date of the 10-year contract, that is, 31 March 2025.

245.3 The mining right for the Brakfontein Extension Colliery was valid from March 2014 to March 2024, but was not yet being mined at that time nor was the coal tested to establish what kind of coal quality Eskom would receive and whether it was suitable for Eskom's Majuba Power Station.

245.4 The Brakfontein coal had previously been subjected to technical tests and failed these initial tests, save for the S4L coal, which was found to be suitable for use only at certain power stations.

246. Mr Bester observed that the date when the Coal Supply Agreement was signed, 10 March 2015, was the day before four Eskom senior executives were suspended.

Brakfontein coal still fails the test

247. The Coal Supply Agreement was subject to a condition that Tegeta conduct a successful combustion test by 16:00 on 31 March 2015. However, this was not done, and it appears that no one at Eskom checked this, including Mr Bester, who stated in his affidavit that he and Eskom Legal had incorporated conditions into the Coal Supply Agreement in order to protect the entity. He resigned from Eskom on 20 July 2015, the day when Mr Koko returned from suspension.

248. Clause 10.2.1 of the Coal Supply Agreement specifically required Tegeta to have completed and reported a successful combustion test by not later than 31 March 2015, failing which the remaining provisions of the Coal Supply Agreement would never become effective. The net result is that, in the absence of compliance by Tegeta (or waiver by Eskom, for which there is no evidence that Eskom did exercise), the Coal Supply Agreement never came into effect.

249. Mr Gert Opperman explained during his evidence that the usual approach was for a combustion test to be done before signing a coal supply agreement to check that the coal was of a suitable quality for the power station intended to be contracted for. It is unusual, he said, to put a condition precedent in a contract that by a certain date and time such a test needs to have been done. The test had to be done prior to signing of a coal supply agreement in order to determine the suitability of the coal prior to the conclusion of the agreement. All the due diligence that needed to be done in order to sign a new contract with a mine is the responsibility of the Fuel Sourcing team in PED. Only once the contract is signed and ready for implementation, does it get handed over to the contract management team.

250. Eskom's failures did not end there. Eskom also failed to enforce a clause marked 22.10 (immediately under clause 23) of the Coal Supply Agreement. This clause required drainage tests to be conducted by not later than 30 days after the first Delivery of Contract Coal. This was important to determine the Equilibrium Moisture content of coal and the stockpile drainage period required for coal to attain such Equilibrium Moisture. The first delivery of coal from Brakfontein was on 07 April 2015. The minutes of the monthly technical liaison meeting dated 13 May 2015 show that a date for drainage tests still needed to be scheduled. This meant that Eskom and Tegeta had failed to conduct drainage tests within 30 days after first delivery of coal. Mr Mashigo confirmed in his affidavit that the test was abandoned after inconclusive results.

251. Eskom failed to enforce clause 22.2 of the Coal Supply Agreement, which required the supplier to have acceptable auto-mechanical sampling equipment for the purposes of sampling and analysing coal to determine its quality. The auto-mechanical sampling equipment was not available for a period of more than 12 months from 1 April 2015. The minutes of the monthly technical liaison meeting dated 10 February 2016 confirm this non-compliance.

252. Eskom failed to strictly enforce clause 14 of the Coal Supply Agreement, which required that "Contract Coal to be supplied from both Brakfontein and Brakfontein Colliery Extension must at all times comply with Eskom's technical and coal supply agreements." The clause provided further that "if these requirements do not render compliance for supply to Majuba Power Station, Eskom reserves the sole and exclusive right to call upon a material breach, as provided for in this Agreement." Despite delivery of non-compliant coal by Tegeta, Eskom failed to exercise this right.

253. Eskom continued, after the conclusion of the Coal Supply Agreement, to conduct coal analysis and combustion tests in respect of the blended coal samples that Tegeta proposed to supply to Eskom. This was after various coal analysis results, in June 2014 and October 2014, in respect of the same blended coal samples, had indicated that the blended coal was not suitable for Majuba Power Station. Presumably, Eskom wanted to find justification for concluding the Coal Supply Agreement in respect of the non-compliant blend product. 41. Two technical tests were conducted, and the results recorded in two reports, one dated 12 March 2015 and the other April 2015. The March report concluded that sending a mixed Brakfontein S4U/S4L blend to, *inter alia*, Majuba Power Station was not recommended, as there was a high probability that the mix would frequently exceed Majuba rejection specifications. The April report also recommended that only S4L be sent to Majuba Power Station and not the S4U.

254. The above demonstrates that Eskom, acting in patent breach of the Coal Supply Agreement, allowed Tegeta to make deliveries of blend coal without prior confirmation that the coal was compliant with Eskom's quality specifications. The full combustion test that would have determined the quality of the coal and its suitability to the Majuba Power Station was not done, as required by clause 10.2 of the Coal Supply Agreement and was ultimately removed as a condition of the contract. On 20 April 2015 Mr Gert Opperman took over as the contract manager for the Brakfontein supply to Majuba Power Station.

Removal of combustion test requirement

255. Just a little over a month after the Coal Supply Agreement came into effect, Eskom and Tegeta agreed to amend the coal quality specifications in the Coal Supply Agreement and effected the amendment by way of a First Addendum to the Coal Supply Agreement. The agreement was reached in a letter signed by Mr Bester on 12 May 2015. A comparison of this letter with Mr Bester's letter of 12 February 2015, reveals that a clause requiring "full combustion tests to be conducted on all proposed coal prior to delivery and acceptance by Eskom" was omitted from his letter of 12 May 2015. The clause had been included in the original contract using double asterisks and a footnote; but now was excluded.

256. When asked about this exclusion or omission of the clause, Mr Bester said that he could not recall the instance specifically and speculated that "there may not have been a specific intention to remove that clause", if the intention was simply to replace the table of quality specifications. Notably, another clause that used a single asterisk and a footnote had not been removed. This may point to the removal

of the clause, requiring full combustion tests prior to delivery and acceptance of coal by Eskom having been intentional. This clause was important to protect Eskom.

Tegeta seeks an amendment to supply more coal

257. Tegeta approached Eskom to start providing more coal than was originally contracted for within three months of the contract. It proposed supplying 200,000 tonnes more coal p/m from October 2015 to the end of the contract. The offer was made by letter dated 19 June 2015, following a meeting Tegeta and Eskom had on the same day. In the letter, Tegeta requested to be informed of Eskom's acceptance of its offer and quite tellingly stated, "to facilitate us to order for the required equipment and development infrastructure accordingly". Quite clearly, Tegeta lacked adequate resources to comply with all of the terms of the Coal Supply Agreement, as is evident from the exposition above.

258. In response to Tegeta's offer, Dr Nteta emailed to Mr Nath a letter signed by Mr Bester on 24 June 2015. That letter stated as its purpose the recording of some of the material terms that were agreed at the meeting of 19 June 2015. The letter mentioned that coal would be supplied from Brakfontein Colliery Extension, and, from October 2015, the volume increased to 200 000 tonnes per month. Significantly, it also stated that the coal "must comply with the relevant Eskom specifications and will be determined once the full combustion test is successfully completed for the proposed product". The letter repeated the requirement under the 'Contract Conditions' that the coal supplied "must comply with Eskom's technical requirements and Eskom's coal supply requirements, including but not limited to Eskom's full combustion test", failing which or if the requirements do not render compliance for supply to Eskom, Eskom shall outright reject the proposal and no modification of the coal supply agreement shall be entered into. Mr Opperman stated he was not involved in this, despite being the manager of the contract.

259. Mr Bester's letter was emailed by Dr Nteta to Mr Nath on 24 June 2015 at 09h27. Mr Nath forwarded it to Mr Rajesh "Tony" Gupta on the same day at 10:07, along with a draft letter noted "as discussed".

260. At 10h20, on 24 June 2015, Mr Nath replied to Ms Nteta by email in which he thanked her for Mr Bester's letter, but stated: "However, from our bankers' purposes we need (sic) letter on the enclosed lines. Kindly help in this regard."

261. Attached to his email was a draft of Tegeta's preferred version of the letter it would like to receive from Eskom. It was abnormal for Eskom to receive drafts of its letters from suppliers. Tegeta's draft letter removed key aspects of Mr Bester's letter above that were meant to protect Eskom, principally that the proposed coal would be subject to a full combustion test successfully completed, the requirement for compliance with all policies and procedures, as well as compliance with governance processes, and that additional volume would only be taken if needed by the relevant power station. Tegeta's draft also removed a provision that the proposed terms were subject to a duly signed modification to the current agreement.

262. On 25 June 2015, Mr Bester signed another letter premised on the new version of Tegeta's aforesaid draft. Mr Bester claimed not to remember why he had signed the letter.

263. According to Mr Opperman, it appears that, at the time of both the June letters, and even by October 2015, the Brakfontein Colliery Extension was not yet being mined, nor had it been tested for coal suitability. He said that, had he been involved, the suitability of the coal would have been a concern to him, because an immediately adjacent colliery, Kuyasa, had a high sulphur content. However, when Kuyasa supplied Majuba, it had the advantage of being able to use a particular rail service, whereas Brakfontein had to make more use of road delivery of the coal via trucks and was more expensive. Mr Mashigo further confirmed that the coal quality of Brakfontein Colliery Extension was never tested.

264. The Fundudzi Investigation Report has made the following findings, especially against Mr Bester:

    264.1 Mr Johann Bester's conduct was irregular because he allowed Tegeta to dictate the terms of the Brakfontein Coal Supply Agreement to their benefit and to Eskom's detriment. Mr Bester claims

that he did his best to protect Eskom but with all the constant pressure "it may appear as if I went soft"

264.2 Tegeta secured a ten-year Coal Supply Agreement, whilst a five-year contract with an option for another five years would have been in Eskom's interest

264.3 Tegeta was allowed to proceed with the contract despite a critical condition precedent the non-satisfaction of which would have resulted in no agreement coming into effect. Tegeta received the benefit of no one following up on the condition precedent

264.4 Tegeta managed to dictate a further extension of the agreement in terms that were favourable to its bankers and less favourable to Eskom. Mr Bester agreed with the above during his testimony before the Commission

264.5 Mr Bester may have received gratification for changing the conditions of the coal supply agreements, which he denied by explaining that he would not have moved to resign if that was the case, as he would have been in a good position; and

264.6 Mr Bester was accused of breaching Section 34 of the PRECCA by not reporting the corruption that was evident to have occurred in relation to the contract. Mr Bester responded that the contract was not in itself fraudulent or corrupt. He had no intention of doing anything corrupt, and there were processes in place that should have checked on specific conditions that needed to be considered. Mr Johann Bester claimed that if everything had been implemented in accordance with the terms of the contract, there would have been no fraud. He attributed his signing of the letter drafted by Tegeta to his frustrations in working at Eskom under the new senior executives that had taken over.

265. Mr Bester resigned on 20 July 2015, following a conversation with Mr Koko that he says had left him uncomfortable. According to Mr Bester, on his first day back from suspension, Mr Koko made inquiries about OCM as well as another project called "New Largo". Mr Bester stated in his affidavit to the Commission that he felt Mr Koko was asking for too much detail for someone at his level of seniority and told Mr Koko he was uncomfortable continuing the meeting with him. He resigned after this meeting.

Laboratory tests for quality compliance

266. As is apparent from the above, Eskom was obligated to procure coal of specific quality suitable for its Majuba Power Station. Thus, Eskom continued to subject coal from the Brakfontein mine to constant inspection and sampling to ensure that it complied with Eskom's technical requirements. As it was entitled to do, Eskom procured services of various service providers to test and transport coal to its various power stations. Amongst the service providers appointed by Eskom to provide laboratory and coal transportation services were Sibonisiwe Coal Laboratory Services CC (Sibonisiwe), SGS Services South Africa (Pty) Ltd (SGS) and the South African Bureau of Standards (SABS).

267. Between March and April 2015 SGS was the nominated laboratory responsible for the analysis of Brakfontein coal samples. From 24 May 2015 to 30 August 2015, Eskom appointed Sibonisiwe as a nominee laboratory for the analysis of Brakfontein coal. Sibonisiwe reported on its coal analysis results to Eskom for the period 23 July 2015 to 25 August 2015 and showed that the coal was non-compliant with Eskom's specifications.

Alleged dispute by Tegeta

268. Dr van der Riet, a Coal Special Scientist working for Eskom's Research, Development and Testing Division, was seconded to an acting managerial position in PED to assist them deal with coal supplies that were under-specification and partly responsible for load-shedding at Eskom's power stations. Dr van der Riet passed away after he had submitted his affidavit to the Commission but before the evidence on Brakfontein was presented. Had he not passed away, he would certainly have given oral evidence before the Commission.

269. During his secondment between 1 July 2015 and 31 August 2015, Dr van der Riet was informed by his Quality Assurance (QA) staff that coal qualities from Brakfontein, which had been fair up until July 2015, had deteriorated, whilst tonnages delivered had increased substantially. Apparently, 50% of stockpiles had been rejected during this period. On 25 August 2015 Mr Mboweni informed Dr van der Riet that Brakfontein Colliery had laid a complaint that the laboratory monitoring Eskom's coal quality, viz. Sibonisiwe, had requested a bribe; it had been alleged that "a certain white woman", employed by an Eskom-nominated laboratory, had demanded a bribe from Brakfontein's representatives to change their coal analysis results.

270. Apparently, this was reported by one of Brakfontein's representatives, Mr Jacques Roux, directly to Mr Koko, and Mr Koko was reported in the Fundudzi Report to have confirmed that much. Mr Koko told Dr van der Riet that he wanted the allegation investigated immediately and findings reported back to him. Mr Mashigo remarked that it was "very, very unusual" for such an issue to be escalated to this level and would normally be handled by the contract manager and quality advisor at Eskom. In his affidavit to the Commission, Mr Masuku of Sibonisiwe, indicated that Sibonisiwe did not have an employee that fitted the description referred to above. The allegation of bribery was likely a ruse by Mr Koko and Tegeta, as it will become apparent below. It was a calculated manoeuvre on their part to get rid of Sibonisiwe and replace it with a third party that could provide positive test results of the coal supplied from Brakfontein.

271. Whilst Dr van der Riet and his team conducted their investigation, Mr Koko called Mr Masuku to his office for a meeting on 28 August 2015 and interrogated him regarding the test results that his laboratory was producing on the Brakfontein coal. The full details of this meeting are captured in the relevant pages of the Fundudzi Report and attached to Mr Masuku's affidavit to the Commission. The details reveal much about Mr Koko's deep interest and involvement in the matter all in favour of advancing the interests of Tegeta. According to Mr Masuku, Mr Koko introduced himself and asked why Mr Masuku was fighting with the Gupta family, to which Mr Masuku responded that he did not understand the question and that he did not even know who the Guptas were.

272. Mr Koko then inquired whether Mr Masuku knew who the owners of the Brakfontein Colliery were, and when Mr Masuku said he did not know, Mr Koko informed him that the Gupta family owned the Colliery. Mr Koko then told Mr Masuku that he was fighting with the Gupta family by providing unfavourable coal analysis results on the Brakfontein coal, allegedly because Mr Masuku wanted to solicit a bribe from the Gupta family. Mr Masuku responded that he was not soliciting a bribe from anyone and reiterated that he did not know the Guptas. He also informed Mr Koko that he (Mr Masuku) had no knowledge of the coal quality specification parameters detailed in the contracts between Eskom and its coal suppliers.

273. Mr Koko requested a break from the meeting, while they waited for the comparison of Sibonisiwe's coal analysis results with those of SGS's and reconvened at 3pm to discuss the results. When the meeting reconvened at the agreed time, Mr Koko made a phone call to one Mr Sam Phetla, who had been appointed together with Dr van der Riet and requested him to bring the results to his office, which he did. The comparison was only in respect of the total sulphur parameter and showed that Sibonisiwe's total sulphur results were similar to those of SGS, a matter that seemed to make Mr Koko unhappy. In response to these allegations, Mr Koko denied that he made threats to Mr Masuku and said that present at the meeting was also Dr van der Riet and Ms Charlotte Ramavhona. It was agreed that samples from the stockpiles at Brakfontein mine that had failed prior tests had to be taken under controlled circumstances for separate analysis at Eskom, Sibonisiwe and SABS laboratories.

274. Dr van der Riet denied that he was present at the said meeting and indicated that Sibonisiwe could not have done coal sampling, as they were not contracted to provide that service. Sibonisiwe was doing coal analysis for Eskom. Mr Masuku has also denied Mr Koko's evidence that Dr van der Riet and Ms Ramavhona were present at the meeting, and as already stated, also said that no samples were delivered to Sibonisiwe for testing. Mr Koko's version of the meeting must therefore be rejected as false.

Results of Dr van der Riet's investigation

275. According to Dr van der Riet, he and three of his colleagues concluded their investigation and reported their findings, which they personally relayed in a meeting at Megawatt Park, to Mr Koko and the then Head of Legal, Ms Daniels. The findings were that coal quality delivered from Brakfontein had been deteriorating. A plan was then devised to retest the samples at another laboratory run by SABS. This was done, and test results from SABS were communicated by Dr van der Riet to Mr Koko on 28 August 2015.

276. Whilst the Sibonisiwe laboratory had failed 15 out of 30 coal consignments in August 2015, the SABS laboratory results showed that 29 of the 30 samples should have failed. Therefore, on either Laboratory's test results, Brakfontein coal was non-compliant.

277. Mr Koko instructed Dr van der Riet and his colleagues, Ms Ramavhona and Mr James Mudau to organise for a re-sample and analysis of the Brakfontein coal that had previously failed minimum specification requirements. An arrangement was made with the Brakfontein Colliery manager for this purpose to have the analysis done on 29 August 2015, with Dr van der Riet and Mr Mudau scheduled to personally witness the sampling and testing.

278. Mr Koko has confirmed his instruction for SABS to conduct resampling of the Brakfontein coal and that he had made it clear to Dr van der Riet and Ms Ramavhona that the analytical process needed to be transparent and above board and had directed the two to "have 'hold points' and 'witness points' where all parties were present and instructed the team to have traceability so that the prepared coal sample would not be compromised". However, Mr Koko would soon make an about turn and telephoned Dr van der Riet to inform him that they were not to be involved in witnessing the sampling. Dr van der Riet stated in his affidavit to the Commission that Mr Koko's instruction was in contravention of Eskom's CQMP which required the Employer (Eskom) to witness any sampling. When he advised Mr Koko of this, Mr Koko suggested that the sampling exercise should go ahead, but that another sampling would take place the next week in the presence of Eskom representatives and Mr Koko. Dr van der Riet states in his affidavit that he received a telephone call from Mr Koko on 29 August 2015, the same day when the resampling was scheduled to take place, informing him that Brakfontein had requested Eskom to cancel the scheduled visit.

279. When confronted with these facts, Mr Koko said that he was not aware that Dr van der Riet and Ms Ramavhona were scheduled to visit Brakfontein mine on 29 August 2015 to witness the resampling process. Had he been aware of such a visit, he said, he would have supported it. He denied issuing Dr van der Riet, Ms Ramavhona and their team with an instruction not to visit Brakfontein mine for resampling purpose. Dr van der Riet maintained his version and there is no reason to suggest that he would have contrived such an elaborate story. Thus, Mr Koko's denials are to be rejected.

280. On the evening of 30 August 2015, a progress report with the resampled stockpile analysis results was sent to Mr Koko, with a preliminary finding that the coal was in fact fit for purpose. Dr van der Riet stated in his affidavit to the Commission that this should have been a cause for considerable concern, as no Eskom officials were present to witness the resampling. He could, therefore, not vouch for the validity of the results. On 31 August 2015 Mr Mboweni asked Dr van der Riet to prepare and handover an investigation file at a meeting scheduled for the morning of 1 September 2015. The file that was prepared included an affidavit and a CCTV footage from SABS Laboratory that alleged that the Brakfontein Colliery manager, Mr Roux, together with a relative, had forcefully gained entry to the laboratory on the morning of 30 August 2015 and confronted staff there who were working 'overtime' on the sample analysis. The colliery manager had attempted to exert undue influence on the laboratory staff to change their results to show that the coal was fit for purpose. 69. The Commission had made requests to obtain the investigation file, including the CCTV footage referred to in Dr van der Riet's affidavit but to date the information has not been made available.

Mr Koko suspends coal supply from Brakfontein

281. On 31 August 2015 Eskom sent a letter suspending coal supply from Tegeta's Brakfontein mine, due to apparent "great concern" over stockpiles that had been coming from the mine between July 2015 and August 2015. Mr Gert Opperman was not involved although he says he was aware of quality issues. Mr Koko issued the suspension letter, allegedly as a precautionary measure in order to enable Eskom to investigate the causes of inconsistencies in the coal quality management processes. Fundudzi has reported that Mr Koko also said that Eskom noted a significant increase in the number of out of specification coal stockpiles that came from the Brakfontein mine during July 2015 and August 2015. However, the suspension was a sham, as Mr Koko would lift it only five days later, on 5 September 2015, without any tests having been conducted on the Brakfontein coal between 31 August 2015 and 05 September 2015. Thus, the reason for the suspension was not fulfilled. In fact, it was Mr Koko himself who thwarted the investigation, by placing on suspension for no valid reason Eskom officials who were to conduct the investigation.

Mr Koko suspends Dr van der Riet and his team

282. On 1 September 2015, when Dr van der Riet arrived at Eskom to meet Mr Mboweni, in order to hand over the investigation file, he was served with a notice of intention to suspend, signed off by Mr Koko. Three other colleagues of his, viz. Ms Ramavhona, Mr Phetla and Ms Siphelele Ngobeni, were served with similar notices. Mr Koko stated that they "may have committed a serious misconduct by amongst others inconsistency in the management of the coal quality assurance process," and that Eskom had decided to investigate the alleged misconduct. The letter came from Mr Koko and not from Mr Mboweni, despite Dr van der Riet and the three officials reporting directly to Mr Mboweni.

283. It is worth noting that at this time Dr van der Riet and Ms Ramavhona were also in the process of investigating the inconsistencies in the test results issued by Eskom's contractual laboratories and those issued by a laboratory contracted by the Brakfontein mine. Dr van der Riet explained in his affidavit that from July 2015, when the tonnages from Brakfontein increased but the quality deteriorated, the Eskom geologist opined that the S4U coal accounted for this deterioration as it was considered to be too low to meet Eskom's specifications.

284. It is, therefore, reasonable to conclude that it was this investigation that Mr Koko, acting in concert with Tegeta, sought to circumvent. It is significant that Mr Koko's unsigned letter of intention to suspend Mr Phetla, dated 31 August 2015, was emailed by Mr Koko to the email address infoportal1@zoho.com on 21 September 2015, without any message in the body of the email. Mr Koko's engagement with this email address, used by Mr Salim Essa, a close associate of the Gupta brothers, permeates all his involvement in matters relating to transactions between Eskom and Tegeta. He facilitated the capture of Eskom by the Guptas and their associates.

285. The reference in Dr van der Riet's affidavit to Mr Mudau as having been one of persons suspended is an error. The fourth person suspended was Ms Siphelele Ngobeni, who was also a geologist. The suspension of Dr van der Riet and his three colleagues was, in fact, effected on 8 September 2015, and thus ended the investigation.

Brakfontein coal supply continues

286. Following Mr Koko's lifting of the Brakfontein Coal Supply Agreement suspension, a further sample of the Brakfontein coal was taken and tested on 6 September 2015 at an Eskom laboratory, which differed markedly from that of the sample of 29 August 2015. Laboratory specialist, Dr Chris Van Alphen Chief Advisor Eskom Research, Testing and Development Division, subsequently advised that the two samples could not have come from the same mine, and further that the sample of 29 August 2015 did not in fact come from Brakfontein Colliery.

287. During this time, on or about 7 September 2015, Mr Gert Opperman received an email from a representative of Tegeta, with results from a SABS test attached. Mr Opperman testified that he then received a phone call from Mr Roux (who was at this stage COE of Tegeta), asking whether they

could dispatch the stock to Majuba Power Station. According to Mr Opperman, one of the quality parameters on the stockpile did not meet the contractual specifications which meant that in terms of the contract the coal would be called "Reject Coal".

288. Mr Opperman testified that he responded to Mr Roux highlighting that he did not "have authority to make a decision to dispatch this coal, I cannot do it and I immediately told him you cannot dispatch this coal ... you need to either declare a dispute or you need to reprocess the coal, you have got only one of those two options." Mr Opperman further testified that Mr Roux was not pleased with this response and that the call was "disconnected". However, soon thereafter, Mr Opperman indicated that he received a phone call from Mr Koko asking him to please engage with the Majuba Power Station to accept the coal. Mr Opperman indicated that he was very surprised to have heard from Mr Koko and he considered it to be an instruction requiring him to perform outside the mandate of the contract. Mr Opperman was not happy about approving coal of the incorrect specification to be pushed through. He sought advice from his immediate manager, Mr Ncube, who agreed with Mr Opperman that out-of-specification coal should not be accepted but felt that they should do what Mr Koko had asked, as it was his instruction. Mr Opperman then called the power station; he claimed he did not pressure them but relayed Mr Koko's instruction, and also gave them his opinion. The power station agreed to accept the coal.

289. Mr Opperman testified that he did not resist Mr Koko because he had a very threatening management style, and there was an "atmosphere" at Eskom where people would get suspended or dismissed, and there was much discussion about this "in the corridors".

Cancellation of arrangement to audit Brakfontein certification process

290. On 7 October 2015 Mr Ncube sent a letter to Mr Roux from Tegeta requesting their cooperation with an independent audit that Eskom was arranging of the coal pre-certification process at Brakfontein Colliery. This was as a result of both Mr Opperman and Mr Ncube's continued concerns over the quality of the coal provided, and also a requirement from an audit report by one of the testing laboratories. Following this, Mr Opperman proceeded to engage with various teams on site, however, during this period Tegeta began making changes at Brakfontein, such as terminating certain laboratory services.

291. On 19 October 2016, Mr Ncube instructed Mr Opperman to send a letter to Mr Roux cancelling the audit. Mr Opperman claimed Mr Ncube said he was instructed to cancel it. Mr Opperman claimed that he did not feel he could resist because "it was just such difficult circumstances you know being under this management of this Executive Team and what was happening at that moment in time. It was difficult."

Eskom relocates the testing of Brakfontein coal to Kendal Power Station

292. From 22 October 2015, Eskom relocated the testing of coal quality from Brakfontein to Kendal Power Station Laboratory, after terminating their contract with SABS laboratories. This was on instruction from Mr Koko to the Head of Majuba Power Station, a Mr Christopher Nani. Kendal Power Station was not an accredited laboratory in accordance with the Coal Supply Agreement and did not comply with the ISO Standard. On enquiring with his General Manager, Mr Mazibuko, Mr Opperman learnt that prior to this change, Mr Koko had the view to move the payment point for coal supply agreements to power stations, so that the power station could analyse the coal and Eskom make payment based on the quality parameters reported by the power station. Although Mr Opperman said he took comfort in the fact that Kendal Power Station laboratory was an internal Eskom laboratory and would look after Eskom's interests, it was still in breach of the Coal Supply Agreement for it to do the testing of the Brakfontein coal. The Coal Supply Agreement required Eskom to appoint an independent laboratory that was independent and ISO accredited.

293. Mr Kwenzokuhle Magwaza, one of Eskom's senior managers at the time, also gave evidence of his encounter with Mr Koko on the issue above. On 21 October 2015, at around 07h30 while driving to work, he received a call for the first time from Mr Koko summoning him to Mr Koko's office. Mr

Magwaza said that when he came to Mr Koko's office, he was not offered a chair and Mr Koko berated him and expressed displeasure about "not just you [meaning Mr Magwaza], but people in PED, who are fighting other people's battles."

294. Mr Magwaza testified that he felt threatened as Mr Koko talked about why he had not yet suspended him (Mr Magwaza). He said that Mr Koko proceeded to give him instructions to use Kendal Power Station Laboratory to do further analyses of Brakfontein samples, which Mr Magwaza said was out of the norm as it was not accredited. He was also asked to remove Ms Viloshnee Moodley from her acting role of Middle Manager: Quality Assurance, which Mr Magwaza did. Ms Moodley had suspended a service provider, Mpumamanzi, from the Brakfontein mine and replaced it with another. Mr Koko told Mr Magwaza that he wanted that decision reversed.

295. Kendal Power Station Laboratory then continued to do the sampling from October 2015 until the end of the contract, and would only fail 3% of the Brakfontein stockpiles, compared to 23% by the accredited labs used before Kendal Power Station Laboratory took over.

296. Based on the affidavit provided by Mr Sethowa, a Supervisor: Coal Chemical Services at Kendal Power Station, the Kendal Power Station laboratory had only obtained their SANAS 17025 accreditation during October 2017, long after they had started testing the Brakfontein coal.

297. Another notable issue is that the CQMP, which is a standard schedule to Eskom Coal Supply Agreement's and sets out the requirements and process for coal testing, was only signed off during September 2015, months after the Coal Supply Agreement had been concluded and Tegeta had been delivering coal. Mr Magwaza also made the following points in his affidavit:

    297.1 During September 2015, Mr Mboweni had called him around 18h00 to come through to Mr Koko's office

    297.2 Mr Mboweni was working with Dr Nteta on responding to questions raised by a journalist on the Brakfontein Coal Supply Agreement and had requested Mr Magwaza to provide assistance

    297.3 Mr Koko then entered the room and requested to know why the CQMP had not yet been signed. Although Mr Mboweni attempted to intervene and inform Mr Koko that Mr Magwaza had recently assumed the role and would not have any knowledge thereof, Mr Koko interjected, stating "Chief, am I allowed to talk to you or ask you a question?", to which Mr Magwaza indicated that he did not know why the CQMP had not yet been signed; and

    297.4 Mr Magwaza signed off on the CQMP on 30 September 2015.

Tegeta requests Eskom to accept more non-compliant coal

298. On a subsequent occasion, Mr Opperman again received a phone call from Mr Roux (date not specified), regarding a stockpile that was out of specification. Mr Opperman testified that this incident was similar to the one already referred to above, in September 2015, in that Mr Roux once again requested Mr . erman to organise that the stockpile be accepted by the Majuba Power Station, contending that "you did it the previous time so why not do it again?". Mr Opperman again told him he did not have the power to authorise it and, thereafter, as before, he received a phone call from Mr Koko requesting him to engage the power station to accept it.

299. Mr Opperman engaged Mr Ncube, who again proposed that he follow the instruction. Mr Opperman then engaged the power station, but internal deliberations amongst the power station management did not result in their outright approval. Instead, there were a lot of engagements between the power station manager, Mr Makwaye, and more senior colleagues at Eskom headquarters (Mr Mashigo) before they would acquiesce. From Mr Opperman's evidence, it seems that Mr Makwaye left the Majuba Power Station not too long after this.

Mr Brian Molefe's awareness of the matter

300. In his evidence before Parliament to the suspension of Tegeta's contract to supply coal from Brakfontein mine on 31 August 2015 due to quality issues, Mr Brian Molefe indicated that the "Guptas were very angry with us". He stated that the Gupta family had requested meetings and engaged in phone calls disputing the quality of the coal they supplied as a political ploy where "the people that are saying there is not of good quality have been paid by the opposition and people that don't like them."

National Treasury declines Eskom's request to increase value of Brakfontein Coal Supply Agreement by R2.9 billion

301. Combustion tests of coal coming from Brakfontein Colliery Extension were conducted, which concluded that there were quality issues, and that more data and information would be required before procuring from the Brakfontein Extension to any power station. Yet, it was shortly after this that Eskom (in particular the Fuel Sourcing team) sought to extend the Brakfontein Coal Supply Agreement to include the Brakfontein Colliery Extension.

302. On 8 August 2016, Mr Ncube sent a submission to the Board Tender Committee. The submission included a motivation for procuring 10.8 million tonnes from Brakfontein Colliery Extension – as opposed to other suppliers. The comparison of costs included showed that coal from Brakfontein by rail was in line with the price of other suppliers, while by road it was the highest price. However, the plan was to use rail transport. Mr Opperman, however, asserted that coal from Brakfontein would be a 50/50 split, and in the earlier stage more likely to be two thirds rail, one third road.

303. A letter was sent on 19 August 2016 to National Treasury requesting permission to do so, as a National Treasury Circular issued in April 2016, required that any amendments of above 15% of the value of existing agreements required prior approval of the National Treasury. Eskom was seeking to increase the contract by R2.9 billion, which was 77% of the original contract value (of R3.79 billion). It is notable that in Eskom's letter, a claim was made that the coal reserve had been validated by Eskom and met the contract's quality and quantity requirements, which was not true.

304. National Treasury rejected the request on the grounds that there was a question over the quality of the coal. Eskom responded that a new auto-mechanical sampling system had been installed and would be commissioned within three months. However, Mr Mashigo stated that this was only done much later, in January 2017. In November 2016, the coal from Brakfontein Extension was tested again, and Eskom's technical team concluded that it was not suitable for the Majuba, Tutuka or Matla Power Stations. It is notable that the technical report contains the phrase, "if Eskom is already contractually obliged to take this coal" and then continues to provide a warning on the risk that would need to be managed. However, it would have been irregular for Eskom to have contracted for coal before its technical department had confirmed its suitability, according to Mr Opperman. Treasury never approved the extension of the contract.

Brakfontein mine fails to deliver and puts Eskom at risk

305. In terms of a letter from Eskom, dated 29 November 2017, addressed to Mr George van der Merwe, Chief Operating Officer of Optimum Coal Holdings, Brakfontein Colliery had undersupplied Eskom by around 265,000 tonnes of coal in the October 2016 to September 2017 period. According to Ms Singh, a management accountant employed at Eskom, for February 2018 to December 2018, a penalty amount of R531 million was calculated on the shortfall experienced, a period during which Tegeta was in business rescue. The sudden commencement of this business rescue did not give Eskom sufficient time to find an alternative supplier. Procurement processes only resulted in an alternative contract by October 2018.

306. Majuba Power Station received out of specification coal from Brakfontein for a significant amount of time, as well as undersupply in terms of tonnes of coal delivered. This had the impact of lowering Majuba's coal stockpile to below ten days at one time, whereas it required 40 days' worth to maintain

security of supply. Twenty-four of the 30 days that were missing was due to Tegeta's undersupply. This put power supply from the station at risk should there have been an interruption.

307. Mr Bester believed that the Brakfontein contract, although concluded under pressure, did not compromise Eskom. In his view, it was only when Mr Koko suspended those trying to implement the conditions of the contract that Eskom was compromised. He believed that "the system wasn't broken", but people such as Mr Koko compromised it, as well as Mr Mboweni, who "appeared powerless to push back" and would try to avoid being accountable and responsible by refusing to sign things and delegating his authority either to people such as Mr Bester to get contracts done or to the Board Tender Committee to sign them off. Mr Bester himself had confessed to having been too soft to Tegeta's demands and/or to internal pressure.

HUARONG ENERGY AFRICA (PTY) LTD

308. In 2015, Eskom entered into an agreement with China Huarong Asset Management Co. Ltd (China Huarong). China Huarong is a majority state-owned financial asset management company domiciled in China. China Huarong approached Eskom with an unsolicited proposal to grant USD1.5 billion (approximately R25 billion) so that Eskom could build or refurbish power stations (capital projects).

309. In 2015 Mr Rajeev Thomas, a representative of a firm called Tribus (Pty) Ltd (Tribus), approached Mr Andre Pillay, General Manager and the Head of Eskom Treasury, with an unsolicited proposal to provide Eskom with technical solutions to assist Eskom with its capital expansion program. In plain English, Mr Thomas was a money broker, who offered for a fee to put Eskom in touch with lenders who would agree to lend money to Eskom.

310. After a couple of engagements, Mr Thomas approached Eskom on behalf of a consortium of Tribus and China Huarong Asset Management Co. Ltd (China Huarong). China Huarong operates in the field of asset management. China Huarong, too, offered to provide capex solutions to Eskom.

311. Negotiations progressed. A company was incorporated in South Africa for the specific purpose of doing this business with Eskom and was called Huarong Africa (Pty) Ltd (HEA). A group of officials within Eskom and a group in and around HEA tried to engineer a situation by which Eskom paid an enormous raising fee up front and then would have recourse only against HEA for payment of the loan. Fortunately for South Africa, this scheme was thwarted by an official in Eskom and officials in the National Treasury.

312. The best option for Eskom when it received a proposal such as that submitted by Tribus was to issue a Request for Information (RFI) or Proposal (RFP) to test whether there were more advantageous options available to Eskom in the market. Eskom was looking for innovative funding that did not utilise government guarantees and should be greater than R15 billion. It was important that, in acquiring such innovative funding, Eskom did not trigger events of default in relation to its current debt which then stood at around R420 billion. Because Eskom is a state owned entity, equity or capital funding was not an option. Eskom was looking for reputable organisations with funding track records that could be implemented within a reasonably short term.

313. At the time, Eskom had a funding plan. This included raising finance through domestic and international bonds, commercial paper loans and development finance institutions like the World Bank and the African Development Bank. Some multilateral institutions also provided funding, as did export credit agencies. In addition, there were structured products, which were innovative funding sources available in the market from time to time.

314. Eskom received twelve responses to its requests: from ABSA, Deloitte Capital, HEA, Wave, J P Morgan, Nedbank, Peu Capital Partners and Total Utilities Management Services, Regiments, Rand Merchant Bank, Standard Chartered, Superstars Group and Afriset Investments. HEA was incorporated for the specific purpose of doing this business with Eskom. As part of their responses, the firms provided non-binding term sheets, which were the frameworks of the terms on which they were prepared to do business.

315. The term sheet submitted by HEA offered to provide approximately USD 1.5 billion; and for a facility fee of 1.6% of the programme value, an annual fee of 0.8% of the funds made available and a cancellation fee of 2%.

316. In December 2016, Mr Anoj Singh, to whom Mr Pillay reported and to whom he had in the normal course reported the responses to the requests, contacted Mr Pillay. He told Mr Pillay that Mr Thomas had asked that Eskom sign a non-binding term sheet as a demonstration to his partners that he had a good working relationship with Eskom. Mr Pillay was not comfortable that the term sheet be signed as it was not common for Eskom to sign such documents. Mr Pillay raised his concern with Mr Anoj Singh, who responded that it was just a term sheet.

317. Mr Anoj Singh and Mr Thomas then proceeded to sign the term sheet on 20 and 21 December 2016 respectively. The document stated in terms that the contents did not bind the parties, except for clauses 17 and 18, which provided for confidentiality between the parties, no entitlement of the one to act as agent for the other and a declaration that the governing law was the law of South Africa.

318. The usual authorisation process within Eskom was not followed and Eskom's legal department was not consulted.

319. From 8 to 13 January 2017, Mr Anoj Singh, together with Mr Pillay, Mr Prish Govender and Mr Poobie Govender, met in Beijing, China with representatives of HEA, namely Mr Thomas, Mr Rex Madida and Mr Wim Terblanche. Following that meeting, Mr Anoj Singh asked for an Investment and Finance Committee submission to inform the board of the HEA proposal and approve a mandate to negotiate and conclude a financing agreement with HEA for loan transactions of R1.5 billion and R6 billion.

320. During the meeting in China, Mr Pillay formed the impression that Mr Anoj Singh was rather disapproving of the proposed transaction. Later, Mr Pillay came to believe that this was a sham to allay Mr Pillay's concerns and that Mr Singh had his own agenda. During that meeting, Mr Pillay met Mr Madida, who introduced himself as a deployee of the ANC.

321. After the meeting, there was an exchange of correspondence between Mr Pillay and Mr Thomas. Mr Pillay wrote that the proposal was subject to Eskom's own internal analysis and that he would have to secure board approval for them to go forward with the proposal. The loan was offered at LIBOR rate (London Interbank Offered Rate) of about 3% plus 7.2%, that is, about 10.2%.

322. This was not simply a financing proposal, which fell within the jurisdiction of the board's Investment and Finance Committee. It was also linked to a capital programme and therefore needed the approval of the Board Tender Committee. The Investment and Finance Committee resolved on 3 February 2017 that a team - which included Mr Pillay - could negotiate but not conclude the financing agreement with HEA.

323. These contemplated transactions would have had to fall within the Eskom five-year corporate plan, which was at that time still being developed. Eskom was assisted in the preparation of its corporate plan by teams from McKinsey and ostensibly Trillian. However, a board member, Mr Khoza, who chaired the Board Tender Committee, told Mr Pillay that if the HEA proposal was brought before the Board Tender Committee that body would approve the proposal.

324. Mr Pillay became concerned that the HEA proposal was being considered outside of the Eskom Treasury. He raised this concern with Mr Singh, who told Mr Pillay that he had been busy with other things and so had allocated the matter to Mr Prish Govender to deal with. He also gave as a reason for Eskom Treasury not being involved that Eskom Treasury already had a huge responsibility for raising funding for Eskom. Mr Pillay found this reason superficial.

325. A few days before 14 March 2017, Mr Anoj Singh told Mr Pillay that he had been contacted by an HEA representative with the request that the term sheet be signed, in effect with the clause relating to its non-binding effect removed, but still subject to Eskom board approval and to be superseded by a formal Asset Loan Framework Agreement (ALFA). This was not a normal procedure in Eskom. Mr Pillay feared that if a binding term sheet were signed, the fees would be payable to HEA. Such term sheet was signed by Mr Anoj Singh on behalf of Eskom on 14 March 2017 and by Mr Chen Jianbao

on a date not stated in the document. The signed term sheet left no doubt that it was designed to create binding obligations.

326. The signed term sheet was not referred to the Eskom legal department and Mr Singh was made aware of Mr Pillay's reservations regarding the document. Mr Anoj Singh's attitude was that the document was not binding.

327. It is difficult to understand the belief allegedly held by Mr Singh that the term sheet was not binding because its first paragraph begins:

> The parties agree that this term sheet shall create legally binding obligations on each party and shall be in full force in effect upon its signature until such time as the asset loan agreement and the other related definitive agreements are concluded between the parties.

328. However, Mr Pillay, who was not a lawyer, considered it possible that certain other provisions in the signed term sheet led Mr Singh to believe that, despite the first paragraph, the document was, nevertheless, not binding. Mr Pillay also believed that Mr Singh would sign this latest term sheet regardless of what Mr Pillay might say.

329. At that stage, Mr Pillay was relying on the help and advice furnished by a firm of lawyers called White & Case. White & Case advised in writing in an opinion dated 12 March 2017 that the latest term sheet contained several important terms that were onerous and were expressed to be binding and should therefore not be signed in its present form.

330. Mr Pillay discussed the White & Case opinion with Mr Singh, who was in London with Mr Pillay and attended a meeting to discuss the concerns raised by White & Case in their opinion.

331. At that stage, Mr Koko was the acting Group CEO of Eskom. According to Mr Pillay, Mr Koko's attitude was also that the latest term sheet was to be signed.

332. Mr Pillay pointed out to Mr Singh that, according to Eskom Treasury, due process precluded Eskom from contracting on an RFI and required an RFP process. An RFP then went out to the market on 13 March 2017. The RFP process was, however, inconsistent with the process agreed in the latest term sheet. Nevertheless, HEA responded to the RFP.

333. Mr Singh left Eskom in July 2017 and Mr Calib Cassim (Mr Cassim) was appointed acting CFO. Mr Pillay conveyed his concerns about the HEA transaction to Mr Cassim, who agreed with Mr Pillay.

334. Certain approvals were made conditions of the latest term sheet. One of these conditions was South Africa Reserve Bank (SARB) approval. The SARB gave its approval on 4 August 2017 on certain of its own conditions, including that no upfront payment of any fees be paid by Eskom. In addition, the conditional nature of the SARB approval required that the promised funds be placed in Eskom's account before the final agreement, the ALFA, could be signed.

335. On 14 August 2017 Mr Pillay received a copy of a memorandum of that date addressed by Ms Palacios, the Eskom Legal Corporate Specialist, to Ms Suzanne Daniels. The memorandum recommended against proceeding with the HEA project without favourable legal advice and queried why Eskom officials had signed the latest term sheet against legal advice and without following proper process.

336. On 15 August 2017 Mr Pillay, as head of Eskom Treasury, submitted a memorandum to the Board Investment and Finance Committee seeking a mandate to conclude the financing arrangement with HEA.

337. After considerable interactions at a technical level within Eskom, the Investment and Finance Committee resolved on 26 October 2017 to approve the HEA transaction subject to numerous conditions. At this stage, Mr Sean Maritz had been appointed acting Group CEO on 6 October 2017 in the place of Mr Johnny Dladla. On 20 October 2017, Mr Maritz, Mr Cassim and Mr Pillay met with HEA representatives. Mr Pillay indicated during the meeting that the signing of the ADFA with HEA would not be a solution given Eskom's liquidity constraints.

338. The usual procedure following an RFP would have been for an independent valuation of the various proposals. This step was not taken. However, several of the proposals received were shortlisted for further consideration. One of these was the HEA proposal. While Eskom was considering these proposals, which were long term proposals, to operate largely over fifteen years, HEA suggested that Eskom enter into a short-term transaction with HEA, to operate for between three and five years. This was considered to be urgent because of Eskom's liquidity problems and the fact that the RFI process had not been followed.

339. Eskom then made a proposal for short term financing to HEA. HEA responded that the proposal was not achievable because its implementation would require a government guarantee. Nevertheless, at its meeting on 27 October 2017, the Investment and Finance Committee resolved that Eskom Treasury negotiate a short-term facility up to a maximum of R2 billion for six to twelve months with HEA. At the same time, the RFP process continued.

340. A board meeting was held on 27 October 2017. Mr Maritz and Mr Khoza did not attend this meeting as they were meeting with the Minister. The board resolved at this meeting to approve the HEA short-term facility subject to certain conditions but no authority was given to proceed with the HEA long term facility.

341. On his return, Mr Maritz demanded to know why the HEA long-term facility was not signed. Mr Pillay sent Mr Maritz all relevant documents and explained that, as due process had not been followed, the contract for the long-term facility could not be signed. Mr Maritz responded that he was, nevertheless, going to sign.

342. Mr Maritz then proceeded to go against the Board's decision or advice and signed the documents for the HEA long-term facility. Nothing further was then done about the HEA short-term facility. Although the RFP process continued, HEA was treated preferentially by Eskom.

343. The next day, an informal meeting took place, convened by the company secretary, and attended by Messrs Maritz, Khoza, Cassim, Sathiaseelan Gounden (the Chairman of Audit and Risk), Dingaan Simphiwe (Mr Simphiwe), the Chairman of the Investment and Finance Committee, and Mr Pillay.

344. At this meeting, Mr Maritz stated that he had been to see the Minister (Ms Brown) and the Minister had said it was acceptable for him to sign. Mr Pillay responded, in effect, that the Minister did not have the power to authorise Mr Maritz to sign. This was the province of the Board. If the long-term facility proceeded, it would amount to fruitless and wasteful expenditure.

345. HEA then submitted an invoice dated 2 November 2017 to Eskom for the development fee amounting to USD 21,888,000, inclusive of VAT. Mr Pillay gave instructions that the invoice was not to be paid as the agreement underlying the invoice was not valid. Towards the end of December 2017, the HEA representatives submitted an updated ALFA to Mr Maritz for him to sign. Mr Maritz signed the updated ALFA. Shortly thereafter, HEA submitted an invoice for payment.

346. Mr Pillay asked Mr Maritz why he was so anxious to get the HEA ALFA signed. Mr Maritz said that Mr Khoza was putting pressure on him. Mr Pillay heard Mr Khoza and Mr Madida of HEA discussing the transaction over the telephone in vernacular. On another occasion, Mr Khoza called Mr Pillay to his office to warn him that Mr Maritz did not like working with Mr Pillay and warned him (Mr Pillay) to be careful and that he was not cooperating with Mr Khoza and Mr Maritz.

347. Mr Pillay was called to Mr Maritz's office. Mr Maritz told him that he had a whistleblower report that Mr Pillay had received a bribe for R5 million from some Russian company, which had built Mr Pillay a house in Plettenberg Bay. Mr Pillay did not see the alleged report and no such allegations were ever lodged with Eskom.

348. When Mr Pillay became aware that Mr Maritz was going to sign the agreement with HEA, a few days before the contract was signed, he went without an appointment to the office of the Director-General (DG) of the National Treasury, Mr Dondo Mogajane, waited in his office and, when the DG had a few minutes to spare, reported the facts of the HEA transaction to him. Mr Pillay felt that he could not safely report his concerns to the Eskom chair or any of the board members. They then followed

a process by which Eskom formally applied for SARB approval to demonstrate that it was following process while privately the Eskom officials, including Mr Pillay, informed the National Treasury officials that permission should not be granted. On 4 August 2018, the SARB approval previously granted to Eskom was suspended.

349. Eskom informed HEA that it would not pay its invoices and that it would litigate the matter if necessary. An investigation into the transaction by attorneys BGB was commissioned. During that process, Mr Maritz resigned on 1 March 2018.

350. The fees provided for in the several contractual documents were never paid. This led to hostility between Mr Pillay and Mr Thomas.

351. It seems clear on the evidence before the Commission that certain Eskom officials conspired with Mr Thomas and certain individuals outside Eskom to bind Eskom to a transaction pursuant to which Eskom would pay out a very substantial sum of USD 21,888,000 as a raising fee before any money had been raised and paid to Eskom. The strong probability is that HEA had no ability to advance billions of US dollars to Eskom. If that happened, Eskom had no recourse and, if it had paid the raising fee of USD 21,888,000, it would have been unlikely to recover any part of that sum. All those Eskom officials who pressed for the raising fee to be paid are prima facie guilty of fraud because they sought to induce Eskom to act to its enormous financial prejudice, representing that this transaction was regular and in Eskom's interests but well knowing that such representation was false.

352. In the end, Eskom did not suffer the huge financial prejudice contemplated by those who promoted this scheme. That Eskom was saved from this financial disaster is due to the courageous actions of Mr Pillay in evading bureaucratic entanglement and reporting the facts of the scheme to the highest officer in the National Treasury, who then promptly took steps to protect the country's money.

353. Although Eskom did not pay out the raising fee to HEA, it is recommended that the National Prosecuting Authority consider the facts of the case with a view to holding those responsible criminally liable.

354. It is important not to get bogged down in detail in relation to this transaction. There was considerable evidence about bureaucracy, process and personal conflict within Eskom, and between Mr Pillay and Mr Thomas of HEA. However, the essence of the matter is that Eskom was seeking to raise money from outside its usual institutional sources in circumstances in which it would not need to provide a government guarantee to the lender.

355. Loan procurement differs from most other types of procurement because the product offered by the lenders was identical: money almost invariably measured, whatever the source and whoever the supplier, in US dollars. What differed was the rate of interest, the fees paid to the middleman or broker and the terms on which the transaction was to be concluded, in particular how loan money was to be paid to Eskom, how it was to be repaid and what would happen if Eskom defaulted.

356. Viewed from this perspective, it is extraordinary, even inexplicable, that Eskom could ever have considered approaching the HEA transaction on the basis that it offered a unique supply that could not be replicated by any other market participant. Absent a cogent reason for pursuing the HEA transaction with such unusual enthusiasm, it is probable that for one reason or another, the officials in Eskom who supported this transaction in its original form wished to prefer HEA over any other potential lender in this class.

357. The most obvious shortcoming in the HEA proposal related to the upfront fee structure. The term sheets which formed the basis for the transaction were exceptionally vague about the source of the funds which were to constitute the product supplied. HEA itself was a company specially created for the HEA transaction. Its parent company was said to be China Huarong, based in China, with assets under management in excess of R2 trillion. The proposal by HEA embodied in the signed term sheet was said to be part of the overarching master ALFA to be concluded between HEA (or its nominee) and Eskom as an asset refurbishment / creation programme value initially of USD 1.5 billion. There was no specific commitment as to how much money was to be paid to Eskom, on what dates it would be paid, and who was liable to Eskom to pay it.

358. Against that background, the once-off facility fee of 1.6% of the amount of the programme value, payable on the signature of the ALFA, is commercially outrageous. This would have committed Eskom to an upfront payment of 1.6% of USD 1.5 billion, which equates to approximately USD 24 million, before a single cent had entered the coffers of Eskom.

359. It is little wonder that the Eskom Treasurer, Mr Pillay, resisted this aspect of the transaction so strongly. It remains unexplained why the then CFO, Mr Singh, who signed the term sheet, and the acting Group CEO, Mr Maritz, who signed the ALFA, should have promoted the transaction so unreservedly.

360. There does not appear to have been any justification for the signing of the term sheet. Signing the term sheet was not in accordance with Eskom's usual practice and it is difficult to see what benefit there was in legally committing Eskom to its terms. It seems as if the purpose in signing the term sheet was to push Eskom closer to HEA and afford HEA preferential treatment over its competitors for Eskom's business.

361. It does not appear to be in dispute that no Board approval was provided for the conclusion of the HEA transaction. This alone rendered the signed contract with HEA invalid. Fortunately, the invoice submitted by HEA was never paid and the HEA transaction therefore caused Eskom no direct loss.

362. Nevertheless, it would appear that there is at least a prima facie case of attempted theft or fraud against Mr Anoj Singh, who signed the term sheet, and Mr Maritz, who signed the contract documents on the strength of which the invoice for USD 21,888,000 was submitted to Eskom. A similar case could be made against Mr Thomas of HEA.

Suspensions and Tegeta issues

363. The evidence proves a scheme by the Guptas to capture Eskom, cause the suspension of the four executives under the guise of an enquiry into the affairs of Eskom, install the Gupta family's selected officials in positions of influence in place of the four suspended executives, and divert Eskom's assets to the financial advantage of the family. Mr Salim Essa, President Zuma, Ms Dudu Myeni, the late Dr Ben Ngubane, Mr Mark Pamensky, Mr Brian Molefe, Mr Anoj Singh, Ms Suzanne Daniels, Mr Matshela Koko and Mr MJ Zwane were persons proven knowingly to have assisted the Gupta family.

364. There were indeed attempts made to influence Eskom employees and the Board of Eskom, most notably by President JG Zuma, Minister L Brown, Ms D Myeni, Mr AZ Tsotsi, Mr B Molefe, Mr A Singh, Mr M Koko and Ms S Daniels in order to benefit the Gupta family and their associates such as Mr S Essa.

365. The Commission investigated the concerns raised by the Public Protector in paragraph 4 of her report relating to the acquisition of Glencore's South African Coal interests and the channelling of funds from Eskom to the Gupta family to pay for that acquisition. The Commission found the Public Protector's concerns to be substantially justified.

ESKOM AND McKINSEY-REGIMENTS-TRILLIAN

366. This section of the report deals with the evidence regarding two transactions between Eskom and McKinsey & Company, as well as payments made pursuant thereto. The two contracts were purportedly concluded with McKinsey in September 2015 and January 2016 respectively, one relating to the Corporate Plan and the other to the Top Engineers Programme. The 2015 contract was concluded for a duration of six months but endured only for a period of about four months. The 2016 contract, known as the Master Services Agreement (MSA), aka Service Level Agreement (SLA), was intended to operate for three years, but Eskom decided to terminate it about five months into the period, in June 2016. On closer scrutiny, both these contracts involved a scheme designed to benefit Trillian Management Consulting (Pty) Ltd, a wholly owned subsidiary of Trillian Capital Partners (Pty) Ltd, in which Mr Salim Essa, a close associate of the Gupta family, had majority shareholding of 60%.

367. The Regiments and Trillian consultancies appear as implicated parties throughout many of the state capture investigations. Both were very small local companies doing advisory work largely of a financial and management consultancy nature, where Mr Eric Wood featured prominently as a Director. He appeared to have a strong working relationship with Mr Essa. Mr Essa was referred to as a "rainmaker" because he allegedly secured contracts with SOEs. Mr Wood led a division of Regiments that had been partnering with McKinsey to procure work with SOEs, and which transferred officially on 1 March 2016 into Trillian, whose main shareholder was Mr Essa.

368. McKinsey & Company Africa and Regiments had a history of working together at Transnet since 2012, predating the work they undertook together at Eskom from 2015. The Transnet evidence is thus important to understand and identify patterns that may have continued into the Eskom space. McKinsey and Regiments also partnered to secure contracts at SAA through a corrupt relationship between Regiments and an SAA official. In total, McKinsey was paid just under R1.9 billion with regards to contracts shared with Regiments or Trillian at Eskom, Transnet and SAA.

369. Once Regiments became involved as McKinsey's Supply Development Partner (SDP) at Transnet there was a succession of sole-source contracts awarded to the McKinsey-Regiments consortium from 2013 to 2015, with exponential (70%) escalation in fees. McKinsey landed seven contracts at Transnet, with the same consortium, within eighteen months. At Eskom, McKinsey's earnings dwarfed previous earnings at Transnet (or previously at Eskom), at over R1 billion in under a year.

370. In 2014, Regiments tried with only limited success to get consulting work at Eskom. Pressure was applied by then Public Enterprises Minister Malusi Gigaba's advisor, Mr Thamsanqa Msomi, on Eskom's new Group CFO, Ms Tsholofelo Molefe, who had been appointed into that position in January 2014, by complaining to her that there was insufficient transformation in the award of Eskom contracts, that he hoped she would improve the situation. He then arranged for her to meet a supposed aggrieved supplier, which turned out to be Mr Salim Essa. However, he was not actually an aggrieved party, but was attempting to use access to the CFO to create a relationship that would be useful to secure contracts. This strategy did not work with Ms Molefe, who referred Mr Essa to the relevant tender processes and did not entertain Mr Msomi's further approaches either.

371. However, a new situation was contrived where Mr Essa would return at a very opportune moment to conveniently offer the services of Regiments Capital. According to Ms Molefe, a financial sustainability plan developed by her was deemed insufficiently robust by Eskom Chair Mr Zola Tsotsi, who said that Minister Brown demanded a more robust plan to be submitted within three months.

372. In response, Mr Colin Matjila, then Acting GCEO organised to meet with Ms Molefe out of the office where he suggested she make use of an external service provider. Pursuant to this suggestion, Mr Matjila introduced Mr Essa to Ms Molefe at a privately arranged meeting at Monte Casino and Mr Essa offered the services of Regiments Capital. Following this, it appears Mr Matjila pushed hard to get a contract signed off for Regiments, whilst Ms Molefe resisted taking up their services because of the lack of a competitive tender process, as well as her perception that they were over-priced.

373. Additionally, the work offered by Regiments was not the revised financial sustainability plan that Mr Tsotsi demanded, but was limited to outlining a few initiatives that could be taken to unlock cash in Eskom's balance sheet; which was work that Ms Molefe felt Eskom had the capacity to do. She indicated that Regiments delayed in submitting its proposal, and ultimately submitted an agreement (not a proposal) for Eskom to sign. She would not succumb to Mr Matjila's pressure for her to sign the agreement, much to his annoyance. The deadlock was only broken by the Board giving a mandate in writing to Ms Molefe that Regiments was permitted to test the viability of their proposed financial options for Eskom in a high-level desktop exercise, for which Regiments was paid R1 million.

374. It is noted that Ms Molefe was suspended the next year, in March 2015, on spurious grounds, and then enticed to exit the organisation, which she did.

Large contract for Regiments and McKinsey in 2015

375. Regiments and its off-shoot company, Trillian, found it much easier to get work at Eskom from 2015, and on a far greater scale. As they did at Transnet, Regiments partnered again with McKinsey on the same basis for contracts at Eskom and were utilising the services of Mr Salim Essa as a 'Business Development Partner', to land contracts in return for a large share of the fees earned. Ms Mosilo Mothepu, a former senior employee of Regiments, testified how the company had struggled to get government contracts when she first worked there in 2007 to 2010, but when she returned in May 2015, this had changed dramatically with the assistance of both Mr Essa and Mr Kuben Moodley. Ms Mothepu testified that if ever someone at Regiments was having a problem, they would call Mr Essa and "it would happen".

376. Significantly, Mr Ian Sinton of Standard Bank testified that in a meeting with Regiments' Directors, Mr Niven Pillay and Mr Litha Nyhonhya, both confirmed that McKinsey had offered to partner with Regiments on an expected project at Eskom, on the same terms of McKinsey's projects at Transnet, i.e., that Regiments would earn 30% of all revenue from the project, but that it would have to pay 30% of this to Mr Essa. In addition, Mr Brian Molefe and Mr Anoj Singh, the Group CEO and CFO at Transnet respectively, who had been key in securing the McKinsey and Regiments team contracts at Transnet, and moved over to Eskom during the course of 2015 to occupy the same crucial positions, initially in acting capacities, before being made permanent. The Eskom evidence on the "suspensions" matter detailed above shows how it appears that these positions were deliberately vacated to make way for these new executives.

377. McKinsey had been sending "unsolicited" proposals to Eskom in 2014 and early 2015, offering to continue working on the 'Top Engineers' programme that it had developed for Eskom, which involved training a cohort of Eskom engineers to provide an in-house consulting capacity rather than outsource the service. Eskom had not taken up this offer, with the reasons given largely as funding constraints. McKinsey and Regiments then jointly submitted a proposal to Eskom on 20 April 2015 titled "Building an Internal Consulting Unit for Eskom by driving savings and unlocking cash". The work areas proposed included: creating an internal consulting unit based on the previous Top Engineering Programme; interventions to reduce expenditure on procurement; "balance sheet optimisation" to unlock cash for Eskom; and assisting with "unlocking funding sources" for Eskom to improve its financial position. The services would be provided on an 'at risk' basis, where payment would be based on a percentage of the "savings" deemed to have been achieved for Eskom, and supposedly this would make the programme 'pay for itself' rather than require a budget from Eskom. Dr Alexander Weiss, the senior partner at McKinsey who served as Co-Lead of the Client Service Team at Eskom, indicated that Eskom had suggested this approach. According to Mr Mabelane, the idea originated from Mr Koko who wanted to replicate McKinsey's alleged success in a previous programme elsewhere within Eskom. The training programme was code named "Top Engineers Programme".

378. Evidence shows that McKinsey and Regiments held extensive consultations with Mr Singh in the months prior to Mr Singh's start date at Eskom. Both McKinsey's senior partner, Dr Alexander Weiss, and Mr Singh, describe these consultations as helping to 'on-Board' Mr Singh and Mr Molefe because of McKinsey's supposed extensive insight into Eskom. However, it is strange that outsiders should take it upon themselves to 'on-Board' anyone when surely this is the role of Eskom and those who deal with the issues at hand, to which McKinsey would not be privy.

379. Regiments were present at these meetings allegedly to provide the 'financial component' of these briefings. It is, however, arguable that Regiments' relative lack of experience with Eskom would give them even less grounds to on-Board anyone for their role at Eskom. If the explanation of the 'on-Boarding' does not hold water, then Ms Mothepu's evidence would be correct that the real purpose was to discuss McKinsey and Regiments' proposal on the MSA and possibly reach an understanding with Mr Singh ahead of any formal decision by Eskom, conduct which is irregular and impermissible. Regiments' presence would then make more sense if it were there to present itself as McKinsey's intended Supplier Development & Localisation (SDL) partner at Eskom. Former Regiments employee, Ms Mothepu, confirms that these were consultations regarding a proposal by McKinsey and Regiments to offer services to Eskom, at which she was present, and which were held off-site, in a

secretive fashion and code-named 'Project Pandora'. It appears Mr Singh was giving extensive direction to McKinsey and Regiments to work on their proposal and required them to do preparatory work for him.

Messrs Singh's, Koko's and Molefe's relationships with Guptas and associates

380. The parallel relationship between Mr Singh, Mr Molefe, and Mr Koko with the Guptas provides important context against which the events in this report took place. Mr Singh admits to making between 10 and 12 visits to the Guptas in Saxonwold, and to having met with Mr Essa a few times since 2012 or 2013. Evidence shows that during 2014 and 2015, Mr Singh made numerous trips to Dubai, where flight bookings were charged to the account of Mr Essa and paid for with large amounts of cash that were delivered to the travel agency, Travel Excellence. The Guptas, Mr Essa and close associates were often shown to be in Dubai at the same time, and on occasion even on the same flight as Mr Singh. Moreover, records show numerous other implicated persons in state capture in Dubai at the same time.

381. Mr Koko claims not to have known Mr Essa in 2015, however there is evidence of numerous emails he forwarded from July to December 2015, to an alias Business Man at an email address, infoportal1@zoho.com, found to have most probably belonged to Mr Essa. Similarly, there is evidence that Mr Koko took a trip to Dubai in January 2016, where Mr Essa appeared to arrange and pay for his flights and visa, and one of the Gupta's close business associates, Mr Ashu Chawla, organised the hotel stay. Ms Sameera Sooliman, an employee of Travel Excellence, indicated that the company offers a 14-day credit facility to its good or longstanding clients, one of which was Mr Salim Essa who frequently requested bookings to be made for other people. He had a standing account with Travel Excellence and travel bookings made at his behest for other people would be allocated to his account as the guarantor for such bookings.

382. Mr Molefe admits to having had many interactions with the Guptas for social and private business initiatives he wanted to pursue. He claims not to know Mr Essa, despite testimony that Mr Essa spoke of a decision to make Mr Molefe the "boss" of Eskom when he was still at Transnet. Drivers for Mr Molefe and Mr Singh testified at how large bags of cash were transferred to them when visiting the Guptas in Saxonwold, or which appeared in the trunks of their vehicles after visits there.

Eskom disregards the requirement for National Treasury approval

383. A submission dated 13 May 2015, prepared by Mr Edwin Mabelane, the Acting Group Executive of Technology and Commercial and Chief Procurement Officer, requested that the Eskom Board authorise for negotiations to take place to appoint McKinsey as a partner for the development of the new Internal Consulting Unit on a sole source, 'at risk' basis for consulting services aimed at achieving cost savings for Eskom. Mr Molefe approved the submission on 13 May 2015, and the Eskom Board Tender Committee (BTC) approved it by round robin on or about 6 July 2015, as follows:

No	Committee Member	Date
1	Mr Zethembe Khoza (Chairperson)	1 July 2015
2	Ms Chwayita Mabude	6 July 2015
3	Ms Nazia Carrim	3 July 2015
4	Ms Viroshini Naidoo	6 July 2015

384. The revised round robin document to be signed by BTC members is dated 6 July 2016. It is unclear how Mr Khoza and Ms Carrim signed off for approval on 1 and 3 July 2015 respectively on a document that was only submitted to the BTC on 6 July 2015.

385. A justification for using sole sourcing to procure McKinsey as the service provider for the contract were set out in a "Sole Source Justification" by Mr Prish Govender on 18 May 2015, approved by Mr Edwin Mabelane on the same day, and then reviewed by Ms Suzanne Daniels on 26 May 2015, who

then prepared a Memorandum in support of the justification. The justifications were said to relate to McKinsey's unique intellectual property over the 'Top Engineers Programme', its unique insights into Eskom because of previous work, and that an in-depth analysis showed there was only one supplier, viz. McKinsey, in the market capable of delivering what Eskom required. However, the justification of the sole source basis was questionable, as there are numerous, large and experienced consulting firms in South Africa that could have competed for this 'turnaround' type of consulting work. If the motivation was that McKinsey was uniquely positioned to deliver because of their previous Top Engineers work for Eskom, then it would not make sense that any of it could be outsourced to another party, such as Regiments or Trillian, nor could this reasoning apply to all the other elements of the contract that had nothing to do with the Top Engineers programme.

386. The justification for using an 'at-risk' approach to the contract remuneration was heavily disputed within Eskom and was clearly unlawful. Mr Molefe has justified the 'at-risk' approach saying that Eskom was carrying very high costs for external consultants, and that McKinsey would help to develop an internal consulting capacity within Eskom from which there would be huge savings, and from which McKinsey could be paid thus not requiring any upfront cash outlay. However, the risk-based approach was not permitted under Treasury Regulations, and the fees that could be charged were neither quantified nor capped. Such a system could easily be abused. Eskom's own 'Directive for the Implementation of the National Treasury Cost Containment Instruction and Government Gazette' (7 July 2014), sets out how Eskom would comply with and implement the Cost Containment Measures of the 2013/2014 Note, with clause 2.2.2.3 setting out that the rates at which consultants are to be remunerated must not be higher than those set out by a particular list of authorities.

387. Mr Ismail Mulla of Eskom Corporate Finance: Internal Consulting Unit had explicitly called for work to be done to establish the case for whether an internal consulting unit was needed, and to determine the best strategy and partner by which this should be delivered ("Briefing Note" to Mr Mabelane, 2 June 2015). Mr Mulla thus rejected Mr Mabelane's proposal. Nonetheless, in a letter dated 29 June 2015, the Acting GCFO, Ms Nonkululeko (Veleti) Dlamini, approved the request for the development of 'Top Engineers Programme' into an Internal Consulting Unit, but subject to conditions which included setting aside budget for the project for three years and compliance with National Treasury Instruction in relation to consultant rates and "if alternative methodology such as incentive-based is used, need to verify that it is allowable within the rules of National Treasury". The Eskom executives (driving the process) failed to comply with any of these conditions. Mr Aziz Laher, the Group Compliance Manager and PFMA corporate specialist at Eskom, repeatedly raised the need to apply for a deviation from National Treasury in **September 2015** to several Eskom officials including Mr Koko, Mr Prish Govender, Ms Maya Bhana (Mr Singh's Office Manager) and Mr Charles Kalima. Mr Koko has stated clearly to the Commission that he was aware that a risk-based contract was not permitted by National Treasury regulations, and that he was advising other colleagues not to make use of it. However, the evidence shows that he was opposed to Mr Laher's advice and questioned why Mr Laher was holding up his with the view that a deviation application was required. Despite these internal warnings, negotiations by Eskom's top executives over McKinsey's proposal proceeded.

Eskom's executives involved in the MSA

388. It appears that from Eskom's side, Mr Mabelane, Mr Prish Govender, Mr Singh and Mr Molefe were involved in the negotiations. There is conflicting evidence as to whether or not Mr Koko was also involved. Ms Mothepu says he was, at least insofar as Regiments is concerned, as will be shown below. Dr Weiss says he was not, but that McKinsey began discussions on the Top Engineers programme with Mr Koko in his capacity as Group Executive for Technology and Commercial.

389. Indeed, Mr Koko came back from his suspension to be part of the Steering Committee that was established to oversee the implementation of the MSA. The Board resolution of 6 July 2016 specifically gave him, as the Group Executive: Technology and Commercial, the mandate to lead the negotiations. Mr Koko, who occupied the position, was on suspension and Mr Mabelane was acting in his place, but Mr Mabelane states that he handed over to Mr Koko on Mr Koko's return on 20 July 2015 and it was after this that negotiations started. Mr Koko denies he was involved in the approval pro-

cess or in the negotiations, because he claimed they were completed by the time he returned from suspension.

390. Mr Koko has also relied on a statement by Dr Weiss as evidence of him not having been involved in the negotiations. However, from 20 July 2015, Mr Koko began sending emails with documents relating to these negotiations to infoportal1@zoho.com, believed to be the email address of Mr Salim Essa. This included an email containing Eskom's negotiating position for the MSA, the Top Engineers programme and online vending.

391. According to Ms Daniels, Mr Koko had a list which he discussed with her and told her that it was part of his instructions from "his principals". The list contained transactions that appear to be areas of existing or potential contract work with Eskom with estimates of "revenue" for each transaction, and with handwritten notes on it which Mr Koko says are his. Some of the notes on the list are worth mentioning, such as "give me a fixed price, I give you the partner", which Mr Koko says relates to the New Largo Mine that Anglo-American was building for the Kusile Power Station. He admitted he was stating who he thought should be subcontracted as a BEE partner

392. This is contrary to Mr Koko's evidence that Eskom never got involved in directing who should be a subcontractor. The other note is 'Zestlor', an entity that belongs to Mr Salim Essa's wife. When asked about Zestlor, Mr Koko could not recall why he had written this on the list. From Mr Holden's report it is apparent that Zestlor was one of the entities used by the Guptas to launder money.

393. Indeed, McKinsey and Regiments did get contract work for these items. Mr Koko denies that he was pursuing the matters on the list, because they do not fall within the scope of the division he headed. However, the presentation made at the first Steering Committee meeting on 9 February 2016 shows that Mr Koko was responsible for, inter alia, "Completion of the Duvha Insurance claim" and the "Master Vending Agent". When confronted with this presentation, Mr Koko's response was that it was an error for his name to be shown. However, there is no explanation why that error was never corrected. It is significant that the SteerCo presentation document was provided by Mr Singh as part of his evidence to the Commission, and he does not point to any errors in the document.

394. Ms Mothepu was one of Regiments' representatives on the SteerCo established by Eskom's executives to oversee the implementation of the MSA. Ms Mothepu sent at least seven emails to Mr Koko on matters relating to the MSA. The fee arrangement between McKinsey and Regiments under the MSA was envisaged to be 70% for McKinsey and 30% for Regiments.

395. However, Regiments was supposed to lead its own financial transactions with Eskom, called "Balance Sheet Optimisation and Cash Unlocking Initiatives", for which it would earn 95% of the fees on this portion of the work, with McKinsey only earning a 5% administration fee. This is exactly the type of work that Regiments had proposed to Ms Tsholofelo Molefe in 2014 when she was the FD, following a meeting with Mr Salim Essa, arranged by Mr Colin Matjila, at Monte Casino in Johannesburg. On that occasion, Regiments did not succeed in obtaining a contract it had wanted from Eskom. This time around, in December 2015, it seems they did, in collaboration with the new management at Eskom, under Mr Molefe and Mr Singh.

396. Significantly, the items of work for Regiments under 'Balance Sheet Optimisation and Cash Unlocking Initiatives' included:

	Ms Mothepu's affidavit	Last proposal emailed to Mr Koko
1	Insurance claims management for the Duvha Unit 3 Recovery Project	Insurance claims management for the Duvha Unit 3 Recovery Project
2	Rebuild – Duvha Unit 3 Recovery Project to recover the 600MW capacity loss	Rebuild – Duvha Unit 3 Recovery Project to recover the 600MW capacity loss
3	On-line vending	On-line vending
4	Optimisation of Fibre Optic Cable Capacity	Optimisation of Fibre Optic Cable Capacity
5	Insurance claims management in relation to the Hitachi settlement offer	Insurance claims management in relation to the Hitachi settlement offer
6	Escap capital structure optimisation	Escap capital structure optimisation
7	Overall insurance claims management	Overall insurance claims management
8	Arrangement and negotiation of long-term facilities	Arrangement and negotiation of long-term facilities
9	Arrangement and negotiation of working capital facilities	Arrangement and negotiation of working capital facilities
10	Sale of Eskom Finance Company business and mortgage book	Sale of Eskom Finance Company business and mortgage book
11	Hybrid Capital Issuance	Hybrid Capital Issuance

397. One of the emails from Mr Koko to Business Man on Saturday, 08 August 2015 at 22:20, related specifically to online vending, and attached a Submission Document signed by Mr Koko himself as Group Executive on 8 August 2015. In fact, the three emails that Mr Koko sent to Business Man on 20 July 2015, all related to the development of the Top Engineers Programme and the appointment of McKinsey as a consultant. This could certainly not have been communications with Dr Ngubane, who has in any event denied ever receiving such emails from Mr Koko. Mr Koko sent these emails to Business Man during the course of the MSA negotiations.

398. The negotiations with McKinsey recommenced on 28 July 2015, eight days after Mr Koko's return from suspension. Mr Koko, as a member of the Steering Committee, was the Eskom lead official responsible for completion of the Duvha insurance claim and to advise on the appointment of the Master Vending Agent. Mr Singh was the Eskom lead official in the Issuance of Hybrid Capital, arrangement of long-term debt facilities, arrangement and negotiation of working capital facilities, and the sale of Eskom Finance Company, all items identified by Ms Mothepu as falling under Regiments' portion of the work. Ms Mothepu has identified some of these items as initiatives that were added to the MSA original proposal by Mr Koko and Mr Singh, such as online vending, Duvha 3 insurance claim and rebuild, and the Hitachi Insurance settlement, as mentioned in an exchange of emails between herself and Mr Koko and Mr Mabelane on 30 November 2015 (copied to Eric Wood, Vikas Sagar, Asanda Smith, Faheema Badat, Grant Joseph and Mahommed Bobat).

399. Mr Koko sought to dispute these emails on the basis that the matters referred to in the emails did not fall under his division. He sought to contend that the email of 30 November 2015 was addressed not to him, but to his PA. His denials do not make sense because it is inconceivable that Ms Mothepu would have written as she did if she had not had any prior discussions with Mr Koko on matters referred to in her emails.

400. The evidence around the purported conclusion and termination of the MSA shows otherwise. The unjustified and irregular payments made to Trillian after approval by SteerCo all stand in stark contrast to his own portrayal of an innocent man. Mr Koko colluded and collaborated with his colleagues and external parties, such as Mr Salim Essa and Mr Eric Wood, to siphon money out of Eskom to Mr Essa's entity, Trillian.

401. On behalf of McKinsey, Dr Weiss and Mr Sagar led the negotiations from May to October 2015, with a final workstream regarding the Balance Sheet Optimisation still being negotiated by Regiments, led by Mr Eric Wood, into November 2015. On 21 October 2015, the BTC approved a submission authorising the Eskom team to conclude the negotiations of the MSA. The submission to the BTC was signed off by Mr Charles Kalima, Mr Govender and Mr Koko on 6 October 2015. Permission for the sole source and at-risk based contracting approaches had still not been sought or achieved, although the submission states that it may be required. Mr Koko has stressed that he knew it was required and had insisted that the submission stress this point. At the meeting, Mr Neo Tsholanku, Head of Legal, apparently advised the BTC that this was required.

402. The submission states that if the contract value exceeded R1.2 billion then it would need to be re-

ported to the Minister of Public Enterprises. This was never done. The MSA was described as having an "R0.0" costed budget, reflecting that it was supposed to be 'self-funding' from savings that were to be made, and never attempts to provide a valuation or to place a cap on the payments that could be made under the contract. This contravened National Treasury regulations. Most extraordinarily, the submission sought approval for a R475 million down-payment to be made upfront to McKinsey, despite the lack of budget and the fact that the risk-based approach was supposed to mean that payment would only be made if Eskom realised actual savings. Further, this meant that Eskom would be making payment without having received any service yet from McKinsey.

403. With no contract and only an acceptance letter in place, McKinsey began working on the Turnaround Programme from January 2016. Regiments were not part of any formal arrangement, yet according to Ms Mothepu, Mr Singh told them that he would undertake to get the necessary approvals from National Treasury and that he wanted them to work concurrently whilst this took place; which it appears McKinsey and Regiments did from around November or December 2015. Moreover, Mr Koko also appears to have informed them that Eskom had requested the National Treasury to approve their "confinement" appointment.

404. Approval was never sought nor obtained from the National Treasury for the MSA as demonstrated in email correspondence.

405. It is no insignificant matter that Dr Wiess says he understood from his McKinsey colleagues that Mr Singh had spoken positively about engaging Regiments at Eskom based on his experience with their work at Transnet. When confronted with this evidence, Mr Singh, clearly unable to maintain a consistent version, firstly denied that he had recommended Regiments to McKinsey, but later conceded that he would have done so and that this was "a normal thing to happen". The minutes of a special Board meeting held on 10 September 2015 reflects the resolutions to appoint McKinsey & Company as a sole partner and duly authorising the Group Executive: Technology and Commercial to delegate further and take necessary steps to effect this resolution.

406. There were further legal difficulties with the Corporate Plan Contract, namely that National Treasury's approval process required the end-user to do a gap analysis before considering the appointment of a consultant. However, Ms Mothepu has testified how Eskom's own teams had the expertise and skills to perform the duties that Regiments and later Trillian were to perform. Mr Amankwah also confirms in his affidavit that Eskom had internal resources and personnel who were experienced in such matters. It was therefore unnecessary for Mr Singh and Mr Koko to have McKinsey and Regiments appointed to render services in relation to the Corporate Plan.

407. Mr Koko signed the acceptance letter on Eskom's behalf on 29 September 2015, but Mr Mabelane purported to sign the contract only on 4 May 2016 – well after services were purportedly delivered and payment made. In any event, Mr Mabelane failed to properly sign the contract where he was required to sign, and only signed the Schedule of Deviations. As a result, the purported services were rendered without any valid contract in place. Eskom required McKinsey to have an SDL partner, but no partner was named in the contract. McKinsey chose to have Regiments work on aspects of this contract, presenting them as their SDL partner, but had no subcontracting agreement with Regiments.

408. The R30.6 million paid to Trillian was apparently not just for the Funding Plan work, but for the overall Corporate Plan work, and according to Mr Singh represents 30% of the just under R100 million contract. Moreover, it appears it was Regiments, not Trillian that did the Corporate Plan work, between October and December 2015, in addition to the Funding Plan work of January/ February 2016.

409. The Board had approved the request for a contract duration of eight months. However, the purported contract was concluded for a duration of six months, from 1 October 2015 to 31 March 2016. This period was still cut short, as the contact endured only until February 2016. Despite the shortened duration, McKinsey was remunerated as if the contract had run for the entire eight-month period. McKinsey was paid R78.6 million and Trillian (not Regiments) was paid R30.6 million, despite the fact that Trillion only had two employees at the time and neither of them had done billable work for Eskom during this time. Mr Wood himself would only officially leave Regiments by end February 2016 and

join Trillian on 1 March 2016.

410. The invoice dated 31 January 2016, was sent from Trillian to Mr Singh directly by email dated 3 February 2016, to which was also attached a covering letter dated 29 January 2016, (bearing the signature of Ms Goodson, who claims that it was her electronic signature that was used, and she is did not draft the letter). The letter indicated that Trillian did not have the "balance sheet available to furnish its share of the "down-payment guarantee required on the Eskom/McKinsey mandate" and proposed that the requirement for Trillian to lodge such guarantee be waived. Additionally, it was stated that "Trillian needs to be in a position to invoice Eskom directly simultaneously with McKinsey for all fees on contracts where McKinsey is appointed to lead and Trillian is the Supplier Development partner". This was based on the rationale that if Trillian had to invoice McKinsey only after McKinsey had invoiced Eskom, there would be "significant cash flow pressure for Trillian".

411. A letter written by McKinsey Senior Partner, Mr Vikas Sagar, on 9 February 2016, to Mr Prish Govender of Eskom, authorised direct payment to Trillian, the subcontractor. However, this letter has been denounced by McKinsey as containing inaccuracies and, therefore, misleading. McKinsey has especially rejected the assertion that Trillian was its sub-contractor on the Corporate Plan and tendered evidence that after it investigated the matter it emerged that the letter was prepared at the request of both Eskom and Trillian, and that it initiated a disciplinary action against Mr Sagar, who was dismissed. He lodged an internal appeal against his dismissal but resigned before the appeal could be dealt with.

412. Mr Singh sought to contend that Eskom had a policy allowing direct payment to sub-contractors in certain conditions to ensure sub-contractors got paid their due, but never produced a copy of such policy. Ms Jainthree Sankar, Senior Manager in Contracts Management at Eskom, has confirmed in an affidavit to the Commission that Eskom's procurement and SCM policies contain no clause for direct payment to sub-contractors. Mr Koko was adamant that no such policy as alleged by Mr Singh existed and that he had refused to approve the payment of the R30.6 million invoice, because Trillian had no contract with Eskom, and that it was McKinsey who had to arrange payment to Trillian based on whatever relationship there was between them.

413. Mr Singh appears to have been aware that Regiments was working on the Corporate Plan in December 2015; but he has sought to argue that he thought Regiments were seconding staff to Trillian. However, Mr Singh admits he had no evidence at any point that this was in fact the case, or evidence that Regiments were sub-contracting their work to Trillian. Mr Singh ultimately asserts that he never approved the Trillian invoice, which he merely sent it on for verification and payment by others, thus seeking to pass responsibility on to others.

414. It is inconceivable that Mr Singh would even forward the invoice for processing when he knew or ought to have known that Trillian was not a subcontractor to McKinsey and that it certainly did not have a contract with Eskom. A very telling comment relayed by Mr Andre Pillay, former Head of Eskom Treasury, is that apparently Mr Eric Wood once boasted to him that they could be given any work at Eskom, even sweeping floors, and Mr Anoj Singh would find a way to pay them.

415. On or about 14 April 2016, Trillian was paid R30.6 million, under the guise that it was McKinsey's BBBEE partner, when in fact it was not, as McKinsey had officially rejected Trillian as an SDL partner, and Eskom and Trillian knew this as from 30 March 2016.

416. By January 2016, not only were the National Treasury and shareholder approvals for the MSA outstanding, but the contract for the MSA also appears not to have been in place. According to Dr Weiss, he received the contract, for signature on behalf of McKinsey, only towards the end of September or early October 2016. The contract purports to show Mr Mabelane as having signed for Eskom on 7 January 2016, and Dr Weiss on 11 January 2016.

417. The long delay in receiving the contract and then the back-dating of the signing is of enormous significance. Firstly, it meant that McKinsey began working with no contract in place, and thus they and any partner working alongside them had no legal basis for doing the work. Secondly, Eskom was permitting and facilitating McKinsey and Trillian to begin working, under the pretext that Eskom required

urgent assistance, whilst knowing that there was no contract in place and that huge resources were being deployed by McKinsey. Mr Singh and other Eskom executives have denied knowing that the contract with McKinsey was not yet in place.

418. However, there are numerous references in both internal Eskom documents, Steering Committee documents and correspondence between Mr Singh himself and McKinsey that indicate that this was indeed still an outstanding matter. In a letter to Dr Weiss dated 19 February 2016, Mr Singh refers to the 'proposed contract' and lists items that remain to be resolved so that the signing of the 'proposed contract' can take place. Dr Weiss responded by letter dated 25 February 2016 also referring to the Top Consultants Programme as "our proposal to serve Eskom", with a clear indication that the contract had not yet been concluded, much less with a BBBEE partner.

419. The following month, McKinsey ultimately informed Eskom, by letter dated 30 March 2016, that it would not partner with Trillian. This letter also makes it plain that the MSA had yet not been concluded as at that date, referring to it still as "the draft of the Services Level Agreement between Eskom and McKinsey". The letter indicated that Trillian had failed to meet a set of criteria and that the partnership had not been approved by McKinsey's global risk and legal teams.

420. Eskom, particularly Mr Singh, appears to have supported the switch to working with Trillian. Most importantly, however, was that McKinsey's corporate governance would not allow a contract to be forged with Trillian before a due diligence was performed on the company, and when this was done unfortunately Trillian failed, as Mr Salim Essa's ownership was identified and he was flagged as a Politically Exposed Person (PEP). Further, as apparent from Dr Weiss' letter, Trillian repeatedly failed to provide the required information, including confirmation of the company's BBBEE status, despite McKinsey's numerous requests.

421. At the end of March 2016 when McKinsey officially informed Eskom of their rejection of Trillian as an SDL partner, according to Ms Mothepu, Mr Singh was very upset about this and begged McKinsey to reconsider, but Mr Singh denies this.

422. Nonetheless, the Transnet evidence shows how Mr Singh and Dr Wood (under Regiments) continuously contrived to work closely together under a series of irregular contracts. In fact, Mr Yeboah-Amankwah of McKinsey has stated that when McKinsey was looking for a BEE partner to work with at Transnet, after their first choice was not possible, Mr Singh had suggested Regiments. Indeed, Mr Singh appears to have played a key role in negotiating for a McKinsey-Regiments contract at Eskom even when he was still at Transnet. Mr Singh was already working with Dr Woods' team (as Regiments) during 2015, under a second small fixed-price contract (in regard to the Corporate Plan) that was put in place with McKinsey, presenting themselves as McKinsey's SDL partner.

423. The modus operandi of Regiments and thereafter, Trillian, across many SOEs is that Mr Salim Essa was essentially the "rainmaker" who would secure a contract with an SOE or a state entity for a major contracting party in return for Regiments/Trillian being sub-contracted as their BEE partner. Mr Essa wielded influence over certain top executives at the SOEs and in return he received a large share of Regiments/Trillian's earnings. Indeed, emails show Mr Essa was being sent important insider information from Mr Koko in 2015 on the MSA and other related matters at Eskom.

424. Most crucially, there is email evidence of Mr Essa needing a fee arrangement to be settled with McKinsey, through Mr Sagar, before he could set up a particular meeting for McKinsey at Eskom with 'Brian' (Molefe), in November 2015. This shows that (1) Mr. Sagar knew that Mr Essa was behind Trillian; (2) Mr Essa was involved in arranging meetings for Mr Sagar and Dr Weiss to meet Mr Brian Molefe; (3) Mr Sagar dealt directly with Mr Essa in relation to the proposed appointment of McKinsey and Trillian at Eskom; (4) Mr. Essa had some influence over Mr Molefe and Mr Sagar and was trying to exploit that influence in relation to McKinsey's position at Eskom, and (5) this was a favour being offered on condition of a favourable fee split for Trillian.

Purported termination of MSA

425. On 7 June 2016, the day of the third SteerCo meeting, being a meeting after Eskom had been informed of McKinsey's decision not to partner with Trillian, the Eskom executives convened a closed session meeting, chaired by Mr Singh. As per the minutes of the closed meeting, the session was convened at Mr Singh's request apparently to raise concerns about the sole source method which they themselves had used to appoint McKinsey to the MSA.

426. The reason given for termination was a complete farce, as Mr Koko and Mr Singh proceeded in September 2015 to compile a motivation for sole sourcing, despite Eskom Internal Consulting Unit's advice, back in June 2015, that a sole source for the scope of work proposed for McKinsey was unjustified, as McKinsey was not the sole provider of consulting services in the market. Therefore, this could not have been the real reason for termination of the MSA. It is reasonable to conclude that the termination was underpinned by these executives' disappointment by McKinsey's decision not to subcontract their friend (Mr Essa)'s company, Trillian.

427. Owing to the premature termination of the contract concluded to run for three years, payments to McKinsey (and Trillian) could not have been based on realised savings, as was envisaged by the risk-based appointment, and such payments would have no legal justification, as the MSA had not been concluded. In fact, the MSA was never concluded, as it was "terminated" before McKinsey could sign off on it. Therefore, in recommending compensation to McKinsey, the executives were acting in blatant violation of Eskom's interests and incurred fruitless and wasteful expenditure in breach of the provisions of the PFMA.

428. The submission was presented to the BTC at its meeting of 21 June 2016. Only an extract of the minutes has been obtained, signed by Ms Daniels on 8 November 2016, recording the BTC's resolution for termination of the MSA. However, the Eskom executives issued McKinsey with a letter of termination on 16 June 2016, five days before the abovementioned BTC meeting. There had been no Board decision on 9 June 2016 terminating the MSA. Mr Mabelane says reference to this date stemmed from his understanding from Mr Singh and Mr Govender that the Board had given the green light to have the contact cancelled. But this cannot be true as from the evidence it is apparent that all these executives acted in such close collaboration with each other that Mr Mabelane would or ought to have known that there was no Board decision at the time when he issued the termination letter.

429. Four days later, Mr Mabelane addressed another letter to McKinsey, dated 20 June 2016, in which he, once again, advised McKinsey that "based on the Board decision to cancel the contract, Eskom would reimburse McKinsey for the costs up to and until 8 August 2016". This was also prior to the BTC meeting on 21 June 2016, without any guarantee, objectively speaking, that the BTC would approve the termination. Therefore, at the time of Mr Mabelane's two letters to McKinsey, the purported decisions to terminate the MSA and to compensate McKinsey were made, not by Eskom's Board or BTC, but by the Eskom executives who served on SteerCo.

430. On 21 June 2016, Dr Weiss responded to Mr Mabelane by noting the decision to terminate but rejecting the offer to reimburse McKinsey on a cost basis only. McKinsey adopted this attitude despite knowing that it had not signed the MSA; which only happened in early October 2016, when Dr Weiss received a copy from Mr Mabelane and backdated it to 11 January 2016. Dr Weiss says that at that stage he did not even expect any further payment from Eskom, and yet he went along and McKinsey issued an invoice which Eskom paid on 22 February 2017. It is significant that in his affidavit, Dr Weiss states that by early June 2016 McKinsey and Eskom had not decided on any alternative SDL partner, and in fact never did, until Eskom's purported termination of the MSA.

431. Despite McKinsey and Eskom officials working for two months on a new contracting approach to the SDL partnering, whereby McKinsey would pay a range of alternative BEE contractors, Eskom executives on SteerCo decided to "terminate" the contract, by letter dated 16 June 2016, signed by Mr Mabelane, even before they could obtain a BTC approval for termination. This negates the urgency and importance of the case that had been argued for sole-sourcing McKinsey to assist Eskom, and the significant investment of time by numerous Eskom officials, including the top executives, to negotiate over the proposal. The official reasons given to the BTC very opaquely referenced concerns about

the "mechanics" of the turnaround programme that McKinsey had not addressed, and there was reference to a concern that National Treasury was starting to review Eskom's contracts with McKinsey. Indeed, according to Mr Singh, the National Treasury scrutiny was triggered by an audit finding over the use of sole-sourcing and the lack of a quantifiable value to the contract with McKinsey, which could trigger a finding of 'irregular expenditure'.

Eskom provides unlawful settlement payments to McKinsey and Trillian

432. Eskom then set about compensating not just McKinsey, but also Trillian, for the time spent on the Turnaround Programme, as well as compensation for the early cancellation. Between August 2016 and February 2017, Eskom made total payments of just under R1.6 billion to McKinsey and Trillian for a purported MSA contract that was backdated after termination. The various payments are shown in the table below:

Date	Supplier Name	Value (Excl. VAT)	Value (Inc. VAT)
12-Aug-2016	Trillian Management Consulting	R99 353 100,00	R113 262 534,00
12-Aug-2016	Trillian Management Consulting	R107 200 000,00	R122 208 000,00
15-Aug-2016	McKinsey & Co	R596 951 648,25	R680 524 879,00
20-Dec-2016	Trillian MC	R134 123 548,47	R152,760, 000.00
22-Feb-2017	Trillian MC	R154 677 525,69	R176,332,379,29
22-Feb-2017	McKinsey & Co	R305 322 474.32	R348 067 620.72
Total		**R1 397 504 748.25**	**R1 593 155 413.01**

433. The executives did not provide any breakdown on how any of the alleged amounts were arrived at. The MSA entitled McKinsey to a 10.55% fee in respect of "Recurring Realised Impact Amounts" and 10.8% in respect of a "Once Off Realised Impact Amount". The alleged potential liability of R2.84 billion, equates to about 15.27% of the alleged R18.6 billion said to have been achieved. Thus, this amount of R2.84 billion, claimed to be inclusive of payment to the BBBEE partner, was simply made up to instil fear and mislead the BTC. The MSA was a nullity from inception and McKinsey had no BBBEE partner entitled to any payment from Eskom. The BTC does not seem to have cared about these realities, not even enquired about who the undisclosed BBBEE partner was. Its resolution simply reproduced the wording of the submission for approval of the BTC. The resolution was signed by Ms Daniels on 8 November 2016. The alleged reinvestment does not make sense and has not been explained.

434. Further payments were made in December 2015 and February 2017, as per the table above. These payments were made in the face of both internal and external advice to Eskom that this would be potentially unlawful and that there had been little value added by Trillian. Oliver Wyman and Marsh (OWM), international consultants who had been hired by Eskom in November 2016 to do a technical review of the MSA, gave an assessment of the claimed value and payments due on the work done on the MSA by the time of the termination, and advised against any payments to McKinsey and Trillian pending a legal review of the MSA and contracting process of the overall programme.

435. OWM were particularly critical of the 'gain share' calculation of the work performed by Trillian at Majuba Power Station. OWM issued a draft report on 9 December 2016, followed by a final report on 15 December 2016, recommending a legal review in both reports before any further payment is made to McKinsey and its BBBEE partner (which McKinsey did not have).

436. However, on 13 December 2016, prior to OWM's final report, the BTC met and approved a further payment of R134 million (excluding VAT) to Trillian. At this meeting, Mr Zethembe Khoza (BTC Chairperson) and Ms Daniels (the Company Secretary) falsely informed the BTC that Cliff Dekker Hofmeyr (CDH) had done a legal review and concluded that Eskom should seek settlement with McKinsey. Eskom nevertheless made payment of R152.7 million (including VAT) to Trillian on 20 December 2016.

The invoice from Trillian was authorised for payment by Mr Prish Govender and Mr Mabelane, who both signed their approval on 14 December 2016.

437. On 8 February 2017, the BTC approved another payment of R460 million to both McKinsey and Trillian in full and final settlement of all claims in terms of the MSA. This approval was also made without Eskom having received a legal review on the MSA. CDH had, in fact, not yet finalised its legal review, and only submitted its memorandum on 17 February 2017, in which it raised concerns regarding the conclusion of the MSA. It would appear that CDH was not aware that the contract had also been back-dated, after it had been "terminated", as CDH had apparently been given a limited set of documents and information to scrutinise at the time.

438. It is necessary to refer to certain events prior to CDH's preliminary legal review on 17 February 2017. On or about 12 February 2017, Ms Daniels asked CDH to draft for Eskom a settlement letter with McKinsey. CDH provided a draft letter on 15 February 2017 by email to Ms Daniels and Mr Govender. On 17 February 2017, Mr Mabelane signed the letter as a settlement agreement between Eskom and McKinsey. McKinsey countersigned on the same day. Also on the same day, McKinsey issued an invoice to Eskom, addressed to Mr Prish Govender, for a final settlement amount due of R348 067 620.72.

439. Trillian, on the other hand, had already issued its invoice of R176 332 379.29 to Eskom two days earlier, on 15 February 2017, even before the purported settlement agreement could be signed. The invoice was addressed to Mr Mabelane. These invoices were approved for payment by both Mr Govender and Mr Mabelane and payment made to McKinsey and Trillian on 22 February 2017. Therefore, when the final legal review from CDH was received on 28 February 2017, the water under bridge had already dried up. The collusion and corruption on the part of Eskom executives, with external third parties (Trillian and McKinsey), was blatant.

Implicated parties

440. The focus will primarily be on the Eskom executives who carry a large responsibility for the MSA. Mr Singh, Mr Molefe and Mr Koko are all central to the origin and furtherance of a scheme at Eskom, designed to exploit Eskom and benefit Mr Salim Essa's company, Trillian. The so-called "on-Boarding" meetings McKinsey and Regiments had with Mr Singh and Mr Molefe, from May 2015, just shortly after Mr Molefe's arrival at Eskom but long before Mr Singh could be seconded to Eskom, presented key moments at which the scheme was conceived and hatched, based on the McKinsey/Regiments model of operation at Transnet with which both Mr Singh and Mr Molefe were familiar.

441. Therefore, the allegation that Mr Singh, and perhaps Mr Molefe, would have introduced Regiments at Eskom is not at all far-fetched. In fact, on the evidence, it is profoundly reasonable to conclude that he did. To that end, Mr Molefe and Mr Singh pursued "negotiations" with McKinsey and Trillian through secret, off-site meetings to agree to work on a range of issues together before any formal contracting processes even began. This would eventually result in them and other Eskom officials, e.g., Mr Kalima, Mr Govender, Mr Mabelane and Mr Koko, taking part in signing off on submissions to obtain Board approvals for the contracting process which they knew was irregular and unlawful.

442. Correspondence from McKinsey on the proposal to render financial work at Eskom places Mr Koko in the picture of negotiations of both the MSA and the 2015 contract in relation to the Corporate Plan. The evidence of Mr Mabelane is to the effect that the idea to employ McKinsey to develop an Internal Engineering Consulting Unit was the brainchild of Mr Koko.

443. From McKinsey's proposal on the finance work, it is apparent that both Mr Koko and Mr Singh would have commenced discussions and negotiations with McKinsey on both the MSA and the Corporate Plan even before April 2015. As the proposed work activities could allegedly not all fit under the MSA, these executives contrived another means, i.e., the Corporate Plan, to facilitate a quick appointment of McKinsey, on a sole source basis, with a last minute requirement to subcontract 30% of the contract value to a Black owned supplier.

444. It is no surprise that the submission to the BTC was prepared by both Mr Koko and Mr Singh, as

parties to the negotiations, and Mr Koko signed off on the Acceptance Letter to McKinsey. It soon transpired that the Black-owned supplier was Regiments, which Mr Singh had spoken positively about and recommended to McKinsey. Mr Essa was, according to Ms Mothepu's evidence, a business development partner to Regiments. He secured government contracts for Regiments, and indeed tried to do so in 2014 at Eskom but fell short. The R30.6 million payment by Eskom in respect of the Corporate Plan followed Mr Essa to Trillian. There was no justification for this payment, nor for the "belief" that Regiments or Trillian was a BBBEE partner to McKinsey. This was corruption, plain and simple.

445. Mr Mabelane and Mr Govender were complicit in the scheme, as they both approved Trillian's R30.6 million invoice for payment directly to Trillian. Mr Govender was also one of the three Eskom officials who signed off on Mr Koko and Mr Singh's submission to the BTC. Mr Govender participated in formulating flawed justifications for the sole sourcing of the MSA, with Mr Mabelane and Ms Daniels supporting this.

446. Mr Koko, Mr Singh and Mr Molefe were present at Board meetings where the potential irregularities of the sole-sourced 'at-risk' contract and the need for National Treasury approvals was discussed, yet Board approvals to proceed with contracting process was requested and obtained, nonetheless. Mr Koko provided confidential information on Eskom's negotiation position on the MSA to "Business Man" (Mr Essa) and took instructions from external parties on additional items to be included under the scope of the MSA, so that the extent of contracting work would be expanded.

447. Mr Koko put pressure on Eskom managers not to hold up the finalisation of the MSA despite lack of Treasury approval. Mr Koko, Mr Singh, Mr Molefe, Mr Prish Govender engaged McKinsey and Trillian to begin working before the contracting process was complete. Mr Singh, Mr Koko and Mr Mabelane, were all complicit in the false statement of Mr Govender that Treasury had approved Eskom's risk-based appointment of McKinsey.

448. Mr Mabelane, without negating that Mr Koko and Mr Singh were both complicit in his conduct, signed off on an acceptance letter for McKinsey without having obtained approval for deviation. Mr Mabelane and Mr Singh concealed the fact that the contract was not signed in January 2016 and was only signed and back-dated much later, after its purported "termination".

449. Mr Singh, Mr Mabelane and Mr Govender, when the hiring of Trillian as McKinsey's BBBEE partner did not materialise, were part of cancelling McKinsey's contract. Mr Singh and Mr Molefe are responsible for allowing payment of invoices that should not have been paid; the payments were unlawful due to the flawed contracting process and involved overpayment to Trillian and McKinsey.

450. Mr Zethembe Khoza and Ms Daniels lied to the BTC at its meeting on 13 December 2016 that a legal review had been obtained advising Eskom to agree to a settlement with McKinsey, when no such review had been received. The conclusion is inescapable that both Mr Khoza and Ms Daniels would either have been part of or, at least, aware of the scheme above perpetrated against Eskom by Mr Koko, Mr Singh, Mr Molefe, Mr Mabelane and Mr Govender.

451. Consequently, the purported conclusion of the MSA and subsequent termination thereof were all a sham, in which Mr Molefe, Mr Koko, Mr Singh, Mr Mabelane and Mr Govender were the primary role-players. The submission, titled Feedback Report, prepared and presented by Eskom executives (Mr Kalima, Mr Govender and Mr Koko), for the conclusion of the MSA was all premised on false and misleading information; the result of a carefully orchestrated and well thought through plan. These executives purported to conclude the MSA, following a process they knew was irregular, and terminated it on spurious grounds even before it could be concluded and before the BTC could approve a decision to terminate it. They offered payment to McKinsey and its "BBBEE partner", Trillian, prior to a BTC decision on the matter, whilst knowing that McKinsey did not have a BBBEE partner, and that Trillian was not McKinsey's BBBEE partner. The MSA (like the 2015 contract) was a charade designed to siphon money out of Eskom to third parties, particularly Trillian. Eskom's money was expended on a contract that never existed. The expenditure was blatantly wasteful and the irregularities pertaining thereto gross.

452. Similarly, in regard to the Corporate Plan, the Eskom executives committed gross irregularities and breaches of the law. Mr Koko and Mr Singh championed negotiations with McKinsey, even before Mr Singh was seconded to Eskom, and ultimately prepared a submission to the Board motivating for an appointment of McKinsey under the guise that there was 'urgent finance and strategy work' to be done and only McKinsey had the 'know-how' to render the service, when according to Eskom's Internal Consulting Unit, this was not the case. Mr Koko and Mr Singh pursued a sole-sourcing contract without obtaining permission from National Treasury for a deviation and where there appeared to be no justifiable case for the work to be done under the contract.

453. Mr Mabelane and Mr Prish Govender acquiesced in the conduct of Mr Koko and Mr Singh in the pursuit of McKinsey's appointment and were thus complicit in the furtherance of a scheme calculated to exploit Eskom financially. Mr Koko signed the Acceptance Letter with McKinsey for the contract, and Mr Mabelane purported to sign the contract well after its end date and, in any event, failed to append his signature on the right place, such that the contract never came into effect. Mr Singh engaged Regiments to conduct work for Eskom when Eskom had no contract with Regiments.

454. Mr Singh, as the GCFO, allowed payment of the R30.6 million invoice directly to Trillian that was unwarranted, as Trillian did not conduct work for Eskom and did not have a contract with Eskom or McKinsey.

455. Another disturbing factor is the apparently fraudulent nature of the invoice sent by Trillian to justify their R595 million share of the settlement. According to Ms Mothepu, the calculations involved grossly inflating the time Trillian employees spent at Eskom, such as allocating 180 days to her, which was not physically possible as she was only with Trillian Financial Advisory for four months and did not even spend all of her working hours on Eskom. In total, R14.7 billion of Eskom's contracts are calculated to have been afflicted by state capture according to the Flow of Funds' investigation and, of this, McKinsey's MSA and Corporate Plan contracts account for R1.1 billion, and related payments to Trillian account for R595.2 million from these two contracts.

456. All the above mentioned individuals colluded together to ensure that at least two large contracts were irregularly awarded to McKinsey and their development supplier, which was intended at first to be Regiments and then Trillian. Substantive payments were made unlawfully and irregularly to these parties, who benefitted unduly at the expense of Eskom.

457. Despite these events and other allegations of corruption becoming public knowledge, the former (2014) Eskom Board and senior executives repeatedly denied wrongdoing and even actively intervened or stopped Eskom from taking the necessary legal steps to review and set aside these contracts and their associated payments. The corporate governance failures inherent in these events triggered, amongst other things, a qualified audit report, a backlash from Eskom's creditors, severe liquidity problems that threatened Eskom's ability to generate electricity to the South African community and downgrades of Eskom's credit rating.

KEY FINDINGS AND RECOMMENDATIONS

The recovery programme of the 2018 Board

458. The late Mr Jabu Mabuza, who was the Chairman of the 2018 Eskom Board, concluded his evidence with the observation that there had previously been within Eskom a culture of corrupt practices, mismanagement and malfeasance that had been inculcated within Eskom by certain individuals over a period of time. The issues of impropriety within Eskom seemingly extended beyond the matters under investigation by the Commission. This was clearly a pervasive culture and was sanctioned from within the Board, the executive and senior management.

459. The 2018 Board concluded that it had to strike a balance between dealing with the past irregularities which it found at Eskom and building a capable, strong organisation able to carry out its public mandate. The recovery programme in the wake of the qualified audit for the year ended 31 March 2017 was a key part of Eskom's efforts to rectify past irregularities.

460. This recovery programme saw a greater number of irregularities surface as the 2018 Board came to understand that: procurement processes and people were at the centre of the challenges; internal controls had not been effective; the system and practices were not set up for proper accountability and consequence management; some of Eskom's policies were too vague and lent themselves to loopholes that could be abused; and there had been lapses in governance because the roles of the shareholder, the Board and the executive often overlapped and flouted best corporate governance practices. Any process of renewal and ridding the organisation of impropriety, whether state capture-related or not, needed to adequately address these deficiencies.

Recommendations

461. The Eskom Board is encouraged to continue with its efforts to strike a balance between dealing with past Eskom irregularities and building a capable, strong organisation able to carry out its public mandate and to take its rightful place in the international family of similar organisations as it once did in the past.

462. The Board should report regularly to the Executive Authority and Parliament on the effectiveness of the recovery programme.

463. In addition to its reporting on the effectiveness of the recovery programme and other reporting responsibilities that are required by the Companies Act and the PFMA, the Eskom Board should particularly conduct (at least annually) an in-depth and objective evaluation of Eskom's application of the King IV principles.

464. The outcome of such objective evaluation of the effective application of the King IV principles at Eskom should be reported to the Executive Authority and Parliament, and published in the Eskom Integrated Report and on the Eskom website for public information.

465. The Eskom Board should re-evaluate the effectiveness of the Eskom Anti-Corruption Strategy, including consequence management for non-compliance and for unethical and poor performance. The Board should formalise and institutionalise the standard operating procedures relating to the implementation of the Anti-Corruption Strategy and take effective and appropriate disciplinary steps against anyone who:

    465.1 Contravenes or fails to comply with a provision of any laws

    465.2 Commits any act which undermines the financial management and internal control of the public entity; and

    465.3 Makes or permits irregular expenditure or fruitless and wasteful expenditure.

The appointment of the 2014 Eskom Board

466. The evidence proves a scheme by the Guptas to capture Eskom, install the Guptas' selected officials in strategic positions within Eskom as members of the Board, the committees of the board and the executives, and then divert Eskom's assets to the Guptas' financial advantage. Central to the Guptas' scheme of state capture was President Zuma, whom the Guptas must have identified at a very early stage as somebody whose character was such that they could use him against his own people, his own country and his own government to advance their own business interests. President Zuma readily opened the doors for the Guptas to go into the SOEs and help themselves to the money and assets of the people of South Africa.

467. It is clear that from quite early in his first term President Zuma would do anything that the Guptas wanted him to do for them.

468. It is also quite clear that during President Zuma's term of office certain decisions which were supposed to be made within Government were made outside of Government and not with his party, the ANC, but with the Guptas.

469. This scheme frequently entailed communication among Minister Lynn Brown, her personal assistant and Mr Salim Essa, the owner of the "Business Man" email address.

470. In addition, a conclusion can be drawn that there was a relationship and communication between the Gupta network and a number of Eskom Board members.

Recommendations

471. The way members of Boards of state-owned companies are appointed cannot remain as it has been during all the years covered by the investigation of the Commission. The same applies to the appointment of CEOs and CFOs of these companies. The evidence heard by the Commission has revealed quite clearly that part of the reason why some of the state-owned companies have performed as badly as they have concerns the calibre of some of the people who are appointed as members of the Boards of these companies or who were their CEOs and CFOs.

The suspension of senior executives and appointment of acting executives

472. The evidence of Ms Daniels, Ms Dlamini and Mr Masango as a whole proves two things conclusively: firstly, that there was a scheme to remove from Eskom certain executives who occupied strategic positions whom the Gupta family believed would not co-operate with them in their plan to capture Eskom and steal taxpayers' money and to replace them with officials who would co-operate with them; and secondly, that Mr Koko was an integral component of the Gupta family's strategy to capture Eskom. Former President Zuma and Ms Myeni were witting participants in the scheme to oust the relevant Eskom executives and thus witting participants in the Gupta family's larger scheme to capture Eskom.

473. Following a Board meeting on 11 March 2015 addressed by Ms Brown, processes within Eskom were then put into operation by which first one, then three, then four officials were notified that the Board had decided to suspend them, but that the Board would hear them on the question of why they should not be suspended. These proceedings were conducted with extraordinary haste. By close of business on 11 March 2015, the processes by which the four executives were suspended had been completed.

474. It is plain that Mr Koko's suspension was a ruse. The Guptas and their associates must have identified Mr Koko much earlier as someone who could work with them to advance their capture of Eskom and, therefore, their business interests. They knew that, after the suspension, he would be allowed back at Eskom and they could rely on him. As it turned out, on the first day he was back at work, namely 20 July 2015, he came with a list of entities that he told Ms Daniels he received from his "principals", and he wasted no time in sending emails to Mr Salim Essa at the infoportal address. In the rest of 2015 and beyond Mr Koko continued to act in the interests of the Guptas and their associates in a number of instances rather than in the interests of Eskom.

475. The suspension of executives was a key component of the scheme from the outset. The only proper conclusion to be drawn is that the proposed inquiry was intended to act as cover for the suspension of the four executives. The primary purpose of the scheme was to install Mr Brian Molefe as Eskom's CEO and Mr Anoj Singh as the financial director because those who devised and implemented the scheme believed that Mr Brian Molefe and Mr Singh would favour the Gupta family and channel the resources of Eskom towards the Gupta family.

476. Members of the Eskom Board took part in the decision to suspend the executives because some must have known that it was part of the Gupta scheme and were happy to advance the agenda of the Guptas, while others may have simply done so to do the bidding of President Zuma and Ms Brown and not because they regarded the suspensions as in the interests of Eskom. Those Board members, with the exception of Mr Baloyi, therefore breached their fiduciary duties to Eskom.

Recommendations

477. Many decisions made by the 2014 Board of directors of Eskom were in breach of their duty in terms of section 50(1) and (2) as well as section 51 of the PFMA, including the decision to suspend the executives and the decision to push three of those executives out of Eskom and to pay them millions of Rands. The amounts paid out to the three executives were in the region of R18 million. It is recommended that the National Prosecuting Authority (NPA) consider the evidence that has already been collected by the Commission and the transcript of the evidence led in the Commission and allow such further investigations as may be necessary to be conducted with a view to the criminal prosecution of all the people still alive who were members of the 2014 Board who made or supported the decisions made by that Board in breach of section 50(1)(a) of the PFMA, including the decisions referred to above.

478. It is recommended that, in so far as this has not been done, serious consideration be given to instituting legal proceedings against all members of the 2014 Eskom Board, except Mr Baloyi, to recover all the financial losses that were suffered by Eskom as a result of decisions taken by the 2014 Board against the interests of Eskom.

The appointment of Mr Mosebenzi Zwane as Minister of Mineral Resources

479. On the evidence, it is clear that Adv. Ramatlhodi was moved from the portfolio of Mineral Resources to that of Public Service & Administration because he refused to co-operate with the Guptas and in regard to matters affecting the Guptas.

480. Viewed in its proper context, it is plain that he was removed from the position of Minister of Public Service & Administration because he did not support Mr Manyi's appointment as Director-General of the Department of Mineral Resources and would not agree to table a memorandum to Cabinet on the appointment of Mr Manyi.

481. It is quite clear on the evidence that Mr Mosebenzi Zwane was appointed Minister of Mineral Resources because the Guptas wanted him to be appointed to that position or because of his connection with the Guptas.

482. In relation to TOR 1.3, the appointment of Mr Zwane as a member of the National Assembly was preceded by the exchange of his CV between, *inter alia*, Mr Tony Gupta and Mr Duduzane Zuma (the son of former President Jacob Zuma).

483. Mr Zwane's appointment by virtue of his association with the Guptas is reinforced by the identities of the two persons whom he appointed as his advisors after he was appointed as Minister. The two persons were Mr Kuben Moodley and Mr Malcolm Mabaso, both of whom were proved to have business links with the Guptas.

484. In relation to TOR 1.8, though the appointment of advisors is restricted to the Ministry of Finance, there is no reason why it should not extend to other Ministries, such as the Department of Mineral Resources, implicating Mr Zwane in his appointment of advisors.

485. In relation to TOR 1.4, Mr Zwane facilitated the unlawful awarding of tenders or contracts by Eskom to the Gupta family.

Recommendations

486. It is recommended that Mr Zwane be investigated for misconduct in relation to TOR 1.4 and 1.8 above and that appropriate sanction be imposed.

The acquisition of Optimum Coal Mine (OCM) by Tegeta

487. The characterisation of the payment as a pre-payment for coal supplies was a sham. This is confirmed by the findings of a cash flow analysis, which show that the R659 million was paid towards the

acquisition price of OCH by Tegeta, as was the R1.68 billion guarantee, which was used to prove to OCH bankers that Tegeta was good for the acquisition price. The context in which these payments were made, their timing and the urgency with which they were processed all demonstrate that the R659 million payment and the R1.68 billion guarantee were not made with the purpose of furthering the interests of Eskom. These were made with the single purpose of ensuring that the Guptas' deal in terms of which they acquired the Glencore coal interests did not fall through for want of finance on the part of the Guptas.

488. Once it is accepted that Messrs Molefe, Koko and Singh were Gupta agents, prepared when they were called on to do the Guptas' bidding, then the possibility that any of them did not know that the money was required to complete the purchase of shares transaction is small. There is no suggestion that any of them was misled as to the true purpose for which the money was needed.

489. There are therefore reasonable grounds to believe that Mr Anoj Singh may be guilty of the theft of this money from Eskom by false pretences or fraud, in that he led Eskom, through the officials who processed the payments, to believe that the payments were in the nature of pre-payments for coal, when in truth and fact they were needed to enable the Guptas to complete and save the share transaction. However, whether he is criminally guilty will be determined by a court of competent jurisdiction.

490. There are reasonable grounds to believe that all those Eskom officials who were party to or facilitated the acquisition by bringing pressure to bear on Glencore to dispose of its coal interests to the Guptas and were party to or facilitated payment of this very large sum of R659 million and the R1.68 billion guarantee may be guilty of theft and ought to face criminal charges.

Recommendations

491. All those Eskom officials who were party to or facilitated the acquisition by bringing pressure to bear on Glencore to dispose of its coal interests to the Guptas and were party to or facilitated payment of the sum of R659 million and the R1.68 billion guarantee are *prima facie* guilty of theft and ought to face criminal charges for such corruption-related conduct.

492. It is also recommended that the NPA should consider possible criminal prosecution of the members of the 2014 Board of Directors who supported the decision to pay this money on the grounds of breach of their obligations imposed on that Board by sections 50 and 51 of the PFMA.

493. The recommendation for criminal charges is particularly applicable to Messrs Singh and Koko, who by false pretences led Eskom, through the officials who processed the R659 million payment, to believe that the R659 million payment was in the nature of pre-payment for coal, as was the R1.68 billion pre-payment, later converted into a guarantee, when in truth and fact they knew that the prepayment and the guarantee were needed to enable the Guptas to complete and save the sale of share transaction.

494. Money laundering transactions need to be pursued further by the law enforcement agencies for further investigation and prosecution.

The irregular supply of coal to Eskom from Tegeta's Brakfontein Colliery

495. It is considered that the following parties are implicated in wrongdoing in regard to the Brakfontein Coal Supply Agreement: Mr Matshela Koko; Mr Vusi Mboweni; Dr Ayanda Nteta; Mr Ravindra Nath of Tegeta; Mr Jacques Roux of Tegeta; and Mr Tony Gupta of Tegeta.

496. *Prima facie* the evidence before the Commission, it may be concluded that:

    496.1 The Eskom officials listed above breached or violated legislation and Eskom policies by facilitating the unlawful awarding of the Brakfontein Coal Supply Agreement to Tegeta

    496.2 Their conduct in awarding the Brakfontein Coal Supply Agreement to a Gupta-owned entity, Tegeta, was vitiated by irregularities, corruption and undue influence; and

496.3 Their conduct involved abuse of position of power and undue influence on subordinates in order to unduly benefit the Gupta family in the retention of the Brakfontein Coal Supply Agreement with Tegeta; and their conduct potentially caused financial prejudice and loss to Eskom by virtue of non-compliant procurement of coal, thereby potentially causing Eskom to incur losses from sub-optimal power generation and / or impacting negatively on the Majuba Power Station generation infrastructure.

Legislative provisions breached

497. Eskom is a major public entity listed in Schedule 2 of the PFMA and is thus bound by the provisions of the PFMA.

498. Section 57 of the PFMA places certain obligations on officials of public entities.

499. The implicated Eskom officials listed above have *prima facie* acted in breach of section 57 of the PFMA in that they appear to have:

499.1 Failed to safeguard the financial interests of Eskom; and

499.2 Failed to take effective and appropriate steps to prevent irregular expenditure and fruitless and wasteful expenditure.

Recommendations

500. It is recommended that the NPA should consider the criminal prosecution of Mr Koko, Mr Mboweni, Dr Nteta and Mr Roux for possible contraventions of the PFMA and policies of Eskom.

501. Further, it is recommended that the law enforcement agencies should consider further investigation into determining whether the implicated parties acted in breach of the provisions of PRECCA (section 3 and / or section 4, section 12(1), and section 21).

The Huarong transaction

502. The attempt to commit Eskom to a contract with HEA providing for an upfront payment of a raising fee of some USD 24 million before any money was allegedly raised to lend to Eskom amounts to corruption.

503. It is little wonder that the Eskom Treasurer, Mr Pillay, resisted this aspect of the transaction so strongly. It remains unexplained why the then CFO, Mr Anoj Singh, who signed the term sheet, and the acting Group CEO, Mr Maritz, who signed the ALFA, should have promoted the transaction so unreservedly.

504. There does not appear to have been any justification for the signing of the term sheet. Signing the term sheet was not in accordance with Eskom's usual practice and it is difficult to see what benefit there was in legally committing Eskom to its terms. It seems as if the purpose in signing the term sheet was to push Eskom closer to HEA and afford HEA preferential treatment over its competitors for Eskom's business.

505. It does not appear to be in dispute that no Board approval was provided for the conclusion of the HEA transaction. This alone rendered the signed contract with HEA invalid. Fortunately, the invoice submitted by HEA was never paid and the HEA transaction therefore caused Eskom no direct loss.

506. Nevertheless, it would appear that there is at least a *prima facie* case of attempted theft or fraud against Mr Singh, who signed the term sheet, and Mr Maritz, who signed the contract documents on the strength of which the invoice for USD 21,888,000 was submitted to Eskom. It is possible that a similar case could be made against Mr Thomas of HEA.

Recommendations

507. It is recommended that the NPA consider criminal prosecution of at least a *prima facie* case of attempted theft or fraud against Mr Anoj, who signed the term sheet, and Mr Maritz, who signed the contract documents on the strength of which the invoice for USD 21,888,000 was submitted to Eskom.

508. The NPA should consider a similar case to be made against Mr Thomas of HEA.

The McKinsey, Trillian and Regiments contracts

The McKinsey and Eskom "contract"

509. The evidence above shows that, despite McKinsey and Eskom officials working for two months on a new contracting approach to the SDL partnering, in terms of which McKinsey would pay a range of alternative BEE contractors, Eskom executives on SteerCo decided to "terminate" the contract, by letter dated 16 June 2016, signed by Mr Mabelane, even before they could obtain Board Tender Committee approval for termination on 21 June 2016. This negates the urgency and importance of the case that had been argued for sole-sourcing McKinsey to assist Eskom and the significant investment of time by numerous Eskom officials, including its top executives, to negotiate the proposal.

510. The official reasons given to the Board Tender Committee opaquely referenced concerns about the "mechanics" of the Turnaround programme that McKinsey had not addressed, and there was reference to a concern that National Treasury was starting to review Eskom's contracts with McKinsey. Indeed, according to Mr Anoj Singh, the National Treasury scrutiny was triggered by an audit finding over the use of sole-sourcing and the lack of a quantifiable value to the contract with McKinsey, which could trigger a finding of "irregular expenditure" and appears to have made Eskom executives nervous.

Trillian and Regiments' work on the MSA / Turnaround programme

511. What actually took place with regard to Trillian's and Regiments' involvement was the following:

    511.1 On the "Procurement" work stream, Trillian made use of Cutting-Edge Commerce (Pty) Ltd, a subsidiary of the Gupta's Sahara group of companies, which had seven employees working at Eskom, who apparently presented themselves as Trillian employees.

    511.2 On the "Generation" work stream, Trillian brought in E-Gateway, a company that consisted of a few individuals brought in from abroad (United Arab Emirates and India).

    511.3 On the Majuba site, there was one E-Gateway individual deployed as a technical expert, who stayed less than a month before being asked to leave, as it was said that he was unable to add much value. Another individual claimed by Trillian to be working on site was never seen by the senior site manager; and a third apparently did little more than arrange some meetings. For all this, Trillian charged R100 million. Moreover, it is not clear why these E-Gateway personnel were even on site when Eskom had said they already had sufficiently qualified and experienced engineers and technical personnel.

    511.4 Indeed, Ms Goodson confirmed that Trillian did not have the capacity to do the work and made use of sub-contractors on the Turnaround programme (MSA).

512. Trillian did not participate in the remaining two work streams, "Primary Energy" and "Claims". Nevertheless, Regiments did work on the "Claims" work stream, and there is particular mention of the online vending initiative and insurance claims. However, according to Ms Mothepu, Eskom already had sufficient in-house expertise to manage these, and Eskom officials were already working on all these initiatives, some of which were near completion, whilst Regiments was not necessarily knowledgeable in these areas and apparently had to be briefed and guided by Eskom officials.

513. The only area where Trillian appears to have had expertise was in financial transactions, such as loan negotiations. However, here again, Eskom's large Treasury division was capable of doing the work

itself.

Eskom provides settlement payments to McKinsey and Trillian that are unlawful

514. Eskom then set about compensating not just McKinsey, but also Trillian, for the time spent on the Turnaround programme, as well as providing compensation for the early cancellation. Between August 2016 and February 2017, Eskom made total payments of just under R1.6 billion to McKinsey and Trillian for a purported MSA contract that was backdated after "termination".

515. The R1.1 billion that McKinsey received between the MSA settlement and 2015 contract payments was nearly ten times what it had earned from Eskom in previous years.

516. Regiments was not paid for the work it had done under the Corporate Plan. Payment went to Trillian. All the payments to Trillian were approved and effected despite the fact that:

    516.1 Eskom did not have a contractual relationship with Trillian

    516.2 McKinsey had, with Eskom's knowledge, terminated any consideration of Trillian becoming its subcontractor or BBBEE partner under the MSA; and

    516.3 Eskom policies and procedures did not provide for direct payment to subcontractors.

Eskom and McKinsey-Regiments-Trillian

MSA

517. Messrs Singh, Molefe and Koko were all central to the origin and furtherance of a scheme at Eskom, designed to exploit Eskom and benefit Mr Salim Essa's company, Trillian. The so-called "onboarding" meetings McKinsey and Regiments had with Messrs Singh and Molefe, from May 2015, just shortly after Mr Brian Molefe's arrival at Eskom but not long before Mr Anoj Singh could be seconded to Eskom, presented key moments at which the scheme was conceived and hatched, based on the McKinsey / Regiments model of operation at Transnet, with which both Mr Anoj Singh and Mr Brian Molefe were familiar. Therefore, the allegation that Mr Anoj Singh (and perhaps Mr Brian Molefe) would have introduced Regiments at Eskom is not at all far-fetched. In fact, on the evidence, it is palpably reasonable to conclude that he / they did.

518. To that end, Mr Brian Molefe and Mr Anoj Singh pursued "negotiations" with McKinsey and Trillian through secret, off-site meetings to agree to work on a range of issues together before any formal contracting processes even began. This would eventually result in them and other Eskom officials, for example, Messrs Kalima, Govender, Mabelane and Koko, taking part in signing off on submissions to obtain Board approval for a contracting process which they knew was irregular and unlawful.

519. From McKinsey's proposal on the finance work, it is apparent that both Mr Koko and Mr Anoj Singh would have commenced discussions and negotiations with McKinsey on both the MSA and the Corporate Plan even before April 2015. As the proposed work activities could allegedly not all fit under the MSA, these executives contrived another means, that is the Corporate Plan, to facilitate the quick appointment of McKinsey, on a sole source basis, with a last-minute requirement, but arguably key to the scheme, to subcontract 30% of the contract value to a black-owned supplier.

520. It is no surprise that the submission to the Board Tender Committee was prepared by both Mr Koko and Mr Singh, as parties to the negotiations, and that Mr Koko signed off on the acceptance letter to McKinsey. It soon transpired that the black-owned supplier was Regiments, which Mr Anoj Singh had spoken positively about and recommended to McKinsey. Mr Salim Essa was a business development partner to Regiments. He secured government contracts for Regiments, and indeed tried to do so in 2014 at Eskom but fell short. The R30.6 million payment by Eskom in respect of the Corporate Plan followed Mr Salim Essa to Trillian. There was no justification for this payment, nor for the belief that Regiments or Trillian was a BBBEE partner to McKinsey. This was corruption, plain and simple.

521. Mr Mabelane and Mr Govender were complicit in the scheme, as they both approved Trillian's R30.6 million invoice for payment directly to Trillian. Mr Govender was also one of the three Eskom officials who signed off on Mr Koko's and Mr Anoj Singh's submission to the Board Tender Committee.

522. Mr Govender participated in formulating flawed justifications for the sole-sourcing of the MSA, with Mr Mabelane and Ms Daniels supporting this.

523. Messrs Koko, Singh and Molefe were present at Eskom board meetings where the potential irregularities of the sole-sourced "at-risk" contract and the need for National Treasury approvals were discussed, yet Board approval to proceed with the contracting process was requested and obtained, nonetheless.

524. Mr Koko provided confidential information on Eskom's negotiation position on the MSA to "Business Man" (alias Mr Salim Essa) and took instructions from external parties on additional items to be included under the scope of the MSA, so that the extent of contracting work would be expanded.

525. Mr Koko put pressure on Eskom managers not to hold up the finalisation of the MSA despite lack of Treasury approval.

526. Messrs Koko and Singh engaged McKinsey and Trillian to begin working before the contracting process was complete.

527. Messrs Singh, Koko and Mabelane were all complicit in the false statement of Mr Govender that National Treasury had approved Eskom's risk-based appointment of McKinsey.

528. Mr Mabelane signed off on an acceptance letter for McKinsey without having obtained approval for deviation; however, Mr Koko and Mr Anoj Singh were complicit in his conduct.

529. Messrs Mabelane and Singh concealed the fact that the contract was not signed in January 2016 and was only signed and back-dated much later, after its purported termination.

530. Messrs Singh, Mabelane and Govender, when the hiring of Trillian as McKinsey's BBBEE partner did not materialise, were involved in cancelling McKinsey's contract.

531. Messrs Singh and Molefe were responsible for allowing payment of invoices that should not have been paid - which payments were unlawful becasue of the flawed contracting process and involved excessive overpayment to Trillian and McKinsey.

532. Mr Khoza and Ms Daniels lied to the Board Tender Committee at its meeting on 13 December 2016, claiming that a legal review had been obtained advising Eskom to agree to a settlement with McKinsey when no such review had been received. The conclusion is inescapable that both Mr Khoza and Ms Daniels would either have been part, or at least aware, of the above scheme perpetrated against Eskom by Messrs Koko, Singh, Mabelane, Govender and Molefe.

533. Consequently, the purported conclusion of the MSA and subsequent termination thereof, in which Messrs Koko, Singh, Mabelane, Govender and Molefe were the primary role-players, were a sham. The submission, titled "Feedback Report", prepared and presented by Eskom executives (Messrs Kalima, Govender and Koko) for the conclusion of the MSA was all premised on false and misleading information - the result of a carefully orchestrated and well-conceived plan. These executives purported to conclude the MSA, following a process they knew was irregular, and terminated it on spurious grounds even before it could be concluded and before the Board Tender Committee could approve a decision to terminate it. They offered payment to McKinsey and its "BBBEE partner", Trillian, prior to a Board Tender Committee decision on the matter, whilst knowing that McKinsey did not have a BBBEE partner, and that Trillian was not McKinsey's BBBEE partner. The MSA (like the 2015 contract) was a charade designed to siphon money out of Eskom to third parties, particularly Trillian. Eskom's money was expended on a contract that never existed. The expenditure was blatantly wasteful and the irregularities pertaining thereto gross.

Corporate Plan

534. Similarly, in regard to the Corporate Plan, the Eskom executives committed gross irregularities and a breach of the law.

535. Messrs Koko and Singh championed negotiations with McKinsey even before Mr Anoj Singh was seconded to Eskom, and ultimately prepared a submission to the Board motivating for an appointment of McKinsey under the guise that there was "urgent finance and strategy work" to be done and that only McKinsey had the “know-how” to render the service, when according to Eskom’s Internal Consulting Unit, this was not the case.

536. Messrs Koko and Singh pursued a sole-sourcing contract without obtaining permission from National Treasury for a deviation and where there appeared to be no justifiable case for the work to be done under the contract.

537. Messrs Mabelane and Govender acquiesced in the conduct of Messrs Koko and Singh in the pursuit of McKinsey’s appointment and were thus complicit in the furtherance of a scheme calculated to exploit Eskom financially.

538. Mr Koko signed the Acceptance Letter for the contract with McKinsey, and Mr Mabelane purported to sign the contract well after its end date and, in any event, failed to append his signature in the right place, such that the contract never came into effect.

539. Mr Singh engaged Regiments to conduct work for Eskom when Eskom had no contract with Regiments.

540. Mr Singh allowed payment of the R30.6 million invoice directly to Trillian, which was unwarranted as Trillian did not conduct work for Eskom and did not have a contract with Eskom or McKinsey.

Further considerations

541. Another disturbing factor is the fraudulent nature of the invoice sent by Trillian to justify their R595 million share of the settlement. According to Ms Mothepu, the calculations involved grossly inflated time that Trillian employees spent at Eskom, such as allocating 180 days to her, which was not physically possible as she was only with Trillian Financial Advisory for four months and did not even spend all of her working hours on Eskom.

542. In total, R14.7 billion of Eskom’s contracts are, according to the "Flow of Funds" investigation, calculated to have been afflicted by state capture, and of this McKinsey’s MSA and Corporate Plan contracts account for R1.1 billion, with related payments to Trillian from these two contracts accounting for R595.2 million.

543. All of the abovementioned individuals colluded to ensure that at least two large contracts were irregularly awarded to McKinsey and their development supplier, which was intended at first to be Regiments and then Trillian. Substantive payments were made unlawfully and irregularly to these parties, who benefitted unduly at the expense of Eskom.

Exposure of irregularities

544. Despite these events and other allegations of corruption becoming public knowledge, the 2014 Eskom Board and senior executives repeatedly denied wrongdoing and even actively intervened or stopped Eskom from taking the necessary legal steps to have these contracts reviewed and set aside by a court and to recover associated payments. The corporate governance failures inherent in these events triggered, amongst other things, a qualified audit report, a backlash from Eskom’s creditors, severe liquidity problems that threatened Eskom’s ability to generate electricity to South Africa, and downgrades of Eskom’s credit rating.

545. Things only changed when new leadership took over at Eskom from 2018. This included a new Board, appointed in January 2018, with Mr Jabu Mabuza appointed as Chair, and an Acting Group CEO, Mr Hadebe. In March 2018 Eskom went to court to have the two contracts and resultant payments of around R1.6 billion to McKinsey and Trillian set aside. The High Court in Gauteng concluded that both

the MSA and the 2015 contract had not been validly concluded, and that there was no legal basis for the payments to McKinsey and Trillian, which had to be returned. McKinsey had already decided to repay the monies – around R1 billion, whilst Trillian refused, with the matter becoming entangled in further court proceedings. Eskom subsequently obtained an order, on 9 March 2020, for the final winding up of Trillian.

546. The conduct of the Eskom executives contravened the National Treasury Instruction 1 of 2013/2014, included in Eskom's own Procurement Policy, which provided that it was mandatory for accounting officers and accounting authorities of public entities listed in Schedule 2 of the PFMA to implement the cost containment measures referred to in paragraph 4 of the Treasury Instruction.

547. Paragraph 4 of the National Treasury Instruction provided, *inter alia*, that public entities could only contract consultants after a gap analysis had confirmed that the public entity concerned did not have the requisite skills or resources in its full-time employ to undertake the assignment in question. The failure by Eskom executives to comply with these provisions constituted a breach of the law and was therefore unlawful.

548. The 2014 Eskom Board failed to exercise their fiduciary duties and prevent financial prejudice to Eskom, as required in Sections 50 and 51 of the PFMA. They instead allowed irregular procurement in breach of both the law and Eskom policies, and allowed irregular, fruitless and wasteful expenditure in the face of legal instruments that enjoined them to act otherwise. The Board members acted unlawfully and committed financial misconduct, as envisaged in section 83 of the PFMA. 87. Eskom officials also acted in breach of section 57 of the PFMA.

Recommendations

549. The Eskom executives used their positions of authority and power within Eskom to benefit Trillian - a corrupt activity under the Prevention and Combating of Corrupt Activities Act No. 12 of 2004. Messrs Molefe, Singh and Koko all benefited from the Guptas and / or Mr Salim Essa in various forms, Messrs Koko and Singh from an Eskom perspective and Mr Molefe as already covered in other reports. This may have constituted the criminal offence of corruption. The conduct of Eskom officials, therefore, implicated several provisions of the Commission's Terms of Reference, namely TOR 1, TOR 4, TOR 5 and possibly TOR 6 (corrupt and irregular awarding of contracts to benefit the Gupta family or their associates) and TOR 9 (corruption to benefit the officials involved).

550. This conduct implicates TOR 1, in that some form of inducement or gain was offered to and received primarily by the three main executives at Eskom (Mr Brian Molefe, Mr Anoj Singh and Mr Koko), which would have served to influence them to act in the manner referred to above. TOR 4, regarding beach of the Constitution and legislation through the facilitation of unlawful awarding of contracts to McKinsey, is also implicated by the appointment of McKinsey on a sole-source basis, in breach of section 217 of the Constitution, the National Treasury Instruction and Eskom's Policy on Cost Containment Measures. Also relevant are the provisions of TOR 5, TOR 6 and TOR 9 regarding corruption in the awarding of contracts by public entities either to benefit the Gupta family and their associates and / or to benefit Eskom individual officials involved in the transactions. Rampant corruption is evident in the awarding of contracts and approval of payments to McKinsey and its BBBEE partner, Trillian, in circumstances described in this report.

551. It is recommended that the law enforcement agencies should conduct such investigations as may be necessary with a view to the possible prosecution by the National Prosecuting Authority of the former Eskom officials referred to above who are implicated in the facilitation of unlawful contracts, corruption and financial misconduct and breaches of the PFMA. It is also recommended that legal steps be taken by Eskom to recover from members of the 2014 Board and the former Eskom officials referred to above all losses that Eskom suffered as a result of their unlawful conduct.

552. Criminal prosecution should be extended to the 2014 Eskom Board, who failed to exercise their fiduciary duties and prevent financial prejudice to Eskom as required in Sections 50 and 51 of the PFMA. They instead allowed irregular procurement in breach of both the law and Eskom policies,

and allowed irregular, fruitless and wasteful expenditure in the face of legal instruments that enjoined them to act otherwise. The Board members acted unlawfully and committed financial misconduct, as envisaged in section 83 of the PFMA. Messrs Molefe and Singh were *ex officio* members of the Board and therefore equally responsible for the Board's various breaches of its fiduciary duties.

STATE SECURITY AGENCY

INTRODUCTION AND CONTEXT

1. The South African State Security Agency (SSA) is the department of government with overall responsibility for civilian intelligence operations. It is mandated to provide government with intelligence on domestic and foreign threats or potential threats to national stability, the constitutional order and the safety and well-being of South African citizens.
2. The evidence relating to state capture, corruption and fraud at the SSA can be seen within the context of evidence that has been brought before the Commission on Law Enforcement Agencies (LEAs). LEAs perform a range of functions falling under various government departments – Police, Justice, Finance, Defence, and Intelligence. The SSA evidence focuses on the intelligence arm of the state, as the SSA is the primary intelligence service.
3. The SSA evidence has shown how vulnerabilities in the regulatory framework make the intelligence services especially susceptible to unlawful abuse by senior public officials and unethical conduct of officials for improper political and personal gain.
4. In particular, the sensitive and sometimes secret nature of intelligence operations carries a heightened risk of corruption as operational funds are not subject to the same level of scrutiny as other public budgets, but an overreliance on classification of documents has hindered full disclosure of relevant information to the Commission.
5. The SSA evidence, accordingly, also highlights the critical role of oversight bodies mandated by the Constitution, including the Inspector-General of Intelligence (IGI), the Joint Standing Committee on Intelligence (JSCI), and the Auditor-General of South Africa (AG).
6. LEAs with policing and prosecutorial functions also form part of the accountability structures which should act as a check on the intelligence services. Evidence of criminality which occurred at the SSA and which has been the subject matter of evidence before the Commission was handed over to the Directorate for Priority Crime Investigations (DPCI) and the National Prosecuting Authority (NPA) The role of LEAs thus remains relevant to the SSA evidence, albeit in this case that their contribution has been one of conspicuous absence.
7. The centrality of the SSA evidence is borne out by the establishment of this Commission of Inquiry. The evidence suggests that this Commission may not in fact have been necessary if the SSA had detected, fully investigated and countered state capture as a threat to our constitutional order when the concerns about state capture first appeared.

Terms of Reference: The SSA and state capture

8. The SSA evidence is central to the Commission's mandate to inquire into allegations of state capture, corruption and fraud. The evidence falls squarely within Terms of Reference (TORS) 1.1., 1.5 and 1.9. The essential questions to be answered are as follows:
   - 8.1 What is the link, if any, between the activities of the SSA and allegations of state capture?
   - 8.2 Did the SSA during the period under review enable corruption?
   - 8.3 Did the SSA, during that period, promote the alleged project of state capture?

8.4 Can it be said that the capacity and resources of the SSA were unlawfully appropriated, under a veil of secrecy?

9. The conclusion is that the SSA evidence shows that the actors in question weakened and misdirected the security services under their control. They appropriated state funds to subvert the institutions established to protect the constitutional order and the safety and well-being of South African citizens. Their activities also constituted the beginnings of a broader project to protect, enable and promote a particular political faction and its members' political and personal interests.

10. This summary will describe how the SSA is implicated in state capture in terms of:

10.1 State capture as a manifestation of intelligence failure

10.2 The protection of the enablers of state capture

10.3 Pervasive corruption and the abuse of state resources; and

10.4 A self-standing project of state capture.

Evidence

11. In terms of how the SSA evidence was prepared, this summary contextualises the witnesses' evidence and highlights the challenges that the Legal Team and investigators encountered in the process of gathering and presenting this evidence before the Commission. The summary presents this evidence in terms of: the High Level Review Panel on the State Security Agency; the Project Veza investigation by the SSA; the Inspector General of Intelligence (IGI); challenges of declassification and disclosure; and attempts to block evidence from being led at the Commission's hearings.

High Level Review Panel (HLRP) on the State Security Agency

12. Dr Sydney Mufamadi testified in his capacity as Chair of the HLRP appointed by President Cyril Ramaphosa in 2018. The Panel was established to enable the reconstruction of a professional national intelligence capability for South Africa that would respect and uphold the Constitution and the relevant legislative prescripts.

13. The two HLRP objectives were, firstly, to assess what had happened at the SSA during the period under review and secondly, to evaluate the oversight mechanisms, their adequacy, where they may have been circumvented, and how it was possible for such circumvention to have been done. In particular, the HLRP aimed to understand the nature of the operations conducted by the Chief Directorate: Special Operations (CDSO – which is the covert operational structure of the SSA) and other units of the SSA, how these operations were executed, and how funds in relation thereto were spent and accounted for.

14. The HLRP submitted its report to the President in December 2018. A redacted version of its report was subsequently released to the public, and the Commission had full access to the unredacted report, though the full report remains classified.

15. Following engagement with the Presidency, the Legal Team and investigators requested the DG of the SSA to declassify certain parts of the unredacted report that were relevant to Dr Mufamadi's evidence. Subject to a few qualifications, the DG declassified certain chapters and limited annexures – but not all that he was requested to declassify.

16. A revised version of the HLRP report was compiled for the purposes of Dr Mufamadi's evidence. The revised HLRP report comprises two parts:

16.1 The declassified chapters from the unredacted report (subject to certain qualifications); and

16.2 The remaining chapters in the redacted version of the HLRP report.

Project Veza investigation by the SSA

17. The Commission's Legal Team and investigators engaged directly with the SSA, focusing on the SSA's internal investigation, known as "Project Veza". Project Veza investigated irregularities and criminality arising from contraventions of the SSA's governance, operational and financial prescripts from 2012 to 2018. The investigation focused on units within the SSA – chiefly the projects conducted by the CDSO, the Cover Support Unit (CSU), and operations conducted from the office of the DG.

18. Mr Y failed to provide evidence because of illness. Ms K testified in his place and provided a supplementary affidavit, with additional information about events which occurred after the first round of SSA-related evidence was presented to the Commission in January 2021. This evidence includes allegations that there had been attempts to shut down the Project Veza investigation.

The Inspector General of Intelligence (IGI)

19. Section 7(8)(a) of the Intelligence Oversight Act 40 of 1994 requires the IGI to consult with any of the responsible Ministers and the President prior to disclosing any information obtained from a Head of a Service or any employee of a Service. Pursuant to this provision, the incumbent IGI, Dr Setlhomamaru Dintwe, consulted with the respective Ministers of the SAPS, State Security, and Defence and Military Veterans as well as with President Ramaphosa. The consultative process was completed, and the IGI decided which information he could properly disclose to the Commission.

20. An accusation was made that the IGI had disclosed information to the Commission prior to the commencement of the consultative process. This fact was, according to Dr Dintwe, used by the three Ministers to lodge a complaint against him with the President and to recommend his suspension. He then received a letter from the President informing him that this complaint had been referred to the Joint Standing Committee on Intelligence (JSCI). The evidence confirmed that information was released to the Commission before the consultation procedure commenced. However, this was not necessarily unlawful.

21. Dr Dintwe appeared before the JSCI, but the Ministers did not pursue the matter further because of technical considerations.

Challenges of declassification and disclosure

22. While the Commission had constructive engagements with both the Presidency and the Acting DG of the SSA, Mr Jafta in preparing evidence, it encountered challenges in relation to declassification and disclosure of SSA documents and information.

23. In both the investigation and preparation of evidence, the Commission has sought to handle the SSA evidence with the sensitivity that it deserves. Accordingly, the importance of protecting the identities of SSA members and operatives, as well as the Agency's approach to its work, was acknowledged.

24. The evidence of Dr Dintwe shows that the intelligence services refused to declassify many documents for no justifiable reason and that documents remained classified to avoid embarrassment and to protect senior officials. It has been the experience of the Commission that an overreliance on classification has hindered full disclosure of relevant information to it – which is dealt with in detail below.

Attempts to impede evidence from being led at the Commission's hearings

25. During the week in which the SSA evidence was first led in January 2021, and the then Acting DG of the SSA, Mr Jafta, was due to give evidence, there was an intervention from the then Minister of State Security, Ms Ayanda Dlodlo. Minister Dlodlo's legal representative on record, Advocate Dumisa Ntsebeza, intimated that the Minister "did not intend to compromise on national security".

26. Advocate Marumo Moerane, on behalf of Mr Jafta, indicated that giving evidence would not threaten or compromise national security. The Commission's Chairperson agreed, pointing out that the general

powers in the Intelligence Services Act 65 of 2002 did not provide for the evidence not to be led and hence the application was dismissed.

27. In an affidavit dated 17 November 2021, Minister Dlodlo defended her actions on the following basis that classified evidence should be protected:

    27.1 Mr Jafta had failed to inform her which members (including former SSA members) would be testifying at the Commission.

    27.2 Mr Jafta failed to disclose what information had been shared with the Commission or to provide details regarding the security clearance of SSA members who would be testifying at the Commission.

    27.3 There were witnesses who did not obtain the requisite consent to testify before the Commission.

    27.4 Classified information of national security was disclosed during the Commission process.

LEGISLATIVE AND REGULATORY FRAMEWORK: DOCTRINAL SHIFTS

The "new" intelligence dispensation

28. The constitutional transition in 1994 brought in a new intelligence dispensation consistent with a paradigm shift in global thinking on security following the end of the Cold War. A more holistic understanding of "human security" emerged that includes the complex nature of threats to stability and development. Democratic human security not only concentrates on traditional military security matters but deals with issues that affect the wellbeing of people. The intelligence services, like any structure of government, primarily serve the interests of the people.

29. The new concept of "human security" embedded in the Constitution is understood as the security of the citizen, free from fear or want. This has many dimensions, including economic security, food security, personal security, and political security. The aim is the creation of a societal environment that is free from violence and instability, while engendering respect for the rule of law and human life. The constitutional framework of human security explicitly seeks to protect the intelligence services from politicisation and abuse. Parliament exercises oversight over the security services.

30. Chapter 11 of the Constitution sets out the governing principles for national security and provides for the establishment, structure and conduct of the security services, comprising intelligence, defence and police.

The White Paper on Intelligence and legislation

31. The White Paper on Intelligence 1994 provides a policy framework for the establishment, principles and functioning of the intelligence services in a democratic South Africa. It sets out the mandate of the civilian services (domestic and foreign) as the provision of an effective, integrated and responsive intelligence machinery that can serve the Constitution and the government of the day through the timeous provision of relevant, credible and reliable intelligence.

32. The National Strategic Intelligence Act 39 of 1994 outlines the mandate of the intelligence services. In terms of this Act, only the intelligence divisions of the SANDF and the SAPS, as well as the civilian intelligence services (namely the SSA), may conduct intelligence functions.

2009 Presidential Proclamation

33. In answer to the question, "What went wrong?" the HLRP report offered some insight.

34. On 11 September 2009, former President Jacob Zuma issued a proclamation in terms of which he established the SSA – an amalgamation of the National Intelligence Agency (NIA), which dealt with domestic security, and the South African Secret Service (SASS), which dealt with foreign security.

The designation of the civilian intelligence organisation (as amalgamated) as the SSA echoed the pre-1994 mindset of the warfare state. It is noteworthy that this change was made without reference to Parliament and the attendant public consultation required by the Constitution, and Parliament did not question these constitutional missteps (breach of section 209(1)) of the Constitution which established a Ministry of State Security that usurped the role of the Legislature.

VULNERABLE FEATURES OF THE REGULATORY FRAMEWORK

The susceptibility of intelligence agencies to politicisation

35. The principle of political neutrality is embraced by various legislative precepts including the White Paper 1994. Section 199(7) of the Constitution entrenches this principle of political neutrality by prohibiting security services and its officials from allowing the political preferences and interests of any party from influencing the functions of these services. Section 10(4)(b) of the Intelligence Services Act places a duty on the DG of the SSA to ensure compliance with this constitutional imperative of political neutrality and non-interference. The definition of “national security” in section 1 of the National Strategic Intelligence Act explicitly excludes from its scope political activity, advocacy, protest, or dissent. However, as was revealed before the Commission, "[t]he key finding of the HLRP was that there had been a serious politicisation and factionalisation of the members of the intelligence community, based on factions in the ruling party, the African National Congress (ANC), resulting in an almost complete disregard for the Constitution, policy, legislation, and other prescripts."

36. The HLRP found that the CDSO unit of the SSA was rekindled, and stimulated by the incendiary and endemic politics of partisanship and factionalism in the ANC.

37. A Special Operations (SO) unit in intelligence refers to a unit that works under deeper cover than other units of a service. The work is usually on particularly sensitive operations against especially serious targets or in relation to especially serious security concerns. Members of such units should be specially trained and highly competent.

38. A witness for Project Veza corroborated the findings of the HLRP report stating that the CDSO had become highly politicised. The politicisation of the CDSO could be traced back to the restructuring of the SSA’s counterintelligence capacity, which shifted focus and resources from countering perceived threats to the personal and political security of Mr Zuma. According to the HLRP, the key player in the politicisation of the SSA was Ambassador Thulani Dlomo, whom Mr Zuma “deployed” to head the CDSO through then Minister Cwele in 2012.

39. According to the HLRP, the SO unit, especially under Ambassador Dlomo’s watch, was a law unto itself and directly served the political interests of the Executive.

40. The SSA was further exposed to the risk of politicisation by a second vulnerability in the regulatory framework, namely the powers of the duly designated Minister of State Security in relation to the powers of the DG of the SSA. The Minister is appointed in terms of Section 209(2) of the Constitution and has extensive powers to create structures and posts in the SSA, to make appointments, to issue regulations, and to exercise political oversight. The powers of the Minister as set out in Section 12(1) of the Intelligence Services Act are broad: "The Minister may, subject to this Act, do or cause to be done all things which are necessary for the efficient superintendence, control and functioning of the Agency."

41. Other senior officials are the DG, who is the Accounting Officer (AO) entrusted with the administration of the department, and deputy directors and senior managers, who are tasked with running the operations. The separation of these functions – political oversight, administration, and operations – is crucial for an intelligence service to insulate itself from political interference.

42. This subsidiary legislative framework to Section 209(2) of the Constitution creates the potential for the blurring of executive and administrative lines of responsibility. Although the powers of the DG are stipulated in the Intelligence Services Act, these powers are constrained by the Minister’s authority

in significant ways. Specifically, the DG exercises command and control of the Agency subject to the directions of the Minister and the Act (Section 10(1)); and the DG is empowered to issue functional directives applicable to a range of matters, but "subject to the approval of the Minister" (Section 10(2) and (3), respectively).

43. Ministerial accountability entails ultimate executive control over the Agency. However, the Minister's power in terms of Sections 10 and 12 of the Intelligence Services Act to ensure the "effective superintendence, control and functioning" of the Agency opens the door to executive interference, including in operational functions of the Agency, and creates the possibility of a politicised intelligence service. The HLRP report and several witnesses argued that there was excessive power of political authorities in relation to the Agency and its employees.

44. Numerous witnesses reported the challenges faced by the DGs who worked under various Ministers appointed to the SSA during the time under review due to executive overreach with Ministers giving directives to staff who did not report to them and handling financial functions in the Agency's covert "projects". Political authorities manipulated existing legislation and enacted new legislative precepts to pursue their interests. Executive overreach was enabled by using the Ministerial Delegation of Powers and Direction of Payment ("MPD"). The MPD has been used to effectively amend the applicable primary legislation, the Oversight Act and the Intelligence Services Act, allegedly to undermine the oversight role of the Office of the IGI.

45. Ministers acting within the MPD succeeded in dislodging some committed and formidable professional senior officials, who recognised the dangers executive overreach posed to the governance systems and processes of the SSA and questioned the legitimacy of some of the covert projects (some referred to as "President's projects" and "Minister's projects"). An unprecedented increase in the Agency's expenditure was another concerning indication that the focus of civilian intelligence services was shifting from democratic values to serving narrow political interests along ruling party factional lines, and more specifically the personal interests of former President Zuma and his appointees. The Special Operations Unit was probably more exposed to the malpractices and corrupt conduct of senior politicians because of the nature of its core functions and how they were conducted. A willing DG in SSA who authorised unlawful access to or use of public funds under the guise of "secret projects" worsened the criminality and irregularities in the unit.

46. The witnesses linked with the SSA described the relationship of the executive and the various DGs as characterised by mistrust and undermining. This situation is believed to have contributed to the perpetuation of state capture. Intelligence information pointed to the Gupta family's influence on the state and on Mr Zuma as a threat to human security in the country; yet the then Minister ignored these warnings.

Financial controls and accountability

47. Another weakness in the regulatory framework is the scope for non-compliance with financial controls and accountability mechanisms. This includes both internal SSA controls and controls external to the Agency. The evidence presented to the Commission reveals that internal controls relating to operational expenditure were breached or bypassed on a routine basis. Some specific examples of the flouting of controls were that funds were withdrawn without the necessary authorisations, or authorisations were not made at the correct level as required by the applicable MPD. This led to widespread malfeasance in the Agency and millions of Rands being unaccounted for.

48. inancial controls were deliberately deactivated to enable access to funds. In relation to the CDSO, budgets were approved (and revised to effect increases) in the absence of Annual Performance Plans (APPs). Little or no specificity was provided as to the nature of expenses. Procedures were not followed - in direct conflict with National Treasury Regulations 2.1.2.

49. The SSA had to use cash in the operational environment. The system of cash disbursements was handled through a Temporary Advance (TA). A member applied for a TA based on a submission approved by the person with the delegation of authority to do so. A TA number issued by the Finance

Chief Directorate enabled the member to withdraw the agreed amount of funds. The member was then required to settle the advance and provide the Finance Chief Directorate with verification that the funds had been utilised as contemplated in the submission. Settling an advance also required that Part B of the TA form be completed by the member for approval by way of signature by the line manager. The claim could then be settled by the Finance Chief Directorate and the TA record removed from the member's name.

50. All cash TAs had to be authorised by the CFO before any withdrawal. For any TA requested and approved, if the amount of money spent fell short, the amount of the unpaid funds would be loaded on the system and deducted from the member's salary. Should there be monies outstanding or not "settled" by the member, they would not be allowed to take out any further money until the advance taken by them had been fully settled.

51. However, the evidence shows that the system could be circumvented if a member who could not take out a further TA asked someone else to withdraw funds for him or her. As a result, certain members had accumulated several advances that they had not accounted for. The HLRP was informed that where steps had been taken to recoup the funds through deductions made against salaries, the amounts were often too large to be realistically settled over time. Several members so affected had left the Agency owing large sums of money. The TA system also did not guarantee that cash leaving the Agency was indeed paid to the intended recipient.

52. Upon Mr Jafta assuming the DG position, all members were requested to settle their outstanding TAs, even when this meant their having to cede their pensions to the SSA. This tough stance was intended to restore governance and proper financial controls within the SSA.

53. Aside from the use of cash, inadequate documentation trails were kept for projects and operations undertaken. The evidence shows that a particular certificate was used to issue cash. All it contained was the name of the person issuing the cash, the amount in words, the reason for the cash issue, the name of the project, and the signature and name of the recipient, which was dated. There was also a declaration that the signatory was the recipient of the cash. This was all that was used to justify the handing over of R1.4 million in cash, in one specific example.

54. The HLRP was made aware that, although the SSA had strict procedures and controls in place for the procurement of assets, these were often reported as missing and could not easily be found on the assets register. Such assets included high value cars and SUVs, specialised surveillance equipment, properties and houses used for cover, and even the profits derived from entities created as front companies.

55. The Project Veza investigations showed that in the creation and operation of a parallel intelligence structure, the secrecy surrounding deep cover operations was (frequently) used as a pretext for accessing funds. One of the key control weaknesses was a perceived impermeable border between the "covert" SSA and the "open" SSA.

56. There were monthly cash-flow shortages and re-direction to covert operational work of SSA-retained funds meant for infrastructure development, for which no proper accounting was done. Financial officers did not have the ability to monitor compliance with Operational Directives (ODs) regarding the remuneration of agents or contacts, resulting in a higher risk of fraud or theft due to incomplete information.

57. Financial irregularities and weak financial controls made it difficult to ascertain the full extent of the operational expenditure incurred under covert CDSO projects. The outlay of funds, was "fast and loose" and mostly in cash. The Project Veza investigation shows that financial irregularities resulted in approximately R1.5 billion from state coffers being expended both domestically and abroad in the period 2012-2018 under the guise of covert operations.

58. The AG regularly made adverse findings on the internal control environment. In the 2017-2018 report, this included findings about lack of monitoring and of implementation plans by the AO and senior management to address key control deficiencies.

59. The Secret Services Account Act 56 of 1978 provided for the establishment of the Security Services Special Account and for the control and utilisation of unexpended balances or unspent funds in the budgets of security services. The unexpended balance could only be accessed with the approval of the Minister of State Security, and with no requirement for the Minister of Finance's concurrence. Officials had direct access to retained earnings in the amount of R130 million, of which R90 million was allocated to fund CDSO operational projects and R20 million to foreign intelligence. These instructions were contrary to commitments made to Treasury.

Secrecy: Classification and covert operations

60. The "secrecy" measures discussed above, which undermine financial accountability, reflect a more general vulnerability in the regulatory framework governing the intelligence services.

61. The SSA's ODs constituted a rigorous and comprehensive regulatory framework governing its operational activities, including deep cover operations. These ODs aligned with the constitutional imperative that national security be pursued in compliance with the law. They also recognised that the need for accountability was greater in the context of covert operations, where there was a risk that secrecy, whilst a necessary component of intelligence, might be abused to conceal unlawful activity.

62. The SSA evidence exposes at least two ways in which secrecy can be abused: classification and covert operations.

Classification

63. The default position in South African law is that everyone has the right to access any information held by the State. Classification is thus an exception to the norm. The national policy governing classification is contained in the Minimum Information Security Standards (MISS).

64. While recognising the importance of information security, the MISS cautions against an overreliance on classification. The MISS also sets out the foundational principle that classification cannot be used to conceal criminality, specifically to cover up maladministration, corruption, and criminal actions.

65. SSA's own regulatory framework for the classification and declassification of documents under its control in terms of the Intelligence Services Act, Chapter XXV of the Regulations issued by the Minister in terms of section 37(1) of the Intelligence Services Act places responsibility for classification and declassification on the DG, although he/she may delegate these powers and duties.

66. Regulation 3(2) of Chapter XXV contains detailed criteria for the application of restrictions of a document according to the three categories of classification: confidential, secret or top secret.

67. In keeping with MISS, the Regulations also prohibit the use of classification to conceal criminality or prevent embarrassment. It indicates that:

> Classification may not be used in instances to – (a) Conceal violations of law, inefficiency or administrative errors; (b) Prevent embarrassment to a person and/or organisation; (c) Prevent or delay the release of information that does not require protection in the safety or interest of the Republic of South Africa; (d) Any other information that does not fall within the categories mentioned in Regulation 3(2).

68. Notwithstanding the important legal principles set out in Chapter XXV, the Regulations are not published in the Government Gazette and are not publicly available. The non-publication of the Regulations is supposedly permitted by section 37(5) of the Intelligence Services Act: "A regulation made in terms of this section with reference to members need not be published in the Gazette but must be notified to members to whom it applies in such manner as the Minister may determine."

69. Similar provisions apply in respect of Regulations issued in terms of the National Strategic Intelligence Act and the Oversight Act.

70. It appears that the discretion of the Minister to publish Regulations in the Government Gazette does not necessarily mean that the Regulations are classified. However, it is unclear what process is to be followed to obtain a copy of the Regulations. The Commission's Legal Team was unable to secure a copy of these Regulations from the Acting DG despite numerous formal and informal requests to the Agency.

71. On 19 October 2020, the Minister of State Security delivered a bundle of publicly available legislation to the Chairperson which was inexplicably classified as "confidential". In a letter accompanying the bundle, the Minister referred to the relevant Regulations as follows:

> In light of the fact that the requested legislation and prescripts are publicly available, with the exception of certain chapters of the Intelligence Services Regulations, 2014, we are of the view that such publicly accessible documents may be submitted to the Commission in the interest of expediting the Commission's work" (emphasis added).

Covert operations

72. Secrecy can also be abused in the context of covert intelligence operations. "Covert collection" is defined in section 1 of the National Strategic Intelligence Act as the "acquisition of information which cannot be obtained by overt means and for which complete and continuous secrecy is a requirement".

73. However, the SSA evidence shows how secrecy was used to shield and sustain unlawful activities by placing them beyond the reach of public scrutiny. Covert companies were registered in the names of individuals who had full control of these entities with no oversight. The need for accountability is increased, not diminished, when state resources are used for covert operations.

METHODS: PATTERNS AND PROCESSES OF STATE CAPTURE

74. In the light of the weaknesses of the regulatory framework discussed above, the paragraphs below show how these vulnerabilities were exploited to use the intelligence services as a resource to pursue personal and political interests rather than human security. According to the evidence, this abuse of intelligence followed familiar patterns and processes of what might be termed state capture.

Centralisation of authority and restructuring of the SSA

75. The over-concentration of power in the hands of a single DG resulted in a span of control and authority that was too wide, and such authority consequently enabled resources to be hidden or moved so that there was no or limited robust oversight.

76. On 27 December 2011, proposed structural changes were approved. These were:

    76.1 The relocation of the CDSO from the line function authority of the Deputy Director: Domestic Intelligence to the Deputy Director: Counterintelligence

    76.2 The relocation of the Cover Support Unit (CSU) from the Office of the Director: SSA Domestic Branch to the Office of the Deputy Director: Counterintelligence; and

    76.3 The establishment of the Directorate Presidential Security Support ("PSS") within the existing CDSO.

77. The restructuring entailed a significant concentration of power in the office of the Deputy Director: Counterintelligence and envisaged a leading strategic role for the CDSO. Resources became increasingly concentrated in the hands of a few individuals. The patterns and processes by which this occurred exploited the vulnerabilities of the regulatory framework discussed above. The evidence shows how these individuals abused civilian intelligence to promote illegitimate interests.

78. The motivation for centralising these key assets within Counterintelligence was explained with reference to "immediate identified security deficiencies" that had left the President "vulnerable to all sorts

of threats". Vague references were made in the proposal to the role of the media in undermining of the office of the Presidency, but no intelligence assessment or evidence was provided in support of this.

79. The recommendation to create the Presidential Support Service (PSS) Directorate included approving the employment of twenty officers who were assembled and sent for training on the outlined function of the directorate. The "head-hunted" officers of that recommendation were the same individuals who were recruited and trained in 2008-2009. Two years later, they were absorbed into a newly established PSS service, coinciding with Ambassador Dlomo's appointment as the GM of CDSO.

80. The centralisation of power within Counterintelligence is borne out by the activities subsequently carried out by the CDSO, the PSS and the CSU, which will be discussed in detail below. In summary, the consequences of these structural changes were the following:

    80.1 The infiltration into the SSA by "co-workers", who bypassed official recruitment, training and vetting processes

    80.2 The overreach of the duly authorised mandate of the SSA

    80.3 Illegal activities carried out by a parallel counterintelligence structure under the guise of covert operations

    80.4 Executive interference in operational activities

    80.5 The "rampant looting" of SSA funds; and

    80.6 The illegal use of SSA firearms.

Abuse of processes and resources

Recruitment of "co-workers"

81. Persons were recruited, trained, armed and deployed in ways that bypassed or breached official channels of accountability within the SSA. It was pointed by Mr Y in his affidavit testified to by Ms K that in 2008 and 2009, a group of approximately 48 non-SSA members were recruited and trained in preparation for their deployment after the May 2009 elections to various roles, with responsibilities that included VIP protection and intelligence collection. The new recruits received training on counterintelligence, weapons training, counterterrorism and VIP protection which took place both outside South Africa and locally, at the South African National Academy of Intelligence (SANAI) in May 2009. These non-SSA members were not subjected to the formal recruitment and vetting processes of the SSA but were rather "co-workers" not formally employed by the SSA. This notwithstanding, they were given access to SSA funds and resources and were provided with SSA firearms.

82. Through the CDSO, the SSA assumed responsibility for Mr Zuma's food and toxin security, his physical security and the protection of the President's aircraft. These tasks should of course have been performed by other security structures within the state.

83. The effect of this irregular recruitment and training of co-workers as well as their infiltration into the Agency created a parallel intelligence structure, which engaged in unlawful and unconstitutional activities that were concealed under the veil of covert operations.

Parallel vetting procedures

84. The following is a summary of the evidence presented to the Commission in respect of Security Clearance (vetting) processes at the SSA.

    84.1 "Vetting" refers to the process of verification and investigation relating to the determination of the security competency of members, prospective members, and contract employees.

84.2 Vetting is a deliberate coordinated effort within the SSA environment, governed by the Intelligence Services Act, the MISS, the National Strategic Intelligence Act, the Promotion of Access to Information Act (PAIA) as well as standard operating procedures and directives, to ensure that all vetting is conducted in accordance with these prescripts.

84.3 The issuing of clearance certificates, which is the end product of the vetting process, provides an assurance to the recipients, organs of state, that the concerned individual is security competent. This process is sacrosanct and falls squarely within the mandate of the SSA as a first-line measure in delivering on its counterintelligence mandate.

85. The Project Veza investigation uncovered evidence of a parallel vetting structure that operated within the Office of the DDG: Counterintelligence during the period 2013-2018. The evidence shows that this parallel structure vetted selected individuals and issued them with purported SSA clearance certificates. This process bypassed official SSA channels, and the vetting processes followed by this parallel structure were irregular and weak.

86. As a result of the establishment of a parallel vetting structure, the checks and balances built into the SSA system were overridden, allowing for persons who were not security competent to gain access to organs of state, sensitive information and positions of power and influence. The structure was set up in October 2013 when vetting officers, including polygraph personnel and evaluators, were seconded to the Office of the DDG.

87. The formal vetting structure was perceived as taking too long to allow for responses to appointments that needed to be made rapidly by the President. As a result, a "drive-through process" came into being in which people were processed within three days. This parallel vetting process severely compromised the integrity and the purpose of the legitimate SSA vetting process. A noteworthy example of where vetting processes were bypassed was in the case of Mr Arthur Fraser, who was appointed DG in September 2016. While Mr Fraser was not vetted through the parallel structure, a flawed vetting process that circumvented prescribed channels was followed, with striking irregular practices condoned based on the purported urgency of Mr Fraser's vetting.

88. The vetting process was also abused for the sole purpose of unseating Mr Robert McBride, which was described as a serious abuse of power by the Ministry of State Security and the SSA.

The weakening of oversight structures

89. The HLRP considered the lack of effective checks and balances within the security environment to be one of the key reasons for the alleged malfeasance, corruption and fraud perpetrated at the SSA. The HLRP posed the following question:

> The framers of our Constitution and democratic intelligence policy and legislation created an oversight system for our intelligence services comparable to the best in the world, comprising a bi-cameral, multi-party parliamentary committee – the JSCI – and the IGI. The question is: given the abuses and infractions identified in this report, did these oversight mechanisms function effectively and if not, why not?

90. The HLRP found that the oversight mechanisms had failed to act effectively in recent years, largely due to neglect or politicisation and factionalism. The absence or failure of oversight mechanisms is a common thread in the SSA evidence. Without weakened structures of accountability, the abuse of civilian intelligence would not have progressed as far as it did.

The Auditor-General

91. The AG's independent audit function serves to promote financial transparency and accountability. The activities that fall within covert operations did not receive the same level of scrutiny that other aspects of the SSA received from the AG. The HLRP was informed that the AG was compelled every year to automatically provide a qualified audit of the SSA. The AG was very uncomfortable with having to write a report which began with a disclaimer of this kind. The reasons for this disclaimer were that:

91.1 Access to information to allow verification of the finances and assets of the SSA was not provided; and

91.2 There was no provision to determine the extent to which performance targets had been met.

92. In addition, the HLRP was told by the AG that the Agency was not always able to provide documentary support for the money used in operations. The AG's report on the SSA for the financial year 2017/2018 provides a good illustration of why the AG had been forced to qualify his audit:

92.1 The high-risk environment within which the Agency functioned and the way expenditure and assets were recorded did not sufficiently mitigate the risks

92.2 There was extensive use of TAs for operations which were required to be certified for surety. However, during the audit, management was unable to provide documentation to verify operational expenditure of R125.6 million or that the money was used for the intended purposes; and

92.3 The AG was unable to confirm redundant assets in excess of R9 million as there was insufficient audit evidence: the assets could not be located by the Agency. The figure given by witnesses in evidence was R9 billion. This figure was extracted from the HLRP report and confirmed during the presentation of evidence at the Commission. The AG was unable to confirm the reported irregular expenditure of R31.3 million stated in the financial statements.

The Inspector-General of Intelligence

93. The oversight role of the IGI is indispensable in view of the vulnerable features of the regulatory framework governing intelligence. The IGI conducts compliance inspections of the work of the SSA and investigations into its activities. The Office of the IGI (OIGI) also investigates complaints of maladministration and corruption against the Agency.

94. In particular, the susceptibility of intelligence services to politicisation underscores the need to protect the independence of the IGI from political interference, and to ensure that the position is always filled.

95. In addition, in terms of the legal framework, the OIGI falls under the SSA, which is a national department reflected in Schedule 1 of the Public Service Act. The effect of the absorption of the OIGI under the office and ministry of the SSA has been that what should statutorily and constitutionally have been two autonomous discrete and independent offices have in practice become amalgamated. As a result, the guaranteed independence of the OIGI has been eroded.

96. A factor undermining the independence of the OIGI is the appointment of members thereto. The DG has control, in practice, over the filling of vacancies in the OIGI – though the Oversight Act provides that the powers to fill vacancies reside with the Minister in consultation with the OIGI.

97. The evidence shows that attempts have been made to investigate the intelligence services within the OIGI, to the exclusion of those within other LEAs. The rationale for this is that the OIGI does not have any of the powers granted to LEAs by section 38 of the Criminal Procedure Act 51 of 1977, which includes legal authority to arrest, serve summons, serve written notice on an accused person, provide a warning statement, or issue an indictment.

98. The OIGI does not carry out its mandate for the purposes of "feeding into the criminal prosecution process". Consequently, all matters investigated by the OIGI will not, as a rule, be acted upon by the criminal courts and do not, in the ordinary course, result in criminal prosecution. This is because, in countering investigation efforts by the Independent Police Investigative Unit (IPID) and the Hawks, an argument is routinely raised that these LEAs do not have a legal mandate to investigate any conduct of criminality, fraud or malfeasance of persons within crime intelligence. This argument is proffered on the basis that the OIGI has exclusive jurisdiction over the intelligence services.

99. In bolstering this argument, it has been consistently maintained that the OIGI is the body that is legally mandated to have access to the classified information of crime intelligence. This argument may obviously be raised in respect of other intelligence services. These arguments for excluding the

jurisdiction of LEAs are advanced in the comfort that the "recommendations" of the IGI need not be acted upon and have no force in law.

The Joint Standing Committee on Intelligence

100. The oversight role of the JSCI must be considered. The JSCI reports to Parliament on the intelligence and counterintelligence functions of the SSA. These include the administration, financial management and expenditure of the Agency in accordance with section 2(1) of the Oversight Act.

101. The JSCI consists of fifteen members who are democratically elected representatives (MPs), who take an oath of allegiance to be faithful to the Constitution and to serve the people of South Africa. It is a multi-party body, the composition of which is determined by proportional representation. In its functional design, the JSCI is different from other parliamentary committees in that, members of the JSCI are not permitted to report to their political parties on issues that the Committee considers. The members also undergo a security clearance process. In addition, the media are not permitted to attend meetings of the JSCI.

102. The HLRP report noted that the JSCI was unable to engage substantively with the Panel, which was told that most of the Committee members were new and had no institutional memory. The Chair of the Committee had changed thrice since 2014, Committee members did not serve on the Committee on a full-time basis and met only once a week for a few hours, rendering the Committee rudderless.

103. The view was that the JSCI did not see or learn of what was happening in the SSA and take steps to halt it. The HLRP report noted that the cumulative effect of these issues was aptly captured by one member of the JSCI, who admitted that the Committee had lost control over their oversight role and that three of their annual reports had not been presented to Parliament.

104. The centralisation which was effected by proclamation in 2009 highlights an important failure in the oversight mechanism. Parliament knew that to change the structures and amend security legislation on the basis that was purported to be done, in terms of a proclamation, had to be done by Parliament and had to go through the consultation process in Parliament. In this instance, there was a complete failure of parliamentary oversight.

Unlawful projects and activities

105. So far, the evidence has shown that the failure of oversight mechanisms, the centralisation of authority, and the restructuring of the Agency paved the way, through the side-stepping of official processes, for unconstitutional and illegal intelligence operations to be pursued. These are discussed below.

Chief Directorate: Special Operations Projects

106. During the period 2012-2018, the CDSO conducted several counterintelligence projects and operations. The Project Veza team found that the majority, if not all, of the projects were established in breach of the SSA's policy and regulatory prescripts. Such attempts to comply with policy prescripts seemed to be aimed purely at meeting the minimum requirements for gaining authorisation to access funds.

107. Notwithstanding the vague and generic motivations for the establishment of projects, the operational activities purportedly undertaken were in clear breach of the constitutional prohibition against partisan and politicised intelligence. The extent of politicisation of the SSA is further illustrated by the executive interference in operational activities which occurred during this period.

    107.1 The documentary motivation for the establishment of the projects was entirely inadequate. The establishment documents of these projects contained only a generic, all-encapsulating reference to the SSA's counterintelligence mandate.

    107.2 No or limited detail was disclosed regarding the proposed plans and outcomes of these operational activities, and there were conflicting accounts of the project's deliverables.

107.3 There was no record of how or when or what intelligence was provided to the client, if any, as a result of these activities.

107.4 The operational activities undertaken exceeded the mandate of the SSA, and at times constituted conduct that undermined the very core of the Constitution, was manifestly unlawful, and involved criminality.

108. Information made available to the HLRP and Project Veza team indicated that among these projects and operations were the following:

Project Construção

109. This project had as its aim the recruitment of personnel outside of the SSA to provide VIP protection and to carry out the SO pursued by the CDSO. The majority of these so-called "co-workers" were trained outside of South Africa and outside of the normal training structures within SSA designed for this purpose.

110. According to the request for authorisation to establish this project, it had "an aim of gathering, influencing, penetrating and neutralising any form of threats or potential threats capable of destabilising the democratic rule of the Republic of South Africa." Ms K explained that vague motivations like this do not tell one exactly what the people involved in this project will be doing.

111. It was also noted by Mr Y that the submissions motivating for the establishment of Project Construção, Project Mayibuye and Project Wave all contained the same wording, were all authorised by the same individuals and were all approved on the same day (23 January 2015).

112. Project Construção involved the recruitment and training of 22 "co-workers" for the CDSO. None of these recruits was vetted by the SSA. Some of these recruits were sent for overseas training during the latter half of 2015. The recruits were trained in two groups – in VIP protection and in counterintelligence tradecraft. Frank (a pseudonym) confirmed that the recruits were trained in firearm handling and that the firearms were sourced from the SSA armoury on the instructions of Ambassador Dlomo and Johan (a pseudonym) of Internal Security. Frank also coordinated the deployment of VIP-trained recruits on the instruction of Ambassador Dlomo. These recruits were deployed to protect identified persons.

113. Mr Y pointed out that it was of concern that this VIP protection training was conducted outside of the available diplomatic channels provided by the agreement on training in place at the time, with the foreign-based trainers apparently under the impression they were training SAPS members rather than new intelligence recruits. During the "graduation" ceremony of the recruits, they were allegedly instructed by Ambassador Dlomo that upon return to South Africa they would report only to him.

114. The project manager, Frank, reported directly to Ambassador Dlomo. He confirmed that this project was linked to the VIP protection of high-ranking officials (who were not ordinarily entitled to be provided with such protection) such as Ms Dudu Myeni, Mr Collen Maine, Mr Desmond Moela and Mr Shaun Abrahams. According to Mr Y, Amb Dlomo himself benefitted from personal protection services using SSA resources.

115. Dr Mufamadi noted that the persons who were legitimately mandated to provide VIP protection were accountable to the Commissioner of Police. But once this function was carried out elsewhere, then these structures of accountability were bypassed. Instead, they accounted to the structures of the SSA, and the SAPS was kept "out of the loop".

116. Dr Mufamadi noted further that the budget of the SSA ought not to have provided for that category of function. Whatever these undercover agents did, might well have been a duplication of what the SAPS believed itself to have been doing.

117. An initial operational budget of R30 million was approved for this project by Ambassador Kudjoe in January 2015, who in August 2013 had been appointed the DG for the SSA. In July 2016, Amb Kudjoe approved the renewal of this project for the period 1 April 2016 – 31 March 2017 and for the allocation of a further R24 million in operational expenditure.

118. Three invoices were issued by the Carrot Export Company (a pseudonym) during February and March 2015 totalling R20 million in respect of this project. According to Mr Y, investigations have not been able to verify the existence of this company. Additional invoices were submitted under this project by two companies, Napa and Squash (pseudonyms). According to Mr Y, six invoices totalling R14.9 million were submitted by Napa and a further six invoices totalling R10.427 million were submitted by Squash.

119. Dr Mufamadi told the Commission that this project was an illustration of what was meant by the unit being a law unto itself: the unit organised the training of agents in VIP protection – which is the constitutional responsibility of the SAPS.

Project Mayibuye

120. According to Mr Y, this project was initiated by Amb Dlomo and was initially approved by Amb Kudjoe in January 2015. It was renewed and continued after the departure of Amb Kudjoe and the subsequent arrival of Mr Fraser as DG in September 2016.

121. The motivation for this project was "to provide counter-intelligence support that will enable to step up [sic] State authority and its organs of governance (Justice, Parliament, Provincial Legislature) against hostile behaviour or radical intents aimed at undermining the rule of law and governance in general."

122. According to Mr Y, Mr Mahlobo, the then Minister of State Security, approved the utilisation of retained earnings to fund these operations, despite advice that the retained earnings should be saved and utilised for infrastructure development to develop the intelligence capabilities of the SSA.

123. According to Mr Y, in May 2018, authorisation was given for the renewal of Project Mayibuye and the payment of related expenditure between 1 April 2016 and 31 March 2017. The related budget of R54.1 million was approved.

124. Based on the TAs, which had been discovered during the Project Veza investigation, the total paid out in respect of Project Mayibuye amounted to R84.79 million. This included eight invoices totalling R38.88 million, which were submitted by "Napa" and "Squash".

125. Dorothy (a pseudonym) testified that she had delivered cash – she presumed on behalf of Project Mayibuye – in the amount of R4.5 million to Mr Mahlobo's house on three occasions and once in the amount of R1.5 million to his official residence in Cape Town. In each case she took out TAs in her own name on behalf of "Lilly", who could not do so because she had outstanding TAs that needed to be settled.

126. On the first occasion that Dorothy was required to deliver the cash to Mr Mahlobo, she did so alone. On this occasion, as on the other occasions when she delivered cash to Mr Mahlobo, she would present herself at the gate and announce her arrival to the guards. Once permitted to enter the property, she would announce that she had brought the money and would be ushered into the Minister's study. There she would take out the money from the bag it had been placed in and count the cash in front of Mr Mahlobo to assure him she had brought the correct amount. She would then put the cash back in the bag and leave.

127. On the second and third occasions, Dorothy was accompanied by "Lilly" when she delivered the cash to Mr Mahlobo. After withdrawing the cash in her name, Dorothy called Mr Mahlobo to say she and Lilly would be coming to deliver the cash to him. When they arrived at the house, they asked Mr Mahlobo's protectors to inform him that they had arrived. Again, after receiving "the green light' that they could enter, Mr Mahlobo ushered them into his study where the money was counted and put back into the bags, after which they left.

128. Dorothy testified that Mr Mahlobo did not give her a receipt for the money on any of the three occasions referred to. Nor did he sign for the money.

129. Before she delivered R4.51 million to Mr Mahlobo on the three occasions, Dorothy claimed that "Darryl" (a pseudonym) used to make these deliveries. According to Dorothy, Darryl had indicated that he had been taking the money to Mr Mahlobo before, but since she (Dorothy) was now acting in his

position, she should now be the one to deliver the cash. She said that after the three occasions on which she had made deliveries she did not know how many times money had been taken to Mr Mahlobo or by whom.

130. Dorothy also gave evidence that Lilly, together with Frank, had requested her to take out cash in the amount of R7 million under her name but nevertheless use the name of his (Frank's) Project. (Dorothy believes this may have been Mayibuye). The reason for the request was that Frank could not draw the money as he had an amount that he needed to clear at finance.

131. When asked to comment on the TA documentation related to Project Mayibuye, Frank confirmed that on one occasion Lilly had requested that he collect and deliver R2.5 million on her behalf, as she was not able to handle the transaction herself. Frank said he took this money to the relevant recipient (which he conceded was the Ministry) and they signed for it.

132. Dorothy testified that she signed various settlement documents for the approval of funds for Project Mayibuye, despite not knowing what the money was for. In the environment in which she worked, she claimed, business was conducted on a "need-to-know" basis. So as long as there was a submission that was approved for a project, she would not question what the money was for because it was "not her place" to know that.

133. Project Mayibuye comprised several operations: Operation Commitment, Operation Justice, Operation Lock, and Operation Sesikhona. These are discussed below.

Operation Commitment

134. According to Mr Y, this operation involved monthly withdrawals of cash by, amongst others, Frank, Darryl and Dorothy, which were delivered on more than one occasion to Mr Mahlobo. Frank confirmed the correctness of the documentary evidence, which showed financial records of cash being withdrawn from SSA for the purposes of the implementation of this operation.

135. It was alleged that these funds were intended for onward delivery by Mr Mahlobo to Mr Zuma. Frank confirmed that he dropped off monthly withdrawals of R2.5 million to Mr Mahlobo's office under this operation and indicated that these payments were going to the "Project of the President." However, Frank could not testify to precisely what the project execution entailed. Nor could he say whether the monies he delivered were used for their intended purpose, or even whether they reached their intended destination.

136. According to Ms K, the Project Veza team attempted to verify these allegations with Mr Mahlobo but were unable to do so. Nor was the team able to determine whether any amounts actually reached their intended destinations, or indeed Mr Zuma. However, in her supplementary affidavit, Ms K states that the Project Veza team was told during interviews with implicated individuals that it was common knowledge that the amount for Operation Commitment was earmarked for Mr Zuma.

137. Lilly's evidence (according to Mr Y) was that the Operation Commitment monthly payments totalled approximately R24 million in the 2015/16 financial year and increased to approximately R54.1 million in the 2016/17 financial year.

Operation Justice

138. Operation Justice involved recruiting and handling sources in the judiciary in order to influence the outcome of litigation against Mr Zuma. Mr Mahlobo, the then Minister of State Security, was responsible for handling the sources. Different witnesses stated that varied amounts of money were regularly or routinely transferred from the SSA to Mr Mahlobo for this purpose.

139. The justification for the project was to counter the influence of members of the judiciary who were perceived to be hostile to Mr Zuma. There were allegations that those judges were colluding to overthrow the government. Cash delivered to Mr Mahlobo's office was intended "to deal with the issue of the judges".

140. In May 2016 Operation Justice was noted for its "achievements" in gaining access to and interaction with the justice system "through what was becoming an alarming concern over the hostility

. . . between the State and the justice fraternity". Equally, the CDSO recognised its own role in improving public perceptions about the justice system through using influential media figures.

141. The existence of Operation Justice could not be proved or disproved. It could have been one of those conduits allegedly used by SSA officials and the Ministers to unlawfully transfer funds out of state coffers. Irrespective of whether it existed and was used for the stated purpose, Operation Justice constituted a fundamental breach of the separation of powers principle and an unconstitutional attempt to compromise the independence of the Judiciary.

142. If indeed the judiciary was influenced in the manner in which it is alleged, this would exemplify how far the politicisation of the intelligence services could have encroached upon the democratic principles enshrined in the Constitution.

143. One of the witnesses testified to secret encounters that involved the Minister of State Security interacting with individuals introduced to those present as "judges".

144. In February 2015 the State of the Nation Address (SONA) was interrupted by an electronic signal jam. This incident was met with a public outcry and a legal challenge brought against the Minister and parliamentary officials as respondents. The Commission heard evidence that Mr Mahlobo had arranged a meeting with two judges to request them to influence the Cape Town Bench, where the matter brought before the court by the South African National Editors' Forum (SANEF) would be heard. Mr Mahlobo informed one of the operatives at the meeting that the two "judges" would work with the operatives and would assist in influencing the case brought against the SSA by SANEF.

145. A witness involved in this operation informed the Commission through an affidavit that the instructions regarding the operations of the agents during the 2016 SONA came directly from Mr Mahlobo. He made decisions about the involvement of operatives in this operation and decided who should run it.

146. Years later the identity of the alleged two judges could not be confirmed. During his testimony before the Commission, Mr Mahlobo denied all allegations..

147. The SSA witnesses believed that there was strong circumstantial evidence that some of the money transported to Mr Mahlobo, as revealed by some operatives, was passed members of the judiciary as alleged. One of the witnesses reported that he was subsequently informed by Amb Bheki Langa (Director of the domestic branch of the SSA), and saw records to confirm, that Amb Langa had authorised the drawing of R12 million in cash from the SO budget. It is possible, however, that there is more to Project Justice than has been shared with the Commission, which requires further investigation.

148. To the extent that this evidence is true and correct, this operation exemplifies how the enablers of state capture were empowered. SSA resources were redirected to protect the personal and political interests of Mr Zuma, by attempting to influence the outcome of litigation involving him.

149. This is also evidence of a self-standing project of state capture, representing a complete undermining of the constitutional prescripts set for the civilian intelligence services. Whether or not this project was in fact successfully implemented, its stated purpose reflects a deliberate attempt to interfere in the constitutional functions and independence of the judiciary, as well as in the separation of powers guaranteed in the Constitution.

Operation Lock

150. Operation Lock was designed to monitor, evaluate and provide logistical support to Mr Eugene de Kock after he was released on parole into the care of State Security. This project involved the provision of a safe house and protection to Mr de Kock when he was released from prison, apparently on the basis of an MOU with DCS. Prior to his release on parole, Mr de Kock had been assisting the NPA's Missing Person's Task Team to locate the bodies of murdered cadres of uMkhonto we Sizwe.

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basis of an MOU with DCS. Prior to his release on parole, Mr de Kock had been assisting the NPA's Missing Person's Task Team to locate the bodies of murdered cadres of uMkhonto we Sizwe.

152. The CDSO had assumed responsibility for Mr De Kock over concerns about his continued links with right-wing groups. Mr Mahlobo was reported to have had close personal involvement with Operation Lock. Operation Lock was allocated around R100 000 – R200 000 monthly for the lease of a safe house, living expenses, and Mr De Kock's salary (of around R40 000), for which he signed acknowledgement receipts. Later this money was reduced to R30 000 a month.

153. None of the witnesses reported that they had seen the MOU signed with the DCS. However, the involvement of the CDSO in a project intended for the protection of Mr De Kock is inexplicable. If the DCS needed assistance in protecting him, such assistance should have come from the SAPS. The CDSO had assumed responsibility for Mr De Kock over concerns about his continued links with right-wing groups. Mr Mahlobo was reported to have had close personal involvement with Operation Lock. Operation Lock was allocated around R100 000 – R200 000 monthly for the lease of a safe house, living expenses, and Mr De Kock's salary (of around R40 000), for which he signed acknowledgement receipts. Later this money was reduced to R30 000 a month.

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Operation Ses'khona

155. This operation was purportedly aimed at stabilising or influencing the nature of public protest by a Cape Town-based group of homeless activists who had demonstrated and spilled human waste on the streets at national key points. The cause for concern for the CDSO was that the nature of these protests could undermine the integrity of the state and send a negative message to potential investors. This may well have been a legitimate concern.

156. Evidence was presented that "The CDSO team was directly tasked by the Minister of State Security to 'activate' the Ses'khona agents to ensure a presence within the City of Cape Town during the SONA. This was done to great success."

157. A Ses'khona three-member team infiltrated the leadership of the Ses'khona movement to determine who was planning to do what, when, where and how, and to assess if their activities would in any way affect the safety and security of people attending the SONA event. Numerous reports were then compiled and submitted to the management team concerning this movement.

158. A day before the SONA the minister instructed the agents to mobilise the Ses'khona group, provide them with all possible support, including transport, food, and T-shirts. Apparently, the intention was to highlight their presence in Cape Town on the day of the SONA to ensure there was another political presence on the streets of the city besides the Economic Freedom Fighters (EFF).

159. Later Mr Mahlobo transferred the Ses'khona project to another agent to ensure operational security and the safety of their sources. Mr Mahlobo instructed the agents to prepare and submit a business case for funding the Ses'khona movement. It was not clear if Ses'khona received funding from CDSO to establish themselves as a self-sustaining and self-sufficient NGO.

Project Wave

160. This project was launched in the 2015/16 financial year with a budget of R24 million. It had the same budget for the 2016/2017 financial year. Spending of the funds started soon after the establishment of the project, but co-workers were only recruited and trained for the project a year later. It emerged through the presentation of evidence that the project allegedly involved infiltrating and influencing the media in South Africa and abroad in order to counter negative publicity for the country, Mr Zuma, and the SSA.

161. According to the project plan and other related documentation, the purpose of the project was to conduct counterintelligence operations aimed specifically at influencing events and neutralising threats or

disrupting threatening behaviour against the constitutional values and the wellbeing of South Africans. This was to be done by infiltrating organisations or entities identified as high risk. The activities conducted during implementation, however, bore no resemblance to the activities later carried out under Project Wave.

162. Media personnel and journalists were identified and profiled, with the aim of recruiting them to meet identified operational needs. The targeted journalists were recruited from outside South Africa. Ambassador Dlomo provided instructions for the operationalisation of Project Wave.

163. There were two reported "achievements" of Project Wave: First, it had been able to confirm allegations about the involvement of foreign intelligence agencies in the planned destabilisation of democratic rule in South Africa; and second, it "confirmed" the involvement of senior cabinet members and various senior leaders in the ruling ANC who were colluding in a conspiracy to effect regime change in South Africa.

164. No credible evidence has emerged that such persons were engaged in unlawful or treasonous activity. But the operation produced a fake intelligence document which came to be known as "Operation Checkmate". Minister Pravin Gordhan testified that his removal from cabinet by former President Zuma in March 2017 was, at least in part, motivated by these allegations.

165. One of the largest payments made under this project was for R20 million, given to Africa News Agency ("ANA") and referred to as "Apricot", for "services rendered". The Commission was provided with a list of the journalists who were allegedly paid, but the list had been redacted and the Commission could not access the names.

166. The very existence of a project of this nature had serious implications for the freedoms guaranteed in the Constitution – in this case freedom of the press but also collusion with the press to abuse this freedom.

Project Hollywood

167. The stated objective of this project was to conduct surveillance and monitoring of high-profile, politically prominent or connected individuals and government officials using illegal interception methods. While it is possible that such a project was a legitimate one, it is also possible that such a project could have been abused to further party political or factional interests.

168. Monthly cash withdrawals of R800 000 were made to pay Innovation Insight Network (Pty) Ltd purportedly for the provision of intelligence and security services, including the remuneration of operatives, involving the establishment of a surveillance platform and encrypted communication capabilities.

169. During the Project Veza investigation, details relating to and provided by this service provider were found to be fictitious, and there was no evidence of a contract between Innovation Insight and the SSA.

170. This arrangement between Innovation Insight and the SSA, irrespective of whether the purported services were in fact rendered, constituted an unlawful outsourcing of the SSA's counterintelligence mandate and the creation of a parallel intelligence network.

Project Accurate / Khusela

171. Project Khusela was purportedly established to replace Project Accurate. The 2013 Project Accurate operational plan (without a budget) was relied on to obtain approval for the "establishment" of Project Khusela in April 2015.

172. This was said to be a project to recruit toxicologists to test the food and bedding of Mr Zuma. The HLRP did not understand it to be the responsibility of the SSA to deal with issues such as these.

173. The project was managed by Dr Mandisa Mokwena, a non-SSA member. But its activities overlapped with those of the Toxicology Unit established in 2012 as part of the Directorate for Presidential Security Support (PSS).

174. Project Khusela was established following the "Minister's intervention into the CDSO financial matters, in which the budget of CDSO needed to be reallocated, because it had depleted." The depletion of the CDSO budget was because of the establishment of the PSS, which was not allocated a budget; instead, the general CDSO budget was used to support the logistical needs of PSS members.

    174.1 The project had an initial allocation of R500 000 per month, which increased to R1.5 million per month in the 2015/16 financial year.

    174.2 The SSA's ODs do not permit concurrency; but Project Accurate continued to function illegitimately in parallel with Project Khusela.

    174.3 The irregularities extended to monthly payments of R1.8 million intended for Project Khusela. In certain instances, submissions relating to Project Mayibuye were attached as the basis for withdrawals.

    174.4 The stated objectives of this project differed from submission to submission. They ranged from bioterrorism threats and threats to economic security, to subversive acts and sabotage directed at strategic installations and national key points. Dr Mokwena stated under oath that all intelligence products were submitted directly to Mr Zuma. Consequently, it could not be confirmed whether the content of the professed intelligence products met the differing objectives of the project.

    174.5 This direct reporting line operated outside of the formal SSA intelligence clearance channels, constituting a parallel information management process.

Project Tin Roof

175. This project involved an investigation into the alleged attempted poisoning of Mr Zuma by his former wife, Ms MaNtuli Zuma. It also involved acquiring a safe house for MaNtuli and maintaining her. The HLRP was not provided with a convincing and logical explanation for why the SSA arranged a safe house for MaNtuli.

176. Further detail on this project emerged from the accounts of witnesses who had been involved in the project. It had been established in December 2014 at the instruction of Mr Mahlobo, who had MaNtuli removed from Nkandla as a suspect. She was given "protection and maintenance" by the SSA until the investigation into the alleged poisoning of Mr Zuma was finalised.

    176.1 MaNtuli was illegally placed in the custody of the SSA. She was in detention, without having gone through the correct processes, and in circumstances where no law allowed the SSA to detain her.

    176.2 MaNtuli was reported in the media to have described this period as a detention where her constitutional rights were not respected. A criminal case was opened at Nkandla, but the then National Director of Public Prosecutions, Mr Abrahams, failed to act on the case.

177. The team working on this project was about forty persons strong, drawn from different directorates within the SSA, as well as externally from administration, investigations, vetting, polygraph testing, surveillance, counter espionage, toxicology, and physical security. Monthly withdrawals of approximately R800 000 were made under the auspices of this project. Operational expenditure included the leasing and maintenance of safe houses, the provision of security services, and the leasing of high-end motor vehicles for surveillance. Project Veza investigations suggested that this project was used by operatives as a front.

178. This project constituted an overstepping of the SSA's duly authorised powers. The SSA does not have powers to detain a person; the CDSO violated the civil rights of a citizen under the pretext of "national interest". In addition, Mr Mahlobo's alleged involvement in the operational activities of this project amounted to Executive overreach.

Operation Lungisa

179. The stated objective of this project was to "neutralise and counter the activities of individuals intent on undermining the authorities."

    179.1 Monthly cash withdrawals of R500 000 were used to pay an entity called Zenzele Economic Advisory, purportedly for the provision of economic services, including data collection and analysis, the collection of financial statements from banks, company and ownership analysis, the scrutinising of assets, and the compiling of reports.

    179.2 The details provided by Zenzele Economic Advisory appeared to be fictitious: the Project Veza investigation did not find any evidence of a contract between the SSA and the service provider. There is also a difference between the stated objective of Operation Lungisa as per its approved submission and the services that were purportedly provided.

180. Activities such as collecting financial statements from banks and company ownership analysis cannot be outsourced; SSA should conduct them.

Project Academia

181. This project, on the instructions of Amb Dlomo and then Mr Mahlobo, was designed to intervene in the #FeesMustFall protests and to influence the direction of related student movements. In the longer term, the aim of the project was to devise long-term solutions to prevent the resurgence of #FeesMustFall protests. Ambassador Dlomo described the purpose of Project Academia as to support "young bright minds" to be "patriotic" and to be strategically deployed to institute counter-measures and to ensure stability and peace in universities.

182. Mr Mahlobo recruited a former SSA member, "Murray" (a pseudonym), to mitigate and resolve the #FeesMustFall protests. This project was allocated R700 000 per month, with a significant portion of this amount handed over to Murray. Murray had consistently and regularly been receiving cash payments from various members of the SSA during the 2016/17 and 2017/18 financial years; including the period during which Mr Fraser was DG. Expenses included the payment of fees for student leaders and other expenses and activities for the Congress of South African Students. The manner of intervention and the expenses were questionable. The #FeesMustFall movement was a legitimate project already being investigated by the SSA after the protests turned violent. The engaging of Murray under a separate SO was questionable. It was also uncertain to whom Murray was reporting and providing information, and to what end. In view of this, Murray's activities were probed.

183. Murray was not able to provide a contract or project establishment document to recruit students that entitled him to the vast amounts of money he claimed. The findings of an internal investigation to verify Murray's claims revealed that some of the students on his list of beneficiaries were recipients of the National Student Financial Aid Scheme (NSFAS) funding. Some students owed the institutions at which they were studying fees from previous years. There was no indication as to what benefit these alleged students were providing to the SSA. 182 Securing stability and peace at universities and preventing malicious destruction of public property constitute a legitimate objective in the national interest, and indeed the SSA had a legitimate project to monitor the #FeesMustFall protests and there was no need for Project Academia to have been separately and independently pursued by the CDSO.

184. To the extent that this project sought to influence or even prevent legitimate forms of student protest, and to the extent that it sought to provide financial support to student organisations involved in the political sphere, it was clearly illegitimate.

Workers Association Union project

185. A trade union named the Workers Association Union was established with the support of the SO unit of the SSA. The HLRP heard evidence that the purpose of forming the union was to neutralise instability in the platinum belt and counter the growing influence of the Association of Mineworkers and Construction Union (AMCU). The HLRP also heard testimony about the SSA having put under surveillance unions that had seceded from the Congress of South African Trade Unions (Cosatu) and were critical of Former President Zuma.

185.1 Four monthly payments of R120 000.00 were paid to Mr Yekani Gadini whom Mr Mahlobo had deployed to start a rival union to AMCU, so that Gadini could secure private security and protection services after falsely alleging that he had been kidnapped and threatened.

185.2 "Steven" (a pseudonym) met Mr Mahlobo at his residence in order to discuss a problem that had arisen with the idea of creating a rival union to AMCU. Special Operations hired the principal agent in the project, Mr Thebe Maswabi. At one of the project meetings Mr Zuma was also present.

185.3 The assignment went ahead as planned but Mr Maswabi became dissatisfied over remuneration and threatened to disclose the details of his assignment (including the role of Mr Zuma and Mr Mahlobo) unless he was paid an amount of R6 million; but his demand was viewed as extortion and was ignored.

The Directorate for Presidential Support Services

186. The PSS, approved by Minister Cwele in December 2011, was established as a response to "immediate identified security deficiencies associated with VIP protection and Technical Surveillance Counter Measures Services (TSCM). The motivation for the project called for an "intelligence-driven" approach to VIP protection to be realised by locating the PSS service at the heart of the CDSO's specialised counterintelligence mandate. Surprisingly, the proposal did not refer to existing state structures. The submission created the impression that VIP protection was the responsibility of the SSA. The Presidential Handbook provides that the President's medical and health care is the responsibility of the Surgeon General and the South African Military and Health Services of the SANDF.

187. Notwithstanding this legislative framework for responsibilities and the existing structures the SSA established the PSS to perform the same functions for Mr Zuma. This not only broadened the mandate of the SSA without legislative processes being followed, but effectively usurped the functions of the SAPS and SANDF. This was an example of the SSA exceeding its statutory mandate through the CDSO under Amb Dlomo's leadership. It also reflects the shift in intelligence philosophy adopted after the restructuring of the SSA since 2009. Increasingly, SSA resources were channelled towards "state security", and the security of Mr Zuma in particular, rather than towards "national security".

188. Evidence heard by the Commission also referred to SSA funds that were spent on uMkhonto we Sizwe (MK) veterans for two ANC events: for assisting SSA with identifying and reporting on potential disruptive behaviour of attendees at certain ANC events at the 8 January 2016 rally at Royal Bafokeng stadium; and for MK veterans deployed by Amb Dlomo for the operation #OccupyLuthuliHouse in September 2016 to prevent the followers of this hashtag from occupying Luthuli House on this day.

189. To the extent that this evidence is accepted, it would constitute an example of a self-standing project where the human and financial resources of the civilian intelligence were redirected to promote partisan interests within the ANC. This constituted an unlawful appropriation of state resources for private and political party gains.

Toxicology Unit

190. A Toxicology Unit was established within the CDSO in 2012 under Amb Dlomo's management. There were no indications that this unit was established legitimately. Amb Dlomo, working with a non-SSA member, Dr Mokwena was involved in the recruitment and training of individuals in the toxicology environment to capacitate this new unit. This was done in conjunction with an organisation referred to as a foreign International Development Agency for Food Safety and Security. Based on the Project Veza investigations, this organisation does not exist in any official records.

191. There appeared to have been a "double dipping" of funds as members of the Toxicology Unit reported to the Directorate for PSS for their travel funds, whilst funds were also paid to Project Khusela as part of CDSO operational expenditure.

192. The leader of the Toxicology Unit (who was given the pseudonym "Kelly") was a trained toxicologist. She indicated that she had used her own business entity called Remix, which had been established

in 2007, as a special purpose vehicle for receiving and disbursing operational funds from the SSA for this project.

193. Members of the unit were responsible for checking spaces that would be occupied by Mr Zuma. Notwithstanding the special training and considerable resources at its disposal, the unit failed to detect or prevent the alleged poisoning of a sitting President in 2014. In all the years that this Toxicology Unit served Mr Zuma, the only threat that had been detected was expired cold drinks. It is possible the Unit was used to syphon funds out of the SSA to be used for other undisclosed purposes.

194. Expenditure on the Toxicology Unit formed part of extraordinary expenses, financing extraordinary undertakings of the SSA, yet issues about toxicology would have involved consultation between the SAPS and possibly the Department of Health. The establishment of the Unit was an overreach of the SSA's authorised mandate.

Presidential aircraft

195. In November 2014, Amb Dlomo instituted a project for the protection of the presidential aircraft. The rationale for the project was that he had been made aware that pilots and crewmembers were bringing in unauthorised individuals to sleep in the aircraft. No formal threat and risk assessment of the alleged concerns formed the basis of the project; only a verbal briefing on a purported threat from Amb Dlomo. Individuals selected for the project had no training or knowledge of aviation matters, yet they accepted and carried out the duty of guarding the presidential plane and helicopter.

196. The project was formally allocated to the Chief Directorate: Internal Security (CDIS) headed by "Johan" (a pseudonym). It was unclear why this project, which like the PSS service encroached on the SAPS mandate, was set up within CDIS. It was suspected that Amb Dlomo deliberately intended to remove all aspects of the protection of Mr Zuma from the realm of SAPS and place them instead under his own control.

197. The protection of the Presidential aircraft did not fall within the SSA's authorised mandate; hence this project was not allocated a budget in the CDIS budget. Nevertheless, almost 40% of the CDIS budget was redirected from other operational activities to meet the alleged requirements of this project.

198. The extension of the SSA mandate, the internal reconfiguration of the CDSO, and the usurping of the functions of the Military and Health Services and the SAPS Presidential Protection Unit breached the provisions of the statutory and regulatory framework and the policy prescripts in the Presidential Handbook. The irregular establishment and implementation of PSS services, the Toxicology Unit, and a static security force for the protection of the presidential aircraft undermined the security of a sitting President, disrupted the reporting lines for duly assigned functions and thereby also undermined accountability.

Undermining firearm management SOPs and illegal use of SSA firearms

199. Mr Y detailed the comprehensive firearms control regulatory regime, according to the Firearms Control Act 60 of 2000 and the Regulations promulgated pursuant to that Act. He explained in his affidavit that the FCA regulates the possession, safekeeping, and deployment of firearms in South Africa and recognises the office of the SAPS National Commissioner as the designated authority and Registrar of Firearms. The SSA has its standard operating procedures (SOPs) relating to the management of firearms from the FCA. The responsibility within the SSA resides with the CDIS, whose mandate includes ensuring physical security, VIP protection, and asset management. These SOPs cover the complete spectrum of procedures, tasks and requisite workflow involved in the management of SSA firearms.

200. The SSA, through the CDIS, implements various steps including, the drafting and approval of SOPs; firearm training materials and training in use of firearms; the development of face recognition ID cards; firearm permits; and other relevant documentary controls. This documentation includes official firearm requisition forms, annual firearm inspection, and accountability forms for all SSA provincial offices and relevant units as well as firearm and ammunition transport documents.

201. The SOPs set out the guidelines for the application process, issuing, possession, usage and storage of official firearms. The SSA has appointed competent Armoury officials who are well acquainted with the FCA and are actively involved in improving the physical security around firearms.

202. Despite the existence of these controls, SSA firearms were misused by individuals and the CDSO for illegal purposes. The Project Veza investigations indicated a nexus between the flouting of SSA recruitment processes, the circumvention of vetting processes, and parallel training initiatives on the one hand, and illegal access to SSA firearms enabled by this parallel counterintelligence structure on the other. Mr Y testified that in late 2014 and early 2015 the CDSO began requesting firearms from the SSA armoury. These requests were made directly to the GM of CDIS, Johan who facilitated the handing over of firearms to the CDSO. This was often done without the necessary forms being completed.

203. Ambassador Dlomo established a parallel firearm training process whereby CDSO members were trained externally by former SAPS members instead of by the members of the Armoury.

204. The GM of CDIS, Johan, breached legal prescripts by facilitating the handing over of firearms to CDSO members without the required safeguards, and himself occasionally overseeing the issuing of firearms from the armoury.

205. Ambassador Dlomo did not have a justifiable reason to make the requests for firearms. The CDSO was a covert operational arm of the SSA and, as such, generally took necessary steps to avoid detectable links to the SSA. It is unclear why the CDSO, if it was indeed conducting legitimate covert operations or training, made use of firearms that were directly traceable to the SSA.

206. The firearms issued to the CDSO remained unaccounted for during this period, without the SSA armoury being able to conduct firearm inspections or ensure that permits were renewed. Numerous reports were submitted highlighting that the CDSO was failing to comply with the firearm controls requirements.

207. In December 2016, the CDSO, under a new GM, was requested to return all firearms, but only 21 were returned and only 755 out of of 1 635 rounds of ammunition issued to the CDSO were returned –some of this did not originate from the SSA.

208. In his evidence before the Commission in August 2021, President Ramaphosa acknowledged that SSA firearms unaccounted for formed part of an intensive investigative process currently under way.

Outsourcing of intelligence mandate

209. The legal and policy framework governing the SSA does not permit the use of outsourced external entities to perform the functions of the SSA in covert operations. In terms of the National Strategic Intelligence Act, only the intelligence divisions of the SANDF, the SAPS and the SSA may perform intelligence functions.

210. There is evidence that these restrictions were not considered. In December 2014, Amb Dlomo illegally signed contracts with several companies on behalf of the SSA. Some of these contracts were neither valid nor legal. Invoices from these companies were then utilised to facilitate illicit financial flows in various CDSO projects, as discussed above. The question of the illegality or otherwise of these outsourcing activities must be considered in view of the evidence below.

    210.1 The matters listed in the contracts are precisely what the legislation mandated the legitimate SSA structures to do, and these structures were to a large extent bypassed.

    210.2 Several contracts were entered into by the SSA, represented by Ambassador Dlomo, around or during December 2014, a month before the projects relevant to those contracts were approved and established.

    210.3 The required procedures were not followed, and in some cases, there was no proper authorisation for the conclusion of these contracts or their later extensions. The form of the contracts did not comply with regulatory prescripts.

211. In summary and according to the evidence, the outsourcing of intelligence functions to third party companies is unlawful. Outsourcing compounds the difficulties in maintaining financial controls, accountability and adherence to the regulatory framework.

Operations within the Office of the DG (2013-2018)

212. In the period following the appointment of Amb Kudjoe as DG of the SSA in August 2013 and the appointment of Mr Mahlobo as Minister of State Security in the wake of the national election in May 2014, the Office of the DG became involved in several covert operations purported to be the "President's Projects", allegedly pursuant to a directive from Mr Mahlobo. These projects fell outside the intelligence mandate of the SSA and improperly sought to influence protest movements, activist groups, a trade union, civil society and internal party politics. There was a notable increase in operational expenditure in the Office of the DG due to these covert projects.

213. The Office Manager in the DG's office from January 2014 withdrew TAs for operational expenses related to "Presidential Projects." She retained her role after Mr Fraser re-joined the SSA as DG in September 2016.

214. Mr Arthur Fraser formally closed the CDSO shortly after assuming office. However, SSA financial systems, documents and witness accounts indicate that the Office of the DG continued to run many of the operations and projects. For example, approximately R242 million was taken or paid by the Office Manager between February 2014 and March 2018, allegedly for operations that were run from the office of the DG.

215. The Project Veza investigation shows that the operations run from the Office of the DG extended well beyond merely the continuation of some CDSO projects. As DG, Mr Fraser worked with individuals who had been implicated in the Principal Agent Network (PAN) investigations, considered in some detail below.

216. During Mr Fraser's tenure, expenditure for the Office of the DG increased from approximately R42 million in the 2016/17 financial year to approximately R303 million in 2017/18. It is striking that roughly 74% of the total expenditure in the 2017/18 budget was used for covert operational expenditure, 15% on contract expenditure and 5% on travel and subsistence.

217. This concentration of SSA funds in the Office of the DG during the 2017/18 financial year came at the expense of legitimate operational structures, and of the functioning of the SSA provincial offices in particular. During this time, the budgets for the provinces were cut by half despite the provinces being where the SSA is most operational.

218. The DG disregard the policies, prescripts and directives relating to SSA document and information management that he was responsible for enforcing as the AO and HOD, which constituted a gross dereliction of duty.

219. In the absence of details of the operational activities undertaken in respect of these projects, the deliberate circumventing of SSA systems by the Office of the DG raises the possibility that these projects were in breach of the SSA's mandate and its legislative framework and / or were vehicles created to facilitate the theft of state funds.

220. While there was a general lack of record-keeping during this period, a record of some of these ongoing operational activities was reflected in a performance review for the period 1 January 2016 to 24 February 2017, which was submitted to Mr Fraser by one of the CDSO Co-Worker Deployment Teams. This report is referred to in the HLRP report as the "Boast Report".

221. The Boast Report recounted that this deployment year had been "exceptional in terms of operational successes achieved". The "achievements", were directly attributed to the co-workers of the CDSO: the ANC January 8 Statement (Rustenburg, January 2016); counter operations to impede CR17-related support activities; the cancellation of the President's visit to Marikana following an incorrect threat assessment provided by the SAPS; infiltration of the leadership structure of the #ZumaMustFall movement in the Western Cape to weaken its presence at the Parliament during the SONA 2016 event; neutralising and preventing dissident groups from being transported to the ANC Manifesto

launch in Port Elizabeth (March / April 2016); and the SONA Questions and Answers / Budget Speech (February 2017). The intelligence collected by co-workers in relation to these events targeted various groups through infiltration and / or penetration and/or monitoring of:

221.1 "All Western Cape universities and student activist groups on social networks"

221.2 The "new federation": the National Union of Metalworkers of South Africa (NUMSA), the Food and Allied Workers Union (FAWU) and other affiliated trade unions had minimal support after co-workers neutralised these unions' "promise of jobs" to young people if they attended the march, by disseminating countering information to affected youths; and

221.3 The NGOs, including South Africa First, Right to Know, Save South Africa (SAVE SA), the Council for the Advancement of the South African Constitution (CASAC) and Green Peace.

222. There were indications that operational activities emanating from the Office of the DG may have related to the ANC NEC at Nasrec in December 2017. Witness reports placed SSA members, including former CDSO "co-workers" and members of the newly configured Cover Support Unit (CSU) and other operational structures, in the vicinity of the Nasrec conference. Services of the CDSO at the Nasrec conference were requested by the ANC Head of Security, Mr Langa, and authorised by senior officials of the SSA.

223. Issues of incumbency and influence over who "ascends" to positions of power or authority within political parties and state organs is not the responsibility of the SSA.

Irregular procurement activities by Crime Intelligence

Attempted procurement of the "grabber" during the 2017 ANC Conference

224. There were various media reports concerning a failed attempt by Crime Intelligence to procure a Precise Mobile Location ("grabber") for utilisation during the 2017 ANC conference at Nasrec to influence the results of the ANC electoral conference. Some reliance was seemingly placed on doubtful intelligence information to justify the intended procurement of the grabber.

225. "Ice Box" (a pseudonym), a company belonging to "Ivan Ivano" (a pseudonym), was contracted to supply a grabber for around R45 million, which was "exorbitant" considering the market value of the product at around R7 million. The intended procurement was in contravention of legal prescripts, which prohibit the procurement of goods or services from a flagged or blacklisted company such as Ice Box. The intended procurement was halted by IPID. Following the IPID investigation, Ivano became a source for the SSA. He later alleged that Mr Robert McBride, then IPID Executive Director, had been involved in illegal activities.

226. The circumstances surrounding this failed grabber procurement warrant attention. Mr Bongani Mbindwane, the then Special Advisor to the Minister of Police, Mr Fikile Mbalula, actively participated in the procurement process (preceding its termination). Mr Mbindwane even contacted the incumbent IGI, Dr Dintwe, telephonically, requesting his approval ("blessing") for the procurement, stressing its importance. He asked to meet Dr Dintwe to discuss this, allegedly on the instruction of Minister Mbalula. This meeting took place on 6 December 2017 in Groenkloof, Pretoria. During their meeting, Mr Mbindwane informed Dr Dintwe that the Ministry of Police was concerned about Dr Dintwe's investigation into procurement of the grabber by Crime Intelligence. Following this disclosure, Dr Dintwe met with Major General KB Ngcobo the then Acting Divisional Commissioner in the Ministry of Police. However, when Dr Dintwe was made aware by General Ngcobo that the procurement involved Ice Box – a company he was investigating – which Mr Mbindwane had not disclosed to Dr Dintwe even though he was aware Ice Box was tainted, Dr Dintwe immediately terminated the meeting.

227. In his affidavit to the Commission, Mr Mbindwane disputed that he had improperly approached Dr Dintwe for the procurement of a grabber and denied any involvement in the procurement process.

Procurement from Icebox of an information technology solution for intelligence collection

228. In December 2016, Crime Intelligence acquired an IT solution intended for intelligence collection operations. Quotations from three companies were obtained. Crime Intelligence allegedly procured the IT solution for R33 million from Ice Box. During the process, rules and prescripts regarding supply chain management were allegedly not complied with. In the process of the investigation by the IGI, it was concluded that the IT solution for intelligence collection which had allegedly been procured did not exist.

229. Dr Dintwe visited Crime Intelligence headquarters during November 2017 for the purpose of a demonstration of the procured product. He was informed that the procured product no longer existed and had since been replaced. The relevant officer could not show Dr Dintwe the IT solution that had allegedly replaced the one procured from Ice Box. The OIGI concluded that the amount of R33 million was fraudulently paid from Crime Intelligence to Ice Box for a non-existent product.

Procurement of a voice encryption system

230. Crime intelligence allegedly procured a voice encryption system from Icebox at a cost of R23 million. The system was not, however, procured for the Crime Intelligence section responsible for any counterintelligence function. Rules and prescripts of SCM had been flouted and there appears to have been fraud and malfeasance involved in this procurement.

Irregular appointments in intelligence services

231. There had been numerous instances of irregular appointments within the intelligence services. Examples included the following:

    231.1 Minister Bongani Bongo was involved in the irregular appointment and promotion to a senior position in the National Intelligence Co-ordinating Committee ("NICOC") of an individual alleged to be personally known to him.

    231.2 The OIGI also found that a person in top management at SSA ordered the withdrawal of a vacant position of Programme Manager at the Intelligence Academy. He did so allegedly because his preferred candidate did not qualify in terms of the post requirements. Notwithstanding this, after the reinstatement process was set aside, the member was appointed in an acting capacity in that position.

    231.3 The policy adopted at SSA concerning the recruitment and provision of bursaries to cadets had been flouted allegedly in order to provide sheltered employment for family members. As the SSA is obliged to provide employment to recruited cadets after completion of their studies, this has meant that persons not necessarily suitable for work at the Agency had possibly been employed to the detriment of the effective functioning of the Agency. Dr Dintwe drew these conclusions based on the evidence summarised below.

    231.4 There is evidence that Mr Mahlobo and the then (May 2014 to May 2019) Deputy Minister of State Security, Ms Ellen Nnana Ntsitse Molekane, were involved in the recruitment process at SSA – a significant executive overreach – and instructed the SSA to grant them cadet bursaries, otherwise intended to be provided to underprivileged persons.

Questionable "intelligence reports" used for removing key persons who stood in the way of state capture

232. Witnesses made allegations of mysterious intelligence reports used repeatedly to target those regarded as "opponents".

233. In March and April 2017, the Democratic Alliance (DA) and the South African Communist Party (SACP) independently submitted complaints to the IGI. Both complaints requested the IGI to investigate allegations surrounding an intelligence report used for the recall of the then Finance Minister Pravin Gordhan and Deputy Minister Mcebesi Jonas. Former President Zuma was the only person

apparently in possession of the (original) report. Despite numerous requests for a copy, nothing was forthcoming. Mr Zuma stated in a meeting at Luthuli House in March 2017 that he had received a copy of the report, however, the OIGI was not used to establish whether the decision of Mr Zuma was credible and based on a report which is authentic.

234. The IGI came across an intelligence report that dealt with an alleged plot by General Sibiya (former Head of the Gauteng branch of the Hawks), Mr Robert McBride, forensic investigator Mr Paul O'Sullivan and others to overthrow the government. This intelligence report, purported to be a product of Crime Intelligence, as well as the further report relating to the alleged unlawful rendition of foreign nationals involving Generals Anwa Dramat (former Head of the Hawks) and Sibiya, have recently been proven to be untrue.

235. All these so-called intelligence reports were not systematically compiled, and the identities of the compilers were not known. These reports were relied upon in the knowledge that they would not stand up to legal scrutiny. They were used to achieve the desired effect of removing key persons who stood in the way of state capture.

CESSATION OF INVESTIGATIONS

236. There has been a discernible pattern, one which is reflected in recent events at the SSA, that investigations into wrongdoing at the SSA are interfered with and eventually stopped. Alternatively, they continue until completion but are never acted upon and the findings remain recommendations which are never implemented. This means that wrongdoers are not called to account, nor are systemic issues dealt with. The result is that malfeasance and even state capture could continue unchecked. The absence of consequence management has become a theme running throughout the SSA.

Investigation into the Guptas stopped

237. In early 2011, there was a news report apparently based on a leak from a meeting of the NEC of the ANC, which claimed that there had been a robust discussion at the NEC concerning the Guptas, who had apparently informed Mr Mbalula of his new post as Minister of Sport. Former intelligence heads Ambassador Mo Shaik, Mr Gibson Njenje, and Mr Jeff Maqetuka decided that, for the security of South Africa, an intelligence investigation should be conducted to determine whether there had been such a discussion at the NEC meeting. It was important to determine whether a core function of government and the President had been taken over by or outsourced to foreign nationals.

238. Three possibilities presented themselves:

    238.1 A breach of national security had occurred in the form of a leak from the Office of the President

    238.2 The Guptas had overheard a discussion of the President in consultation, and they were now peddling this information; or

    238.3 The Guptas in fact had suggested the appointment.

239. In his evidence, Amb Shaik explained that if the third possibility was found to be true, it would be even more serious because the Guptas, as foreign nationals, should not be suggesting members in the national cabinet of another country. It was also problematic that the Guptas demonstrated that they knew of the appointment before the appointment occurred. This, Amb Shaik explained, is referred to as a "created dependency", which in this instance was intended to extract value from Mr Mbalula as the Minister of Sport, and there would be dependence because if they "made him" Minister, they could "unmake him".

240. Messrs Shaik, Njenje and Maqetuka were also alerted to the Gupta's purchasing of a uranium mine, which raised concerns. The purchasing of a uranium mine and its funding would be a national security issue, so they decided that this should also form the subject of an SSA investigation. Shortly after they decided to initiate these investigations, the three were summonsed to Police Minister Cwele's office, where a tense and confrontational meeting occurred. The Minister was angry that they had launched

these investigations into the Guptas without his authority, refusing to accept the reasons that informed the investigation. He argued that their investigation was intended to promote the business interests of Director Njenje. Director Njenje had previously placed his conflict of interest and his interactions with the Guptas on record – an explanation with which Ambassadors Shaik and Maqetuka were satisfied. As a matter of principle, any conflict of interest would not be a reason to stop an investigation; rather, Director Njenje could have been taken off the case.

241. The three maintained that the investigation was warranted, and that Ministerial authorisation was not required. That the three were left with the impression that he was unhappy about the investigation and did not want the investigation to continue, was indisputable. However, their evidence differed on whether or not he had given a clear instruction to stop the investigation.

242. On Minister Cwele's version, his primary concern related to the business relationship between Director Njenje and the Guptas, the alleged instruction to institute an illegal interception of "that Gupta person", and he had not instructed that the investigation be stopped. He told the three executives that they had to obtain permission from a judge to proceed with the interception, as required by the Interception and Monitoring Prohibition Act 127 of 1992. He also reminded Director Njenje that he was not to utilise state resources to pursue private interests, Amb Shaik testified that there would not have been, at that stage, any direction from a designated judge because the investigation had not yet commenced; the meeting took place only days after the decision to investigate had been made. The relevant Act on which Ambassador Cwele relied was repealed in 2008. In any event, this level of Ministerial involvement in operations was inappropriate, even illegal.

243. This exchange illustrates, according to Amb Shaik, why there should not be a Minister of Intelligence. A Minister, who serves at the behest of a President, would seek to gain favour from the President. The DG of Intelligence serves the national interest of the country. It should be noted, however, that Amb Shaik's views about the motivations of the Minister of Intelligence may not have been valid in all cases.

244. Messrs Shaik, Njenje and Maqetuka refused to stop the investigation, as they believed that it fell squarely within the mandate of the SSA. They told the Minister that an instruction to halt the investigation should come from the President. Mr Zuma, in a meeting the next day with the three, sought to reassure them that the Guptas were beyond reproach and that foreign capital was not involved in the purchase of the uranium mine. He narrated at length how the family had helped him with his son, Duduzane. The three understood that Mr Zuma's preference was for them not to take the investigation further. Amb Shaik could not recall whether Mr Zuma had specifically instructed them to halt the investigation, but he clearly viewed the investigation as unnecessary.

245. Ambassador Shaik testified that the three were speaking to Mr Zuma in his capacity as President but were mindful of his own long history in intelligence. He should have understood that this was a matter of national security. Amb Shaik added that there was a clear sense in that meeting that the President thought the investigation was not really about the Guptas but about toppling him as President.

246. Ambassador Shaik explained that the basis for the investigation was simple: there was a breach at the highest level of the land – either a leak from the Office of the President or a suggestion by the Guptas for the appointment of a Minister. Despite this view, the investigation stopped.

247. Regrettably, the allegation about the Guptas turned out to be correct. If the investigation had been allowed to proceed, then, there might have been no need for this Commission. It constitutes a further example of how the SSA played a role in the state capture project, by protecting those who enabled the project.

Cessation of Principal Agent Network investigations

248. The implementation of a PAN is accepted practice in intelligence agencies. The PAN was established under the auspices of the then DDG of Operations, Mr Arthur Fraser. While there was nothing untoward in the establishment of a PAN project itself, it was the implementation of the project by Mr Fraser

that was problematic since the project was neither controlled by nor accountable to the SSA in its operations.

249. Amb Cwele confirmed that in 2009, soon after his appointment as Minister of State Security, he had ordered an investigation to "clean up" the PAN programme. He suspected that the structure had been established outside the legal framework. Accordingly, Director Njenje instituted a preliminary inquiry by internal auditors in September 2009. The internal auditors found that there had been maladministration, including discrepancies on TAs in the amount of R85 million, and non-compliance with various directives. The internal auditors further recommended a full independent forensic audit.

250. Director Njenje appointed an investigation team in February 2010 to further investigate alleged maladministration and financial irregularities within the PAN programme. The investigators identified numerous breaches of the SSA's regulatory framework, the irregular authorisation and utilisation of funds.

251. The IGI at the time, Ms Faith Radebe, conducted another investigation into the PAN programme and released two reports with findings similar to those of the internal SSA investigation. Both OIGI's reports into the PAN programme implicated Mr Fraser in serious wrongdoing.

252. The final report of Director Njenje's PAN programme investigation, dated May 2012, was presented to the Minister of State Security and the Acting DG on 19 June 2012. It is significant that many of the persons implicated by the PAN investigations returned to the SSA when Mr Fraser was appointed DG in September 2016.

253. Equally significant is the evidence that, by 2011, significant progress had been made with Director Njenje's PAN investigation. As a result of this, the investigation team approached the SIU and the NPA, agreeing to hand over the investigation and the related documentation to the SIU. It was clear to Director Njenje that, at this point, prosecution was possible.

254. In an affidavit presented to the Commission, a representative from the SIU acknowledged the engagements between the NIA (subsequently the SSA) and the SIU, which led to a preliminary assessment of alleged irregularities in relation to the PAN programme in March 2011. However, shortly thereafter, the NIA advised the NPA that NIA management had decided that the IGI would be conducting the investigation. The documentation from the NPA was retrieved and returned to the SSA, and the NPA did not prosecute those implicated in the PAN investigation.

255. Director Njenje recalled that Amb Cwele had summoned him to a meeting at ORT International Airport, where he allegedly instructed Director Njenje to stop the investigation and the prosecution of Mr Fraser and others in the PAN programme. He alleged that it was the President's decision because it was going to compromise national security if they went ahead and prosecuted those implicated. Director Njenje indicated that the matter related to criminality, not national security. Director Njenje believed that this had been the President's decision.

256. Ambassador Cwele's version was that there were outstanding risk assessment reports relating to court processes that had to be followed after the PAN project had finally been reported on. He said that he would not oppose any court processes that might follow. Amb Cwele stated that neither he nor the President would stop prosecutions because this was the responsibility of the NPA.

257. There is no reason to prefer Amb Cwele's version over that of Director Njenje regarding the circumstances of the stopping of the SIU investigation. In any event, the undeniable fact is that the investigation was stopped. Ambassador Cwele must have been aware of this because, on his own version in evidence, he followed this matter closely. He was also aware that the matter of PAN investigation was removed from the SIU and handed over to the OIGI – which happened after the case had been retrieved from the SIU. The SIU confirmed that it had evidence before it of criminal wrongdoing.

258. According to the HLRP, it appeared that the PAN programme at the SSA had adopted a methodology designed to bypass the procedural requirements for recruitment of staff, disbursement of funds, and procurement. Allegations of malfeasance, procedural transgressions and criminal behaviour were placed before the Panel. These included, for example, the procurement of assets without adherence

to formal procedures, the signing of fraudulent contracts and payments to persons without valid signed contracts, the employment of family members outside of formal processes, the abuse of assets, and missing funds and assets. The investigation concluded that there was a sufficient basis on which to institute criminal proceedings against, amongst others, Mr Fraser.

259. All the reports placed before the Commission implicate Mr Fraser in wrongdoing. Significantly, however, none of the findings and recommendations by either the internal SSA investigation team nor the IGI was acted upon.

260. In his statement in support of his application to cross-examine seven witnesses, Mr Fraser insisted that he had been cleared of any wrongdoing during the PAN period. The PAN programme, he maintained, was legitimate, and the nine forensic, criminal, and other investigations conducted over a three-year period ending in November 2012 could not substantiate allegations of malfeasance against him. In his view the investigations had all been conducted by mandated or legitimate institutions of state, including with Minister Cwele's oversight. The Commission is unaware of any report acquitting Mr Fraser and he has not put any such report before the Commission.

261. These claims were repeated by Mr Fraser's new attorney, Mr Mabuza, in his letter to the Commission dated 24 August 2021. Despite having been asked to identify the reports referred to, Mr Fraser has failed to do so. The statements of Mr Fraser referred to above are contained in an annexure to his affidavit submitted to the Commission. The annexure itself is not a sworn statement.

Project Veza

Project Veza's predecessor

262. An internal investigation with the code name "Project Momentum" was established in June 2018 by then Minister Letsatsi-Duba to address allegations of corruption in the SSA. Limited progress was made under this project – due to a lack of cooperation from implicated persons and alleged undermining of the investigation. The documents that ought to have been disclosed to the investigators of Project Momentum were not disclosed; they were deliberately hidden. The documentation relating to the CDSO – which informed much of the content of Mr Y's affidavit and the investigative reports on which it was based – was discovered by chance during an inspection for other purposes of a walk-in safe at the SSA headquarters.

263. The safe in which the documents were discovered was controlled by the GM: Cover Support Unit (CSU), a position previously located, albeit unofficially, within the office of Mr Fraser, the former DG of the SSA. Certain members of the CDSO informed the investigation team that after Mr Fraser was appointed the DG in September 2016, he closed the CDSO and requested that all the documents concerning the operations of the CDSO be handed to his office. He also moved the CSU to the Office of the DG and these documents were then put in the safe.

Launch of Project Veza

264. The investigation conducted under Project Momentum was reinforced and re-launched by the then Director: Domestic Branch, Mr Lloyd Mhlanga, and then Acting DDG, "Ian" (a pseudonym), under the name "Project Veza".

265. After Mr Mhlanga's departure, Mr Jafta reaffirmed and approved the continuation of Project Veza and reconstituted the team. Notwithstanding the institutional support provided to the team, it continued to face a lack of cooperation, obstruction, and deliberate sabotage of the investigation from those implicated, from the Director of the Domestic Branch, Advocate Mahlodi Muofhe, and from the Executive. Project Veza did not have the support of some elements within SSA, who seemed to want to preserve the status quo rather than support efforts to remedy wrongdoing.

266. The Project Veza investigation has focused on various units within the SSA – chiefly the projects carried out by the CDSO, the CSU, and the operations run from the Office of the DG.

267. The Project Veza investigation team uncovered similar patterns of maladministration in the CSU as there had been during the earlier PAN programme. Evidence before the Commission indicated that during Mr Fraser's tenure as DG, there were irregularities in the management of the CSU that suggested an intention to resuscitate the operating model that was used in the implementation of the PAN programme. Several of the same individuals were implicated in both episodes.

Threats against the investigators

268. There were concerns that threats had been made against individual members of the Project Veza investigation team by certain implicated parties. These threats and intimidation continued even after the testimony of SSA officials had been given to the Commission. Despite Ms K's testimony having been given in camera during her testimony on 28 January 2021, Ms K received a photograph of herself, which was circulating on social media, revealing her identity, coupled with defamatory and disparaging remarks about her person and her career, presumably to discredit her testimony.

269. Mr Y's identity was also revealed, and pictures of his family were circulated on social media in what Ms K describes as a veiled threat against him, at a time when he was hospitalised and in a coma.

270. Mr Fraser had opened a case of perjury against SSA officials who testified at the Commission, eventually applying to cross-examine certain witnesses who had given evidence concerning him before the Commission.

Attempts by Advocate Muofhe to interfere with the Project Veza investigation

271. Ms K explained that Advocate Muofhe had allegedly interfered with and actively obstructed the work of Project Veza. Adv Muofhe, while he was Minister Letsatsi-Duba's advisor, sought to persuade Mr Mhlanga (DG, DPCI) to withdraw his referral to the DPCI of the criminal conduct uncovered during their investigations. At a meeting attended by Mr Mhlanga, Ian, Ms K and Mr Y, Adv Muofhe demanded that they hand over to the Ministry all evidence relating to Project Veza, which Ms K refused to do unless the instruction was given in writing. Such instruction was not forthcoming.

272. Ms K testified that a few weeks after this incident, Ian was instructed to return to his foreign posting. Around the same time, Adv Muofhe opened a criminal case against Mr Mhlanga. Mr Mhlanga was cleared of any wrongdoing by the IGI, and the NPA declined to prosecute the matter. However, this was used as a basis to suspend and subsequently remove Mr Mhlanga. Ms K stated that these actions eroded the governance structure of Project Veza.

273. According to Ms K, after Advocate Muofhe himself replaced Mr Mhlanga as Director: Domestic Branch, he made it clear that he did not support the investigation.

EVIDENCE OBTAINED BY THE COMMISSION AFTER 29 JANUARY 2021

274. After the completion of Dr Mufamadi's, Mr Jafta's and Ms K's testimony at the Commission between 25 and 29 January 2021, the Commission received further affidavits from the following persons: "Ms K", Mr Patrick Mlambo, Brigadier Burger, Mr Shanga Jele, and Mr Jafta.

275. These affidavits deal with the following matters, which occurred after 29 January 2021:

    275.1 The steps taken within the SSA to terminate the existing operation of the Project Veza investigation

    275.2 The outsourcing of the Project Veza investigation

    275.3 The conduct of certain SSA officials, in response to a search and seizure warrant which the Investigating Directorate of the NPA attempted to serve on and execute against the SSA; and

    275.4 The conduct of former Minister Dlodlo in relation to Project Justice and in relation to the proceedings of a JSCI meeting held in early 2021.

276. The supplementary affidavit of Ms K, referred to above, has been forwarded to Minister Dlodlo and to Adv Muofhe for their response. Both Minister Dlodlo and Adv Muofhe have filed affidavits dealing with their complaints levelled against the Commission on oath as required by the Chairperson. Minister Dlodlo's affidavit also dealt with her response to Ms K's affidavit. Adv Muofhe, however, limited his affidavit to his complaints, but has been invited to respond to Ms K's affidavit, to no avail.

Steps taken within the SSA to terminate the existing operation of the Project Veza investigation

277. Since testifying at the Commission:

277.1 During the week of 11 February 2021, the Ministry instructed Mr Jafta to hand over the Project Veza investigation to Adv Muofhe. Despite having diligently carried out its investigation, the Veza Project team was subsequently labelled a "rogue unit" by Adv Muofhe.

277.2 After having been assigned the Project Veza investigation, Adv Muofhe demanded the keys to the office from which the Project Veza team had conducted their investigation. This office had in fact been allocated to Mr McBride, Director of the Foreign Branch of the SSA, who thereafter requested the return of the keys to him. Ms K refused to hand over the keys to Adv Muofhe without Mr Jafta being present. She later agreed to hand over the keys to Mr Jafta's office after consulting Mr Jafta.

277.3 On 9 March 2021, the Project Veza investigators sought to move the Veza documents from Mr McBride's office to a safer office to protect the documentation It was resolved between the Project Veza team; by the OIGI; and by the Investigating Directorate of the NPA ("the ID") that to safeguard the processes that needed to be followed, the documents pertaining to their three concurrent investigations at the time should be transferred for safeguarding to the OIGI, which had the requisite security clearance. Soon after, Internal Security ("IS") placed a security lock on the office allocated to Mr McBride.

277.4 On the morning of 11 March 2021, Ms K was informed by members of IS that they had been instructed to lock certain offices (including those occupied by Mr Y) and to change the padlocks of the offices where the Project Veza team had previously worked.

277.5 The Project Veza investigators were redeployed to their former positions.

278. These actions effectively shut down the Project Veza investigation. The investigators were denied access to their workspaces, to the documentation they had been working with, and to the computers and printers allocated to them.

279. In this affidavit, dated 18 November 2021, Adv Muofhe denies that he hampered or sabotaged the Project Veza investigation. He also denies having placed Project Veza under lock and key and unlawfully refusing to release documentation to the NPA.

280. In her affidavit referred to above, Minister Dlodlo denies Ms K's authority to depose to her supplementary affidavit. The new acting DG of the SSA, Amb Tony Msimanga, also denies that Ms K had authority to depose to her supplementary affidavit. He also alleges that she disclosed classified information in her affidavit. Ms K's authority to assist the Commission and to testify before it had been obtained from Mr Jafta. After Mr Jafta's employment as DG had been terminated, the new acting DG, Amb Msimanga, did not withdraw Ms K's consent to testify or to depose to any further affidavits to the Commission. Accordingly, Mr Jafta's authorisation still stands.

281. Minister Dlodlo also claims that she has been prejudiced by not having been furnished with a formal Rule 3.3 notice. It is correct that no Rule 3.3 notices were issued in respect of Ms K's evidence. Ms K was not called as a witness to testify. In any event there was, in the view of the Commission, a real risk to her security. On 18 October 2021, a copy of Ms K's affidavit was forwarded to Minister Dlodlo. In her invited response, Minister Dlodlo admits her instruction to Mr Jafta on 19 Feb 2021 to hand over the investigation to Adv Muofhe. Minister Dlodlo states her reasons as follows:

281.1 She referred to Mr Jafta's evidence before the Commission to the effect that the SSA should not conduct operations from the Office of the Accounting Officer (DG). Minister Dlodlo relied on this evidence to justify removing the Project Veza investigation from Mr Jafta's office.

281.2 She denies that she in any way influenced or played any part in the locking of the offices from which the Project Veza investigators worked or in determining where the documents were kept or moved to.

The outsourcing of the Project Veza investigation

282. During the week of 11 February 2021, the Project Veza investigation was intended to be handed over to a private law firm, Bowman Gilfillan, a firm of attorneys, at a rate of R15 million per year. It is not clear to the Commission precisely what the mandate of Bowman Gilfillan was and is. However, all SSA-related criminal investigations should be placed before the Investigating Directorate of the NPA (ID). In addition, it should be noted that Adv Muofhe's request that the Project Veza investigation be outsourced had been declined in April 2020 by the finance department at the SSA and by Mr Jafta as the accounting officer. Adv Muofhe's allegation that no investigations had been carried out since the release of the HLRP report was not true, as the findings of the HLRP had been extensively investigated under Project Veza.

283. Minister Dlodlo defends Adv Muofhe's decision to refer the investigation to a private law firm, on the following grounds:

283.1 The HLRP recommended that a forensic investigation be conducted, and on 17 April 2020 Adv Muofhe informed Minister Dlodlo that he had appointed Bowmans. She thus directed Adv Muofhe "to urgently proceed with further operationalisation of the process for a forensic investigation and... all other investigations as was recommended by the HLRP". It is significant that the HLRP report was made public in December 2018 but the urgency in relation to the forensic investigation had arisen only after evidence relevant to the SSA had been given before the Commission in January 2021.

283.2 Minister Dlodlo stated that Adv Muofhe was entitled to brief Bowmans as the HLRP had recommended that the "competent authorities" conduct a forensic investigation. However, it is doubtful that the HLRP intended to recommend that an independent forensic law firm be briefed to conduct the investigation. Adv. Muofhe informed Minister Dlodlo on 17 April 2020 that he had briefed Bowmans "to investigate malfeasance, perceived and or otherwise, within SSA" (emphasis added). In this regard, it is considered significant that any further investigation conducted into the affairs of the SSA should be entirely independent. Such an investigation should also be vested with powers of obligation.

283.3 Minister Dlodlo stated that she supported the appointment of Bowmans as its forensic investigation was intended to augment the investigative capacity of the Agency.

284. Minister Dlodlo alleged further that the Project Veza investigation had been "political" and that the persons involved in that investigation worked within the Agency. Despite its investigations, the Commission has been presented with no evidence directly implicating the Project Veza investigators in harbouring political motives.

The conduct of certain SSA officials and executive: NPA denied access to Project Veza documents

285. On 11 March 2021, a summons in terms of Section 28(6) read with section 28(1)(a) and section 28(14) of the National Prosecuting Authority Act, 1998 was issued to be served on the DG of the SSA. On 12 March 2021, the Investigating Directorate of the NPA (ID) sought to execute the summons to obtain Project Veza documents. The attempts to execute these summonses have been dealt with in Ms K's supplementary affidavit dated 11 May 2021. In addition, the Commission has been provided with an affidavit dated 25 March 2021 deposed to by Brigadier Burger, who has been seconded to the ID

since June 2019 as the Head Operational Coordinator. Further relevant affidavits deposed to by Mr Mlambo of the ID and Mr Jele of the OIGI have also been provided to the Commission.

286. On 12 March 2021, the summons was served on Mr Jafta. He instructed Ms K and one of the members of the Project Veza investigation team to point out to the ID and OIGI officials where the documents had been secured. However, as the teams from the OIGI and the ID were attempting to gain access to the office where the documents sought were thought to be, they were intercepted by Adv Muofhe. He refused them access to the office and documentation on the basis that they were classified and that there was no need for their safekeeping by the OIGI. It was explained to Adv Muofhe that this was tantamount to obstruction of justice.

287. Adv Muofhe claimed that the Project Veza investigation was illegitimate and accused the project investigation team of being "a rogue unit" which ought to be charged. He adopted the view that he could revoke the instruction of Mr Jafta to cooperate with the ID. Adv Muofhe also indicated his intention to bring an urgent application to prevent the removal of any documents from the SSA's premises. Adv Muofhe received a call from then Deputy Minister Zizi Kodwa and assured him (Mr Kodwa) that he would not permit the documents to leave the premises. Mr Kodwa indicated that the matter was being escalated politically and that the Minister was engaging with the President.

288. On 12 March 2021, Dr Dintwe instructed Adv Muofhe to grant the OIGI access to the information relating to the Project Veza investigation. On the instruction of President Ramaphosa, Dr Dintwe held off on the execution of his powers until President Ramaphosa had had an opportunity to meet with Dr Dintwe to discuss the situation. Following a negotiation with representatives from the ID, the OIGI and the SSA, an MOU signed by Mr Jafta was concluded allowing the ID to execute the summons on Friday 26 March 2021. Mr Jafta signed the MOU on behalf of the SSA. However, when the members of the NPA attempted to execute the summons on the afternoon of Friday 26 March 2021 they were told to return on Monday 29 March 2021.

289. On Saturday 27 March 2021, Mr Jafta was informed by letter from Minister Dlodlo that his acting appointment as DG "[was] hereby terminated with immediate effect". President Ramaphosa's insistence that Mr Jafta's acting contract was not terminated was thus not entirely accurate. Mr Jafta's contract came to an end at the very time that the summons under discussion was sought to be executed.

290. Mr Mlambo (of the ID) and Mr Jele (of the OIGI) returned to the SSA premises on 29 March 2021 to execute the summons. They presented themselves at the office of the newly appointed Acting DG, Amb T Msimang, but he was in Cape Town. Mr Zweli Itholeng, the Manager: Physical Security, and Mr Motha: Unit Head Internal Security, stated that they had been sent by the DDG, Mr Welcome Simelane, to escort them off the premises. Mr Simelane then made it plain that access would be denied unless a court order was obtained to release the documents since the summons had lapsed.

291. The ID was not able to take the matter further as the summons had been granted in terms of section 28(13) and not section 29 of the NPA Act – which allowed for search and seizure. Since then, and at least until 15 November 2021, the ID has not been furnished with the documents it has sought.

292. Minister Dlodlo denies that she played any part in Adv Muofhe's refusal to hand over the documents. However, according to the witnesses present, during their attempt to obtain the documents Adv Muofhe was on the phone to the Deputy Minister and assured him that the documents would not leave the premises.

293. Minister Dlodlo also denies that there was any ulterior motive behind the termination of Mr Jafta's contract of employment. There is, however, no explanation as to why Mr Jafta's appointment was not further extended at this critical time. One would have thought that given the events taking place concerning the SSA at the time, continuity in the leadership was important.

294. Both Minister Dlodlo and Adv Muofhe are of the view, based on legal advice, that the summons issued by the ID was invalid. For this contention, Minister Dlodlo and Adv Muofhe rely on the fact that there was no search warrant presented to authorise the ID to enter the premises. In this regard, they rely on the opinion of Nalane SC that the summons was unlawful if no search warrant had been signed by a judge magistrate for the ID to enter the premises.

295. Brigadier Burger concedes that the ID did not rely on a section 29 summons to access the documents and so could not search for them. However, he states that they were perfectly entitled to issue a section 28 summons for Mr Jafta to hand over the documents. The handover of documents did not have to take place at the offices of the NPA. Mr Jafta acted lawfully in authorising the documents to be handed over, with his consent, at the SSA premises. It is noteworthy that currently Mr Jafta was cooperating with the law enforcement authorities. The termination of his acting appointment referred to above brought an end to this cooperation.

296. Minister Dlodlo alleged that the presence of members of the IGI at the SSA to obtain the documents was unlawful; the IGI was only entitled to gain access to documents if section 7(8)(a) of the Oversight Act was complied with. Section 7(8)(a) requires the IGI to notify the DG in writing before requiring access to the premises of the SSA. Section 7(9) of the Oversight Act states, "No access to intelligence, information or premises contemplated in subsection (8)(a) may be withheld from the Inspector-General on any ground" (emphasis added). The presence of the IGI was by way of arrangement with the ID and OIGI that they would maintain the security of the classified documents removed from the SSA.

297. On the other hand, Mr Jafta was of the view that his actions were entirely lawful. He sets out his position in detail in his affidavit.

298. What is apparent from the above is that Minister Dlodlo and Adv Muofhe, on the one hand, and Mr Jafta, representatives of the NPA (and the ID), and the Office of the IGI on the other hand, adopted entirely opposing views regarding the legality of the attempts of the ID to obtain documentation from the SSA. Further, Minister Dlodlo adopted an entirely adversarial stance, which she has maintained. Minister Dlodlo did not attempt to regularise the situation and to facilitate the handover of documents to the ID.

The meeting of the Audit and Risk Committee of the SSA

299. In her supplementary affidavit, Ms K explained that after the leading of the SSA evidence at the Commission, the Project Veza investigation team was summonsed to attend a meeting with the Audit and Risk Committee of the SSA (ARC) on 11 February 2021. During the meeting the Committee members discredited the Project Veza investigation and questioned the progress of the investigation, its legitimacy and the methodology adopted. The ARC report on the meeting did not accurately reflect what had transpired at the meeting. Although Minister Dlodlo admitted being the signatory to the ARC report, she could not verify the accuracy of the Chairperson's information.

Matters relevant to the subsequent meeting of the JSCI

300. Soon after this, a parliamentary question related to "Project Justice", was sent to the SSA via the Ministry. A response was prepared by the Project Veza investigation team for Mr Jafta to submit to the Ministry, indicating that the investigation was ongoing and that it was not prudent to discuss details at this stage. It was suggested that the issue could be canvassed further by the JSCI.

301. On the morning of the relevant Parliamentary Question and Answer session, the Ministry sought further details about Operation Justice and asked to be provided with the entire file on this project, which Ms K felt was inappropriate.

    Minister Dlodlo said that she required only the content of the administrative file in relation to Project Justice – this to brief Parliament and to respond to parliamentary questions. Despite having been informed about the existence and stated objectives of the operation, in Parliament the Minister discredited reports about Project Justice stating they were based on "peddler [referring to Steven's] information".

302. The Minister's response disregarded the Project Veza's investigations which revealed that Project Justice existed and had been approved to influence the judiciary. Additionally, substantial amounts of

monies were withdrawn and delivered to the then Minister's office monthly, allegedly for the execution of this operation.

303. Following the Parliamentary Question and Answer session, Mr Jafta instructed the Project Veza team to prepare a presentation regarding Project Justice to be presented to the JSCI. At the ensuing JSCI meeting, the team was excluded. Ms K believed that she was prevented from addressing the meeting in order to ensure that the peddler information narrative was upheld and that Minister Dlodlo's statements that there was no documentary evidence of the existence of Operation Justice were not contradicted.

304. In her affidavit submitted to the Commission, Minister Dlodlo denies that she excluded Ms K from the meeting; however, she does not deal with the assertion that she informed the meeting that Ms K was not available.

Allegations made by Mr Fraser

305. Mr Arthur Fraser brought an application to cross-examine several witnesses who had testified at the Commission. In this application, Mr Fraser refers to his unsigned and incomplete statement to the Commission, annexed to his application as Annexure AF 1.

306. In the main, Mr Fraser's statement to the Commission seeks to justify his involvement in the PAN programme and the activities conducted by the CSU as necessary counterintelligence. Mr Fraser asserts that:

> As soon as the National Intelligence Agency realized that we were being manipulated, through the inherited Apartheid National Intelligence Service networks, the National Intelligence Agency adopted the 2006 Principal Agent Network Programme to be free of Apartheid forces' manipulation...

307. Mr Fraser further alleges that President Ramaphosa and Mlambo JP had interfered with a case involving Dr Dintwe, namely Inspector General of Intelligence and others v Minister of State Security and others. Specifically, Mr Fraser alleges that as a result of the interference, this case was removed from the roll on 19 April 2018 on the basis that the relief sought by Dr Dintwe had been met.

308. Having been invited to respond to Mr Fraser's allegation, and in an affidavit dated 12 November 2021, Mlambo JP denies that he interfered with this case in any way: he denies receiving a phone call from President Ramaphosa regarding the case; being involved in the case in any way; or being requested to do anything about the case. In support of his version, Mlambo JP attaches an explanatory e-mail from Van der Westhuizen J and notes inscribed on the roll for that week to show that the parties' legal representatives were present in his chambers on 19 April 2018 and that the matter was removed from the roll by agreement.

309. President Ramaphosa was also invited to respond. In an affidavit dated 22 November 2021, he denies the allegations relating to this case.

THE JOINT STANDING COMMITTEE ON INTELLIGENCE REPORT

310. The latest report of the JSCI is of relevance to the evidence before the Commission. This report covers the financial year ending 31 March 2020 and the period up to December 2020.

Background to the JSCI report

311. The report was presented in accordance with the provisions of the Intelligence Services Oversight Act, 1994 (ISO Act). Section 3 of the ISO Act deals with the functions of the JSCI. They are, amongst others, to hold hearings and subpoena witnesses on any matter relating to intelligence and national security. The JSCI may also request relevant officials to explain any aspect of reports furnished to the Committee.

312. Given these and other powers and duties, it may well be asked what the JSCI has done in relation to the intelligence services over the past decade. Of course, the full functioning of the Committee may not be known to the Commission. The question is, however, a legitimate one: even if the JSCI did act to curb illegality (which is not apparent), it was certainly not effective.

Reports submitted to the JSCI

313. Contrary to the evidence of Amb Cwele, the JSCI report records that the SSA was indeed illegally established by Proclamation 59 of 2009. The legislation regularising the situation only came into force in 2013 with the passing of the General Intelligence Laws Amendment Act of 2013.

314. It was reported to the JSCI that, at the SSA, there had been corruption, improper recruitment to the SO unit, the existence of a parallel vetting structure resulting in fake top-secret clearance certificates being issued, and "sniper training" for non-SSA members. This latter issue should be referred for further investigation: for what reason would operatives need to undergo "sniper training"?

315. The Committee was informed that only between 0% and 2% of IGI recommendations were implemented. This is dealt with below.

316. It is clear from the JSCI report that matters of economic development and illicit economic activity are regarded as matters within the SSA mandate. This corroborates evidence given by Amb Shaik and others regarding the scope of the SSA mandate and the propriety of the Gupta investigation – which was halted prematurely at the insistence of former President Zuma. It raises the further question as to why the many allegations of corruption and state capture were simply not dealt with, adequately or at all.

317. What is also clear from the report is that the White Paper is still seen as a relevant document. Its review (namely, an update to align it with the National Security Strategy) is recommended. This is contrary to the evidence of Mr Mahlobo, who dismissed the White Paper as merely a guide to the intelligence community.

318. According to a presentation by the ARC of the SSA, the main concern of ARC was the continuous and automatic audit qualifications based on the nature of SSA business.

319. Project Veza reports were given to the JSCI, first in November 2019 and then at special meetings between 25 August and 4 September 2020. The reports included matters of criminality and of various (illegal) projects. If one has regard to the record of interaction between the JSCI and the SSA concerning Project Veza, it is apparent that the JSCI accepted that the project would continue, reports would continue to be submitted to the JSCI, and the project would not be terminated.

320. In the IGI's report to the JSCI regarding the SSA, several instances of the SSA acting outside of its mandate were reported. The IGI also reported that intelligence failures were not reported in terms of the Act. A possible "loophole" was identified in this regard in that the Act only requires "significant intelligence failures" to be reported.

Findings of the JSCI

321. The JSCI recorded, amongst others, the following findings and made the following observations:

    321.1 It was found that implementation of the recommendations of the HLRP report had been slow

    321.2 It commented that the IGI Intelligence Certificate refers to financial irregularities, as well as security breaches, leading to intelligence failures (see further below)

    321.3 Threats to the Project Veza team were noted. Security protection for those individuals involved in the investigation was recommended (this also assumes the project's continuation). It was also noted that serious financial irregularities had taken place at the SSA

    321.4 Challenges in the SSA's financial statements were noted. It was also noted that quarterly reports to enable ministerial oversight were not produced by the SSA

321.5 Governance challenges were noted, as well as instability in senior management. The Committee also noted a lack of consequence management (at all SSA sites)

321.6 Irregularities at Crime Intelligence were noted; and

321.7 It was noted that the IGI reported "looting of funds" from the Secret Service Account by "officials".

Recommendations of the JSCI

322. The JSCI made the following recommendations of significance:

322.1 All three intelligence services Ministers were directed to implement the IGI's findings. The JSCI is to investigate ways of making the OIGI recommendations enforceable.

322.2 The HLRP report is to be implemented without delay.

322.3 Those implicated in financial irregularities are to be reported to law enforcement agencies.

322.4 The loopholes identified in legislation regarding reporting of significant intelligence failures must be addressed when legislation is reviewed.

322.5 The White Paper should be reviewed when the legislation is reviewed.

322.6 Regarding Project Veza: security is to be provided to the investigators; and the team is directed to report quarterly to the JSCI. The clear understanding of the JSCI therefore seems to be that the Project Veza investigation would be maintained.

322.7 Disciplinary action is to be taken in respect of financial mismanagement.

322.8 Crime Intelligence must consider the recovery of money looted from the Security Services Account.

The Auditor General's report to Parliament

323. The SSA received a qualified report from the AG. Attached to the JSCI report is the AG's report to Parliament on the SSA for the 2019/20 financial year. In this report the AG gives a qualified opinion. The basis for this opinion begins at paragraph 3 of the report. In paragraph 4.2, the AG states that part of the reason for the qualified opinion is the nature of the business and related inherent risk, which has limited the AG's ability to confirm assets under property and equipment and computer software. Paragraph 5 then deals with property and equipment. In it, certain figures have been redacted.

323.1 Among the other significant findings in the report, the AG found that effective and appropriate steps had not been taken to prevent irregular expenditure. Furthermore, effective steps had not been taken to prevent fruitless and wasteful expenditure of R16 261 000.

323.2 The AG was unable to confirm what disciplinary steps had been taken and what investigations had been initiated. Furthermore, the AG found that disciplinary hearings were not always held for confirmed cases of financial misconduct committed by officials.

324. Similar findings to the above were made in respect of Crime Intelligence and Defence Intelligence.

QUESTIONS PUT TO PRESIDENT RAMAPHOSA CONCERNING STATE SECURITY

325. President Ramaphosa testified before the Commission in his capacity as President of the country and as President of the ANC. During this questioning, he admitted that the SSA had been compromised and was itself acting under the "milieu of state capture" (this is discussed in detail in another section dealing with President Ramaphosa's evidence).

The PAN investigation

326. On 24 August 2021, Mr Fraser's attorney, Mr Mabuza, addressed a letter to the Commission complaining that Mr Fraser had been unfairly and unjustifiably implicated in the evidence before the Commission and in the statements made by Adv Pretorius in his opening address and during the course of his questioning of President Ramaphosa.

327. Mr Mabuza claims on behalf of Mr Fraser that Adv Pretorius stated (presumably with reference to the PAN Summary): "... It is replete with references to criminal offences, for example the unlawful procurement of assets..." Mr Fraser denies that he was ever accused of making unlawful procurements during the PAN programme.

328. During his questioning of President Ramaphosa, Adv Pretorius put to him the following:

> There is a declassified summary of the SSA internal report... it is replete with references to criminal offences for example the unlawful procurement of assets, signing of fraudulent contracts, payment to persons without valid contracts having been signed. And the internal SSA report concluded that there was a sufficient basis upon which to institute criminal investigations into a range of persons who have not been named in – well were named in the summary but their names were redacted. But Mr Arthur Fraser was one of those against whom criminal investigations were recommended.

329. These propositions put by Adv Pretorius are an accurate reflection of what is contained in the PAN investigation summary.

330. These were also the findings of the HLRP. In paragraph 7.3.4 of the HLRP report it is stated, referring to the PAN programme, that:

> Several investigations have been conducted into this project by the internal Agency investigators, as well as two investigations which were conducted by the OIGI. The Panel heard the views of several persons involved in the investigations, as well as those of the IG.

331. The Panel noted that allegations of malfeasance, procedural transgressions and criminal behaviour were placed before it. It appeared to the Panel there had been instances of serious criminal behaviour which had taken place under the guise of conducting covert work and that this behaviour may have involved theft, forgery and utter fraud, corruption, and even bordered on organised crime and transgressions of the Prevention of Organised Crime Act (POCA).

332. What Adv Pretorius ultimately put to the President was that the illegality of the PAN programme insofar as it existed between 2007 and 2011 had been "swept under the carpet". It was also put to President Ramaphosa that the investigations which were carried out by the IGI "died an unnatural death." This is because the IGI has no powers of compulsion or sanction and is only empowered to make recommendations. Because of this, the IGI's recommendations have, until recently, largely been ignored and there has been no consequence management.

333. This was of particular concern to the HLRP, which stated in its report that:

> Of particular concern for the Panel was that, apart from suspending the programme in 2011, it appears that no formal action or consequence management has taken place by the Executive or the Agency management. The absence of consequence management has become a theme running throughout the Agency for several years.

334. The principal proposition put, namely that there had been no prosecutions or other accountability following the investigations into PAN, was accepted by President Ramaphosa. The President stated that he had become aware of the allegations in relation to PAN through the HLRP report. The President was also aware of the IGI investigation into PAN. President Ramaphosa also agreed that the investigations into PAN had been taken away from law enforcement. As to how that happened, President Ramaphosa said "it happened as many other things happened that are unexplainable"; the task, he said, is now to "move forward".

335. Mr Fraser also complains that reference has not been made by the Commission to further investigations into the PAN programme. Mr Fraser also insists that the Audit report implicating him was withdrawn by the SSA audit team after irregularities were discovered. The Commission is not aware of further investigations conducted by Crime Intelligence, the external private forensic audit firm, or the external legal firm which allegedly cleared Mr Fraser. Mr Fraser has not provided these reports to the Commission.

336. Mr Fraser was directed to provide an affidavit under oath in which he was to provide detail to the Commission of the investigations referred to by his attorney. Mr Fraser was also directed to provide full details on the basis of which the Audit Report was allegedly withdrawn by the SSA audit team. Mr Fraser has not availed himself of this opportunity.

337. Mr Fraser points out that the disciplinary proceedings against an agent involved in the PAN proceedings were withdrawn, presumably suggesting that the SSA itself accepts that there was no wrongdoing during the PAN programme. However, as was pointed out by the learned judge hearing the matter referred to, the disciplinary procedure applicable to the said agent's employment with the SSA is governed, inter alia, by Chapter XVIII of the Intelligence Services Regulations, 2014 made in terms of section 37 of the Intelligence Services Act 65 of 2002. While clause 9 of this chapter provides for the suspension of a member of the SSA pending the outcome of an investigation into misconduct or a disciplinary hearing, clause 9(8) provides that the total period of such suspension must not exceed 18 months.

338. This technicality could not be complied with in the case of the agent referred to as the internal investigation had not been completed. The fact that the member concerned was because of this technicality ultimately re-instated and no charges were proffered against him does not mean that charges ought not or will not in future be proffered against him. The member's re-instatement was thus not any indication of the absence of criminality.

The Project Veza investigation

339. Similarly, when the findings of Project Veza were put to President Ramaphosa, he stated that he did not know when he became aware of those findings but admitted that he was aware of them. He further stated that these findings had motivated him to move the SSA into the Presidency:

> [p]olitical responsibility of the State Security Agency now resides in the Presidency and deliberations continue on the Panel's recommendations to split up the SSA into distinct domestic and foreign intelligence services.

340. President Ramaphosa admitted that when he deployed Mr Fraser to Correctional Services in 2018, he was aware of some of the allegations against him in relation to SSA. He stated, however, that he was hoping that the Commission was going to assist him in making a fuller determination.

The events surrounding the recent violence following former President Zuma's arrest

341. Mr Fraser has complained, through his attorney, that Adv Pretorius suggested that there was a correlation between the events of July 2021 and himself and Amb Dlomo. Mr Fraser points out that Amb Dlomo was not even at the Agency during 2008. However, it is pointed by Mr Y in his affidavit testified to by Ms K that:

    341.1 In 2008 and 2009, a group of approximately 48 non-SSA members were recruited and trained in preparation for their deployment after the May 2009 elections to various roles, with responsibilities that included VIP protection and intelligence collection at SANAI and elsewhere. Their recruitment and training was directed by Ambassador Thulani Dlomo, then a security manager at the KwaZulu-Natal Department of Social Development ("DSD"). Ambassador Dlomo had previously been a member of President Jacob Zuma's protection team.

    341.2 According to one of the SANAI trainers who reported to the investigation team, the rationale proffered by Ambassador Dlomo for the training was to build a presidential protection unit that

is like the United States Secret Service which would collect intelligence affecting the President. These recruited personnel would subsequently be deployed to SANDF, SAPS and SSA (bypassing official recruitment and vetting processes) when President Zuma assumed leadership after the elections in 2009.

342. The involvement of Amb Dlomo in SSA matters referred to above was followed by his formal appointment to the SSA.

343. At no stage in the questioning of President Ramaphosa did Adv Pretorius suggest that there was a correlation as alleged by Mr Fraser. Rather, throughout this questioning, Adv Pretorius put it to President Ramaphosa that questions had arisen that should be investigated. The President agreed.

344. Mr Y's affidavit makes it plain that persons trained under the auspices of Amb Dlomo who were neither vetted nor formally employed by the SSA remained unaccounted for, as did certain weapons which were provided to them. Mr Fraser himself testified before the HLRP that some of the persons trained under Amb Dlomo were trained as "assassins".

345. As stated above, it was put to President Ramaphosa that these were matters of great concern, which one does not know the answer to, but which should "raise red flags". This proposition was accepted by the President.

CONCLUSION

346. At least during the period under review (from 2009 to the present) there appears to have been a marked shift in the thinking and actions of the SSA. During this period the activities of the SSA appear to have been directed not primarily at serving the interests of the South African population but rather and to a material degree at serving factional and political interests, including those of former President Zuma and those close to him.

347. The evidence shows that the failure of the various oversight bodies, often due to them being improperly resourced or these bodies' negligence, allowed the corruption and unlawful benefit of various actors within and outside the SSA to continue unchecked.

348. The evidence has shown that while there was a centralisation of authority and a restructuring of the Agency, constitutionally sanctioned processes were transgressed, side-lined, or simply ignored. This paved the way for the carrying out of intelligence operations which were unconstitutional and illegal.

349. The shift signalled a return to an intelligence agency where coordination between the intelligence services (i.e., the police, military and civilian intelligence services) is weakened. In intelligence, there is a need for sharing of information, because in the absence of coordination there could be intelligence agencies spreading disinformation, information peddlers, and bogus informants.

350. This shift was accompanied by the subversion and avoidance of the prescribed rules and processes for good and accountable governance, including financial controls. This enabled the carrying out of operations and activities which fell outside the lawful mandate of the SSA, and which were to a material extent unlawful.

351. Unlawful intelligence operations and fronting companies were used to siphon funds from the SSA and to create parallel intelligence capacities that posed a risk to national security and the constitutionally established state.

352. In answering the questions posed at the outset, it is reasonable to conclude that the SSA contributed materially to the creation and protection of an environment which facilitated state capture.

352.1 First, the SSA failed to protect the people of South Africa from the threat that state capture posed to our national security. The SSA failed to establish the nature and extent of corruption and its effect on South Africa. The SSA, instead, allowed state capture to continue unchecked – a major intelligence failure. It then embarked upon a course of action which was not only unlawful, but constituted a project to benefit, personally and politically, beneficiaries not entitled thereto. This

is evidenced most directly by the fact that the SSA halted its investigation into the Guptas and their undue influence over Mr Zuma.

352.2 Second, the SSA played a role in protecting the alleged state capture project and those who enabled it. First, SSA resources were redirected to protect the personal and political interest of these enablers, especially Mr Zuma. Second, in this way, the SSA made common cause with the weakening and redirecting of the work of LEAs when state capture was ongoing. Third, the SSA itself positively contributed to endemic corruption, theft and the abuse of state resources.

353. There was pervasive fraud and corruption within the SSA. Large amounts of money, mainly cash, remain unaccounted for. Even viewed as a state institution in isolation from the broader LEA framework, the SSA evidence sheds light on the nature and extent of systemic corruption which this Commission is tasked to investigate.

354. There was a co-ordinated project to repurpose the financial and human resources of civilian intelligence in order to protect and promote factional political interests rather than the collective national interest. Fundamental to the evidence is the complete undermining of the constitutional prescripts set down for the civilian intelligence services. The evidence shows that there was not only a failure to achieve the constitutional goal of human security, but that there was a reversion to a pre-democratic mindset in which the security services were used to assert the executive authority of the state in ways that limited human rights and democratic freedoms.

355. The mismanagement of the armoury and vetted employment and training of intelligence personnel not vetted by SSA provided access to arms by people who may not understand the ethics of intelligence services and the societal aim to create a societal environment that is free from violence and instability, while engendering respect for the rule of law and human life.

356. Whether all the intelligence projects and operations were in fact successfully implemented or not, their stated purpose reflects a deliberate attempt to interfere in the constitutional functions and independence of other pillars of democracy, namely the media and other branches of government –including the alleged attempts to influence the judiciary. In short, the SSA project was an attempt at unaccountable, unconstitutional, and parallel government.

357. There is inadequate legislative regulation of the “dividing line” between lawful and unlawful intelligence operations, particularly of the intrusive and covert kind which infringe constitutional rights such as privacy.

357.1 The interception of certain communications is regulated by the Regulation of Interception of Communications and Provision of Communications-Related Information Act 70 of 2002 (“RICA”). However, the privacy protections of RICA have recently been declared unconstitutional by the Constitutional Court in the case of AmaBhungane.

357.2 Other intrusive intelligence collection methods – such as the infiltration of an organisation, physical surveillance, and recruitment of sources – are not governed directly by any express legislative authority. Instead, these kinds of intrusive, covert activities are regulated only by ODs, which are internal, classified prescripts setting out the SSA’s work method for such operations.

358. Notwithstanding the need for greater legislative clarity as to the “dividing line” between lawful and unlawful intelligence operations in these contexts, the SSA evidence asserts that many of the intrusive covert operations undertaken were unlawful.

359. Irrespective of the covert nature of an intelligence operation, the constitutional imperative remains: national security must be pursued in compliance with the law and within the limits of the law. That law must be known to the people governed by it. It cannot be secret to any degree. The intelligence services are required to protect rights, not infringe them, regardless of the secrecy of these operational activities.

RECOMMENDATIONS

360. Many of the general recommendations which the HLRP has made have not been implemented, either at all or satisfactorily. Accordingly, it is recommended that:

On consequence management, discipline and criminal proceedings

361. The President instructs the appropriate law enforcement bodies and oversight and internal disciplinary bodies to investigate all manifest breaches of the law, regulations and other prescripts in the SSA with a view to instituting criminal or disciplinary processes.

362. The investigation is now best pursued by LEAs, appropriately capacitated and resourced. The criminal matters dealt with by the Project Veza investigators, coupled with the evidence obtained through the Commission's investigations, should be sufficient to expedite the ID investigation and subsequent prosecutions.

363. It is recommended that the erstwhile internal Project Veza investigation should not be outsourced in circumstances where the SSA will continue to control the investigation and decide what documentation and information should be provided. Certainly, the SSA should not have any control over who may be questioned as part of any such investigation.

364. Any further investigation into the affairs of the SSA should be independent. It should have powers of compulsion regarding witnesses, documentation, and information. It should also have appropriate powers of access to classified information.

On the structure of the intelligence services

365. A comprehensive architectural review of the intelligence structures is undertaken, which considers:

    365.1 Appropriate separation of the SSA into two services – a domestic and a foreign service.

    365.2 The appointment of a task team to initiate, undertake and coordinate the recommended structural reviews and oversee the implementation of their outcomes.

    365.3 The title "State Security Agency" be changed to reflect the determination to return the role and philosophy of our democratic intelligence capacity back to their constitutional origins.

    365.4 As part of the architectural review, attention should be given to clearer and more focused definitions of the mandate of any resulting services as well as other sections of the broader intelligence community.

On executive powers

366. It is noted that the executive responsibility for the SSA now resides in the Presidency. It is noted that in terms of the Intelligence Services Act, the definition of "Minister" includes the President himself.

367. There remains a need, however, to clarify the respective powers and responsibilities of the administration and the Executive. In particular, sections 10 and 12 of the Intelligence Services Act require attention.

On strengthening of oversight

368. The current legislative provisions governing the IGI are reviewed, in particular:

    368.1 To provide appropriate enforcement mechanisms to the OIGI, to ensure that its recommendations are implemented

    368.2 To amend the Public Service Act to incorporate the OIGI as a national department distinct from the SSA

368.3 To amend the Oversight Act to make allowance for the funding of the OIGI from an independent source, not aligned to the SSA or any other Intelligence Service; and

368.4 To ensure the independence of the OIGI from the SSA and other security entities in all relevant respects. Equally the OIGI should be independent from the Executive, including the President.

369. The JSCI performs an important role in exercising control over the Security Cluster Executive and the Security Cluster itself. It is evident that over the period under review it failed to detect, prevent or ensure accountability in respect of the unlawful activities of the SSA. It is important therefore that a review into the functioning of the JSCI is undertaken. Further, and given the demands of intelligence oversight, the issue of a dedicated and well-resourced support capacity for the JSCI needs to be explored.

On financial controls

370. The Office of the President and the SSA should consider alternative payment methods to cash, where appropriate and possible. The methods implemented should provide the necessary protection of sensitive information. The methods considered and implemented may be benchmarked against the practices of foreign intelligence services to determine how to minimise the use of cash and to identify secure methods of non-cash options for the movement of cash and the making of payments.

370.1 The SSA should ensure that the rules governing Temporary Advances (TAs) are revised, detailed and consistently implemented. These should include the introduction of auditable methods for accounting for the expenditure of such advances. The SSA should further ensure that there are routine and visible consequences for breaches of such rules and processes. Measures should be put in place to prevent evasion or avoidance of such rules.

370.2 The Ministry and SSA should review the SSA's annual planning process and its relation to the budgeting process. This review should consider clear accountability and management of budgeting, expenditure and performance against planning priorities and targets that are shareable with the AG, JSCI and other relevant oversight bodies.

On ethical culture

371. The intelligence community instill ethical intelligence practices through the establishment of an autonomous Ethics Office within the Office of the DG and the institutionalisation of integrity testing for members and protection of investigators from intimidation.

372. Finally, reference is made to the full set of detailed recommendations which were made by the HLRP at Section 15 of the report.

373. In summary, since 2009 the SSA has failed to meet the goals set for it in the Constitution. More concerning is the abundant evidence that it has deliberately abused its powers and resources in furtherance of unlawful objectives. The institution needs a complete reset. Its overall aims and objectives require alignment with its constitutional mandate – the security and protection of the South African people. Thereafter its structures, personnel, plans, and projects need to be revised to meet these aspirations.

CRIME INTELLIGENCE

INTRODUCTION AND CONTEXT

1. This report specifically relates to the Criminal Intelligence (CI) unit, a unit within the South African Police Services (SAPS) and the Secret Services Account (SSA), a financial account administered

from within the CI. The contents of this memorandum derive from bundles of documents, exhibits and witness statements, and from brief discussions with the Chairperson, an official in the Commission administration and one of the evidence leaders.

2. The establishment of the Commission arises from a report by the Public Protector, no. 6 of 2016/2017 dated 14 October 2016 called the “State of Capture”, written and published in terms of s 182(1)(b) of the Constitution, s 3(1) of the Executive Members Ethics Act and s 8(1) of the Public Protector Act, 1994. The Public Protector called her report State of Capture. The SoCR related to an investigation into complaints of alleged improper and unethical conduct by the then President of the Republic and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of ministers and directors of SOEs resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family’s businesses.

Relevant content of the "State of Capture" report

3. The investigation by the Public Protector which culminated in the SoCR emanated from complaints lodged against President Zuma on 16 March 2016 and 22 April 2016. The investigation included an examination of the business dealings of the Gupta family with SOEs and government departments and included whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the extension of state-provided business financing facilities to Gupta linked companies or persons. There is no specific reference in the SoCR to improprieties within CI or arising from transactions effected through the SSA. It does, however, fall within the scope of the Commissions TORs.

Scope of the evidence

4. The Commission’s interest stems from evidence presented to the Commission in relation to crime intelligence. Two witnesses testified: Colonel Kobus Demeyer Roelofse, employed in the Directorate of Priority Crimes Investigations (the DPCI), Western Cape, of the SAPS, and Lieutenant Colonel Dhanajaya Gangulu Naidoo, a member of the SAPS formerly stationed at its head office, with duties including the administration of the SSA. The focus of their evidence was on transactions effected, which appeared to constitute misappropriations.

5. In addition, a sworn statement of Col Jacobus Johannes Hendrik Roos, was placed before the Commission as an annexure to the statement of Col Roelofse, and the affidavits of certain persons who were served with notices under rule 3.3 of the Rules governing the Commission.

6. The Commission issued 45 such notices in relation to the evidence of Col Naidoo and 43 such notices in relation to the evidence of Col Roelofse and/or Col Roos. Three persons responded to the notices in relation to Col Naidoo: Ms Navaranjeni Munusamy, Gen Rayman Lalla and Gen Mphego. Seven persons responded to the notices in relation to Col Roelofse and/or Col Roos: Mr Bheki Cele, Ms Navarenjeni Munusamy, Lieutenant General Johannes Khomotso Phahlane, Lieutenant General Bongiwe Zulu, Major General Chris Ngcobo, Lieutenant General Julius Molefe and Lieutenant General Richard Mdluli. None of these persons sought leave to cross-examine or give evidence. Certain of them submitted affidavits in response to the notices, and these affidavits have been considered in this memorandum.

7. The evidence focussed on but was not limited to the alleged conduct of Gen Solomon Lazarus, the CFO of the State Security Account (SSA) at least until his arrest in 2011 and Gen Richard Mdluli, who was appointed divisional commissioner for CI in 2009.

CRIMINAL INTELLIGENCE MANDATE, AND STRUCTURE AND PURPOSE OF SSA

8. The mandate of CI is the managing of crime intelligence, the analysis of crime information and the provision of technical support for investigations and crime prevention operations. The strategic operations of CI include collating, evaluating, analysing, coordinating, and disseminating intelligence for the purposes of technical operational and strategic utilisation; supplying intelligence products relating to national strategic intelligence to National Intelligence; instituting counterintelligence measures within SAPS; and preventing and fighting crime through enhanced international cooperation and innovation in police and security functions.

9. The SSA contains government money made available through the National Treasury. All funding for CI is carried out through the SSA. The money allocated to the SSA may, however, be deposited into different bank accounts. The SSA is a financial management system within SAPS but is not audited in the same manner as the SAPS open account, used in everyday police operations. The secrecy attached to the SSA is to protect covert operations and protect individuals, projects and operations from exposure.

10. Apart from undercover members of SAPS, there are two categories of civilians used and paid by CI: contact persons (i.e., those who assist in a specific situation or provide ad hoc information) and informants (i.e., persons registered on the CI payroll who receive a monthly remuneration).

11. The SSA also pays for the rental and furnishing of safe houses; premises from which members undertaking CI operations can carry out their functions without public exposure. Such premises may not be used for private purposes. There is an established procedure by which such premises are acquired.

12. The regulatory framework applicable to CI and the SSA consists of the South African Police Services Act 68 of 1995, the Public Finance Management Act 1 of 1999 (PFMA), the Secret Services Account Amendment Act 142 of 1992, and policy directives and procedures for CI laid down from time to time.

13. In South Africa and within the SAPS documents are classified in ascending levels of secrecy called “Restricted”, “Confidential”, “Secret” and “Top Secret”. The workings of the classification system are contained in a document classified as Restricted but available on the Internet called the Minimum Information Safety Standards (MISS).

14. The question of the classification of documents received the attention of the Constitutional Court in Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa and Another CCT 01/07 [2007]. The power of the national executive to classify documents to protect them from disclosure derives from s 172(1) of the Constitution which permits the executive to formulate national policy. On 4 December 1998, the national executive made a policy in relation to the classification of documents called the Minimum Information Security Standards (MISS), which was adopted by the Cabinet. It applies to all departments of State that handle classified information in the national interest. It provides for measures to protect classified information and empowers the Minister to protect information by classifying it. In addition, national legislation and regulations prohibit the disclosure of certain classified information but these are not relevant to the present topic.

15. Clause 3.4 of Chapter 2 of MISS which precedes the descriptions of the several types of classification reads: The security measures are not intended and should not be applied to cover up maladministration, corruption, criminal actions, etc or to protect individuals/officials involved in such cases.

16. It follows that MISS itself requires that classified material should in principle be made available to SAPS when investigating alleged maladministration, corruption, criminal actions and the like. The files should not be withheld from any SAPS officer in the performance of their duties and when investigating cases included in clause 3.4.

17. During the period July 2009 to November 2011. Lieutenant General Richard Naggie Mdluli was the Divisional Commissioner Criminal Investigations (CI), Gen Solomon Lazarus was the Chief Financial

Officer (CFO) of the SSA, and Col Heine Johannes Barnard was the Section Commander, Supply Chain Management of CI, based in Pretoria.

18. During the same period Company X was a trading entity which formed part of a clandestine operation, set up and funded through the SSA and operated by members of CI. Col Barnard was a procurement officer for Company X.

Events leading to the investigation into the looting of the SSA

19. Col Roelofse, Section Commander: Major Case Operations in the Directorate for Priority Crimes Investigations (DCPI), investigated a murder implicating a very senior officer, Gen Mdluli. This led to a further investigation that he described as the "looting" of the SSA. During this latter investigation, he encountered efforts to frustrate and hamper his investigation and attempts to prosecute allegedly criminal conduct by members of the SAPS were frustrated by senior officials within the SAPS and the National Prosecuting Authority (NPA). Both these organs of state failed to address this situation.

20. Specific examples of the attempts to frustrate and hamper this investigation and subsequent prosecution of officials are provided below. But some events transpired within CI before Col Roelofse was brought on board that illustrate the challenges faced by his predecessors and particularly Col Roos, whose affidavit was part of the submitted evidence.

21. In 2003 Col Roos was the head of internal audit at CI. The audit plan for 2004 was to conduct an audit of the SSA advance office. Certain discrepancies were noted, including one related to a company called LLVS Trading and Services, which provided cleaning services to undercover offices used by CI. LLVS was owned by a colonel in CI in charge of an undercover office. The same audit revealed fraud in relation to the repairs of CI vehicles.

22. The audit findings were discussed with Brig van Vuuren, the legal officer of CI whose opinion was requested. The findings of this investigation and the request to Brig van Vuuren for an opinion were reported to Gen Mphego, the Assistant Commissioner of CI. Gen Mphego became angry and told Col Roos to leave his office.

23. Brig van Vuuren provided an opinion dated 21 October 2004 which Col Roos supplemented with an information note dated 22 October 2004 and submitted to Gen Mphego. Gen Mphego informed him not to discuss the matter with or hand over any documentation to any other persons.

24. However, Col Roos discussed the matter with Mr Steyn, in charge of the office of the Auditor General (AG) responsible for auditing the SSA. Mr Steyn reported that he had already been approached by Divisional Commissioner Lalla and Major General Els, head of Crime Intelligence Gathering (CI) at head office, who had questioned him about the matter. Col Roos gave his documentary information to Mr Steyn.

25. Col Roos was later summoned to Gen Mphego's office and took with him Col Groenewald of CI Internal Audit. Col Malaza, a suspect in the investigations, was with Gen Mphego. Gen Mphego discussed the possible fraud and informed Col Malaza that he was implicated. Col Malaza indicated he had no idea about what was going on. Col Roos attempted to present the facts of the case, but Gen Mphego interrupted him and told him and Groenewald to leave his office.

26. In November 2004, Col Roos was contacted telephonically by a brigadier in the Commercial Branch of the SAPS, who informed him that he would send the documents to Commercial Crime in Pretoria who would conduct the investigation. A few days later, Col Roos was summoned to the office of Gen Mphego where Gen Lazarus and Brig van Vuuren were present. Gen Mphego was angry and allegedly threatened Col Roos, who he believed had reported the matter to Commercial Crime. Gen Mphego said he would end Col Roos's career. Brig van Vuuren acknowledged reporting the matter to Head Office and then left the meeting. Col Roos was then told to leave.

27. The matter was never again discussed but later while under the impression that Col Malaza had resigned from SAPS, Col Roos learned that Col Malaza was in the undercover agent program. He also

learned that Col Malaza had been convicted of fraud, forgery and uttering in the Pretoria Magistrate's Court while working at CI.

28. After Gen Mdluli was appointed Divisional Commissioner for CI, a Col Odendaal summoned Col Roos to a meeting with Gen Mdluli in July 2009 at a Pretoria hotel room. This was the first time Col Roos had met Gen Mdluli. Gen Mdluli told him that he wanted to clean CI and charge all corrupt members. He wanted Col Roos to provide him with his information in this regard. Gen Mduli specifically mentioned the name of Gen Lazarus. Col Roos believed that Gen Mdluli was serious about the investigation and that he wanted to clean up CI.

29. At a second meeting with Gen Mdluli at his Erasmuskloof office, the General handed Col Roos a letter dated 29 July 2009 appointing him as team leader in the investigation of certain instances of fraud relating to informer files, safe houses and receipts of purchases and invoices within the SSA in KwaZulu-Natal, Limpopo and the Northern Cape.

30. On 3 December 2009, he attended a third meeting at Gen Mdluli's office. Present, when he arrived, were Col Odendaal, Col Ntuli, Brig Mokoshane and Gen Mabasa. After a while Gen Mdluli arrived with Gen Lazarus and Brig van Vuuren.

31. Gen Mdluli wanted to know why those present had gone to Gen Dramat and who had given them permission to do so. Col Roos had not done so, but the others had to explain their actions to Gen Mdluli and seemingly Gen Lazarus.

32. Gen Lazarus confronted those present for their audacity to investigate him. Gen Mdluli did not intervene. Col Roos asked Gen Mdluli why they were being humiliated by Gen Lazarus, the person Gen Mdluli had told them to investigate. Gen Mdluli said that the institution (i.e., SAPS) was bigger than any one individual and told them to stop the investigation. They were then ordered to leave. Col Roos concluded that Gen Mdluli was now "big friends" with Gen Lazarus and Brig van Vuuren.

33. During May and June 2010, Col Roos oversaw an audit at Universal Technical Enterprises CC (UTE), one of the front companies used by CI. He uncovered fraud in UTE's dealings with Hills Fitment Centre in KwaZulu-Natal. Essentially the over quoting for repairs to vehicles. While still busy with the audit, Brig Steyn, the Head of Internal Audit, instructed Col Roos to stop the audit and not to compile a report. By then only one report regarding the Advance Office had been compiled.

34. Brig Steyn handed Col Roos a letter dated 14 June 2010, signed by Gen Mdluli, informing him of the establishment of an inspection capability at CI and his appointment to head up this new section. Col Roos was removed from Internal Audit and conducted no further audits of the SSA.

The Gen Mdluli Vosloorus case

35. In March 2011, Col Roelofse became part of a team assigned to investigate a criminal case against Gen Mdluli and three others. The investigation into the death of Mr Ramogibe at Vosloorus and related matters had been discontinued after Gen Mdluli was appointed to the post of divisional commissioner in 2009. But information about the discontinued investigation re-surfaced after Gen Mdluli's appointment.

36. At a meeting called by Major Gen Matakata, the head of the Hawks in the Western Cape, attended by several high-ranking SAPS officers, Col Roelofse and Lieut Col Piet Viljoen were briefed by Gen Shadrack Sibiya, the Provincial Commissioner, who disclosed that members conducting the investigation had been intimidated by those under investigation and could not continue. Col Roelofse and his team were assigned to take over the investigation and remain objective.

37. On 31 March 2011, Gen Mdluli, then Divisional Commissioner of CI was arrested and brought to court on charges including murder, kidnapping, assault and intimidation. The then Commissioner of Police, Gen Cele, suspended Gen Mdluli from office on 8 May 2011 and instituted disciplinary proceedings against him. Col Barnard was charged with fraud and corruption in the Specialised Commercial Crimes Court, Pretoria.

38. On 3 November 2011, Gen Mdluli wrote a letter to President Zuma, the Minister of Safety and Security and the Commissioner stating that the charges against him were the result of a conspiracy among senior police officers, including the then Commissioner, General Cele, and the head of the Hawks, General Anwar Dramat. The letter also stated that "[i]n the event that I come back to work, I will assist the President to succeed next year", which the Supreme Court of Appeal (SCA) found was an obvious reference to the forthcoming presidential elections of the ruling African National Congress (ANC) in Mangaung towards the end of 2012. The allegations of a conspiracy led to the appointment by the Minister of a task team which later reported that there was no evidence of a conspiracy and that the police officers who had accused Mdluli of criminal conduct had acted in good faith. There is no evidence that President Zuma responded to Gen Mdluli's overtures.

39. On 17 November 2011, Gen Mdluli made representations directly to Adv Lawrence Mrwebi, the head of Specialised Commercial Crime Unit (SCCU), Pretoria. Adv Mrwebi concluded that the SAPS had no power to investigate the case and that thus any investigations into the matter could be unlawful. He embodied this view in a memo dated 4 December 2011 and decided to withdraw the fraud and corruption charges against Gen Mdluli and Col Barnard. Adv Mrwebi asserted that only the Inspector General of Intelligence (IGI) had the power to investigate.

40. On 14 February 2012, the charges were provisionally withdrawn by Adv Andrew Chauke, the Director of Public Prosecutions (DPP) for South Gauteng.

41. On 29 February 2012 the Acting National Commissioner of Police at the time, General Mkhwanazi, withdrew the disciplinary proceedings against Gen Mdluli and on 31 March 2012 Gen Mdluli was reinstated and resumed his office as Head of Crime Intelligence. Shortly thereafter, his duties were extended to include responsibility for the unit which provides protection to members of the national executive.

42. The only reasonable inference from the circumstances arising from what happened after Adv Mrwebi's memo is that the acting National DPP, Adv N Jiba, knew of and approved the decision to terminate the prosecution of Gen Mdluli.

43. The IGI expressed the view that the reasoning of Adv Mrwebi was wrong. Adv Mrwebi took the view, in a communication made on 30 March 2012, that the IGI did not have the power to review his decision, which he declared he stood by.

44. Ultimately, the decision to terminate the prosecution was set aside by the court. It is common knowledge that Gen Mdluli was prosecuted, convicted of certain crimes and sentenced to imprisonment.

45. After legal proceedings to challenge Adv Chauke's decision, charges were reinstated against Gen Mdluli and one other. The charges did not include murder and attempted murder. Gen Mdluli was convicted in the South Gauteng High Court on various charges.

46. After the arrest of Gen Mdluli, some members of CI approached Col Viljoen and Col Roelofse with information about crimes allegedly committed by members within CI. They did not want to speak openly and were fearful of Gen Mdluli and officers within CI.

47. Cols Roelofse and Viljoen received a file, containing claims with supporting documents regarding, amongst others, a cleaning company, and repairs to motor vehicles, from Col Johannes Hendrik Roos, an internal auditor within CI. The file contents indicated that fraudulent quotes had been obtained to favour specific service providers. Col Roos reported these incidents to Gen Mphego, then head of CI, whereupon he was ordered not to proceed with his investigation. Col Roos claimed that the obstructions of his investigation, which included investigation into the conduct of Gen Lazarus, came from Gen Lazarus via Gen Mphego.

48. Allegedly, on Gen Mdluli's appointment on 1 July 2009, Col Roos wanted an investigation into the SSA and the conduct of Gen Lazarus. Col Roos was allegedly obstructed in this investigation. Gen Mdluli asked him to draft a letter for Gen Mdluli's signature granting him unrestricted access to information relating to the investigation. But when presented with the letter, Gen Mdluli refused to sign it.

49. According to Col Roelofse, when Gen Mdluli was appointed as Divisional Commissioner of CI, Mdluli began with the intention of cleaning up CI. But unfortunately, Mdluli became, in the opinion of Col Roelofse, "at that stage the number 10 victim of General Lazarus, who set in motion certain events to compromise General Mdluli." This impression was also conveyed by Col Naidoo in recalling his initial meetings with Gen Mdluli. The General succumbed to these pressures and stopped the investigation to protect himself.

50. The main body of the evidence presented to the Commission reveals the manner in which Gen Mdluli was corrupted and the looting of the SSA, which had started years before his appointment.

Trips overseas by Gen Mdluli and family facilitated by Gen Lazarus

51. On 6 November 2009, Gen Mdluli and his then wife, Ms VL Mdluli, flew business class to Hong Kong and back to visit their daughter, a student in China. The cost of the trip was R110 000, of which R60 000 was paid directly by the SSA and R50 000 was funded through the Barut account (discussed in the next section). Travel arrangements were made through Westville Travel in Durban (a division of One Stop Travel and Tours) and were done by Col Naidoo at the request of Gen Lazarus.

52. On 3 November 2009, Col Naidoo was called into Gen Lazarus's office. He was told to take an envelope on the table and keep it until Gen Lazarus discussed it with him. On the same day, Col Naidoo was again summoned to Gen Lazarus's office where Col Barnard was present. Gen Lazarus said they had secured a loan of R50 000 from Jan Venter of Atlantis Nissan for air tickets for Gen Mdluli's wife. Col Naidoo applied for an advance of R50 000, which was approved by either Col Barnard or Gen Lazarus. Col Naidoo subsequently bought two tickets for Gen Mdluli and his wife at Flight Centre.

53. Immediately afterwards Col Naidoo was concerned by his actions and that the advance was in his name. Col Naidoo wrote out an account of what had happened and kept a copy typed by his wife and copies of the E-tickets. Later, he gave these documents to Col Roelofse.

54. On 7 November 2009, Gen Lazarus instructed Col Naidoo to apply for R10 000 for Gen Mdluli as spending money for his trip. Col Naidoo did this and the application was approved by Gen Lazarus. Later that day, Col Naidoo met Gen Mdluli at the airport and gave him R20 000: R10 000 for which Gen Mdluli had applied and R10 000 from the balance of the money left after the ticket purchases. Col Naidoo misappropriated the balance of R3 848. All transactions were in cash.

55. Col Naidoo later purported to reconcile the claims by Gen Mdluli for expenses but failed to do so because most of the receipts were in a language he did not understand.

56. On 21 November 2011, Gen Mdluli flew on official business to Singapore, ostensibly to buy electronic equipment for CI. He was accompanied by Ms Lyons, his girlfriend. Her trip was paid for by the SSA although she was not a member of SAPS. She worked as a clerk at for the Department of Home Affairs (DHA). Her business class air ticket cost R46 809.

57. The party accompanying Gen Mdluli to Singapore included several SAPS officers and three civilians, Ms Lyons, Ms Juanita Barnard (the wife of Col Barnard) and Ms Sandra Lazarus (the wife of Gen Lazarus). The tickets of Col Naidoo and Col Miranda Venter were paid from the SSA in cash. Col Naidoo thinks that Ms Barnard's ticket was also purchased in this way. Except for Gens Mdluli, Lazarus and Ms Lyons, the rest of the party travelled economy class.

58. Col Naidoo conceded that there was no reason why anyone from CI needed to travel to Singapore for the stated purpose. After two days of buying electronic equipment at a general mall the rest of the trip was spent sightseeing. Col Naidoo admitted to buying a camera at the expense of CI as a present for his sister, valued at about R5 000. Gen Lazarus and Col Barnard approved the funding for this purchase.

59. On returning to South Africa, one of Gen Mdluli's contacts enabled the party to evade customs duties on the items they had purchased. The equipment was paid for by credit cards issued to Col Naidoo and Col Barnard at the ABSA branch where Ms Juanita Barnard worked. Col Naidoo believed that

each credit card was loaded with R100 000. Thereafter, Col Naidoo was involved closely with Gen Mdluli and Gen Lazarus in their legitimate and illegitimate activities within CI. He was required to be at their beck and call in most of their personal and official requirements, including acquiring vehicles, the use of safe houses, buying groceries, ensuring safe houses were cleaned, buying air tickets, having their cars washed and transporting their family members. Col Naidoo aptly described himself as the "lackey" of the two Generals.

60. These two overseas trips formed the subject of a charge, and a comprehensive charge sheet was prepared. But SAPS would not declassify the documents required for the prosecution and the case was withdrawn.

Atlantis Nissan Motors and the BARUT account

61. BARUT was the name given to an account ON the books of Atlantis Motors in Centurion. The account was created following an arrangement between the dealer principal, Mr Jan Venter and Col Barnard. The account was funded from portions of the profit in the hands of Atlantis Motors arising from the sale of vehicles by Atlantis to CI at inflated prices. Mr Venter would then ensure that from time to time that these funds would be paid to third parties on the instructions of Col Barnard.

62. Financial records detailing these transactions were only available to Col Roelofse from 8 April 2008 when the BARUT account was in credit of R175 045.15. By 19 October 2012, an additional R1 527 601.61 was credited to the BARUT account, of which R1 659 923.08 was paid via EFT to third parties.

63. The BARUT account funds were used to give Gen Lazarus and other CI members discounts on private vehicles. An additional total of R465 000 was transferred to New World Motors (NWM), which Col Roelofse believed supported Col Naidoo's claim that Gen Lazarus had to generate cash inter alia to cover shortfalls in the SSA account. An additional R143 621.78 in this account was used to settle an amount owed to WesBank on a vehicle registered to a journalist, Ms Munusamy.

OBSTRUCTION OF CRIMINAL AND DISCIPLINARY PROCEEDINGS

64. Disciplinary proceedings were taken against Gen Lazarus which led to his dismissal. Col Roelofse did not know the outcome of the disciplinary proceedings against Col Barnard who is still in the employ of the SAPS.

65. Brig Madonsela and Capt. Heeralal were tasked with the investigation of 250 members of CI. Col Roelofse provided copies of fourteen criminal case dockets opened by Capt. Heeralal, relating to the non-disclosure of criminal convictions or civil judgments. All these dockets were closed on the SAPS criminal administration system. None of them was submitted to the NPA for a decision on whether to prosecute. Col Roelofse knew that the investigation of Brig Madonsela and Capt. Heeralal was stopped but he did not know by whom.

ALLEGED INVOLVEMENT OF GENERAL BHEKI CELE

66. When Gen Mdluli was appointed, in 2009, Mr Bheki Cele was the National Commissioner of the SAPS and was rumoured to have been instrumental in the award of large tenders to a Mr Marimuthu. Gen Lazarus was aware of the connection between Mr Marimuthu and Mr Cele. In an attempt to secure Mr Cele's support and assurances that he was not transferred away from his position by the arrival of Gen Mdluli, Gen Lazarus contacted Mr Marimuthu. Thereafter, Gen Lazarus made several unsuccessful attempts to meet Mr Cele. Ultimately, Lazarus made a call to Col Naidoo to organise cash which Col Naidoo assumed that Gen Lazarus would need to pay to Mr Cele.

67. Col Naidoo was in possession of R40 000 which he had taken from CI head office for another purpose which he could not recall. Col Naidoo gave the R40 000 to Gen Lazarus. A meeting took place between Gen Lazarus and Mr Cele at a house where Col Naidoo was present but not in the same

room. After the meeting, Gen Lazarus did not hand the R40 000 back to Col Naidoo, who then assumed that it had been paid over to Mr Cele. Gen Lazarus was not transferred and remained CFO of CI.

INAPPROPRIATE APPOINTMENTS AND PROMOTIONS WITHIN CI

68. On 1 February 2006, Col Naidoo was promoted from a civilian clerk to the functional arm of CI as a warrant officer. For about six months, he was employed as an undercover operative concentrating on drug syndicates. Through his association with Gen Lazarus, he was later promoted from warrant officer to Lieutenant Colonel through a covert advertising process. Col Naidoo also identified others who were improperly promoted or improperly skipped ranks in promotions.

69. During January or February 2010, 250 posts were made available within CI. Most of these positions were filled by friends or family of Gen Mdluli, Gen Lazarus and those close to them. To hide their connections with Gen Mdluli, most of his family members and friends were placed in the agent program, for which they had no prior police experience. Various persons appointed to fill these posts had criminal convictions.

70. During January or February 2010, Col Naidoo was present at a discussion between Gen Mdluli and Gen Lazarus. Gen Mdluli produced a list of persons he wanted employed in CI. The two generals agreed that the persons on the list would be appointed. Gen Mdluli said that Col Naidoo should be their handler because he trusted the Colonel. After Gen Mdluli left, Gen Lazarus remarked to Col Naidoo that Gen Mdluli wanted his family members appointed.

71. Mr Marimuthu and members of his family were similarly employed in CI. The names of these family members were withheld from the sworn statement and testimony before the Commission. Two family members of Col Barnard were also appointed. Two relatives of Major General Willie Els were appointed without any prior experience in SAPS or CI. Relatives or friends of Lt General Raymond Lalla and Lt General Stander were improperly appointed to CI and a relative of Gen Bellingham skipped ranks and was appointed to colonel.

72. A colonel in CI, identified as FM41, previously convicted of vehicle related fraud, was placed in the agent program and Col Naidoo was one of his handlers. According to Col Naidoo, Gen Lazarus wanted to “help the old man”.

73. Col Naidoo asserted that Col FM41 was placed in the agent program because he knew too much about Lt Gen Raymond Lalla and Gen Mulangi “Marshall” Mphego. Col Naidoo stated that Col FM41 told him that he was paying Gens Lalla and Mphego R100 000 per month from the money he made from the submission of false informer claims.

74. At the time Gen Lalla was Divisional Commander and Gen Mphego was Assistant Commissioner at CI. Col Naidoo believed that Gens Lazarus, Lalla and Mphego had Col FM41 placed in the agent program because they feared he would expose them. Both Gen Lalla and Gen Mphego later left SAPS.

75. A relative of Gen Lazarus stationed at Tongaat was found guilty of corruption and dismissed from SAPS. After his dismissal he was recruited as a CI informant and paid R50 000 per month. Another relative of Gen Lazarus, stationed at Tongaat SAPS until retirement, was employed as an informant by CI.

PAYMENTS OF FALSE AND INAPPROPRIATE CLAIMS TO AGENTS

76. Col Naidoo was responsible for paying salaries and operational expenses to relatives of Gen Mdluli and others. Col Naidoo identified to Col Roelofse the relatives concerned and certain payments made to them but withheld their names in his sworn statement and testimony. Col Naidoo indicated that these specific corrupt claims he administered and paid out exceeded R5 million. Col Naidoo

provided details of false claims submitted by the handlers but again withheld their names in his sworn statement and his testimony.

ALLEGED ABUSE OF SAFE HOUSE SYSTEM

77. Col Naidoo provided instances where he alleged the safe house system was abused. He provided the names of the beneficiaries of these schemes, but the names were withheld in his sworn statement and his testimony. Prominent in Col Naidoo's account of this alleged abuse were Gen Lazarus, Mr Appalsami, Mr Marimuthu and Gen Mdluli, and other SAPS officers.

78. In 2005 or 2006, an attempt was made to hijack Gen Lazarus outside his house that was being renovated. Gen Lazarus used this as an excuse to get other accommodation at state expense during the renovations. Col Naidoo found him the premises in AX Estates, Greenstone, Johannesburg. The premises were rented at about R6 000 per month, paid from the Secret Services Account. Gen Lazarus and his family stayed there for over a year and the premises were furnished at CI expense through the SSA. When Gen Lazarus returned to his now refurbished house, the furniture in the Greenstone house was distributed between Col Marinda Venter (Gen Lazarus's second-in-command), Gen Lazarus and Col Naidoo.

79. A private Sheffield Beach property was developed by a consortium of CI members. These included Gen Deena Moodley, the commander of Crime Intelligence Gathering (CIG) in Durban who was promoted to assistant commissioner and became provincial head of CI in KZN, Gen Lazarus and two members whose names were withheld.

80. Most of the funds to develop this property came from false informer claims processed by Col Naidoo. The project required the generation of R250 000 every fortnight. Furniture and appliances were purchased via the SSA and placed as an asset against one of the CI safe houses. Much of this furniture was later stolen. This caused a problem as the items were not stolen from the safe house to which they registered. On the instructions of Gen Lazarus, Col Barnard removed the items from the Secret Register (this register will be further discussed in the next section). It is unknown if Col Barnard was a member of this consortium.

81. Gen Mdluli had to pay money to Karin Hanekom Attorneys for the purchase of a property. Gen Lazarus instructed Col Naidoo to deposit a cheque for R40 000 into her trust account. Gen Lazarus also instructed him to draw R30 000 cash from the SSA and deposit it with Karin Hanekom for the account of Gen Mdluli. Col Naidoo drew the funds from the SSA in his own name and paid the cheque and the cash to Karin Hanekom. Gen Lazarus approved the withdrawal of the R30 000 as well as the recouping of the money drawn from the SSA by applying at least four (and possibly five) monthly rentals applicable to the rental of Gen Mdluli's Gordon's Bay property for this purpose.

82. Mr Appalsami, a friend of Gen Lazarus, controlled Daez Trading CC. Through Daez, Mr Appalsami facilitated various transactions approved by Gen Lazarus, including safe house rentals and benefited from an account with Atlantis Motors called the BARUT account.

83. In November 2010, CI rented a safe house at Clearwater Estate, Boksburg through Daez at a monthly rental of R20 000. This house was exclusively used by Gen Mdluli and continued to be paid in November 2011 although Gen Mdluli had been arrested in April 2011.

84. Gen Mdluli owned premises called Gordon Villlas in Gordons Bay. CI rented this property through Daez, as a safe house at a monthly rental. The rental was inflated by R2 000 per month that was divided between Gen Lazarus and Col Naidoo. It was also used to recoup some of Gen Mdluli's debt to Hanekom Attorneys Trust Account.

85. CI leased office accommodation through Daez at which family members of Gen Mdluli were employed. According to Col Naidoo the rents charged to the CI were inflated.

86. Four properties belonging to a Mr Marimuthu were rented by CI as safe houses. Mr Marimuthu received rents from these properties of up to R25 000 per month.

ALLEGED IRREGULAR UPGRADING OF PROPERTIES

87. The Commission heard that the properties of CI members and other officials were irregularly upgraded with funds from the SSA. In some instances, the names of the officers who allegedly benefited were withheld. These were:

    87.1 Gen Lazarus's sister's flat in Tongaat: R150 000

    87.2 Gen Lazarus's uncle's premises in Richards Bay

    87.3 Col FM09's mother-in-law's property in Shaka's Rock

    87.4 Col FM07's house in Durban

    87.5 Gen Deena Moodley's properties in Pinetown and Belair

    87.6 A property associated with Col FM08, owned by him or his father; and

    87.7 A security upgrade to Gen Mdluli's house funded from the SSA to the value of R190 735, to which he was not entitled.

88. Gen Manoko Nchwe was provided with a security upgrade funded from the SSA to the value of about R40 000. This officer was not entitled to such an upgrade. When given notice of disciplinary proceedings against her, she resigned.

89. During the period September 2010 to January 2011, the then Minister of Police, Nathi Mthethwa, was provided with security upgrades to his house financed by the SSA and totalling R195 581.45. The allegation is that the documents evidencing these transactions and payments were handed to then Commissioner of Police Bheki Cele. These were to be used in his disputes with Minister Mthethwa to ensure that the Minister could not act against Cele. This investigation did not proceed because of the failure of the SAPS to provide important documents needed in the investigation.

90. When Gen Lazarus's property was being renovated, his builders had downtime. Col Naidoo had a boundary wall built and driveway gate replaced at his property by these builders. For this purpose, Gen Lazarus gave Col Naidoo a cheque for R20 000.

91. The CI bought a VW Golf for Col Naidoo's use at a price inflated by R40 000. He retained this vehicle for his private use. Expenses related to the vehicle and renovations to his private home, including those needed to enable his wife to start a catering company, were also from the SSA.

ALLEGED MISUSE OF VEHICLES ON THE SECRET REGISTER

92. Gen Lazarus used the acquisition of vehicles and other endeavours, such as security upgrades, to influence senior managers and to acquire their 'favour' and support. One of the means he allegedly used was to allow senior managers to choose a vehicle to the value of about R500 000, which the General funded from the SSA. These managers already received a vehicle allowance through their remuneration packages and were not entitled to these benefits. As these managers were receiving a financial benefit to which they were not entitled, they were placed in a difficult position in any action against Gen Lazarus.

93. Company X maintained a register of vehicles used by operatives in covert operations. This was identified as the Secret Register (SR) and seemingly included other assets used by CI. Gen Lazarus operated a scheme with Mr Joe Marques, through the firm New World Motors (NWM), owned or operated by Mr Marques. The scheme was for Mr Marques to buy SR vehicles from Company X which were due for replacement and sell vehicles to Company X at inflated prices. At the end of 2010, Mr Marques had about 80 vehicles he had bought from Company X.

94. For security reasons, when SR vehicles were due for replacement, they were sold by closed tender. There were five closed tenderers, of which two shared directors and members who were family of Mr

Marques. Gen Lazarus would inform Mr Marques beforehand of the competing bids, thereby enabling Mr Marques to bid amounts just higher than his competitors.

95. Using SSA funds, Company X would then repurchase some of the vehicles sold, after some refitment or refurbishment, to Mr Marques at inflated cash prices. Some of the cash derived from the sale by Mr Marques of these vehicles to Company X was used to settle advances made to members for work related expenses. Col Naidoo stated that he frequently collected money from Mr Marques for this purpose. Mr Marques would provide amongst other persons known as FM07, FM08, FM09 and Col Naidoo himself with fraudulent invoices to generate cash to be used to cover shortfalls in respect of other unaccounted for expenses. Members of CI were also allowed to buy SR vehicles bought by Mr Marques at the same prices paid by Mr Marques.

96. Col Naidoo provided several instances where vehicles were purchased or leased with SSA funds and then improperly made available to persons for their private use. He alleged that Gen Mdluli's family benefited from this conduct in several instances and that Gen Mdluli himself had seven vehicles allocated to him; six were registered as SR vehicles. Gen Mdluli had five vehicles valued at R3 153 730. This excludes vehicles provided to members of his family who were appointed to CI without due process.

97. About April 2010, Col Barnard approached Leon Haase BMW in Pretoria to buy a 5 series BMW for Company X. This included a trade in of Gen Mdluli's personal car with a settlement amount of R560 526,01 outstanding through BMW Financing. The deal that Col Barnard negotiated required that Company X had to buy two vehicles from Leo Haase to finance the shortfall on Gen Mdluli's private car. Col Barnard reported directly to Gen Lazarus who reported to Gen Mdluli. These two vehicles were for Gen Mdluli's personal use although financed through SSA.

98. Gen Manoko Nchwe, Divisional Commissioner and head of the police human resources unit, was provided with one vehicle valued at R557 079.96. The motivation was that she would use the vehicle for sensitive operations. But she was never a member of CI, nor did she undertake sensitive operations. Although the vehicle was registered on the SR it was also registered in her name.

99. Col Naidoo alleged that Mr Marimuthu improperly received a white BMW fitted with blue lights.

FALSE CLAIMS MADE BY COL NAIDOO TO BENEFIT HIMSELF

100. Col Naidoo said he benefited from false claims which he submitted, exceeding R100 000. He claimed he could not remember them all without documentation. However, he gave some examples. He mentioned false claims on the replacement of windscreens at NWM where no such service was rendered. He also mentioned false receipts for furniture not purchased from Masons Furniture.

101. Col Naidoo claimed that the stories of Gens Dramat and Sibiya's arrests for illegal activities, printed with great prominence by the Sunday Times, were facilitated with input from CI.

102. Between late 2009 and early 2010, Col Naidoo drew R25 000 which he gave to Gen Mdluli who, Col Naidoo claimed, informed him he needed the money to pay a journalist not to print information about CI.

103. Col Naidoo claimed that approximately R40 000 was paid to repair the silver BMW 3.3CL of journalist Ms R Munusamy, who was the confidante of Gen Mphego, who was the former CI head. Naidoo claimed that on three or four occasions he collected the vehicle from Ms R Munusamy and returned it after repairs.

The validity of Col Naidoo's evidence

104. Col Naidoo gave evidence at a disciplinary enquiry into Gen Lazarus's conduct. At the conclusion of the evidence, the chairperson of the enquiry made certain comments on the credibility of Col Naidoo. The chairperson of the enquiry concluded that Col Naidoo's evidence should be approached with "some caution"; that his own conduct in the events leading to the charges against Gen Lazarus was

"brazen and dishonest". It was his opinion that the Colonel Naidoo was not a person whose evidence could be trusted. The Chairperson did not to rely on his evidence, except where it was corroborated by other evidence or left unchallenged.

105. Many of the allegations made by Col Naidoo before the Commission lack corroboration. He himself was an accomplice to many of the alleged offences. Col Naidoo's evidence, as a result, must be approached with caution. On the other hand, those implicated by his evidence were given an opportunity to contradict the allegations against them or otherwise defend themselves. Gen Lazarus and Gen Mdluli elected not to do so.

106. The general allegations of corruption within CI stand uncontradicted, but the essence of the individual allegations of criminal conduct will depend largely on the documents that have been withheld from Col Roelofse and his team by Gen Lazarus and other senior officers of SAPS.

107. The evidence before the Commission leaves no doubt that for an extended period at the beginning of the present century, corruption, nepotism, theft and fraud in relation to the SSA administered from within the CI was conducted on such a scale that it can justly be described as looting and that at least three officers controlled the looting by virtue of their positions within CI. The execution of the orders of Gen Lazarus and Gen Mdluli in this regard was carried out by several subordinate officers within CI. Lieutenant Colonel Naidoo was prominent in the execution of their criminal schemes.

RECOMMENDATIONS

108. The allegations of Col Naidoo include claims that two Ministers of Police, one former and one present, were implicated in corrupt conduct committed by Gen Lazarus. These allegations do not appear to be corroborated by any evidence produced to the Commission. This does not mean that such evidence does not exist. Whether those allegations, and others made by Col Naidoo, justify further action against any individual depends on the evidence uncovered by those investigating the allegations in accordance with law.

109. There is evidence that Gen Mdluli appealed to President Zuma to help him in his efforts to escape from the consequences of his crimes in return for the assistance of Gen Mdluli in getting President Zuma elected. However, there is no evidence that President Zuma responded to his overture.

110. The conduct of Adv Mrwebi and Adv Jiba in relation to the withdrawal of the charges preferred against Gen Mdluli gives rise to a suspicion that something more sinister was behind the decision to withdraw other than simple professional incompetence and ineptitude. On a balance of probabilities, the evidence before the Commission does not extend sufficiently to convert the suspicion into a conclusion adverse to these two officers of the court.

111. There is no evidence that either Gen Lazarus or Gen Mdluli conducted their criminal depredations of the secret funds entrusted to their custody for any purpose beyond their own personal enrichment and that of their friends and family. It is also apparent that they provided largesse to certain of those who they feared might be in a position to uncover their wrongdoing (i.e., to implicate such persons in their schemes as insurance against exposure). There is no evidence that they sought to influence national politics or capture institutions outside the sphere of CI. Compared to other aspects of state capture, where the misappropriations involved millions and indeed billions of Rands as well as the capture and subsequent impoverishment of state-owned enterprises, the criminal conspiracies of Gens Lazarus and Mdluli appear to rank them as relatively small-scale hoodlums.

112. This contextualises the crimes exposed by the evidence before the Commission and does not mitigate or minimise the extent of crimes proved to have been committed and likely to have been committed. Those identified were placed in positions of the highest trust in an institution critical to the functioning and the protection of society. They abused that trust over long periods of time for personal gain and corrupted their subordinates, who should have been able to look to them for example and guidance.

113. This memorandum concerns alleged and established criminal conduct by high-ranking SAPS officers. Historically and structurally, the main obstacles to the law taking its proper course have been that the

tendency of the SAPS to close ranks and obstruct the investigations into the conduct of their own and to abuse the system of classification of documents to protect their own.

114. When secret state funds fall under the control of scoundrels, as in this memorandum, only strong oversight institutions can protect the public against the harm that such scoundrels can inflict by invoking, when their conduct is called into question, the very secrecy that should exist only for the public good.

115. Quis custodiet ipsos custodes? - Who will guard the guardians themselves? This question is generally considered the embodiment of the philosophical question of how those in power can be held to account for their actions or inactions. The problem is as old as the institutions created to protect against wrongdoing but by their nature are equipped to evade detection and retribution when they go rogue. The allegations which Col Roelofse and his team set out with such determination to investigate and place before the prosecuting authorities for further action consistent with law is commendable. In the light of the evidence brought before the Commission and the report of the Commission Chair, no action is needed other than to ensure that the law takes its course.

116. The crimes and allegations and challenges in the SAPS, including the CI, as evidenced in this memorandum, can be best addressed if the President instructs the Minister of Police to take the following measures to:

    116.1 Satisfy himself or herself that the oversight institutions that exist to protect the integrity of the Secret Service Account are adequate to protect the state and the public against any risk of malfeasance and misappropriation and, if not, to take appropriate steps to strengthen such institutions

    116.2 Ensure that all investigations into corrupt conduct (in the broadest sense) within CI continue without any obstruction and receive the appropriate support from all units within SAPS; and

    116.3 Ensure that those members of SAPS who have been tasked with investigating corrupt conduct within CI are given access by SAPS to all documents which may be relevant to establish the guilt or innocence of any person in relation to such corrupt conduct, while at the same time ensuring that any legitimate state interest in preventing the wider dissemination of such documents is protected.

SABC

INTRODUCTION

1. The report of the Public Protector, no. 6 of 2016/2017 dated 14 October 2016, sub-titled “State of Capture”, included various allegations concerning the abuse of power raised against the South African Broadcasting Company (SABC). The following is stated in the report in this regard:

    > During the course of this investigation, I interviewed Honorable Julius Sello Malema (’Mr Malema’) to solicit any evidence in support of statements attributed to him in the media relating to the influence of members of the Gupta family. During the said interview, Mr Malema made the following allegations relating to SABC:
    >
    > > That the SABC, previously allowed government departments to communicate with the nation at no cost. This includes instances where Ministers required air time in order to make announcements and launch campaigns; and
    > >
    > > SABC has since entered into a partnership agreement with the New Age newspaper and government departments, including Ministers are required to pay either SABC, New Age newspaper and/or the relevant partnership to appear on SABC for purposes of communication with the nation.

The above allegations were confirmed by Minister Mbalula during an interview with him on this investigation.

Following the above allegations, I have decided to investigate any contract(s) awarded to the New Age newspaper and/or TNA Media by the SABC. The investigation into SABC will however form part of the next phase of the investigation.

2. The Public Protector briefly dealt with the arrival of the Gupta family in South Africa, gave an outline of their business activities and mentioned that they had started a media company called TNA Media, which published a newspaper called The New Age (TNA) and owned a television channel called ANN7. The Gupta family are known friends of the former President, Jacob Zuma. His son, Mr Duduzane Zuma, was also involved in various business activities with the Gupta family. The New Age newspaper had also secured contracts with some provincial government departments and state-owned entities (SOEs), most notably Eskom and South African Airways, but also the SABC.

3. In her report, the Public Protector referred to an interview with Mr Maseko, the former CEO of Government Communication and Information System (GCIS). Mr Maseko informed her that late in 2010 he received numerous requests from members of the Gupta family for a meeting to which he finally agreed. On his way to the meeting he received a call from then President Zuma who said: (loosely translated from isiZulu): "The Gupta brothers need your help, please help them". He then met the brothers at their Saxonwold residence.

4. During the meeting, Mr Ajay Gupta had said to him that they were setting up a newspaper called TNA and that they wanted government advertising channelled to such newspaper. As GCIS CEO, Mr Maseko told Mr Gupta he was in charge of a media buying budget of just over R600 million a year. He also said that GCIS performed market research and decided on clients' target market before selecting the right medium of advertising. He added that GCIS did not have the advertising budget and that it was with the various departments. Mr Ajay Gupta then said that this was not a problem as he would instruct the departments to advertise in the newspaper. He added:

   tell us where the funds are and inform the departments to provide the funds to you and if they refuse, we will deal with them. If you have a problem with any department, we will summon ministers here.

5. A few weeks later he received a call from a senior staffer at TNA newspaper who demanded a meeting with him. Mr A Gupta called an hour later. Mr Maseko told him that he was on his way to a golf tournament on Saturday and that they could meet on Monday. The reply was: "I will talk to your seniors in government and you will be sorted out". Mr Gupta also said that "we will replace you with people who will co-operate".

6. It is clear from the report that the Public Protector envisaged further phases of investigations both in the context of the alleged irregularities involving TNA and other strategic SOEs such as Eskom. This did not occur for a number of reasons, but she did recommend that a Commission of Inquiry be appointed.

7. The Public Protector investigated the SABC after receiving several complaints about fraud and maladministration. Her Report, dated 17 February 2014 and titled When Governance and Ethics Fail, was an "Investigation into Allegations of Maladministration, Systemic Corporate Governance Deficiencies, Abuse of Power and the Irregular Appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)". The report identified systemic corporate governance failures at the SABC. The major issues identified are:

   7.1 The alleged irregular appointment and salary progression of Mr Motsoeneng, the Acting Chief Operations Officer. This included a "success fee" awarded to Mr Motsoeneng valued at (more or less) R11 million

   7.2 That Mr Motsoeneng allegedly fraudulently misrepresented his qualifications to the SABC, including stating that he had passed matric when applying for employment

   7.3 The alleged irregular appointment and salary progression of Ms Sully Motsweni and Ms Gugu Duda

7.4 The purging of senior officials at the SABC resulting in unnecessary financial losses in the CCMA, in court and other settlements

7.5 Irregular salary increases of various staff members that resulted in a salary bill increase in excess of R29 million; and

7.6 Alleged undue interference of the Department and former Minister of Communications in the affairs of the SABC, including giving unlawful orders to the SABC Board and staff.

8. On 25 May 2014, former President Zuma appointed Ms Faith Muthambi to the Cabinet as Minister of Communications. In the Cabinet reshuffle of 30 March 2017, she was retained as a Member of Cabinet, as Minister of the Public Service and Administration (DPSA). On 17 July 2017, Ms S. Fick, the Head of Legal Affairs at the Organisation Undoing Tax Abuse (OUTA), gave evidence concerning Ms Muthambi. In brief:

8.1 On 24 February 2017, the National Assembly's ad hoc Committee found that she "displayed incompetence in carrying out her responsibilities as Shareholder Representative (of the SABC)". The Committee noted "major shortcomings" in Ms Muthambi's conduct; and

8.2 The Western Cape High Court found that she had acted irrationally and unlawfully in appointing Mr Motsoeneng as COO of the SABC. The Supreme Court of Appeal made the same findings.

9. Mr BE Makhathini gave evidence on the current state of the SABC. In his view there was prima facie evidence that the SABC's primary mandate as a national public broadcaster had been compromised by the lapse of governance and management within the SABC, which ultimately contributed to the Boards inability to discharge its fiduciary responsibilities.

10. He stated in his introductory paragraph that:

> Like many of our state and public institutions that are the subject of this Inquiry into State Capture, the SABC has had a turbulent recent history and, at least from a financial point of view, the Corporation has been mortally damaged by the unlawful and irregular practices of a succession of boards and management.

11. According to Mr Makhathini, there appears to have been a flouting of governance rules, law, codes and conventions, including disregard for decisions of the Courts, the Independent Communication Authority of South Africa (ICASA), as well as the findings of the Public Protector. This collective conduct:

11.1 Rendered the SABC potentially financially unsustainable due to mismanagement because of non-compliance with existing policies and irregular procurement

11.2 Was manifested in interference in editorial independence, which is in direct conflict with journalistic ethics; and

11.3 Saw the purging of highly qualified, experienced and skilled senior staff members in violation of recruitment/human resource policies and procedures, and the replacement of purged staff, in many instances, without due consideration for, or compliance with, established recruitment policies.

12. The two reports of the Public Protector, as well as the evidence of several witnesses and their deposed affidavits to the Commission, thus drew attention to a variety of topics related to the SABC. Each is dealt with in more detail separately below.

THE NEW AGE NEWSPAPER AND ANN7

13. The introductory background has already been sketched in the Public Protector's report referred to above. Ms Yolande van Biljon, the SABC Chief Financial Officer (CFO) from 25 June 2018, provided evidence to the Commission on these issues from relevant books and records she had access to even though the events took place before her appointment.

14. As far as *The New Age* (TNA) was concerned, the relationship had the following purposes:

    14.1 TNA would supply newspapers on a weekly basis to the SABC; and

    14.2 With reference to a schedule, Ms van Biljon could determine that the SABC had made payment to TNA for the delivery of newspapers in the sum of R 908,035.57, including VAT.

15. Dr Ben Ngubane (now deceased), Chairperson of the SABC Board from January 2010 until March 2013, stated that he had not been involved in the negotiations on TNA.

16. Ms van Biljon also testified that:

    16.1 The SABC provided TNA with certain broadcasting services and more particularly outside broadcasting services which were conducted at various venues across the country

    16.2 From what she could determine, the SABC was never paid, nor did it invoice TNA for any of the so-called "breakfast shows" and other outside broadcasting services rendered by the SABC; and

    16.3 From the internal records she could determine that the costs incurred by the SABC in this context amounted to R 4,268,887 (excluding VAT). Travelling expenses alone amounted to R 2,784,009.

17. Dr Ngubane, Chairperson of the SABC Board at the time, stated that the SABC was required to build up audience ratings to increase advertising revenues. The breakfast shows were part of "Morning Live". There was no direct payment for the breakfast shows apart from SABC staff to record and broadcast the discussions. The SABC was merely bringing the audience to communicate with the Ministers; "Interest was very high".

18. Mr Hlaudi Motsoeneng, the SABC's Group Executive for Corporate Affairs prior to his dismissal on 12 June 2017, stated that his interactions with the Gupta family was solely as the result of the partnership between TNA and SABC and nothing of consequence was ever discussed with him. At no time did he ever receive any gifts or other rewards from the Gupta family. As far as the TNA contract and the "Business Breakfasts" was concerned, he was not in possession of any minutes of meetings and was also not involved in establishing the contract. In a number of instances, he merely signed as a witness.

19. Ms Mokhobo, a former CEO of the SABC, gave evidence on the "New Age Breakfast Briefings" and their cost to the SABC.

    19.1 She confirmed that no partnership or joint venture was created between TNA Media and the SABC. TNA undertook the main obligations to be able to host such event and would ensure attendance. At no stage was it envisaged that the SABC would invoice TNA for the services rendered and it was also not envisaged that the SABC would share in any profit made by TNA. In terms of the relevant legislation and policies within the SABC it was not permissible that the SABC derive any payment from any party in the sponsorship of any news events because this might limit and/or impede the impartiality and independence of the SABC.

    19.2 She was able to determine (subject to SABC finance officials confirming this) that the amount spent by the SABC in facilitating those outdoor broadcasts over a few years amounted to some R 20,326,980.

    19.3 She could also confirm that the events did not stay within the contract at the prescribed two events per month and suddenly escalated, and in certain cases almost doubled. The decision to allow for the escalation was entirely within the purview of the News Division. The contract was also renewed. It was signed by Mr J Mathews on 20 February 2015.

    19.4 It was only when she was presented with certain facts by investigators of the Commission that she became aware that TNA was charging the various SOEs it had engaged with and who were part and parcel of the various breakfast shows.

20. Mr R Sundaram, an employee of the Gupta family-owned Infinity Media, gave the following evidence on the "New Age Breakfast Briefings":

20.1 Mr Sundaram was told by Nazeem Howa that these "Breakfast briefings" were "insanely profitable" for them as the entire cost of broadcast was borne by the SABC. The New Age had to invest in just the flimsy permanent props and the cost of the venue and hospitality. It would appear that often the cost of the venue and hospitality was also picked up by the department or ministry that the dignitary came from. Further profits were secured by selling tables at these events.

20.2 Former President Zuma was informed that his Cabinet colleagues were reluctant to attend. Mr Sundaram was told by Nazeem Howa that Mr Zuma helped not only in convincing the ministers and officials to attend these events but would also persuade them to use taxpayers' money to pay for the venue and hospitality and ask stakeholders to buy tables at these events.

21. Further background on these issues is found in the affidavits and evidence of Mr Sundaram before the Commission. In his first affidavit of 5 April 2019 he gave a brief background summary of TNA and ANN7. His second supplementary affidavit is more detailed. He arrived in South Africa from India on 3 June 2013 and remained until 2 September 2013. During this time, he worked with the Gupta family-owned Infinity Media and worked as "Editor" to set up the 24/7 television news station called ANN7. During this period, he was part of four meetings between former President Zuma and the ANN7/ TNA teams. Three of these meetings took place at former President Zuma's official residence and the fourth at the Midrand office of ANN7.

22. The first meeting took place on 22 June 2013. He had earlier been told to prepare a detailed presentation about all aspects of the proposed TV project for the President. The presentation contained details of such a confidential nature as would normally only be shared with stakeholders. He was also told that the former President's son, Mr Duduzane Zuma, was a 30% shareholder of Infinity. He was told that Mr Ashu Chawla, a trusted employee of the Gupta family, would be the point person for the family at the President's office.

23. At the President's residence, they were ushered into a well-appointed room to the extreme right of the entrance. They were not frisked, were not asked to pass through metal detectors and were not required to give over names and details to any security personnel. Neither his cell phone nor his laptop was screened. Mr Chawla was waiting in the room when they entered. After about an hour the remaining members of the Gupta delegation appeared.

24. There was another delay during which Mr Ajay Gupta had explained the origin of the channel name. It had been suggested by the President himself during the last meeting they had with him on this issue. "Africa News Network" had been taken, so they decided to add the "7".

25. After a further delay former President Zuma entered the room and apologised for the delay. He and Arun were introduced. The President said: "I soon have to go back to the meeting I left behind. I know there are a lot of things to discuss, but like they say in Zulu we will just skin the animal today. We must leave the rest for later". Mr Sundaram handed the President a copy of the presentation and summarised the content.

26. Mr Zuma had a number of comments about what he preferred to see. For example, he did not like the repetitive news presented on eNCA. After that it was mentioned that they wished to discuss the newspaper and commercials, and that the television personnel should leave.

27. Mr Sundaram was later told by a member of TNA marketing team that the remainder of the discussions were crucial for the newspaper to get government advertising and bring hard-to-convince Ministers and officials in as guests on TNA's breakfast briefings.

28. After the so-called Waterkloof airport scandal, some Ministers and officials seemed reluctant to be seen in public with Atul Gupta or on a platform hosted by his newspaper. Atul told Mr Sundaram that these Ministers and officials were convinced after a nudge from the former President. The bad press and public outcry following that incident did not seem to have made any difference to the relationship between Mr Zuma and the Gupta brothers. In the three meetings with former President Zuma that he was part of, the two brothers bonded well with Mr Zuma and joked occasionally about the scandal.

It was like nothing had happened. The brothers had fairly free access to the former President's residence and he often defended his friendship with them.

29. The second meeting occurred during July 2013. It took place in the same room as the first meeting and was attended by all those who attended the first meeting. This time Mr Chawla picked him and Arun Gupta up from the Midrand office. The meeting reviewed the progress of various aspects of the studio project, but the primary focus was on "editorial content". When the President arrived, he was shown the channel ID, and said that it looked impressive. He made certain suggestions, namely that they should not convert this into a publicity channel for the ANC and himself as they would have no credibility. The views of the opposition and his rivals in the ANC had to be presented as well. However, because in his view eNCA only presented the government and himself negatively, they needed a channel that presents the positives.

30. President Zuma added that he would be in Mpumalanga the following week and that he would meet people in the local communities and announce measures for their welfare. He was sure that eNCA would not cover that event but would seek out opposition supporters and report negatively. The former President added that their teams should be present two days before him to do background reports. He was assured that this was possible.

31. It must be said at this stage that there was evidence that former President Zuma was indeed in Mpumalanga on 9 August 2013 to attend the Women's Day celebrations at Bushbuckridge. This lends credence to Mr Sundaram's version as to what President Zuma had told them in advance of the visit.

32. Mr Nazeem Howa then asked the former President to recommend journalists and presenters. The name of Mr Jimmy Manyi came up for the first time. Mr Zuma offered to speak to him regarding talk-shows. He also wanted to know the names of any other high-profile journalists who would be selected. Mr Sundaram added that it was strange to him that the President would allocate two hours of his time on a Sunday to the ANN7 project. The intensity of his interest in the project was like that of a full shareholder.

33. Mr Sundaram later asked Mr Howa why the President showed so much interest in editorial and personnel matters. The reply was that his son, Duduzane, held a 30% share in the company. If the newspaper was able to get government advertisements, they would be able to break even in the first year. Mr Sundaram stated that if the news channel that he was heading would be pro-ANC and pro-Zuma and would be headed by people close to the President, or even chosen by the President himself, there would be a clear conflict of interest in light of the fact that the former President's son had shares in the newspaper and television news channel.

34. The third meeting took place in the first week of August 2013. It was also at the President's residence in Pretoria, but in the evening. Mr Williams was not present. The meeting was attended by Mr Duduzane Zuma, but his interventions were not significant. Having first been ushered into the waiting room, they proceeded to a larger room with a TV set. President Zuma then entered and was shown several news bulletins that they had produced. Mr Ajay Gupta added that the project was only about 50% complete. One visual showed Mr Julius Malema exiting a helicopter. Mr Ajay Gupta pointed out how "corrupt" he looked. These visuals had been bought from the SABC. The former President was very happy with the graphics and the bulletins. He did not want to be present when the channel was inaugurated because this would affect their credibility.

35. The next day he was told by Mr Howa and Mr A Gupta that they had secured R20 million worth of business the previous evening.

36. By this time, Mr Sundaram had decided to resign as editor at ANN7 and to return to India after the launch. What really pushed him was the violation of editorial integrity and dubious commercial dealings.

37. The fourth meeting was held at the Midrand office of ANN7 on 19 August 2013 just two days before the station was to go on air. The usual attendees were there, as were Mr L. Goel, Mr Duduzane Zuma and former President Jacob Zuma, who toured the studios, newsrooms and technical areas and met

the staff. Mr A Gupta insisted that no recording be made of President Zuma's visit. Mr Zuma himself said that any association with him at that time would be bad for both of them.

38. Mr Sundaram made a further supplementary affidavit on 22 January 2020. He confirmed that a book he had written on the events described above gave a true account of his experiences while working as "Editor" during the setting up of ANN7 in 2013.

39. Mr M Williams made an affidavit but did not give oral evidence, nor did he apply to cross-examine anyone. In September 2012, he took up the position as editor of TNA and retired in June 2017. In the interim he also served as editor-in-chief of ANN7. He gave details of him having met former President Zuma on numerous occasions since 2012, mainly at breakfast briefings. This was not uncommon for journalists at all. It was only in that professional capacity that he attended one meeting (not two as Mr Sundaram attested to) at the President's official residence.

40. According to Mr Williams, it was widely known that TNA and ANN7 were inclined to report on the positive achievements of the government and the ruling party, rather than to focus on negatives as did the majority of news outlets. It was therefore preposterous to suggest that the former President would have had any input in editorial policy and discussions and commercial decisions relating to the newspaper and the television station. It would not be uncommon, though, to discuss in general terms with a person, such as Mr Zuma, the general approach a newspaper such as TNA or a television station such as ANN7 would follow insofar as its article or programme content was concerned.

41. Mr Williams added that Mr Sundaram should know, as does any seasoned journalist, that there was a "Chinese Wall" in all journalistic enterprises between journalists and its editorial staff, on the one hand, and management of the commercial enterprise on the other. The Gupta family in general never interfered with the editorial policy, direction or integrity of TNA for as long as he was involved in it. They also never interfered with the editorial independence of ANN7. Tensions between journalists and commercial managers do exist, however. They have different aims and purposes in mind.

42. Mr Williams denied that former President Zuma had a direct say in the commercial aspects of the newspaper and the television station in order to secure lucrative government advertising for the television station. He added that the Commission could easily verify this with reference to information readily available on what the advertising content of the TV station was immediately after the launch and for a considerable period thereafter.

43. He also denied that he, with others, stayed on in a meeting with Mr Zuma to discuss advertising support for TNA. This was simply false and in any event hearsay evidence. He also denied the version that representatives of the television station were asked to leave the meeting in order for a discussion to take place in relation to the commercial affairs of the newspaper.

44. Mr Williams denied that he had participated in three meetings at the residence of the then President. He was also not present at the studios on 19 August 2013. It must be remembered that a careful reading of Mr Sundaram's affidavits will show that his second affidavit contradicts his first insofar as the presence of Mr Williams at the President's residence was concerned. In the second affidavit he says that Mr Williams did not attend the third meeting. He also did not specifically say that Mr Williams was at the studios on 9 August 2013, but merely referred to the "usual attendees". It must be asked, however: why would the editor of the channel not be present on such an occasion? Mr Sundaram also contradicted himself in regard to the presence of Mr Duduzane Zuma at these meetings. In his first affidavit he said that he was never present, while in his supplementary affidavit he said that he was present at the third meeting. His evidence must be viewed with a degree of caution.

45. Mr Williams stated that he did attend one meeting with the former President on an off-the-record basis to discuss the general objectives of the television station, its imminent launch and how it would pursue the "objective" reporting pertaining to government and the ruling party. This was not out of the ordinary. This meeting could well have been on 22 June 2013, the date Mr Sundaram referred to. He noted that Mr Sundaram could not recollect the dates of the second and third meetings. He also denied that Mr Duduzane Zuma was present at the single meeting that he had with the President. Access records to the official residence would belie the version of Mr Sundaram. He also denied that

the ANN7 delegation was permitted to circumvent the security measures.

46. The core issue here is: what was discussed with the Gupta delegation and why? Is it correct that much of Mr Sundaram's version is either trivial, or of a hearsay nature? It is unfortunate that Mr Williams took a passive stance in these proceedings. His attitude was simply that, inasmuch as no wrongdoing was attributed to him, there was no need to testify or to cross-examine anyone. If there were indeed four meetings as described by Mr Sundaram, the reasonable deduction can be made that then President Zuma showed an extraordinary interest in the Gupta family and the television channel as well as TNA. The important question to be answered is: why? Was it merely for the benefit of the ruling party, or did his son's 30% shareholding play a role? Both scenarios are feasible, and the one conclusion would not exclude the other.

47. Of significance is that an insolvent Corporation pays some R908,000 for an unsolicited newspaper delivery, and some R4,2 million for outside services relating to the ANN7 breakfast shows. No reasonable adjudicator would accept that this was just a coincidence, totally unrelated to Mr Zuma's extraordinary interest in TNA and ANN7, or the fact of his son's said shareholding.

SALE OF THE SABC ARCHIVES

48. Mr Sundaram also dealt with the above topic in his first affidavit. He was told by a Gupta joint venture partner, Mr Goel, that their company had concluded an agreement with the SABC relating to the purchase of one hundred hours of archived video footage for what he called "peanuts". The actual market value of this footage would rise significantly over decades, including priceless footage of former President Mandela that would be worth millions of dollars. He was told that the SABC officials were persuaded to sell this footage for far less than the market value.

49. Mr Sundaram also testified that Mr Nazeem Howa from Infinity Media told him that, given the close relationship between the Guptas and Mr Zuma, no one at the SABC would dare to question this deal. As per the said agreement, the relevant footage would be transferred to an ANN7 tape that could later be digitised. The SABC had no way to monitor the use of such footage, although it appeared that ANN7 had agreed to pay the SABC every time the footage was played.

50. Mr JJ Scott, a sales executive within the news agency at the SABC, made an affidavit and gave evidence on the transaction involving 2000 minutes' worth of archive footage with Infinity Media during October 2013. His responsibilities included the sale of archive content to the general public and commercial enterprises. This would be footage of new and other key events that the SABC would have captured over the years. The sale of such materials generated revenue for the SABC.

51. During June/July 2013 he received a call that the acting CEO, Mr Hlaudi Motsoeneng, wanted to know how the sale of archive footage works as he had an external inquiry. He met with Mr Motsoeneng and explained the process. He was told by Mr Motsoeneng that he should expect a call from a new customer. Later he received a call from Mr Nazeem Howa, who requested an appointment. They met, and he explained the sale process of archive material. He was not told that the inquiry related to ANN7 or Infinity Media, nor exactly what was required. Later that day he met his manager, Mr J Mathews, to discuss this project and how they should price the requested 2000 minutes of content. Mr Mathews was the person authorised to deviate from the standard price guide. Under normal circumstances they would have charged "R100 per minutes of footage transferred and taken away". This transaction would have been the biggest sale his division had ever made to a single customer. They then decided, given the volume of content required, to deviate from the said standard price, and rather charge R70 per minute. This was the first time that they had offered such a discount. Mr Howa accepted this quotation.

52. The transfer of archive footage took place over about one month, facilitated by Mr Masimule, Mr Scott's assistant, who would sit on almost a daily basis with Mr Rahul of ANN7. Mr Scott had signed all the required documentation. They did charge for the agreed-upon 2000 minutes of content, although only 1982 minutes were taken. The necessary invoice was generated in the amount of R159,600, and is dated 10 October 2013.

53. As per paragraph "G" of the said Price Guide, the SABC charges R2000 per 30 seconds or part thereof for broadcasting rights of copied content. A specific process was followed in this context: the SABC would send an email to Infinity and enquire if any content was used for a given month. Infinity would then reply with a declaration indicating the minutes used, and Mr Scott would then raise the appropriate invoice. Unfortunately, however, there was no process in place to confirm how much content was in fact used.

54. The weak link in the process relating to actual data or footage used is obvious, but from Mr Scott's evidence no impropriety can be gathered. It is clear, however, that by 2013 the Guptas already had a relationship with Mr Motsoeneng.

55. Ms Yolande van Biljon testified before the Commission that she was able to determine the following from the relevant records on the agreement described by Mr Scott:

    55.1 Infinity was issued invoices amounting to a total of R405,840 (incl. VAT)

    55.2 Infinity did make these payments; and

    55.3 At no stage did the SABC make any payments to Infinity.

56. Mr Motsoeneng testified that his role was to direct the ANN7 management to engage the person who was responsible for the Archives. He was not involved in the "debacle".

EDITORIAL INTERFERENCE

57. The Public Protector's earlier investigation of the SABC alleges that various politicians interfered with the editorial integrity of the news operations of the SABC. A number of witnesses dealt with this topic at the Commission. Mr J.D. Krige was employed by the SABC from April 1990 until he retired in May 2019. His last position was at the RSG Current Affairs team as executive producer. He referred to several instances of direct editorial interference from his line managers. On 5 February 2014, at 09:30, the former acting head of Radio News, Ms S Ditlhakanyane, came into his office and informed him that they could not report on any Economic Freedom Fighters (EFF) activities. She said it was an order from the then Chief Operating Officer (COO), Mr Hlaudi Motsoeneng. He objected, but she replied that they had no choice as it was a directive from the top. His reply was that they would not ignore the EFF on broadcasting news. A while later he received a call from Mr Mathews, the then Head of News, to see him in his office. In the presence of Ms Ditlhakanyane he was given a speech about not conforming to the rest of the SABC, and Mr Mathews accused him of thinking that they were an island on their own. Mr Krige replied that he would listen to every instruction and evaluate it before complying.

58. On 26 May 2016, the SABC issued a media statement declaring it would not cover violent protest action. On 31 May 2016, a studio interview was conducted with Mr Motsoeneng accompanied by his advisor Mr Anton Heunis. A debate ensued thereafter, and as a result Mr Krige was summoned to the office of Mr Motsoeneng.

59. Mr Krige recalled the following discussion at this meeting:

> Mr Hlaudi: We are cleaning up the organisation. This is a new SABC. You must adapt or find a job somewhere else. Editors' forum must go. It is advertising for rival newspapers. I do not believe in research. You must defend the organisation. No journalist is independent. The COO has the final responsibility for news.
>
> Mr Jimi Mathews: It is cold attitude. If you don't like it you can go. You've got two choices: the door or the window.

60. On 6 to 7 June 2016, the senior editorial staff attended a pre-election workshop where Mr Motsoeneng made the following statements, according to Mr Krige's notes:

> Do not focus on negative stories. I am the one in charge. News is now part of operations. We can change the world. We must have news with content. I am in charge. You must adhere

to any instruction. President Zuma is the President of the country. I don't regard him as ANC. You cannot treat him the same. We will give him more time. And you can question everyone (Mantashe et al) except our President. We need to respect him, especially you SABC. I expect you to align with my instructions.

61. Ms K Pillay confirmed the above quote. She also mentioned other disturbing incidences. In February 2016, a day before former President Zuma's State of the Nation Address (SONA) she received an instruction that there would be no analysis of the address. She protested to the General Manager of Radio News but was told that they had no choice in the matter. On 23 August 2016, Parliament's Portfolio Committee met the SABC board. She was again instructed not to include analysis on this story.

62. On 7 June 2016, a SABC News Election Workshop was held, and minutes were taken. According to Ms Pillay, Mr Motsoeneng said the following:

    I am in charge of editorial content. President Zuma is the President of the country. That's how we cover him. Can't treat him like anyone. Talks about SA. Treat the President with respect. Question the politicians as much as we like. Align yourself with this.

63. Mr M Phiri, the Executive Producer in the SABC Current Affairs department, was the Executive Producer at the time of "Question Time", a current affairs programme whose mandate was to interview various sources for clarification of important issues in the public interest. They invited the then Public Protector, Adv Thuli Madonsela, onto their platform. At that time Question Time was pre-recorded. Adv Madonsela was invited for 18 February 2014. Earlier they heard that an interview with her scheduled for SAFM's "Forum at Eight" had been cancelled. They nevertheless recorded her interview but hid the final recorded tape until it went on air on 18 February 2014.

64. Local government elections were held in March 2014. The EFF, through Mr Julius Malema, had just released the party's election list. He was invited to Question Time. The newsroom was at the time abuzz with Mr Motsoeneng's close ties with the then President and inviting a person like Mr Malema was going to be seen as an affront to their boss's reputed relationship with Mr Zuma.

65. Mr Malema entered the SABC on the morning of 18 March 2014 just as the Head of TV News, Mr Mathews, was leaving the building. Mr Mathews then sent the Executive Producer, Mr K Skhosana, to follow Mr Malema and to stop whatever interview he had come for. They recorded the interview nevertheless and made two copies to avoid confiscation. The interview went on air on 19 March 2014.

66. Ms Thandeka Gqubule-Mbeki, an Economics Editor at the SABC, became involved in a struggle for independent public broadcasting. She was dismissed as part of the group known as the "SABC 8" for their objection to the "Protest Policy" introduced by Mr Motsoeneng. She had also experienced personal harassment, smear campaigns and death threats. She mentioned two instances of political interference with the editorial independence at the SABC. She was engaged by Ms N Maseko, "who had been appointed mysteriously and inappropriately over us" to lead the TV news division, about how to cover the fall in the currency after the sacking of the former Minister of Finance, Mr Nhlanhla Nene. She was told that they should editorially veer away from explaining the link between market perceptions of the dismissal of Minister Nene by President Zuma and the fall in the fortunes of the currency and its effect on the market. She obviously objected as the currency had plunged in relation to the rest of the basket of currencies on the Emerging Market Index. She was of the view that this instruction amounted to an attempt to bend the facts and to deceive or mislead the public.

67. On another occasion, Ms Gqubule-Mbeki was given a file by Ms N Molete of alleged misdemeanours committed by Mr Pravin Gordhan at SARS. She was told that this file had been furnished to the News Division by Mr Jimmy Manyi. She looked through the file and documents and found them to be flimsy. She was only "let off the hook" when she asked that those who had made various allegations should lay charges at a police station by way of an affidavit. This would protect her from a possible defamation suit. She was told that this would be conveyed to Mr Manyi, but she never heard of this again.

68. Mr Magopeni joined the SABC as Head of News in March 2018. Below, in summary form, is the situation he found at the SABC News Division at the time:

    68.1 There was no effective capable leadership to guide the work of the division, while the leadership was mistrusted

    68.2 There was a general sense that management of the division was compromised; and

    68.3 Issues were endemic and deeply entrenched.

69. As a result of the sustained period of editorial transgressions, serious ethical drifts, editorial bullying by external parties, corporate bullying of newsroom staff, the news operation was characterised by the following:

    69.1 No existence of either editorial or administrative philosophy to guide management thinking and decision making

    69.2 No expressed and commonly understood value system to guide conduct in the news operation

    69.3 Crippling fear, anxiety, resentment and tensions, as well as unproductive staff

    69.4 A paralysed editorial system that could not enable ethical editorial decision making

    69.5 Lack of transparency and accountability in management decision making

    69.6 Management who tolerated and nurtured unethical editorial practices

    69.7 Extremely low morale, lack of motivation and employee engagement

    69.8 No clear lines of command as journalists were getting instructions from everywhere; and

    69.9 An environment where politicians thought that they had a say in editorial decisions.

70. There is ample and credible evidence of the abuse of power by Mr Motsoeneng, and, in all probability, with the tacit, if not express, approval of former President Zuma when one keeps the evidence of Mr Sundaram and the role of the ANN7 channel in mind.

THE MULTICHOICE CONTRACT

71. On 15 May 2013, when MultiChoice wrote a set of proposed provisions to the SABC COO, Mr Motsoeneng, that would form the basis of a MultiChoice / SABC Multi-Channel Agreement (MCA), MultiChoice had seen an opportunity to bring about a major policy shift in government's digital terrestrial TV transformation project.

72. Mr LR Kruger, Technical Advisor to Ministers Dina Pule and Yunus Carrim between January 2012 and July 2014, described the Digital Terrestrial (DTT) project roll-out for South Africa at the Commission. In essence, the Government's Broadcast Digital Migration (BDM) project is about converting the "old" analogue TV and Radio transmission/transmitter equipment to the latest digital broadcasting equipment. The BDM project arose from a decision taken in 2008 to provide ± 5 million set-top-boxes (STBs) to poor households, at no cost, to ensure that most of the population could receive television and radio signals on all TV sets irrespective of how old the units were. One of the critical capabilities of the control system is that of encryption. This function "scrambles" data to prevent unauthorised "taping/copying" of TV and radio programmes.

73. Mr FL Mutuvhi, Chief Director: Broadcasting Digital Migration with the Department of Communications, testified before the Commission that analogue television is the means by which video and audio is sent to the viewer over the airways using a terrestrial transmitter (tower) where a normal TV can receive it without an external device. Digital television is the means by which video and audio is sent to the receiver over the airwaves using a digital terrestrial transmitter (tower) where a normal TV can receive it using an external device called a decoder/set-top-box.

74. The objective of the BDM programme is to release radio frequency spectrum divided through migration of television broadcast from analogue to digital platforms without people losing television broadcast signal. The programme is to be achieved through connecting citizens to digital networks by means of digital decoders (terrestrial and satellite) – as well as integrated television sets.

75. The objectives of the Government's 2008 BDM policy were the following:

    75.1 Strengthening South Africa's capacity to be a more effective information society and knowledge economy

    75.2 Reducing the digital divide between the rich and poor

    75.3 Releasing much-needed radio frequency spectrum for wireless broadband and mobile communications

    75.4 Stimulating the development of the local electronic manufacturing industry and job creation

    75.5 Provision of e-Government services

    75.6 Encouraging additional television channels and in different languages to promote access to information and contribute towards nation-building

    75.7 Providing a framework for community television and mobile broadcasting services

    75.8 Providing access to broadcasting for people with disabilities

    75.9 Developing the electronic manufacturing industry; and

    75.10 Encouraging the creative industries.

76. However, according to the SABC's CEO at the time, Ms Mokhobo testified before the Commission that:

> The country-wide digital migration programme has been stalled for 11 years now since its policy, the Broadcasting Digital Migration ("BDM") Policy was approved by Cabinet and reflected in the Government Gazette on 8 September 2008. This resulted from a seeming lack of policy agreement and/or implementation coherence as the Ministerial leadership of the Department of Communications changed hands.
>
> The Department of Communications effectively changed hands 10 time in as many years, resulting in real leadership crisis as the broadcasting sector found itself with no solid Digital Terrestrial Television ("DTT") direction as it pertained to Set Top Box ("STB") technology choices, despite the provisions of the then existing BDM policy of 2008.

77. Mr Kruger testified that Sentech (the Government owned TV and Radio signal distributer) already had a STB control system in place and fully operational and working with trained staff. During March 2012, he wrote to Minister Pule informing her of Sentech's capabilities. Initially the SABC technical team and management agreed to Sentech providing STB control in the DTT network, and agreements were drawn up by Sentech indicating costs, responsibilities, etc. for the use of the STB control system. The SABC and eTV were on the verge of signing agreements with Sentech when Mr Hlaudi Motsoeneng, the acting COO of the SABC, suddenly decided that the SABC would no longer require STB control.

78. On investigating the reason, it turned out that Mr Motsoeneng had signed an agreement with MultiChoice in which the latter "banned" the SABC from using a STB control system on the DTT network. Among the reasons MultiChoice was providing – and which had convinced Mr Motsoeneng – was that a STB control system would render the SABC TV channels no longer "Free To Air" (FTA), supposedly meaning that all South African citizens would have to pay to watch TV. Mr Kruger's view was that this was all nonsense, as all FTA channels were just that: no viewers of FTA channels would have to pay to watch. MultiChoice's network is fully encrypted, which is just to protect the network and the data travelling on the network. According to Mr Kruger, the conclusion of the Department of Communication project team was that MultiChoice did not want another Pay TV channel operator in South Africa.

79. Ms L Mokhobo testified that on 6 June 2013, the SABC Interim Board and MCA's Chairman, Mr Letele, CEO, Mr Imtiaz Patel, together with Mr Greg Hamburger had met to discuss the substance of the future Multi-Channel Agreement. Of contention, as may be gleaned from the verbatim minutes of the said meeting, were two provisions that effectively dictated the SABC's 2008 Digital Migration Broadcast (BDM) policy-based strategy on STB encryption. They stated the following:

    79.1 Point 9: "The offer presupposes that all SABC Channels on its DTT platform will be made available to the public unencrypted, without a conditional access system and thereby incidentally receivable by the MCA DTT decoder;" and

    79.2 Point 10: "MCA, the SABC, Sentech (if required), work together to promote carriage of all the SABC's free to air channels on the SABC free-to-air multiplex will be made available to MCA satellite platform, subject to available capacity. This is in order to enable the SABC to generate revenue from day one."

80. Ms Mokhobo claimed that she was joined by an SABC Board member, Mr Mavuso, in categorically stating that points 9 and 10 were not enforceable through the future Multi-Channel Agreement, and entirely dependent on the Department of Communications (DOC) and government deciding to amend the 2008 BDM Policy to reflect the change. Moreover, the DOC had begun a Must-Carry Regulations review process, which could ultimately lead to the SABC being paid for any channels that were broadcast through MCA and other satellite platforms.

81. However, the CEO of Multichoice, Mr CP Mawela, stated in a 170-page responding affidavit prepared for the Commission that on 19 June 2013 Ms Mokhobo wrote a letter to MultiChoice (copying Ms Tshabalala, the Chairperson of the SABC Board). The letter reads as follows:

    > The Board and Executive Management has duly considered MultiChoice's proposal... and we are pleased to inform you of the decision to proceed in accordance with the proposal as the terms that will be agreed between the SABC and MultiChoice.

82. In a letter dated 20 June 2013, MultiChoice replied to Ms Mokhobo's letter of 19 June 2013. Mr Mawela was of the view that it is inexplicable that Ms Mokhobo did not disclose this letter in her affidavit or in her evidence to the Commission. Her failure to do so casts a cloud over the whole of her testimony as to how the agreement was concluded. Mr Mawela's response to Ms Mokhobo's letter was as follows:

    > Dear Lulama, Thank you for your letter dated 19 June 2013. We are delightful that your board has agreed to the broad terms as contained in our letter of 15 May 2013. We are in the process of drafting the agreement on this basis. I am informed that our legal teams have already been in contact and will liaise on the finalisation of the documentation as soon as possible. We share your excitement about this mutually rewarding project.

83. It is important to note that Ms Mokhobo did not respond to MultiChoice's letter of 20 June 2013, nor did she give any indication to MultiChoice that it had misunderstood the purport of her letter.

84. The parties then proceeded to draft the SABC Agreement in accordance with the terms of the MultiChoice proposal. The initial draft agreement was circulated by MultiChoice to the SABC on 27 June 2013. The SABC made comments on 30 June 2013. After some discussion via email, further versions of the draft were circulated on 3 July 2013, and the Agreement was signed later that day. Ms Mokholo had taken emergency leave of absence from work on 2 July 2013 and returned to work on Monday 8 July 2013. On 3 July 2013, Mr Hlaudi Motsoeneng, Mr Tiaan Olivier and Ms Ellen Tshabalala, chair of the board, signed the agreement on behalf of the SABC, and, according to Ms Mokhobo, effectively forced the SABC to declare the set-top box encryption mechanism as wholly unjustifiable. To them, the SABC's gain of a just over R500-million over a period of five years was far more important than the overall impact this was going to have on the total digital transformation trajectory of the country.

85. Minister Carrim, Minister of Communications between 10 July 2013 and 24 May 2014, set up a forum to try to get all parties to agree to using a STB control system or to come to a consensus as to how to run the South African DTT network according to the existing policy document. MultiChoice, supported

by Mr Motsoeneng, approved all suggestions of STB control in the DTT network. The Department in turn received support from both the then CEO, Ms L Mokhobo, and the then Chair Ms E Tshabalala.

86. However, another change of Ministers again put the STB control system further in dispute when Minister Faith Muthambi, with full support of Mr Motsoeneng, decided to go against the Government and ANC recommendations that a STB control system be implemented in the DTT network.

87. Former Minister Carrim testified before the Commission that a key aspect of the debate between free-to-air (FTA) and Pay-TV broadcasters was that Pay-TV takes the FTA programmes for free and re-broadcasts them and uses the programmes to build market share. In so doing they acquired two revenue streams and subscriptions, which was unfair. STB control would allow FTA broadcasts to protect their content against unauthorised use. He gave details of the high concentration of the media industry, dominated mainly by Naspers which had a terrestrial subscription TV in the form of M-Net, owned by MultiChoice, that had more than 98% of direct to home (DTH) satellite subscription TV and controlled the country's internet service providers mainly through MWeb.

88. However, Mr Carrim conceded that despite allegations and counter-allegations of corruption, he himself could not attest to having personal knowledge of any fraud and/or corruption in respect of the SABC/MultiChoice Agreement. Nevertheless, according to the former CEO of the SABC, Ms Mokhobo: . . . certainly the interest of MultiChoice became paramount to Motsoeneng to the detriment of the organisation. Yes, he claims that he succeeded in bringing R500 million into the organisation, it was R100 million per year. There is somewhere where I do very roughly calculations about different scenarios for the SABC, that was very little compared to what the SABC was forced to concede as a result of this man.

89. In his testimony before the Commission, Mr Hlaudi Motsoeneng referred to the Electronic Communications Act 25 of 2002 (section 60 (3)) and ICASA Regulation 6 (1), which prescribed that "the PBS Licence must offer its television programmes, at no cost, to a SBS Licence upon a request from the SBS Licence". Any deal with MultiChoice was thus to give effect to the "must carry" regulations. He did not benefit therefrom.

90. Subsequently, the Competition Commission investigated this matter, and in its findings made on 9 November 2018 stated that the encryption aspect of the agreement resulted in a notifiable change of control as envisaged in section 12(2)(g) of the Competition Act 89 of 1998 as amended. The Competition Commission stated: "Being able to influence a policy on encryption materially impacted the structure of the market in that it protected MultiChoice's dominance in the PayTV market in that the STB Control would have significantly challenged the dominance of MultiChoice particularly in lower LSM segments of the market". This was also in violation of section 2 (h) of the Broadcasting Act 4 of 1999 which reads: " ... ensure fair competition in the broadcasting sector".

91. The Competition Appeal Court also found that the Agreement gave MultiChoice control over SABC's public policy on STB decryption capability but held that "the agreement per se does not prevent (the SABC) from adopting a public policy supporting encryption. What it does is to constrain it from encrypting the free-to-air for the duration of the agreement".

92. It was patently clear at that time that neither Mr Olivier, Mr Motsoeneng nor Ms Tshabalala (as the Chairperson of the Board) understood the gravity and future impact of their actions to both the public and the industry.

93. Additionally, the entire process leading to the signing of the contract was deeply flawed in that it flouted the SABC's own Delegation of Authority Framework of 2012. Former Minister Carrim testified that there had been no SABC Board approval prior to signature, and that Mr Motsoeneng did not have the legal authority to sign such an agreement on behalf of the SABC.

94. The MultiChoice agreement came up for renewal in mid-2018 and, according to Ms Mokhobo, a new contract is in place. It was approved by the new Board, negating much of the "evidence" that it had been improperly entered into.

95. According to Mr CP Mawela, Multichoice CEO, in his 170-page responding affidavit, MultiChoice

acquired the right to distribute and market specific subscription and free-to-air channels developed, produced and made available by the SABC. These channels are the Entertainment Channel, the News Channel, and the SABC free-to-air digital terrestrial television channels. The SABC received fees in consideration for the rights to broadcast and distribute the said channels and was also entitled to all revenue received from sales in respect of advertising and sponsorship on all of its channels. The SABC also acquired the right to distribute a MultiChoice free-to-air terrestrial entertainment channel. Certain technological requirements were included, and one such was that the SABC's free-to-air digital broadcasting signals should not be encrypted for the duration of the Agreement.

96. According to Mr Mawela, the Agreement, concluded during the term of office of an interim SABC Board, survived the scrutiny of two subsequent Boards: the Board appointed in September 2013, which considered and debated the agreement before proceeding with its implementation; and the Board appointed in October 2017, which resolved to renew the agreement in August 2018.

97. Mr Mawela also drew the Commission's attention to the fact that the Competition Commission, after an investigation, reported on 9 November 2018 that in its view the SABC Agreement did not give MultiChoice control over the SABC archive.

98. Furthermore, it is clear from the objective evidence referred to above, and the conduct of the parties, that MultiChoice had entered the Agreement in good faith on the understanding that the SABC's representatives had obtained the necessary approval from the SABC Board and Executive Management and held the requisite authority to negotiate and conclude the agreement. It had no knowledge of any of the internal irregularities such as they were, and MultiChoice relied on Ms Mokhobo's personal assurance that the SABC Board and Management had accepted its proposal before the Agreement was signed.

THE ROLE OF FORMER MINISTER FAITH MUTHAMBI

99. On 17 July 2017, Ms S Fick, the Head of Legal Affairs at the Organisation Undoing Tax Abuse (OUTA), concluded an affidavit concerning then Minister Faith Muthambi.

100. Certain emails were retrieved from the server of Sahara Computers (Pty) Ltd, a company owned by the Gupta family. OUTA received a copy of these emails from an unknown source. Ms Fick states that amongst those emails were those that evidenced "crimes of corruption and high treason". This misconduct occurred during Ms Muthambi's tenure as Minister of Communications.

101. On 25 May 2014, then President Zuma appointed Ms Muthambi to the Cabinet as Minister of Communications. In the Cabinet reshuffle of 30 March 2017, she was retained as a Member of Cabinet, as Minister of the Public Service and Administration (DPSA). On 24 February 2017, the National Assembly's ad hoc Committee found that she "displayed incompetence in carrying out her responsibilities as Shareholder Representative (of the SABC)". The Committee noted that the evidence suggested "major shortcomings" in Ms Muthambi's conduct, particularly in relation to the SABC's Memorandums of Incorporation (MOI) and her role in Mr Hlaudi Motsoeneng's permanent appointment as COO. It concludes that ".... the Minister interfered in some of the Board's decision-making and processes and had irregularly amended the MOI to further centralise power in the Minister..." and condemned all political interference in the Board's operations by Minister Muthambi. The Committee recommended that then President Zuma should seriously reconsider the desirability of this particular Minister relating to the Communications portfolio.

102. The Western Cape High Court found that she acted irrationally and unlawfully in appointing Mr Motsoeneng as COO of the SABC in the face of the Public Protector's findings against him of abuse of power, fraud and maladministration. The Supreme Court of Appeal made the same findings in a prima facie basis against the Minister. It also criticised her for "treating with disdain" the allegation that Mr Motsoeneng's appointment was irrational and unlawful, and for raising technical objections rather than furnishing the Court with an explanation of her actions.

103. The Constitutional Court also expressed concern at her "evasive" and "suspicious" responses – or the

lack thereof – to pertinent questions raised by eTV as regards consultations she had with undisclosed parties.

104. The Gupta emails obtained from the Sahara computer server show that between July and August 2014, shortly after her appointment, Ms Muthambi sent a series of emails to Mr Tony Gupta on confidential matters of executive policy and matters in the scope of her ministerial powers. The correspondence suggests either:

    104.1 That the transfer of powers to her national portfolio was influenced and vetted by the Guptas; or

    104.2 That she used their relationship with the Guptas to influence the manner in which President Zuma transferred powers to her portfolio.

105. These emails were either sent directly from Ms Muthambi to Mr Tony Gupta, or indirectly from her to the Sahara Company's CEO, Mr Ashu Chawla, who in turn forwarded correspondence to Mr Tony Gupta and Mr Duduzane Zuma. The latter appears to have acted as a conduit between the Guptas and former President Zuma.

106. On 18 July 2014, Ms Muthambi emailed a copy of the President's Proclamation on the transfer of administration and powers to certain Cabinet members to Mr Ashu Chawla, who, in turn forwarded the email to Mr T Gupta. This Proclamation provided inter alia that all powers under the Electronic Communications Act 36 of 2005 and the Sentech Act of 1996 were to be assigned to the Minister of Telecommunication and Postal Services, then Minister Cwele. Previously they were assigned to the Minister of Communications.

107. A few minutes after emailing this Proclamation to Mr Chawla, Ms Muthambi sent a second email attaching a document which described the effect of Proclamation. On 25 July 2014vshe sent two emails to Mr Chawla again describing the effect of the Proclamation and also stating that Sentech's signal distribution must rest with the Ministry of Communications. Both emails of 25 July 2014 were subsequently forwarded by Mr Ashu Chawla to Mr Tony Gupta and Mr Duduzane Zuma, in separate emails.

108. The said Proclamation transfers power under section 3 of the Electronic Communications Act 36 of 2005 to make national policy "to the extent that it deals in any way with a broadcasting service or an electronic communications network used for as in the provision of broadcasting service".

109. On 6 December 2013, then Minister Carrim had used the power under section 3 by issuing for public comment draft amendments to the broadcast digital migration technology, the features of which were prominent:

    109.1 It proposed fixed dates for certain stages in the digital migration process; and

    109.2 It proposed that government would subsidise set-top-boxes capable of receiving encrypted signals. This was in accordance with ANC policy on the issue.

110. On 29 July 2014, Ms Muthambi sent an email to Mr Chawla giving notice of a Cabinet meeting the next day. She attached a memorandum that she had sent to Minister Cwele in connection with concerns that she had expressed regarding his intention to table final amendments to the Broadcasting Digital Migration Policy in Cabinet. Ms Fick expressed the view that this amounted to a gross violation of Cabinet confidentiality. This must be so. Mr Chawla forwarded the email and the document to Mr Tony Gupta later that day. Minister Cwele did not at any stage obtain Cabinet approval for his proposed amendments.

111. On 1 August 2014, Ms Muthambi sent an email to Mr Chawla to which she attached a draft of a Proclamation that the President had to sign. On 8 August 2014, one "Ellen" of Fortune Holdings emailed Ms Muthambi in reply thanking her for the proposed Proclamation that former President Zuma "must sign". The email was signed by "Zandile", presumably Ms Tshabalala, the SABC Chairperson at the time. "Zandile" copied Mr Chawla and a certain Khumalo at the SABC. The said draft Proclamation was never promulgated.

112. Ms Muthambi had policy on Broadcast Migration under her control, and on 16 March 2015 published her amendments under Government Notice 232 of 2015. It included neither of the two features of former Minister Carrim's draft of December 2013.

112.1 The policy no longer tied the Government to any dates for the digital migration process; and

112.2 The policy provided that Government subsidised set-top-boxes would not be capable of receiving encrypted signals. It thus reversed Minister Carrim's proposal which had been in accordance with ANC policy and replaced it with a decision that was contrary to it.

113. The communications described above amounts to an abuse of her office. There is no reasonable explanation for communications of this nature between a Minister and members of the Gupta group who control a television station subject to her regulatory jurisdiction.

114. Reference has been made to Ms Muthambi's irrational appointment of Mr Motsoeneng as permanent COO, which was set aside by the said Courts. It is most probable that Mr Motsoeneng's gross abuse of power at the SABC, including diverting public resources vested in the SABC to benefit the Gupta's rival media company, appear to have been sanctioned by both Mr Muthambi and then President Zuma.

115. Her actions should be referred to the National Prosecuting Authority if this has not yet been done. Her actions are in conflict with s 96 of the Constitution and her oath of office. There is also sufficient evidence on record to consider charges in terms of sections 3, 4, 7, 21 and 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004.

116. On 21 May 2021, Ms Muthambi appeared before the Commission. She was represented. She denied that she had sent emails to persons who were not entitled to be privy thereto. She merely "engaged" with various stakeholders, which included the Gupta family, who were the owners of TNA Media and ANN7 television at the time. She confirmed that she had made a statement which was undated and not sworn to, but she confirmed that it was true and accurate. She then raised preliminary objections on the basis that disciplinary proceedings were pending in Parliament and that those should run their course. She was still an MP at that time.

117. Ms Muthambi confirmed that she had sent an email to Mr Ashu Chawla on 18 July 2014. Attached to that was the Proclamation referred to above. She had no knowledge of whether Mr Chawla acted as a conduit between the Guptas and former President Zuma. Mr Chawla was merely a stakeholder in that context. Ms Muthambi admitted that she had sent all emails referred to by Ms Fick but did so as part of a consultation and engagement process with stakeholders. She also denied that she had changed any policy as suggested by Ms Fick, saying that previous policies had merely been in draft form. It was only in 2015 that the Digital Migration Policy was approved by Cabinet.

118. Ms Muthambi also denied that she had sent any confidential documents relating to the said Cabinet meeting inasmuch as that mentioned notification was not confidential. She also added that the fact that the Constitutional Court had criticised her as being "evasive" and "raising suspicious responses" was irrelevant because that Court had actually found in her favour regarding her powers. She also did not accept the finding of the Court that she had failed to disclose who she had consulted with. In any event she did not remember having been asked to disclose whom she had consulted with. She also denied that the reason of the said non-disclosure was that she had shared information with third parties (the Guptas) who were not entitled thereto.

119. The evidence of Ms Muthambi is unconvincing to say the least. She knew quite well that she had unauthorised communications with the Guptas, and for that reason most probably did not disclose to the mentioned Courts who she had consulted with. Her version that the Guptas in the given context were mere innocent stakeholders in a consultation process is unacceptable. If they were, there would have been no reason not to disclose that to the Courts. It is clear that she had abused her power in a number of instances.

CONCLUSIONS AND RECOMMENDATIONS

120. It is clear from the evidence relating to TNA and the creation of the ANN7 television channel that the Gupta family and their associates had a close relationship with President Zuma at that time and that he showed a particular interest in their ventures. Mr Hlaudi Motsoeneng, having regard to his own utterances as described by witnesses, and in some instances recorded, saw himself (and probably was) the facilitator between the former President and at the very least the news section of the SABC. Whether this was for President's personal benefit is impossible to say, but there is clear evidence that it benefited the ANC, and his son Mr Duduzane Zuma who had a 30% share in Infinity Media, a Gupta family company.

121. Most probably TNA benefited from government advertising, but it certainly benefited from being distributed (uninvited) at the SABC at a cost of some R960,000, as well as at Eskom. The breakfast shows cost the SABC over R4 million, with about half being spent on "travelling expenses". It is not clear if those funds can still be recovered from those who benefited improperly. The outdoor broadcasts which were initially planned for two per month, escalated beyond that and the evidence was that these cost the SABC some R20 million over a few years.

122. In respect of the mentioned archive deal there is no evidence of any impropriety, except to say that there was no process in place to determine how much content of the material bought had actually been used and in respect of which use the SABC would have been entitled to a fee of R2,000 per second.

123. Several witnesses gave credible evidence of editorial interference with reference to specific events that were not allowed either to be broadcast or to be commented upon. Former Minister Muthambi handed the reign over SABC editorials to Mr Motsoeneng, as it was put, and allowed him to act above the law.

124. One must wholly agree with the view expressed by Mr Makhathini, the Chairperson since 2017, that depoliticising is of paramount importance in the renewal, rehabilitation and strengthening of governance systems. Appointing competent and credible executives with the prerequisite skills and experience is at the heart of the renewal process.

125. As the two cases dealt with above - the Multichoice Agreement and the role of Ms Muthambi - illustrate, it is necessary that a statutory offence with severe penalties should be created dealing with the abuse of power by public officials in all spheres of government and organs of state. Abuse of power has become endemic in South Africa. It is a recurrent theme almost everywhere, be it perpetrated by Ministers or by members of the Boards of SOEs or their Executives.

WATERKLOOF

INTRODUCTION

1. The Terms of Reference for the Commission Inquiry into the landing, on 30 April 2013, of a Jet Airways charter flight JAI (the flight) at the Air Force Base Waterkloof (the "Waterkloof Landing") require that the Commission conduct an inquiry into:

   > Whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and or functionaries employed by or offices bearers of any state institution or organ of state or directors of the boards of SOEs.

2. To answer that question, one must examine the events and people that may have led to a positive response to the question whether the Waterkloof Landing was caused or influenced by any state official or public office bearer, and what offences or breaches of protocol were committed by any such

person/s. The examination will entail consideration of the oral evidence presented to the Commission and the documents placed before it. These will be discussed in more detail below.

3. Upon the direction of the Chairperson of the Commission, investigations and the legal inquiry was launched revealing the circumstances under which the commercial aircraft had been permitted to land at the Waterkloof Base. Twelve witnesses led evidence over seven days in July 2019. In testimony, they referred to some nineteen (19) exhibits, all of which have been examined. Not all the witnesses' testimony was relevant to the Inquiry, and mention shall be made only of the relevant oral evidence and the documents that are of importance.

The issue under investigation

4. A commercial Airbus A330-200, Flight JAI 9900, carrying Indian nationals which departed from India to South Africa landed on 30 April 2013 at the Waterkloof Air Force Base (Waterkloof Base), Pretoria. The intended purpose for the passengers was to attend the Gupta family wedding which took place at The Palace of the Lost City at Sun City.

5. The landing at the Waterkloof base of the commercial plane created a whirlwind of controversy throughout the country as the Waterkloof Base is a military base and a home to the Central Photographic Institute, the Joint Air Reconnaissance Intelligence Centre, the Electronic Warfare Centre, and the South African Air Force (SAAF) Telecommunications Centre. It is also utilised for presidential use and is classified as a National Key Point.

6. It was not contested at the hearing of oral evidence, nor in any of the documents before the Commission, that the purpose of the flight was to bring the guests of the Gupta family to a wedding of a family member at the Sun City hotel in the North-West Province. The officials who facilitated the landing had been advised, however, that there were several Indian Ministers of State aboard the flight. This proved to be false, as shall be shown.

THE INVESTIGATION PANEL

7. The circumstances in which the commercial airline had been permitted had been marginally probed by the Public Protector's office and in large by an exclusive investigation panel of Directors-General appointed by Mr Jeff Radebe, the Minister of Justice and the Crime Prevention and Security Cluster (JCPS). The investigation panel comprised of the following persons: Mr Dennis Dlomo, Acting Director-General of the State Security Agency (the Chairperson); Ms. Nonkululeko Sindane, Director-General of the Department of Justice and Constitutional Development; Mr Tom Moyane, National Commissioner of the Department of Correctional Services; and Dr CG Swemmer, Acting Coordinator of Intelligence.

8. The Terms of Reference given to the investigation panel were as follows:

   8.1 Determine the sequence of events prior to, during and after the landing of the chartered commercial aircraft at the Air Force base Waterkloof

   8.2 Assess the actual events in light of the established legislation, regulations, government and departmental protocols

   8.3 Interview and interact with relevant persons as to their understanding of established legislation, regulations, government and departmental protocols; and

   8.4 Make findings and recommendations to avert similar occurrences in future.

9. Ms N Sindane, who had played the leading role in the Panel's investigation, testified before the Commission on the process, the planning undertaken by the investigation panel, her role in the investigation panel, and interviews, documents and audio recordings considered throughout the investigation process. Her testimony was centred around the Justice Crime Prevention and Security (JCPS) Cluster Report, "Landing of a Chartered Commercial Aircraft at Air Force Base WaterKloof", 17 May 2013.

10. Numerous officials and individuals were interviewed by the investigation panel.

PRE-ARRIVAL PHASE OF A FLIGHT AT WATERKLOOF

11. The panel established the process that would ordinarily be followed prior to an aircraft landing at the Waterkloof Base:

    11.1 The Waterkloof Base would only receive flights classified as military flights, VVIP flights or VIP flights. The former would include Heads of State and/or Government and Ministers. No commercial or charter flights would receive permission to land except in an emergency. Only military personnel, Heads and Deputy Heads of State were permitted to make use of AFB Waterkloof.

    11.2 The Embassy or High Commission would forward a Note Verbale to the Office of the Chief of State Protocol requesting the assistance of government with the visit. The Air Force Command Post would then interact with the Department of International Relations and Cooperation (DIRCO) for clearance of state visits or VVIPs prior to issuing the clearance.

    11.3 Under the Customs and Excise Act 91 of 1964, Section 7(1A)(a), non-military and non-VIP flights seeking to land at an airport other than one of the ten customs and excise airports would need to obtain special permission prior to landing from the SARS Commissioner. This would especially be the case when the passengers are not subject to the Diplomatic Privileges and Immunities Act 37 of 2001.

    11.4 Once clearance had been granted, the Waterkloof Base would notify departments with immigration, customs, health, and port health sanitary responsibilities of the pending arrival to enable them to be in attendance at the time. This notification would take place in writing and/or via telephone notification. All the above departments would be notified of all incoming and outgoing flights. However, full protocol would only be provided during state and official visits.

    11.5 DIRCO would convene and chair an interdepartmental meeting to deal with official state visits; the meeting would include the Presidential Protection Unit for visiting VVIPs and Special Envoys. Protection for vehicle convoys of visiting delegations would be arranged at the national level by way of activation of the National JOINTS (National Joint Operational and Intelligence Structure) when the route crosses provincial boundaries. This is the responsibility of the National Commissioner of the South African Police Services (SAPS).

    11.6 The Department of Home Affairs would issue visas to the visitors against return flight tickets if travelling on a commercial flight, or if confirmed to travel on a charter flight.

ARRIVAL PHASE OF A FLIGHT AT WATERKLOOF

12. The panel established that the following procedures would ordinarily take place upon the arrival of an aircraft at the Waterkloof Base:

    12.1 Air Traffic and Navigations Service (ATNS) would manage the flight from its entry into South African airspace in terms of International Civil Aviation Organisation (ICAO) Standards; South African Civil Aviation Authority Regulations and Technical Standards; as well as the requirements and procedures published in the South African Aeronautical Information Publication.

    12.2 The receiving airport radar would manage the actual landing.

    12.3 Health procedures would take place according to the prescripts of Port Health.

    12.4 Customs procedures would take place according to the prescripts of the Customs and Excise Act of 1964 and the Diplomatic Privileges and Immunities Act of 2001. The latter Act quotes the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular

Relations of 1963, which confer inviolability on a Head of State, Foreign Ministers and Ambassadors; and lesser immunities and privileges on a Special Envoy, albeit with a certain degree of inviolability.

12.5 Immigration procedures would take place according to the Immigration Act 13 of 2002. The Act requires that civilians present themselves physically to the Immigration Officer for processing.

12.6 Firearms would be cleared in terms of the Firearms Control Act 60 of 2000.

12.7 Convoy protection for VIPs would be provided upon request by SAPS in terms of the approved Operational Plan under the Safety at Sport and Recreational Events (SSAREA) Act 2 of 2010.

THE SEQUENCE OF EVENTS PRIOR TO AND ON 30 APRIL 2013

13. In reference to the customary process ordinarily followed in respect to the pre-arrival and arrival of an aircraft at the Waterkloof Base, the panel established through the interviews, documents and audio recordings, that the following transpired which had been contrary to the protocol set out in respect to the processes of aircraft landing:

13.1 In February 2013, Mr Tony Gupta approached the Airports Company South Africa (ACSA) to enquire about the use of O.R. Tambo International Airport for the arrival of "at least five heads of state, ministers and senior Indian Government officials" invited to a four-day wedding event at Sun City.

13.2 Mr Tony Gupta, together with the Chief of State Protocol, Ambassador Koloane, attended a meeting to facilitate approval for Mr Tony Gupta. Mr Bongani Maseko, the Acting CEO of ACSA, and Minister of Transport, Mr DB Martins, were present at the said meeting. During the meeting, Mr Gupta requested to utilise the facilities at O.R. Tambo to welcome guests from India who were to attend the wedding.

13.3 Mr Tony Gupta's request was denied by Mr Maseko, as the space requested by Mr Gupta was being utilised by the Department of Home Affairs for checking passports and the landing and reception at O.R. Tambo would disrupt the arrivals process at immigration. ACSA suggested that alternatives be considered, among them, Lanseria or Pilanesberg airports. It was later determined that the runway at Lanseria was being upgraded. At a follow-up meeting and after enquiring with SAA, ACSA informed Mr Gupta that the tarmac at Pilanesberg could not accommodate an Airbus A330-200.

13.4 In early March 2013, Ms Nosiviwe Mapisa-Nqakula, the then Minister of Defence and Military Veterans, was approached by Mr Atul Gupta. The Minister's Political Advisor, Mr Michael Ramagoma, was approached by Mr Ashu Chawla on behalf of the Gupta family in seeking a platform to land the aircraft which was scheduled to arrive for the Gupta wedding.

13.5 During the latter half of March 2013, Mr Ramagoma, approached the Chief of the SAAF, Lt. Gen. Msimang, to determine the regulations governing the landing and taking off of civilian aircraft at Air Force Base Waterkloof.

13.6 The Chief of the Air Force informed the Political Advisor that it would be irregular for an aircraft carrying wedding guests to land at the Waterkloof Base. The Chief of the Air Force advised Mr Ramagoma that the matter should not be entertained any further. This was confirmed by Lt. Gen. Msimang in testimony at the Commission.

13.7 On 2 April 2013, Ambassador Koloane contacted Mr Ramagoma to enquire as to progress with the Gupta's request to land the aircraft carrying their guests. Ambassador Koloane relayed to Mr Ramagoma that he was "under pressure from No. 1" (alleged to be former President Jacob Zuma) on the matter. Mr Ramagoma stated that he was not in a position to respond at that time. The following day, Mr Ramagoma met with Mr Chawla to inform him that the Minister had denied permission for the aircraft carrying wedding guests to land at the Waterkloof Base.

13.8 On 4 April 2013, Mr Chawla then liaised with individuals in the Indian High Commission for assistance, resulting in a faxed letter being sent by the Indian High Commission at 15h38 to the Air Command Unit at the Air Force Command Post for Overflight and Landing Clearance for a "Chartered Flight" at the Waterkloof Base. The Chartered Flight was described by the Indian High Commission as a "Delegation Visit".

13.9 On 9 April 2013, Ambassador Koloane telephoned Sgt. Maj. Ntshisi at the Air Force Command Post to enquire as to progress with the clearance request from the Indian High Commission. Sgt. Maj. Ntshisi informed Ambassador Koloane that the Waterkloof Base could only receive flights transporting Heads of State and their Deputies. Ambassador Koloane responded that there would be "four to five Ministers on board". Ambassador Koloane added that the Minister of Transport, Mr Martins, had been given instructions by President Zuma to assist the Gupta family and that the Minister of Defence and Military Veterans had no objection to the landing of the aircraft at the Waterkloof Base. He also stated that at a meeting between Minister Martins, Mr Maseko and the Guptas, he had been instructed to assist the Gupta family and that the case of the landing of the aircraft at the Waterkloof Base was a unique case.

13.10 Sgt. Maj. Ntshisi requested a note or a letter from Ambassador Koloane. Ambassador Koloane responded that "the challenge was that this could not be put in writing". Ambassador Koloane informed Sgt. Maj. Ntshisi that he had met with Lt. Col. Anderson the previous week to show them around the area; and that Sgt. Maj. Ntshisi should contact Lt. Col. Anderson to confirm this. Ambassador Koloane confirmed in conversation with Sgt. Maj. Ntshisi that the request for the aircraft to land was for "the Gupta family wedding". Ambassador Koloane then instructed Sgt. Maj. Ntshisi to call him back.

13.11 Sgt. Maj. Ntshisi then telephoned Lt. Col. Anderson to enquire about the 217 Indian delegates that were requesting to land at the Waterkloof Base. Sgt. Maj. Ntshisi was then informed that Lt. Col. Anderson was not available and would return his call. Lt. Col. Anderson returned Sgt. Maj. Ntshisi's call. Lt. Col. Anderson stated that she had just spoken to Ambassador Koloane, who had informed her that Sgt. Maj. Ntshisi had rejected the request for the aircraft to land at the Waterkloof Base. Lt. Col. Anderson questioned Sgt. Maj. Ntshisi as to how he could have refused such a request from the Chief of State Protocol, Ambassador Koloane. In reply, Sgt. Maj. Ntshisi clarified that he had requested written confirmation from Ambassador Koloane. Lt. Col. Anderson then stated:

> I must be very careful now, our Number 1 knows about this. It is political. Allow them. Phone the Ambassador back to find out who's the senior Minister". It transpired later, in the testimony of Lieutenant Colonel Anderson, that Ambassador Koloane had said to her that the President had asked if everything was on track for the landing.

13.12 The Presidency subsequently, on 13 May 2013, denied that the President had given any instructions, or received any request, about a landing at the Base.

13.13 Sgt, Maj. Ntshisi then asked Lt. Col. Anderson to confirm that the Waterkloof Base could only receive flights carrying Heads of State and Ministers. Lt. Col. Anderson in response stated that it depended on the visit type, and that it would be acceptable for a private visit if DIRCO approved.

13.14 Ambassador Koloane then called Sgt. Maj. Ntshisi and stated to him: "I believe you have spoken to Col. Anderson?" Sgt. Maj. Ntshisi confirmed this and stated to Ambassador Koloane that he would go ahead with the clearance immediately. Sgt. Maj. Ntshisi then inquired from Ambassador Koloane whether he should fax the clearance to Mr Matjila, the Directorate State Visits at DIRCO. In response, Ambassador Koloane instructed Sgt. Maj. Ntshisi to e-mail a copy of the clearance for the aircraft to land to his private e-mail address and to his official e-mail address.

13.15 Ambassador Koloane then called Mr Matjila, instructing him to assist with the clearance of the Indian delegation. In response to the request for a letter from Sgt. Maj. Ntshisi, Mr Matjila for-

warded an e-mail sent to him by Ambassador Koloane's secretary, Ms. Morris. It stated: "As per your discussion with Ambassador Koloane with regards (sic) to the request for flight clearances and landing at Waterkloof AFB for the Indian Delegation, kindly note that Ambassador Koloane telephonically approved the request". Mr William Matjila forwarded this e-mail to various recipients within State Protocol at DIRCO.

13.16 A flight clearance certificate was eventually signed by Lieutenant S J van Zyl who had the authority to clear flights for the Base. He did so on the strength of various documents presented to him, and after talking to people at the Base. The clearance certificate indicated that an 'Indian Delegation' was the requestor.

13.17 On 9 April 2013, Captain Kutty of the Indian High Commission forwarded a request titled "Fuelling Requirement: VVIP Chartered Flight at AFB Waterkloof" to the Air Force Command Post requesting forty tonnes of fuel for "refuelling of the VVIP chartered aircraft" and requesting that this be included in the request for overflight landing and clearance.

13.18 On the same day, Lt. Col. S.J. van Zyl signed RSA05 External Clearance on the strength of the documentation received and conversations conducted that morning. The clearance was sent to Air Traffic Navigation Services (ATNS), the Civil Aviation Authority (CAA), the Department of Transport (DOT), the Department of Home Affairs (DHA), the Chief of Joint Operations, DIRCO and a Senior Staff Officer.

13.19 On 19 April 2013, the SAPS Provincial Commissioner of the North-West Province, Lt. Gen. Mbombo, received a letter from Ms. Ronica Ragavan, representing the Gupta family, requesting protection for the convoys that would be travelling from the Waterkloof base to Sun City.

13.20 On 22 April 2013, Sun City Security applied to the SAPS for an Event Risk Categorisation. The request was from Mr Claud Home, the Security Manager at the Entertainment Centre at the Sun City Resort. The application was forwarded to the Cluster Commander, Maj. Gen. P. Asaneng, and by the Provincial Commissioner to the North-West Province Crime Intelligence and Operational Response Services. On hearing about the nature of the visit, the Provincial Commissioner turned down the request, and also declined to attend the wedding as a guest.

13.21 A second application that emphasised the attendance of Indian Ministers at the wedding was then presented. The applicant requested that the event be categorised as High Risk; but the Deputy Provincial Commissioner: Operational Services, Maj. Gen. Mpembe, categorised the event as "Medium Risk" on 25 April 2013.

13.22 On 23 April 2013, the Waterkloof Base was informed by fax of the arrival information of the Jet Airways flight.

13.23 On 24 April 2013 the Indian High Commission requested Ambassador Koloane to assist with arranging the reception and logistics at the base. On the same day, Ambassador Koloane met with Lt. Col. Anderson and an individual in the Indian High Commission at the base to discuss arrangements in preparation for the arrival of the aircraft at the Waterkloof Base.

13.24 On 25 April 2013, an individual at the Indian High Commission sent the Air Force Command Post a written request for "Permission for Private Helicopters and Chartered Flights" to land at the Waterkloof Base. The request stated that the aircraft would be required to ferry the delegation from the Waterkloof Base to Sun City on 30 April 2013, and back again on 3 May 2013. Tail and registration numbers for the seven helicopters and two fixed-wing aircraft were provided.

13.25 A SAPS report stated that on 25 April 2013 the SAPS Cluster Commander, Maj. Gen. Asaneng, convened the Operation Bojanala and South African Music Awards plenary meeting at Sun City to initiate security planning. An Operational Plan with serial number 44/2013 dated 25 April 2013 was compiled. It was recorded that Maj. Gen. Asaneng would liaise directly with Maj. Gen. Gera of Gauteng SAPS to arrange for assistance. Gauteng Province did not develop an operational plan.

13.26 On 26 April 2013, the loadmasters were briefed in their regular daily meeting by Lt. Col. Anderson on the arrival of the VIP flight from India on 30 April 2013. Lt. Col. Anderson then subsequently briefed the Officer Commanding Air Force Base Waterkloof, Brig. Gen. T.S. Madumane, to the effect that a VIP aircraft from India would be arriving on 30 April 2013 with Ministers on board. Brig. Gen. T.S. Madumane directed that the visitors should be accorded the requisite protocols as he would be on leave.

13.27 On 29 April 2013, the Air Force Command Post issued RSA04 Internal Clearance for the helicopters and the fixed-wing aircraft. On the same day, Jet Airways lodged a flight plan for flight JAI 9900 through the Civil Aviation Briefing Office at Indira Gandhi International Airport, New Delhi. The flight plan was addressed to all air traffic control authorities that would handle the flight from departure from New Delhi to arrival at the Waterkloof Base. Letters of Procedure were provided to the Beira (Mozambique), Johannesburg and Waterkloof Air Traffic Service Units (ATSUs) to coordinate the transfer of control of the aircraft amongst themselves. The lounges at the Waterkloof Base were decorated by an unvetted private company in preparation for the arrival of Flight JAI 9900.

13.28 On 29 April 2013, the SAPS Joint Operational Commander, Lt. Col. Du Plooy, activated the Event Safety and Security Planning Committee (ESSPC) and all relevant role players as the plan went operational in keeping with the Standard Operating Procedures.

13.29 On 30 April 2013, the aircraft landed at the Waterkloof Base along with seven helicopters and two fixed wing aircrafts. The operating agent, BidAir, placed the stairs against the aircraft and positioned its loadmasters to receive the baggage. Health procedures were conducted by Deputy Director Ockert Jacobs of Gauteng Port Health. A reception had been arranged at the entrance to the Waterkloof base lounges consisting of music and dancing, and refreshments were being served to the passengers who had just arrived.

13.30 Col. Visser was on duty to receive VIP's that supposedly were to disembark from the aircraft. Two red carpets were laid out at the entrances to the lounges. No VIPs were identified from all the passengers who had disembarked. Col. Visser ended up greeting everybody who greeted him. No DIRCO protocol officers were present.

13.31 The National Immigration Branch of the Department of Home Affairs processed the passports of the disembarked passengers. This was done at the immigration counters, with Lt. Col. Anderson and two members of the delegation bringing the passports to the Immigration Officers, without the passengers physically being present to present their own respective passports.

13.32 According to the Flight Sgt. Van Bentheim and the SAPS report, the helicopters, fixed-wing aircraft and vehicles left the base. The vehicles were divided into four convoys of fifteen vehicles each, with one police vehicle to lead the convoy and one traffic vehicle at the rear. Members of the SAPS Flying Squad were present outside the Waterkloof Base.

13.33 SAPS Gauteng deployed 31 cars and 62 members for route security. Gauteng Province developed a highway patrol matrix to guide the process. Extraordinary deployments were made that necessitated the utilisation of members who were not on duty. These additional deployments, which were not planned for, cost the department approximately R47 000. The Gauteng Province SAPS provided route security from OR Tambo International Airport and Air Force Base Waterkloof up to the boundary with the North-West Province at the Brits Toll Plaza. The North-West Province Flying Squad, consisting of five cars and six members, were deployed from North-West to Sun City.

13.34 On 2 May 2013, the Jet Airways Airbus A330-200 was moved from the Waterkloof Base to O.R. Tambo International Airport on the instructions of Ms Mapisa-Nqakula, the Minister of Defence and Military Veterans. The transfer was done in accordance with normal procedure, and the Civil Aviation Authority (CAA) imposed a fine of R80 000 on the airline for the flight not having had a Foreign Operators Permit.

13.35 On the same day, the DG of DIRCO had a telephone discussion with the Indian High Commis-

sioner, Mr V Gupta. The High Commissioner stated that there were no Union (National) Ministers on the flight, but only state ministers. He further informed the DG that the Gupta family had not asked him to assist with the arrangements for the visiting delegation.

13.36 On 3 May 2013, the DG of DIRCO again called in the Indian High Commissioner to discuss circumstances and procedures followed regarding the landing. It was pointed out to the High Commissioner that a Note Verbale had not been presented prior to the landing, which was consistent with diplomatic protocol.

13.37 Six check-in counters were set aside at O.R. Tambo International Airport to process the visitors who had previously landed at Waterkloof Base. Immigration procedures were complied with, except that the seven state ministers had left on a chartered flight to Cape Town and would leave on a commercial Emirates flight to return to India. It was also determined that one of the visitors originally listed as crew had in fact not yet left South Africa at the time of the investigations.

FINDINGS OF THE INVESTIGATION PANEL

14. The investigation panel found that Mr Tony Gupta's direct approach and request for the use of a strategic entry point for a wedding was improper because it amounted to a request for untoward assistance to the Gupta family. Moreover, the investigation panel concluded that the subsequent interaction on 2 April 2013 between Ambassador Bruce Koloane, Chief of State Protocol, and the Political Advisor to the Minister of Defence and Military Veterans on the wedding of the Gupta family was also improper.

15. Furthermore, during the interactions in these meetings, Ambassador Koloane abused the name of the President of the Republic in an effort to exert pressure for the aircraft to land at the Waterkloof Base and that in itself amounted to misrepresentation. Moreover, the involvement of Mr Chawla, which led to abuse of the diplomatic channel, was a deliberate manipulation of the system to further wedding objectives couched as official business.

16. In addition, the investigation panel found that the collusion between Mr Chawla and an individual in the Indian High Commission to abuse the diplomatic channel to request flight clearance on 4 April 2013 was of great concern, and improper in many respects. Firstly, the Indian High Commission failed to provide a Note Verbale to DIRCO, and that that was a serious infringement of diplomatic protocol. Secondly, the request was one for "Diplomatic Overflight and Landing Clearance"; that amounted to a misrepresentation of the nature of the visit. Thirdly, the purpose of the flight was listed as "Delegation Visit"; that was again a misrepresentation of what the actual purpose of the visit was.

17. It was further found that it was not normal practice for Ambassador Koloane as the Chief of State Protocol to interact directly with the Waterkloof Base Command Post to enquire as to progress with a specific clearance. Secondly, Ambassador Koloane had stated that there would be four to five Ministers on the flight; this was a misrepresentation of the facts, as the Ministers in question were State Ministers, the equivalent of Members of the Executive Council (MEC) in South Africa, not national Ministers which could have been accorded a different status. Thirdly, Ambassador Koloane had used the names of the Minister of Transport, the Minister of Defence and Military Veterans, and the President in an effort to put pressure on the Command Post to issue the clearance. They found that such conduct by Ambassador Koloane was improper and inappropriate and amounted to abuse of the political clout and office of members of the National Executive.

18. The investigation panel found that SARS had not been present at the arrival of the aircraft at Waterkloof Base, which was also improper.

19. The investigation panel further found that the actions of the individual from the Indian High Commission who requested Ambassador Koloane on 24 April 2013 to facilitate arrangements for the reception at the Waterkloof base amounted to a major security violation, particularly because the company involved in preparing celebrations at the Waterkloof Base had not been vetted.

20. It was found by the investigation panel that on 25 April 2013, an individual in the Indian High Commission applied for clearances for helicopters and fixed-wing aircraft as a continuation of a cover up of an official delegation that did not in fact exist. The officer responsible had approved the landing as this was part of the so-called 'diplomatic package', and that in itself had the potential of compromising national security.

21. In their findings the investigation panel stated that the collusion of officials in permitting and facilitating the landing of the flight from India resulted in numerous irregularities and an abuse of official authority. However, none of the findings indicated that there was any inducement or gain given to any member of the National Executive or office bearer. The only officials who clearly misled others to facilitate the landing, the welcoming of the wedding guests and the irregularities attendant on the convoy of vehicles from the Base to Sun City, were Ambassador Koloane and Lieutenant Colonel Anderson.

TESTIMONY BEFORE THE COMMISSION

22. We shall not discuss the evidence of every witness, but only that which is relevant to the Commission's Terms of Reference. The first oral evidence given to the Commission relevant to the TORs was that of Major Thabo Ntshisi. His evidence was not helpful. He alleged that he had been reluctant to issue the flight clearance certificate requested by Ambassador Koloane for the flight carrying Indian guests without a written Note Verbale, but had eventually done so under pressure from the latter and when he received the email from Ambassador Koloane's secretary saying that the clearance had been authorised, and after speaking to Lieutenant-Colonel Anderson. He did not have the authority to issue the clearance certificate himself, but he had advised Lieutenant Colonel Van Zyl (who was newly in his position at the Base) that it should be issued.

23. Ultimately Major Ntshisi's evidence amounts to no more than this: he facilitated the issue of the flight clearance certificate only because he was pressured to do so by Ambassador Koloane and Lieutenant Colonel Anderson, who had both given him the impression that the President of the Republic at the time had authorised the process. He had in turn misled Lieutenant Colonel Van Zyl, and Mr William Matjila.

24. General D M Mgwebi subsequently testified that Major Ntshisi had deliberately misled various officials: General Mgwebi had made that finding when presiding over a disciplinary hearing convened by the SANDF. General Mgwebi claimed not to have known of the landing at the base until it had happened, and blamed lack of communication and the con-compliance with rules for the unauthorised landing of the flight. He had recommended that Major Ntshisi and Lieutenant Anderson be disciplined for "colluding and assisting with the approval to land knowing very well that doing so was unlawful. Charges of misuse of state property and corruption should also be laid against them".

25. Mr Matjila, who has a very long career as a diplomat, testified as to the standard procedure to be followed when there is a request from a foreign mission for the landing of foreign aircraft and that these procedures were not followed for the flight carrying the guests attending the wedding. The first time Mr Matjila heard about the Waterkloof Landing was through the press on the day of landing – 30 April 2013. The following day Mr Matiila was advised of the meeting of the JCPS cluster principals, and he asked for a briefing from the DIRCO spokesperson: he invited Ambassador Koloane to attend the meeting since so much had been said about his role in the saga by the media. Mr Matiila also called Mr V Gupta, the high commissioner of India, to establish whether there were Union Ministers aboard the aircraft.

26. Mr Matjila then testified as to the decision to follow disciplinary procedures against Ambassador Koloane. A special hearing was convened by DIRCO, following the recommendations of the report of the investigation panel (referred to above). The charges laid against Ambassador Koloane were: that (1) in the period between February and April 2013 he had abused diplomatic channels and had facilitated an illegal request for the landing of an international aircraft at the Waterkloof Base on 30 April 2013; (2) he had misrepresented facts in an endeavour to procure the unlawful landing; and (3) he had compromised the process and procedures of DIRCO in that no request had been properly

made and the required interdepartmental coordination process had not taken place.

27. Ambassador Koloane pleaded guilty to the charges. Following the recommendation made by the committee that heard the charges, the sanction imposed on Ambassador Koloane was, as an alternative to dismissal, suspension without pay, for a period of two months. However, the infractions were serious because Ambassador Koloane caused embarrassment to the Republic and abused diplomatic channels.

28. Ambassador Koloane was not a credible witness. He evaded questions posed at the Commission and denied having suggested to anyone that President Zuma knew about the proposed landing of the flight from India at the Waterkloof Base. A clear example of his evasion was in relation to the email sent by his secretary to Mr W Matjila stating that the flight had been approved. He tried to obfuscate the questions asked of him by the Chairperson of the Commission and the evidence leader. He then denied that he had asked his secretary to communicate authorisation to Mr Matjila. All that Ambassador Koloane had said to her, he claimed, was that she should push "them" to process the request.

29. As to the meeting earlier in the year at O.R. Tambo, which was attended by Mr Tony Gupta, Ambassador Koloane alleged that his memory had faded, but that he did recall that at the meeting Mr Gupta said there would be wedding guests aboard the flight, some of whom would be 'Ministers' and possibly one of the 'Vice Presidents' of India. Ambassador Koloane could not, however, deny the veracity of a recording of a phone call between Major Ntshisi and himself in which he had explained to the Major that he could not put the request in writing. Major Ntshisi said that Colonel Anderson was in charge of the Base. Ambassador Koloane then reminded Major Ntshisi that people representing the Indian delegation had met Colonel Anderson at the Base and said that a few Ministers would be on board to attend the Gupta wedding.

30. Later, Ambassador Koloane admitted to "name dropping", presumably in respect of then President Zuma, but that, he had done so purely to push officials who were "supposed to process the flight clearance to do their job" – to process the flight. But he insisted that no one in a position of power, such as a Minister or President Zuma, had asked him to act in this way. Using their offices and names was an error of judgement on his part. Ambassador Koloane accepted that he had been wrong to use the names of Ministers and President Zuma because it could have tainted their reputations.

31. Lieutenant Colonel Anderson deposed to several affidavits regarding the landing, the first to the Board of Inquiry convened by the SANDF and then for the Commission. She described the events preceding the landing of the flight in these affidavits.

32. On a Sunday night sometime in March or April 2013, Ambassador Koloane had phoned Lt. Col. Anderson to enquire whether the Waterkloof Base had the capacity for the landing of an Airbus A330. Ambassador Koloane told Lt. Col. Anderson that there would be a 'cultural event' following the landing of the aircraft, which had 'two ministers' on board and that 'Number One' had knowledge of the flight proposed. Lt. Col. Anderson understood the term 'Number One' to refer to President Jacob Zuma.

33. Lt. Col. Anderson had advised Ambassador Koloane that it was possible for the aircraft to land but that an overflight clearance (a landing authority) was required for landing at the Base. Ambassador Koloane had said that he would start the process of obtaining the clearance from the Airforce Command at the Waterkloof Base.

34. On 2 April 2013 a gentleman who Lt. Col. Anderson thought was named 'Mr Ashuc', and two others, visited him at the Base and she escorted them through the lounges. They told Lieutenant Colonel Anderson that there would be about 150 to 200 people on board the flight. After some discussion it was agreed that the passengers could use the two lounges and a reception area. Lt. Col. Anderson was advised that once the immigration process was finalised the passengers would be escorted to Sun City.

35. In mid-April 2013, Ambassador Koloane phoned Lieutenant Colonel Anderson and said that he had been asked by President Zuma if the flight "was still on track". She responded that once flight clearance had been obtained "we would be able to finalise the movements of the passengers".

36. Ambassador Koloane had phoned Lt. Col. Anderson again two days later and advised that the passengers would not be taken in buses to Sun City. At that stage no flight clearance had been obtained. Ambassador Koloane had then made an appointment to see her at the Base on 22 April 2013, and he had arrived with Mr Ashuc and two women. Lt. Col. Anderson had shown them the arrival and departure procedures. That afternoon, she had spoken to her Commanding Officer, Brigadier General Madumane, and had advised him that the overflight clearances for the international flight had not yet been obtained.

37. Lt. Col. Anderson had received clearances for the flight from India and for the local aircraft that were to land and depart with the passengers to Sun City on 23 and 25 April, respectively. The aircraft from India, and the other national aircraft and helicopters for shuttling passengers, had arrived early in the morning of 30 April 2013

38. In 2019, in response to a request from the Commission and questions sent to her, she confirmed the contents of her affidavit deposed to in May 2013. She denied allegations about what she had done in preparation for the landing on 30 April 2013. Lt. Col. Anderson also denied that she had done anything to pressure Major Ntshisi into unlawfully issuing a flight clearance for the flight from India that landed at the Waterkloof Base.

39. In her oral testimony to the Commission, Lt. Col. Anderson (represented by a legal practitioner), said that she had ascertained that Mr Ashuc was Mr Ashuk Chawla, employed by a company associated with the Gupta family. She had believed at the time of the proposed landing that he was a Protocol Officer at DIRCO. She had also believed that there was nothing untoward about Ambassador Koloane's requests: she was told that there were wedding guests on board the flight. But it was not her job to question the purpose of passengers. When questioned by the evidence leader and the Commission Chairperson, she admitted that she had realised that the landing of the flight from India at the Base was not lawful. But that realisation has struck her, she said, only when she heard press reports.

40. Lieutenant Colonel Anderson accepted that she had been pressured by Ambassador Koloane to put procedures in motion for the improper landing of the flight at the Waterkloof Base.

FINDINGS AND RECOMMENDATIONS

41. The Commission finds that the investigation conducted by the JCPS Cluster team into the Waterkloof landing and its findings were credible and that the subsequent evidence led before the hearing, in particular by Ms Nonkululeko Sindane, the Director-General of the Department of Justice and Constitutional Development, confirmed those findings. This is relevant to Clause 1.6 of the Terms of Reference in that there was undue influence on DIRCO and the officials stationed at the Air Force Base to accommodate the business dealings, in this case, the wedding delegation of the Gupta family.

42. From the evidence considered above, it is not possible to make any clear finding that the Waterkloof Landing was the result of "any form of inducement or gain" by any member of the National Executive. We conclude that the officials at the Base had not complied with the SAAF's procedures and that the flight clearance was given as a result of misrepresentations by Major Ntshisi, who in turn was pressured by Ambassador Koloane. This misconduct calls for no further action.

43. Ambassador Koloane was guilty of abuse of diplomatic channels. Whether any member of the National Executive was in some way involved in the process did not emerge at the Commission.

44. Ambassador Koloane's evidence was in places incoherent and in several respects contradictory: the best example is his denial of having "name dropped" on the first day that he testified at the Commission. After listening to tape recordings of his telephone conversations with Major Ntshisi overnight, he suddenly recalled that he had referred to ministers and former President Zuma. Ambassador Koloane had done so simply to put pressure on the Major and others to expedite the proceedings, he asserted, and apologised for his mistakes.

45. In the Commission's view, it is not possible to find that Ambassador Koloane, or any official whom he had pressured, acted because of the 'capture' of any officer or institution of the State. At worst,

his conduct, and the lapses in procedure by the officials at the Base, brought embarrassment to the Government and to the country. At best, the Waterkloof Landing, for which he was responsible, brought to the attention of the media and the wider public how the Gupta family was able to influence officers of the State to facilitate their private affairs.

PRASA

INTRODUCTION

1. The Passenger Rail Agency of South Africa (Prasa) is not specifically mentioned in the Public Protector's "State of Capture" Report (2 November 2016) that led to the appointment of the Zondo Commission. However, the Commission was delegated to inquire into, make findings, report and make recommendations on the nature and extent of corruption, if any, in the award of contracts and tenders to companies, business entities or organisations by Government agencies and entities. As a result of quite serious allegations, including of corruption, received by the Commission in respect of Prasa, extensive evidence was led on alleged wrongdoing at Prasa.
2. Fifteen months prior to releasing her State of Capture Report, Adv Thuli Madonsela had released her earlier report Derailed into an investigation she conducted into Prasa, which made several findings of maladministration. The report required the chairperson of Prasa's Board of Control (the Board) is to support a forensic investigation by National Treasury, to be commissioned by Prasa's Acting Group CEO, into all Prasa contracts above R10 million since 2012.
3. Two general themes that emerge from that evidence were that (i) influential individuals and/or entities, were permitted to benefit unduly in respect of the procurement of goods and services by Prasa, and employees who did not toe the line were victimised or "hounded out", as was Prasa's Board, when it sought to instil a "cleaner culture"; and (ii) Prasa was so "deeply and systemically captured" that a few courageous women and men who tried, were unable to stop the rot because those who wielded public power were obstructive and/or refused to assist, or simply stood by when there was a duty, whether constitutional, legal or moral, to assist the Board.
4. Prasa has been the subject of numerous adverse media reports. After the Commission was established, people with relevant knowledge were asked to present this to the Commission, but few did so.
5. On 1 August 2014, a new Board of Control took office at Prasa. Although some members of the old Board were re-appointed, most were new appointees. Veteran ANC leader Mr Popo Molefe was appointed Chairperson of the new Board when Mr Lucky Montana was Prasa's Group CEO. According to Mr Molefe, the new Board set about understanding how Prasa worked and perhaps how it could be improved.
6. However, the new Board soon began to experience challenges in discharging its responsibilities, encountering obstacles and resistance, from Mr Montana and others, to changes it considered were required for it to fulfil its weighty obligations. The obstacles and resistance, some direct others more subtle, were widespread but manifested themselves especially in respect of the procurement of goods and services.
7. Within a few months of taking office, the new Board declined to approve the award of two contracts, with a combined value of more than R4 billion, to service providers whom a sub-committee of the Board had recommended be the preferred bidders. Not long thereafter, the Board became aware that in her Interim Report, prior to the release of Derailed, the PP had made findings of serious maladministration at Prasa.
8. Mr Montana who, according to Mr Molefe, appeared to view the new Board with suspicion, told it in March 2015 that he would be leaving Prasa when his contract expired in mid-July 2015. By then,

Mr Montana's relationship with the Board and especially Mr Molefe, was strained and on a sharp downward spiral, evolving into acrimony even in the public space.

9. In July/ August 2015, it was reported to Mr Molefe that Mr Auswell Mashaba, the chairperson of the company that in July 2012 had been declared by the previous Board the preferred bidder to supply locomotives to Prasa at a cost of some R3.5 billion, had alleged that, after his company had been awarded the contract, he had been directed to, and did, pay R79 million to persons who were to pay the money over to the ANC. As Mr Molefe regarded himself as a "deployee" of the ANC, he felt constrained to raise this bombshell allegation with the ANC. Seemingly on account of his weighty political profile, Mr Molefe was granted an audience with the ANC's "Top Six". Mr Molefe told the meeting that he saw himself as having been deployed by the ANC as the Chair of Prasa's Board. He had therefore expected the ANC leadership to come to their defence when he and his Board were attacked by alleged wrongdoers such as Mr Montana.

10. Disappointed by the lack of support from ANC leadership, the Molefe Board nevertheless used its statutory powers to clean up Prasa, as evidenced by the Final Report of the Public Protector and an earlier direction by the Auditor-General, that forensic investigations should be conducted. The matters investigated by Werksmans Attorneys included the R3.5 billion locomotives contract awarded to Swifambo and R2.8 billion worth of contracts awarded irregularly to a long-standing service provider of Prasa. The contracts were found to have been tainted by irregularities and corruption and were accordingly reviewed and set aside by the High Court.

11. Whilst the ANC Top Six had been non-committal, other entities obstructed the Board's efforts. Parliament's Portfolio Committee on Transport attacked the Board for revealing in the Swifambo review papers the allegation that the ANC had been a beneficiary of the Prasa-Swifambo contract. ANC members of that Committee alleged that the Board was paying too much to Werksmans for the investigations. The Molefe Board was rendered dysfunctional before its term of office formally ended on 31 July 2017.

12. Mr Molefe was mystified by the ANC's and the Government's reaction to what the Board uncovered, as well as the appointment only of Acting GCEOs after Mr Montana's departure in July 2015, and interim Boards after 31 July 2017. Prasa thus lacked a permanent GCEO for nearly six years and a permanent Board for three years.

13. Mr Montana challenged Mr Molefe's contention that he was attempting to clean up Prasa, alleging that it was a personal vendetta. Nonetheless, much of the evidence was based on documents and affidavits. In judgments they handed down in review applications to set aside the multi-billion Rand Swifambo and Siyangena contracts, courts found that the procurement processes followed were irregular and tainted by corruption.

14. The focus hereunder will be on 1. the extent of maladministration or corruption at Prasa; and 2. the failure to provide appropriate assistance to the Board when steps were taken to address the wrongdoing.

15. With that in mind, a useful approach to the evidence, is to trace the sequence of events following the inception of the Molefe Board, the deterioration of its relationship with Mr Montana, the Board's clean-up process, the maladministration and corruption uncovered, and the reasons that the clean-up efforts did not succeed.

16. In light of the foregoing, the issues considered are the following.

    16.1 As regards Mr Molefe: his evidence about the state of affairs at Prasa soon after his Board was appointed; the deterioration of his relationship with Mr Montana; his notice to the ANC's Top Six of problems at Prasa; an alleged effort by former President Jacob Zuma to have Mr Montana back at the helm of Prasa; and the mechanisms used to obstruct the Molefe Board's clean-up attempt.

    16.2 In light of the fact that it provides a concrete basis for the concerns that Mr Molefe had "inherited", there is a quite extensive consideration of the irregularities that plagued the award of the

locomotives contract to Swifambo and reports prepared thereon by a forensic investigator and by the liquidators of Swifambo.

16.3 A consideration of the irregularities and improprieties surrounding the award of certain contracts to Siyangena and the findings of the Full Bench of the North Gauteng High Court in the application that Prasa instituted to have the contracts reviewed and set aside.

16.4 The sale of a property by Mr Montana to a lawyer who had acted for Siyangena and the funding for the purchase of three properties which Mr Montana had expressed an interest in purchasing, one of which he did purchase and was transferred into his name.

16.5 Evidence by senior members of Prasa's internal legal section on the consequences that they suffered after they opposed attempts to unduly benefit entities in which Mr Roy Moodley had an interest.

16.6 The role of the chairperson of the Interim Board that was appointed a few weeks after Mr Molefe's Board left office, in seeking unduly to benefit Mr Makhensa Mabunda, a known associate of Mr Montana.

16.7 The failure, until recently, to appoint a permanent Board and a permanent CEO.

16.8 The appointment of Werksmans to conduct forensic investigations.

MR MOLEFE'S EVIDENCE

Introductory matters

17. Prasa's main object and business is to provide rail and bus passenger services in the public interest and to generate income from the exploitation of its assets. Prasa is funded by National Treasury, through allocations made to the Department of Transport. Prasa's Board is its accounting authority. As an organ of state, Prasa is required to procure good and services in compliance with s 217 of the Constitution and other applicable statutory and regulatory measures as well as its own SCM processes and procedures. But, because of "its being captured" for many years, it failed to deliver on its mandates.

18. Mr Molefe said that his experience at Prasa equipped him to assist the Commission to better understand the different strategies that were used by those involved in state capture. He was of the view that Prasa was one of the state institutions identified for state capture, particularly in the awarding of lucrative tenders. Irregularities in the award of tenders occurred because [lower] decision-makers were made vulnerable by the manipulations of those who were at the heart of the capture of Prasa, or simply permitted it as they were afraid of the consequences of being seen to be "opposed" to the senior management at Prasa. Individuals and institutions with the duty to protect Prasa and the vulnerable, failed to do so and thus allowed the capture of Prasa to succeed, to the advantage of certain individuals and the entities associated with them.

19. It was Mr Molefe's experience that the captors targeted decision makers, so that they could direct contracts, and ultimately money, to favoured companies or individuals. An example was Mr Roy Moodley, a known associate of former President Jacob Zuma, dealt with in more detail below.

20. Mr Molefe said that at his first meeting with Mr Montana, Mr Montana told him that he had told the previous Chairperson of the Board, Mr Sifiso Buthelezi that he intended to resign from his position of GCEO. Mr Molefe said that he told Mr Montana that he expected him to stay for a while, as Prasa was in the process of carrying out its modernisation programme, which would entail a spend of some R172 billion over forty years and envisaged the replacement of aged trains, coaches and locomotives with new ones; delivering a better quality of service to commuters; renovating train stations and other infrastructure; and installing a modern signalling system.

The initial problems

21. The problems in the relationship between Mr Montana, on the one hand, and the Board and Mr Molefe, on the other, began to manifest themselves soon after the abovementioned meeting took place. Among those problems were the following:

    21.1 Most of the major contracts had already been concluded; when the Molefe Board asked for details and the status of these contracts, Mr Montana proved uncooperative

    21.2 Audits of the financial statements for the previous and following years indicated a steep rise in irregular expenditure

    21.3 Many of Prasa's departments were dysfunctional

    21.4 Its controls were weak or non-existent and many employees in strategic positions lacked the requisite skills; and

    21.5 There were serious labour issues, with employees being suspended or dismissed only for the decisions to be successfully challenged, and Prasa being required to find funds, not budgeted for, to compensate these employees.

22. Mr Montana disputed each of these allegations, saying that during his nine years of heading Prasa, it had not had a qualified audit. In respect of suspensions, he said he was being blamed for what had been done by other managers. In one case the Labour Appeal Court had reinstated 500 dismissed employees because Prasa under Mr Molefe had not properly opposed the appeal, which, he alleged, had cost Prasa about R1 billion. He also alleged that he and Mr Molefe had had a good relationship until November 2014. He said that the fall-out between them was not because the Board had tried to hold management accountable, but because he [Mr Montana] had instructed Prasa not to pay one of its contractors, SA Fence and Gate (Pty) Ltd, to terminate Prasa's contract with the company and to recover all monies from it. He alleged that SA Fence and Gate had sponsored a golf day hosted by Mr Molefe's Foundation, the Popo Molefe Foundation, which had received corrupt benefits from SA Fence and Gate. He asked the Commission to subpoena the accounts of Mr Molefe and his Foundation.

23. Mr Molefe responded to Mr Montana's allegations in respect of SA Fence and Gate in a later affidavit, saying that his Foundation is a Trust created for charitable purposes, one of which is to focus on the plight of disadvantaged youth; the Trust is independently audited; and its bank and other accounts are regulated by at least three of the Trustees. Regarding the Golf Day, Mr Molefe's affidavit said: SA Fence and Gate had purchased golf shirts, directly from the supplier, that had been used by the golfers on one of the two days of the event; it had however not donated any funds to the Foundation; there was no link between the purchase of the golf shirts and any contract or litigation between SA Fence and Gate and Prasa; and in any case the relationship between SA Fence and Gate and Prasa pre-dated his appointment to Prasa's Board. Mr Molefe also denied an allegation by Mr Montana that Prasa had not defended a claim brought against it by SA Fence and Gate and annexed papers that showed that Prasa had instituted a counter-claim against SA Fence and Gate for payment of some R45 million.

24. Mr Molefe's evidence continued as follows: at the Board's first substantive meeting, on 27 November 2014, Mr Buthelezi, then chairperson of the Board's FCIP, said he was resigning from the Board. However, the FCIP had recommended the appointment of service providers for two quite major contracts. The one was for the Braamfontein Depot Modernisation project and the other for the purchase of Rails and Turnouts, which the FCIP said were urgent. The tenders had a combined value of some R4 billion. Mr Molefe said that the Board was concerned that there was no probity report confirming that applicable procurement prescripts and processes had been properly followed. As a result, the Board gave only provisional approval in respect of the awards. Mr Montana assured the Board that the probity report would be made available to the Board, but it never was. It turned out that there could not have been such a report as the contract of the probity officer had expired at least one year earlier. Thereafter, Prasa's internal auditors had conducted a probity assessment of the tender processes and found that the SCM policy and the provisions of the PFMA had not been complied with. As a

result, on 26 February 2015, the Board cancelled the award of the tenders and asked management to re-issue RFPs.

25. Conversely, Mr Montana contended that Mr Buthelezi had not pushed for the tenders to be awarded; he (Mr Montana) had not been asked for a probity report, which he accepted did not exist for the reason given by Mr Molefe; and although the awards of the tenders were cancelled, he alleged that it was not because of corruption but because the Molefe Board had "destroyed" Prasa in less than three years.

26. Reverting to Mr Molefe's evidence, he said that in December 2014 he became aware that the PP would soon release a report on her investigations into the affairs of Prasa, following complaints that had been lodged with her office. Her Interim Report had been shared with Prasa's management but the Board had not been told of its existence. Mr Montana confirmed receipt of the PPs Interim Report and at around that time, told the Board that, for personal reasons, he would not be renewing his contract on expiry in March 2015. The Board accepted Mr Montana's "resignation" but asked him to stay on while it searched for a replacement, and limited his powers.

27. Thereafter, at a meeting with Mr Molefe in Knysna on 4 April 2015, Mr Montana presented a "litany of complaints" about him and the new members of the Board, accusing them of conspiring with Minister Dipuo Peters to work against him and to get rid of him, an accusation Mr Molefe denied. Mr Montana said that Mr Molefe had "leaked" the PPs Interim Report to the press and had told Mr Molefe this at their Knysna meeting. The relationship between Mr Montana and the Molefe Board deteriorated further, spilling into the public arena with accusations against each other.

28. Mr Molefe's affidavit and evidence highlighted certain findings of the PP's Final Report and prescribed remedial actions. In particular, it was found that the scope of a number of tenders had been extended, which Adv Madonsela said constituted maladministration and improper conduct. In one case, a tender for two train stations was later improperly extended to seven stations.

29. The Public Protector's Report indicated that it had been difficult to get information from Prasa, which had delayed finalisation of this investigation lodged in 2012. Requests for documents yielded very few, yet Mr Montana said that the complainants could not provide documentary evidence on these allegations. The PP also found that Mr Montana suspended some employees without following proper disciplinary procedures, in contravention of Prasa's disciplinary code, resulting in fruitless expenditure.

30. Remedial actions that the PP said should be taken were that the Board should note the findings of maladministration and improper conduct by Mr Montana and others; report these to National Treasury and support a forensic investigation into all Prasa contracts above R10 million from 2012; and take appropriate measures to address the findings.

31. Mr Montana's reaction was that there were no findings of corruption and he had applied to the High Court for the Report to be reviewed and set aside. He said there was no connection between his resignation (March 2015) and the release of the Report (August 2015). He said Adv Madonsela did not have an "understanding" of Prasa and had applied inapplicable legal prescripts. Whereas she had dealt with only about half the complaints, the present Public Protector [Ms Busisiwe Mkhwebane] had dealt with the rest of the complaints and in her report had made only one adverse finding. Mr Montana denied that he had not co-operated with Adv Madonsela.

32. Around the time of the release of Derailed, Mr Molefe became aware that Mr Mashaba had, after Swifambo was awarded the R3.5 billion locomotives contract paid R79 million to people who then allegedly paid the money to the ANC. The meeting between Mr Molefe and the ANC's Top Six must be considered in this light.

Mr Molefe's meeting with the ANC's Top Six

33. Mr Molefe's meeting with the ANC Top Six took place in July or August 2015. It appears that the meeting was preceded by a meeting Mr Molefe had with the ANC's Treasury General Dr Zweli Mkhize, to

discuss his concerns about the Mashaba payments and the contracts Prasa had awarded to companies connected with Mr Roy Moodley, such as Siyangena, Prodigy and Strawberry Worx. The only member of the Top Six who was not present at the meeting was party chairperson, Ms Baleka Mbete.

34. Mr Molefe said he told the five members of the Top Six who were present at the meeting that the ANC leadership had approved his [Mr Molefe's] appointment as Chair of Prasa's Board, in a sense deploying him there, yet none of them had defended him or the Board. Mr Molefe told them that he had been quiet for a long time, but he was going to use legal instruments with which the Board was armed, such as the PFMA.

35. At the meeting Mr Molefe raised the malfeasance and corruption at Prasa identified by the PP in her reports, involving R1,9 billion of contracts with Siyangena. As a result, his Board had initiated new procurement processes for contracts for the Braamfontein Depot Modernisation and the purchase of Rails and Turnouts, which together involved an amount of R4 billion. He said that following the award of the R3,5 billion locomotives contract to Swifambo, its chairperson, Mr Mashaba, had alleged that he paid money to people purporting to be collecting it on behalf of the ruling party.

36. Asked what the reaction of the Top Six was to the foregoing interaction with them, Mr Molefe said that they felt he had not given them enough time to think about what he had told them. They said that they would have another meeting, but there was no further meeting.

37. In his evidence on this issue, President Cyril Ramaphosa admitted that the meeting had taken place and that Mr Molefe had mentioned that he would utilise the PFMA against wrongdoers, with which the ANC leadership was satisfied. However, he denied that Mr Molefe had mentioned the alleged payment of R79 million to the ANC. He also denied that they had asked for more time to think about the issues raised at the meeting.

38. Mr Molefe referred to a further meeting relating to the dispute between Mr Montana and the Molefe Board, which took place at the Presidential Guest House in Pretoria.

The meeting with former President Zuma

39. Mr Molefe said that after the Board had accepted Mr Montana's "resignation", Mr Montana had publicly announced that, if the Minister and the Board wanted him back, he was available to stay on as Prasa's GCEO. Given the strained relationships and public acrimony, the Board declined his offer. According to Mr Molefe, in early August 2015 President Zuma and Minister Jeff Radebe (then the Minister in the Presidency) invited him to a meeting at the Presidential Guest House, together with Minister Peters and Mr Montana. The meeting took place on 20 August 2015. It started three hours late. Each of the attendees had a different version of what transpired at the meeting.

Mr Molefe's version

40. At the start of the meeting, only President Zuma, Minister Radebe, Minister Peters and Mr Molefe were present: Mr Montana was called in later. President Zuma expressed concern about the ongoing public conflict between Mr Molefe and Mr Montana. President Zuma said: "I have invited that boy, Lucky Montana", and asked Minister Radebe to call Mr Montana in. President Zuma then said that the public spat between Mr Molefe and Mr Montana was embarrassing to the ANC, of which both Mr Molefe and Mr Montana were members. He said that Mr Montana was very knowledgeable about commuter rail matters. He said the two should sort out their differences and that Mr Montana should be brought back as the GCEO of Prasa.

41. Mr Montana, who, according to Mr Molefe, appeared to have been briefed about the meeting, criticised the Board and Minister Peters, complaining that he had not been consulted before the Molefe Board had been appointed. Minister Peters pointed out that he was an employee of Prasa, with no right to be consulted on Board composition.

42. Mr Molefe invited President Zuma to address the Board and tell the Board why its acceptance of Mr Montana's "resignation" was "a problem". It did not please President Zuma that Mr Molefe was not

prepared simply to reinstate Mr Montana. Mr Molefe said that at about 02:00 the meeting ended because President Zuma fell asleep. 43. Despite what President Zuma had said at the meeting, the Board did not re-visit its decision on Mr Montana's resignation. Mr Molefe said that President Zuma had described it the meetings as a meeting of "comrades of the ANC". However, Mr Molefe told the Commission that he was deeply concerned that the President of the country was personally interfering in the operations of Prasa.

Minister Peters's version

43. In her affidavit and evidence, Minister Peters said that the meeting had been arranged when she requested President Zuma to ask Mr Montana and Mr Molefe to stop their public spat. President Zuma told her that he knew that Minister Radebe was very close to Mr Montana and he would ask him to speak to Mr Montana. At the meeting, she had gained the impression that Mr Montana wanted his job back, but there was not "a conscious decision" by President Zuma that Mr Montana should return to Prasa.

44. She agreed with Mr Molefe that Mr Montana was not present when the meeting started and that the meeting had been inconclusive because the President had fallen asleep. She did not recall that President Zuma had said that Mr Montana was knowledgeable about rail matters. She agreed that Mr Molefe had invited President Zuma to address the Board on why it had agreed to release Mr Montana early but said that the invitation was also extended to enable President Zuma to "see" Prasa. She said she could understand the concern Mr Molefe had expressed about "interference" (by President Zuma in Prasa's affairs). She said that Mr Montana had spoken at length about why the organisation needed him. She confirmed that the meeting had ended at about 2 am.

Mr Montana's version

45. Mr Montana said he had no interest in going back to Prasa. He had been invited by President Zuma and Minister Radebe to the meeting after a public spat between him and Mr Molefe. He said that they were all present at the start of the meeting. He said that it was not the President, but Mr Molefe who had said he was very knowledgeable about the rail industry. After a while he and Mr Molefe were asked to leave the meeting because the President wanted to talk to the two Ministers. He denied that the President had said "bring Montana back". He said the meeting ended on "a very positive and a jovial note" when he and Mr Molefe left. It had lasted four to five hours, ending about midnight. He had not spoken for long. He denied he had compiled a document entitled "Prasa in Turmoil". He denied that the meeting ended because the former President dozed off. However, he accepted that "the war" between him and Mr Molefe continued after the meeting; and no clear pronouncement was made about "the outcome".

Minister Radebe's version

46. In Minister Radebe's affidavit, he said he had called the meeting because he was concerned about the public spat between Mr Montana and Mt Molefe. He had asked President Zuma to intervene, and had invited Mr Montana, Mr Molefe and Minister Peters. He said, "The meeting was cordial and the resolution amicable to the satisfaction of everyone at the meeting, including Mr Molefe." He added that it was regrettable that Mr Molefe now painted a different picture. He said the meeting finished before midnight, not at 2am. He denied that President Zuma wanted Mr Montana reinstated; or that he [President Zuma] had fallen asleep during the meeting.

Brief analysis

47. The versions of Mr Molefe and Mr Montana differ in some material respects. The version of Minister Peters lends some support to that of Mr Molefe, while the version of Minister Radebe lends some support to that of Mr Montana. The critical issues are the reasons for the meeting and whether it ended amicably.

48. The Montana-Radebe version is that the meeting was called to end the public spat between Mr Montana and Mr Molefe; and it ended amicably. While Mr Molefe interpreted the purpose of the meeting as to get the Prasa Board to take Mr Montana back, Minister Peters was of the view that Mr Montana used the meeting to make a case for his return to Prasa. Both agreed that Mr Molefe had invited President Zuma to address the Board for only one purpose: to give President Zuma an opportunity to persuade the Board to retract its acceptance of Mr Montana's resignation. That the "war" between Mr Montana and Mr Molefe did not end after the meeting (as acknowledged by Mr Montana), suggests strongly that the meeting did not end on a positive note (Montana- Radebe version). The continuation of the "war" supports the Molefe-Peters version that the meeting ended inconclusively – and when President Zuma fell asleep.

49. President Zuma did not testify or respond to Mr Molefe's affidavit or evidence. Accordingly, his version is not known. That this meeting took place about a week after Mr Molefe's meeting with the ANC's Top Six, at which President Zuma was present, suggests a link between the two meetings. President Zuma was in a position to answer that, but he chose not to do so. Mr Molefe's concerns that the President would involve himself in the affairs of an SOE but characterised the meeting as one among "ANC comrades" is valid. It blurs the distinction between affairs of the ruling party and the SOE to which the ANC deploys its cadres.

Developments soon after the meetings

Appointment of Werksmans

50. After Mr Molefe's meetings with the ANC Top Six and with President Zuma, the Auditor General (AG) issued adverse findings in respect of Prasa, and the Derailed Report was released. In August 2015, the Board appointed Werksmans Attorneys to conduct forensic investigations as required by the AG. Thereafter, Werksmans' scope of work was broadened to include matters that arose from the PP's Report.

51. Mr Molefe said Werksmans uncovered many irregularities and acts of maladministration at Prasa. The appointment of Werksmans was criticised by Mr Montana, Minister Peters and Parliament's Portfolio Committee on Transport. The AG later found that the appointment of Werksmans was irregular as the panel from which Werksmans had been selected had not been renewed by Prasa for a lengthy period. However, in a letter to the Minister of Transport in June 2017, a leading law firm in Johannesburg expressed the opinion that there was nothing amiss with the appointment of Werksmans.

52. In defending his Board's appointment of Werksmans, Mr Molefe said a lawful procedure had been followed before Werksmans was appointed. Werksmans' investigations had enabled the Board to institute legal proceedings which resulted in the courts setting aside major contracts, found to be tainted: the R3,5 billion contract awarded to Swifambo; and two substantial contracts awarded to Siyangena totalling R2,8 billion.

The vilification of Mr Molefe and his Board

53. Mr Molefe's Replying Affidavit (deposed 25 August 2016) in Prasa's application to have the R3.5 billion locomotives contract with Swifambo reviewed and set aside, stated that Mr Mashaba had told him that: he [Mr Mashaba] was aware that the award of the locomotives tender to Swifambo in 2012 was being investigated by the Molefe Board, and wished to come clean. Mr Mashaba said he had bid for the locomotives tender after an approach by Mr Makhensa Mabunda (a known associate of Mr Montana). After Swifambo had been awarded the contract, Angolan businesswoman Ms Maria Gomes (known to be a "fundraiser" for the ANC) told him that 10% of the value of the contract should be paid to the ANC. Mr Mashaba later furnished documents indicating that R79 million was paid to persons or entities who would pay the money to the ANC. This disclosure, made in court papers, was widely reported in the media. It suggested strongly that the award of the tender to Swifambo was tainted by corruption.

54. However, Mr Molefe pointed out that it was he and his Board who were painted as villains by Parliament's Portfolio Committee (PPC) on Transport when they appeared before it on 31 August 2016. The record of the proceedings made available to the Commission suggests that this is true. An issue raised at the PCC meeting was that Prasa needed only 20 executives but it had a complement of 65 executives. However, instead of dealing with this on-going fruitless and wasteful expenditure, an ANC member focused on the allegation that Mr Molefe had made about money paid to the ANC. Mr Molefe's request, on the basis that the matter was sub judice, that the issue be dealt with in a closed session was rejected. Another ANC member of the PPC then questioned why the firm carrying out the forensic investigation (Werksmans Attorneys) was being paid R93 million. The record of subsequent meetings of the PPC indicates that the approach of ANC members was to target those who blew the whistle on wrongdoing, rather than ascertaining how it came about, and identifying the beneficiaries so that recoveries could be made.

55. An affidavit (deposed 21 October 2020) by Ms Phillistus Dikeledi Magadzi, ANC MP who chaired the PCC between 2014 and 2019, and who later became Deputy Minister of Transport, addressed Mr Molefe's allegation that he and his Board were vilified by the PPC. The affidavit was submitted in response to an invitation by the Commission to the ANC to set out how Parliament carried out its oversight obligations over the Executive and held it accountable. She stated that the PPC consisted of twelve members, seven of whom were from opposition parties; she understood that the role of the Committee was to oversee the operations of the Department of Transport, which had twelve SOEs under its jurisdiction. She said the PPC performed its oversight obligation well and that with the exception of Prasa, the other SOEs were relatively stable. During her tenure, the PPC focused on Prasa, because it was undergoing a modernisation process.

56. The Deputy Minister's affidavit stated that a high turnover of executives, CEOs, Board members [and Ministers] after 2015 contributed to Prasa's instability. While she was Chairperson of the PPC, Prasa had three Ministers, four Boards and numerous CEOs. The instability at Prasa "hampered" the Committee's efforts "to follow up" on allegations in the media that the purchased locomotives were not fit for purpose, especially since the Rail Safety Regulator in its report indicated that the trains could be used. The PPC wanted state institutions such as the Auditor-General, National Treasury, the Hawks and the SAPS to investigate the irregular procurement of the locomotives, but the Board "saw fit to engage a private law firm, Werksmans" to conduct the investigations. The PPC wanted to know how this would be funded, and was told there had not been a bid [before Werksmans had been appointed] and the cost had not been estimated. The PPC proposed "regularisation", but this was not done, although the procurement was "irregular" and the cost had then reached R120 million. The AG had made several findings of irregular, unauthorised and wasteful expenditure at Prasa and had recommended consequence management. The PPC also wanted disciplinary steps to be taken but this did not happen. The PPC "wanted to pursue" Mr Molefe's allegation that "Prasa had donated R80 million to the ANC". She said, "[t]he Committee demanded invoices and evidence from Prasa to support this allegation because it fell within the purview of oversight". It was her "personal observation" that Mr Molefe "was angered by this request". Another allegation that the Committee "wanted to explore" was the [alleged] appointment of Mr Molefe's son at Werksmans.

57. Ms Magadzi alleged that the PPC pursued its oversight obligation rigorously. In March 2016, it asked for a report from Prasa on actions taken to recover money lost through irregular expenditure and asked why additional expenditure of about R250 million to pay SA Gate and Fence was not reflected in briefing documents. In February 2018 it was given a status report that said due process was not followed in the appointment of Werksmans and that governance processes had been flouted. She also said that when allegations of procurement impropriety at Prasa surfaced in the media, the PPC conducted oversight visits and was assured by the Regulator that the trains were "fit for purpose". She also alleged that the "ANC Study Group" was "very forceful in demanding that the allegations of impropriety be investigated" and "only disengaged" after the Regulator provided assurances "that all was well".

58. In an affidavit responding to the allegations against him by Deputy Minister Magadzi, Mr Molefe denied that he had been asked to provide invoices in respect of the payments allegedly made to the ANC. He

also denied that his son worked for Werksmans, but rather for a company that manufacturers buses and trucks. It was not explained why the Deputy Minister raised the issue of Mr Molefe's son only in her October 2020 affidavit, when she could have asked Mr Molefe and/or Werksmans about the matter.

59. Mr Molefe said there appeared to be a plan by those with influence to make it impossible for the Board to operate effectively. The Board sought to appoint a new CEO, embarking on a rigorous recruitment process. A list of its preferred appointees was sent to the Minister, recommending appointment of the top candidate, a black woman. In terms of clause 15.8 of the Board Charter, the GCEO is appointed by the Minister, on the recommendation of the Board. But, according to Mr Molefe, the Minister insisted that Mr Collins Letsoalo, CFO of the Department of Transport, be seconded as an Acting GCEO. Mr Letsoalo appeared to have been instructed to stop or significantly curtail the Werksmans investigations: he insisted that it was he who should take charge of the investigations. This led to tensions with Werksmans. Minister Peters herself attempted to stop the investigations, but the Board refused to relent. The Board applied to the high Court (27 November 20150) for review and setting aside of Prasa-Swifambo contract, and (1 February 2016) likewise for the Prasa-Siyangena. Both applications were successful.

60. In her affidavit and evidence, former Minister Peters denied frustrating the Board's attempt to appoint a permanent GCEO. She said the decision to appoint Mr Letsoalo was not unilaterally imposed on the Board: it had been discussed with Mr Molefe, who had written the appointment letter and congratulated Mr Letsoalo. She denied attempting to stop the Werksmans investigation, but alleged that she repeatedly asked when the investigation was likely to be concluded, mindful that the unbudgeted legal fees were close to R200 million as flagged by the AG.

61. Mr Molefe said he had made several attempts to seek protection from Parliament. He wrote (8 March 2017) to the Speaker of the National Assembly, Ms Baleka Mbete, requesting Parliamentary intervention, raising the Public Protector's Report and the matters under investigated by Werksmans. On the same day he also wrote to Ms Magadzi, Chairperson of the PPC on Transport, regarding humiliating treatment meted out to Board members by the PPC. Both these letters, he said, went unanswered. Instead, on the same day that he had written the two letters, Minister Peters dismissed the Molefe Board. No reasons were given. Shortly thereafter, Minister Peters appointed an Interim Board. However, the dismissed Board Directors approached the High Court to have their dismissals reviewed and set aside. Minister Peters opposed the application. She lost with costs and the Molefe Board was reinstated. A few weeks later, Minister Peters herself was relieved of her Cabinet position. Minister Peters said she was mindful of lodging an appeal against the High Court's decision setting aside her dismissal of the members of the Molefe Board, as it was based on a procedural point, namely that she had not given the Board members a hearing before dismissing them.

62. Minister Peters was replaced by Minister Mkhacani Joseph Maswanganyi as Minister of Transport. Mr Molefe said Minister Maswanganyi, who had been a member of the PPC on Transport, avoided meeting with the Board, despite several requests. It appeared to Mr Molefe from the outset that Minister Maswanganyi's agenda was to dissolve the Board. In letters dated 5 June 2017 Minister Maswanganyi asked Board members to show cause why they should not be dismissed. The "irregular" appointment of Werksmans was raised as a significant reason for the decision. Board members disputed that there was a basis for them to be removed and Minister Maswanganyi did not follow through on his threat. Mr Molefe said there were further moves to weaken the Board by ensuring that it did not have a quorum. Some Board members were encouraged to resign and did so, and they were not replaced. In addition, the nominee of the Department of Transport stopped attending Board meetings, rendering the Board ineffective, as a quorum could not be formed for valid meetings.

63. Former Minister Maswanganyi responded that when he had been a member of the PPC, Prasa Board's "poor performance and financial management" had been discussed. He "strongly" denied that he had refused to meet with the Board; in any case, it was not "compulsory" for the Minister to meet with the Board; he accepted that on 5 June 2017 he had asked each of the remaining Board members to make representations on why he should not terminate their membership. His reasons were their poor performance and financial mismanagement; and their appointment of Werksmans

without following Prasa's SCM policy, without a Board resolution, contract and/or mandate. In addition, he alleged the following: "It was a Parliamentary decision to dissolve . . . the Board . . . and a Minister cannot go against a decision made by the Parliament of South Africa."

64. Mr Molefe was of the view that the Board could not rely on Parliament's Portfolio Committee on Transport for support. He alleged that the PPC did not take its responsibility of oversight in respect of public assets seriously, turned a blind eye to malfeasance and protected the culprits, rather than defend the public purse.

Other entities also did not act

65. On 13 May 2016, pursuant to the investigations by Werksmans, Mr Molefe wrote to General Berning Ntlemeza, the Head of the Directorate of Priority Crime Investigation (DPCI) colloquially known as "the Hawks", and to Advocate Shawn Abrahams, the National Director of Public Prosecutions (NDPP), setting out the grave revelations that had been uncovered by investigations and the cases that had been reported to the Central Reporting Office in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA Act) for further investigation. The letter to General Ntlemeza noted that several cases concerning Prasa had been registered with the police, but seemingly no progress had been made. Mr Molefe asked the DPCI to allocate dedicated resources to process the cases, especially those registered as serious offences. However, Mr Molefe alleged, the DPCI refused to discharge its statutory and constitutional mandate.

66. Ultimately, on 29 May 2017, the Board applied to the High Court for an order compelling the DPCI to act on the allegations. That application has not been finalised. This is in part because, instead of dealing with the merits of the Board's complaints, the DPCI raised technical objections. The Court however dismissed those technical objections. Thereafter, the DPCI filed its answering affidavit in respect of the substantive issues raised by Board in its founding affidavit and Prasa filed its Replying Affidavit. The matter has however not been taken further. Mr Molefe was of the view that the interim boards that were later installed simply did not have the determination of the dismissed Board to hold those who abuse power to account.

67. In response to a request from the Commission to deal with the allegations of the failure of the DPCI to act, Lieutenant General Seswantsho Godfrey Lebeya (appointed as National Head of the DPCI on 1 June 2018), submitted an affidavit dated 23 August 2021 stating that the DPCI was investigating twenty cases relating to Prasa; the first docket, which was opened in July 2015 on the basis of a complaint by Mr Mamabolo, an assistant manager at Prasa, related to the award of the locomotives contract to Swifambo; the next docket, which concerned the extension of the scope of work in respect of contracts awarded to Siyangena was opened in September 2015 following a complaint by Mr Paul O'Sullivan. Mr Mamabolo, representing Prasa, also submitted a statement; thereafter, following the Public Protector's Report, eighteen further cases were opened – on 16 August 2019.

68. Lt General Lebeya mentioned the three reasons for the delay in finalising the Swifambo and Siyangena investigations. First, he was told that details of the Swifambo complaints were not provided by the complainant or other Prasa employees when requested. Second, he was told that certain documents relating to contracts and the bases on which they were awarded were not made available by Prasa. He referred to letters that had been written to senior Prasa employees and in one case a subpoena being served. From the time of his appointment (1 June 2018), he had met with the previous Board, the Administrator and the current Board on nine occasions, the last being a virtual meeting on 7 April 2021. Third, there was a lack of cooperation from Prasa employees, especially Ms Ngoye and Mr Dingiswayo, who insisted on being part of every interview with Prasa employees. The investigators wished to interview Mr Mamabolo on his own in terms of an investigation plan compiled by the investigators and the case prosecutor.

69. Lt General Lebeya confirmed that the matter had not been concluded. The Swifambo case (in respect of which 383 statements had been taken) was still under investigation, though the investigation was "90% complete". The Siyangena investigation (with 185 statements taken) was 75% complete; of the remaining eighteen cases, four investigations had been finalised, while the other fourteen are

still under investigation. He said: "[T]he unsound relationship between the DPCI and Prasa between 2015 and 2018 contributed to the delay in completing the investigations." Allegations that Prasa's legal section did not co-operate with the DPCI were denied by Ms Ngoye and Mr Dingiswayo. Given that what Lt General Lebeya alleged is for the most part hearsay, there is no reason to reject their denials. The dilatoriness of the DPCI is dealt with below.

THE SWIFAMBO AWARD

Introduction to the award of the locomotives tender

70. A procurement process culminated on 24 July 2012 with the appointment of Swifambo by Prasa's Board as the preferred bidder for the locomotives contract. On 23 March 2013, Prasa and Swifambo Rail Leasing (Pty) Ltd concluded a contract in terms of which Prasa would purchase seventy locomotives from Swifambo for R3.5 billion. On 27 November 2015, sixteen months after the Molefe Board took office, Prasa approached the High Court's Gauteng Local Division, Johannesburg, to have its contract with Swifambo and other decisions made in respect of the locomotives tender reviewed and set aside. Prasa alleged that the procurement process in terms of which Swifambo had been appointed was highly irregular and possibly corrupt. On 3 July 2017, the High Court concluded that the procurement process was deeply flawed and corruption was involved. Similar findings were made by the Supreme Court of Appeal (SCA) when it dismissed Swifambo's appeal on 30 November 2019. The Constitutional Court (CC) refused to grant Swifambo leave to appeal.

71. On 18 December 2018, Swifambo Leasing and its "holding company", Railpro Holdings (Pty) Ltd were both liquidated by way of special resolutions.

72. The allegations of irregularity and impropriety made in the Founding Affidavit suggest that the procurement process was designed to award the tender to a company which had little or no experience in the rail industry and was a front for a foreign company. Moreover, whilst the RFP envisaged Prasa leasing the locomotives from the winning tenderer, a decision was made at a very late stage in the procurement process for the locomotives to be purchased – at a cost of R3.5 billion.

73. A forensic investigation (dated 19 April 2017) requested by the DPCI and the Report of the Liquidators identified individuals and entities that received payments from the R2.65 billion that Prasa had paid to Swifambo. This was despite only twenty locomotives (out of seventy) having been delivered, and said to be "not fit for purpose". The DPCI has until recently not taken the matter further. Other allegations were that minutes of a meeting of one of the Committees that recommended the appointment of Swifambo as the preferred bidder were inaccurate, if not forged; because the Committee re-visited its decision after being urged to do so by a senior person at Prasa.

74. The aforementioned information was available to the PPC on Transport and the DPCI were under a duty to pursue them properly, but did not do so. Had they done so, it is safe to conclude that they would also have uncovered at least some further matters that emerged when evidence on Prasa was led at the Commission and possibly even the matters that have come to light only recently. The blameworthiness of the PPC and the DPCI in respect of their inaction on the locomotives contract, becomes clearer as revelations are considered chronologically.

Brief overview of events preceding the procurement process

75. First, in July 2009 PRASA published a request for expressions of interest in the supply of locomotives for the haulage of passenger trains on various national routes as it had a shortfall of locomotives and wanted to lease locomotives.

76. Second, in May 2011, a Spanish company, Vossloh Espana S A U (Vossloh) inspected Prasa's fleet of locomotives and made recommendations on what Prasa needed in the short, medium and long terms.

77. Third, Prasa's Executive Manager: Engineering Services, Mr Daniel Mtimkulu, recommended that Prasa acquire air-conditioning systems from Vossloh Kiepe Ges.mbh.H (a subsidiary of Vossloh incorporated in Germany), and authorised the payment in terms of the contract of €3 631 090 (R24.6 million at the time).

78. Fourth, in July 2011, Mr Mtimkulu sent a memorandum to Mr Montana about Prasa's needs. He indicated that Prasa's fleet was outdated and that this impacted on the reliability of the services that Prasa was supposed to provide. He estimated that it would cost R5 billion over a period of six years and recommended that Mr Montana and the Board approve the sourcing of 100 locomotives.

The procurement process

79. The milestones that led to a contract being concluded for Prasa to purchase seventy locomotives from Swifambo are detailed in Prasa's founding papers in its review application. Mr Molefe alleged several times that documents could not be found and that there was a general lack of co-operation from some employees. Moreover, most of the minutes that were attached to the founding affidavit were unsigned.

80. The principal allegations made in the founding papers were the following:

    80.1 Prasa published the RFP (tender HO/SCM/223/11/2011) on 27 and 28 November 2011 and issued the RFP on 2 December 2011. As regards Swifambo, documents annexed to the papers indicated that the tender document was collected by someone from the "S Group" and that S Group Holdings paid for the tender documents using the reference "Swifambo". On 9 December 2011, Prasa held a compulsory briefing session for potential bidders. Swifambo was not one of the companies in attendance, but its holding company Swifambo Holdings (or Railpro Holdings) was present. Some two months thereafter, on 7 February 2012, Swifambo Holdings acquired a company known as Mafori Finance Vryheid (Pty) Ltd. (Its name was later changed to Swifambo Rail Leasing (Pty) Ltd, referred to as Swifambo.)

    80.2 Six bidders responded by the closing date: Mafori Financing t/a Swifambo Rail Leasing; Havdap Investment Solution (Pty) Ltd; Thelo Rolling Stock Leasing (Pty) Ltd; CRM Consortium; RRL Grindod; and GE South Africa. On 9 March 2012, Swifambo submitted its response to the RFP, with Vossloh Espana SAU (Vossloh) as its supply partner. Swifambo submitted its bid to the tender on 27 February 2012, as Mafori Finance Vryheid t/a Swifambo Rail Leasing. The founding papers alleged that there was no documentary evidence identifying those responsible for the compliance assessment of the bid proposals.

    80.3 According to unsigned minutes of Prasa's Bid Evaluation Committee (BEC) that were annexed to the founding affidavit, the BEC met on 27 March 2012. In a report that was compiled later, the BEC recorded that only Swifambo achieved the threshold compliance of 70% and it recommended that Swifambo be appointed as a preferred bidder. Thereafter according to the unsigned minutes of Prasa's Corporate Tender and Procurement Committee (CTPC), annexed to the founding affidavit, the CTPC met on 11 July 2012. Those minutes record that the CTPC concurred with the recommendation [presumably by the BEC] that Swifambo be appointed as a preferred bidder.

    80.4 According to an unsigned report purportedly compiled by the "Bid Adjudication Committee" (BAC), the committee met on 12 July 2012. The "BAC report" states that the BAC adjudicated and approved the BEC's recommendations, but also recommended that "Swifambo's appointment as a preferred bidder be based on outright purchase option". The "BAC Report" appears to have been forwarded to Mr Montana in his capacity of GCEO. The GCEO's report, which was unsigned, was also annexed to the founding affidavit. It simply repeats the recommendation set out in the BAC Report.

    80.5 The Board's Finance Capital Investment and Procurement Committee (FCIP) met on 19 July 2012. It recommended to the Board that Swifambo be appointed as the preferred bidder for

the provision of 67 dual electric diesel locomotives (hybrids) and that a separate procurement process be entered into for the remainder of the required 25 diesel locomotives.

80.6 According to the minutes of the Prasa Board's meeting of 24 July 2012, the Board approved Swifambo as the preferred bidder for the procurement of dual diesel electric locomotives.

80.7 On 27 July 2012, Prasa notified Swifambo of its appointment as a preferred bidder for the provision of the "diesel-electric (hybrid) locomotives".

80.8 On 25 March 2013, Prasa and Swifambo concluded the main contract on the terms set out therein. The contract was signed by Mr Montana, on behalf of Prasa, and Mr Mashaba, on behalf of Swifambo. It was for the purchase of 20 Euro 4000 locomotives and 50 Euro Dual locomotives, with a contract value of R3.5 billion (including VAT).

80.9 On 11 April 2014, Mr Montana approved a recommendation by Mr Mtimkulu that the "rudimentary" systems that came with locomotives needed to be upgraded, at a cost of some R335 million. This however, met resistance from Prasa's [internal] legal section and it was not approved by the Board.

The alleged irregularities

81. In the founding papers, Mr Molefe stated that a range of irregularities had been committed during the procurement process, including patent irregularities that appear on the face of some of the documents annexed to the founding affidavit. Those that appear significant for the purposes of this report are set out hereunder.

The designing of the specifications

82. Prasa's Procurement Policy required that specifications were to be designed or drawn up by a Cross Functional Sourcing Committee (CFSC), which would consist of at least three members; specifications ought to promote the broadest possible competition; and they should be based on relevant characteristics or performance requirements and avoid brand names or similar classifications.

83. In the founding affidavit, on the bases summarised hereunder, it was stated that those requirements were not met in that the specifications for the locomotives were not designed by a committee: they were authored by Mr Daniel Mtimkulu, who had told Mr Montana in July 2011 that Prasa's fleet of locomotives was outdated and had recommended the sourcing of 100 locomotives. The specifications appeared to have required features of the locomotives that Swifambo would offer when it later submitted its bid, namely the EURO 3000 diesel-electric locomotive.

84. The specifications included items that were irrelevant. The power output of the engine is a relevant consideration but the way the output is achieved and the identity of the manufacturer are irrelevant. However, the specifications stipulated that the manufacturer of the engine had to be EMD, which is the brand for which Vossloh had expressed a preference after its May 2011 inspection. Other irrelevant requirements set out in the specifications included almost exact matches for Vossloh's locomotives: the number of cylinders (V12); the bore and stroke (230, 19mm x 279,4 mm); the engine speed (904 rpm); and a multi-traction control with 27 pins.

85. In addition, the following specifications were an exact or nearly exact match for Vossloh's locomotives: a track gauge of 1065 mm (Vossloh's was 1067 mm); locomotive weight of 88 tons; and a traction effort of 305KN. Moreover, the following features, which Vossloh's locomotives had, were also specified: two cabs, which were not required, but had added cost implications as all the driver controls and displays had to be duplicated; a monocoque structure, which is more difficult to service as access to components for maintenance is difficult; and the UIC standard applied in Europe, although in South Africa, the Association of American Railroads standards are applied.

86. The founding papers said that the inclusion of manufacturer identity and of irrelevant considerations, and tailoring some requirements to the Vossloh locomotive had the effect that Swifambo's bid enjoyed

a decisive advantage in the bid evaluation, ensuring that Swifambo was awarded more points in the technical evaluation phase. It was the only bidder that met the 70% threshold when the bids were evaluated by the BEC.

RFP requirements and Swifambo's non-compliance

87. The RFP had set out a number of matters with which bids were required to comply and stated that failure to do so would lead to disqualification of the bid. The founding papers identified some of those requirements and stated that Swifambo's bid did not meet them.

88. The RFP stated that bids would be checked for completeness and compliance with the essential RFP requirements. Incomplete and non-compliant bids would be disqualified. The technical ability of bidders to deliver the locomotives in accordance with the prescribed specifications was a threshold criterion. Bidders were required to achieve a minimum of 70% in order to qualify for further evaluation.

89. Each bid had to meet at least the following requirements: demonstrating previous experience in the supply and leasing of locomotives and the bidder's capacity to handle a project of this magnitude; submitting letters of references from at least three previous clients for whom they had done similar work; and to provide, within ten days of appointment, an unconditional performance bond of 10% of the value of the project price offered by the preferred bidder. The purpose of the RFP was to enable Prasa to select a final bidder who was technically and financially qualified and had sufficient experience in similar projects.

90. The founding papers then went on to state that Swifambo's bid did not comply with some of the requirements set out in the RFP. The tax clearance certificate did not have a VAT number, and no tax clearance certificate was submitted in respect of Vossloh (according to the bid, a sub-contractor). The bid did not comply with the local content requirement as the locomotives were to be designed and manufactured in Spain. The bid did not contain evidence to support Swifambo's claim that it and its shareholders had previous experience in the rail industry, or demonstrate that it had experience in the supply of locomotives or the capacity to manage a tender of the size in question. The furnished reference letters related to Vossloh, not Swifambo, but Swifambo indicated that it would rely entirely on Vossloh to fulfil its obligation, although Vossloh was not a co-bidder and at the time had no contractual relationship with Swifambo.

Flaws in the consideration of the bids

91. The bids were considered by different committees before the Board made its decision. However, there was no documentary evidence of the identity of the individuals in the committees. Two documents were produced by the BEC: a set of minutes and a report.

92. The minutes, neither signed nor dated, record that the BEC met on 27 March 2012. They note that the RFP had requested bidders to submit proposals for two options: a five-year renewable lease with full maintenance programme; and a 10-year lease with a full transfer of ownership thereafter. The minutes note that those responsible for checking compliance with the SCM policy had not satisfactorily done so. The minutes record six persons as present: Ms Ntombeziningi Shezi, Mr Benedict Khumalo, Mr Thabo Mahlobogwane, Mr Jabulani Nkosi, Mr Peter Stow and Mr Joseph Magoro.

93. The founding affidavit records that Mr Molefe was told by a member of the BEC (whose confirmatory affidavit was annexed) that some BEC members had raised concerns about the compliance of Swifambo's bid but the chairperson, Ms Ntombeziningi Shezi, had told them that the Chief Procurement Officer, Mr Chris Mbatha, had instructed that the BEC should not concern itself with compliance issues, as SCM had performed the compliance check; and the BEC had been constituted merely to perform a technical evaluation of the bids. (Affidavit submitted by Mr Mbatha denied that he had given such an instruction to Ms Shezi.)

94. The BEC Report was signed by Ms Shezi in her capacity as Chairperson of the BEC. The Report lists the six persons, who according to the minutes were present at the meeting of 27 March 2012 but

makes no mention of Ms Jerita Motshologane, or that she was absent or had tendered her apology. Contradicting the minutes of the BEC, the Report said the bids had been checked for completeness and compliance. It also noted "the scope of work" as being the provision of locomotives on lease and correctly reflected that the periods of lease were either five years or 15 years (and not ten years as recorded in the minutes). The Report recorded that the RFP required a minimum technical threshold of 70% and that only Swifambo's bid had achieved that threshold. As a result, only Swifambo's bid was "financially evaluated". The report also noted that Swifambo's bid provided three options: a five-year lease, a 15-year lease and the cost of purchasing the locomotives.

95. The date on which Ms Shezi signed the Report is not reflected under her signature, although there is space therefor. However, there are two insertions at the foot of each page of the 13-page report: on the left-hand side, the words "Bid Evaluation Committee" and in the centre, the page number. In addition, the date 23 June 2012 appears on the right-hand side of the first seven pages of the Report, and the words "[insert date]" on the last three pages.

96. In the founding papers, Mr Molefe said that Prasa's procurement policy required that the CFSC, not the BEC, should prepare the scoring sheet and allocate the weighting for different items. In this case, the BEC had prepared the scoring sheet.

97. As noted above, according to its Report, the BEC found that only Swifambo's bid achieved the threshold compliance of 70% and only its bid was financially evaluated. Mr Molefe attributed this in part to the fact that the specifications were tailored to suit Swifambo's product. He added that there were other irregularities in the scoring process. A member of the BEC who participated in the first scoring exercise on 27 March 2012 was replaced for the next sitting on 15 May 2012, but the scores that he gave on 27 March 2012, which were favourable to Swifambo, were used in the final calculation; and the bids were not scored in accordance with the weighting allocated.

98. If, as recorded in the Report that was signed by Ms Shezi, a proper compliance check had been done, the check inexplicably overlooked obvious deficiencies in the Swifambo bid. In particular, Swifambo's bid did not contain documents confirming that it had entered into a joint venture with Vossloh Southern Africa, on whose experience and technical capabilities it would rely to fulfil its contractual obligations to Prasa. Documentary evidence of the existence of such an agreement would have been critical if Swifambo was to be awarded the contract on the basis not of its own experience and expertise but that of Vossloh as its alleged partner.

99. The BEC's Report recommended that Swifambo be appointed as a preferred bidder; and the CPO appoint a negotiation team to enter into negotiations with Swifambo and if the negotiations were successful, the negotiated agreement be submitted to the GCEO for recommendation to the Board's FCIP.

100. According to a set of minutes annexed to the founding papers, Prasa's Corporate Tender and Procurement Committee (CTPC) held an "extra-ordinary" meeting on 11 July 2012. The minutes record that the following persons were present at the meeting: Mr Tiro Holele (the chairperson), Mr Chris Mbatha, Mr Siphiwe Mathobela, Ms Jerita Mothshologane, Mr Maishe Bopape, Ms Martha Ngoye, Ms Ntombeziningi Shezi and Mr Sidney Khuzwayo. A resolution taken at the meeting was that the CTPC concurred in the recommendation [presumably by the BEC] that: Swifambo be appointed as a preferred bidder; and the Group CEO appoint a negotiations team to negotiate with Swifambo and, if the negotiations were successful, the negotiated agreement be submitted to the GCEO for recommendation to the FCIP. Significantly, however, although there are spaces for the signature of the chairperson and the date these are left blank in the copy annexed to the Founding Affidavit. There appears to be no copy that is dated or signed.

101. The next document annexed to the founding affidavit is titled "Bid Adjudication Report", which notes: "On 12 July 2012, the Bid Adjudication Committee of Prasa (CTPC) adjudicated and approved the recommendations of the Bid Evaluation Committee." The Report was neither signed nor dated. The "Report of the BAC", for the most part, repeats almost word for word, what was said in the BEC's report of (presumably) 23 June 2011. Apart from a few additions, it simply reproduces the BEC Report but effects changes to page numbers. However, unlike the reproduced BEC Report that it incorpo-

rates, the "BAC Report" does not identify the members (in this case of the BAC) who were present at its meeting of 12 July 2011. In addition, it includes some additions to the BEC Report, such as at the end of paragraph 1: "On 12 July 2012, the Bid Adjudication Committee of Prasa (CTPC) adjudicated and approved the recommendation of the BEC." Thereafter, at paragraph 6 (recommendations), prior to repeating the BEC's recommendations, it states that Swifambo be appointed as a preferred bidder for the dual and the E300 locomotives; and that its appointment "be based on outright purchase option". There is a space for Mr Holele to sign in the capacity of "the Chairperson of the Bid Adjudication Committee", but no signature was affixed.

102. Also annexed to the founding affidavit is a document titled "Report of the Group CEO". The report has Mr Montana's name, but it is neither signed nor dated. In the section of the report titled "recommendation", the following is said: "The GCEO has reviewed the report of the Bid Adjudication Committee and makes the following recommendation . .." The recommendation repeats, virtually word for word, the recommendation of the BAC.

103. In his founding affidavit, Mr Molefe noted that when comparing the contents of the BAC and the GCEO reports, the two documents are clearly generated from the same template. The inference is that the BAC recommendation was not considered by the GCEO.

104. Mr Molefe said that the Board's FCIP, tasked with focusing on the Board's responsibilities in respect of finance, capital investments and procurement, met on 19 July 2012. The FCIP recommended that Swifambo be appointed as the preferred bidder for the provision of 67 dual electric diesel locomotives and that there be a separate procurement process for the remainder of the required 25 diesel locomotives.

105. According to its minutes annexed to the founding affidavit, Prasa's Board met on 24 July 2012. The attendees were: Mr Sifiso Buthelezi, Dr Gasa, Mr Nkosinathi Khena, Ms Marissa Moore, Mr Ntebo Nkoenyane, Mr Mfanyana Salanje and Mr Montana (who were members the Board) and the following non-members: Mr Lindikaya Zide, Mr Goggi Ngakane, Mr Gastin and Mr Sebola. The tender was discussed under the item "diesel-electric locomotives" and the minutes noted that the Board approved Swifambo as the preferred bidder for the procurement of dual diesel electric locomotives.

106. On 27 July 2012, Prasa notified Swifambo of its appointment as a preferred bidder. The value of the contract was R3.5 billion and thus had to be approved by the Board. In these circumstances, one would expect that properly dated and signed documents would be produced at each stage of the process to enable one to ascertain precisely what decisions were taken or recommendations made; when they were taken or made; who was present on each occasion; signed registers; and the reasons for the decisions and recommendations. In this matter, however, only the Report of the BEC was signed. Quite how the bids passed through the successive committees and individuals without the omissions being detected and commented upon is quite a serious matter affecting not only the regularity of the process but its integrity as well.

107. A further worrying aspect that is raised in the founding is that the Board had approved the award of the tender to Swifambo on 24 July 2012 after the then chairperson, Mr Buthelezi, and Mr Montana were told that concerns had been raised about Swifambo.

108. The concerns are reflected in emails annexed to the founding papers, namely that on 6 November 2012, Dr Gasa (the chair of the FCIP) sent an email to, among others, Mr Buthelezi and Mr Montana, saying "I have just received intelligence information about Swifambo Rail Leasing. ... Failure to follow this up, would sink the organization (sic). Should the intelligence report prove true, we need immediate intervention as the Board". On 20 November 2012, Dr Gasa emailed to the Chief Procurement Officer, Mr Chris Mbatha, copying Mr Buthelezi. Part of this email said: "There are concerns that have been raised around [Swifambo Rail Leasing] and the FCIP is needing you to confirm that indeed a capacity check was properly done in relation to this contract and that you have satisfied yourselves that the necessary checks and balances have been done". In the email, Dr Gasa emphasised that time was of the essence as it would be "an anomaly to conclude contract negotiations in light of the seriousness of the matters we'd raised for which we have not received a response from you". Nonetheless, the contractual negotiations proceeded. There appear to be no written responses

to these emails or the serious concerns that Dr Gasa raised.

109. On 25 March 2013, Prasa and Swifambo concluded the main contract on the terms set out therein. The contract was signed by Mr Montana on behalf of Prasa. The contract was for the purchase of 20 Euro 4000 locomotives and 50 Euro Dual locomotives, with a contract value of R3.5 billion (including VAT).

110. On 11 April 2014, Mr Mtimkulu sent a memorandum to Mr Montana in which he requested a variation to the Swifambo contract because "the systems that came with the locomotives per the Swifambo proposal to Prasa were rudimentary and therefore needed to be upgraded to ensure that the locomotives are fitted and assembled with the latest technology". The additional cost to Prasa was R335 million. The request was approved by Mr Montana on 11 April 2014 [although he had no authority to approve amounts over R100 million]. Mr Molefe said that the suggestion that the systems that came with the locomotives were rudimentary was nonsensical. He said the locomotives offered by Swifambo were state of the art and the systems mentioned in the memorandum were standard features.

Main grounds of review

111. In support of its review application, Prasa relied on numerous irregularities and improprieties. Some of them have already been mentioned above. The specifications had been designed by Mr Mtimkulu as opposed to a CFSC; and Swifambo's bid was non-compliant as it did not meet some of the requirements set out in the RFP.

112. In addition, the review papers stated that the following matters rendered the award made to Swifambo unlawful:

    112.1 The main contract that Prasa concluded with Swifambo deviated materially from the terms of the RFP: the RFP required a lease of locomotives, but the main contract was for the purchase of the locomotives. The main contract however stated that the RFP had invited proposals for three options, with one being an outright sale of locomotives to Prasa. Mr Molefe stated that that was incorrect: the RFP did not provide for an outright purchase. As a result, competing bidders were not afforded an opportunity to bid on an outright sale as one of the options. Accordingly, Mr Molefe contended that this change (in procurement strategy) was fundamentally flawed and unlawful.

    112.2 The award of the tender to Swifambo and the conclusion of the main contract without the contractual involvement of Vossloh constituted a material irregularity. Swifambo had no technical capacity, and Vossloh had no contractual obligation to design, manufacture and deliver the locomotives in terms of the main contract. The risk to Prasa was palpable.

    112.3 The conclusion of the main contract without the submission of an unconditional performance bond by Swifambo within the time period prescribed in the RFP was irregular.

    112.4 Swifambo had offered the Euro 3000 diesel locomotive in its bid, and that was the model that had been evaluated. However, Prasa acquired the Euro 4000 diesel model, which had not been evaluated.

    112.5 In terms of the main contract, the first twenty locomotives to be delivered were the Euro 4000 locomotives. But the Euro 4000 did not comply with the specification as set out in the RFP in several material respects. Moreover, the Euro 4000 was designed for the European rail network, not for South Africa. It is not compliant with the vehicle gauge specifications designed to ensure that the locomotives are able to operate on the rail networks safely and effectively: it has an overall vehicle gauge height of 4 140mm, whilst the RFP specifications required that the maximum vehicle gauge height be 3 965mm. The consequence was that Prasa was saddled with locomotives that were not fit for purpose and unsafe to operate on the South African rail network.

113. Other irregularities to which Mr Molefe referred were that approval from the Minister of Transport had not been obtained; there was no indication that National Treasury had received a written submission;

there had been no budgeting for provision for the purchase of the locomotives; and Mr Mtimkulu falsely stated that he held a doctorate.

114. Swifambo's response through its deponent Mr Massaroa, who was not initially involved in its bid, did not dispute these irregularities, but indicated that these were a result of Prasa's internal decisions, by which Swifambo ought not to be prejudiced. Similarly, Mr Montana expressed the view that irregularities must be distinguished from corruption. He said that, while there may have been certain irregularities, this did not justify setting aside the award and contract by the High Court or the SCA.

115. It is appropriate to observe at this stage that the irregularities detailed in the founding papers make it clear that the award of the locomotives tender to Swifambo were attributable to much more than incompetence or negligence. They suggested a pre-determined plan that involved a number of people of various levels of seniority at Prasa.

Bombshell allegations in the replying affidavit

116. In mid-August 2015, Mr Mashaba told Mr Mamabolo that he was aware that Prasa was investigating the award of the Swifambo tender and asked Mr Mamabolo to arrange a meeting with Mr Molefe. That meeting was held on 31 August 2015. Present at the meeting were Mr Mashaba, Mr Molefe, Mr Mamabolo and Ms Mashila Mtala, a member of Prasa's Board and chairperson of its FCIP Committee.

117. Based on Mr Molefe's affidavit, Mr Mabunda had asked Mr Mashaba to participate in the locomotives tender; he was aware that the award of the tender was being investigated. Mr Mabunda had instructed Mr Mashaba to pay some of the money received from Prasa into specified accounts and this would "benefit the movement"; and while it was a pity that he did not have documents with him reflecting the payments he had made he would provide the documents.

118. Mr Mashaba later did indeed hand over some documents to Mr Mamabolo. As regards the payments, the documents reflected that, through his company, AM Consulting Engineers (Pty) Ltd, Mr Mashaba had paid R79 million and had charged a "handling fee" of 10%. At subsequent meetings between Mr Mashaba and Mr Mamabolo, Mr Mashaba told Mr Mamabolo that, after Prasa had made payments to Swifambo or Swifambo Holdings, Ms Gomes would instruct him to make payments to certain entities. These were: Similex (Pty) Ltd, Nkosi Sabelo Incorporated and Knowles Hussain Lindsay Incorporated. None was a creditor of Swifambo or Swifambo Holdings. He said that he had also made two cash payments to Ms Gomes: one for just over R1 million and the other for R90 000. She would then distribute the funds.

119. In his replying papers, Mr Molefe also mentioned two sets of documents that he suggested were relevant to what has been set out above. First, a document ostensibly prepared by Siyaya Rail Solutions (Pty) Ltd, a subsidiary of Mr Mabunda's S Group. This document appears to have been submitted to Prasa in response to the request by Prasa for Expressions of Interest (EOI) to lease locomotives to Prasa. In the document, Siyaya Rail Solutions said that for the purposes of the EOI, it had entered into a partnership with two international companies, one of which was Vossloh Espania, to provide turnkey solutions to Prasa for the leasing of locomotives. Second, emails exchanged between Mr Montana and Ms Gomes on 16 and 17 December 2013, which Mr Molefe alarmingly indicated the following: the familiarity between them and the fact that they referred to each other as "comrades"; and that Mr Montana gave Ms Gomes details of various projects within Prasa.

120. Swifambo filed an affidavit by Mr Mashaba responding to the bombshell evidence in Mr Molefe's replying affidavit. Mr Mashaba denied that Mr Mabunda had told him that he was friends with Mr Montana. He denied that he did not have experience in the rail industry, saying that he had three years' experience. He said the purpose of the meeting of 31 August 2105 was to "amicably iron out difference between Swifambo and Prasa emanating from the contract". He alleged that at the meeting Mr Molefe had asked him if he supported the ANC financially - his affidavit sets out contributions he made to the ANC. He made them, according to the affidavit, after he was contacted by Mr Sabelo, who professed to be an ANC "fundraiser". It was Mr Sabelo who introduced him to Ms Gomes, whom he said was also an ANC fundraiser. The payments were not made by Swifambo or from its account.

Mr Mashaba later gave documents to Mr Mamabolo to demonstrate that he supported the ANC, "as requested during the meeting by Molefe".

121. Mr Mashaba made two other points in his affidavit which are worthy of special mention as they display a somewhat cynical approach to dealing with wrongdoings in procurement processes of SOEs The one point was that by the time the payments referred to by him were made, the contract had already been awarded to Swifambo. The other point is worth quoting in full. Mr Mashaba said:

> I honestly believe that if Mr Molefe dealt with this matter at an arm's length basis, a commercial solution could easily have been found in a manner that would permit Prasa's technical issues to be addressed, and costly protracted litigation avoided. The public would now have state of the art locomotives.

122. The complaints that Mr Molefe's papers raised about the unlawfulness of the contract that Prasa had concluded with Swifambo for the purchase of the locomotives were considered by the High Court and the SCA. In the High Court, the review application was heard by Francis J. The learned Judge reviewed and set aside the contract on the basis that it was tainted by serious irregularities, some of which related to corruption and fronting. On appeal, the SCA confirmed the order and also concluded that there was corruption. The CC refused Swifambo leave to appeal. A consideration of the review papers suggests that, on the basis of the information and documents placed before the Courts, a proper case for review had been made out.

123. It is instructive to consider what the SCA held about the tender and its outcome:

123.1 It was Mr Mtimkulu who had in July 2011 recommended that Prasa sources 100 locomotives at a cost of R5 billion; it was he who had drawn up the specifications of the locomotives to be supplied; he had no expertise in the subject, but had been appointed to a position in Prasa by Mr Montana in 2010 and had a meteoric rise through the ranks, with a salary to match; he claimed to have diplomas in engineering and later a doctorate; in fact he had no qualification at all. He resigned before disciplinary proceedings could be instituted by the new Board.

123.2 The specifications drawn up by Mr Mtimkulu contravened various requirements of Prasa's procurement policy. But they matched those of the locomotives manufactured by Vossloh Espana (who in May 2011 had made recommendations on Prasa's needs) and were tailored to include several features that were of no relevance to Prasa's needs, so as to benefit Vossloh and thus Swifambo. Accordingly, the High Court had correctly held that this was a factor that justified the conclusion that the tender process was corrupt.

123.3 No proper assessment of Prasa's needs had been undertaken, and the normal financial procedures required by the procurement policy were not followed. National Treasury's approval, required by the PFMA, had not been obtained.

123.4 Swifambo's bid did not comply with the requirements of the RFP in at least the following respects: Swifambo's tax clearance certificate did not have a VAT number and no such certificate was submitted for Vossloh; Swifambo's bid did not comply with the local content requirement as the locomotives were to be designed and manufactured in Spain, and it had not provided evidence of previous experience in the rail industry; Swifambo's bid did not demonstrate that Swifambo had experience in the supply of locomotives or its capacity to manage a project of the size put out to tender.

123.5 Although the contract between Prasa and Swifambo was concluded on 25 March 2013, a contract for the supply of locomotives was concluded between Swifambo and Vossloh only on 4 July 2013. Thus when Prasa and Swifambo concluded the contract, Vossloh had no legal obligation to Swifambo or Prasa and Swifambo had no capacity to provide Prasa with the locomotives. Like the High Court, the SCA found that Swifambo was a party to a fronting practice.

123.6 Mr Montana was party to Mr Mtimkulu's conduct. Of Mr Montana, it also said:

> He controlled PRASA and its staff, was obstructive and attempted to cover up his role in various corrupt transactions, including the award of the tender to Swifambo. ... The Public

Protector had experienced similar obstruction in her investigation.

123.7 Mr Montana agreed that Courts have a responsibility to fight corruption, but in the Swifambo matter, he alleged, they went beyond their duty in declaring the contract corrupt. He said that it was important that, as regards corruption, even Mr Sacks had not found that any money had gone to "Prasa people". He said he rejected both judgments and attacked Francis J and the Justices of the SCA.

The Sacks Report

124. Mr Sacks is a Chartered Account and a director of Crowe Forensics SA (Pty) Ltd, formerly Howarth Forensics. Horwarth was appointed by Werksmans to perform expert forensic investigations relating to certain expenditures incurred by Prasa, one of which was in respect of the Swifambo contract. On 28 December 2015, the DPCI appointed Horwath Forensics, represented by Mr Sacks, to perform a cash flow analysis investigation pertaining to the Swifambo tender. In his report, which is dated 20 April 2017 and is described as a "preliminary report", Mr Sacks sets out how it came about that he had compiled his report.

125. On 8 July 2015, Mr Mamabolo reported a number of corrupt activities at Prasa to the Hillbrow Police Station, under CAS 405/07/2015. In a supplementary affidavit, Mr Mamabolo stated that the award of the locomotives contract to Swifambo was irregular and could amount to fraud or corruption. On 27 November 2015, Prasa launched its application to have reviewed and set aside the contract that Prasa had concluded with Swifambo. On 28 December 2015, Horwath Forensic, represented by Mr Sacks, was appointed by the State to perform a forensic investigation into the allegations of irregularity. The scope of the investigation included all identified bank account details and individuals implicated in the process of the award of the tender and the entities that benefitted therefrom; to conduct a forensic audit of certain bank accounts and to trace the flow of funds and establish any individuals (including Prasa employees) or entities that benefitted from the award of the tender to Swifambo.

126. The objective of the audit was to analyse payments that Prasa had made to Swifambo, which payments were made into bank accounts of Swifambo Rail Leasing and Swifambo Rail Holdings, and the subsequent utilisation of those funds by Swifambo.

127. In his report, relying on the allegations made in Prasa's review papers, Mr Sacks analysed the entire tendering process.

Summary of main findings of Sacks' Report

128. The report notes that the contract between Swifambo and Vossloh reflected the following:

128.1 In terms of the contract, Vossloh was to sell 70 locomotives to Swifambo at €255 993 640, or for €3 657 052 each, while the price at which Swifambo sold the 70 locomotives to Prasa was €267 603 000 or €3 822 900 each. This means that Swifambo's profit margin was €165 848 per locomotive or €11 609 360 for 70. Using an exchange rate of R10.18 per Euro, the Report continues, Swifambo would earn more than R118 million.

128.2 Prasa's first payments were R64 473 684 to Swifambo Leasing on 6 December 2013, and R460 526 315.79 to Swifambo Holdings on 5 April 2013.

128.3 Prior to Prasa's first payment to Swifambo Leasing's account (on 6 December 2013), there was no transactional or operational activity on the account, apart from bank charges and insignificant receipts with a description of "Musa".

128.4 Between 1 January 2011 and 5 April 2013 (when Prasa made its first payment to Swifambo Holdings), the call account of Swifambo Holdings was evidently used to pay for various operating costs. Of the R1 043 865.40 received into this account: a total of R690 000 was received from an entity called Siyaya Rail Solutions; and a total of R257 265.40 was received from Vossloh SA

and Vossloh Track. During that period, an amount of R1 008 516.23 was paid mainly for rent and furnishings for Swifambo's offices.

128.5 The Report draws the following conclusions: Swifambo had no trading activity prior to receipts from Prasa; it was not an operating or trading company; the only expense it had incurred was for start-up costs and bank charges, thus confirming that it was a company set up for the locomotive tender with Prasa.

129. In the Report, Mr Sacks also set out his preliminary findings of his flow of funds analysis of Swifambo's bank accounts. He emphasised that those were "Level 1" findings, meaning that they pertained only to the flow of funds to and from bank accounts of Swifambo Leasing and Swifambo Holdings into which Prasa made payments. He cautioned that each of these entities held several bank accounts and that he had not been able to identify them all. In his "Level 2" findings he would have dealt with the flow of funds from entities that or individuals who received payments from Swifambo. The analysis considered descriptions in Swifambo's bank statement, as confirmed by beneficiary bank statements.

Swifambo's accounts

130. The outcome of Mr Sacks' analysis suggests that, as of 30 November 2015, the receipts into, disbursements from and balances in the accounts of both Swifambo Leasing and Swifambo Holdings may be summarised as follows:

130.1 In all, Swifambo received more than R2.65 billion from Prasa.

130.2 Swifambo made total payments to Vossloh of more than R1.8 billion [R1 873 474 161.62] and of R237 021 909.04 to SARS and as of 30 November 2015 it had R111 376 943.89 as balances in its accounts.

131. Mr Sacks set out a table of the dates when Swifambo received payments from Prasa and when it made payments to Vossloh (see below). The first and second columns reflect the dates on which Prasa (P) paid Swifambo (S) and the amount paid; the third and fourth columns reflect the dates on which Swifambo (S) paid Vossloh (V) and the amount thereof. The last column reflects the difference between what Swifambo was paid and what it paid Vossloh.

Date	P pays S	Date	S pays V	Difference
05/04/13	R460 526 316	01/08/13	R288 750 000	R171 776 316
06/12/13	R64 473 684	02/01/14	R52 118 805	R12 354 879
24/12/13	R468 672 881	17/01/14	R320 000 000	R148 672 881
13/05/14	R335 308 062	19/05/14	R241 565 356	R93 742 706
01/07/14	R430 166 417	08/07/14	R375 040 000	R55 126 417
12/01/15	R444 565 614	20/01/15	R307 000 000	R137 565 614
05/06/15	R182 424 652	15/06/15	R114 000 000	R68 424 652
07/07/15	R264 070 325	10/07/15	R175 000 000	R89 070 325

131.1 Mr Sacks said Swifambo made the first payment to Vossloh 116 days after it had received its first payment from Prasa. Details of five of the payments that Swifambo made to Vossloh were obtained from a letter that Swifambo had written to National Treasury. The bank accounts were not available to Mr Sacks, so he was not in a position to confirm those payments.

131.2 Mr Sacks says the bank accounts indicate that Swifambo received five payments from Vossloh totalling R811 508.59. The reasons for these payments were unclear, but even before the contract between PRASA and Swifambo was signed, Swifambo had received three payments from Vossloh SA/Vossloh Track totalling R257 265, seemingly to fund the set-up costs for Swifambo's office.

132. It is convenient now to consider the more significant payments that Swifambo made from the R2.65 billion that it received from Prasa. It paid a total of R1.8 billion to Vossloh and R237 million to SARS. Mr Sacks identifies the persons and entities to whom significant payments were made. However,

his report was compiled in April 2017, some twenty months before Swifambo was placed under liquidation.

Report of the liquidators

133. A more up-to-date picture of the flow of those funds emerges from the report prepared by the Liquidators, dated 18 February 2020, titled "Report to Stakeholders", and signed by Mr JZH Muller, one of the joint liquidators, who gave evidence at the Commission.

134. It should be noted that Mr Mashaba was summoned to appear before the Commission as a witness on 24 February 2021 and answer questions on among other matters the Liquidators' Report. In response, Mr Mashaba's attorney wrote to the Commission that Mr Mashaba "does not recognise and accept the lawfulness and/or legal validity" of the summons and would not be appearing at the Commission. He failed to comply with the terms of a summons without sufficient cause, and the Commission's Secretary has laid a charge against Mr Mashaba.

135. Be that as it may, the Liquidators Report records that in total the beneficiaries of most payments made by Swifambo were Mr Mashaba (and entities "under his control") and Mr Mabunda (and "entities under his control").

Payments to Mr Mashaba

136. The flow of funds analysis conducted by the Liquidators, found that Railpro Holdings made payments totalling more than R146 million to Mr Mashaba or "entities under his control" as indicated in the table that follows:

Payment amount from Railpro Holdings	Beneficiary
R1 680 000.00	Mr Mashaba
R9 293 000.00	Britewave
R31 066 859.88	AM Investments
R29 816 020.28	AMCE
R50 000 000.00	MM Trust
R26 200 000.00	Manoroko Makol

137. The liquidators' report shows Swifambo Leasing made payments of more than R22 million to entities "under the control of [Mr] Mashaba", as shown in the next table:

Payment amount from Swifambo Leasing	Beneficiary
R7 500 000.00	Bahn Wheels
R5 859 658.03	Mizana
R399 256.00	Mizana
R10 870.00	Am Luxury Lodge
R9 000 000.00	Manoroko Makol

138. Although Mr Mashaba did not comply with the summons to appear on 24 February 2021, he furnished an affidavit in response to a Directive served on him in terms of Regulation 10(6) of the Commission's Regulations. He said that at all material times and until they were liquidated, he was the managing director of Railpro Holdings and of Swifambo Leasing. Mr Muller had laid charges against him in respect of racketeering and money laundering. Should he respond to the contents of the Liquidators' Report, he ran the risk of possibly incriminating himself. He was challenging the lawfulness of the appointment of the Liquidators of Railpro Holdings and Swifambo Leasing. There was on-going litigation between him and the Liquidators; and an application was to be made to the Master [of the High Court] to remove Mr Muller as a final liquidator of Swifambo Leasing. He was exercising his right not to respond to allegations made in the Report about monies received by him or entities referred in the Liquidators' Report.

139. Regarding Mr Mabunda and Mr Montana: Mr Montana had worked for the Ministry of Public Enterprises, whilst Mr Mabunda had worked at the Department of Public Enterprises. Mr Mabunda appears to control the "S-Group" (Siyaya) of companies, which have been paid more than R1 billion by Prasa for work performed by them.

140. In a statement submitted to the Commission, Mr Mabunda responded to the allegations. Regarding Railpro Holdings, he said: the payments made to him were for "service rendered"; the payments to the entities mentioned, except for Bahn Wheels, were for "service rendered"; and the payment to Bahn Wheels was made after he had "sold" the company to Swifambo. Regarding Swifambo Leasing, he said: the payments made to him were for "service rendered"; the payments to Siyaya DB and the S Group were for "service rendered"; the payments to Nsovo Holdings were for rental for offices; while the payments to Ntshovelo Logistics and Sterlings "had nothing to do" with him.

141. As has been noted above, in his report Mr Sacks also dealt with the flow of funds from Swifambo to third parties such as Mr Mashaba and Mr Mabunda and entities with which they were associated. Although his flow of funds analysis considered what the position was as of 30 November 2015, his findings on the payment amounts and recipients are broadly in accord with the findings of the Liquidators. It is necessary to consider the reasons that the DPCI gave for not acting on Mr Sacks' Report.

142. According to Mr Sacks he was asked to meet with the DPCI to present his Report [on his investigation into Swifambo] before the DPCI met with prosecutors on 20 April 2017. He presented his Report to Brigadier Makinyane and another member of General Khana's team on 19 April 2017. After that he heard nothing further from the DPCI.

143. Mr Sacks notes in his affidavit however that when his firm, then known as Howarth Forensics, was appointed by the DPCI on 28 December 2015, the DPCI team under General Mosipi had envisaged extending the firm's mandate as and when it was deemed appropriate. It was envisaged that the next investigation would be into the award of certain contracts to Siyangena. However, General Khana took over the investigations from General Mosipi. From then on, Mr Sacks said, his firm did not receive any further appointments. In particular, he was not even asked to conduct the Second Level analysis in respect of the Swifambo tender.

144. It will be recalled that Lt General Lebeya, in his affidavit in response to Mr Molefe's allegation that the DPCI had been dilatory in their investigations into Prasa-related matters, had laid the blame for the delay on Prasa and its employees. He sought, in that affidavit, to explain why Mr Sacks' services had not been retained. Following a complaint by Mr Mashaba, the chairperson of Swifambo, the mandate of Horwath Forensics in respect of the Swifambo investigation had been withdrawn. However, there was "an indication" that because they were "Forensics Accountants" as opposed to a "Forensic Investigating Company", the police continued to meet with Horwath: hence the meeting of April 2017. However, the prosecutors allegedly "raised a concern and discomfort" about the "objectivity" of the Sacks Report and advised that an "independent report" by a different services provider should be sourced and "as such the investigation team did not continue with Crowe Forensics' services".

145. Lt Gen Lebeya's explanation as to why the investigation into the Swifambo tender had not been finalised is hearsay. He relies on what he had been told, without saying by whom. But, given that more than six years had passed since the complaint was lodged with the police, his explanation does not stand scrutiny, and even after he took over in 2018, not much has happened. In particular, it does not appear that there was any urgency in securing an "objective" report on the flow of money received by Swifambo as a replacement to Mr Sacks' Report. In addition, he does not even seek to explain why Mr Sacks was not told about the concerns that had been raised about his report.

146. With respect, the explanation tendered by Lt General Lebeya does not dispel the impression entertained by Mr Molefe, Ms Ngoye and Mr Dingiswayo that there was a reluctance on the part of law-enforcement authorities to investigate and prosecute persons who may have committed offences during the tender process. If anything, Lt General Lebeya's explanation not only gives force to the impression but leads one to conclude that that reluctance persists even today.

Allegations of other irregularities

147. It appears in 2012 there was no Committee at Prasa called a Bid Adjudication Committee (BAC). Despite this, one of the documents that Mr Molefe annexed to his founding affidavit was what purports to be a "Report of the BAC". Rather, when the Swifambo tender was being considered, the BEC would submit its recommendation to the CTPC, which became known as the BAC only a year or so later. The Swifambo tender could thus not have been considered by the BAC.

148. However, based on minutes of the CTPC annexed to it, the founding affidavit went on to say that the BEC's recommendation was also considered by the Corporate Tender and Procurement Committee (CTPC). A three-page document was attached to the Founding Affidavit as being the "minutes" of the meeting of the CTPC. The document that was annexed as being the "minutes" of the CTPC meeting simply recorded the names of the persons who were present and that presentations had been made in respect of certain "items" [presumably reflected in the minutes]. In addition, the "resolution" taken was recorded in the minutes.

149. The next document annexed to the Founding Affidavit was titled "Bid Adjudication Report". Mr Molefe relied in part on the minutes of the BEC meeting held on 27 March 2012 and an undated and unsigned Report of the BEC, which reflected the date 23 June 2012 at the foot of some of its pages. Mr Molefe also relied on what he was told to him by Mr Peter Stow, who attended the BEC meeting of 27 March 2012, alleging that the BEC minutes and Report were misleading in certain respects.

150. Significantly, there was no similar allegation by Mr Molefe relating to the minutes of CTPC meeting or the BAC Report being misleading. However, towards the end of the Commission's scheduled hearings, questions were raised about what was reflected in those two documents, which were annexed to the founding affidavit.

151. Ironically, the questions arose in the following circumstances. During the course of his testimony before the Commission, Mr Montana made a number of quite serious allegations against Ms Martha Ngoye and Mr Tiro Holele. Mr Montana claimed that Ms Ngoye and Mr Holele had accused him of wrongdoing, but they could not escape blame in respect of the award of the locomotives tender to Swifambo. He testified that this was because they were members of the BAC that supported the recommendation that Swifambo be appointed as the preferred bidder.

152. In response to Montana's allegations against them, Ms Ngoye and Mr Holele filed affidavits and were thereafter given an opportunity to respond to Mr Montana's evidence against them. They said that in July 2012 according to the documents purporting to be the minutes of the CTPC and BAC meetings that were annexed to the review papers, they [Mr Holele and Ms Ngoye] were members of the CTPC, appointments to that committee being made on an annual basis, and Mr Holele was the chairperson of the CTPC. Neither of them could recall being at a CTPC meeting on 11 July 2012 or a "BAC meeting" on 12 July 2012, given that there was no BAC at the time. Given the sheer size of the tender [R3.5 billion], they said they would remember being part of the process. Ms Ngoye and/or Mr Holele also pointed out that in 2012, recommendations from the BEC were considered by the CTPC: at that time there was no committee known as the BAC. The CTPC was "converted" into, and became known as "the BAC", a year or so after the locomotives tender had been considered by the BEC in March 2012. Accordingly, the locomotives tender could not have been considered by a Prasa BAC. Significantly, the minutes of the CTPC meeting are not signed (or dated), nor is the BAC Report signed, notwithstanding the space in the respective documents for the Chairperson to sign. Ms Ngoye and Mr Holele also noted that there would also have been recordings of the meetings, signed attendance registers and duly signed minutes. But these are not included in any of the papers.

153. The foregoing matters, they said, are evidence of fraudulent and corrupt conduct that was associated with the locomotives contract. They in effect suggested that the minutes (of the CTPC) and the Report (of the BAC) are forgeries.

154. However, soon after they testified at the Commission, Prasa decided to institute disciplinary proceedings against them. In affidavits to the Commission, Ms Ngoye and Mr Holele complained that they were being victimised by Prasa because they had testified at the Commission. However, the Chair-

person of Prasa's new Board, Mr Leonard Ramatlakane, disputed that allegation in an affidavit that he submitted to the Commission. This led to further affidavits from Ms Ngoye and Mr Holele and further responding affidavits with accompanying documents from Mr Ramatlaklane. The affidavits referred to herein deal with a number of issues, not all relevant hereto.

155. In his affidavits to the Commission, Mr Ramatlakane denied that the institution of disciplinary proceedings against Ms Ngoye and Mr Holele were in any way related to their giving evidence at the Commission. In support of that denial, he said that his Board was concerned about several issues that had arisen at Prasa, among them that there had not been consequences for management and compliance failures at Prasa; there was inadequate record keeping, and in some instances no records at all; and an increase in irregular expenditure. As a result, he said, his Board had undertaken various investigations to get to the root cause of the concerns. Among the matters that it investigated was role of different Prasa employees in the award of the locomotives tender to Swifambo, including the roles of Ms Ngoye and Mr Holele.

156. Mr Ramatlakane said that the evidence that is now at the disposal of his Board confirms that Ms Ngoye and Mr Holele attended the CTPC meeting of 11 July 2012. In support of that allegation, he relied on an affidavit by Mr Sydney Khuzwayo, who was the temporary secretary of the CTPC/BAC during 2012. In his affidavit, which was also submitted to the Commission, Mr Khuzwayo said he was a member of the CTPC that met on 11 July 2012. He said he had made handwritten notes of what had transpired at the meeting and annexed a copy of those notes to his affidavit. According to his notes, the eight persons who according to the unsigned minutes of the CTPC annexed to Mr Molefe's affidavit attended the meeting, were in fact present. Mr Khuzwayo also said that Ms Ngoye and Mr Holele had signed declaration of interest forms on 11 July 2012 and annexed those to his affidavit.

157. There is one further matter that arises from Mr Ramatlakane's affidavit. It concerns a formal transcript of a tape recording of a meeting of the CTPC that was allegedly held on 19 July 2012 and at which the locomotives tender was again discussed. According to the transcript, the following persons were present at this meeting: Mr Mbatha, Mr Holele, Mr Khuzwayo, Mr Mathobela and Ms Shezi. Insofar as the transcript is concerned, the following needs to be stressed: this is the first and only indication that there was a further meeting of the CTPC after 11 July 2012 at which the locomotives tender was considered. From what is recorded to have been said at the meeting, it is difficult to piece together precisely why it was called and what the final outcome was, as there appears to be no formal resolution that was adopted. However, it would appear that after Mr Mbatha had conveyed the resolution of 11 July 2012 to someone senior at Prasa, he was urged to ask the CTPC to modify to some extent the resolution it had adopted on 11 July 2012. It appears from the transcript that this is what was done at the meeting of 19 July 2012. However, there is no written record of the resolution adopted at the meeting of 19 July 2012.

158. In their responses to the foregoing allegations, Ms Ngoye again denied that she was present at the CTPC meeting of 11 July 2012. She challenged the correctness of what was recorded in Mr Khuzwayo's notes about the meeting. Mr Holele reiterated his denial that he was present at the CTPC meeting of 11 July 2012. He also appears to deny being present at the CTPC meeting of 19 July.

159. It is regrettable that new evidence relating to the meeting of the CTPC was received only at a late stage, and after Ms Ngoye and Mr Holele had testified that they had not attended the meeting. None of the evidence relating to the CTPC meetings of 11 or 19 July 2012 has been tested by cross-examination. Although Ms Ngoye and Mr Holele gave oral evidence they were not cross-examined; and the new evidence from Prasa is set out in affidavits. In light of the foregoing, it is not possible to make a firm decision on whether or not Ms Ngoye and Mr Holele attended the meeting of the CTPC on 11 July 2012 and whether Mr Holele attended the CTPC meeting of 19 July 2012. Nevertheless, it must be accepted that the new evidence presented appears to cast doubt on their version that they were not part of the process that recommended that Swifambo be the preferred bidder for the locomotives contract.

160. Be that as it may, the new evidence considered in the paragraphs above reinforces the contentions set

out in Mr Molefe's affidavits in the Swifambo review application that the procurement process followed by Prasa to acquire the locomotives was seriously flawed. Certainly, the new evidence confirms that not much reliance can be placed on the documents that recommended that Swifambo be approved as the preferred bidder. In addition, the transcript suggests that on 19 July 2012 the CTPC re-visited the decision that it had taken on 11 July 2012 – after being urged to do so by someone senior.

161. It is clear that all those who were involved in the procurement process for the acquisition of the locomotives should be made to account for their actions.

THE SIYANGENA REVIEW

162. Ms Martha Ngoye made the Founding Affidavit in the application that Prasa instituted in the High Court to have reviewed and set aside certain contracts that Prasa had concluded with Siyangena Technologies (Pty) Ltd. The application was instituted on 5 March 2018.

163. In respect of the awards of tenders to Siyangena and the contracts that Prasa concluded with Siyangena, Ms Ngoye was not able to give a complete picture of what happened or what decisions were taken. According to her, there were a number of reasons for this. Various versions of documents and what supposedly transpired at meetings existed, and obtaining information from within Prasa proved to be very difficult. A number of persons actively impeded the investigations by removing hard copies of documents from Prasa's premises and deleting electronic copies from their computers. Moreover, Mr Othusitse Mogolelwa, one of Prasa's IT Specialists was found to have deliberately deleted information from Mr Montana's computer on the instruction of Mr Montana. Following an arbitration, he was dismissed.

164. For the purposes of her evidence to the Commission, Ms Ngoye prepared a further affidavit which she deposed to on 15 March 2020. In that affidavit, she summarised the evidence given in her affidavit in support of Prasa's review application, and responded to evidence given in Siyangena's answering affidavit.

165. The review application that was considered by the High Court was the second application by Prasa to have reviewed and set aside certain contracts that it had concluded with Siyangena. The first review application was dismissed on a procedural point: Prasa had not complied with the 180-day period set out in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for a review application to be instituted. However, following a decision by the CC that a review application brought by an organ of state is based on the legality principle, as opposed to a review under PAJA, Prasa instituted a new application in March 2018 in which it sought the same or similar relief as sought in the application that had been dismissed.

166. In both review applications, Prasa applied for various contracts between it and Siyangena, to be reviewed and set aside. The bases of Prasa's applications is that they were concluded without the requisite authority, and/or in violation of s 217 of the Constitution, the Preferential Procurement Policy Framework Act (PPPFA) and Prasa's SCM policies and procedures. Also, there were property dealings between an attorney associated with Siyangena and two Prasa officials, including Mr Montana himself.

167. The general bases on which Siyangena opposed the relief sought were as follows: the bulk of the founding affidavit consisted of inadmissible hearsay evidence and inadmissible documentary evidence; the institution of the review application was unauthorised and Prasa had unduly delayed in prosecuting it; even if it were to be found that the review application should succeed, Siyangena ought not to be deprived of what was due to it under the contracts, because Siyangena was not a party to, nor involved in what transpired within Prasa in relation to the tender; charges laid against those allegedly involved in corruption had not resulted in any prosecutions; and the core of the attack was a power-play between Mr Molefe and Mr Montana.

Background to review application

168. In 2009, in preparation of the Confederation Cup of 2009, as a "pilot project", two railway stations (Nasrec and Doornfontein) were to be developed by Intersite, a subsidiary of Prasa. Intersite awarded the contract to a company called Enzo to upgrade Nasrec and to a company called Rainbow to upgrade the Doornfontein station. These companies appointed Siyangena as a sub-contractor to install speed gates. There were no complaints about the process.

169. For the World Cup preparations in 2010, Siyangena's "contract" was extended to an additional five stations. Ms Ngoye testified that there were several fundamental problems with this "extension". Primarily, no procurement process preceded the "extension". In addition, Siyangena had not been a contractor on the Nasrec and Doornfontein stations: it had only been a sub-contractor to the entities which had been appointed as the contractors. Accordingly, there was no legal basis for an "extension" of Siyangena's contract when the contracts of the main contractors had not been extended.

170. Ms Ngoye also stated that, in addition being unlawful for non-compliance with s 217 of the Constitution, what took place prior to the extension was improper and irregular. In this regard, she stated that a report that Mr Gantsho sent to Mr Montana on 22 February 2010 said that the gates being offered were not suitable; an associated company of Siyangena, ESS, was asked for a quotation, but their gates were "very expensive"; the extension had not been budgeted for, but following a telephone call in which Mr Montana advised him to contract with Siyangena, Mr Gantsho requested that Mr Montana approve the "extension" of the Confed Cup contracts to seven further stations. In the request, Mr Gantsho stated that Prasa had no funds for the project, but the engagement of Siyangena should nevertheless proceed.

171. Thereafter Mr Montana appears to have approved the request, subject to engagement with the Finance Department on the availability of the funds. Siyangena thereafter submitted a written proposal. However, Mr Piet Sebola, the Senior Manager: Projects raised several concerns about the process being followed and the proposal. Instead of addressing the issues that were raised, it was decided that the project would not proceed under Prasa, but would be implemented by Intersite, meaning Mr Sebola would no longer be involved. Thereafter, Mr Sindane requested approval for the "extension" but this was refused on the basis that it was the approval of Intersite's Board that was required. Ms Ngoye states that there is no record that Intersite's Board gave its approval. Despite this, Siyangena was appointed to install access gates at the train stations close to these stadia. Ms Ngoye went on to say that it was Mr Gantsho who championed Siyangena's cause and that Mr Montana gave his approval.

172. Regarding Phase 1 of the project Ms Ngoye said Prasa's Chief Procurement Officer (CPO), Mr Chris Mbatha, decided that eight companies be invited to a briefing session. It however emerged that the selected invitees had not been given copies of the RFPs. Nevertheless, the BEC sat for two days in December 2010 and awarded Siyangena the highest points, although another bidder Protea Coin, had quoted a lower price. Mr Montana decided that Prasa would not proceed with the transaction but Mr Gantsho urged "the team" not to relent and requested reasons for Mr Montana's decision.

173. The matter suddenly came back to life on the eve of a sitting of the CTPC on 14 February 2011. There, according to a submission made to the CTPC it was a contest between two companies, Siyangena and Protea Coin; but Protea Coin had failed because it had not provided something referred to as a "funding model". The submission requested the CTPC to recommend to the FCIP the appointment of Siyangena for a project called ISAMS for an amount of R1,1 billion over five months. Having deliberated on the submission, the BAC decided not to recommend the award to Siyangena. However, Prasa documents show a document with a signature that purports to be that of the BAC's then Chairperson, Ms Tara Ngubane, on minutes of the BAC that records a decision recommending the award to Siyangena for an amount of R1,1 billion.

174. On 17 February 2011, just three days after the BAC meeting, the matter came before the Board's FCIP Committee, which was requested to recommend to the Board the appointment of Siyangena for the ISAMS project. Minutes of this meeting show that the FCIP recommended to the Board the award of this contract to Siyangena at a sum of R1,9 billion. There is no indication in the minutes that

the views of the CTPC were shared with the FCIP or how the FCIP would have found its way clear to recommend this award.

175. What was also strange was that one of the items on the agenda of the meeting related to Prasa's Medium-Term Expenditure Framework (MTEF) budget. According to the MTEF budget that was recommended by the FCIP Committee at the meeting, the project had been allocated R317 million over the period of the MTEF. Despite this, the FCIP Committee recommended the award of a contract for R1,9 billion over a period of 18 months, which was half of the MTEF period.

176. The Board approved the recommendation of the FCIP but did not indicate the contract amount. The Board mandated management to negotiate with Siyangena. Mr Mbatha initiated discussions with Siyangena.

177. According to Ms Ngoye, the irregularities in the award of the contract with Siyangena were lack of an open tender process and no request to deviate from the normal open tender process; no RFP and no evaluation criteria (bidders were asked to make a "shot in the dark" and hope that Prasa would be happy with it). Although Protea Coin's tendered contract price was R1,3 billion, much cheaper than that of Siyangena, it lost because it did not have a "funding model". Additionally the minutes of the CTPC and of the Board were forged. (If the minutes of the FCIP recommending the award and the tendered amount were true, they are self-contradictory: they approve one amount on the MTEF budget and another one for the contract amount).

178. Ms Ngoye stated in her affidavit that after the conclusion of the R1,9 billion contract, Prasa and Siyangena concluded further contracts for the extension of Phases 1 and 2.

Extension of Phase 1 and Phase 2

179. Phase 1 was followed by an extension of Phase 1. In the extension, twelve stations were selected under the guise of filling gaps in the corridors of the 69 stations that were part of the Phase 1 tender. However, this extension required Siyangena to install the ISAMS on twelve stations for an amount of R350 million. Siyangena agreed to do so. The patent irregularity of the request and Siyangena's agreeing to comply was that there simply was no procurement process that preceded this "extension".

180. Be that as it may, this irregular extension was followed by what was referred to as Phase 2. This Phase had a number of stops and starts. However, it is not necessary to refer to all of them, save for one that goes to the heart of the irregularity of this award.

181. In her affidavit and evidence, Ms Ngoye pointed out that for a change there was an RFP before a contract was concluded. However, instead of requiring functionality, the RFP required that the parties be accredited to procure and install certain branded equipment. One or two of the parties who submitted a tender complained that this made the requirement restrictive. Prasa's SCM Policy discourages the use of branded products in RFPs and prefers the requirement for functionality. The specifications were tailor-made for Siyangena, and Siyangena was awarded the contract.

182. Thereafter, an addendum to the contract appeared in the midst of an urgent interdict application that Siyangena had launched after Prasa had instructed it to stop working. No Prasa employee was aware of the "addendum". However, Siyangena produced it as part of its interdict papers. The "addendum", signed by Mr Montana on behalf of Prasa, purported to engage Siyangena to replace some equipment and to maintain equipment installed under the Phase 1 contract for a period of three years.

183. Considering the amounts it obliged Prasa to pay, it was a strange document: it consisted of only five pages and did not include a service level agreement regulating Siyangena's maintenance obligations. It required Prasa to pay Siyangena R10 million a month. The obvious irregularity about the addendum was that no procurement process was followed before Siyangena was appointed to undertake the services and replace the old equipment.

184. In addition to setting out the irregularities noted above, Ms Ngoye said Prasa was not authorised to proceed with works contemplated in Phase 1 and Phase 2 and the addendum. This is because

the transactions had not been budgeted for and no approval had been obtained from the Minister of Transport.

185. A Full Bench of the High Court reviewed and set aside the contracts on account of the irregularities identified by Prasa and also on account of the property dealings referred to earlier that involved Mr Van der Walt on the one hand, and, Mr Gantsho or Mr Montana, on the other.

186. Ms Ngoye said in her affidavit that a disciplinary hearing was held into Mr Gantsho's conduct and Mr Gantsho was dismissed by Prasa.

187. Ms Ngoye noted that Prasa reported the Siyangena contract irregularities, and allegations regarding the property dealings to the DPCI. The investigation moved at a snail's pace. Among the allegations are that Siyangena paid R550 million to a company called Hail Way Trading, which shares a registered address with Royal Security, of which Mr Roy Moodley is a director. In addition, criminal charges in respect of the above matters were laid at the Brooklyn Police Station. Despite a lapse of more than five years, not much appears to have been done.

188. Mr Montana filed an "intervening witness statement" in the review application. In this affidavit, he noted an earlier order of the Full Bench giving him the right to respond to the allegations made in Prasa's papers. The thrust of his affidavit is as follows:

    188.1 First, he noted that three investigations formed the bases of Prasa's allegations in the Siyangena review application. One was by the Public Protector whose findings on about half the matters that were referred to her are set out in her Report titled Derailed. Then there were investigations by the National Treasury, which had not been completed. He had seen draft reports that had been compiled but had not been given an opportunity to respond thereto. In any case, he said, they do not make any finding of fraud or corruption. The third investigation was conducted by Werksmans. He said that he did not "recognise" this investigation because among other things: Werksmans had been irregularly appointed; it had utilised "illegal measures" against him; its investigation was a "witch-hunt" against him; and it and Prasa claim that "irregular appointments automatically translate into corruption".

    188.2 Second, the two contracts awarded to Siyangena in 2011 and 2014 went through a competitive bidding process and were awarded by the Board and not by him, as the amounts involved were beyond his delegated authority [of R100 million]. Despite this, the Board members were not joined as parties to the review application. He denied receiving any gratification, alleging that reports to that effect were made by a journalist who linked him to Mr Van der Walt. Mr Montana said that Mr Van der Walt was not an employee or director of Siyangena, had not done work for Prasa and had not been involved with the Siyangena tenders in question.

    188.3 Third, the review application was part of a "political vendetta" in which organs of state are used to further personal political interests. He accused Mr Molefe of a range of illegal or improper conduct, including "laundering" money from Prasa for his personal benefit, being conflicted, unduly and unlawfully favouring a service provider, SA Fence and Gate, at huge cost to Prasa; as a director claiming remuneration not due to him, which he was instructed to pay back; and irregularly using a Prasa motor vehicle for personal purposes. However, these matters were not investigated by Werksmans.

    188.4 Fourth, Mr Montana also alleged that Ms Ngoye, who it will be recalled had made the affidavits in the second Siyangena review application, was bitter because he had removed her as the CEO of Intersite and she had a personal vendetta against him. She had also irregularly approved a large payment to SA Fence and Gate without Board approval.

    188.5 Fifth, Mr Montana challenged the merits of Prasa's application for the review and setting aside of the contracts on among others the following bases: it was false to allege that the requisite needs assessments had not been undertaken; in fact, a business case had been developed for the ISAMS project; the documentary search tool used by Ms Ngoye was selective and supported her "narrative"; the specifications that were mooted by Ms Ngoye had not been approved by Prasa; as demonstrated by an examination of the background and "true facts", it was not correct

that Prasa needed to obtain approval from the Minister of Transport for the ISAMS programme, as it did not constitute the acquisition of a significant asset; Mr Montana disputed Ms Ngoye's allegation that the GCEO was "intimately" involved in the procurement process; he also disputed her allegations that the appointment of Siyangena was at R1,1 billion and that this was changed to R1,9 billion, alleging that the sum of R1,1 billion was for the capital amount only for the supply and installation of the speed gates, while the R1,9 billion included rates of exchange, warranties and maintenance; he alleged that Prasa's SCM policy provided for deviations from competitive bidding where there was a proper motivation.

189. As was pointed out above, among the bases on which the Full Bench reviewed and set aside the Siyangena contracts that Prasa sought to impugn were the allegations of property dealings between Mr Van der Walt and Mr Montana. The Commission itself investigated property transactions in which Mr Van der Walt and Mr Montana were involved.

The Oellermann Report

190. The backdrop against which the property transactions between Mr Montana and Mr Van der Walt took place is of significance, when considering the allegations that Ms Ngoye made in respect of the lawfulness of Prasa's awards of contracts to Siyangena and the prism through which to view the propriety of Mr Montana's role in the awards of those contracts.

191. Based on what was said in Ms Ngoye's affidavit, the Oellermann Report states that several matters deserve highlighting. In June 2014, Prasa appointed Siyangena to execute the ISAMS Phase 2 Project. Three months later, the parties agreed in an addendum (signed by Mr Montana on 30 September 2014) that Siyangena would provide further services to Prasa – costing an additional R800 million.

192. At this time between August 2014 and October 2014, Mr Montana was involved in arrangements for the purchase of three properties for a total of more than R36 million.

193. The Commission investigated four property transactions in which Mr Montana was involved or showed an interest. One of them was a property he sold to Precise Trade and Invest 02 (Pty) Ltd, one was a property that was transferred to him and the other two were properties in which he had shown an interest in purchasing but which were eventually sold and transferred to the name of Precise Trade.

194. The purchases were funded through arrangements made by Mr Adrian Van der Walt, an attorney who has acknowledged that he has acted for Siyangena and other companies with which Mr Mario Ferreira is associated. Mr Van der Walt, who apparently now resides in Texas, United States, was the sole director of Precise Trade. In addition, only a few months earlier, in May 2014, Precise Trade bought a house from Mr Montana. The agreed purchase price was R6,8 million, which appeared to be R3 million more than the house was valued.

195. Mr Oellermann drew the inference from an analysis of the four property transactions that Mr Montana was central to each of the purchases, but attempts were made to conceal his link, even in respect of the one property that was eventually transferred into his name. Despite this, and the fact that all the properties were fully paid for, on the documents that Mr Oellermann has been able to get his hands on, Mr Montana himself appeared not to have paid even a cent towards the purchases.

196. Most of the finance for the purchases was made available by Mr Van der Walt, through an Investec Bank account in the name of Precise Trade. In a letter to his erstwhile co-directors, Mr Van der Walt suggested that quite large amounts of money flowed into Precise Trade's account from "TMM" [TMM Holdings (Pty) Ltd], an entity linked to Mr Ferreira. In an affidavit in response to the Oellermann Report, Siyangena denied that it had made any payments to Precise Trade. Documents indicate that TMM, together with Mr Ferreira, had entered into a joint venture with Mr Van der Walt.

197. In his Report, Mr Oellermann said that these matters called for a frank explanation about the four transactions, principally from Mr Montana, Mr Van der Walt and Mr Ferreira, who played a principal role in securing the addendum that in September 2014 led to the extension of Siyangena's contract

with Prasa. None has been forthcoming. When he testified, Mr Montana did not volunteer any explanation save to say that he and Mr Van der Walt had a business relationship.

198. While Mr Van der Walt is no longer in the country, one of the fellow directors of his law firm, Loubser van der Walt Inc., Mr Nicholas Loubser, after being served with a subpoena, provided the Commission's investigators with several documents relating to the property transactions. Mr Loubser also gave evidence. Among the documents that were provided to the investigators was the transactional history of Precise Trade's Investec bank account. It is from this account that many of the payments relating to the property transactions were made, and into which Mr Van der Walt allegedly deposited monies which had been deposited into other accounts by Mr Ferreira's entities. In addition, in two letters to his partners, Mr Van der Walt identified Mr Ferreira's entities as being the main source of the money that was paid to settle the purchase price and other expenses associated with the purchase of the three properties and the property that Precise Trade bought from Mr Montana.

199. In addition to the documents that Mr Loubser made available to the Commission, its investigators have come into possession of several documents connected to the transactions. Among them are the following: deeds of transfer, offers to purchase and communications preceding the conclusion of the contracts and subsequently about their implementation. The Commission's investigators are also in possession of affidavits or sworn statements made by an estate agent, an owner and a conveyancing attorney. Documents concerning each transaction were annexed to Mr Oellermann's Report.

200. It will be recalled that that Ms Ngoye said Prasa only became aware of the addendum when Siyangena annexed it to its interdict papers. The addendum was signed by Siyangena on 19 September 2014 and by Mr Montana, on behalf of Prasa, on 30 September 2014. The cost to Prasa was nearly R800 million. Ms Ngoye raised concerns about the validity of the addendum. The Report notes that the addendum was concluded shortly before, during and/or soon after the period during which Mr Montana was taking steps that led to the purchase of the three properties (in Waterkloof, Sandhurst and Hurlingham), the first two by Precise Trade and the last by Mr Montana.

201. It was not suggested in any evidence or papers before the Commission that Mr Montana had purchased properties to the value of some R36 million. Rather, the evidence was that he was involved, either personally or through his Trust, in interactions that led to the purchase of three properties valued at R36 million and that one of those properties was in fact registered in his name.

202. The property transactions with which Mr Montana was involved were as follows: First, Precise Trade bought from Mr Montana a house that he owned in Parkwood, Johannesburg, for R6,8 million. The price was R3,3 million more than Mr Montana's own banker had valued it only twenty months earlier. Second, after Mr Montana had expressed interest in a house in Waterkloof, Pretoria, it was eventually sold to Precise Trade for R11 million, but when she moved out the previous owner handed over the keys to Mr Montana. Third, after Mr Montana's Trust had made an offer to buy a house in Sandhurst, Johannesburg, Precise Trade bought it for R13,9 million. Fourth, Mr Montana bought a house in Hurlingham for R11,5 million.

203. The above transactions had been widely reported in the media long before the Commission began its investigations. However, the details of the transactions and how payments were made only became known as a result of the Commission's investigations. As regards payments for these properties, the evidence presented at the Commission was based to a large extent on the transactional history of Precise Trade's Investec bank account and what Mr Van der Walt said in the two letters to his partners which have been referred to above.

204. With regard to the transactions in which Mr Montana or his family trust was involved, the facts were based on documents which Mr Montana did not dispute when he gave evidence on these matters.

The Parkwood property

205. Mr Montana bought the Parkwood Property on or about 4 July 2008 for R1,85 million. In August 2012, Mr Montana's private banker (from Absa Private Bank) valued the property at some R3,5 million. On 5 May 2014, Precise Trade, represented by Mr Van der Walt, offered to purchase the property from

Mr Montana for R6,8 million, an offer Mr Montana accepted on the same day. Transfer was affected on 20 February 2015. Mr Montana made a profit of nearly R5 million [R4,95 million] on the property.

206. As regards payment, the agreement provided for a deposit of R2,5 million to be paid to Loubser van der Walt Inc. by about 4 June 2014 and the balance of the purchase price to be paid into Loubser van der Walt Inc.'s trust account by about 3 August 2014.

207. Payments towards the purchase price were made, but not in accordance with the agreement. Among the deviations were the following: the money was not paid into Loubser van der Walt Inc.'s account; and a "deposit" of R2,25 million, not R2,5 million, was made but on 18 June 2014, not 4 June 2014. Moreover, periodic payments were made from June 2014 to February 2015. In other words, payment of the purchase price was not made by 3 August 2014, as required by the agreement. Based on the entries in Precise Trade's Investec account, from which all the payments were made, Mr Montana was paid R439 200 less. When questioned about this at the Commission, the thrust of Mr Montana's explanation was that Mr Van der Walt may have paid the money from a different account and not from Precise Trade's Investec account.

208. The first deposits into the Investec account, being in the amounts of R1,85 million and R4 million, were, according to Mr Van der Walt's written note on the transaction account and in his letters to his partners, made by TMM – and reflected in the account on 18 June 2014. That is the day on which payment of the "deposit" of R2,25 million was made – from the Investec account. The next three payments to Mr Montana from the account totalled R860 800.

209. Six weeks after the agreement of sale was concluded, Mr Montana signed an addendum which imposed on him onerous obligations to effect – at his cost – specified improvements and/or alterations to the property that he had just sold. The addendum recorded that although a friend of Mr Montana was residing at the Parkwood Property, Mr Montana undertook to give Precise Trade vacant possession within 30 days of registration, if Precise Trade and Mr Montana's friend were unable to conclude a lease agreement for at least R20 000 a month. Mr Montana's friend continued occupying the property after transfer on 20 February 2015, but no payment of rental by the friend is reflected in Precise Trade's bank statement. The addendum stipulated that Mr Montana had to bear the costs of the alterations. Surprisingly, Mr Montana had improvements effected to the bedroom even though the addendum did not require this.

210. What is also surprising is that Mr Montana sent the invoices for the improvements and alterations to Mr Van der Walt to foot the bill, telling him at one stage that he was "under pressure to pay the contractor for additional work". The amounts that Mr Montana required Mr Van der Walt to pay totalled more than R1 million. Asked to explain this, Mr Montana said that there was a special and dynamic relationship between him and Mr Van der Walt and they had not "strictly aligned" the payments with the agreement. But he did not have a problem with this as he and Mr Van der Walt were working together on many properties and there were many transactions beyond what "we have here".

211. In response to Mr Oellermann's Report, Siyangena said in an affidavit in support of an application to cross-examine Mr Oellermann that it had made no payments to Precise Trade. It did not dispute that it had made payments to other entities and that, if what Mr Van der Walt had told his partners and had recorded in handwriting on the bank account was correct, its payments to those other entities appear to have found their way into Precise Trade's Investec account. It would appear that in noting the source of those funds, Mr Van der Walt was referring to the ultimate source of those monies.

The Waterkloof property

212. On 25 August 2014, the Aanmani Guest House CC, represented by Ms Karen de Beer, and Mr Johan Smith, in his capacity as Trustee of the Minor Property Trust, a Trust the beneficiaries of which were Mr Montana's children, entered into an agreement in terms of which the CC was to sell the Waterkloof Property to Mr Smith for R11 million. The purchase price was to be paid as follows: a non-refundable deposit of R3,5 million payable within fourteen days; and the purchaser to render approved guarantees within 60 days as security for the balance of R7,5 million.

213. The R3,5 million deposit was paid from Precise Trade's Investec account on 23 September 2014 and reflected as "minor property trust loan". The entry just before that on the copy of the transactional account reflects, seemingly in Mr Van der Walt's handwriting, that TMM had paid that same amount into Precise Trade's account on the same day. According to Mr Van der Walt's second letter, the balance of R7,5 million was paid directly to the transferring attorneys from TMM. Thereafter, on 25 February 2015, Precise Trade paid R1 105 084. 92 to the transferring attorneys in respect of the costs of the transfer. Not coincidentally, it would appear, the entry prior to that entry on Precise Trade's account reflects a deposit of that exact same amount on the same day. The handwritten note reflects that payment was made by TMM.

214. Payments made from Precise Trade's Investec account in respect of the Waterkloof Property appear to be consistent with the agreement between the CC and Mr Smith, in his capacity as trustee of the Minor Property Trust. However, on or about 20 February 2015, a new agreement about the purchase of the Waterkloof Property was concluded.

215. The most important difference between the two agreements is that in the new agreement Precise Trade was reflected as the purchaser, in the stead of Mr Smith, the trustee. Other changes are that the deposit of R3,5 million had already been paid; a further amount of R1,5 million had been paid to the seller; and the "balance of the purchase price of R6,5 million" had been paid into the transferring attorney's trust account. The new agreement also reflected that occupation had been given to the purchaser on 1 December 2014 and that the purchaser would be responsible for rent of R50 000 a month until registration. The domicilium of the purchaser was changed from that of Mr Smith to that of Loubser van der Walt Inc. The property was transferred to Precise Trade on 8 April 2015.

216. Notwithstanding that what is set out above suggests that Mr Montana himself had not played any role in the transaction, according to an affidavit and evidence given at the Commission by the sole member of the CC, Ms Karen de Beer, Mr Montana indeed played a key role, which is considered in the paragraphs hereunder.

217. According to Ms De Beer, Mr Montana's role in this transaction may be summarised as follows. On 10 February 2013 she and Mr Montana concluded a deed of sale in terms of which she sold to Mr Montana her member's interest in the CC for R10,5 million but the deal fell through ("the earlier agreement"). When Ms De Beer put the property on the market again in August 2014, Mr Montana again indicated an interest in the property but Ms De Beer would not entertain an offer from him, unless he paid a substantial deposit. He agreed to pay a non-refundable deposit of R3,5 million. Whereas the earlier agreement had been concluded in the name of Mr Montana, this new agreement was in the name of Mr Smith. The "new agreement" is the agreement referred to above concluded on 25 August 2014. Mr Montana, however, later asked Ms De Beer to change the name of the purchaser from Johan Smith to Precise Trade. The balance of the R7,5 million was eventually paid by Mr Van der Walt, whom Ms De Beer described as "Montana's attorney", and the deal went through.

218. Ms De Beer said that she had first met Mr Montana in mid-November 2014, when he walked through the house as he wanted "to check some things". She then moved out. On 26 November 2014, she handed the keys to the property to Mr Montana. The next day she sent an email to her neighbours telling them that "the new owner of [her] property was Lucky Montana". She was in no doubt that the CC had sold the property to Mr Montana and that the contracting entities were merely his "alter ego".

The Sandhurst property

219. Mr Montana signed an offer to purchase the property on or about 26 October 2014, after he had attended a show day. The price set out in the offer to purchase was R13,9 million. The seller, a Mr NG Kohler, accepted the offer on 28 October 2014.. On 6 November 2014, Mr Van der Walt wrote to the estate agent, Mr Louis Green, saying that he held R5 million in "our trust account" towards the purchase price. He asked for the Offer to Purchase to be forwarded to him and what the amount of the deposit was. On 7 November 2014, Mr Green sent a copy of a sale agreement and said the deposit payable was R3,9 million. Later that day, Mr Van der Walt wrote to Mr Green confirming that Precise Trade had paid R5 million into the estate agency's trust account with beneficiary reference being

kohler/montana. An entry in a copy of Precise Trade's Investec account reflects that on 7 November 2014 an amount of R5 million was paid to the estate agency for 119 Empire Place and an entry on the previous day reflected a payment of a deposit of R5 million seemingly from an entity identified by Mr Van der Walt as "Pimemtal JV".

220. On 25 November 2014, a month after Mr Montana had signed the offer to purchase the property, Mr Van der Walt wrote to Mr Green asking that the "buyer" be changed from Mr Montana to Precise Trade. A new offer to purchase by Precise Trade, was signed by Mr Van der Walt on 26 November 2014 and returned to Mr Green. In the new offer, Mr Green noted that a R5 million deposit had been received on 7 November 2014. On 6 March 2015 Precise Trade paid the balance of the purchase price.

221. Although Precise Trade was reflected as the buyer on 26 November 2014, correspondence relating to the property was still sent to Mr Montana. For example: on 27 November 2014, the seller asked Mr Montana (whom he addressed as "Lucky") if he was interested in taking occupation before transfer; thereafter, in response to a query to him by the seller about payment of the transfer costs, on 3 February 2015, Mr Montana emailed an apology for the delay and said Mr Van der Walt had undertaken to pay by the following day at the latest. Precise Trade paid the transfer costs of R1 105 537.30 on the following day. On 6 March 2015 the balance of the purchase price, being R8,9 million, was paid by Precise Trade. Transfer of the property from Mr Kohler to Precise Trade was affected on that day.

222. Even though ownership of the Sandhurst Property was transferred to Precise Trade on 6 March 2015, subsequent exchanges relating to the property show that Mr Montana was still intimately involved with the property. Among the exchanges that confirm this are the following: a request to Mr Montana on 12 March 2015 asking him to co-operate with the sellers in the transfer of the electricity account; and communications by Mr Green to the sellers indicating that he had spoken to Mr Montana about the electricity and other issues such as the pool cover. Mr Green communicated with Mr Montana about the property as late as 23 June 2015.

223. However, on 10 May 2015 Mr Van der Walt suddenly asked Mr Green why he had copied Mr Montana on an email relating to the pool cover, saying: "You were well aware of the fact, and as I explained to you last year, before the property was even bought by my company, that Mnr L Montana has nothing to do with Precise [Trade] or this property. Please refrain from this action in the future." Mr Green apologised. However, Mr Green continued communicating with Mr Montana about the Sandhurst Property.

The Hurlingham property

224. On 14 May 2015, Ms Merileon Gevisser, the owner of the Hurlingham Property, accepted an offer by Mr Montana to purchase the property for R13,5 million. The purchase price was payable as follows: a deposit of R2 million, and the balance of R11,5 by the following day. (It is necessary to record at this stage that a previous contract between Mr Montana and the owner for the sale of the same property to him did not proceed.) A deposit of R2 million had been paid on 23 March 2015 from Precise Trade's Investec account. An earlier entry on the copy of the transaction account records that on the same day a deposit of R5 million had been made into the account. Mr Van der Walt's handwritten note says that it was a "TMM grant". On 15 May 2015, payment of the R11,5 million was made to the conveyancing attorney by an entity called "Midtownbrace". The property was transferred to Mr Montana on 28 July 2015.

225. Several significant events and developments preceded Mr Montana's purchase of the Hurlingham Property. The same agent who had been involved in the sale of the Sandhurst Property, Mr Louis Green, had been mandated by the owner to market and sell the Hurlingham Property. Mr Montana attended a show day on or about 12 October 2014, expressed an interest in purchasing the property and asked that an offer to purchase be sent to Mr Johan Smith of the Minor Property Trust. Mr Smith, representing the Trust, then submitted an offer to purchase the property for R12 million. Mr Green told the seller that they had received the offer from Mr Montana [though it] "is in the name of his Trust".

226. On 30 October 2014 a new offer was made, this time in the name of the Trust. The purchase price offered was R13,5 million. It would appear, however, that nothing came of these two offers and that not much happened for four months. On 3 March 2015, Mr Montana himself made an offer to the seller to purchase the property for R13,5 million, payable as follows: a deposit of R2 million within seven days; and the balance of R11,5 million to be secured by approved guarantees. The seller accepted the offer on the same day. The R2 million deposit was recorded in the conveyancer's bank account on 24 March 2015. On 14 April 2015, Mr Van der Walt, on instructions from Mr Montana, asked for more time to submit the guarantee. Following concerns that the conveyancer expressed about the guarantees, that agreement was cancelled and a new one was concluded and implemented, with transfer being affected on 28 July 2015.

227. As noted above, whilst Precise Trade paid the guarantee of R2 million, payment of the balance of R11,5 million was made by Midtownbrace (Pty) Ltd. This payment was dealt with in a rather terse affidavit that Mr Andre Wagner submitted after he was invited to deal with what the Report had said in respect of the Hurlingham Property.

228. Mr Wagner said he was a representative of Midtownbrace and that he and Mr Van Der Walt, who were good friends, had "engaged in joint ventures". Mr Van der Walt had introduced him to Mr Montana. Midtownbrace and Mr Montana had agreed on a development in 2015; the "full investment amount [totalling R11,5 million] was paid over to Mr Montana. The company was satisfied with "the agreements" to secure its investments but had issued summons against Mr Montana "if he defaults again".

Mr Montana's objection to the evidence

229. Mr Montana was not in a position to dispute what was said in the documents produced as evidence. In addition, insofar as payments for the properties, whether to him or in respect of the properties in which he had expressed an interest in purchasing for himself or his Trust, he was also not in a position to dispute what Mr Van der Walt had told his partners or had recorded in handwriting on the Investec bank statement. In the circumstances, the relevant factual matrix was not in dispute.

230. Mr Montana however attacked the evidence on several grounds:

    230.1 He alleged that the Commission's investigations were based on a 22-page affidavit that Mr Paul O'Sullivan had submitted to the police and the Werksmans Report. As a result, the Commission was aligning itself with certain people, whom he alleged had acted unlawfully in their investigations. The short answer to this allegation is as follows: as it was entitled to do, the Commission considered what was said by Prasa in its application to review and set aside certain contracts that it had concluded with Siyangena; the documents that it relied on were in the main contracts and communications that were annexed to the Siyangena application papers; the more significant allegations against Mr Montana related to the payments made in respect of the properties; and the main source of that information was Mr Van der Walt's former partner, Mr Nicholas Loubser, who made available to the Commission several important documents, in particular the transactional history of Precise Trade's Investec bank account. In addition, Mr Loubser gave oral evidence at the Commission. In the circumstances, there is no merit in that complaint by Mr Montana.

    230.2 Mr Montana also objected to the commentary on Mr Oellermann's Report being considered by the Commission. The difficulty with that objection is that, properly considered, the "commentary" that forms part of the Report is nothing more than inferences to be drawn from the facts, events and circumstances that are detailed in the annexures to Mr Oellermann's Report. Of course, where the inferences that are drawn are not reasonable or do not flow from a proper consideration of the documents annexed to the Report, they should not be and are not accepted. The approach adopted was to consider the contents of the annexures and determine what conclusions should be drawn, having regard to the totality of the evidence led and the documents available.

230.3 At a late stage in the evidence he was giving in respect of the property transactions, Mr Montana asked that the evidence leader recuse himself on the basis that he was "invested" in suggesting wrongdoing on Mr Montana's part and had displayed bias.

Conclusions in respect of the property transactions

231. The details about the agreements to purchase the Waterkloof, Sandhurst and Hurlingham properties make it clear that Mr Montana was a key figure in the purchases. Although two of the properties were transferred to Precise Trade, Mr Montana was a significant role player in all three purchases.

232. As regards Mr Montana's role in the three transactions, the following is highlighted:

232.1 With respect to the Waterkloof Property, as far back as February 2013, Mr Montana and the seller, Ms De Beer concluded an agreement of sale, which fell through. In August 2014, Mr Montana again expressed an interest in the property. An agreement was concluded with Mr Smith, the Trustee. Thereafter, Mr Montana asked the seller to change the name of the purchaser from Mr Smith to Precise Trade. When Ms De Beer moved out, on 26 November 2014 she handed the keys to Mr Montana. She was in no doubt that the CC had sold the property to Mr Montana.

232.2 With respect to the Sandhurst Property, Mr Montana signed the first offer to purchase on 26 October 2014, which offer was accepted by the seller. However, following a request by Mr Van der Walt on 25 November 2014, a new offer to purchase in the name of Precise Trade was drawn up, which Mr Van der Walt signed on the following day. It recorded that the R5 million "deposit" [that had been paid pursuant to Mr Montana's offer] had been received on 7 November 2014. Even after the change in the name of the purchaser, correspondence relating to the property was still sent to Mr Montana, whom the seller addressed as "Lucky". When the costs were late in being paid, in February 2015 it was Mr Montana who apologised to the seller and seemingly caused Mr Van der Walt to make payment on the day after. Even after ownership of the property was transferred to Precise Trade [on 6 March 2015], when the electricity account needed to be transferred, it was Mr Montana with whom the estate agent and the seller communicated.

233. What Mr Van der Walt told his partners about the source of the funding for his purchase of the Parkwood Property and the purchases of the Waterkloof Property, the Sandhurst Property and the Hurlingham Property and an analysis of Precise Trade's Investec's transactional account suggests that there is a link between the payments for all four properties and Siyangena. The deposit for the Hurlingham property was paid from those monies. Mr Montana alleged that he had paid the deposit, but that is not what the documents show. A further question arises: why were such efforts made to disguise his involvement. Having regard to the foregoing, there is a reasonable basis for concluding that Mr Montana received an undue benefit from a Siyangena-linked entity, at least in respect of the Hurlingham property.

Mr Roy Moodley

234. It is instructive to preface the evidence relating to Mr Moodley by recording that when the then Public Protector Adv Thuli Madonsela was compiling her State of Capture Report, she submitted a list of 42 questions to President Zuma. One of them was his relationship to Mr Moodley. President Zuma refused to answer her. Moreover, allegations were made in affidavits submitted to the Commission that entities connected to Mr Moodley had received preferential treatment at Prasa and that on several occasions Mr Montana intervened in this respect. In all, five witnesses gave evidence on Mr Moodley: Mr Molefe, Ms Ngoye, Mr Dingiswayo, Mr Holele and Mr Makwanatala Jacob Ramagothe.

235. The evidence indicated that Mr Moodley had direct or indirect interests in several companies that provided services to Prasa, including Royal Security, Strawberry Worx and Prodigy. A company of which he is the sole director, Hail Way, is also said to have received a total of R550 million from Siyangena.

236. In his evidence, Mr Molefe told the Commission that he did not know Mr Moodley before he (Mr Molefe) had been appointed as Chair of Prasa's Board. However, he soon became aware that the name Roy Moodley was on the lips of many at Prasa, with some describing him as "the owner" of Prasa. He was told that Mr Moodley would often walk around with managers in their work environment.

237. Mr Molefe gave examples of means by which Mr Moodley intended to "capture" him. On one occasion, Mr Moodley invited him to a Golf Day that he had arranged and, on another, Mr Moodley invited him to the Durban July Handicap, telling him that President Zuma, Minister Jeff Radebe and other Ministers had been his guests at the event every year. Mr Molefe declined both invitations. Mr Moodley also wished to attend the US Masters with Mr Molefe in April 2015. Mr Molefe wriggled out of this. In an affidavit in response, Minister Radebe denied that he had attended the July Handicap as a guest of Mr Moodley. And, in an affidavit, Mr Moodley disputed Mr Molefe's evidence.

238. In his response to Mr Molefe's allegations, Mr Montana claimed that: Mr Molefe and Mr Moodley were close; Mr Molefe had told him that he and Mr Moodley were to travel together to the US "to play the golf event"; he had not attended any golf event organised by Mr Moodley: and whilst he had not heard Mr Moodley being described as "the owner" of Prasa, he was aware that Moodley's entities had contracts with Prasa. He also said that Mr Moodley had been appointed "in Railways" in around 1991, before Mr Montana joined Prasa. He alleged that Mr Molefe was relying on hearsay and rumours to back up his claims of state capture.

239. In an affidavit, Mr Moodley denied that he had tried to capture Mr Molefe and in general denied all the allegations made by Mr Molefe. He alleged Mr Molefe had tried to befriend him for his own personal benefit to secure sponsorships for himself and his Foundation. It was Mr Molefe who had tried to pursue an association with him, rather than the other way around. it was Mr Molefe who initiated plans for the US trip but these fizzled out.

240. In her affidavit and evidence, Ms Ngoye dealt with a contract between Prasa and Strawberry Worx. In July 2011 Intersite [a subsidiary of Prasa] and Umjanji (Pty) Ltd concluded an advertising agreement that was to last for five years. In August 2011, with the consent of Prasa, Umjanji ceded portions of its rights to Strawberry Worx and Siyathembana Trading. Although Intersite was the contracting party, it received instructions from Mr Montana on dealing with the advertising portfolio.

241. Ms Ngoye was once summoned to a meeting with representatives of Strawberry Worx. Strawberry Worx representatives were a Mr Maharaj, Mr Ashveer Dwaerkapersadh, Mr Selwyn Moodley and a fourth person whose details escaped her. At the meeting, she was given instructions by Strawberry Worx's representatives on how to manage the advertising portfolio. She was also told that she would have to take instructions from them; that they had the power to remove the portfolio from Intersite; that they intended to do so, as she clearly did not know what she was doing; and that there were instructions from Mr Montana to take back instructions given to attorneys Hogan Lovells, who were representing Prasa in litigation that had been instituted by Primedia challenging the validity of the award of the advertising tender. BBM Attorneys (who were not on Prasa's panel at the time) would be appointed to represent Prasa.

242. After the meeting, Intersite continued to manage the portfolio, amidst continuing threats of removal. On 20 May 2013, the threat of removing the portfolio was carried out in an aggressive and bullish way by Ms Marlini Naidoo, described as the special legal adviser in the office of the GCEO. She arrived at Intersite's office and "conducted a raid". Ms Naidoo told Ms Ngoye that she (Ms Naidoo) was "an officer of the court", instructed by Mr Montana to remove the Strawberry Worx files from Intersite. Ms Ngoye called Mr Montana, who did not respond. She also called Intersite's lead independent director, who was not aware of the instruction. Ms Naidoo proceeded to remove the files.

243. Ms Ngoye raised the issue of the removal of the files at an Intersite Board meeting that had been scheduled for the following day. Mr Montana told her he had nothing to do with the instruction. At Ms Ngoye's request, a meeting of all relevant parties was then held a few days later. Present were Ms Hope Zinde (GM: Corporate Affairs), Mr Holele, who was based at Intersite at the time, Ms Naidoo and Mr Montana. After the meeting Mr Martin Chauke, the manager who was responsible for the

advertising portfolio, was placed on suspension. There is a dispute as to what happened at the meeting and particularly who placed Mr Chauke on suspension: Ms Ngoye says it was Mr Montana, while he claims that it was Ms Zinde. It is not necessary to resolve this dispute, save to note that disciplinary action was taken against another employee in respect of a difference of opinion about a contract that Prasa had with an entity in which Mr Moodley had an interest. Mr Chauke's suspension on full pay, lasted for more than two years. He was one of the employees who was brought back after the Molefe Board had instructed that all suspensions of employees be investigated.

244. The foregoing matters, Ms Ngoye submitted, demonstrated just how powerful Mr Roy Moodley was at Prasa.

245. Mr Montana's responses to the allegations made by Ms Ngoye may be summarised as follows: he was not aware of any link between Strawberry Worx and Mr Moodley, nor was he aware of any link between Siyangena and Mr Moodley; he denied giving instructions on how to deal with the advertising portfolio; he said he was not aware of Ms Ngoye's meeting with Strawberry Worx at which she was told that she would have to take instructions from them; he denied that Ms Ngoye had told him that it had been suggested that Hogan Lovells should be removed as Prasa's attorneys, but said that his legal adviser had later spoken about changing attorneys and he supported the idea; he was not aware that Maharaj Attorneys, who were also acting for Strawberry Worx, were the last group of attorneys to handle the matter for Prasa; Ms Ngoye had not raised with him the threatened removal of oversight of the contract from Intersite; he also said that it was Ms Ngoye as the CEO of Intersite who had signed the contract between Intersite and Strawberry Worx; he also said that one of the reasons that Primedia was not awarded the contract again was that Prasa was not getting value for its portfolio.

246. Mr Montana agreed that the manner in which the files were removed was incorrect; but he did not agree with the way in which Intersite was dealing with the litigation that Primedia had instituted after it was not awarded the tender. He disputed that Intersite was required to manage the portfolio under difficult circumstances. Mr Montana alleged that Ms Ngoye raised the issue with the Commission to implicate Strawberry Worx (and Mr Moodley) and denied that he had attended the meeting that led to Mr Chauke's suspension and did not know Mr Chauke had been suspended. As regards Ms Ngoye, Mr Montana said she was moved from being CEO of Intersite because the Intersite Board was not happy with her and she was unhappy about being moved to Prasa as Executive Head of Group Legal. He confirmed asking her to act when he went on leave in December 2014 and thanked her when he returned; he denied that her dismissal had anything to do with a refusal to assist with changes to the Swifambo contract.

247. Mr Dingiswayo said that it was known at Prasa that certain persons and entities wielded undue influence over Mr Montana and other senior Prasa employees and that if you crossed Mr Montana's path or attempted to ensure that things were done lawfully and properly insofar as these entities and individuals were concerned, Mr Montana ruthlessly abused his powers and even arrogated to himself powers that he did not possess. (This was disputed by Mr Montana). Being in Group Legal Services, Mr Dingiswayo was often required to deal with the maladministration that was pervasive at Prasa.

248. As an illustration of the foregoing matters, he testified on how concerns that he had expressed about the lawfulness of certain dealings between Prasa and Prodigy Business Services (Pty) Limited led to his dismissal.

    248.1 Prodigy had entered into a number of contracts with Prasa to provide training and related services. Mr Moodley was previously a director of Prodigy. Prasa has since placed the validity of those contracts in dispute and applied to the High Court to have set aside agreements purportedly concluded between it and Prodigy. As the validity of the agreements was before the High Court, he did not wish to deal with that issue. He did give evidence on the manner in which the agreements had been concluded. When he raised questions about the validity of one of the agreements, Mr Montana dismissed him and later Ms Ngoye, who had questioned the fairness of Mr Dingiswayo's dismissal.

    248.2 On 10 June 2010, Ms Shunmugam an employee of Prodigy, sent a letter to Mr Montana proposing some form of "partnership". Mr Montana noted on the letter that the proposal should be

accepted in writing and an MOU be concluded. A partnership agreement was signed by the two on 11 October 2010. On 30 August 2011, an addendum was concluded and on 31 October 2012, a further aspect was added to the agreement, with Mr Montana again representing Prasa. This aspect in effect required Prasa to pay Prodigy R24 000 per learner for a five-day course for 300 learners, which meant that Prasa would be required to pay R72 million to Prodigy. Thereafter, on 10 May 2015, Prasa and Prodigy entered into an SLA.

248.3 In February or March 2015, Mr Dingiswayo was asked by the Contracts Manager at SCM to draft an agreement to reinstate and extend two of the earlier contracts with Prodigy. After reviewing the matters, he raised a number of compliance issues. On 1 April 2015, Prodigy sent an email to the office of the GCEO asking about outstanding payments. Mr Dingiswayo again later raised questions about issues relating to the drafting of the proposed agreement and said, until they were addressed, he would not begin drafting the agreement.

248.4 On 10 April 2015, Prodigy sent a further email, setting out the thrust and purposes of the agreements. On 18 April 2015 Mr Dingiswayo was asked to finalise a draft of an SLA sent to him. He raised concerns about the draft in an email, also sent to the Group Chief Procurement Officer, Mr Josephat Phungula. Mr Dingiswayo said there was general acceptance that the contracts were invalid, but a view was put forward that Prodigy was "innocent" and that Prasa should therefore proceed with the transaction. On 18 May 2015, Mr Montana sent an email contending that there was nothing wrong with the extension of the contract and alleged that "certain contracts" were being targeted and a "dirty campaign" was being waged against him.

248.5 At about 19h00 on the following day (19 May 2015), Mr Montana's PA phoned Mr Dingiswayo to say Mr Montana wished to see him urgently. Mr Dingiswayo asked if the matter could wait until the following day. He was told Mr Montana wished to see him personally that evening. Mr Dingiswayo arrived at Mr Montana's office and sat to meet with Mr Montana, who thanked him for coming back to work and made light of this by chuckling. Mr Montana then told Mr Dingiswayo that he had been told that he was one of the people that were working against the interests of Prasa on a number of matters. He accused Mr Dingiswayo of leaking documents to the Board and of abusing his position as one of Prasa's legal advisors, citing as an example that he had told Prasa employees to cancel a tender. Mr Dingiswayo denied the allegations and said he had no such power.

248.6 Mr Montana told Mr Dingiswayo that he was not interested in what he had to say and that the only thing that he had called him for was to tell him that he no longer worked at Prasa. He went on to say that the only thing that he could discuss with Mr Dingiswayo was how much he would accept for his contract to be terminated. Mr Dingiswayo responded that he would not be party to an unlawful termination of his own employment. He was told to collect his letter of termination the following day. Mr Dingiswayo noted that the meeting lasted just five minutes.

248.7 Mr Dingiswayo called Ms Ngoye soon thereafter. She was outraged and arranged to meet Mr Montana the following day. On that day, Mr Montana dismissed Ms Ngoye.

249. In the events leading up to her dismissal, Ms Ngoye confirmed that she had received Mr Montana's email of 18 May 2015 about the Prodigy contract. She added that during that period the Legal Function had declined to assist in amending the Swifambo contract as it had not been involved in the negotiations and drafting thereof. She confirmed that Mr Dingiswayo's advice in respect of the Prodigy contract did not accord with instructions given to him to amend and extend the Prodigy contract. On the evening of 18 May 2015, Mr Dingiswayo called her to tell her he had been dismissed. She immediately called Mr Montana and asked why he had dismissed Mr Dingiswayo who, as general manager, was her direct reportee. She said she had found it unacceptable and a repeat of how he had dealt with Mr Chauke. Whilst the interaction over the phone did not go well, Mr Montana agreed to meet her the following day.

250. Ms Ngoye confirmed that "[we] indeed met on 19 May 2015. The meeting started at 18:00. By 18:05, Mr Montana told me he was dismissing me with immediate effect. I received my dismissal letter on 20 May 2015."

251. After what happened to Mr Dingiswayo and Ms Ngoye, Mr Molefe intervened and prevailed on Mr Montana to follow the law in applying discipline. Mr Montana agreed to reinstate the two but within about a week he suspended them again. Mr Dingiswayo noted that other Prasa employees who had not supported the Prodigy contract were also placed on suspension. They returned to work after Mr Montana had left Prasa [in mid-July 2015] without any charges being made against them.

252. Three other matters raised by Mr Dingiswayo when he gave evidence on Prodigy and Mr Moodley's influence at Prasa are worthy of mention. Prasa's contracting with Prodigy breached other regulatory measures as well. For example, Prodigy was not an accredited provider of train drivers but nonetheless charged Prasa for the development of training for the drivers. Moreover, it charged Prasa penalties for non-attendance by employees, thereby contravening the PFMA and constituting wasteful expenditure. Mr Dingiswayo was of the view that Prodigy was favoured because Mr Moodley exercised undue influence over Mr Montana and some other senior employees. Mr Dingiswayo was of the view that what happened to him as a result of his not toeing Mr Montana's line on Prodigy illustrates part of how the capture of Prasa was implemented: when employees stood for what is proper, they were disciplined and often dismissed.

253. As regards the Prodigy contracts, Mr Montana testified that: as Mr Dingiswayo was not in Prasa's employ when the Prodigy contract was concluded, his evidence on this issue was "hearsay"; Mr Montana went on to say that there was a background to the contract of which Mr Dingiswayo was not aware; the training was for persons who did not have Matric and had gained Prasa an international award. It was not for Mr Dingiswayo to decide which contracts he would draft or whether counsel should be briefed. He also accused Mr Dingiswayo of undermining his leadership and being part of a "campaign" against him; among others whom he alleged were part this "campaign" were Mr Molefe and Ms Ngoye. Mr Montana conceded that no procurement process had been followed before the Prodigy agreement had been concluded and also accepted that the Legal Department had not been asked if the contract was valid.

254. As regards Mr Dingiswayo's dismissal, Mr Montana said he decided to "fire" Mr Dingiswayo, who was "not working in the best interest of Prasa"; he said he had made up his mind to dismiss Mr Dingiswayo even before the meeting; he alleged that the labour laws allowed for summary dismissal "when you think a lot is at stake". He could not recall if Mr Dingiswayo had told him that he would not be part of an unlawful process [in respect of his dismissal], but said Mr Dingiswayo was unhappy that he was dismissed; he also said he had consulted the head of HR, who had advised against summary dismissal, but he weighed up the situation and decided on summary dismissal.

255. Regarding whether the appointment of Prodigy complied with s 217 of the Constitution, Mr Montana said that the way in which s 217 of the Constitution was being interpreted "has become an instrument to undermine transformation in the country". Mr Montana said Mr Dingiswayo was bitter because he [Mr Montana] had fired him.

Mr Holele's and Mr Rakgoathe's evidence on Mr Moodley

256. In about February or March 2017, Ms Shunmugan asked to meet Mr Holele to discuss the issue of non-payments to Prodigy. Mr Holele invited Mr Rakgoathe, GM: Group Compliance to attend the meeting with him. When they got to the boardroom, it was not Ms Shunmugan who was present, but Mr Moodley. Mr Holele said that Mr Moodley complained that Prasa owed Prodigy a significant amount and demanded that it make payment in full. Mr Holele found it irregular that none of Prodigy's directors or employees were present and that it was Mr Moodley who was insisting on payment. The meeting was "very tense". He said he explained that as the matter was before the court, they could not accede to his demand before the court decision.

257. Mr Holele said that Mr Moodley then told them that "[h]e was part of the top 15 decision makers in the country and referred to media reports of an impending Cabinet re-shuffle. He then threatened us that 'big changes' were coming and that we needed to ensure that we were on the right side of these changes." Mr Rakgoathe confirmed this but added that Mr Moodley had also said that "he was involved" in the selection of CEOs of SOEs. Mr Holele pointed out that the "big change" for Prasa

was announced in March 2017 when Ms Peters was replaced as Minister of Transport by Mr Joe Maswanganyi.

258. In an affidavit that he submitted to the Commission, Mr Moodley emphatically denied that he had met Mr Holele and Mr Rakgoathe. Mr Moodley did not apply to testify at the hearing. He filed an affidavit notwithstanding that serious allegations had been made about him.

259. Having heard the evidence of Mr Molefe, Mr Holele and Mr Rakgoathe, and the substance of what they said, the probabilities are that what they said is true and correct and should be accepted.

260. Aside from Mr Moodley, according to the evidence led at the Commission, the other person who enjoyed undue favourable treatment at Prasa was Mr Makhensa Mabunda.

Mr Mabunda

261. Evidence by Mr Molefe in respect of the Swifambo tender made several references to Mr Mabunda. However, in respect of Mr Mabunda and the Siyaya Group, Mr Dingiswayo had given the most direct evidence, though it was given in the course of complaints he had made about the role that Ms Makhubele had played in effecting payment of some R59 million to the S group. The two issues should, however, be separated. In this section, what Mr Dingiswayo said about Mr Mabunda and the S Group is summarised.

262. According to Mr Dingiswayo, Mr Mabunda controlled the Siyaya Group of Companies, also known as the "S Group". It had over the years received work of more than R1 billion from Prasa. Mr Dingiswayo said that the entity that received a lot of work from Prasa was Siyaya Consulting Engineers (Pty) Limited (Siyaya Engineers), which was registered in 2006. It is now in liquidation.

263. Regarding the relationship between Mr Montana and Mr Mabunda, Mr Dingiswayo said that it was a matter of public record that they had worked together at the Department of Public Enterprises and thereafter at the Department of Transport. He noted that Mr Montana left Prasa on 15 July 2015. In September 2015, he said three High Court summonses were served on Prasa. The agreements on which two of the claims were based had been signed by Mr Montana, and the one on which the third claim was based had been signed by Mr Daniel Mtimkulu. The following year, whilst the above three matters were pending, the Siyaya Group instituted two further actions. The agreements that formed the bases of these claims were signed by Mr Montana.

264. The attorneys who represented the Siyaya Companies in the above matters were Mathopo Attorneys. Based on instructions from the relevant business unit or division that Prasa was not liable, the actions were defended. Siyaya Engineers was voluntarily liquidated on 27 March 2017. When the actions had reached the pre-trial stage, Prasa pressed for discovery, but the plaintiffs did not comply. In order to expedite proceedings and because some of the agreements had arbitration clauses, the matters were referred to arbitration. However, the plaintiffs still struggled to produce the documents. It was agreed however that the arbitration would be held from 11 to 22 September 2017.

265. In the meantime, the Liquidators held an enquiry in terms of sections 417 and 418 of the Companies Act. They subpoenaed a number of past and present Prasa employees.

266. Although this was not part of Mr Dingiswayo's evidence, it is worth noting that, according to the record of the liquidation proceedings, among those who gave evidence in support of Siyaya's claims were Mr Montana and Mr Mtimkulu.

267. At this stage, it would be convenient to deal with the manner in which the Interim Board that replaced Mr Molefe's Board dealt with the Siyaya's claims. This necessitates a consideration of the role played by its chairperson Adv Nana Makhubele.

Adv Makhubele

268. Regarding the dispute between Prasa and Siyaya, Mr Dingiswayo said that the trial bundles were to be filed by 25 August 2017, which did not happen. Prasa made applications to compel the filing of

the pre-trial processes but to no avail. In the meantime, although the term of the Molefe Board ended on 31 August 2017, a new Board was only appointed on 17 October 2017, with Adv Nana Makhubele SC as chairperson.

269. Mr Dingiswayo noted that although the finalisation of Prasa's Audit Report imminent at that time, the new Chairperson started making enquiries about the litigation between Siyaya and Prasa. Mr Dingiswayo summarised what happened in respect of the litigation as follows:

269.1 On 14 November 2017, Ms Makhubele met with Ms Ngoye to enquire about the cases involving the Siyaya Group. Upon a request by Mr Dingiswayo, Prasa's attorneys prepared a report. The report detailing the defences that had been set out in the Plea in each matter was shared with Adv Makhubele.

269.2 Advocate Makhubele said she had been approached by the attorneys of the liquidators; she was in possession of an interim report of the Commissioner in the insolvency inquiry; and that that report indicated that Prasa employees who had testified had made "major concessions" in respect of Prasa's liability. She asked for written reports from the employees "to confirm their testimony". But they had to do so without being furnished with a transcript of their testimony. Two employees compiled reports in which they indicated that they had not made concessions.

269.3 On 30 November 2017, Mr Dingiswayo prepared a further memorandum in which he said the delays in the litigation were at the instance of Siyaya and the liquidators; the liquidators appeared to have given preference to liquidation proceedings instead of preparing for the arbitration, which would produce a binding outcome. He sent his memorandum and the reports of the two employees to Adv Makhubele.

269.4 On the following day, 1 December 2017, the Board held a special meeting at which it resolved to suspend the panel of attorneys but did not mention the Siyaya litigation.

269.5 On 15 December 2017, a meeting was held between Adv Makhubele and Mr Madimpe Mogoshoa, of Diale Mogashoa Inc., Prasa's then attorneys in the Siyaya matters. At the meeting, Mr Mogashoa was told to settle each of the matters at the amounts given to him. These instructions were confirmed in a letter from the Company Secretary later that day. However, when Mr Mogashoa tendered the offer to Mr Mathopo, he was told that it did not conform to Prasa's "specific and express instructions". As a result, he sent a revised offer. On 7 February 2018, this revised offer was made an award by the appointed arbitrator. In the meantime, Mr Mogashoa had been told that he was not to communicate with Group Legal Services in respect of the Siyaya litigation.

269.6 In early March 2018, Mr Dingiswayo became aware that Mr Mabunda had indicated that he would be receiving monies from Prasa pursuant to an application to make an arbitration award an order of court. On being requested, Mr Mogashoa furnished Mr Dingiswayo with a copy of the papers.

269.7 Prasa's Group Legal then instructed Bowman Gilfillan to enter a notice to oppose the application, which had been set down for 9 May 2018. The attorneys representing the liquidators were Mathopo Attorneys, the attorneys who had represented Siyaya Engineers before it was liquidated.

269.8 Mathopo Attorneys challenged Bowman Gilfillan's authority to act on behalf of Prasa. A power of attorney signed by Ms Ngoye was filed to counter this. However, Mathopo Attorneys then wrote to Bowman Gilfillan to indicate that they were in possession of a text message from Adv Makhubele saying that Bowman's did not have the authority to represent Prasa. Mr Dingiswayo communicated this to the Board by email on 8 March 2018, but no member of the Board responded to the e-mail. Ms Ngoye sent a similar email to Minister Blade Nzimande, who had just been appointed Minister of Transport. No response was received from him.

269.9 At the hearing of the matter on 9 March 2018 Mr Botes, for the Siyaya Companies, had in his possession a letter on the Prasa letterhead addressed to Diale Mogashoa Attorneys, instructed them to concede to the Siyaya claims. The letter referred to the conclusion of a "settlement

agreement" that led to the arbitration award being made. Mr Dingiswayo was surprised that Siyaya's legal representatives were in possession of a privileged letter. Be that as it may, the order sought by Siyaya and the liquidators was granted by Acting Judge Holland-Muter, who ruled that Prasa's attorney did not have the authority to represent Prasa.

269.10 Group Legal Services then told the Board and the Minister that judgment had been entered against Prasa.

269.11 In the meantime, Siyaya Companies and the liquidators instructed the sheriff to attach Prasa's banking account and about R59 million was removed therefrom.

269.12 The Minister then called a meeting with Ms Makhubele and senior Prasa employees, including Ms Ngoye and Mr Dingiswayo. At the meeting, Adv Makhubele was told to compile a report setting out her version. Group Legal was asked to do the same.

269.13 Upon instructions from the Minister, Prasa applied for the rescission of the judgment granted on 9 March 2018 and an order interdicting the Sheriff from paying any money to Siyaya. That application was granted, the attached money returned and the judgment was rescinded.

270. Adv Makhubele resigned from the Board with effect from the due date of her report, namely 16 March 2018.

FAILURE TO APPOINT A PERMANENT BOARD OR CEO

271. After the demise of the Molefe Board, Prasa had no permanent Board for just over three years. Interim Boards were appointed – until 22 October 2020 when a new permanent Board was appointed.

272. Similarly, Prasa did not have a permanent GCEO for more than five and a half years. After Mr Montana left as GCEO on 15 July 2015, only Acting GCEOs were appointed – until 24 February 2021 when Cabinet approved the appointment of Mr Zoleni Kgosietsile Matthes as the GCEO.

273. This is despite the Office of the Auditor General telling the Commission that it had drawn to the attention of the Minister and Cabinet the following matters. First, from November 2016, there was instability in the Board and from 1 August 2017, there was no permanent Board. Second, from July 2015 only acting GCEOs were appointed. Third, the instability in the Board and at Prasa's key management level were negatively impacting Prasa's operations and contributed to the collapse of the control environment. Fourth, irregular expenditure had increased from R0,01 billion in 2013/14 to R24,2 billion in 2017/18.

274. As has been noted above, Mr Molefe complained that Minister Peters obstructed the appointment of someone to replace Mr Montana after Mr Montana left office. Former Minister Peters could offer no proper explanation for not acting on the Board's recommendations. With respect, that inaction does not reflect well on the manner that she carried out her responsibilities. Further, this delay with no explanation does not reflect well on the different Cabinet Ministers as it is Cabinet that has the final say on who should be appointed to the Boards of SOEs. In the case of Prasa, this is despite the fact that the relevant Act reposes that power in the Minister of Transport.

THE APPOINTMENT OF WERKSMANS ATTORNEYS

275. An issue that arose repeatedly relating to the Molefe Board's attempt to deal with corruption at Prasa was the appointment of Werksmans Attorneys to conduct investigations into matters first identified by the Auditor General and thereafter by the Public Protector.

276. Ms Ngoye gave evidence on this at the Commission, based on a report (21 September 2020) prepared by Prasa's Group Legal for Prasa's (new) Board.

Ms Ngoye's report

277. Werksmans was appointed by way of a letter of engagement dated 6 August 2015. It was signed by Mr Nathi Khena, the then Acting GCEO. Werksmans was appointed to investigate irregular expenditure identified by the AG in the 2014/2015 financial year. The appointment was the culmination of discussions between the 2014 Board and a Consortium initially led by a chartered accounting and auditing firm, Ngubane & Company, and later led by Werksmans. According to Mr Khena, the decision to appoint Ngubane to conduct the forensic investigation was based on Regulation 16 of Treasury's Regulations.

278. After an initial meeting with Ngubane, a further meeting was held, which included sub-contractors to Ngubane. Among them were Werksmans. The meeting was told that the Board had decided that Werksmans would lead the team and not Ngubane. The reasons were: as Werksmans was a law firm, Prasa would be protected by attorney-client privilege in the work done by the Consortium; Regulation 16A was not applicable to the appointment; and Werksmans was one of the law firms on Prasa's panel. A new letter of engagement was then prepared, which was vetted by Group Legal Services and signed by Mr Khena.

279. An issue raised by Prasa's Group Legal was negotiations on the method of billing. But the Chairperson of the Board's Risk and Audit Committee, Ms Zodwa Manase, responded "if you want quality work, you don't negotiate fees". Initially, fees were paid by the cost centre of legal fees and would be refunded to that cost centre. Later, payments were made from the cost centre of the GCEO, who approved the invoices.

280. From its inception, until the final report was issued in 2017, the forensic investigation and litigation that flowed from it was under the purview of the Board. The role of Group Legal Services was to assist the investigation team, provide information and facilitate meetings between them and officials. Werksmans did not report anything to Group Legal Services. Their reports were presented to the Board and then the Minister of Transport. Invoices were signed by the Company Secretary and the Acting GCEO. However, after Group Legal Services suggested that their services should be more productively used, they were allowed to see reports, but only at Werksmans' premises.

281. In June 2016, a meeting was held at which Group Legal Services thought the costs of the investigations would be discussed. But Ms Manase said she would discuss the costs separately with Werksmans' lead partner and the two retired to a separate room.

282. The initial scope of the investigation was that of fruitless and wasteful expenditure that the AG had found in the 2014/2015 financial year. After the Public Protector had tabled her Derailed Report, the Board and NT agreed to refer to Werksmans some of the investigations that the PP had directed be undertaken. This agreement increased the number of investigations from 33 to about 140.

283. The report notes that among the outcomes that flowed from the Werksmans investigations were the review applications that the Board had instituted in respect of the Swifambo and Siyangena contracts. It also noted that the investigation had highlighted Prasa's fight against corruption.

284. The parties who were mentioned in Ms Ngoye's report were invited to respond. They did so by way of affidavits. Their responses are considered separately hereunder.

Werksmans' response

285. Werksmans' response to the allegations made by Ms Ngoye is set out in an affidavit made by Mr Hotz on 16 February 2021, read with an earlier affidavit dated 24 November 2020 that he had submitted to the Commission, the essence set out hereunder:

    285.1 The Special Investigations Unit (SIU) was investigating various Prasa-related matters, one of them being the appointment of Werksmans. Prasa has already instructed Werksmans to help the SIU in respect of the investigations and Werksmans did so. As regards the SIU's investigation into the appointment of Werksmans by Prasa, Mr Hotz said that Werksmans had given a detailed oral explanation to the SIU on 25 June 2020 and thereafter confirmed it in a letter dated 30 June

2020. Werksmans had not heard from the SIU after it sent the letter, which had also been copied to Mr Molefe, Ms Manase and Ms Ngoye.

285.2 In the letter of 30 June 2020 Mr Hotz set out how Werksmans came to be appointed. After Prasa had decided to appoint Ngubane, Werksmans was asked by a firm that was to provide investigative capacity to Ngubane whether Werksmans was on Prasa's legal panel and if so would it accept an instruction; when Werksmans confirmed that it was on the panel and would accept the instruction, it was invited to a meeting with Mr Molefe, Ms Manase and other firms whom Prasa intended to engage for the purposes of the investigations; at the meeting, Ms Manase said that Ngubane had been appointed in terms of Treasury Regulation 16A; it was also envisaged that Ngubane would be leading the process; thereafter, Werksmans met with Ngubane to discuss, among other things, the methodology that could possibly be followed in the investigations; however, no agreements were concluded between Ngubane and Werksmans or any of the other firms pursuant to the earlier meeting.

285.3 Werksmans had in the meantime concluded that it was not competent for Prasa to utilise Regulation 16A to appoint Ngubane and advised Mr Molefe and Ms Manase of that view. It also stressed the importance of attorney and client privilege, which would only exist if Prasa instructed a firm of attorneys to conduct the investigation and explained that if Werksmans were appointed by Prasa the attorney-client would extend to services providers whom Werksmans would appoint. Prasa accepted Werksmans' advice and Ms Ngoye finalised the letter of engagement, which was signed by the Acting GCEO on 6 August 2015. It was only then that Werksmans commenced rendering its services.

285.4 At the time of its engagement, Werksmans was ("and still is") a member of the Prasa legal panel and as such Prasa was lawfully entitled to appoint Werksmans for the tasks and in the manner it had. Werksmans had appointed the different service providers; after it was appointed, Werksmans often engaged with the Board, representatives of NT and the AG's office, Minister Peters, the Head of Scopa (Mr Themba Godi) and law enforcement.

286. Mr Hotz disputed the correctness of certain allegations made by the AG in respect of Prasa's appointment of Werksmans. Mr Hotz said that the AG's allegation that no SCM process had been followed by Prasa in the set-up of the legal panel was incorrect. This is because a proper tender process had been followed by the South African Rail Commuter Corporation Ltd (SARCC) and the SARCC's name was changed to Prasa by the Legal Succession Act. The SARCC had lawfully appointed a panel and accordingly Prasa was not required to conduct a fresh tender process.

287. The AG had made the following further allegation: no SCM process was followed when selecting suppliers from the panel and not all services providers were given a fair chance to participate/bid. In his response to this allegation, Mr Hotz said Prasa's SCM policy in place at the time permitted the development and maintenance of a database and obtaining of quotations from persons on the database; but the policy also permitted Prasa to deviate from the requirement to obtain more than one quotation in certain circumstances; one of those circumstances is in respect of "single source" or "confinement", which Prasa was permitted to use, but only in respect of professional services such as legal. Mr Hotz's affidavit states Prasa formed the view that the requirements for confinement were satisfied for Werksmans' appointment as a professional legal service provider. Accordingly, there was no merit in the allegations made by the AG's office.

288. As regards the June 2016 meeting when he and Ms Manase retired to a separate room to discuss the issue of Werksmans' costs, Mr Hotz said that a private discussion was necessitated by the fact that Werksmans were not operating in "friendly waters"; many people in Prasa did not welcome the investigation; measures were taken to interfere with the investigation, destroy or conceal evidence, mislead investigators and be generally obstructive; this was because the evidence that had been gathered suggested that Prasa was "plagued by corruption". One of the measures used was to delay payment of Werksmans' invoices. Because Mr Molefe and Ms Manase were the driving force behind the initiation and continuation of the investigations, he [Mr Hotz] informed them of the non-timeous payments. He had at the outset cautioned them that their interactions should be confined to a small

group of trusted persons within Prasa; that is the reason that only one copy of Werksmans' Reports would be presented to Mr Molefe and it was for him to decide to whom to make the reports available. In June 2016, their invoices had again not been paid; it was to discuss the delay in payment of those invoices that he had asked to meet separately with Ms Manase; and their outstanding invoices were eventually paid.

Ms Manase's response

289. Ms Manase dealt with the issue of the appointment of Werksmans in her affidavit. After the Board had received the AG's report on irregular and fruitless expenditure, it resolved to investigate this; the Board approved the use of Regulation 16A; it delegated the responsibility to appoint a service provider to its chairperson (Mr Molefe) and Ms Manase (as the chair of its risk and audit committee); Ngubane was appointed in terms of Regulation 16A; a member of a forensic team that Ngubane had engaged, BCPS, introduced them to Werksmans; BCPS said it was standard practice that a firm of attorneys is appointed to lead the investigations, so that attorney-client privilege could be claimed in respect of the investigations. Consequently, she and Mr Molefe agreed that Werksmans could be appointed to lead the investigations, provided they were on Prasa's panel of attorneys.

290. After Ms Ngoye confirmed that Werksmans was on Prasa's panel, Werksmans was appointed to lead the investigations. She was satisfied that Werksmans rates were reasonable and the agreement with Werksmans was thereafter signed on Prasa's behalf by its then Acting GCEO, Mr Nathi Khena, on 6 August 2015.

291. As regards the investigations, Ms Manase and Mr Molefe met with the forensic team regularly. As the investigations were sensitive, only she and Mr Molefe were privy to some of the information that was obtained. After the Derailed Report, in order to reduce Prasa's costs, she asked that investigations that the Werksmans team had not started be referred to National Treasury. She pointed out that when the agreement with Werksmans was signed, there were 33 contracts; thereafter, following a meeting with NT on 2 March 2016, it was decided that, in respect of the Public Protector's remedial action, Werksmans would investigate 141 contracts and Treasury would investigate 220 contracts.

292. Of the 141 matters investigated by Werksmans, 66 had been referred to the DPCI by the time she had left Prasa in April 2017; and Prasa had succeeded in setting aside the Swifambo and Siyangena contracts.

Mr Molefe's response

293. In a separate affidavit dealing with the allegations made by Ms Ngoye, Mr Molefe said Werksmans had been appointed to Prasa's legal panel prior to his tenure as Board chairperson; after receiving the AG's draft report on fruitless expenditure in June and July 2015, the Board mandated him and Ms Manase to ensure that the investigations did happen; Ms Manase was of the view that Regulation 16A could be utilised to fast track the appointment of a service provider; it was thereafter that the appointment of Werksmans was made by Mr Khena. He and Ms Manase met frequently with Werksmans; and the reason that he and Ms Manase had adopted a hands-on approach was management's reluctance or refusal to cooperate with the investigation.

Brief analysis: Appointment of Werksmans

294. It is considered that there are three significant issues that arise in respect of the Molefe Board's appointment of Werksmans to conduct the investigations that the AG and the PP required:

    294.1 The first is the lawfulness, propriety and fairness of the appointment. In respect of this issue, what emerges from the foregoing is that it does not appear that a procurement process as such was followed when first Ngubane and thereafter Werksmans were engaged by Prasa. It appears that Werksmans appointment was made on the basis that it was one of the law firms on Prasa's panel and that Prasa was entitled to rely on its "single source or confinement powers" to appoint

Werksmans, as it was a professional legal service provider. In the circumstances, whilst it may have been lawful for Prasa to appoint Werksmans, given the scope of the work and the time for which the services were to be procured, it may appear to have been unfair to other service providers. However, it appears that the required work was done and that it bore fruit. In that sense, even though the appointment may not have been made strictly in compliance with s 217 of the Constitution, even if a declaration to that effect is made, it does not appear that there is a case for setting aside the appointment of Werksmans.

294.2 Given the difficulties that the Molefe Board experienced when they assumed office at Prasa and that Werksmans were achieving at least some measure of success, the Board's concerns about being questioned about the appointment of Werksmans may be understandable, but concerns raised about the appointment are also understandable. Legitimate concerns were: the absence of an estimation of the total cost of the services; the possible irregularity of the appointment and the appointment possibly being unfair; and what appears to have been the Board's approach, namely that the raising of such matters in itself put you in the camp of the Prasa wrongdoers. Ironically, the Molefe Board rightly wished to hold wrongdoers accountable, but itself appeared to resent being held accountable for how state funds were being spent.

294.3 The unfortunate result is that much of the good work done by the Board and Werksmans in the fight against corruption at Prasa was hindered by allowing the appointment of Werksmans and insistence on the continued utilisation of its services to be a major distraction. The Molefe Board, as well intentioned as it was, could have done more to root out corruption at Prasa had it adopted a more nuanced approach to questions about its appointment of Werksmans by the Parliamentary Portfolio Committee.

295. The observations made above about the Board's approach is not to be understood as an acceptance of the treatment meted out to the Molefe Board by Minister Peters and the Portfolio Committee. They too were under a duty to ensure that corruption, rather than well intentioned boards, are rooted out from public entities. In this they failed.

296. It should perhaps be reiterated that Mr Montana on several occasions criticised the appointment of Werksmans and accused them of engaging in illegal surveillance, allegations that Werksmans denied.

297. Mr Montana also raised several matters not directly connected to allegations that were made against him to which he was required to respond when called as a witness by the Commission. The more significant of those matters are considered in the next section.

MATTERS RAISED BY MR MONTANA

298. Long before the Commission was established, Mr Montana had been in the public eye – mainly for the wrong reasons. Among the significant matters that attracted attention to him were: the award of the locomotives contract to Swifambo, whose managing director, Mr Auswell Mashaba, reportedly paid some R79 million to persons who were to pay the money over to the ANC: his defence of Mr Daniel Mtimkulu, the engineer who falsely declared that he held a doctorate and was according to the judgment of the SCA, central to Prasa's acquiring trains that were said to be "too tall" for South Africa's rail network; his relationship with Mr Van der Walt, an attorney who had provided legal services to Siyangena and whose company provided the funding for houses which Mr Montana had expressed an interest in purchasing; and the quite damning findings made by the Public Protector.

299. It was therefore not surprising that several witnesses made serious allegations against Mr Montana. Unlike some senior persons in other SOEs and also Prasa, Mr Montana was intent on presenting "his side of the story". He approached the Commission with a lengthy affidavit in which he dealt with matters that were likely to be considered by the Commission. Several quite diverse themes emerge from that affidavit:

299.1 President Zuma was the target at which the establishment of the Commission was aimed

299.2 The membership of the Prasa Board was changed in 2014 to get rid of him as Prasa's GCEO or made that as one of its missions

299.3 It was wrong to "elevate" irregularities that taint procurement processes to corruption

299.4 Prasa was a well-run entity during his reign as GCEO, as emerges from the quite numerous and extensive examples he set out in his affidavit, to which thousands and thousands of pages of documents were annexed; and

299.5 Prasa went on a downward spiral after the Molefe Board was appointed.

300. While Mr Montana was entitled to set out "his side of the story", many of the matters that he dealt with in his affidavit were not relevant to the Commission's TORs. Members of the Commission's investigating and legal teams dealing with Prasa-related matters sought to persuade Mr Montana to exclude those parts of the affidavit that did not fit into the Commission's TORs. Mr Montana took offence at this suggestion and alleged that the Commission was attempting to "curtail" his evidence. He accused the Commission of depriving him of the opportunity to tell his story and the "real story of Prasa" and refused to accept the excising of the irrelevant parts of the affidavit.

301. Mr Montana's approach could not legitimately be countenanced because this is a Commission whose TORs set out the matters it should deal with. It is perhaps important to stress that this is not a Commission into Prasa, although given what has emerged about Prasa at the Commission, it may well be that a separate commission should be established to look at the wrongs at Prasa. Be that as it may, a stand-off ensued about Mr Montana's evidence.

302. Eventually, Mr Montana was required through a directive issued in terms of Regulation 10(6) of the Commission's Regulations to respond on oath or affirmation to the allegations made by Mr Molefe, Ms Ngoye, Mr Dingiswayo and the Report of Mr Oellermann. However, Mr Montana did not comply with the directive to furnish to the Commission affidavits or affirmations that set out his responses to each of the allegations that had been made against him. The purpose of requiring such responses is to identify precisely what is being disputed and thereby curtail the time spent on oral evidence. As a result of Mr Montana's failure to comply with the directive, it became a time-consuming exercise to get answers from him when he did testify. And, as noted above, he did not agree to answer all questions relating to the property transactions, alleging that the evidence leader was biased.

303. In order to ensure that the public had heard from Mr Montana himself, he was accommodated. However, as regards his affidavit, the problems remained until the very end. Eventually, the Chairperson admitted the affidavit. But not all the original annexures form part of the affidavit that was admitted.

304. Among the more significant issues that emerged in Mr Montana's evidence or affidavit are summarised here. He delivered what he described as an "opening statement to the Commission", which throws some light on his views of the Commission, the role of SOEs and allegations made about them generally and at the Commission. It is accordingly instructive to set out some of what he said on these matters:

304.1 He had written to the Chairperson on 26 July 2019 asking for an opportunity to testify about a whole range of issues that he intended to address, but the Commission wanted to curtail his evidence and wanted him to take out some parts that dealt with the appointment of Werksmans Attorneys (by the Molefe Board).

304.2 He expressed the following general views: we have made many gains as a country; and key SOEs and public entities have played a major role in those gains but they are being destroyed because "[w]e are a country that is prepared to lose R100 to save R1 and that is why we see all our things are falling apart in the country."

304.3 He also claimed that "all that has been said here in this Commission is actually not the totality of our experience and reality of our country". SOEs such as Prasa and Transnet are being destroyed "because we fail to understand [that] these are important instruments in the hands of a democratic government to drive economic transformation".

304.4 It was his view that irregularities (in procurement processes) should not be "elevated" to mean criminality and corruption. Irregularities and a poor control environment created favourable conditions for fraud and corruption, but irregularity in itself did not constitute corruption: "As a nation we are now using irregular expenditure as a barometer to measure corruption. *Our courts in my view seem to have fallen into this trap. We have created an unfortunate picture of South Africa as an extremely corrupt nation*" (emphasis added).

304.5 Mr Montana went on to accuse the Commission of bias and pursuing "a pre-determined agenda" and stated that "this Commission is captured".

304.6 He asked the Commission to subpoena the bank accounts of Mr Molefe, who was "the most preferred witness of this Commission", and those of his Foundation.

305. It may not be inappropriate to end this section with the following allegations that Mr Montana made in his affidavit: there appeared to be a split in the ANC, between those deemed to be associated with former President Zuma and the so-called State Capture project and those seemingly opposing them; the ANC or some of its leaders were either beneficiaries of payments by companies that were contracted to Prasa or directly from Prasa; as the GCEO, he worked very closely with the ANC; ANC leaders would put pressure on many CEOs of SOEs and public entities to assist the ANC or entities that it said belonged to "the movement"; the "dominant view and practice in the party" was that cadres "deployed" in positions of power should assist the party financially; the ANC "would ask many of us in leadership positions of SOEs and public entities" to get contractors to contribute financially to the party; he had once agreed to meet companies to whom the ANC owed money to see if "we could assist them in the future"; although the ANC had denied that it had ever received money from Swifambo, Mr Mashaba had confirmed to Mr Montana that he had made payments to the ANC; the ANC, through instructions from the Minister of Transport, had over years used Prasa transport services without paying; and Prasa had also provided dozens of trains and more than 200 buses for the ANC's Centenary Celebrations in 2012.

306. Mr Montana also alleged that on two separate occasions he had been approached by Minister Peters to provide transport for ANC events. First, in 2014 the request was to provide "Prasa buses" for a large gathering of traditional leaders in the North West Province. He said that he refused to comply with the request despite being told that "he was defying the movement". He said he refused to provide the buses as Autopax would have lost an estimated R40 million had the buses been provided. Second, in January 2015 Minister Peters had asked him to provide trains and buses for the ANC January 8 celebrations in Cape Town as she was "under pressure". On this occasion he put together a transport plan for the event.

307. In her response former Minister Peters said that in January 2014 she had approached Mr Montana after she had been told by former Minister Bathabile Dlamini that she had not been able to get hold of Mr Montana to ascertain the process to follow to secure Autopax buses and a quotation for the use of the buses. There had been no suggestion that the buses were to be made available free of charge. As regards her request to Montana in January 2015, she said she had asked Mr Montana to provide a quotation and assistance with the use of the trains. She alleged that she had not requested him in his capacity as Prasa's GCEO or to make the trains available for free or without following the usual processes "when such services are enlisted".

308. In response to allegations made in Mr Montana's affidavit against him personally or in his capacity as Treasury-General of the ANC, Dr Zweli Mkhize filed an affidavit in which he said that Mr Montana had made similar allegations in the past and that he had responded to those allegations in a letter to the Parliament's Public Enterprises Portfolio Committee. A copy of his letter was annexed to his response to the Commission. The thrust of what is set out in Dr Mkhize's response and letter is that when Mr Montana visited the ANC's Headquarters [at Luthuli House], he would "come and greet"; Mr Montana had on a few occasions offered to let Dr Mkhize know if there were private business people who were willing to offer a donation to the ANC, though such offers were not linked to Prasa contracts; he and Mr Montana had never discussed a donation [to the ANC] that would be solicited through a Prasa contract; he confirmed that Ms Maria Gomes had made donations to the ANC, but the money was

not “derived from Prasa contracts”; and at some stage Mr Montana had asked him to meet a Prasa service provider, but he refused to do so.

309. The allegations made by Mr Montana are worrisome. They suggest that people whom the ANC deployed to leadership positions in SOEs were expected to secure benefits for the ANC from their service providers.

310. The evidence of former Minister Peters is equally worrisome. Even on her own version, in early 2014 she had asked Mr Montana to assist the ANC by providing Prasa transport in 2015 and had succeeded in getting him to provide the ANC with Prasa transport in 2015. Former Minister Peters alleges that she expected that the ANC would have to pay for this. Yet, what is missing from her response to Mr Montana’s allegations is whether she had followed up on the issue of payment. Given that she was the Minister, there would have been a duty to do so.

CONCLUSIONS AND RECOMMENDATIONS

311. The evidence led on Prasa at the Commission is, to put it mildly, deeply disturbing. Prasa has been in the public eye, often in a negative light, over many years. Various complaints regarding Prasa were made and reported on by the media especially about its procurement practices. In addition, employees were disciplined and when such disciplinary action was successfully challenged Prasa was required to compensate them at massive cost. But the problems at Prasa were also systemic and more fundamental. Its record-keeping was deeply flawed. More worryingly, it appeared that not only could critical documents not be found, but that in some instances several versions of the same documents, including minutes and reports, existed. And, as has been alleged, documents appear to have been created to suggest that certain matters were discussed at meetings, certain persons were present or certain decisions were taken when they had not, if indeed the meetings had taken place at all.

312. In 2012 Adv Thuli Madonsela began her investigation into Prasa arising from 32 complaints. However, she was able to furnish her Derailed Report only in August 2015. Even then, that report did not deal with all the complaints she investigated. Adv Madonsela says the report was delayed because of a lack of co-operation mainly from Prasa’s then CEO (Mr Montana) and also from the Board that was in office at the time. She found that some of the allegations had been proven, but some had not. She did not make findings in respect of fifteen of the matters. One of her recommendations was that every contract worth more than R10 million that Prasa had concluded after 2012 be investigated by Treasury and that the Board assist with that investigation. Given that Prasa would have paid at least R10 million for many of the goods and services that it procured, that is a seriously damning finding in respect of Prasa’s procurement of goods and services.

313. Fortunately, however, by the time that that recommendation was made, Prasa had a new Board. That Board, whose members were appointed for a period of three years, took office on 1 August 2014, just about a year before the PP’s Report was released. However, most of the complaints that were investigated related to actions and decisions that had occurred prior to 2012.

314. It is however difficult to comprehend that, notwithstanding the dire state in which Prasa was found to be for such a prolonged period, no action was taken and that its state of disrepair had been allowed to remain officially undetected until uncovered by the Public Protector and thereafter by the investigations initiated by the Molefe Board.

315. In seeking to provide an explanation some of the witnesses who testified at the Commission expressed the view that Prasa had been “captured” or was a victim of “state capture”. Most suggested that Mr Montana was central to that capture. Notwithstanding that questions had been raised about at least two multi-billion Rand contracts while he was at the helm of Prasa, he remained the GCEO. The suggestion was that he had been allowed to become too powerful, in fact so powerful that, according to Mr Molefe, at the meeting of 20 August 2015 Mr Montana had complained to former President Zuma that the Molefe Board had been appointed without his (Mr Montana’s) being consulted. In ad-

dition, Mr Molefe, who was probably the Commission's main witness on the ills that afflicted Prasa, suggested that Mr Montana enjoyed the protection of quite powerful persons behind the scenes.

316. Mr Molefe was also of the view that for state capture to succeed, systems in organisations must be broken, must be weakened and good people must be removed and substituted by people who were compliant, who would carry out the agenda [of those] whose objective is the looting of the public purse. In addition, he perceptively pointed out that he was in a position to speak out but not everybody can do that.

317. According to Mr Molefe, his Board tried to clean up Prasa. Ironically, however, it was his Board that was in effect cleared out, a process that was allowed to continue with the commission of some and the omission of others, who all ought to have known better. As regards his attempts to clean up Prasa he said after he took over as the Chairperson of the Prasa Board, he became aware of the extent to which maladministration and possibly corruption were rife in Prasa. Mr Mashaba had told him that after Swifambo had been awarded the R3,5 billion locomotives contract, he had been asked to pay some R79 million to persons to pay the money to the ANC; the ANC's then Treasury General, Dr Zweli Mkhize, facilitated a meeting between Mr Molefe and the ANC's Top Six to assist in that clean-up effort. They however did not give him the requisite support; instead, soon after that meeting, the then most powerful person in the ANC and in Government, former President Zuma, tried to influence him to have Mr Montana back at the helm of Prasa. In addition, neither Parliament nor the law enforcement agencies did the right thing.

318. Mr Molefe's evidence shows that he and his Board did not allow themselves to be regarded as victims. They fought back: they approached the Courts to set aside the Swifambo contract and certain contracts that Prasa had concluded with Siyangena; they attempted to get the High Court to require the DPCI to finalise its investigations into matters in which Prasa had laid criminal charges; and when Minister Peters dismissed the members of his Board, they launched a High Court application which succeeded in setting aside her decision. Sadly, that success had limited practical benefit: the Board was rendered unworkable for the remaining short period of its existence.

319. It is also clear from the evidence led at the Commission and in what is said in affidavits, that if the requisite care was displayed by those in a position to assist in the clean-up of Prasa, Prasa would not be in the sorry state it is today. For example, although the DPCI had initially intended utilising Mr Sacks' services, after he submitted to it his damning and quite incriminating "first level" flow of funds report in respect of the Swifambo tender, he has not heard back from the DPCI. Nor did they ask him, as was envisaged at the time he was engaged, to perform a similar exercise in respect of the Siyangena contracts.

320. In the face of foregoing, one would expect that everyone concerned who had anything to do with Prasa would express at least a measure of regret or apology about the manner in which they exercised, or failed to exercise, their powers. This applies both to those within Prasa who exercised power and took or influenced decisions and those who were required to have held the repositories of power and influence accountable.

321. In determining who should be held responsible for the ills at Prasa, it would be instructive to divide the persons or entities into two broad categories: first, those who occupied positions of oversight and who should have ensured that perpetrators were held accountable; and second, those who actually perpetrated the wrongs.

Persons who had a duty of oversight

322. Insofar as oversight of the maladministration at Prasa is concerned, at least two fundamental questions must be asked. First, can it be said that the Government leaders, and of course the ANC leadership were not aware of it? Second, given what they knew and also what they must have known, what steps did they take?

323. It would appear that the answer to the first question is as follows: the ANC leadership and also the then President and the then Deputy President were told, at least in general terms, about the extent

of the problems at Prasa and the amounts involved.

324. The answer to the second question would appear to be that, at best, they and other public representatives and public bodies stood by and did nothing while the Molefe Board attempted to fight corruption and bring perpetrators to book. In this regard, it will be recalled that Mr Molefe said he had written to the then Deputy President Ramaphosa, just before the term of his Board expired identifying the critical challenges that Prasa faced and had asked him and Government to intervene and get things back on track. He said that he had also alerted the then Deputy President to the methods used to make his Board dysfunctional, namely not filling in vacancies on the Board.

325. If only some of the individuals and entities had fulfilled their obligations and responsibilities, Prasa might have enjoyed a better fate. It will be instructive to set out formally what those commissions or omissions were, in respect of individuals or entities.

    325.1 First, it is necessary to consider the role of then President Jacob Zuma. He was the head of the ANC, Cabinet and Government. As the President, in terms of his oath of office, he was under a constitutional duty to among other things tlprotect and promote the rights of all South Africans; do justice to all; and devote himself to the well-being of all South Africa's people. He must have been aware of some of the wrongdoings that were happening at Prasa. Given his constitutional obligations, he was under a duty to put in place mechanisms to right them. He failed to do so and as a result did not carry out his oath of office. He owes a profound apology to persons and entities who tendered to provide goods and services to Prasa but whose tenders were unlawfully and unfairly overlooked; and an apology to the thousands of commuters whom Prasa cannot and does not serve on account of the disrepair into which it has fallen.

    325.2 Second, the inaction of the ANC's Top Six when told by Mr Molefe of the extent of the rot at Prasa and the R79 million paid to the Party by the managing director of a company that had received a R3,5 billion tender. That information was subsequently made public. The beneficiaries of that contract are still at large – with large sums of money still in their possession. The Top Six too owe the country a profound apology. They allowed a state entity required to provide an essential service to the most vulnerable to be incapable of fulfilling its duty. Although the ANC's Top Six does not formally exercise public power, important positions in SOEs are determined or ratified by the ANC's "Deployment Committee". The Top Six must be therefore held accountable to the public for not acting in circumstances where the public interest requires that action be taken.

    325.3 Parliament's inaction is a matter of serious concern. It will be recalled that on 7 March 2017, Mr Molefe wrote to the Speaker of Parliament pleading for protection for his Board when it appeared before Parliament's Portfolio Committee on Transport. Mr Molefe did not get the requisite protection. Instead, at a sitting of the Portfolio Committee on that very day an announcement was made on behalf of Minister Peters that she had dismissed the Molefe Board. There is no record of Parliament calling Minister Peters to account for this public embarrassment of the Board, even after the High Court set aside her decision to dismiss the Board. With respect, Parliament failed to hold the executive to account and allowed it to punish a Board that sought to fight corruption and maladministration. It is recommended that Parliament puts in place mechanisms to ensure that such unlawful use of power by the executive to silence its critics is not allowed to happen again.

    325.4 The members of the Portfolio Committee on Transport have hardly covered themselves in glory in their handling of Prasa-related matters. Just how little some of them cared about their obligations or applied themselves to fulfilling those obligations is illustrated by the following: In her affidavit to the Commission in response to Mr Molefe's complaints about the manner in which his Board was treated by the Portfolio Committee, its then Chairperson, Ms Magadzi, said that in the Swifambo review application Mr Molefe had alleged that "Prasa had donated" R79 million to the ANC. However, that was never Mr Molefe's allegation: he said that Mr Mashaba had told him that he [Mr Mashaba] had paid R79 million to the ANC after Swifambo had won the locomotives tender. Worse still, Ms Magadzi and her Committee held it against Mr Molefe that he could not produce receipts from Prasa confirming the payments. Given that Members of Parliament

are paid from public funds, one would expect that they would not be guilty of such basic and unacceptable errors. However, there are more fundamental problems with the approach that the ANC members of the Portfolio Committee adopted. In her affidavit, Ms Magadzi alleged that her Committee wanted state institutions (National Treasury, Hawks (the DPCI), police) to investigate the award of the locomotives contract to Swifambo, but "comrade Popo Molefe" engaged Werksmans. The focus on the appointment of Werksmans was a diversion from the real problems at Prasa. It is regrettable that this Committee permitted the Minister to use the hallowed rooms of Parliament to dismiss unlawfully the Molefe Board and when the High Court set aside her decision, not hold her accountable for this serious lapse of judgment.

325.5 In respect of ANC MPs who were members of the Portfolio Committee on Transport during the period that the Molefe Board was in office, the following needs to be recorded. President Zuma appointed Mr Maswanganyi as the Minister of Transport after he dismissed Minister Peters. According to Mr Molefe, Minister Maswanganyi refused to meet with his Board and in effect rendered it unworkable. What is however more worrisome about the elevation of Mr Maswanganyi to Minister of Transport is this: he said that it was Parliament that had decided to dissolve the Board and a Minister "cannot go against a decision taken by Parliament!" On that score, Mr Maswanganyi is simply wrong. As powerful as Parliament is, the power to dismiss the Board lies with the Minister. There should be serious reservations about appointing a person who has so limited an understanding of where certain powers lie, as a Minister. Notwithstanding Ms Magadzi's inadequacies as Chairperson of the Portfolio Committee, she has been elevated to the position of Deputy Minister of Transport. One of the other members of the Portfolio Committee at the time that Mr Molefe's Board was in office at Prasa was Mr Leonard Ramatlakane. He is now the Chairperson of Prasa's Board. As has been noted in the section dealing with the award of the locomotive tender to Swifambo, Mr Ramatlakane has embarked on a process of consequence management at Prasa. This is commendable. However, given his less than distinguished performance as a member of the Portfolio Committee, and complaints made by Prasa employees who appeared before the Commission, it is recommended that the Portfolio Committee on Transport exercises particular oversight over this process and prepares appropriate reports that are available to the public and civil society organisations.

325.6 Minister Dipuo Peters must be credited with appointing the Molefe Board in 2014. It appears that initially at least she was supportive of the Molefe Board's attempt to clean up Prasa. However, it seems that her support for this effort waned. The reason she proffered for withdrawing her support was that the Board was not focusing on ensuring that Prasa was running properly. However, what emerges from the evidence is that she wished the investigations into Prasa's ills at least to be curtailed. Thereafter, when it became public knowledge that Mr Mashaba had said that, after his firm had been awarded the Swifambo tender, he had paid money to persons who would pay it the ANC, one would have expected that as the Minister to whom Prasa was accountable, she would have insisted that that embarrassing allegation was expeditiously pursued. Instead, she stood by. Moreover, she ought to have been aware of the unacceptable treatment meted out to the Prasa Board by the Portfolio Committee of Transport. By her inaction, it would appear that she made common cause with that Committee's approach. She must accordingly share some of the blame for the fact that the wrongdoers in the Swifambo matter have still not been brought to book. In addition, then Minister Peters must take responsibility for the non-appointment of a GCEO to replace Mr Montana after he left Prasa in July 2015. That position remained vacant throughout the remaining period that she was Minister – until March 2017.

326. There are at least two matters of a general nature that arise from the systemic failure to allow the rot at Prasa to continue, notwithstanding its devastating effect on the many vulnerable persons who depended on its services:

326.1 First, the fact that not one person who is paid, from scarce public funds to exercise oversight over Prasa assisted the Molefe Board in its fight to rid Prasa of corruption and maladministration leads to two broad inferences. All of them, individually or collectively, were incompetent and/or uncaring. The other is that they were implementing a pre-determined plan, namely, to ensure

that the Molefe Board failed. It will be recalled that that is precisely what Mr Molefe told the Top Six when he met them in July or August 2015. A consideration of the evidence led at the Commission, suggest that the probabilities are that Mr Molefe's prognosis was correct.

326.2 Second, many professions have bodies that exercise oversight over their members. Should a member deviate quite radically from what is expected of a reasonable member of that body, he or she can face malpractice proceedings. The term political malpractice has been recently coined. Given the extent to which certain public representatives failed to exercise their power, and the resultant massive losses to the fiscus and the suffering caused to vulnerable members of the public, perhaps it is time for South Africa to ensure that its public representatives fulfil their obligations by introducing a form of sanction for what may be termed constitutional and political malpractice.

Persons who should be held accountable

327. It is worth reiterating that Mr Molefe was clear that in his view Prasa had been "captured" or that Prasa was a victim of state capture. He was also of the view that, at Prasa itself, Mr Montana was at the helm of that project. A similar view was expressed by among others Ms Ngoye and Mr Dingiswayo.

328. In assessing the cogency of these views, it is necessary to appreciate that it would be difficult to secure direct evidence of state capture or the capture of state institutions. Whether or not that happened is to be inferred from the evidence tendered, the contents of documents and facts and circumstances that cannot reasonably be disputed. The latter includes known relationships between those in positions of powers and persons who are known beneficiaries of contractual relationship that are concluded between organs of state and persons or entities in the private sector.

329. During the course of the Commission's hearings, evidence was led of the enormous influence that Mr Roy Moodley exercised at Prasa in respect of the contracts that Prasa concluded with entities with whom he was associated or known to be associated and the consequences visited upon those who raised questions about some of those contracts. In addition, it is a matter of public record that there was a quite close relationship between President Zuma and Mr Moodley, whose Royal Security paid Mr Zuma a salary for a period of fifteen months before Mr Zuma became the President of the country and a month thereafter. In addition, when Mr Montana appeared at the Commission he made no secret of his allegiance to Mr Zuma, even after Mr Zuma had stepped down as President. Not coincidentally, Mr Montana was of the view that institution of the Commission was "targeted" at former President Zuma.

330. The other person who benefitted handsomely from Prasa contracts was Mr Makhensa Mabunda. He is a known associate of Mr Montana. Evidence was led that entities with which he was associated received contracts totalling nearly R1 billion. In addition, Mr Mashaba told Mr Molefe that it was Mr Mabunda who had encouraged him [Mr Mashaba] to submit a bid for the locomotives contract, which he did through Swifambo. The manner in which the tender came to be awarded to Swifambo, despite the fact that its bid ought to have been disqualified, is a further factor that needs to be considered. Likewise, the fact that Swifambo paid large sums of money to Mr Mabunda or entities with which he was associated.

331. Considered collectively, the information available to the Commission leads to the following reasonable inferences: first, Prasa was indeed captured or a victim of state capture; second, its procurement processes, as noted by the Public Protector were suspect at best; and third, Mr Montana was the key role player at Prasa in its capture and determining which service providers would be allocated major tenders, such as the acquisition of locomotives.

332. As is clear from what has been detailed, a fair amount of the evidence related to allegations about Mr Montana and the manner in which Prasa was run during his tenure as GCEO. Based on the position that Mr Montana held at Prasa for some nine years, the evidence that was led, the documents that served before the Commission, the findings of the Public Protector and the judgments handed down by Courts in the Swifambo and Siyangena matters, it appears to be a reasonable conclusion to

identify Mr Montana as the key internal role player in the capture of Prasa. However, the following further question must be asked. Who else was involved in the project, whether knowingly or simply by virtue of the position he or she held at Prasa or by virtue of having been a member of a committee that was part of the procurement processes that were followed at Prasa?

333. Whilst a consideration of documents that were received suggested that in several instances there were serious irregularities, very little direct evidence of corruption was received. Accordingly, in deciding against which persons from Prasa steps should be taken, reliance will have to be placed on the reasonable inferences to be drawn from the documents, read in their proper context.

334. As noted above, one of the serious problems experienced in respect of determining what happened during those procurement processes related to documents. Importantly, it is a problem that was referred to by the Public Protector, who found that Prasa hid documents from her office and then alleged that a finding should be made against complainants because they were unable to produce the documents. In the affidavits in the applications to review and set aside the contract between Prasa and Swifambo and contracts between Prasa and Siyangena that issue was also raised, as all the relevant documents could not be located. In addition, the following further matters were raised in respect of documents that were in fact located: in many cases, minutes or reports were not signed or dated; and in some instances, different versions of minutes or reports existed. As noted above, when the Swifambo matter was dealt with earlier in this Memo, documents relating to the procurement process were made available to the Commission only after the scheduling of oral evidence had been finalised. The correctness of what is reflected in those documents and in some instances the authenticity of the documents has been challenged. In addition, in his affidavits to the Commission Mr Ramatlakane also referred to some of these concerns. As a result of the foregoing, it is a difficult task to identify the individuals who may have knowingly participated in the capture of Prasa insofar as procurement matters are concerned.

335. However, despite the difficulties relating to documents, and the absence of direct evidence of wrongdoing, it can be said with some certainty that Mr Montana must have been assisted to ensure that the locomotives tender was awarded to Swifambo and that there was support for concluding the impugned Siyangena contracts.

336. Insofar as the awarding of those tenders is concerned, it bears reiterating that according to the National Head of the DPCI, Lt General Lebeya, the investigations into the criminal complaints relating to these two matters is quite advanced. In the circumstances, as regards these matters, the following recommendations are made. 341. As regards the Swifambo matter, it is recommended that:

336.1 The DPCI finalise the investigation as soon as possible

336.2 The NDPP immediately appoint a team to oversee the investigation and the prosecution of those suspected of committing criminal offences; and

336.3 In deciding whom to prosecute, the DPCI and the NDPP, in addition to the documents that they have already collated or are in the process of collating, have due regard to the evidence led at Commission, the documents that served before the Commission, the documents that formed part of the record in the review application, and the documents that Mr Ramatlakane's current Board has uncovered recently.

336.4 it is further recommended that:

336.4.1 Serious consideration be given to prosecuting the following senior employees who played a role in the award: Mr Montana, Mr Mtimkulu and Mr Mbatha

336.4.2 The roles of following persons, who were members of the BEC that recommended that the tender be awarded to Swifambo, be examined to determine whether they, or any of them, should be prosecuted: Ms Shezi, Mr Khumalo, Mr Mahlobogwane, Mr Nkosi and Mr Magoro

336.4.3 It be investigated whether the following members of the CTPC should be prosecuted: Mr Holele, Mr Mbatha, Mr Mathobela, Ms Motshologane, Mr Bopape, Ms Ngoye, Ms Shezi, and Mr Khuzwayo

336.4.4 The prosecutions of Mr Mashaba and Mr Mabunda be expedited

336.4.5 Others who may have received undue benefits from the award of the locomotives contract to Swifambo, as detailed in the Reports of Mr Sacks and the liquidators, be identified; and

336.4.6 the NDPP consider instituting a prosecution, in terms of section 86(2) of the PFMA, against members of the Prasa Board that approved the recommendation that the locomotives contract be awarded to Swifambo: Mr Buthelezi, Dr Gasa, Mr Khena, Ms Moore, Mr Nkoenyane, Mr Salanje and Mr Montana.

337. As regards the Siyangena matter, it is recommended that:

337.1 The DPCI finalise the investigation as soon as possible

337.2 The NDPP immediately appoint a team to oversee the investigation and the prosecution of those suspected of committing criminal offences

337.3 In deciding whom to prosecute, the DPCI and the NDPP, in addition to the documents that they have already collated or are in the process of collating, have due regard to the evidence led at Commission, the documents that served before the Commission, the documents that formed part of the record in the review application, and any further documents that the current Prasa Board has uncovered recently

337.4 Based on the foregoing, serious consideration be given to prosecuting the following Prasa employees who played a role in the conclusion of the two impugned contracts: Mr Montana, Mr Gantsho and Ms Ngubane; and

337.5 The NDPP consider instituting a prosecution, in terms of section 86(2) of the PFMA, against the Prasa Board or any of its members who approved the award of the contracts with Siyangena.

338. As regards Mr Montana's property dealings, it is recommended that:

338.1 The DPCI finalises as soon as possible its investigations into the sale by Mr Montana of the Parkwood Property to Mr Van der Walt's Precise Trade and the assistance that Precise Trade or Mr Van der Walt gave to Mr Montana to pay the deposit for the Hurlingham Property and the assistance that Mr Van der Walt gave to Mr Gantsho to acquire the property in the Point area in Durban

338.2 The NDPP immediately appoint a team to oversee that investigation and prosecutes Mr Montana, Mr Van der Walt and Siyangena (and / or its associated companies) for contravening sections 12 and / or 13 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

VREDE INTEGRATED DAIRY PROJECT

INTRODUCTION

1. The province of the Free State with its grassy flatlands always struck even an occasional passer-by along the N1 national road that cuts through the province as being ideal for agricultural production. The idea did not escape the attention of the MEC for Agriculture in the province, Mr Mosebenzi Zwane, who on or about 17 November 2011 called potential role players, including members of opposition parties, to a meeting at his offices at Glen Agriculture College in Bloemfontein. At that meeting the MEC unveiled what he called the "Mohoma Mobung" Strategy, meaning "plough into the soil" in Sesotho. The strategy was in due course to be complemented by another strategy, called "Zero tolerance for hunger".
2. Implicit in the meaning of these two strategies was that the soil had to be worked and utilised for agricultural production and agri-processing in the province. The province had for some time been pro-

ducing agricultural produce, which it dispatched in trucks to centres such as Gauteng and KwaZulu-Natal provinces, where it was processed and then either exported or trucked back to the Free State at a higher cost. The idea was to create a processing centre or centres within the province. The strategy was largely supported by those in attendance as one that would contribute to the creation of employment and alleviation of poverty.

3. The unveiling of the two strategies appears to have coincided with the arrival of Mr Mbana Peter Thabethe within the provincial government. He had just finished a three-year period as the special adviser to the national Minister of Agriculture Forestry and Fisheries where, according to his CV, he had risen to the position of Acting DG of the National Department.

4. On arrival in the provincial government, Mr Thabethe was appointed Head of Department (HOD) of Rural Development, which was then attached to Public Works, with both departments under one ministry. Later, Rural Development was moved to Agriculture, which became the Department of Agriculture and Rural Development (DARD). When the two sections were formally merged Mr Thabethe was appointed HOD of DARD.

5. Shortly after his appointment (as he stated to Mr SJ Schalkwyk, the senior financial investigator for the National Prosecting Authority [NPA]) he became aware of a report compiled by the National Agricultural and Marketing Council (NAMC) highlighting that the Free State was ranked second in terms of its suitability for dairy farming and that there had been a decrease in the numbers of dairy farmers nationally. With him at the helm, the Department saw an opportunity for the province to become a large player in the dairy industry.

6. Mr Thabethe conducted a feasibility study on the internet, identifying three countries, India, Germany and Sweden, as potential partners – subsequently discounting Germany and Sweden because they were first-world countries and too advanced. He chose India because he considered it to have comparable economic conditions to those in South Africa. He was also impressed by the Paras Dairy company of India because it collected milk from local producers and then processed it profitably.

7. The Vrede Dairy Project (VDP) was first mentioned when, in his State of the Province Address on 16 February 2012, the Premier, Mr Ace Magashule, indicated that a dairy project would be established at Vrede. The project was expected to create 150 jobs. It was introduced as part of the Mohoma Mobung strategy, a “growth and development strategy for agriculture and rural development. Mr Zwane subsequently informed Mr Thabethe of the availability of suitable land in Vrede, which happened to be near the MEC’s hometown.

8. On 24 February 2012 Mr Thabethe made a written request to the Premier for approval for him and one Mr Ashok Narayan “to attend a strategic meeting with a strategic partner in India from 29 February to 4 March 2012 in support of the expansion of a dairy farming in the Free State”. The request was recommended in writing by the MEC and was approved and signed by the Premier on 28 February 2012. On 29 February 2012, the day of the trip, the Premier appointed Mr Ashok Narayan as a member of his Advisory Council “with effect 1 March 2012”, indicating that his role would be “as an ICT and Project Management expert.” The Premier indicated in his letter of appointment that he would announce the names of members of his Advisory Council in his Budget Vote speech on 29 March 2012. As the sequence of events demonstrates, the request for Mr Narayan to travel to India at state expense was made, recommended and approved before his appointment – on the date of his departure for India.

9. Evidence from several other witnesses suggests that a top (unnamed) government delegation undertook the trip to India together with representatives of Estina Pty Ltd (Estina).

ESTINA

10. The company Estina was registered on 24 June 2008 with the Companies and Intellectual Property Commission (CIPC) under registration number 2008/015033/07. Its director was one Anthony Last, who resigned as director on 1 August 2008. On the same date a new director, Kamal Vasram,

assumed the sole directorship of the company. On enquiry, the NPA investigator established that prior to assuming the directorship of Estina, Kamal Vasram had been the retail sales manager at Sahara Computers. He had no background or experience in farming or agriculture.

11. The core business of the entity on registration was stated as "business consultancy". On 19 October 2012, the company's core business was changed to "agriculture, farming and related activities". On 1 July 2015, Mr Vasram resigned as director and one Mr Seo Young Jeon was appointed as the sole director in his place. Two years later, on 4 May 2017, Estina applied for voluntary liquidation. In its declaration of statement of affairs, it declared that its total assets amounted to R10,000, total liabilities to R34,200, and that its liabilities therefore exceeded its assets by R24,100. This information was confirmed by the CIPC.

12. In summary, Estina has throughout had only one director, to which the Free State government entrusted the establishment and management of a R570 million project. The director, Mr Vasram, was only 33 years old when he assumed management of the dairy project. It is not clear who the shareholders of the company were when it was granted the government contract between May and July 2012.

Trip to India

13. Details have not been furnished as to who represented Estina on the trip to India. The official (government) delegates for the trip to India were the new HOD of DARD, Mr Thabethe, and the freshly appointed advisor to the Premier, Mr Ashok Narayan. However, Mr Narayan was in the process of being appointed when he boarded the plane. It is unclear what qualified Estina delegates or Mr Narayan to be on the flight.

14. On their arrival in India the delegation met with the CEO of Paras Dairy, who outlined the value chain of milk production in India. Staff members of Paras were in attendance. The South African and host delegations together visited the Paras processing plant. A copy of a presentation made by Paras was given to the South African delegation and later incorporated into a presentation made by Estina to DARD and by DARD to the Executive Council (Exco) of the Free State. An in-principle agreement for cooperation had been reached between the two delegations, though its precise nature is not clear. An official report on the trip was presented to the Free State government.

15. It appears from the first of the three affidavits signed by Mr Thabethe, dated 10 August 2017, that he and Mr Narayan did not continue to work together on the report on their return from India. Mr Narayan joined the office of the Premier while Mr Thabethe prepared the report for Exco.

Proposals by Estina

16. Following the trip to India, Estina made a presentation to DARD, wherein it proposed a partnership between Estina and DARD. A version of the project proposal was signed on 15 May 2012 by Mr Sanjeev Gautam as Managing Director of Estina. There are three different versions of the same proposal, one of which is unsigned. The three versions differ in various ways.

17. In the versions of the project proposal there is very little information given about Estina. A standalone company profile of Estina indicates that it was "established in 2010 to provide the highest calibre support in the areas of project implementation, management and consulting services to its clients" and that "Estina consultants have decades of industry experience and functional expertise" – though there is no mention of agricultural expertise or experience.

Presentations to DARD

18. On 24 May 2012 Estina made a presentation to DARD, presumably on the basis of one or a combination of the versions of the project proposal. On 26 May 2012, the Chief Directorate: District Services made a written submission for acceptance of a proposal from Estina. The document has as its subject: 'To accept the proposal from ESTINA with regard to the Vrede Integrated Dairy project

and to enter into a partnership with ESTINA". The background section in the submission indicates that Estina had signed an MoU with Paras to set up the dairy project in Vrede, that Estina had made a proposal to this effect to DARD, and that the Chief Directorate recommended that DARD enter into a partnership with Estina. The final paragraph of the submission recommends that approval is granted to accept the proposal from Estina. The document was signed by Dr TJ Masiteng, Chief Director: Services; Ms S Dlamini, CFO; and Mr P.M. Thabethe, HOD Agriculture.

19. However, in evidence before the Commission, Dr Masiteng explained that the document had not been compiled by him; he did not authorise its drafting and he was not consulted about it. He was not in the office at the time of the preparation and signing of the document. The signature next to his name was that of one of his colleagues from another district, Mr Sarel Van Schalkwyk, who was acting in his position at the time. Indeed, the signature had the letters 'pp' next to it. The compiler appears to have used a template which already had the name of Mr Matsiteng on it.

20. Significantly, from its contents, the submission document refers only to Estina as the company that made the presentation. There is no reference to the involvement of Paras Dairy in the presentation or the submission.

21. Mr Thabethe explained in his affidavit of 10 August 2017 that upon his return from India he drafted an Executive Council report recommending implementation of the dairy project, which was approved by the Exco. He then invited the CEO of Paras to visit the country to inspect the proposed location of the dairy project. The CEO subsequently submitted a proposal through a South African-registered company which was accepted and a partnership agreement was drafted.

22. In his affidavit Mr Thabethe does not mention the involvement of representatives of Estina in the trip nor any presentation to his department by Estina. It appears to have been his suggestion, when talking to the CEO of Paras, that the Indian company needed to invest through a South African-registered company. He does not mention introducing his guest to Estina or any South African company.

23. According to another statement Mr Thabethe made to Mr Schalkwyk, the representatives of Paras were accompanied by representatives of Estina when they visited the Department where a joint presentation of the proposal was made. The question arises as to whether there was more than one presentation to DARD – one made jointly by Paras and Estina and another made by Estina on its own. The submission document does, however, specifically indicate the involvement of Estina ("Estina made a proposal with regard to this to DoARD"). It appears fair to accept that Estina did make a presentation to DARD. The written submission for recommendation and approval of its involvement is dated 26 May 2012, two days after the date of the alleged presentation.

24. At the hearings of the Commission, the evidence leader asked Mr Thabethe a direct question: "Who suggested that Estina partner Paras?" No direct answer was given; instead, vague statements were made that did not answer the question. This issue, therefore, remains unresolved.

Verifying the credentials of Estina

25. Mr Thabethe describes Estina as a company that appeared after the visiting CEO of Paras had left the country. He makes no mention of the involvement of Estina prior to that date. Consistent with this, it became necessary for his department to verify the status of Estina before he did business with it. His statement about the verification process confirmed that a SARS tax clearance certificate was obtained. Verification of account details was to be obtained by provincial Treasury.

26. The expression "verifications were done in respect of Estina Company" is insufficient for Departmental accreditation purposes. He says nothing about meeting with the directors or other management of the company prior to signing the First Agreement with them other than the above statement about verification.

Decision to appoint Estina (and First Agreement)

27. Following the presentation of 15/24 May 2012 and the recommendation and approval of 26 May 2012, on 27 May 2012 Mr Thabethe addressed a letter to Mr S Gautam accepting the proposal made by Estina subject to an appropriate agreement being signed between DARD and Estina.

28. The evidence of the CFO, Ms SS Dhlamini, is that two agreements between Estina and DARD were signed in June 2012. Both were signed on behalf of Estina on 5 June 2012. The first was signed on behalf of DARD on 6 June 2012 and the second on 7 June 2012. The differences between these two agreements are described more fully below. When the agreement signed on behalf of DARD on 6 June 2012 was presented to the CFO by the HOD, who had already signed it, she pointed out that as the agreement referred to procurement of services from Estina, it would be subject to SCM processes and the contract would accordingly have to go out on tender. Her own understanding of the proposal was that the relationship between Estina and DARD envisaged in the proposal was not for acquisition of services. Mr Thabethe returned with the agreement, dated 7 June 2012, which he had signed on behalf of DARD.

29. The idea was therefore to conclude an agreement which would not need to go through the competitive process of SCM. On closer examination, however, there is little difference between the agreement of 6 June 2012 and that of 7 June 2012. Both spelt out broadly similar obligations for both parties, and the values espoused are the same. It would appear, however, that the agreement signed on behalf of DARD on 6 June 2012 was never taken further and was for all intents and purposes replaced by the one signed on 7 June 2012. The latter agreement is therefore referred to henceforth as the First Agreement.

30. The First Agreement, described as a partnership agreement between Estina and DARD, was signed on 5 June 2012 by Mr S Gautam on behalf of Estina and on 7 June 2012 by Mr Thabethe on behalf of DARD. The CFO witnessed the HOD's signature, having satisfied herself of its terms, in particular of the circumvention of the SCM process.

31. The Provincial Treasury was approached on 15 June 2012 by the CFO of DARD. She attempted to secure payment of R30 million for Estina in terms of the partnership agreement. She presented the contract between DARD and Estina, together with a document request from DARD for an amount of R30 million, to the DDG: Financial Services of Provincial Treasury Ms Anna Susanna Fourie. In assessing the documents, Ms Fourie raised certain questions about the contract, which the CFO was unable to answer satisfactorily. Her concerns were twofold: the normal procurement process had not been followed in procuring the services of Estina; and the contract in question, signed on 5 June 2012 by Estina and on 7 June 2012 by the HOD, did not sufficiently protect the interests of the Department. Ms Fourie also approached her colleague dealing with the Provincial Revenue account and established that there were in fact no funds available to meet the requested payment. The agreement had been concluded without budgetary provisions.

32. Accordingly, on 18 June 2012 Ms Fourie approached the State Law Advisors (Legal Services) in the Office of the Premier to review and advise on the contract. She consulted Advocate Ditira, the DDG: Legal Services, who furnished her written opinion on 19 June 2012 confirming that indeed procurement processes had not been followed and that the contract might be invalid for a number of reasons. Adv Ditira further suggested that the Treasury Committee should send the procurement documents to Legal Services for their review.

33. In the meantime, on 13 June 2012 DARD had made its presentation to the Executive Council in which it sought the approval of Exco to enter into an agreement with Estina to establish a dairy project in the Free State. By resolution number 62/2012 dated 13 June 2012 the Exco of the Free State Province resolved to approve the implementation of the dairy project and the sourcing from the province of additional funding of R84 million for that financial year, and agreed that the Department would cover the costs, which over the next three years would amount to R114 million per annum. The resolution was signed by the Secretary of Exco, the MEC of Agriculture and Rural Development and the Premier. Ms Dlamini would, as CFO, have been aware of this resolution when she approached the Provincial Treasury on 15 June 2012 to try to secure payment to Estina of R30 million.

34. Having advised on the illegality of the First Agreement between DARD and Estina, Legal Services proceeded to draw up an altogether new agreement between the same parties in order to give effect to the above resolution of the Executive Council taken on 13 June 2012. The new agreement was signed on 05 July 2012 by Mr Thabethe as HOD representing DARD and by Mr Gautam as Managing Director of Estina.

35. In his affidavit Mr Thabethe does not refer to the first and then to the second agreement that his Department signed with Estina; nor does he indicate why one agreement was signed after the other. In paragraph 14 of his affidavit he merely refers to "The ultimate agreement signed [having been] perused and edited by the state legal adviser". He glosses over the fact that he personally ended up signing two consecutive agreements with DARD (in fact three) because of inherent illegality.

Second Agreement between DARD and Estina

36. In 2012 Dr Masiteng was employed as a "General Manager: District Services" by DARD. He had the status of Chief Director. At the time of testifying before the Commission he was the Acting HOD for DARD within the Free State provincial government.

37. The core of his evidence appears in an answering affidavit which he prepared as the third respondent in the Free State High Court application in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA) brought by the NPA. The NPA later withdrew the charges against him and paid his costs; they also withdrew the criminal case against him. He claimed to have been one of the general managers reporting to the HOD and was responsible for district services. He was not an accounting officer. He had no decision-making powers and was only allowed to submit documents, proposals and submissions to the CFO, who then recommended them to the HOD for approval. All submissions of line managers had to go to the CFO for consideration and recommendation. Dr Masiteng therefore had no authority, power or competency to recommend or to approve the proposed project or to authorise any payments to be affected in pursuance of the project.

38. Dr Masiteng claimed he became "involved" in the VDP for the first time on 5 July 2012, after the agreement had already been signed. On the same day the HOD handed him some documents and requested him (Dr Masiteng) "to immediately draft a submission for his approval in execution of a resolution by Exco" for the implementation of the proposed VDP "with entities known as Estina and Paras". The documents Mr Thabethe submitted to him included a submission to Exco by MEC Zwane; a proposal compiled by Sanjeev Gautam on behalf of Estina dated 15 May 2012; a partnership agreement concluded between DARD and Estina dated 5 June 2012; an agreement between DARD and Estina for the establishment and management of VDP dated 5 July 2012; and an Exco resolution dated 13 June 2012. 39. When he received these documents, the decision to approve the dairy project had therefore already been taken by Exco and the necessary contracts in respect of VDP had already been signed and steps had been taken to implement the agreements. What the HOD sought of him was to compile and submit a submission for the CFO's consideration and recommendation and his (the HOD's) final approval.

39. Dr Masiteng complied, handing his submissions to the CFO, who approved and submitted the document to the HOD. Mr Thabethe, however, immediately informed Dr Masiteng that those submissions he had made had previously been recommended and approved. The Finance unit within DARD later confirmed that a previous submission dated 26 May 2012 to the same effect had indeed previously been approved by the HOD and that payments totalling an amount of R30 million had already been made by DARD to Estina on 11 June 2012. The Finance unit furnished him with the necessary proof.

40. Mr Thabethe made it clear to Dr Masiteng that he did not want a submission that had already been approved; he wanted a proposal to be compiled for his approval "to deviate from the normal SCM processes and procedure and appoint Estina/Paras to implement/establish Integrated Dairy in Vrede". In compliance, Dr Masiteng added an additional proposal to his initial submission by inserting the motivation, as specifically instructed, for a deviation from SCM procedures to appoint Estina. It is clear that Mr Thabethe himself initiated the process of obtaining the approval for deviation when the

agreement had already been signed. By then an initial payment had also been made to Estina – or steps had been taken to effect payment – even before the agreement itself was concluded.

41. It emerged from Dr Masiteng's further evidence before the Commission that if an HOD gives an instruction to a Chief Director, the Chief Director must comply with that instruction. Failing to comply with a clear mandatory instruction of the HOD may expose the Chief Director to disciplinary action for failing to carry out the instructions of the accounting officer. The official performance agreement obliges the Chief Director to assist the HOD in executing the objectives of the department.

42. Similarly, a resolution of the Exco obliges the different layers of management to give effect to it. The expectation is nevertheless that officials, like the CFO, are not expected to act blindly in the face of a resolution. They are expected to interrogate it and take up matters with Exco to ensure compliance with the law. The CFO, who is appointed in terms of the PFMA, is required to review the implementation of those Exco resolutions which have financial implications. This is a perspective to bear in mind when one considers the fact the final submission of 0 July 2012 was compiled, recommended and approved when the Agreement between Estina and DARD had already been signed on the same day. The signed contract and the Exco resolution were part of the documents placed before Dr Masiteng by Mr Thabethe when he instructed him to prepare the submission.

43. Dr Masiteng explained that once an implementing agent has been appointed, as was done with Estina, a number of normal internal procedures do not apply to the project in question. The implementing agent takes charge of the implementation from the outset. Such an agent has total responsibility for the appointment of service providers and the procurement of materials. In this case Estina was also appointed to undertake the feasibility study, to do the business planning, to deal with the water issues, and so forth. Dr Masiteng agreed to the suggestion of the Chairperson of the Commission that in such a case an implementing agent should be an independent party. Estina effectively acted as project manager, implementing agent and contractor. As a partner with the Free State government through DARD, Estina was in effect also a co-owner of the project, taking charge of it without any evidence of accountability. Paras, according to media reports, denied ever having been involved in the project.

44. The government appears to have given Estina extraordinary powers in relation to the VDP: money was paid over even before the approval of Exco; and the implementing agent was itself never assessed. If Estina was simply "preferred" by Paras, then an international company with no standing in South Africa and with no agreement with the Free State government simply imposed Estina on the provincial government, which accepted Estina without any due diligence having been performed.

LAND, PHUMELELA MUNICIPALITY AND 99 YEAR LEASE

45. VDP was to be established on the farm Krynaauwlust 276, in the district of Vrede. The property was owned by the Phumelela Municipality, which held it through a Deed of Trust.

46. Evidence suggests that the HOD of the provincial DARD initially wanted to locate the project somewhere near the town of Sasolburg, which would have been close to the big market of the densely populated City of Johannesburg in Gauteng. It was eventually taken to Vrede on the suggestion of MEC Zwane. The MEC's hometown where he grew up and was educated is the nearby town of Warden, whose residents were also targeted to benefit from the project. The black small-scale farmers of that town and those of the nearby Memel were invited to join and submitted their names as potential intended beneficiaries.

47. At the time when the suggestion was made and a decision taken to locate VDP there, the local municipality had leased a substantial part of the farm to some local farmers for a total annual rental income of approximately R1 million. The lease agreements were all terminated and the whole farm was leased to the project on a 99-year rent free lease. The municipality derived no demonstrable benefit from the lease.

48. Evidence about how the land was acquired for VDP came mainly from Mr Albert Doctor Radebe, a farmer and member of the Municipal Council of Phumelela Municipality, where he represented the

minority opposition party, the Democratic Alliance (DA), and from Mr Moremi, the Municipal Manager at the time. Mr Radebe gave evidence mainly about a presentation to the municipality in June 2012 about land for the farm and his being attacked for exposing irregularities on the farm. He testifies about a day on which the MEC for Agriculture, Mr Zwane, the HOD, Mr Thabethe, and the CFO, Ms Dlamini, made a presentation to the council regarding the facilitation of a transfer of 4400 ha of agricultural land owned by the municipality in Vrede to the Free State DARD. The land was required for the purposes of establishing a dairy farm, which the council had just leased to local commercial farmers for a period of three years. The MEC and his officials told the council that they would pay off the commercial farmers and lease the land from the municipality at market rates.

49. The presentation, according to Mr Radebe, stated that DARD had budgeted R400 million for the project and that Estina, which was in partnership with Paras of India, would inject funds of approximately R500 million to bring the project to approximately R900 million in value. There were to be approximately one hundred BEE intended beneficiaries who would together hold 51 precent of the shares. The project would generate R100 million a year and would benefit and uplift the community.

50. Mr Radebe and other DA members on the council were not supportive of the project as presented because the details presented by the government officials appeared sketchy: there was no budget, no business plan was presented to council, and no feasibility study had been conducted. There was nothing documented, and the council was provided with only an oral presentation.

51. However, the mayor, Mr John Motaung, was highly supportive of the VDP proposal. Mr Radebe gathered that the mayor and the MEC were very close, “like brothers”. As members of the opposition were vastly outnumbered by members of the majority party on the council, a resolution was passed by council allowing the Department and Estina to use the municipal land to develop dairy production facilities in Phumelela.

52. A copy of the resolution attached to Mr Radebe’s affidavit is vague, stating only that “Estina Pty Ltd / Paras Dairy Company are hereby permitted to use the 4400 ha of agricultural land located in Phumelela local municipality, for use in conjunction with a dairy production facility”. The resolution was unanimously adopted on 19 June 2012, the opposition having decided not to participate.

53. A summary of the representation regarding VDP attached to Mr Radebe’s statement suggests that the intended beneficiaries were to hold 51%, Estina 49% and the municipality 4% (which does not sum to 100) and that “the government will fund the establishment of the dairy. PARAS / Estina will fund the processing plant”.

54. Mr Radebe later learned that there were several dead cattle on the farm, dumped next to the stream which provided drinking water to the town of Vrede. Having confirmed the facts, he reported them to the press. He also informed the environmental authorities, who ordered the owners of the farm to remove the carcasses and bury them at an appropriate place on the farm. This was done. Mr Radebe claimed that “the people who were in charge of the operations at the dairy farm knew nothing about farming dairy cows”.

55. After publication of the deadly state of affairs on the farm, those running the farm placed security guards at the entrance gate and prevented the public from accessing it. As a result of his activities, Mr Radebe became a target of the people he called “a group of enforcers employed by the Department of Agriculture in Vrede”, whom he named.

56. The evidence of Mr Moremi on the presentations and the deal on the land from which the dairy was to be operated complements that of Mr Radebe, though given from a slightly different perspective. 58. When he gave his version, Mr Moremi was the Chief Director at the Free State Provincial Treasury. Between May 2012 and 14 February 2014, he was the Municipal Manager of the Phumelela Local Municipality, within whose area of jurisdiction the VDP was established.

57. He testified that in June 2012 a team from DARD led by Mr Thabethe had visited the municipality, where they made a presentation about the VDP to municipal managers, the community, and commercial farmers. The purpose of the presentation was to brief those addressed and to request the municipality to make land available, namely the farm Krynaauwlust 275.

58. The presentation sounded positive: the project was going to be one of the biggest in the country and was going to attract foreign direct investment in Vrede, with an Indian company, Paras, being part of the project. The municipality was going to be on the international map, with massive economic spin-offs, and was offered a 4% shareholding in the project.

59. At that time, part of the farm in question had been leased to four commercial farmers between 1 October 2011 and 30 September 2013 for an annual rental of approximately R1 million. However, there was sufficient will on the side of both the DARD and the municipality to negotiate and reach agreement with the existing commercial tenants.

60. On 26 June 2012 Mr Moremi wrote to Mr Thabethe confirming that the municipality had in principle agreed to avail its farm to the Department for the VDP. On 21 June 2012 the HOD had sent to the municipal manager a draft resolution which the municipality was requested to adopt. On 3 July 2012 the municipal council took a formal resolution that Estina Pty Ltd / Paras Company were permitted to use the 4400 ha of agricultural land located within the municipality for use in conjunction with the dairy production facility. The resolution directed the municipal manager to publish the resolution, which was to take effect after thirty days unless a valid petition in opposition was filed in accordance with municipal bylaws.

61. On 18 July 2012 Mr Moremi held a meeting with representatives of a new venture company, Zayna Investments Pty Ltd. They were Mr Narayan and a lawyer, Mr Johann Schalkwyk. At that meeting the lawyer presented the municipal manager with a draft lease agreement. After perusing the agreement in their presence, the municipal manager requested that he be afforded an opportunity to seek legal opinion on the draft.

62. Following the legal advice which he obtained from Legal Services in the Office of the Premier, the draft lease agreement was not signed. Instead, subsequent thereto, he, acting on behalf of the municipality, and the HOD, acting on behalf of the provincial government, signed a Cession and Land Use Agreement on 12 and 14 December 2012 in which the municipality assigned its rights in respect of the farm and under pre-existing lease agreements to the Free State provincial government – which duly entered into a 99-year lease of the farm with Estina on the same date, with the HOD signing on behalf of the government and Mr Vasram signing on behalf of Estina. The lease was notarially executed on 18 December 2012 and registered in the Deeds Office on 18 January 2013.

63. The salient terms of the lease agreement were that it was entered into for a period of 99 years and that no monthly rental was payable by Estina to the government for the entire term of the lease. As appears from the NT report, the HOD was asked several times about whether the 99-year rent free lease was signed with Estina and his response was that such a lease was not signed.

NATIONAL GOVERNMENT PERSPECTIVE

64. The evidence of two witnesses, Mr Elders Mtshiza from the national Department of Agriculture Forestry and Fisheries (DAFF) and Mr Dumisani Cele from the NT, has a bearing on the turn of events involving the implementation of the VDP.

65. Mr Mtshiza, Programme Management Coordinator in DAFF and coordinator of the Comprehensive Agriculture Support Programme (CASP), oversaw provincial requirements for managing project funds. Provinces had to prepare a provisional business plan and present it to the National Assessment Panel (NAP). Every project had to have conducted a feasibility study, produced an environmental assessment plan (EIA) where applicable, and investigated water rights and access to electricity.

66. During 30-31 January 2013, the Free State DARD made a presentation to the NAP on the VDP as part of the CASP and Ilima/Letsema business plan. The delegation informed the NAP that the VDP had been approved by the provincial Exco as one of its strategic projects for the Mohoma Mobung Strategy; the province had secured a private investor, Estina, to partner with the DARD; one hundred black dairy producers around Vrede were to be owners of the dairy value chain; the feasibility

study had been conducted; equitable share had been invested in clearing the identified land where construction had started; and the land had been donated by the municipality.

67. The NAP sought clarity on a number of issues: the amount of water available for the project, water rights, the feasibility study, and the project business plan. The province was requested to submit a list of the 100 intended beneficiaries of the project to the DAFF before the end of April 2013.

68. Overall, the NAP supported the implementation of the VDP. However, only R53 million from CASP was approved in the 2013/14 financial year; the requested R23 million from Ilima/Letsema was declined.

National Treasury

69. Mr Dumisani Cele, in 2013 the Director: Specialised Audit Services within NT, headed the Forensic section of that unit. He attached to his affidavit a copy of the NT Report on the investigations into the Vrede Project conducted by ENS Forensics issued on 11 February 2014, testifying that on or about 10 June 2013, NT received a complaint regarding the irregular appointment of and payments to Estina. The complaint came through a Mail & Guardian newspaper article dated 10 June 2013. It appeared that the funds used to pay Estina had come from a grant administered by the national DAFF.

70. As a result of the media article, NT initiated an investigation. Mr Cele was assigned to it. He acquired the services of ENS Forensics to assist with the investigation. On 22 August 2013 Mr Cele made an appointment with the HOD of DARD, Mr Thabethe, seeking "information pertaining to allegations of irregular engagement of Estina / Para for the establishment of an integrated dairy in Vrede". The HOD claimed that he (Cele) had no power to investigate his department. Mr Cele returned home without any documentation about the VDP.

71. After investigation Mr Cele found that SCM procedures had not been followed in the appointment of Estina. Nor were the requirements for a deviation followed. Mr Cele also found that an un-authorised payment of R114 million had been made and that there were no intended beneficiaries in terms of AGRIBEE.

72. Mr Cele urged that his claims be investigated because, as he pointed out, the Commission had a responsibility in terms of its own TORs to take action to dislodge practices of state capture.

73. Areas not covered by the NT report include a possible Gupta connection and allegations of overpricing of assets acquired.

Delegation to Vrede

74. Following the presentation made by the Free State DARD to the NAP in January 2013, Mr Mtshiza, in July/August 2013, led a delegation of DAFF to Vrede in response to the letter that NT had sent to DAFF citing concerns of non-compliance by the DARD. NT needed information from DAFF on the project and on how much CASP funding had been made available. The delegation found that de-bushing, fencing, road construction and the silage bank had been completed; construction of the dairy structure was underway; about 351 Friesland cows had been purchased; and the cows had been attended to by a veterinarian. An assessment of the required documentation indicated that the water rights were not in place and that the amount of water available for the project had not been established, the list of intended beneficiaries had not been provided, and the feasibility study and business plan had not been submitted.

75. The feasibility study was later sent by the province to the DAFF and was analysed by the chief economist and a dairy expert. On the basis of their analysis and of the assessment of the delegation, it was concluded that the assumption that 45 litres of milk per cow per day would be produced was highly unrealistic; more detail was required to verify the economic feasibility of the project; figures mentioned for the economy-wide impact of the project were not conclusive; and there was no evidence to support the inclusion of small-scale farmers as intended beneficiaries in the project.

76. Professional technical support persons required to make the plan work (such as animal scientists – dairy experts, animal nutritionists, and pasture scientists – and irrigation and infrastructure engineers) had not been involved in the project.

77. In addition to recommending that the above deficiencies had to be addressed, it was proposed that the R53 million allocated from CASP in the 2013/14 financial year be withdrawn from the project immediately and redirected to incomplete projects in the province and to small-scale farmers indebted to the Agricultural Credit Board – to boost their productivity to enable them to service their DAFF loans.

78. DAFF offered to make experts available to support the province to ensure that the requirements were met, which would allow DAFF to make funds available for the project in the next financial year. However, no requests were made by the province for additional support and no funding was requested for the completion of the project.

LOCAL BUSINESS PERSPECTIVE

79. In addition to the testimony of Mr Radebe, the Commission received the evidence of Mr Willie Basson who owned and operated a construction company and hired out moving equipment and Mr Johannes Cornelius Hermanus Theron who was also involved in local dairy farming.

80. In about March 2013 Mr Basson was contracted by Estina to attend to the drainage and certain construction and earth moving works related to the various cattle sheds in which dairy cows would be housed. In the same year he was approached directly by Mr C Prasad to assist in the establishment of what was called “the processing plant”.

81. Parts for the processing plant appeared to him to have been shipped in containers. When they arrived at the farm on trucks it was required that they be removed from the containers and installed in the appropriate positions in the processing plant. Mr Basson provided various heavy lifting equipment to facilitate the process. He was personally present when much of the equipment was removed and “immediately noted that several of the stainless-steel kettles and containers appeared used and in fact were badly rusting and in a general poor condition”. In his view this was not new equipment but second-hand. Later that year he was contacted again by Mr Prasad to be of assistance to Estina after the death of approximately one hundred cattle. He was asked to excavate a suitable burial site, transport the carcasses of the dead animals to it, bury them, and then refill the excavated site. His observation was that “the majority of these cattle had died from hunger and malnutrition”.

82. On two further occasions he again assisted in burying cattle, ten to fifteen cattle at a time. It was clear to Mr Basson that the people in charge of the project had absolutely no idea about cattle farming. He procured just over R2 million worth of cattle feed between 8 August 2014 and 4 January 2016.

83. In the course of his involvement with the VDP, Mr Basson came to meet several of the people tasked with the establishment of the VDP. He said that “No less than three of these individuals were clearly Indian nationals who had very limited ability to communicate in English language and who were identified to me by Mr Prasad as being members of the Gupta family”.

84. Mr Theron was a dairy farm manager of an established dairy in Vrede with extensive experience in the industry, including in the Free State. He testified that he provided information to representatives of Estina about dairy farming in Vrede; he knew about the termination of the lease contracts of the four commercial farmers who previously leased the farm Krynaauwlust from the municipality; he referred representatives of Estina to the local agents of Alva Laval, from whom they bought milking machines; and representatives of the company later invited him to a Saxonwold compound, which possibly belonged to the Gupta brothers.

85. During 2012 Mr Theron was in the employ of Mr Rodney Neuman as a dairy manager at his dairy business at Cork in the district of Vrede. Mr Neuman invited him to a meeting with a delegation from Estina who were visiting the Neuman Dairy and needed some advice as to the local dairy conditions. In the delegation he recognised Mr John Motaung – the Mayor of Vrede – accompanied by a delegation of about fifteen people, all of Indian descent. Although some of them were South

African, several were not South African but from India. He demonstrated to them the operations at the Neuman Dairy, which had 400 cows producing about 21,000 litres of milk every second day, equating to approximately 25 litres per cow per day. It was a profitable operation.

86. Mr Theron's employer, Mr Neuman, had leased a portion of the farm from the local Phumelela Municipality. After the delegation had exerted substantial pressure on Mr Neuman, the agreement was terminated.

87. Approximately a month later, Mr Theron was contacted telephonically by Mr Narayan, who had been part of the delegation to the Neuman Dairy, who invited him to meet urgently with him in Johannesburg. Messrs Theron and Neuman met in a security compound in Saxonwold, where stringent security measures were in place.

88. The meeting was chaired by Mr Narayan, who informed them that VDP was a major government project in which Estina had undertaken to make a substantial investment of R300 million and in which the government would in turn invest some R700 million, making it a R1 billion agricultural project. The project was described as a key project of the then Premier of the Free State, Mr Magashule. Mr Narayan was there as an adviser to the Premier to ensure the success of the project. Initially in awe, Messrs Theron and Neuman subsequently had some misgivings: the budget felt inflated; and the area in which they wished to establish the project was not the best location (the project was best suited to coastal areas where water was in abundance).

89. Mr Theron was then introduced to an Indian veterinarian, to whom he spoke at length, advising him on how to construct and establish the dairy. At the end of the meeting, Mr Narayan handed Mr Theron an envelope containing approximately R5000 in cash. There was no invoice or receipt for this payment.

90. The primary interest of Messrs Theron and Neuman was to sell cattle to the project. They had top quality Holstein genetic material of stud quality and would have been able to supply cattle at approximately R8000 a head at the time.

91. They did, however, refer their hosts to the local agents of Alva Laval, the suppliers of dairy plant equipment, who were successful in selling and installing a 30-point rotary milking machine at the farm for R6 million. Both Mr Neuman and Mr Theron were jointly paid a further sum of R60 000 as a 1% spotter's fee for the referral.

92. Some months later, Mr Theron offered his services as a dairy farm manager to Mr Prasad, of Estina, but was rejected and chased off the property by Mr Prasad.

93. Mr Theron become aware of a rumour that the mayor, Mr Motaung, the municipal manager for Vrede, had been given a brand-new Mercedes Benz ML4 50 as a thank-you gesture for facilitating the lease agreement and negotiation of the new 99-year lease that Estina had secured for the farm.

94. The abovementioned evidence counters the suggestion that since local businesses were not willing to assist in the establishment of the VDP, the HOD had to seek assistance from India.

EXPERT PERSPECTIVE

95. In addition evidence of an objective expert assessment of the project was also received. The evidence came from Mr David Andreas Maree, an agricultural economist employed by FNB as Head: Information and Management. The evidence was based on his assessment of and investigation into Estina and the VDP in November 2013. Mr Maree's qualifications (BSc in Agricultural Economics, MBA, and MSc in Agricultural Economics) and experience (as agricultural economist at HG Grain Marketing, the Milk Producers Organisation, Agri-SA, and FNB) lend considerable weight to the validity of his testimony at the Commission.

96. Mr Maree provided a background to the dairy industry in South Africa. The number of dairy farms had declined from 3,899 in January 2007 to 2,083 in September 2013. In the Free State in particular, producers had declined by 57% over the same period – the number diminishing from 1,067 in June 2007 to 423 in September 2013. The decline was due to higher production in pasture-based (coastal)

areas. The cost of milk production in-land due to the increase in maize prices and other input costs was a key factor in these declines. In December 2007 the Free State province produced 80% of total milk in South Africa; but by February 2012 this had declined to 10.5%. The VDP proposal, Mr Maree explained, claimed that India was the largest milk producer in the world. But this was only true if buffalo milk was included. South Africa consumed mainly cows' milk. For the period 2010 to 2012, the European Union was the largest producer of milk, followed by the United States, with India in third place. Nor did Estina and Paras feature in the list of the top twenty major dairy companies in the world. The VDP proposal had estimated employment creation by the VDP of 600 jobs, which was improbable given the growing mechanisation of the sector. Dairy cattle were costed at R25 000 per cow in milk in the Estina proposal – also too high since the then cost of a cow in milk was about R15 000 per cow.

97. An amount of R5 million had been budgeted for a milking parlour, and a further R15 million for "other dairy equipment". The expert's view was that for an amount of R15 million a state-of-the-art, high precision parlour could be erected. While the sale of milk had been touted to provide extra income on a regular basis for rural people, the VDP had been envisaged primarily as a large commercial project to provide jobs in the rural areas rather than to promote small-scale milk production. The proposal did not seem to appreciate the difference between the various business models. Mr Maree's conclusion was that an in-depth cost-benefit analysis of the impact of the proposed project was needed given the amount of money the government had been lured into spending on VDP.

98. The business plan contained inconsistencies; the feasibility study had no clear findings or recommendations; and the plan lacked detail on the costing of equipment, a marketing plan, an environmental impact assessment (EIA), information about management and personnel requirements, a time schedule for the project, possible contingency plans with regard to electricity costs and energy supply, a plan for the sourcing of cows, and a complete cash flow projection. On these grounds, Mr Maree's recommendation was that the government should discontinue the project since it would not receive value for money from it.

INTENDED BENEFICIARY PERSPECTIVE

99. Small-scale black dairy farmers were the intended beneficiaries of the project. Those who were already in that business would benefit by growing their dairy farming businesses into bigger commercial operations, while those interested but not yet in dairy farming would be offered an opportunity to enter the business.

100. The project had been proposed on the basis that it aimed to empower 100 individual small farmers, who would each receive a donation of ten milk cows via government funding. There were to be no cows in the dairy project business except those that the government would acquire and donate to the intended beneficiaries, who were not expected to pay to enter the project. Government would buy shares for them.

101. Evidence was obtained mainly from two persons numbered among the intended beneficiaries: Mr Ephraim Makhosini Dhlamini, chairperson of the local Farmers Association; and Mr Meshack Mpaleni Ncongwane, his deputy. Evidence was also obtained from Mr Mhlaba, who, together with two others, was chosen to form a committee of representatives of intended beneficiaries dealing with government representatives on the one hand and representatives of the company appointed to implement the project on the other. Mr Mhlaba was chosen to chair the committee in question.

Evidence

102. Since the testimonies of Messrs Dhlamini and Ncongwane are similar, their evidence is presented together. Mr Dhlamini was self-employed at the time of the implementation of the VDP, mainly as a farmer with 52 cattle in the homage of the municipality. Out of his farming proceeds he had established another business, a record bar, in Vrede. Mr Ncongwane owned about 60 head of cattle and focused on dairy farming, while Mr Dhlamini focused on beef farming. As chair of the African

Farmers Association, Mr Dhlamini represented small farmers in the area, mostly in their interactions with DARD. The Association initially comprised 82 farmers, and at the time of testifying the number was 120 farmers.

103. Together these gentlemen attended several meetings about VDP. Most meetings were held with government officials, mostly representatives of DARD, officials of the office of the Public Protector, the Hawks, representatives of political parties, and the media.

104. Mr Zwane was well known to Mr Dhlamini and other intended beneficiaries. Mr Zwane had grown up, been educated, and had worked within the Vrede area. Residents of his hometown, Warden, were included amongst the intended beneficiaries.

105. Of the meetings about the VDP attended by Messrs Dhlamini and Ncongwane, four are the focus of the following discussion.

    105.1 The first meeting was called by the then MEC, Mr Zwane, in about June 2012. Amongst the attendees were the Mayor, Mr Motaung, the HOD, Mr Thabethe, Mr Dume Kobeni (from the local ANC office, also an extension officer attached to DARD), Mr Jimmy Mphahlele, and two other officials of DARD who were residents of Vrede, Mr Khuliza Sibeko and Ms Thuto Kganye. About 100 community members were in attendance. The MEC introduced the idea of a dairy project to include milking and the processing of milk into products like yoghurt, cheese, and a number of other dairy products. Most members of the community were receptive to the idea, though a few were suspicious. Local farmers were asked to indicate which category of stock farming they had an interest in.

    105.2 At the second meeting, attended by the mayor, the HOD, Ms Alta Meyer, Mr Khanye, Mr Dume (an employee of the municipality), the two local representatives of the MEC (Mr Sibeko and Ms Thuto), and by intended beneficiaries from the nearby towns of Warden and Memel, it was announced that the Mayor of the local Phumelela Municipality had made available to DARD 4 000 ha of land where the dairy cows would be kept. Government would provide feed for these cows. Farmers were told to sell their existing cattle, especially meat or beef cattle, in return for which the government would give each of them ten head of dairy cows. MEC Zwane added that the intended beneficiaries would have a 52% shareholding in VDP, 20% would go to roads, bursaries for scholars, hospitals, and so on, and 28% would go to government. He urged the intended beneficiaries not to sell the shares allocated to them as these would be their legacy. The intended beneficiaries would be taken to India for training in dairy farming. According to the testimony of Mr Mhlaba, it was at this meeting that Ms Meyer explained the contents of the Beneficiary Agreement to all the intended beneficiaries, whereafter he was required to sign the agreement. When the Agreement was presented for his signature, it had already been signed on behalf of DARD by Dr Masiteng with witnesses but not dated. Neither Messrs Dhlamini nor Ncongwane makes specific reference to Ms Meyer's presentation of the Beneficiary Agreement.

    105.3 At the third meeting, held on a Friday in 2013 and convened by Ms Meyer, intended beneficiaries were asked to furnish her with copies of their identity documents. Having anticipated the issue, Mr Dhlamini had held a brief caucus meeting with the farmers before the meeting, advising the farmers not to provide Ms Meyer with copies of their identity documents as funds had already been released without the details of intended beneficiaries having been provided. There was a realisation that the identity documents were being sought to legitimise a project which had already been initiated. However, the farmers did not heed the advice and all (including Mr Dhlamini) ended up furnishing Ms Meyer with copies of their identity documents. The intended beneficiaries were asked to nominate three amongst them to represent them at VDP-related meetings with DARD. The representatives were Mr June David Mahlaba (as chairperson), Ms Zelpha Lindiwe Masiteng (as secretary), and Mr James Dumalisile Ngqosini (as treasurer).

    105.4 At the fourth meeting, in 2014, it was announced by its convener, Ms Meyer, that at the behest of the Premier, Mr Magashule, the Free State Development Corporation (FDC) would be taking over VDP (from Estina) the following week. At an imbizo at Frankfort attended by Mr Zwane, Mr Thabethe, and Lesedi Radio Station, Mr Dlhamini tried to raise the concerns of the intended

beneficiaries about VDP but was ignored. The Minister patently told him that as he (Mr Dhlamini) had called the people running the farm "Ma-Gupta", the Minister could not help him. Mr Thabethe promised to sort things out but as far as the intended beneficiaries could see, nothing was done to honour that undertaking.

106. Further meetings were held in connection with VDP but from which the intended beneficiaries derived no benefit: at a meeting in March 2019 (MEC Ms Mamiki Qabathe of DARD in attendance), the MEC reprimanded the intended beneficiaries for having contacted the media; at another meeting intended beneficiaries were asked to reregister their interest in the VDP because of the appointment of a new chief director, Mr Madiba, but refused; at yet another meeting, Dr Masiteng met with intended beneficiaries to inform them that the farm project had not started showing a profit and that the 52% shareholding announcement had been an error; and at the last meeting attended by Messrs Dhlamini and Ncongwane, which took place on the Vrede dairy farm itself courtesy of the leader of the opposition, Mr Mmusi Maimane the visitors found poisonous plants and the carcasses of dead cattle.

107. Messrs Dhlamini and Ncongwane also met independently with and gave statements to representatives of the Hawks and the Public Protector (PP), Adv Busisiwe Mkhwebane. In the last of a few meetings with the PP they indicated that they had lost faith in her because of a broken promise to secure statements from them in 2017 (she herself visited them in person in 2019), because she had issued her first report (probably an interim report) on VDP without consulting or interviewing the intended beneficiaries, and because she claimed that only 35 persons were beneficiaries of the VDP.

Beneficiary Agreement

108. The Beneficiary Agreement alluded to above (which Mr Mhlaba signed) had emerged in the process of attempts to formalise the interests of the intended beneficiaries in the VDP.

109. DARD had sought legal advice from Mr AJ Venter, head of the Legal Services section within the Office of the Premier, on Beneficiary Agreements. Mr Venter claims to have given the advice orally to Dr Masiteng, who presented Mr Venter with a Beneficiary Agreement which he had already signed. Dr Masiteng, Mr Venter noted, was not an accounting officer and therefore had no authority to sign such an agreement. Legal Services was simultaneously provided with a list of intended beneficiaries who, it was assumed, were to be presented with those agreements in order for them to sign.

110. Mr Venter noted that the document was inappropriate for the purpose for which it had been drafted. It was not clear precisely what was being transferred by DARD to each individual beneficiary; the intended beneficiaries, not being part of a cooperative, could not hold rights over the same thing without a structure to do so; and the Agreement indicated that individual intended beneficiaries could dispose of the assets of the project.

111. From the perspective of Dr Masiteng, the document entitled "Beneficiary Agreement" to which Mr Venter referred had not been drawn up by him personally: it was drafted by his internal legal team. As the document itself showed, it was signed by him and Mr Mhlaba – the chairperson of the representative committee which had never functioned. Dr Masiteng conceded that the document had certain defects, claiming that it was cleaned up and certain clauses rectified and that there was a new agreement in place. Such an agreement has not been found.

Special purpose vehicle

112. Mr Roy Jankielsohn, a member of the provincial legislature who took a keen interest in the VDP, testified that a special purpose vehicle was to be registered in which BEE intended beneficiaries were to hold 51% and Estina 49% of the shares. The new legal entity to be formed was Mohoma Mobung Dairy Project Pty Ltd. Other evidence presented in this report identifies the entity as Zayna Investments Pty Ltd t/a Mohoma Mobung Dairy Project.

113. Mr Jankielsohn testified that the VDP was initiated without intended beneficiaries having been identified. Only in late 2013, when DAFF queried who the beneficiaries were, were attempts made to identify them.

Death threats and acts of violence

114. A number of death threats and acts of violence have been associated with the VDP. Investigators from the Hawks visited VDP and held a meeting with intended beneficiaries on 25 January 2019, taking statements from some. Intended beneficiaries from Vrede, Warden and Memel were interviewed. Once members of the Hawks had left Vrede, Mr Dhlamini made a phone call to a brigadier at the Hawks saying, "we were being threatened by death at Vrede". The investigation of these threats seems to have stalled, yielded no results, or simply did not take place. The following evidence of threats has been assembled:

    114.1 Mr Dhlamini came into possession of a video in which threats were made on his life. He sent a copy to a Mr Ntombela at the Hawks.

    114.2 He also provided the video to the station commander at Vrede police station, who listened to it. The station commander promised to investigate but at the same time told Mr Dhlamini to look after himself. No statement was taken from him regarding the complaint, and as far as Mr Dhlamini is aware no formal file was opened.

    114.3 Some people made threats directly to his face. He is therefore in a position to give police further information if there is a credible investigation.

    114.4 He said: "In Vrede once you mentioned the dairy project (or the name of Mr Mosebenzi Zwane) you won't sleep in your house ... We had to brave ourselves to come before the Commission and report before everyone is killed." Despite having reported threats against his life to the SAPS, nothing has come of this. The Chairperson of the Commission directed on record that a supplementary affidavit be taken from Mr Dhlamini in which he would be free to mention names. Those mentioned would be given rule 3 notices before their names were disclosed before the Commission.

    114.5 Mr Jankielsohn as a member of the provincial legislature and the portfolio committee was part of a collective charged with oversight over provincial government projects. VDP was part of their responsibility. He also reported his concerns to the PP. He testified to the Commission about how the project had been reported on in the Mail and Guardian newspaper of 7 to 13 June 2013. The article raised a number of concerns about the project, which are adequately summarised in the NT Report. The concerns included allegations that DARD might have flouted NT rules relating to procurement in entering into a R500m partnership with Estina which did not seem to have a discernible infrastructure, track record, or resources.

    114.6 Following the unsatisfactory responses on issues about the VDP Mr Jankielsohn spoke of a climate of fear that had gripped the provincial government. One Moses Chake / Tshake / Chauke was kidnapped, tortured and murdered, allegedly because he had raised too many questions about the project. Some people lost jobs within the government for speaking out. Mr Jankielsohn also spoke of a culture in which members of the ruling party in the legislature protected fellow comrades in the executive, thus frustrating the oversight role of the provincial legislature over the provincial executive.

    114.7 In the wake of his reporting dead cattle on the VDP farm to the press, DA Councillor Mr Radebe was physically attacked by a group of individuals (Mr Thuto Khanye, Mr Khulisa Sibeko, and Mr Bongani Radebe) – "individuals [who] eventually became well known as enforcers of Mr Zwane's policies in and around Vrede and more particularly relating to the Vrede Dairy Project". On attempting to report the attack to the SAPS in Vrede, officials, including the new station commander, Mr Xhasa, informed him that he was not allowed to open a case since this concerned political activity. He was further victimised by being continually refused access to the State Veterinarian in the area – as a result of which he lost about 45 head of cattle to a disease that had

broken out in his herd.

114.8 The climate of fear and death threats around VDP also affected the NT investigator, Mr Cele, in August 2013 – through a threat that "Dumisani, Basotho ba tla u bolae" ("Dumisani, the Basotho people are going to kill you"). In addition, a robbery took place at the house of Ms Elizabeth Cornelia Rockman, the former DG in the Office of the Premier and later MEC Finance in the province, The ostensible target of the armed robbery appears to have been the information which was possibly stored in her laptop as well as in the two small safes. No-one was arrested for the robbery, and the case remains unsolved.

Recommendations arising from death threats and acts of violence

115. Arising from these incidents, the following recommendations for action are made:

115.1 Over and above any other conclusions arising from his investigations, the Commissioner is urged to ensure that the conclusions identified in the affidavit of Dumisani Cele of 3 October 2017 be followed vigorously, not only because they involve criminality, as he pointed out, but also because the Commission has a responsibility in terms of its own TORs to take action to dislodge practices of state capture.

115.2 The particular area on which the Commission must continue to report, as there is no evidence of pending processes being followed, is threats to life. The Commission has heard evidence from Messrs Dhlamini, Ncongwane and Radebe suggesting strongly that the culture and practice of intimidation is not isolated and amounts to state capture.

115.3 The Commission should ensure that all deaths, death threats, acts of violence and threats of violence around the VDP made in this report are investigated by an independent team under independent leadership from outside the Free State. Complainants need to be informed directly about the outcome of their complaints if public confidence in the justice system is to be restored.

115.4 In terms of the robbery at the home of Ms Rockman, the investigation should examine the type of security, if any, provided for her at her house at the time, given her senior position in the provincial government. If she had no security at all at her house, that aspect too should be of interest to the investigators. Those law enforcement investigators assigned to the case should report on why they did not resolve the reported crime and provide a satisfactory answer.

116. Reading the perspective of the intended beneficiaries, as presented in affidavits and oral evidence, one gets the impression that the locals were duped, Nongcawuse-style, to sell their cattle on the basis that government would donate dairy cows to them. Having regard to what was truly happening as evidenced by written documents and other informed evidence, intended beneficiaries were told half-truths or plainly lied to by officials who promised the world. This was an Indian-run project on African soil – operated by people who did not speak English or any local language. Intended beneficiaries were merely mentioned, identified late, and were never involved in or properly informed about the project.

117. From this perspective, Estina used the Indian connection (Paras) to milk more than R250 million from the government, which deliberately or with gross negligence blindly pumped money into an "agricultural" company without asking questions or investigating how it was spent.

PROVINCIAL GOVERNMENT OFFICIALS' PERSPECTIVE

118. The perspective provided in this section of the report is that of the individual officials within government involved in the VDP. Unless the context indicates otherwise, the perspective does not represent the official position of the government.

119. The testimony of Ms Fourie, the former DDG: Financial Governance in the Provincial Treasury of the Free State government, pertains largely to two aspects: her having been asked on 15 June 2012 to assist DARD with a payment they required; and her concerns about the contract and the legal advice

she obtained about it. Presented with a contract between DARD and Estina and a written request for payment in the amount of R30 million, she queried with her colleague dealing with the Provincial Revenue account to verify the availability of funds, discovering that there were in fact no funds to meet the requested payment – which was accordingly not issued.

120. Noticing that the normal procurement process had not been followed and that the contract in question (signed on 5 June 2012 by Estina and on 7 June 2012 by the HOD) did not sufficiently protect the interests of the Department, she consulted with Advocate Ditira, the DDG: Legal Services in the Office of the Premier, who furnished her with a written opinion on 19 June 2012 confirming that indeed the procurement process had not been followed and that the contract might be invalid for various reasons. Adv Ditira further advised that the Treasury Committee send the procurement documents to Legal Services for their review.

121. What emerged from Dr Masiteng's answering affidavit in the High Court application was that he became involved in the VDP for the first time on 5 July 2012, after the agreement had been signed on that same day, when the HOD handed him some documents and requested him "to immediately draft a submission for his approval in execution of a resolution by Exco" for the implementation of the proposed VDP with entities known as Estina and Paras. The order of events has been outlined above. Dr Masiteng concluded his testimony by saying: "I did not collude with Estina in any way. I do not know any of its employees or directors".

122. Estina, the implementing agent of the VDP, with the power to do almost everything and to deliver a finished product to the government, was at the same time a partner with the government (ostensibly representing intended beneficiaries). This on its own presented a problem. The government appears to have given it extraordinary powers on the VDP, with money paid over even before the approval of Exco. The implementing agent itself was never assessed – raising the question of whether it was trusted only because it went to India with representatives of the government.

123. In a document purporting to be an MOU between Estina and an Indian company (VRS Foods Ltd t/a Paras India) signed on 11 April 2012 to be in effect for an initial period of twelve months Estina was described as having acquired familiarity with the regulatory, social, cultural and political framework and therefore capable of closely coordinating with the authorities, of comprehending applicable government policies, of identifying opportunities for participation in various government projects, and thus of facilitating trade of goods and services concerning such projects. The company was described as having been in the business of implementing dairy projects and the production and marketing of dairy products. Estina was therefore approached to assist with identifying suitable avenues for participating in the dairy projects in the territory, while Paras would assist Estina with technology and commissioning of those identified opportunities.

124. Clause 4 of the MOU specified the duties and responsibilities of Estina including being "the prime contractor or bidder in all such identified opportunities ... [which] shall subcontract the work to the company based on the proposals submitted by the company to Estina". The MOU limited Estina's role to the identification of bids – tenders – with specifications and opportunities and getting the tender documents to comply with the requirements of tenders – a responsibility which was to be located in the company. As the Chairperson of the Commission pointed out, the MOU did not even mention VDP and did not constitute an agreement binding the company, Paras, in any way to VDP. The Chairperson also queried whether anyone in government had attempted to ascertain the authenticity of the MOU and whether government should not have ensured that their contract was with a body with expertise rather than relying on an MOU, as they appeared to have done.

125. Ms Dhlamini, CFO of DARD during the critical period of the VDP, claimed she became aware of the VDP the project for the first time when she was invited to attend the presentation by Estina: "Estina advised that it had an agreement with Paras ... We were advised that Estina was appointed by Paras". No agreement with Paras was forthcoming at the meeting.

126. She claimed that VDP existed as a project prior to the presentation by Estina, and that a budget allocation existed at the time for the VDP. Like many other witnesses, she understood that the VDP was going to be in line with the "Mohoma Mobung Strategy". She did not, however, refer to the fact

that she had recommended and signed for the HOD to approve it – instead stating "I am not the one who approved it". However, she personally recommended approval in writing under her signature, which she appeared to evade if not avoid.

127. The CFO claimed on first seeing the submission for approval dated 26 May 2012, to have approached the HOD and informed him that the Estina / Paras proposal was going to cost R342 billion, and at the time they only had a budget allocation of R9 million for the VDP. The HOD advised her that he would re-prioritise the budget to make provision for the entire project. She claimed she could not overrule him. While she concedes here that there was no budget for the project when it was signed, in other parts of her affidavit she contradicted herself on this point.

128. The June 2012 agreements were discussed earlier and the details will not be repeated here. What is significant is new detail about the CFO's testimony. She claimed in her affidavits that "the Estina /Paras project was not a service nor was it a contract as envisaged in section 217 of the Constitution dealing with procurement". Her understanding was that the Estina / Paras proposal was a "strategic partnership arrangement". Why, then, did DARD pay Estina for what the company did? Estina did indeed propose doing something to establish the dairy. It would not have done what it proposed for free. Someone, the recipient or contractor for the service, had to pay for it. Government ended up doing so.

129. The 6 June 2012 agreement had already been signed by both parties and witnesses when the HOD brought it to the CFO, who indicated that if the agreement was styled as being for services, then SCM procedures had to be followed and the contract would need to go out on tender. The main difference between the 6 June and 7 June agreements was that the expression "provide the services" used in the 6 June agreement had been replaced with the expression "execute the project".

130. Significantly, in both agreements, unlike in the later July 2012 final agreement, in addition to DARD and Estina there was a third party, Zayna Investments Pty Ltd, trading as Mohoma Mobung Dairy Project (MMDP). In both agreements an amount of R30 million was to be paid in advance to Estina. However, the balance of the payment from the total amount of R342 million payable by the government was in terms of the 6 June agreement payable to Zayna Investments, described as "the beneficiary", whereas in the 7 June agreement the balance was payable to Estina, described as the "implementing agent".

131. The CFO further stated that: "All submissions with financial implications have to come to the CFO for recommendation. ... I am not the custodian of the SCM policy; it is the accounting officer who is the custodian of the SCM policy ..." – revealing that she did not take responsibility, despite her title speaking for itself. She would have the HOD face all responsibility and herself take none. The explanations of the CFO made no sense and were in some respects contradictory: on the one hand she argued that the requirements for deviation were met and on the other that there was no need to comply with the SCM procedures.

132. According to the CFO's testimony, DARD under her watch paid Estina just over R330 million from the financial year 2012/2013 up to and including 5 May 2015. No explanation was provided as to where the R30 million allegedly paid in the 2012/2013 financial year came from when there were no funds in the revenue account. But in her 2019 affidavit she said: "[A]s the CFO, I was all the time mindful of the fact that the Department had limited budget in as far as the VDP is concerned. In truth and in fact, the Department only had R9 million in its budget. To be precise, the Department did not have R300 million."

133. Why the CFO and the HOD committed the Department to paying money it did not have is at the heart of the enquiry. Money found its way into accounts of entities which had no ostensible involvement in farming in the Free State, including corporate entities and individuals linked to the Gupta family.

Evidence of Mr Thabethe

134. The evidence of Mr Thabethe is central to the enquiry into the Estina saga since he played a vital role throughout the whole process. He was suspended on 25 April 2018, five days before the end of his

five-year contract as HOD, having been arrested and criminally charged on 14 February 2018.

135. Once the broad proposal to establish the VDP had been accepted, he started the consultative process for investment opportunities. In addition to holding discussions with local farmers to sell the idea as an intended project by the Department, he and his colleagues in DARD also consulted private sector organisations in the industry such as Nestle, Parmalat, Clover and Dairy Belle. However, nothing seems to have come from these consultations as none of these big milk industry players became involved on the project. Questioned by the Chairperson of the Commission during its proceedings about whether these companies were all not prepared to assist, the HOD's answer was somewhat vague: "They did not indicate interested to work with us".

136. The HOD claimed that for the implementation of the project "the department had to deviate from the normal procurement process" since Paras as an investor was also making a financial investment in the second phase of the project, namely construction of the processing plant. However, an investment of a smaller percentage of the total costs would not be a reason to deviate from normal procurement process, particularly given the fact that the investment was to be done only at a much later stage. He confirmed that there were no tender documents and that in terms of the PFMA he, as an accounting officer, used his discretion to deviate from the normal procurement process. No cogent reasons for deviation have been provided.

137. In paragraph 42 of his affidavit the HOD stated:

> Pursuant to the aforesaid research and various further consultation processes and the consideration of various proposal(s) regarding the implementation of the Vrede Project, which included proposals from Estina and Paras, the implementation of the Vrede Project was approved and an initial partnership in respect thereof was concluded between Estina and the Department on 7 June 2012. The Department and Estina subsequently concluded a further agreement in respect of the Vrede Project on 5 July 2012.

138. This statement gives rise to a number of issues: first, the research itself has not been seen – other than the possible internet activity conducted by the HOD; second, the statement suggests that the Department considered "various proposals" which included the proposals from Estina and Paras – this investigation has seen and heard of only one proposal, which the HOD accepted; third, the statement suggests there was a proposal from Paras – but the proposal by Paras to DARD has not been seen, and probably does not exist; and finally, the statement suggests that there were two agreements that governed the relationship between Estina and Paras, whereas there was only one agreement. The HOD maintained the idea of more than one proposal. He expressly accepted responsibility for its approval but implicated both the MEC and the Executive Council in the approval process.

139. A further sentence is of some significance: "During the negotiations and implementation of the VDP, Estina was represented by Varum Gupta and Sanjeev Gautam and Paras was represented by Gajiender Kumar."

140. The HOD clearly does not disavow any contact with Mr V Gupta. Later in the 2019 affidavit, however, he corrected his reference to Mr V Gupta as having represented Estina during the negotiations with him and states that he only met this Mr V Gupta for the first time when they were arrested in February 2018. On that version, at the time of making the 2018 affidavit, Mr Thabethe would have known Mr V Gupta for not more than three months. In a further correction he stated: "The reference to Mr V Gupta in paragraph 47 of my answering affidavit was meant to be a reference to Mr K Vasram."

141. In his evidence before the Commission the HOD conceded that he had ignored the existence of milk processing facilities in the vicinity of Vrede – in Harrismith, Frankfurt and Standerton. This major concession collapses a main reason for the establishment of VDP.

142. The HOD claimed that before the partnership agreement between Estina and DARD had been concluded a draft had been provided to the province's legal advisers and that the legal advisers, including Mr Venter, had prepared the partnership agreement which was ultimately concluded on 7 June 2012. The statement is disingenuous, however, because it is known that the legal advisers were not provided with a draft agreement but were given an agreement which the HOD had already signed.

143. As far as payments to Estina by DARD are concerned, the HOD claimed that "if Estina was not lawfully entitled to these payments, Provincial Treasury would not have authorised and paid the money to Estina". On this basis he denied that he had committed any offence.

144. According to him, between 18 April 2013 and 5 May 2016 DARD, through Provincial Treasury, paid a total amount of R250 202 652.00 to Estina in terms of the agreement. He reiterated that he did not receive any benefit or proceeds from VDP.

145. Paragraph 84.6 of his testimony reconfirms the illicit money flow and possibly the elusive Gupta connection:

> After the curator issued his report in the preservation application, it has been established that monies were paid from the Oakbay account to Tegeta Resources, Islandsite Investments and Shiva Uranium in the total amount of R5,000,000.00; that the sum of R36,000,000.00 was transferred on 19 April 2013 from Oakbay to Islandsite Investments and that Oakbay furthermore received the respective amounts of R45,000 000.00 and R1,675,716.00 from Estina and Aerohaven.

146. In paragraph 84.7, the HOD confirms: "The aforesaid monies which were paid over by the Department into the bank accounts of Estina was stolen when it was transferred to persons or entities who/which were not in business relationships with Vrede Project" – confirming that a crime had been committed involving funds paid over by DARD to Estina.

PROCEEDINGS BEFORE THE COMMISSION

147. The justification by the HOD for establishing VDP, namely that milk was being produced in the Free State and transported on trucks to places like Gauteng Province to be processed there and sent back to the Free State at an increased cost because of lack of processing facilities, was turned on its head by his concession in evidence before the Commission. He conceded that his evidence on that score as the reason for his having approached Paras was in fact incorrect. That concession has the effect of throwing off the initial justification for his research in the first place and the real motivation for seeking to establish VDP. There were in fact dairy processing plants in the vicinity of Vrede, contrary to his view when he initiated the project. His entire submission and the motivation he made to the Premier for the trip to India was thus questionable.

148. On the question of whether DARD had conducted any due diligence before appointing Estina as the implementing agent it transpired that no proper due diligence had been carried out. The Department only checked the registration particulars of the company and its tax compliance status. Mr Thabethe was deliberately noncommittal when asked by the Chairperson whether with the benefit of hindsight he realised that proper checking on the company and its background was necessary. He ultimately acknowledged in response to the Chairperson's probing that he should have conducted further research into Estina as a matter of diligence. He claimed he was not even interested in establishing what the main business of Estina was because his focus was on the Indian company, Paras.

149. With regard to the very First Agreement between DARD and Estina signed on 5 June 2012, the HOD testified that that original agreement had been drafted by Estina. It did not matter whether the agreement came from Estina, since as long as it came from Estina it was coming from Paras. The expertise the government required was located in Paras but the HOD was content to have the agreement only with Estina. This is further evidence either of gross negligence or gross incompetence.

150. In terms of the agreement of 5 June 2012, the HOD accepted in hindsight that he should not have relied on the advice of his own internal lawyers but should have sought the advice of experienced lawyers, available in the office of the Premier, before signing. 156. The HOD conceded that the intended beneficiaries had never formally been registered. DARD had requested Estina to register a company on behalf of the intended beneficiaries and "then put them in and officially make them beneficiaries, but we did not get to that stage". At the time of signing the agreement (5 June 2012), as the Chairperson put it, the only entity or person that stood to gain was Estina.

151. The HOD explained the system of having certain items budgeted for under "transfers". Whether particular money was budgeted for under "transfers" or not depended entirely on how DARD gazetted it. This was done by the MEC. Once money or an item appeared under "transfers", said Mr Thabethe, SCM did not apply until in April 2018 when the NT issued a new instruction note, made retrospective to 2016. It was not only funds from those two sources from the national Department of Agriculture that would fall under transfers. Even funds allocated by the provincial Treasury under Vote 11 and which came the way of DARD could be gazetted as transfers.

152. It appears that the use of transfers by gazetting certain amounts of money under "transfers" irrespective of the quantity involved circumvented PFMA and the Constitution and might not have been legal.

"Deviation"

153. DARD failed to comply with the Constitution and the PFMA in that when appointing Estina and acquiring its services as an implementing agent, it did not follow a system which was fair, equitable, transparent, competitive, or cost-effective. Even when the HOD decided to deviate, he did not follow the prescribed procedure for deviation.

    153.1 Estina was appointed without any due diligence into its background and competence to carry out the obligations under the contract.

    153.2 The contract was entered into and signed without prior consultation with the Treasury and without ensuring that funds were available for the contractual obligations.

    153.3 The HOD ignored the advice of legal services and the provincial Treasury and was determined to procure payment of the first tranche to Estina with indecent haste.

    153.4 DARD failed to secure and register intended beneficiaries and to secure their interests before paying large sums of money to Estina.

    153.5 DARD failed to put in place a mechanism for monitoring the expenditure of funds once paid to Estina. The HOD and DARD must therefore shoulder the responsibility for funds which were improperly dispersed by Estina.

154. The failure to involve prospective beneficiaries in VDP is shockingly inexplicable. Intended beneficiaries were asked to put their names forward and were listed on the basis of the interest they had indicated in dairy farming. However, the intended beneficiaries were not even employed on the project. The list appears to have been redrawn each time a new director was appointed, to the total irritation of the intended beneficiaries.

155. The appointment of Mr Narayan and the role he played in VDP requires close investigation. His relationship with the notorious Gupta family similarly needs to be investigated.

GUPTA CONNECTION

156. The possible connection of the Gupta family to the VDP was raised in the Mail and Guardian newspaper expose of 7-13 June 2013 but was not investigated by the NT investigators or by the initial and final report of the PP on VDP (the PP did not even refer to an alleged link). The possible link would have been uppermost in the public eye after media allegations relating to funding of the Gupta wedding by VDP funds. The PP seems to have stuck to the complaint received by her office and ignored issues raised by the media.

157. Some of the evidence that could point to a possible link with the Gupta family are the following. The evidence presented here is neither conclusive nor exhaustive.

    157.1 A key employee of VDP, project coordinator Mr Prasad, was said by witnesses to the Commission to have been linked to the Gupta family. All evidence, however strong, pointing in that direction should be recorded and evaluated by the Commission.

157.2 One of the small-scale black farmers in Vrede, Mr Dhlamini, noticed at one stage that milk from VDP was delivered to a shop next to his record bar in Vrede, from where it was sold to consumers. The shop was owned by some people of Indian origin who could not speak English or any of the local languages. Since Paras allegedly denied involvement in the project, the question arises whether the shop could be linked to the Guptas, or to the project manager. If a link to the Guptas is to be investigated that possibility might as well be probed.

157.3 One hint of a Gupta connection came during examination of one of the three affidavits of the HOD, in which he stated: "It was brought to my attention during the investigation that some of the monies were paid to Dubai and some to consultancy in Dubai. That information was not in my disposal and as such those were not in terms of agreement signed between the parties."

157.4 The Answering Affidavit of the HOD to the Founding Affidavit and other supporting affidavits reconfirmed the illicit money flow and possibly the elusive Gupta connection:

> After the curator issued his report in the preservation application, it has been established that monies were paid from the Oakbay account to Tegeta Resources, Islandsite Investments and Shiva Uranium in the total amount of R5,000,000.00; that the sum of R36,000,000.00 was transferred on 19 April 2013 from Oakbay to Islandsite Investments and that Oakbay furthermore received the respective amounts of R45,000 000.00 and R1,675,716.00 from Estina and Aerohaven.

157.5 The theft of money – though not necessarily channelled into a Gupta bank account – was confirmed by the HOD's statement that "The aforesaid monies which were paid over by the Department into the bank accounts of Estina was stolen when it was transferred to persons or entities who/which were not in business relationships with Vrede Project."

157.6 In two paragraphs of his 2018 Answering Affidavit, the HOD claimed that "During the negotiations and implementation of the VDP, Estina was represented by Varum Gupta, and Sanjeev Gautam and Paras was represented by Gajinder Kumar." The HOD clearly does not disavow any contact with Mr V Gupta – a clear reference to a member of the Gupta family. This reference to a connection with the family was, however, later recanted by the HOD in his 2019 affidavit to the Commission, in which he claimed that Mr V Gupta had never represented Estina in any of the negotiations or discussions which he had held with Estina representatives. He claimed to have met Mr V Gupta when he was arrested on 14 February 2018, and that "The reference to Mr V Gupta in paragraph 47 of my answering affidavit was meant to be a reference to Mr Kamal Vasram ... I unfortunately did not notice the erroneous reference to Mr Varun Gupta but only establish it later."

157.7 This is the context in which the Gupta family was connected to the VDP and Estina. Even if corrected, the point remains that the connection was made. It is also irrefutable that the Mr V Gupta mentioned in the above context was the 9th respondent in the High Court application in case number 1778/2018 in the Free State division – the only member of the Gupta family to be cited in the court application.

157.8 Over 29 months, between April 2013 and 16 May 2016, DARD made seven payments to Estina in a total amount of R220 202 652.00 in respect of services purportedly rendered: a total amount of R113 950 000.00 into Estina's Standard Bank Account; and a total amount of R106 252 652.00 into Estina's First National Bank Account. Immediately upon this money having been paid into these Estina bank accounts, several large payments were made to several entities and individuals as follows:

157.8.1 R40 000 757080.00 to Gateway Pty Ltd

157.8.2 R43 392 660.00 to an entity known as Varsgafield PTY Ltd whose director is an Indian national with a residential address in Dubai

157.8.3 R110 450 000.00 to the Bank of Baroda

157.8.4 R10 000 000.00 to Atul Gupta

157.8.5 R14 500 000.00 to Oakbay Investment Pty Ltd

157.8.6 R21 200 000.00 to Aero Haven

157.8.7 R19 000 000.00 to Stanlin Bedford Gard

157.8.8 R60 000 000.00 to VLRS Investments

157.8.9 R6 000 000.00 Westdawn Investments; and

157.8.10 R4 000 500.00 to Uxolo Diamond Cutting.

158. One member of the Gupta family was alleged to have been paid. Similarly, some of the entities to which payment was made are linked to the Gupta family. Mr Mradla's analysis of the aforementioned payments was that the bulk of the payments received by Estina were paid to several related entities and individuals that did not appear to have any legitimate business relationship with Estina and its core business.

159. Mr Basson, the local businessman and farmer called in to assist with various services when VDP had problems, came to meet several of the people tasked with the establishment of the VDP. He said: "No less than three of these individuals were clearly Indian nationals who had very limited ability to communicate in English language and who were identified to me by Mr Prasad as being members of the Gupta family." Mr Prasad, himself connected to the Guptas, disclosed the involvement of members of the Gupta family at VDP.

160. In 2012, after visiting the Neuman Dairy in the vicinity of Vrede as part of the delegation, Mr Narayan invited Mr Theron, the farm manager of Neuman Dairy, and Mr Neuman, owner of Neuman Dairy, to a meeting at the Gupta compound in Saxonwold. Mr Narayan attended the meeting with the Guptas, at the end of which Messrs Theron and Neuman were given an unsolicited amount of R5 000.00 in cash. No invoices were exchanged. At the meeting Mr Narayan stated that he was there on behalf of the Premier to ensure the success of the VDP.

161. The role of Mr Narayan in the VDP deserves examination. He has not testified and therefore no conclusion about him can be drawn. The observations about him are recorded in case the Chairperson finds it necessary to investigate further: he was appointed by the Premier as his adviser by letter dated 29 February 2012 (the appointment was expressly with effect from 1 March 2012); even before he assumed office in that capacity, on 24 February 2012 his name was on the proposal for the trip to India, prepared by the HOD, recommended by the MEC (on 28 February), and approved by the Premier.

162. On the very date on which the Premier signed his letter of appointment (29 February 2012) he left with Mr Thabethe on a trip to India fully paid for by the government, at which time he was neither a government employee nor an adviser to the Premier; on his return from the trip to India, according to the HOD, he went straight to the office of the Premier and did not assist in the preparation of the official report because he was not part of his team; Mr Narayan later approached the municipal manager of Phumelela, Mr Moremi, together with the lawyer, Johan Schalkwyk, to present a draft lease for the farm, Vrede for the VDP; his only role on the trip to India was to assist with interpretation as some of the representatives of Paras in the meeting did not speak English well.

OTHER INVESTIGATIONS AND THEIR CONCLUSIONS

163. It is recognised that the following state entities conducted investigations into possible irregularities at VDP: NT (assisted by ENS Forensics); the PP; and the NPA. The reports and conclusions of the first two are a matter of record, and parts thereof have been referred to and relied on in sections of this report. The affidavits drawn by the NPA and used in the High Court application under the Prevention of Organised Crime Act 121 of 1998 (POCA) were similarly perused and considered. The POCA application in the Free State High Court and the related criminal charges were withdrawn. Some NPA witnesses have not testified before the Commission and the value of their affidavits to the Commission is somewhat uncertain. However, the affidavits of three NPA witnesses – Messrs Samson John

Schalkwyk, Motlalekhosi Knox Molelle, and Nkosiphendule Mradla – have been summarised, and the summaries have been made available separately to the Chairperson of the Commission for his consideration. This is because of uncertainty about their evidential value, in the light of the fact that criminal proceedings may still be reinstated at the behest of the NPA.

164. Mr Schalkwyk's overall conclusion was that Mr Thabethe, the CFO, the directors of Estina, as well as the directors of Linkway were involved in a series of irregularities and acts of criminality wherein they colluded with one another to circumvent DARD's SCM processes.

CONCLUSIONS AND OBSERVATIONS

Appointment of Estina

165. Estina was appointed as the implementing agent for the VDP without the SCM process as prescribed by the PFMA being followed.

166. The HOD provided contradictory reasons for not having followed the prescribed process. In fact, evidence shows that when it came to signing the July 2012 contract, the HOD had already decided not to follow a competitive process. The submission for deviation dated 5 July 2012, which he approved, was a mere formality, prepared on his instruction so as to validate the decision which he had already taken to deviate. South African milk farmers and operators of milk processing plants were denied the opportunity to tender for the project.

Experience of Estina

167. Estina had no experience whatsoever in farming, let alone dairy farming, prior to its appointment. Estina had only one director, Mr Vasram, when it was appointed as an implementing agent for VDP. Prior to assuming the directorship of Estina, Mr Vasram had been the retail sales manager at Sahara Computers. He had no farming or agricultural experience.

168. The director is the only decision-maker within a company. The decision to entrust such a big government project to the decision-making power of a single person is illogical.

169. The evidence of at least one witness suggests that Estina's representatives accompanied the senior representatives of DARD on the trip to India. However, the HOD in his report made no mention of representatives of the company having travelled or accompanied him to India. If Estina accompanied government on the trip, the question of why it was selected for that purpose remains.

170. The people appointed to manage the VDP farm did not seem to know what they were doing – learning as they went along. This cost the government a considerable amount of money. This is seemingly the only explanation one can give for the death of many dairy cows and the negligent and environmentally hazardous manner in which the carcasses were disposed of.

171. The reason Estina was a sole provider for the services procured is unsustainable in the light of the fact that there were and still are milk farmers in the Free State and in the vicinity of Vrede.

172. Estina was appointed without DARD having conducted any due diligence about it and without having followed the prescripts for procurement The HOD decided to appoint Estina and instructed his juniors to prepare a submission for him to approve the deviation.

173. According to the HOD, Estina was in fact appointed by the CEO of Paras to represent Paras in South Africa and to contract with DARD. He claimed the company he had actually wanted to contract with was Paras. If indeed he wanted to secure a relationship with Paras, he clearly should have taken legal advice, which was available to him. By signing a contract with Estina he did not secure any obligation by Paras towards DARD or the Free State provincial government. The MOU to which he referred did not secure a relationship between Paras and the government.

174. The absence of any monitoring mechanism overseeing the utilisation of public funds once they were paid to Estina aggravates matters. DARD used a questionable "transfers" budgeting process on the basis of which the HOD maintained that once money had been paid over to a farmer beneficiary, government had discharged its obligation as the money then belonged to the beneficiary. Estina was neither the targeted small-scale farmer nor a beneficiary of government programmes. The contract made it a beneficiary, which was clearly a deliberate misnomer and part of a scheme to siphon public funds out of the government purse to benefit chosen private entities and individuals.

175. The reasonable suspicion is that Estina's director had a close relationship with someone in government who had influence in the decision to appoint the implementing agent. The Estina director had been a manager of Sahara Computers, the initial Gupta business in South Africa.

176. Estina was given carte blanche to conduct a feasibility study, develop a business plan, and organise an event to find and register beneficiaries. Estina became an implementing agent while at the same time partnering with government. The partnership relationship gave it authority to make a profit, while its role as an implementing agent or management company entitled it to payment for its services – entirely contradictory roles.

177. The shareholders of Estina have not been identified. The company had only one director at all material times, but DARD entrusted it with the power to manage a R500 million project. DARD was prepared to pour public funds into the entity without exercising authority over or monitoring how the funds were expended.

178. The agreement of 7 June 2012 was signed without the approval of Exco. It is not clear whether the MEC for Agriculture had approved it; but it is likely that at the very least he was informed about and did not oppose it.

179. The agreement was signed, and the government was committed to expending funds for which there was no provision in the budget. The HOD alone took a decision that funds would be redirected from other projects and on that basis signed the agreement.

180. The proposal made to DARD at first and subsequently by DARD to Exco put the Indian company, Paras, at the centre. The profile of the presenting company was that of Paras and not of Estina, which was mentioned in only one or two lines. If that proposal was the basis for Estina's appointment, it constituted fraud committed against the government because it induced government to commit to a project of half a billion Rands and to its making payment to an entity which did not qualify to be appointed.

181. Since the HOD of DARD had himself undertaken the trip to India and knew exactly where the expertise lay, and since there was nothing Estina knew about Paras which he himself did not know. He could only be defrauded if he submitted voluntarily to the "fraud". If it was the expertise that government had contracted for then there was a clear obligation to ensure that the contract signed secured the expertise for the VDP.

182. The HOD suggested that he was the one who advised Paras to make the presentation through a South African registered company. If he did not introduce Estina to Paras, he had a duty to ensure that the South African-registered company was properly qualified to implement the project.

183. Similarly, if the reason for appointing Estina was the promise of financial contribution by way of investment, the contract should have had at its core the securing of the contribution.

184. In the final analysis, if fraud was committed against the government, then the HOD as head of DARD must have been the core perpetrator because he could not have been defrauded when he knew the truth. He visited Paras, met its CEO, became aware of its expertise, secured its commitment, and represented to government that it was safe for it to approve the deal.

185. Absent fraud committed against the government, all those involved in the arrangement collaborated and colluded in siphoning and channelling public monies to an incompetent entity without a shred of accountability become the fraudsters.

Intended beneficiaries

186. In theory, VDP was started for the benefit of small-scale black dairy farmers and those interested in dairy farming. They registered their interest in the project. Promises were made to them that were never fulfilled. Those involved in beef or other forms of farming were persuaded to become involved in dairy farming under the pretext of receiving government support.

187. However, the intended beneficiaries were side-lined and overlooked in the launching and development of the project. They were never given shareholding or any right to participate in the project until the national DAFF intervened. The company Zayna Investments Pty Ltd, trading as Mohoma Mobung, was effectively a shell company, registered ostensibly to house interest in the project. No farmer interviewed appears to have been aware of that company. It was also not clear whether the company ever had any formal relationship with Estina until the contract between Estina and DARD was terminated.

188. The local black farmers had a structure, the African Farmers Association, led by Mr Dhlamini and Mr Ncongwane. These leaders both formally indicated interest in the VDP. If the intention had been to benefit and develop these farmers, as has been suggested, it was incumbent on DARD to consult with the African Farmers Association, involve it in the project, and empower it where necessary.

189. The farmers do not appear to have been consulted about the structure in which they were invited to participate and were by and large left in the dark. DARD decided to overlook these established small farmers and instead paid money into a small company with one director, without any farming background, who effectively decided on the management of public funds without any monitoring by the authorities.

190. Small-scale farmers were asked to put forward their names and submit their identity documents more than once, without any demonstrable progress. A representative committee formed by the farmers themselves to interact with the government on the project, under the chairpersonship of Mr Mhlaba, was similarly ignored and kept in the dark.

191. A so-called Beneficiary Agreement signed with Dr Masiteng representing DARD was drawn up without proper legal advice and had major deficiencies. The agreement appeared to have been signed in haste when the national Department of Agriculture demanded evidence of the involvement of the intended beneficiaries. At that stage, around August 2013, no beneficiary was involved in VDP despite the fact that millions Rands of public funds had been poured into the project.

192. The intended beneficiaries were left with the impression that their names and identity details were used to secure money from the Treasury without any intention to involve them in the project.

Fear and death threats

193. The intended beneficiaries had heard rumours that the VDP had started and that government had paid money into it. They raised questions which DARD was not able to answer satisfactorily. They were even denied access to the site of the project, which fuelled their suspicions. When they asked more questions and insisted on answers, they were victimised. Some received death threats while others were killed under mysterious circumstances. From the perspective of the intended beneficiaries a cloud of secrecy covered the VDP and those who tried to expose the truth were victimised.

State capture enabled by oversight failure and absence of law enforcement

194. When members of the opposition in the legislature insisted on exercising oversight over the project and asked questions about it, satisfactory answers were hardly ever given.

195. Similarly, those in municipal councils who opposed the way in which the VDP was being implemented were victimised and even assaulted. Threats were issued openly. Cases of assault reported to the SAPS were not followed up.

196. An atmosphere of fear reportedly hangs over the project, with those appearing to be critical of it becoming victims at the hands of the supporters of political leaders.

197. There are allegations also that members of the majority party in both the legislature and municipal council protect one another in the face of questions formulated by members of the opposition parties in those structures. The allegations, if true, point to a culture of nurturing and protecting state capture.

THE CLOSURE OF BANK ACCOUNTS OF GUPTA COMPANIES

RELEVANT TERMS OF REFERENCE

1. In December 2015 and 2016 four banks closed the bank accounts of companies owned or controlled by or linked to the Gupta family. They were First National Bank, Standard Bank, ABSA and Nedbank. The terms of reference of the Commission cover this topic. Term of Reference 7.1 requires the Commission to investigate, inquire and determine:

   > whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies.

   This part of the report deals with this issue.

RELEVANT CONTENT OF THE PUBLIC PROTECTOR'S REPORT

2. The Public Protector identified in para xxi(e) of her executive summary an issue which required investigation:

   > Whether President Zuma and other Cabinet members improperly interfered in the relationship between banks and Gupta owned companies thus giving preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies.

3. In paragraph 5 of her "observations" regarding the scope of her report, the Public Protector stated:

   > Cabinet appears to have taken an extraordinary and unprecedented step regarding intervention into what appears to be a dispute between a private company co-owned by the President's friends and his son. This needs to be looked at in relation to a possible conflict of interest between the President as head of state and his private interest as a friend and father as envisaged under section 2.3(c) of the Executive Ethics Code which regulates conflict of interest and section 195 of the Constitution which requires a high level of professional ethics. Sections 96(2)(b) and (c) of the Constitution are also relevant.

4. The Public Protector recorded that one of the complaints pursuant to which she investigated and submitted her Report was that it had been alleged in the media that the Cabinet had decided to get involved in holding banks accountable for withdrawing banking facilities for Gupta-owned companies. The complainant in question wanted to know if it was appropriate for the Cabinet to assist a private business and on what grounds was that happening. He asked if corruption was not involved and specifically asked if such matters should not be dealt with by the National Consumer Commission or the Banking Ombudsman.

5. An Executive Ethics Code was promulgated on 28 July 2000 by the Acting President of the Republic, prescribing how members of the Cabinet, Deputy Ministers and members of Provincial Executive Councils must comply in performing their official responsibilities. The complaint before the Public Protector asserted that the conduct of President Zuma in relation to the issue between the banks

and certain Gupta-owned companies may have contravened articles 2(3)(a), (c) and (d) of the Ethics Code. The suggestion was that President Zuma may have exposed himself to a situation involving the risk of a conflict between his official responsibilities and his private interests; acted in a way that is inconsistent with his position and used his position or any information entrusted to him, to enrich himself or improperly benefit any other person.

THE ISSUES THAT NEED TO BE DETERMINED

6. The focus herein is on whether any member of the National Executive unlawfully, corruptly or improperly intervened in the matter of the closing of banking facilities of the Gupta owned companies.
7. The TORs require a consideration of the the conduct of former President Zuma and other Cabinet members and determine whether they improperly interfered in the relationship between Banks and Gupta owned companies, thus giving preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies.
8. Although no Rule 3.3 notices appear to have been served on anybody in regard to the evidence that was led in relation to this topic, Mr Gwede Mantashe, who was the Secretary-General of the ANC at the time of the closure of the bank accounts of Gupta companies, and Mr Mosebenzi Zwane did place their versions before the Commission. President Ramaphosa also explained in his affidavit furnished to the Commission in his capacity as President of the Republic, in which he explained what decisions the Cabinet took about the Task Team that was chaired by Minister Zwane.

EVIDENCE HEARD

9. The Commission heard evidence about the closure of the bank accounts of Gupta companies. That evidence included the evidence of various witnesses who represented the banks or at least some of the banks involved as well as the evidence of Mr Mosebenzi Zwane and Mr Gwede Mantashe. Mr Mosebenzi Zwane was the Minister of Mineral Resources at the time and chaired a Committee or Task Team that was set up by the Cabinet in response to the closure of the bank accounts of Gupta Companies. The Commission did not hear Mr Jacob Zuma's evidence because he elected not to testify before the Commission.

Evidence of Mr Ian Hamish Scott Sinton

10. Mr Sinton (Head of Compliance at Standard Bank) testified to the manner in which Standard Bank terminated its banking relationship with companies (the Gupta companies) in which various members of the Gupta family and Mr Duduzane Zuma had a direct or indirect interest. He also submitted a witness statement signed on 13 August 2018.
11. Standard Bank gave notice on 6 April, 2016 to the Gupta companies of its intention to terminate the banker-client relationship with them as from 6 June, 2016, a notice period of two months. On 6 June 2016 Standard Bank officially terminated that relationship.
12. Mr Sinton provided a list of the Gupta companies, 27 in total including Oakbay Investments (Pty) Ltd, Westdawn Investments (Pty) Ltd, Sahara Computers (Pty) Ltd, TNA Media (Pty) Ltd, VR Laser Services (Pty) Ltd, Optimum Coal Mine (Pty) Ltd, Optimum Coal Terminal (Pty) Ltd and Estina (Pty) Ltd. Certain of the Gupta companies operated multiple accounts.
13. This process was not preceded by consultation with the client. Sometimes Standard Bank will consult with the client before terminating and sometimes not. In this case the reasons for termination included:

    13.1 Absa had previously terminated its relationships with certain Gupta companies, the Gupta companies' auditors had terminated their relationship with the Gupta companies, former Deputy

Minister Jonas had published on the National Treasury website the allegation that the Guptas had offered him benefits if he would do their bidding.

13.2 a former MP, Ms Mabel (Vytjie) Mentor, had announced that she had been offered a Cabinet post by the Guptas in exchange for favours.

13.3 Standard Bank provided services to the Gupta group in the media business through two of its own customers and was concerned about being implicated in unlawful behaviour.

13.4 Mr Themba Maseko from the Government Communication and Information Service (GCIS) had announced that he had been instructed to help Gupta entities.

13.5 Minister Zwane had accompanied a Gupta delegation to Switzerland to negotiate the purchase by the Guptas of the Optimum coal mine from Glencore (which Standard Bank believed Minister Zwane had falsely denied).

13.6 it had been reported in the press that one of the Gupta companies had bound itself as surety for the obligations of a trust in which a wife and son of President Zuma were beneficiaries.

13.7 Estina (Pty) Ltd had been awarded a contract to develop a farm in the Free State but had sent substantial sums of the money paid to it to Dubai instead of using it for the proper purpose.

13.8 the Guptas had attempted to persuade Standard Bank to transfer money held in trust for the rehabilitation of Optimum mine to the Bank of Baroda.

13.9 In addition, Standard Bank's money laundering reporting officer had warned the bank to use extreme caution in dealing with the Gupta companies.

14. On 25 May 2016 Standard Bank received a letter from Oakbay's attorneys threatening an application to compel Standard Bank to keep the Gupta companies' accounts open. Standard Bank rejected the demand and Oakbay withdrew its letter of demand.

15. Mr Sinton testified that the Gupta companies launched a media campaign to induce those banks which had terminated their banking relationships with Gupta companies to reverse their decisions. In addition, the ANC requested the Standard Bank CEO to attend a meeting at Luthuli House to account to the ANC for why it had closed the Gupta accounts. Standard Bank also received a separate request from a committee which described itself as an Inter-Ministerial Committee of Cabinet (IMC) to account to them in this regard. Standard Bank regarded these requests as inappropriate but decided to attend the meetings.

16. Three relevant meetings took place after Standard Bank had announced its decision to close the Gupta accounts. The first was with representatives of Oakbay. This meeting was attended by Mr Nazeem Howa, Mr Terry Renson, Mr Trevor Scott, Mr Ashu Chawla and Ms Veronica Ragavan for Oakbay and certain senior Standard Bank officials.

17. Standard Bank was not persuaded by the representations and refused to reverse its decision to terminate the accounts. Indeed, the attempts to explain certain conduct which had led to the decision to terminate the relationship reinforced Standard Bank's perception that it had made the right decision.

18. Mr Sinton referred to certain examples. One of these was that Oakbay, through Ms Ragavan, asked that Standard Bank move R1,456 billion in an Oakbay account from itself to the Bank of Baroda. Standard Bank responded on 22 April 2016 that these funds were held in trust to cover rehabilitation costs in relation to Optimum mine and only the trustees could give this instruction. Two business days later, Oakbay produced letters of authority from the Master, recording that the former trustees had been removed and Gupta appointees installed as trustees. It is common knowledge that the Master's office is notoriously slow; yet Oakbay managed to push this process through in two working days. The explanation from Oakbay for this conduct was that Baroda offered a better rate of interest. Standard Bank did not believe this because it had not been asked by the Guptas what rate of interest they were paying on the funds held by it.

19. Standard Bank raised the question of the mortgage bond to the trust of which a wife and son of President Zuma were beneficiaries and asked Ms Ragavan if there was any truth in the allegation that a Gupta company, Westdawn Investments, had guaranteed the loan. Ms Ragavan responded that she had never met President Zuma's wife and had not been party to arranging the loan. Ms Ragavan's signature under her maiden name, Govender, was put to Ms Ragavan. After a lengthy pause, Ms Ragavan admitted that she had indeed arranged that loan.

20. Mr Sinton produced an undated letter written by Mr Howa to Oakbay's attorneys stating that Oakbay had requested the intervention of President Zuma and Ministers Zwane, Oliphant and Gordhan (members of the IMC) to investigate the account closures. The letter by Mr Howa was published in the media on 8 April 2016. The IMC was established on 13 April 2016. Mr Howa wrote similar letters to these four members of the executive as well as to Mr G Mantashe, then secretary general of the ANC.

21. Standard Bank further referred to a provision in the agreement in terms of which Glencore sold Optimum mine to Tegeta, a Gupta company. In terms of that agreement Tegeta was obliged to procure the release of Glencore from liability for a claim of R2,1 billion which Eskom had against the Glencore company which owned the mine and dealt with Eskom. Standard Bank asked the representatives of the Gupta companies what consideration they had given Eskom for the release. Their response was that they had given Eskom no consideration and that Eskom had effectively waived the entire claim of R2,1 billion.

22. On 21 April 2016 the CEO of Standard Bank, Mr Simpiwe Tshabalala, a senior executive, Ms Hannah Sadiki and Mr Sinton attended a meeting at Luthuli House with Mr Mantashe, Ms Jessie Duarte, Mr Enoch Godongwana and others. The ANC delegation said that they accepted that the meeting was not to discuss the relationship between Standard Bank and a particular customer but to gain a better understanding of how Standard Bank entered into and terminated banking relationships. Amongst other things, the ANC representatives asked the Standard Bank delegation how it responded to the accusation that it was colluding with "white monopoly capital" to oppress black-owned businesses in the form of the Guptas and why it allowed construction companies which had been fined for collusion in the construction of stadiums to maintain their accounts while the bank had closed the accounts of the Gupta companies.

23. Mr Sinton said in his statement before the Commission that the fact that the ANC requested the meeting at the behest of Oakbay showed the extent of Oakbay's influence at the highest echelons of political office-bearers and the willingness of the Gupta companies to use their influence to reverse a decision taken lawfully and in good faith in compliance with legal and regulatory obligations.

24. On 1 September 2016 Minister Mosebenzi Zwane told the media that on 13 April 2016 Cabinet had established an IMC to consider allegations that certain banks and other financial institutions had acted unilaterally and in collusion in closing the bank accounts and terminating contractual relationships with Oakbay. It seems that the IMC was also, or more accurately, called a task team. The IMC requested a meeting with Standard Bank and invited the CEO of Standard Bank's group holding company to attend it. Standard Bank decided that it would be more appropriate for the CEO of Standard Bank, Mr Tshabalala, to attend.

25. The meeting took place on 5 May 2016. On the government side, the meeting was attended by Ministers Zwane and Oliphant and Mr Mzwanele Manyi. Mr Manyi said that he was attending as advisor to the Ministers and remained in attendance throughout the meeting. Mr Zwane said that he was the Chairman of the Committee. Minister Gordhan did not attend. His absence was not explained. The inclusion of Mr Mzwanele Manyi in this Ministerial team was strange because there is no evidence that Mr Manyi worked for Government in 2016. However, it must be remembered that Mr Manyi is the person that President Zuma – possibly at the instance of the Guptas – appointed as a replacement of Mr Themba Maseko at GCIS in February 2011 after Mr Maseko had been removed from the position of CEO of GCIS at the instance of the Guptas. It must also be remembered that Mr Manyi is the person that Mr Zwane wanted to have appointed as DG of the Department of Mineral Resources in 2014 or 2015 but did not succeed in getting him appointed because Minister Ramathlodi

as Minister of Public Service and Administration blocked that on the basis that Mr Manyi did not qualify for the position of DG.

26. Mr Sinton understood the purpose of the meeting to be to discuss the closure of the accounts of the Gupta companies. The Standard Bank delegation stated that it was willing to discuss and explain its policies and procedures regarding account closures but not individual cases because of banker client confidentiality. Mr Sinton explained how the Serious Fraud Office in London had effectively fined Standard Bank UK a very large sum of money for failing to ensure that one of associates did not engage in corruption and placed Standard Bank UK on probation for three years. This required Standard Bank in South Africa to be exceptionally careful about being caught up in bribery and corruption in South Africa.

27. The IMC members argued in favour of the Gupta companies that these companies employed up to 7 500 employees with the result that up to 60 000 South Africans, including the dependents of employees, had been affected by the decision to close the accounts.

28. It became clear to Mr Sinton that the true purpose of the meeting was to secure an outcome favourable to the Gupta companies. The IMC members:

    28.1 Expressed a concern about the criteria used to identify politically exposed persons such as members of the Gupta and Zuma families

    28.2 Suggested that Standard Bank had not acted fairly towards the Gupta companies and that the Standard Bank and its competitor banks may have colluded with “monopoly capital” in the way it treated the Gupta companies

    28.3 Asked Standard Bank to explain why it continued to provide banking facilities to construction companies convicted of collusive conduct but decide to close the Gupta companies’ accounts

    28.4 Admonished Standard Bank for operating under a license from the government and held that it should therefore be responsive to issues raised by them on behalf of the government

    28.5 Suggested that Standard Bank should have placed the interests of the employees of the Gupta companies above the bank’s legal obligations; and

    28.6 Suggested that the government had the power to change the law to make banks accountable for job losses caused by account closures, including those flowing from the closure of the Gupta company accounts.

29. The meeting closed with Mr Zwane asking what changes Standard Bank would need to see within the ownership and management of the Oakbay Group that would be sufficient to persuade the bank to reverse its closure decision. This was after the Standard Bank delegation had made it clear that they would not discuss the affairs of any specific customer.

30. Mr Sinton concluded that the queries at this meeting were substantially the same as those posed on behalf of the ANC and were all directed at inducing Standard Bank to reverse its closure decision. As the committee was a committee of the Cabinet, it might mean that the Cabinet itself wanted through its committee to achieve a reversal of the closure decision.

31. Although the secretary to the committee was present throughout and took notes, no minutes of the meeting were circulated after the meeting. Standard Bank accordingly wrote a letter dated 6 May 2016 recording what had transpired at the meeting. The response was an email dated 9 May 2016 from the representative of the two ministers on the committee, a Ms Kellerman, thanking Mr Tshabalala for his input. Nothing in the letter from the bank was placed in dispute.

32. Standard Bank’s letter reminded the Ministers that the bank had hoped to keep the meeting about policy and practice and not any particular customers, but that the meeting did go on to discuss particular customers. It summarised all the laws that the bank said were applicable to them and the risk faced by the bank if it did not strictly adhere to those laws. The letter summarised the experience of dealing with bribery and corruption and then described its process about what considerations it would take into account when deciding whether to close a client’s account, demonstrating that such

decisions were not made arbitrarily or capriciously, but were considered carefully. In response to the query whether there was any possibility of Standard Bank reversing any decisions that could help save the jobs of the employees of the Gupta companies, Standard Bank indicated that it applied the known facts and suspicions as envisaged by PRECCA and POCA to the law to reach its decisions and, therefore, if the facts should change, there could be a review of its decision.

33. On 1 September 2016 Mr Zwane issued a media statement announcing that Cabinet had resolved to recommend to President Zuma that a judicial commission of inquiry under s 84(2)(f) of the Constitution be appointed to consider the current mandates of the Banking Tribunal and the Banking Ombudsman, on the grounds that, on the evidence presented to the committee, all of the actions taken by the banks and financial institutions against Oakbay were a result of innuendo and potentially reckless media statements and Oakbay had had very little recourse to the law.

34. On 2 September 2016 the Presidency issued a very sharply worded statement confirming that the banking sector was on a sound footing and describing Mr Zwane as being a member of the IMC who had spoken in his personal capacity, that he "does not speak on behalf of Government" and that the Presidency regretted the "unfortunate contents of the statement" and the confusion the statement had caused.

35. However, on 23 November 2016, President Zuma spoke in Parliament in response to a question by an MP.

36. Mr Sinton takes the view in his statement that the remarks in Parliament by President Zuma show that he regarded the banks' decision to close the accounts as having been taken without due consideration ("willy-nilly"), that he, believed there may have been collusion between the banks and other financial institutions in that regard, that government would continue to deal with the banks' decisions and that Mr Zwane's unauthorised remarks were still being investigated.

Application to court by the Minister of Finance

37. By notice of motion dated 13 October 2016, the then Minister of Finance, Mr Gordhan, brought an application under case no. 80978/16 in the Pretoria High Court with several Gupta companies and South African Banks, as well as the director of the Financial Intelligence Centre (FIC), for an order declaring that the Minister of Finance was not empowered or obliged to intervene in the relationship between the Gupta company respondents and the Bank respondents regarding the closing of the Gupta companies' bank accounts. The declarator included a founding affidavit deposed to by Mr Gordhan on 13 October 2016. The relevant part of Mr Gordhan's affidavit reads as follows:

> The closure of the Gupta bank accounts ...
>
> 139. Following a Cabinet meeting on 13 April 2016, at which I was not present, a Ministerial task team (which should not be confused with an Inter-Ministerial Committee ("IMC")), was established to look into the issue of the closure of the Gupta bank account. Mr Zwane, Labour Minister Mildred Oliphant and myself were nominated for this task.
>
> 140. Following correspondence received from Mr Zwane purporting to schedule a meeting of the task team (seemingly expanded to include the then Minister of Communications, Faith Muthambi) with the banking institutions, I questioned the purpose and seeming aim of the task team with my colleagues who were nominated to it. I explained the extensive global and domestic legal regulatory framework that governs the financial sector, and cautioned that this framework needed to be understood and considered prior to any engagements with the banking institutions. My concerns were not addressed by the members of the task team.
>
> 141. I chose not to attend the meetings of the task team nor to participate in its actions, because I was of the view, confirmed in legal advice, that members of the executive cannot interfere in the contractual relationships between banks and their customers.
>
> 142. I do recall further events in Cabinet that I cannot publicly disclose but which I have indicated to the Commission should be investigated, that indicated to me that Mr Zwane had the full

backing and support of former President Zuma in pursuing the task team's objective of undermining and maligning the stance adopted by myself and National Treasury to the closure of the bank accounts, this included three reports from the task team, two of which were distributed in Cabinet.

143. On or about 1 September 2016, Mr Zwane issued a media statement, purportedly on behalf of the task team and, I believe, based on its first report, announcing that it, through Cabinet, would recommend to former President Zuma that a judicial inquiry be established into the closure of the bank accounts of several Gupta companies by the major commercial banks in South Africa. This statement was effectively abandoned in the days that followed, with a statement issued by the Presidency, to clarify that no such decision had been endorsed as a decision by Cabinet.

144. On or around 14 October 2016, I launched a court application to seek declaratory relief regarding the limitations of my available powers to intervene in various decisions taken by several commercial banks to close the accounts held by Gupta-related firms.

144.1. This application attracted further hostility towards me from supporters of the former President and the Guptas.

144.2 Attached to the application as an annexure was a certificate issued by the Financial Intelligence Centre certifying that it had received 72 Suspicious Transaction Reports from the various banks relating to suspicious account activity and transactions conducted using the bank accounts that had been closed. This was the first public acknowledgement of suspicions regarding the business affairs of the Gupta entities since the Public Protector's State of Capture report was only released to the public on 2 November 2016 (following litigation aimed at interdicting its release launched by former President Zuma, Mr Zwane and Mr Van Rooyen.

145. I submit to the Commission that it should "follow the money" and request a full account of all transactions by any Gupta-related company and related individuals that has gone through bank accounts. By doing so it will be better placed to determine which activities were related to criminality and malfeasance. This will assist State Owned Enterprises and taxpayers to recover funds lost in this process.

Evidence of Mr Johan Petrus Burger

38. Mr Burger testified before the Commission on 18 September 2018. Mr Burger was, during April and May 2016, a director and the CEO of FirstRand Bank Limited. FNB is a division of FirstRand.

39. In his evidence, Mr Burger described the process pursuant to which FNB closed client accounts. He made the point that banks had a legal obligation to scrutinise ("vet") a proposed client before opening an account and to monitor clients on an ongoing basis. He said that FNB not only had such obligations under SA legislation but also pursuant to the UK's Bribery Act and the USA's Foreign Corrupt Activities Act because FNB did not restrict its business activities to the Republic. He said that FNB had to take positive steps to ensure that it was not being used for money laundering or other unlawful activities.

40. In his oral evidence, Mr Burger further made the point that FNB was careful to avoid reputational and consequent business risk pursuant to its dealings with its own clients.If events external or internal to a client relationship lead FNB to question whether a relationship ought to be maintained, FNB would conduct a due diligence, which would include transaction monitoring for potentially suspicious transactions. This might lead to the next phase of the process, deliberation. FNB has an internal "person of interest (POI) forum, an independent committee set up to review client relationships in such cases.

41. This process was followed in the cases of Gupta related entities which had accounts with FNB. By letter dated 1 April 2016, FNB notified its Gupta related clients through its attorneys that it had decided

to terminate its relationships with these entities with effect from 31 May 2016. The Gupta entities which had accounts with FNB were Tegeta Exploration and Resources (Pty) Ltd, TNA Media (Pty) Ltd, Islandsite Investments One Hundred and Eighty (Pty) Ltd and Sahara Computers (Pty) Ltd.

42. The Gupta related entities asked for the reasons for the decisions and FNB's attorney responded in a letter dated 13 April 2016 that the decision had been taken due to associated business and reputational risks.

43. In a letter dated 24 October 2016 to FNB's attorneys, the attorneys for the Gupta entities made allegations against FNB and asked FNB for information. FNB responded through its attorneys in a letter dated 31 October 2016 rejecting the allegations made against it and declined on several grounds, to provide the further information sought.

44. By email on 22 April 2016, Ms Kellerman, who described herself as the Acting Secretary of the IMC, requested FNB's CEO to attend a meeting with the committee. FNB had learnt that the committee had been set up to look into certain allegations made against certain financial institutions. On 23 April 2016, in response Mr Burger asked amongst other things for details of who would be attending on behalf of the committee, what specific allegations had been levelled against FNB and what the nature and scope of the committee's process would be.

45. Ms Kellerman responded on 24 April 2016 that she was not mandated to respond to questions. On 24 April 2016 FNB declined to attend the meeting. On 4 May 2016 Ms Kellerman again invited FNB to a meeting with the committee. After further correspondence, during which Mr Burger raised questions and Ms Kellerman responded that she was not authorised to answer questions, FNB again declined to meet the committee.

46. On 18 or 19 April 2016 Mr Burger received a call from Mr E Godongwana, who was trying to set up a meeting between bank CEOs and the SG of the ANC in regard to the closure of client accounts. After some correspondence, during which Mr Burger enquired who would be attending the meeting and what its agenda would be, to which Mr Burger received no response, Mr Godongwana notified Mr Burger by text message that the meeting was off.

47. Mr Burger accordingly did not meet the members of the committee or the ANC in regard to the alleged irregularities or the closure of client accounts. Mr Burger stated that in his 32 years in banking, this was the first time ever that he had received requests from a political party or an inter-ministerial committee to discuss bank-client relationships and that the involvement of the Minister of Mineral Resources (Mr Zwane) in relation to the operations of financial institutions was worrying. The proper organs for that purpose are the Minister of Finance and other regulatory bodies conducting oversight in relation to the financial sector.

Evidence of Ms Yasmin Masithela

48. In 2016 Ms Yasmin Masithela was Head of Compliance at Absa Bank Ltd. She testified before the Commission in 2018 when she was Absa's Chief Executive: Strategic Services.

49. Ms Masithela explained that Absa was a subsidiary of Barclays Africa Group Ltd, which itself was a subsidiary of Barclays PLC. As such Absa was obliged throughout the world to comply with laws pertaining to the combating of money laundering and terrorist financing and fell squarely within the regulatory ambit of financial authorities in all major countries. She stated that Absa had risk management policies to ensure that Absa was not used for unlawful activities. She testified that Regulation 36 of the Regulations made under the Banks Act required banks to have in place mechanisms to prevent this from happening.

50. In about November 2014, as part of Absa's normal annual review process, the relationship between Absa and what Ms Masithela described as the Oakbay companies, i.e., those Gupta related companies which held accounts at Absa, came under review. An organ within Absa, its politically exposed persons (PEP) review committee decided that Absa should exit the relationship with its Gupta controlled customers.

51. In December 2015 Absa gave notice of its intention to close the bank accounts of various Oakbay companies and related parties. In February 2016 Absa closed the accounts concerned.

52. The Absa review committee concluded that the Oakbay companies were not using ABSA as their primary or dual bank and were apparently moving their banking accounts elsewhere to other financial institutions. As a consequence, ABSA was limited in its ability to monitor appropriately and understand the transactional activity in those accounts. There was also evidence of large unexplained transfers of funds between the Oakbay companies and related parties at other banks. ABSA was unable to account for these transfers in accordance with its obligations. Furthermore, the revenue received by ABSA from the portfolio at the time had declined materially over the years and the costs of fulfilling its monitoring obligations in respect of this account had accordingly been significant. Ms Masithela also said that there was adverse media that was in the public domain regarding the Oakbay companies and related parties which increased the reputational and conduct risk arising from a continued relationship with these companies and ABSA.

53. Ms Masithela confirmed the identities of 33 linked companies and individuals which or whom Absa considered to be Gupta linked and thus hit by the decision to terminate. These included Oakbay itself, Sahara Computers, Tegeta, Shiva Uranium, TNA Media, Westdawn, Mr Duduzane Zuma, Mr Rajesh Gupta, Mr Atul Gupta, Ms Chetali Gupta, Mr Varun Gupta, Mrs Shivani Gupta and Mrs Arti Gupta.

54. On 20 April 2016 and at the request of the NEC of the ANC, a meeting was held at Luthuli House between representatives of Absa and representatives of the NEC of the ANC. The ANC was represented by Mr Gwede Mantashe, Mr Enoch Godongwana, Ms Jesse Duarte and Mr Krish Naidoo, the ANC's legal representative. Absa's team was led by its CEO, Ms Ramos, and included Ms Masithela.

55. The stated purpose of the meeting was to discuss the judgment in *Bredenkamp and Others v Standard Bank of SA Ltd*, which provided certain guidelines about how a bank ought to go about terminating its relationship with its own client and to enable the ANC to understand the regulatory framework applicable.

56. Absa made clear, and the ANC appeared to accept, that Absa would not discuss the affairs of any specific client. Despite this, the ANC also raised the allegation or perception that the banks had colluded in effecting the closures of the accounts of the Gupta related entities.

57. On 22 April 2016 Absa received an email from Ms Kellerman requesting Absa to attend a meeting with the IMC on 25 April 2016 to gain clarity on current media reports relating to allegations against certain financial institutions. Absa requested further information regarding the nature of the proposed meeting. The information sought was not provided to Absa's satisfaction and Absa sent an email on 24 April 2016 declining the invitation to the meeting.

58. By email sent on 4 May 2016, Ms Kellerman extended a further invitation to Absa to a meeting with the IMC to discuss the deterrent effect the closure of client bank accounts might have on potential investors in South Africa. On the same day, Absa declined the request to meet the IMC.

Evidence of Mr Michael William Thomas Brown

59. Mr Brown made a statement to the Commission and gave evidence. When he testified, he was the CEO of Nedbank Limited, the banking entity in the Nedbank group.

60. Mr Brown testified that in February 2016 Nedbank began reviewing its relationship with the Gupta family and associated entities, following a request by Mr Brown to Nedbank's Chief Risk Officer to escalate reviews of Gupta-related accounts. Mr Brown perceived at the time that Nedbank's relationship with the Gupta-linked entities posed an increased reputational risk to Nedbank. Of particular relevance was a statement on Ministry of Finance stationery containing an allegation from the then Deputy Minister of Finance that members of the Gupta family had offered him the position of Minister of Finance to replace the then Minister, Mr Nhlanhla Nene.

61. On 4 April 2016 Mr Brown saw media reports and reports from the underlying companies confirming that both KPMG who were the auditors to these companies and SASFIN who at that stage were the

sponsoring broker, had terminated their relationships with the Gupta family. Mr Brown considered, from a Nedbank point of view again, that these were particularly significant terminations, because he regarded it as likely that the auditor of a set of companies was privy to information that Nedbank, who were not the main transactional bankers to the Gupta family, would not have had. He took the view that there must have been a reason for them to make their decision. Mr Brown noted that the then CEO of KPMG was quoted as saying that the association risk was too great for them to continue. While there was no direct quote from the sponsoring broker, Mr Brown considered it likely that Sasfin would have had access to more information than Nedbank at that stage.

62. Nedbank proceeded to convene a meeting of a sub-committee of its executive committee which was mandated to review Nedbank's relationships with the Gupta family. That sub-committee concluded that because of the reputational and business risks associated with doing business with the Gupta family, Nedbank should give notice to terminate the accounts held at Nedbank by these entities. Accordingly, on 7 April 2016 - Oakbay, Islandsite, Confident Concept (Pty) Ltd and Sahara Computers were given 30 days' notice of termination. Termination letters were tendered to a representative of the Gupta entities at a meeting on 7 April 2016. The representative refused to accept the notices. Thereafter, the notices were delivered by registered post. On 4 May 2016 notice of termination was given to a further Gupta company, VR Laser Services (Pty) Ltd.

63. On 14 April 2016 Mr Howa of Oakbay requested an urgent meeting with Nedbank. Mr Brown did not attend this meeting but learnt that the meeting was held between Mr Howa and officials of Nedbank, that Mr Howa urged Nedbank to reconsider its closure decision and that Nedbank refused to do so.

64. On 20 April 2016 Mr Brown attended a meeting at Luthuli House at the request of Mr Mantashe, Ms Duarte, and Mr Godongwana to enable them to get a better understanding of the process banks followed to close customer accounts. Mr Brown was told that complaints had been made by the general population that banks were able just to close accounts unilaterally. This was the first time that Mr Brown had ever been asked to attend a meeting to discuss the closure of Nedbank's customer accounts. He testified that Mr Mantashe and Ms Duarte attended the meeting. Mr Brown was not sure whether Mr Godongwana attended.

65. Mr Brown explained that Nedbank's closure decisions were made without consulting other banks but on reasonable notice, after Nedbank had assessed the situation. He testified that, if the client wanted to discuss the matter, Nedbank would be prepared to listen to what the customer had to say and may, in a proper case, reverse its closure decision.

66. Mr Brown did not feel that the ANC had sought to place him under any pressure to reopen the Gupta accounts.

67. On 4 May 2016 Nedbank received an email from Ms Kellerman to say that an IMC had been established by Cabinet to look into certain allegations made against certain financial institutions. Mr Brown testified that he understood the IMC to consist of the Minister of Mineral Resources, Mr Zwane, the Minister of Finance, Mr Gordhan, the Minister of Labour, Ms Oliphant and the Minister of Communications, Ms Muthambi.

68. The purpose of the meeting was said to be to gain clarity on the media reports and public statements made by Nedbank with regard to the closing of bank accounts and/or termination of bank/client relationships. The meeting was held at the offices of the Minister Zwane in Pretoria. Mr Brown said that before this meeting he had not met government at the offices of the Minister of Mineral Affairs in relation to banking matters.

69. On 5 May 2016 Ms Kellerman informed Mr Brown that she was unable to confirm who from the IMC would be attending the meeting as it was an ad hoc meeting. The meeting was attended on the government side by Mr Zwane, Mr H Mkhize as Ms Oliphant's representative and two other persons who were not introduced. Mr Brown asked if the meeting was quorate and Mr Zwane assured him that it was.

70. A letter put up by the Minister of Finance in the application, written by Mr Gordhan to Mr Zwane and dated 22 April 2016 was drawn to Mr Brown's attention. The letter stated, amongst other things, that

Mr Gordhan had established that:

70.1 The date on which Mr Zwane had announced that the Cabinet had met and authorised the constitution of the IMC, April 2016 was incorrect because no Cabinet meeting had been held that day

70.2 No IMC had been established

70.3 Three Ministers were nominated: Finance, Labour and Mineral Resources

70.4 No one Minister had been designated as convenor in contradiction of Mr Zwane's announcement that he had been appointed to chair the IMC; and

70.5 The financial services sector was not "already distressed" as Mr Zwane's letter indicated and care had to be taken not to compromise financial stability.

71. In response to a request from Nedbank, Ms Kellerman said in an email on 9 May 2016 that the following had attended the meeting on behalf of government: Mrs F Muthambi as well as her advisors, Messrs Z Manyi and Z Nene, Ms M Oliphant as well as her advisors, Mr H Mkhize and DDG Mr V Seafield, Mr Zwane and his advisor, Ms S Kellerman. However, Mr Brown testified that this was inaccurate as Ms Muthambi, Mr Manyi and Ms Oliphant had not attended the meeting.

72. Mr Zwane began the meeting by saying that the IMC had been constituted by Cabinet and was not there to represent any particular company or family but to resolve apparent issues of investor confidence and reported potential job losses. In response Mr Brown affirmed that Nedbank would not discuss individual cases. He went on to explain the regulatory environment. He quoted from a JP Morgan report which dealt with reputational risk and in which JP Morgan disclosed publicly that it had closed 18 000 accounts. He said that Nedbank had similar experiences. In the year ending in June 2016 Nedbank had closed about 100 accounts for reputational reasons.

73. Despite Mr Zwane's assurance that individual closures would not be raised at the meeting, several questions were asked about the triggers for the closures of the Gupta accounts including a reference to a recording of a Nedbank staff member talking to a client about the Gupta accounts. Mr Zwane also observed that Nedbank was not the main transactional banker to the various Gupta entities and went on to suggest that Nedbank might step in to save jobs and come to an amicable solution.

74. Mr Brown found the request strange and reminded Mr Zwane that Nedbank could not discuss specific customer matters. At the conclusion of the meeting, Mr Zwane thanked Nedbank for its attendance and remarked that he found it surprising that other banks had refused to attend the IMC meetings considering that banks received their licences from the government. Mr Brown perceived this as a threat. After the meeting, Nedbank asked for a set of minutes of the meeting, but no minutes were provided.

75. Mr Brown left the meeting with the impression that the IMC was focused on two key issues: to try to determine whether there had been collusion amongst the banks in relation to the Gupta account closures and to see whether Nedbank would be prepared to become the Guptas' primary transactional banker.

Evidence of Mr Gwede Mantashe

76. Mr Mantashe submitted an affidavit which he signed on 11 November 2018 on behalf of the ANC. Mr Mantashe testified that the ANC met with Standard Bank, Absa and Nedbank but not with FNB.

77. Mr Mantashe said in his statement that the purpose of the meeting convened by the ANC with the Standard Bank (and, therefore, by extension with the other banks as well) was not to discuss the bank's relationship with a "particular customer" but to "obtain a better understanding of the process and criteria applied by Standard Bank in entering into and terminating banking relationships with its customers, especially when politically-exposed persons are involved". In his oral evidence he said that Oakbay's argument for the ANC to intervene with the banks was that the termination decisions

had caused job losses. The ANC had two meetings with Oakbay. The first meeting was to explain the structure of the company and the second focused on job losses.

78. Mr Mantashe admitted that at the meeting with Standard Bank, the ANC expressed a concern that there was a perception that race or political affiliation played a role in Standard Bank's decisions to retain or terminate relationships with its customers.

79. Mr Mantashe admitted that at the meeting, the ANC expressed a concern about possible collusion between Standard Bank and other banks.

80. Mr Mantashe stated that the ANC made the point at the meeting with Standard Bank that stringent FICA requirements could force the dishonest into cash transactions.

81. On 8 April 2016 Mr Howa, the CEO of Oakbay, sought a meeting with Mr Mantashe to discuss job losses in the group arising from the banks' decisions to close accounts. Mr Howa said in a letter to Mr Mantashe that he believed that the terminations were anti-competitive and politically motivated, designed to marginalise the Gupta entities. The ANC was concerned about the impact of such action on the employment situation and the serious nature of the allegations. It held two meetings with executives of Oakbay. The second such meeting was held after the account closures. Arising from these meetings and the allegations made by Mr Howa, the high office bearers of the ANC directed Mr Mantashe to meet the four banks involved and "some of the relevant Ministers". The decision to create the IMC however rendered it unnecessary for Mr Mantashe to meet the Ministers.

82. Mr Mantashe went to the meetings with the banks armed with a "framework of principles" developed by its officials for the engagement. The principles were:

    82.1 The ANC had to be mindful that banks were not permitted to share information about their customers with a third party. The engagement, therefore, had to be about principles and general facts.

    82.2 The ANC sought clarity on how "consistent is the principle of account closures applied" and how "widespread is the practice of account closures in the banking sector".

    82.3 The ANC sought to enquire whether the "internal debate on corporate capture in the ANC had an impact on the banks' decision-making processes in relation to closure of accounts."

83. This framework was extended, "emanating from certain quarters in the ANC", to seek clarity on:

    83.1 Whether the banks were using their ability to terminate banking relationships to exercise the power of "white monopoly capital" against black business "to a degree that should concern policy makers"; and

    83.2 Whether the four large banks were "colluding or acting in concert in withdrawing banking services from a common customer."

84. On 23 May 2016 the officials of the ANC reported the essence of their discussions with Oakbay to the ANC's National Working Committee (NWC) and Mr Mantashe reported on his meetings with the banks. Following these reports, the NWC observed that:

    84.1 The "coordinated action of the banks smacks of collusion"; the power of the banks to "close businesses without being required to explain their action" was a threat that these powers could be abused for various reasons, including possible resistance to transformation.

    84.2 The potential for job losses had to be raised sharply without the ANC being seen as the spokesperson for any particular company.

    84.3 The government had to ensure that there was broad understanding at government level of the legislation in question; it would serve a good purpose if leaders and public representatives of the ANC were made to understand the concept of politically exposed persons (PEPs) and the moral stigma attached to PEPs, "i.e., that they are morally corrupt until proven otherwise".

84.4 The ANC had to always be sensitive to public perceptions and appreciate the need to reassure society that its interventions were genuine.

84.5 With hindsight, the engagement with the banks would have been more effective if conducted through the regulator; any other approach carried the risk that the ANC would be seen to be talking from a biased position without acquainting itself with the facts; as the ANC raised the issue of possible job losses, the ANC had to emphasise the importance of businesses complying with law.

85. At its meeting of 28-30 May 2016 the NEC of the ANC adopted the report of the NWC and resolved that the decision of the ANC to meet with the banks had been driven by loss of jobs, perceptions that the banks were colluding and perceptions that the banks were exercising the power of "white monopoly capital" (WMC) against black businesses.

86. Mr Mantashe conceded that at the time this resolution of the NEC was passed, it was public knowledge that President Zuma had a relationship with the Guptas, that Mr Duduzane Zuma had a business relationship with the Guptas and the facts and allegations around the purchase of Optimum mine from Glencore by Tegeta were being aired in the media. The media were also reporting that Tegeta had been awarded a contract worth R4 billion to supply coal to the Majuba power station in Mpumalanga. It was also known by the ANC that Mr Jonas had publicly announced that he had been offered the position of Minister of Finance by the Guptas (although Mr Mantashe doubted that this was true). The ANC was also aware that Mr Themba Maseko had claimed that President Zuma had requested him to help the Guptas. Mr Mantashe said Mr Maseko was one of the eight ANC members who came forward with allegations that efforts had been made to corrupt them in favour of the Guptas.

87. In his oral evidence Mr Mantashe said that during the meetings the banks explained the processes they followed in complying with the law. Mr Mantashe said that in the end "we understood the basis of banks closing accounts and that was the essence of our meeting." After the meetings, Mr Mantashe said, the ANC reported telephonically to Oakbay that while their argument regarding job losses was attractive, the ANC could not help the Guptas because "people must comply with regulations and rules".

88. At the same NEC meeting, the ANC created a process by which persons could report conduct by the Gupta family amounting to what is now called "state capture". Mr Mantashe noted that eight ANC members came forward with information and noted these members' preference was for their submissions to be made to an independent body.

89. Mr Mantashe's statement concluded with the quotation of a resolution passed by the ANC at its national conference in December 2017 declaring unanimously its resolve to combat corruption and an observation that this Commission was appointed by former Present Zuma a month later on 23 January 2018.

Evidence of Mr Mosebenzi Joseph Zwane

90. Mr Zwane was the Minister of Mineral Affairs in 2016. In 2021 he was a member of Parliament and was no longer a Minister. He was invited to respond to the evidence in relation to the account closures and did so in an affidavit he signed on 31 May 2021 in response to questions sent to Mr Zwane by an evidence leader.

91. Mr Zwane's answer to the evidence that he put pressure on the banks to reverse their closure decisions was that he did so in an effort to forestall job losses. This, he said, was also why he travelled to Switzerland to attend a session of the negotiations between Glencore and Tegeta relating to the acquisition by Tegeta of the Optimum mine. He claimed that he never discussed Cabinet business with third parties. Mr Zwane confirmed that an IMC was constituted of which he was the chair.

EVALUATION

92. The facts show that there were four banks which provided banking facilities to the Guptas: namely, Standard Bank, FNB, Absa and Nedbank.

93. Standard Bank gave notice to terminate on 6 April 2016; FNB gave notice on 1 April 2016, Absa gave notice in December 2015. Nedbank gave notice on 7 April and 4 May 2016.

94. Each of the banks' representatives gave his or her bank's reasons for terminating the relationship. Absa, described by one of the witnesses as the main transactional bank used by the Guptas, was the first to terminate. Ms Masithela gave those reasons as the Guptas appeared to be moving their accounts away from Absa, which limited its ability to monitor the character of transactions, there were large unexplained transfers of money between the Oakbay companies and related parties, the costs of monitoring the account were significant and there had been adverse reports in the media regarding the Guptas.

95. Some four months later, the other three major banks followed suit in short order.

96. Mr Sinton gave Standard Bank's reasons for its closure decision. He said that Absa had previously terminated its relationships with certain Gupta companies; the Gupta companies' auditors had terminated their relationship with the Gupta companies; former Deputy Minister Jonas had published on the National Treasury website the allegation that the Guptas had offered him benefits if he would do their bidding, a former MP; Ms Mentor had announced that she had been offered a Cabinet post by the Guptas in exchange for favours; Standard Bank provided services to the Gupta group in the media business through two of its own customers and was concerned about being implicated in unlawful behaviour; Mr Themba Maseko had announced that he had been instructed to help Gupta entities; Minister Zwane had accompanied a Gupta delegation to Switzerland to negotiate the purchase by the Guptas of the Optimum coal mine from Glencore ; it had been reported in the press that one of the Gupta companies had bound itself as surety for the obligations of a trust in which a wife and son of President Zuma were beneficiaries; Estina (Pty) Ltd had been awarded a contract to develop a farm in the Free State but had sent substantial sums of the money paid to it to Dubai rather than using it for the proper purpose; the Guptas had attempted to persuade Standard Bank to transfer money held in trust for the rehabilitation of Optimum mine to the Bank of Baroda. In addition, Standard Bank's money laundering reporting officer had warned the bank to use extreme caution in dealing with the Gupta companies.

97. Mr Burger gave FNB's reasons for its decision to close the accounts as reputational and consequent business risk pursuant to FNB's dealings with its own customers.

98. Mr Brown gave Nedbank's reasons for the termination of the bank-client relationships as the resignations of the Gupta companies' auditor and sponsoring broker, and reputational and business risks as determined by the sub-committee of its executive committee.

99. There is no reason to doubt the veracity and cogency of this evidence. The suggestion that these banks might have terminated, or did terminate, for reasons of racial prejudice and jealousy (all embraced within the manufactured public relations tag of "white monopoly capital") demands that it be accepted that these banks decided to cut themselves off from a lucrative income stream and, for some unexplained motive, decided to suspend their participation in this competitive market to achieve some other unstated goal.

100. Not only is there no evidence on which to disbelieve the witnesses who explained the conduct of the banks, but the probabilities are strongly against the white monopoly capital, anti-competitive, collusion narrative. From the abundant evidence before the Commission, it is clear beyond any reasonable doubt that the Guptas, and their politically connected enablers, had embarked on a coordinated campaign to loot the South African state coffers and, until the banks stopped them from doing so, were using the banks as their vehicles for this purpose. It is equally clear that, when this looting became notorious in the public sphere, the banks were obliged by law to act against the Guptas and did so for that reason.

101. The banks should, therefore, not be criticised for acting against the Guptas. If anything, the three banks which delayed their closure decisions until April 2016 might have been interrogated as to why it had taken them so long to act.

102. Although some doubt exists as to whether Cabinet ever constituted an IMC to enquire into the reasons surrounding the termination decisions was raised by Mr Gordhan in his letter dated 24 May 2016.

103. The application for a declaratory order was launched after Mr Howa had persistently sought to place Mr Gordhan as Minister of Finance under pressure to intervene on behalf of the Gupta companies to procure the reversal of the termination decisions. To this end, Mr Howa engaged in correspondence and met with Mr Gordhan. This correspondence was attached to Mr Gordhan's founding affidavit in the High Court application. For example, on 8 April 2016, Mr Howa wrote that the termination decisions, and indeed the termination decision of their auditors as well, were the result of an "anti-competitive and politically motivated campaign designed to marginalise our businesses."

104. In response, Mr Gordhan obtained counsel's advice that nothing in law authorised governmental intervention with the banker-client relationship arising by contract. In a letter dated 24 May 2016, Mr Gordhan communicated this advice to Mr Howa and pointed to the highly regulated environment in which banks operated and to the legal impediments to banks discussing client related matters with the Minister of Finance and suggested that Oakbay exhaust its legal remedies.

105. Nonetheless, Mr Howa, while acknowledging that the termination decisions were unassailable in a court of law, persisted with his requests that Mr Gordhan as Minister of Finance somehow assist him to achieve the reversal of the decisions.

106. The pressure exerted by Mr Howa was the reason stated by Mr Gordhan for his decision to institute the application for a declaratory order. It is overwhelmingly probable, however, that Mr Gordhan was faced with pressure from some of his colleagues in the Cabinet and the ANC to place pressure on the banks to reverse their termination decisions:

    106.1 It is likely that Mr Howa, having unsuccessfully sought to pressurise the Minister of Finance into an interaction with the banks, placed the same pressures on the ANC and government.

    106.2 It is similarly probable that the ANC and the government acceded to Mr Howa's request. Never before, in the lengthy experience of the bank officials who testified had the ANC or government sought or held meetings with banks to discuss their decisions relating to a single client and exert pressure on banks to reverse or modify their termination decisions.

    106.3 Mr Gordhan did not attend any of the meetings convened by government to pressurise the banks. This reinforces the conclusion that Mr Gordhan was not prepared to do something counsel had advised him was unlawful.

    106.4 Both the Cabinet and the ANC had decided to place such pressure as they could on the banks to reverse their decisions. It is highly unlikely that Mr Gordhan would not have disclosed to his colleagues the legal advice which rendered it unlawful for the government to intervene in the dispute and which justified his stance.

    106.5 It is therefore probable that both the ANC and government tried to place pressure on the banks to reverse their closure decisions even though they knew that they had no legal right to intervene in individual banker-client relationships.

    106.6 This is reinforced by the acknowledgement of both the ANC and Mr Zwane to the banks at the various meetings that they were not entitled to intervene in, or receive information about, the circumstances of and context within which the termination decisions had been made in respect of any client(s) of the specific banks.

    106.7 Nevertheless, other members of the National Executive, particularly Mr Zwane in his statement that the President had decided to establish a Commission of Inquiry to investigate the banks, had chosen publicly to perpetuate the narrative that the termination decisions had been taken on improper grounds.

106.8 The evidence of the bank officials makes plain that, while both the ANC and Mr Zwane paid lip service to the principle that there could be no discussion of the relationships between the Gupta account holders and the banks, the conversation at the meetings was constantly steered in that direction and the bank officials were left in no doubt that they had incurred the displeasure of the ANC and of government and would only regain their good opinion by restoring banking facilities to the Guptas.

106.9 Indeed, Mr Zwane did not deny that he used what he mistakenly believed to be the government's power to interfere with banking licences in an effort to pressurise Standard Bank to bend to government's will.

106.10 While concern over job losses was a legitimate focus of both the ANC and the IMC, their focus on this aspect was no more than a cover for their attempts to pressurise the banks into reversing their termination decisions. It was hypocritical to focus on job losses.

106.11 When Mr Zwane's attempts at the meetings to impose the Guptas' will on the banks through government failed, his next move was to announce that the President would appoint a Commission of Inquiry to investigate conduct that did not remotely display any of the negative characteristics both the ANC and government sought to attribute to it.

106.12 The Presidency proceeded to issue a statement repudiating Mr Zwane. It appeared from the text of the statement that even the suggestion that such a commission was to be appointed had disconcerted the markets. However, when President Zuma was questioned on the subject in Parliament, President Zuma gave answers which would enable him to jump either way; either to establish such a commission or to repeat the repudiation of Mr Zwane, by so doing casting doubt on the assertion in the statement that Mr Zwane's utterance had been unauthorised and unfortunate.

106.13 At some stage while answering questions about the Government's reaction to the closure of the bank accounts of the Gupta entities in Parliament on 23 November 2016, President Zuma said:

> We wanted to look into that matter and get to the bottom of it because we cannot say, at any other time any business person will be dealt with and the government will just stand and look. [Interjections.] We were not dealing with the company but the actions of the bank. That is what we were dealing with and we will continue to do so. [Applause.]
>
> We are responsible because we are government of this country. There is nothing that sounds very suspicious that we are going to look at and do nothing. That is the reason why we acted on this one. Thank you, Madam Speaker. [Applause.]

106.14 Conspicuous by its absence from President Zuma's answers and remarks was any concern about the possibility that the banks may have taken the decisions they took because his friends, the Guptas, were involved in suspicious transactions. When it came to the conduct of the banks, he said when there was "action" that looked "suspicious", as a responsible government governing this country, they had to investigate, and yet there had by 2016 been a lot of allegations of criminality and wrongdoing on the part of the Guptas and yet this government as a responsible government that governs this country, as he put it, had not seen fit to investigate the Guptas.

106.15 Finally, on this subject, there is the reaction of the NEC of the ANC to what they must have regarded as the banks' intransigence. Without any evidence to back them up, they adopted as the party position a stance which characterised the actions of the banks as racially motivated mischief ("white monopoly capital"), anti-competitive and collusive. There is not a word in the resolution of the NEC which recognises the right of the banks to manage their own businesses if they do so in good faith. Indeed, the tone of the resolution conveys the strong impression that the ANC had decided that the banks had not acted in good faith. Nor is there any reference to the wrongdoings of the Guptas which had been reported at the highest party level from within their own ranks.

106.16 Nevertheless, the ANC recognised that their support for their members, the Guptas, might back-

fire on them. So they included in the resolution of the NEC a reference to the anxieties of some of their own comrades about the conduct of the Guptas and a vague reference to a process by which the anxieties might be redressed.

107. The regret expressed by the ANC about the decision to take on the banks publicly and directly was not a moral regret; it was a regret that the tactic employed had not born political fruit. This conclusion is reinforced by the suggestion in the assessment of the ANC, testified to by Mr Mantashe, that the "engagement with the banks would have been more effective if conducted quietly and done through the regulator."

CONCLUSIONS

108. The accusation that the termination decisions to close bank accounts were taken to advance the agenda of WMC, was entirely unjustified on the facts of this case. There is absolutely no evidence to support that accusation. The decisions of the banks were taken in the light of their legal obligations when a client appears to be involved in suspicious transactions that could cause a bank reputational damage.

109. It is quite clear with regard to the meetings that representatives of various banks had with the Inter-Ministerial Task Team chaired by Mr Zwane that that Task Team's focus, as they seem to have understood it themselves, was to get the banks to reverse their decisions to close the bank accounts of the Gupta-owned companies. Therefore, that Task Team improperly intervened in the matter of the closing of the bank facilities of the Gupta owned companies to advance the cause of the Guptas. That is why in one or more of the meetings Mr Zwane effectively asked bank representatives what the Guptas would need to do in order for the banks to reverse their decision.

110. President Zuma may have issued a media statement repudiating a statement that had been issued by Mr Zwane to the effect that the Cabinet had decided that a judicial commission of inquiry would be appointed to investigate the conduct of the banks concerned. However, if one reads the transcript of the proceedings of the National Assembly on 23 November 2016 when President Zuma was answering questions on, among others, the Government's reaction to the closure of the bank accounts of the Gupta-owned companies, one wonders to what extent what Mr Zwane had articulated may have been something that Mr Zuma would also have wanted but had felt that he would not have enough support for it. I say this in part because the transcript of those proceedings on that day reveal that President Zuma said that as Government they wanted to investigate the conduct of the banks. A Commission of inquiry conducts an investigation. Subsequently, President Zuma does not seem to have pursued the idea of an investigation once the idea of a Commission of Inquiry had been rejected. So, it may well be that the investigation that President Zuma talked about in Parliament was intended to be conducted by a Commission of Inquiry as Mr Zwane had announced but the idea was not pursued once it was clear that there would be a lot of criticism against the Government if it was pursued.

111. In this regard it must be remembered that President Zuma was the President of the ANC and the country in 2016. He still had strong support both in the ANC and in the Cabinet. It must also be remembered that the evidence heard by the Commission was to the effect that his friendship or bond with the Guptas was very deep. This was part of the evidence that was given by Mr Rajesh Sundaram when he testified about the relationship between Mr Zuma and the Guptas. We have seen in the evidence heard by the Commission that President Zuma's relationship with the Guptas was so deep that he was even prepared to fire his own ANC comrades in Government if that is what the Guptas wanted. We saw that when he removed Mr Themba Maseko from GCIS because Mr Ajay Gupta wanted him removed. We can see in this Report that he was prepared to fire Minister Nene who was doing a good job as Minister of Finance simply because he was not prepared to work with the Guptas and was not prepared to approve transactions that he believed were not in the interests of the country.

112. Given all the above and all evidence heard by the Commission in relation to President Zuma, there can be no doubt that he wanted the "IMC" to come to the assistance of his friends, the Guptas, which

would have been and was an improper interference in the relationship between the banks and their clients. That conduct on his part was also in breach of section 96(2)(b) of the Constitution. That section reads:

> 2. Members of the Cabinet and Deputy Ministers may not . . .
>
> b. Act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests ....

113. It was also in breach of section 2 of the Executive Members' Ethics Act. That Act reads:

> Code of ethics 2.
>
> (1) The President must, after consultation with Parliament, by proclamation in the Gazette, publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities.
>
> (2) The code of ethics must—
>
> (a) Include provisions requiring Cabinet members, Deputy Ministers and MECs—
>
> (i) At all times to act in good faith and in the best interest of good governance; and
>
> (ii) To meet all the obligations imposed on them by law; and
>
> (b) Include provisions prohibiting Cabinet members, Deputy Ministers and MECs from—
>
> (i) Undertaking any other paid work;
>
> (ii) Acting in a way that is inconsistent with their office;
>
> (iii) Exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;
>
> (iv) Using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person; and
>
> (v) Acting in a way that may compromise the credibility or integrity of their office or of the government.

114. When one also has regard to the statements he made in Parliament on the matter, it is quite clear that he sought to improperly interfere in the matter of the closing of the banking facilities of the Gupta owned companies in order to assist his friends.

115. There is no doubt that Mr Zwane used his position as Chairperson of the Committee to try and assist the Guptas and get the banks to reverse their decisions. His intervention was improper and he should not have played that role. It would appear that Rule 3.3 notices were not served on other members of the Committee. For that reason, it would not be fair to make any adverse findings against them.

116. Mr Zwane was vested with the public power and used public resources in an effort to get done what the Guptas wanted. The Constitution requires public power to be exercised in good faith and for a proper purpose. President Zuma also used the power of his office to improperly intervene in the matter of the closure of the banking facilities of Gupta-owned companies in order to assist the Guptas.

117. One can only conclude that President Zuma and Mr Zwane misused their public power in an attempt to achieve a benefit for the Guptas, not because their case was a deserving one which ought to enjoy the protection of the state but because of the power and influence which the Guptas were able to wield in the South Africa of those times.

118. This conduct on the part of Mr Zuma and Mr Zwane ought to be deplored and condemned both as a violation of the powers vested in them by the Constitution and as a breach of the provisions of the Executive Ethics Code.

119. The ANC tried to say that it held the meetings that it held with the banks not because they wanted to assist the Guptas but because they wanted to understand the process and the circumstances under which a bank would terminate a banker-client relationship or because they were concerned about job losses. The TOR do not require findings in relation to the ANC. Nevertheless, the following questions can be raised:

    119.1 If the ANC wanted to understand the process relating to a bank closing a client's bank account, why did they refer to politically exposed persons in their questions to the banks when we know that the politically exposed persons they were really having in mind were the Guptas? Furthermore, if they just wanted an understanding of the bank processes, why could they not deal with the issues in the normal course? What was the urgency in the matter? They wanted to understand the process or reasons and then do what after the banks had explained? Why did they report back to Oakbay after their meetings with the banks if they simply wanted to understand the reasons and processes of the banks when in general they close client's bank accounts?

    119.2 If they were concerned about job losses or the workers, why did they not leave this issue to their ally COSATU, which deals with labour issues all the time? If they were concerned about workers, it is Oakbay which approached the ANC and not the workers – at least on the evidence heard by the Commission. If they had been approached by the workers, would they have called the meeting with the banks as they did or would they have referred the workers to COSATU?

120. As far as the Cabinet is concerned, it was improper for it to get involved in the matter of the four banks closing the accounts of the Guptas. Minister Gordhan was the Minister of Finance at the time. The banks fall under his portfolio. He was dead against the Cabinet and anybody getting involved in the relationship between the banks and their clients. He sought a legal opinion which made it clear that it would be improper for government to get involved. Mr Gordhan boycotted the committee that was chaired by Mr Zwane. It is highly unlikely that Mr Gordhan would have stayed away from that Committee without having explained to the Cabinet that it would be unlawful for the Cabinet to get involved. The Cabinet should have left this matter to the relevant regulatory body.

RECOMMENDATIONS

121. Some of the banks which closed the bank accounts of the Gupta companies were prepared to have a discussion with their clients before they could terminate their relationship with them but others appeared not to have been prepared to have such a discussion and thought that all they needed to do was to give their client a reasonable notice of the termination of the relationship. In Bredenkamp and Others v Standard Bank of SA Ltd the Supreme Court of Appeal decided that a bank was not obliged to hear its client's side of the story before the bank could terminate the relationship. It seems that the Supreme Court of Appeal's basis for this decision was that the relationship between a bank and a client is a contractual one.

122. Representatives of banks who testified before this Commission revealed that the banking industry is regulated or is subject to many laws. Banks possess an enormous amount of power. This would become very clear if all the banks were to refuse that you hold an account with them. You would not be able to run any serious business without being able to open a bank account. If you already had a bank account and all the banks in which you have accounts terminated their relationship with you that would be devastating. If you were running a serious business, you would need to close down that may result in job losses. Depending on the size of the business one may be talking about hundreds or thousands of people who would lose jobs. The workers would have to suffer serious consequences even though they may not have done anything wrong themselves.

123. In this day and age in South Africa it is unacceptable that an institution as powerful as a bank should have no obligation to hear – whether in a discussion or in writing - what a client has to say before the bank may close that client's account on suspicion that the client may be involved in illegal or corrupt transactions. It does not appear to be in line with the kind of society that our Constitutional democracy envisages. A decision to close a client's bank account on those grounds is a decision that could have

far reaching consequences for the client and others and it is only fair that banks be required to afford their clients the opportunity to be heard or to make representations to show if they are able to, that there are no grounds for the bank to be concerned. The bank may be persuaded or it may not be persuaded. The bank would need to afford the client a proper opportunity to be heard and should not just go through the motions or pay lip service to the principle of *audi alteram partem* (hear the other side).

124. The fact that the relationship between a bank and a client may be contractual is neither here nor there because there are other relationships which are or were at some stage contractual in nature and Parliament intervened in order to infuse the notion of fairness in the relationship. The first of those is the employment relationship. Under the common law an employer had all the power to terminate an employment relationship for a good reason or for a bad reason or for no reason at all and there was very little that an employee could do about such a termination. Labour legislation was enacted to infuse fairness into the employer-employee relationship and, now, an employer must have a fair reason to terminate the relationship and must follow a fair process to do so. The same applies to certain leases. Some legislation requires that certain tenants be treated fairly. Illegal occupiers of land also need to be treated fairly. In our legal system even those who are accused of rape and murder are not sent to jail without being given an opportunity to tell their side of the story. There is no reason why Banks should not be required to observe this basic principle.

125. It is therefore recommended that relevant existing legislation governing banks be amended to introduce this requirement of fairness or, if warranted, a new piece of legislation be enacted which will make this a requirement.

THE CONCEPT OF STATE CAPTURE

INTRODUCTION

1. This Commission is the result of remedial action directed by the former Public Protector, Ms Thuli Madonsela, on 2 November 2016, in her report titled State of Capture. The report was issued in terms of section 182(1)(b) of the Constitution read with section 8(1) of the Public Protector Act.

2. The State of Capture report relates to an investigation into complaints of alleged improper and unethical conduct by former President Zuma, certain state functionaries and the Gupta family in the appointment and removal of cabinet ministers and directors of SOEs which possibly resulted in the improper and corrupt award of state contracts and other benefits to the Gupta family.

3. The essential task of the Commission, as stated in the Proclamation[9] establishing it, is to investigate allegations of state capture, corruption and fraud. The terms of reference of the Commission (TORs), discussed more fully later, are broad in scope, with the Commission being appointed "to investigate matters of public and national interest concerning allegations of state capture, corruption and fraud." As will appear later, this broad formulation is narrowed somewhat by the terms of particular TORs.

4. The Proclamation specifically requires that in investigating, reporting and making recommendations the Commission shall be guided by the Public Protector's State of Capture report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016. While the concept of state capture is the central framing issue of concern for the Commission, neither the Public Protector's report, nor the High Court judgment, nor the TORs define the concept. There is also no legal definition of the concept to rely on.

5. Accordingly, understanding what is meant by "state capture" in the context of the Public Protector's report, the judgment and order of the High Court of 13 December 2017, and the TORs is thus of

[9] Proclamation No. 3 of 2018 GN 41403 GG 25 January 2018.

central importance to the Commission's work. A workable delineation of the concept of state capture is necessary to guide the Commission in determining how to approach the facts before it; in determining what conclusions or findings it can and should make; and in determining the related recommendations.

STATE CAPTURE AS UNDERSTOOD IN THE PUBLIC DISCOURSE

6. The term "state capture" has in recent years gained popularity in the South African public discourse, where it has been used generally to describe an increasing degree of corrupt private influence over state power. The term has been used in the media since 2013 but the beginnings of its pervasive use can be traced to the aftermath of the dismissal of the then Finance Minister, Mr Nhlanhla Nene, on 9 December 2015.

7. When the Public Protector produced her report, the term state capture had not yet gained the wide currency it has today. The publication of the report was the catalyst for civil society and the media to put together the pieces of the "big picture" of state capture in South Africa. The "Gupta-leaks" emails revealing the extent of state capture entered the public domain after the Public Protector's report was published.

8. Generally speaking, state capture is a term of art used in the lexicon of agencies and institutions involved in anti-corruption strategies and endeavours internationally. It has no precise, universal meaning and is used variously in different contexts to encompass activities by private actors and enterprises intent on their own enrichment by capturing state processes, regulatory functions and procurement, with the assistance of corrupt state functionaries. This conduct is often criminal in nature and depending on the circumstances may constitute the offences of corruption, fraud, money laundering and racketeering.

9. The Commission's mandate as proclaimed is directed at state capture, corruption and fraud in the public sector. In general terms, corruption in the public sphere concerns the unlawful exercise of influence over political and administrative decisions, and often the unlawful appropriation of public funds and benefits. It is essentially the abuse of entrusted power for private gain. Corruption is endemic in many countries and may in certain contexts become so prevalent that standard systems of accountability and law enforcement become inadequate and unable to restore constitutional standards of governance. The situation that was taking hold in South Africa threatened to have that outcome, and has required an intervention, namely the establishment of this Commission, to provide a comprehensive understanding of what occurred and how it occurred with a view to making recommendations regarding accountability and reform.

10. Against that background it is therefore necessary to determine an adequate and appropriate definition of state capture. Establishing the meaning of state capture for the purpose of the Commission involves identifying the key elements that make up the overall concept with a view to determining if these elements have been shown in evidence substantially to exist.

11. The concept of "state" is generally understood to mean the civil government and organised public sphere of a country, and includes the legislative and executive branches of government, but also all the public mechanisms and institutions whereby public services are delivered to the citizenry by all levels of government. Section 239 of the Constitution helpfully encompasses the notion of the state in the South African constitutional order. It defines an "organ of state" primarily to mean any department of state or administration in the national, provincial or local sphere of government. However, the definition goes further and includes "any other functionary or institution" exercising a power or preforming a function in terms of the Constitution, a provincial constitution or any legislation. It expressly does not include a court or a judicial officer. The Public Finance Management Act 1 of 1999 (PFMA) which regulates financial management in national and provincial government, further defines the state in South Africa. It applies to all national public entities. These include national government business enterprises and public companies which are publicly funded.

12. The word “capture” ordinarily and relevantly means the taking into one’s possession or control by force. In the context of state capture, the taking of control is not necessarily by force, but rather by illegitimate means. The taking of control need not be absolute. Rather, capture is attained where sufficient control can be exercised to achieve the corrupt purposes of improper enrichment or benefit.

13. However, it is important to note that state capture is not just about corruption and similar offences. It is not even just about widespread corruption. Corruption may be part of state capture but state capture is more than that. State capture, at least in theory, concerns a network of relationships, both inside and outside government, whose objective is to ensure the exercise of undue influence over decision-making in government and organs of the state, for private and unlawful gain. The task of the Commission is to consider the various ad hoc instances of corruption and to determine if there has been a coordinated and deliberate project of state capture. As is evident in various parts of this report, the Commission has identified repeated patterns of conduct of corruption or state capture as well as networks of persons, entities, government office bearers and state officials involved. Herein is the answer to the question as to whether an organised and recognisable project of state capture occurred in the period under review, which it manifestly did.

THE PUBLIC PROTECTOR’S STATE OF CAPTURE REPORT

14. The State of Capture report was based on various complaints filed with the Public Protector. The complaints requested the investigation and determination of several allegations including the following: 1. the veracity of allegations that the then Deputy Minister of Finance, Mr Mcebisi Jonas, and Ms Vytjie Mentor, a Member of Parliament, were offered positions in cabinet by members of the Gupta family; 2. all the business dealings of the Gupta family with government departments and SOEs to determine whether there were irregularities, undue enrichment, corruption and/or undue influence in the award of contracts, mining licences, government advertising or other governmental services; 3. President Zuma’s role in the alleged offer of cabinet positions to Mr Jonas and Ms Mentor; 4. President Zuma’s role in relation to the alleged corrupt offers and Gupta family involvement in the employment of cabinet members and directors of SOE boards; 5. whether President Zuma acted improperly and in violation of the Executive Ethics Code; and 6. the role and conduct of the cabinet in holding banks accountable for withdrawing banking facilities for Gupta owned companies and whether it was appropriate for cabinet to assist private business in this regard.

15. The Public Protector identified a number of issues as relevant for investigation. These included whether: 1. President Zuma had breached the Ethics Act and had acted improperly and in violation of the Code of Ethics; 2. President Zuma had allowed members of the Gupta family and his son, Mr Duduzane Zuma, to be involved in the process of removal and appointment of the Minister of Finance in December 2015; 3. President Zuma had allowed members of the Gupta family and his son to engage in or become involved in the process of removal and the appointment of various members of cabinet; 4. President Zuma had allowed members of the Gupta family and his son to be involved in the process of appointing members of boards of directors of SOEs; 5. President Zuma had enabled or turned a blind eye in violation of the Ethics Code to alleged corrupt practices by the Gupta family and his son in relation to allegedly linking appointment of cabinet ministers and board members to quid pro quo conditions; 6. President Zuma had improperly and in violation of the Code of Ethics exposed himself to any situation involving the risk of a conflict between his official duties and his private interests or used his position or information entrusted to him to enrich himself and the businesses owned by the Gupta family and/or his son so as to be given preferential treatment in the award of state contracts, business financing and trading licences; 7. other Cabinet ministers had improperly interfered with the relationship between banks and Gupta-owned companies thereby giving preferential treatment to such companies when they should have been handled by an independent regulatory body; 8. any state functionary in any organ of state or other person had acted unlawfully, improperly or corruptly in connection with the appointment or removal of ministers and directors or boards of directors of SOEs; 9. any state functionary in any organ of state or person acted unlawfully, improperly or corruptly in connection with the awarding of State contracts or tenders to Gupta-linked companies or persons; 10. any state functionary in any organ of state or other person acted un-

lawfully, improperly or corruptly in connection with the extension of state-provided business financing facilities to the Gupta-linked companies or persons; and 11. any state functionary in any organ of state or other person had acted unlawfully, improperly or corruptly in connection with the exchange of gifts in relation to Gupta-linked companies or persons.

16. As mentioned, the State of Capture report contains no definition of state capture, but there are a number of indications of what the Public Protector understood by the concept which had begun to emerge as part of the public discourse in South Africa prior to her report. The title of the report, “State of Capture” was presumably intended as a play on the term. State capture is broader in its conceptual reach than State of Capture which does not specify who (e.g., the President) or what (e.g., the state or government) has been or is being captured. “State of Capture” simply denotes that there is a situation, circumstance or setting of capture, with the application of the concept depending on the factual information filled in — whether implying a form of regulatory capture, or the capture of particular state institutions or SOEs, or more specifically the capture of the President by the Gupta family.

17. The term state capture appears in only one paragraph of the Public Protector’s report. This paragraph reads:

> The media reports alleged that the relationship between the President and the Gupta family had evolved into "state capture" underpinned by the Gupta family having power to influence the appointment of Cabinet Ministers and directors in boards of SOEs and leveraging these relationships to get preferential treatment in state contracts, access to state provided business finance and the award of business licences.[10]

18. While the paragraph reflects the essence of state capture as it has occurred in South Africa, (the improper influence of the Gupta enterprise in relation to the appointment of cabinet ministers and the directors and executives at SOEs in order to influence procurement and financing decisions), the concept is broader than this. The sub-title of the report and the issues identified for investigation envisage a broader scope. The focus of the report is on the improper and unethical conduct by the President and other state functionaries relating to improper relationships with the Gupta racketeering enterprise and involving inter alia the removal and appointment of cabinet ministers and directors and employees at SOE’s resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta enterprise.

19. A reading of the "State of Capture" report as a whole reveals that the Public Protector accepted the following elements as being the essential components of state capture in South Africa: i) improper relationships between influential state actors and private individuals or enterprises; ii) the resultant involvement and influence of those private individuals or enterprises in the appointment of cabinet ministers, directors and executives of SOEs, and other senior state officials; iii) the leveraging of the relationships so formed resulting in the improper and corrupt award of state contracts and benefits to the private individuals concerned; and iv) the consequent (mostly unlawful) financial and other benefits to those private individuals, their businesses and their associates.

20. After a review of the issues she identified for investigation, the Public Protector in paragraph 8 of the report proposed the following remedial action:

> 8.4 The President to appoint, within 30 days, a Commission of Inquiry headed by a Judge solely selected by the Chief Justice who should provide one name to the President.
>
> 8.5 The National Treasury to ensure that the Commission is adequately resourced.
>
> 8.6 The Judge to be given the power to appoint his/her own staff and to investigate all the issues using the record of this investigation and the report as a starting point.
>
> 8.7 The Commission of Inquiry to be given powers of evidence collection that are no less than that of the Public Protector.

[10] Page 5 at para viii, repeated verbatim on page 30 at para 2.6.

8.8 The Commission of Inquiry to complete its task and to present the report with findings and recommendations to the President within 180 days. The President shall submit a copy with an indication of his or her intentions regarding the implementation to Parliament within 14 days of releasing the report.

The judgment of the High Court

21. In December 2016, former President Zuma launched an application under case number 91139/16 in the Gauteng Division of the High Court, Pretoria to review and set aside the remedial action of the Public Protector instructing him to appoint a commission of inquiry. The former President sought an order that the matter be remitted to the Public Protector for further investigation on the basis that the Public Protector lacked the power to delegate her functions to a commission of inquiry. The review was directed, in the main, at the lawfulness and rationality of the remedial action with the primary question being whether the President's constitutional power to appoint a commission of inquiry could be limited by remedial action taken by the Public Protector.

22. A full bench of the court found that the President's power under section 84(2)(f) of the Constitution to appoint a commission of inquiry is not untrammelled and must be exercised within the constraints of the Constitution. The Public Protector's powers in terms of section 182(1)(c) of the Constitution included the power to direct members of the executive (including the President) to exercise powers entrusted to them under the Constitution including the power (in appropriate circumstances – such as when the President was conflicted) to direct the President to appoint commissions of inquiry and to direct the manner of implementation.

23. In the light of the compelling evidence that the relationship between President Zuma and Gupta family had evolved into state capture and the Public Protector's lack of capacity to investigate on the scale required, the court held that a judicial commission of inquiry was pre-eminently suited to carry out the task of investigating the allegations of state capture contained in the report. Given that the President was implicated in the allegations of state capture, his insistence that he alone select the judge to head the commission of inquiry was at odds with the legal principle of recusal.

24. The court accordingly dismissed President's application with costs *de bonis propriis*. In addition, the court declared the report to be binding and directed the President to appoint a commission of inquiry within thirty days to be headed by a judge selected by the Chief Justice.[11]

25. In reaching its decision, the High Court did not analyse the concept of state capture in any detail. It merely observed as follows:

> There is thus compelling prima facie evidence that the relationship between the President and the Gupta family had evolved into "state capture", underpinned by the Gupta family having power to influence the appointment of Cabinet Ministers and directors in boards of SOEs and leveraging these relationships to get preferential treatment in state contracts, access to state provided business finance and the award of business licences. . . . The issue of "state capture" is a matter of great public concern. The outcome of her investigation is that there is deeply concerning evidence of serious malfeasance and corruption, but she does not have the resources to complete the investigation. She has reasoned that a commission of inquiry is the appropriate remedial action in light of her findings and constraints.[12]

26. It added later:

> There can be no question that this aspect of the remedial action is both necessary and appropriate. Since the release of the Report, further allegations of "state capture" have become public in the form of the so-called "Guptaleaked emails". The Public Protector's remedial relief is broad enough to encompass the investigation of these issues ...[13]

[11] *President of the Republic of South Africa v Office of the Public Protector and Others* [2018] 1 All SA 800 (GP).
[12] *President of the Republic of South Africa v Office of the Public Protector and Others* [2018] 1 All SA 800 (GP) para 128-129.
[13] *President of the Republic of South Africa v Office of the Public Protector and Others* [2018] 1 All SA 800 (GP) para 154.

27. Both the Public Protector's report and the High Court judgment upholding her remedial action are thus foundational documents which guide the Commission in discharging its mandate. Taking the broad approach to the concept of state capture in these two documents, two features can be identified as having the main focus: i) improper conduct by the President or state functionaries enabling improper involvement or undue influence by the Gupta enterprise in the appointment of cabinet ministers and directors and executives of SOEs; and ii) the fact that those improper relationships were leveraged to give undue and preferential treatment in state contracts and other benefits to the Gupta enterprise. These two features while not exhaustive of the investigative tasks identified in the Public Protector's remedial action are central to the state capture thesis. The High Court judgment pointed to serious misconduct or impropriety also on the part of other persons, functionaries and entities referred to in the report. The Public Protector's report, read with the High Court judgment, thus provide the background and context within which to construe the practical meaning to be given to the concept of state capture as it appears in the TORs of the Commission.

THE ACADEMIC LITERATURE

28. Before turning to the concept of state capture envisioned in the TORs, it may help to comment briefly on the term as used in the works of reputable academics and in evidence before the Commission. A review of the academic commentary on the concept "state capture" reveals that there is no single or standard academically or internationally accepted usage of the term. Rather, the term has been used to describe different manifestations of what has been termed "state capture" in different political contexts and at different periods in history. Hence, establishing a contemporary definition appropriate in the South African context, which accurately reflects the Commission's mandate, while being appropriately informed by the academic discourse, must look primarily at sources within the South Africa context.

29. Much of the literature describes state capture as occurring when institutions of the state can no longer function without high levels of corruption. Viewed through this lens, state capture is a situation where corruption has become so routinised as to become institutionalised, and where the shape and future trajectory of state institutions are determined by capturers through corrupt and clandestine means. State capture normally involves a distinct network structure where corrupt actors cluster around a particular part of the state, enabling it to launch privately constituted goals at the expense of the public interest.[14]

30. In the early stages of the inquiry, the Commission heard testimony from Prof Hellman and Dr Kaufmann. They testified that state capture is not confined to developing countries or to countries in transition (although they are particularly vulnerable). It is to be found also in countries with a traditionally robust constitutional and legal system, in which the laws have not been refreshed and amended to keep pace with developments, where grey areas have developed between the legal and the illegal, and advantage is taken of loopholes in the law, as well as of official discretion.

31. In their original work, Prof Hellman and Dr Kaufmann discussed and analysed the phenomenon of state capture which had come to the fore in the turbulent transition from state to private ownership in the countries of the former Soviet Union and bloc. These countries, in the midst of simultaneous economic and political transitions, were particularly vulnerable to state capture since they were in the process of both redistributing property rights and redrafting the basic rules by which their markets, polities and societies were governed. In the context of the former Soviet bloc, Prof Hellman and Dr Kaufmann defined state capture as shaping the formation of the basic rules of the game (i.e., laws, rules, decrees and regulations) through illicit and non-transparent private payments to public officials.[15] That definition is too narrow for purposes of this Commission.

[14] See, for example, Mihály Fazekas and István János Tóth, "From Corruption to State Capture: A New Analytical Framework with Empirical Applications from Hungary", *Political Research Quarterly* 69, no. 2 (1 June 2016): 320–334, https://doi.org/10.1177/1065912916639137.

[15] Hellman, Jones, and Kaufmann, "Seize the State, Seize the Day", 3.

32. The transition in South Africa, from apartheid and white minority rule to majority rule and democracy, was significantly different at a number of levels. Our transition was not accompanied by a comparable collapse of the existing state. Although in the dying days of the apartheid era some measures were adopted to shift public resources away from the state for the benefit of a few, the new constitutional order closed off immediate opportunities for large-scale looting of the state. The relevant context within which the Commission has to consider and evaluate the threat and onset of state capture and rampant corruption here differs, therefore, in fundamental respects from the particular context addressed in the initial work of Prof Hellman and Dr Kaufmann. 33. In developing the concept of state capture, Prof Hellman and Dr Kaufmann adapted the then prevailing conception of regulatory capture in the post-Soviet societies that they had examined. However even that narrow conception, which was limited to the formation of regulatory rules, has since undergone significant development. Regulatory capture may now be understood as the result or process by which regulation, in law or in its application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.[16] The concept of state capture itself requires a similarly broadened approach, applying of course not necessarily to whole industries but to firms, groups of firms, and individuals.

33. Prof Hellman and Dr Kaufmann distinguished state capture from two other types of interactions between firms and the state. These are administrative corruption and the exercise of influence. They are distinct but potentially overlapping.[17] Administrative corruption is the practice of making illicit and non-transparent payments to public officials in order to alter the implementation or application of laws, regulations and rules for the illicit gain of the firm or associated network. The proceeds of administrative corruption primarily accrue to corrupt public officials. However, in state capture, “the rents” are shared between the corrupt officials and the capturing firms. This is because state capture allows firms to build significant advantages into the rules of the game. Influence is the ability to alter the formation of laws and other rules without recourse to such payments. Influence is often considered to be within the bounds of acceptable practice, as in the case of lobbying and consultative pressure. If that influence reaches levels of shaping or controlling of the legal and regulatory environment, subordinating it to the influence, then it has become state capture.

34. The term “state capture”, as defined by Prof Hellman and Dr Kaufmann, identifies a form of corruption in which firms and public officials collude in sharing rents, as distinct from forms of extortion (bribery) in which rents are monopolised by public officials.[18] This is a helpful distinction for our purposes, and more relevant to the South African context than the rule-changing definition of state capture that was applicable to post-Soviet societies. State capture involves something more than — and qualitatively different from — particular acts of bribery and corruption, however large, occurring in relative isolation from each other with the aim of altering or evading the implementation of one or more particular laws. A systematic project of securing illicit and corrupt influence or control over the decision-making and conduct of state institutions cannot be considered as anything other than a project of state capture, even if it has not (yet) entailed efforts to shape the formation of laws, rules, and even policies. Such a project may evolve as particular, initially separate, acts of bribery and corruption, combined to form a pattern to which the description “state capture” should rightly be applied. This has quite evidently been the case in South Africa.

35. Dr Kaufmann when testifying before the Commission did not remain glued to the initial narrow definition but confirmed that the concept of state capture could legitimately be extended to include the control and allocation of public assets and public finances, including the tax system, how expenditures are allocated and so on, and it varies from country to country which one is more prevalent.[19] He was able to draw in particular on his knowledge and research relating to state capture and corruption

[16] Daniel Carpenter and David A. Moss, eds., *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge: Cambridge University Press, 2013), 13.

[17] Hellman, Jones, and Kaufmann, "Seize the State, Seize the Day", 7.

[18] Hellman, Jones, and Kaufmann, “Seize the State, Seize the Day”, 2–3. “Rent” as an economic concept refers to an amount of money earned that exceeds that which is economically or socially necessary. In the corruption literature, “rent-seeking” is a common term used to describe the behaviour of an entity that seeks to gain added wealth without any reciprocal contribution of productivity.

[19] Transcript 31 August 2018 p. 92.

in Latin American countries.

36. Prof Hellman and Dr Kaufman, while conceding that there is no all-embracing concept of state capture, identify key institutional reforms aimed at its notable common features. State capture is principally a product of institutional deficiencies and a systemic failure of governance, and thus more than a criminal issue. However, some legal and judiciary initiatives and reforms (including those that can be preventive and not necessarily punitive) should also feature as a component in a strategy to address state capture. Reducing the risk of state capture therefore requires focus on institutional and policy reforms. It is critical to have an in-depth diagnostic of the unique socio-political and institutional context of each affected country so as to elaborate country-relevant action programmes. To develop an action program, country-specific expertise is essential yet still general lessons of experience globally may also be useful in pointing to an array of potential reforms and initiatives that can have an impact. The range of potential reform areas is substantial. However, they generally fall into a few broad reform categories – political and economic contestability; political finance; conflict of interest; procurement; sector-specific initiatives, as well as transparency reforms generally.

37. Procurement is often a focus for state capture as public procurement can be a major source of economic rents for firms closely tied to politicians and political parties. Using state capture to shape the procurement playing field to the benefit of specific firms is perhaps one of the most common forms of state capture, as was certainly the case in South Africa. As a result, procurement reform is generally an important starting point in the effort to combat state capture.

38. As experience of state capture and the evidence before the Commission has shown, state-owned enterprises are used to cement the ties between politicians and private actors. They are often critical transmission mechanisms through which state capture occurs, and though potential vehicles for fostering the state's interests, powerful state-owned firms can use their close relationships to state actors to shape laws, policies and regulations in their own interest. Moreover, the murky boundaries between ownership and control rights in state-owned enterprises can give leeway to managers to manipulate their ties to the state for their own interests. As a result, to prevent state capture emanating from state-owned enterprises, there needs to be a clear separation of the management of state-owned companies and politics, as well as the empowerment of professional, independent boards, which should also be selected through a meritocratic process, emphasizing technical expertise over political patronage. Further, ensuring transparency and oversight by disclosing revenues, costs, revenue flow between SOEs and the state, as well as disclosing data on production, plans, trading activities as well as quasi-fiscal activities, are essential preventive mechanisms. Independent financial audits and an effective level of legislative oversight are also very important.

39. At root, state capture is a manifestation of a conflict of interest. Private individuals or firms seek to engage politicians and public sector actors through the provision of private benefits to shape public decisions in their interests. As a result, robust legislation to regulate conflicts of interest and the interaction between public officials and private actors is critical to prevent state capture.

40. There is also a growing body of academic literature on state capture and corruption in South Africa[20] that offers various elaborations of the meaning of state capture. For example, party state capture is said to occur when the state is used as an instrument to deal with issues that have typically remained within the confines of political party structures. A ruling party may hollow out state institutions, substituting the party machinery for the state. The power of the state apparatus is then used to deal with intra-party political and administrative issues.[21] *Corporate* state capture occurs when public power is exercised in the interests of particular corporate formations.[22] The concept of elite capture focuses on corruption that occurs around initiatives that are meant to promote economic or infrastructural development; elites capture the resources that have been mobilised for development.[23] It can be

[20] See Swilling et al., *Betrayal of the Promise: How South Africa is Being Stolen*, State Capacity Research Project, May 2017; and Chipkin, Swilling et al., *Shadow State: The Politics of State Capture*, Wits University Press, 2018.

[21] Anna Grzymala-Busse, "Beyond Clientelism: Incumbent State Capture and State Formation", *Comparative Political Studies* 41, no. 4–5 (1 April 2008): 638–673.

[22] Abby Innes, "The Political Economy of State Capture in Central Europe", *JCMS: Journal of Common Market Studies* 52, no. 1 (January 2014).

[23] Vivi Alatas et al., "Does Elite Capture Matter? Local Elites and Targeted Welfare Programs in Indonesia", *AEA Papers and*

observed in the siphoning off of value towards an elite grouping with ties to the upper reaches of the state, such as rural elites (the 'chieftain' class) embezzling funds from a rural economic development project. Public goods and their value in this scenario are effectively extracted by elites for their own narrow benefit.[24]

41. Professor Tom Lodge describes state capture as a situation in which control or power passes from officials to non-state corporate interests, or where officials themselves (including elected politicians) become corporate, primarily individually- and entrepreneurially-oriented actors. He further argues that it may not be necessary to actually capture the regulation process itself in order to gain control of an institution. Regulatory capture may be superfluous in environments in which regulations or laws are under-developed. In such cases captors might focus on a single state department to secure decisive influence over its procurements. Thus, state capture implies that the state has become unable to function in such a way as to serve broad social interests or to make decisions that might achieve long-term developmental goals. It is unable to do these things because it has become harnessed to a very particular and especially narrow set of private interests. This is more in line with what has happened in South Africa.

ENGAGEMENT WITH STATE CAPTURE IN THE COMMISSION

42. References to state capture and assertions as to its true meaning in the South African context appear in the evidence of a number of witnesses who testified before the Commission.

43. Mr Gordhan, current Minister of Public Enterprises and with long prior ministerial and public service experience, testified that state capture "became a sophisticated scheme or racket" which involved: advancing false narratives; enlisting the assistance of facilitators such as consulting and legal firms to entrench the project; marginalising public servants who possessed integrity and honesty; and fostering an enabling environment of impunity for crime and corruption. Mr Gordhan explained that his own understanding of state capture evolved over time as he became more aware of the connections between events that at the time did not seem as significant as they did in hindsight. In his view, these events included repeated and irrational changes to the cabinet, SOE boards and the leadership of key institutions and organs of state for the purposes of plundering resources at those institutions without the risk of prosecution.

44. Mr Gordhan cited analysis from the research report of the State Capacity Research Project titled The Betrayal of the Promise: How South Africa is being Stolen[25] and the book The Shadow State.[26] He found these works to be instructive in applying the concept of state capture to the South African context and the "politics of capture" in terms of which a schema of brokers, mobility controllers, elites and dealers, all perform various functions towards the maintenance of networks of patronage. The following critical account of state capture appears in the State Capacity Research Project's Betrayal of the Promise report:

> Corruption tends to be an individual action that occurs in exceptional cases, facilitated by a loose network of corrupt players. It is somewhat informally organised, fragmented and opportunistic. State capture is systemic and well-organised by people with established relations. It involves repeated transactions, often on an increasing scale. The focus is not on small-scale looting, but on accessing and redirecting rents away from their intended targets into private hands. To succeed, this needs high-level political protection, including from law enforcement agencies, intense loyalty and a climate of fear; and competitors need to be eliminated. The aim is not to bypass rules to get away with corrupt behaviour. That is, the term corruption obscures the politics that frequently informs these processes, treating it as a moral or cultural pathology. Yet, corruption, as is often the case in South Africa, is frequently the result of a political conviction that

Proceedings 109 (1 May 2019): 334–339; Diya Dutta, "Elite Capture and Corruption: Concepts and Definitions", *National Council of Applied Economic Research*, 2009, 1–16.

[24] Dutta, "Elite Capture and Corruption: Concepts and Definitions".

[25] M Swilling et al. *The Betrayal of the Promise: How South Africa is being Stolen* (May 2017). State Capacity Research Project.

[26] I Chipkin and M Swilling (eds.) *Shadow State: The Politics of State Capture* (2018). Wits University Press: Johannesburg.

> the formal 'rules of the game' are rigged against specific constituencies and that it is therefore legitimate to break them. The aim of state capture is to change the formal and informal rules of the game, legitimise them and select the players allowed to play.[27]

45. The current Transnet board chairperson and former PRASA board chairperson, Mr Popo Molefe, provided his own analysis of the way that the state capture project manifested in the case of Transnet as follows: key individuals with a common purpose and interests were placed in key executive roles to pursue the rapid accumulation of wealth through companies with links to influential businesses. This was achieved through the flouting of constitutional provisions, the weakening of governance structures and processes in the company, and the dismissal of skilled individuals and their replacement with people who brought a "veneer of professionalism" but who ultimately lacked ethical and moral leadership, all culminating in the corrupt awarding of major contracts to connected entities.

46. Former Deputy Minister of Finance, Mr Mcebisi Jonas, postulated that state capture in South Africa is the result of the failure of South Africa's "developmental framework". In his testimony, Mr Jonas explained his belief that South Africa's current economic developmental framework rests on three fundamental pillars. These are (1) the protection of the established elite through property rights protections and other measures; (2) the promotion of the new elite through policies such as Black Economic Empowerment ("BEE"); and (3) the provision of services to the under-classes and the working-class. He asserted that this is effectively a patronage system, where resources to all three layers should be dispensed successfully. However, he continued:

> That model depends effectively on three things to work. One, it depends on a strong state and an efficient state. It is a state that is able to manage resources very well and dispense them more efficiently. But secondly, it also depends on growth because ... without growth then you would not be able to do those things. The third is revenue, consistent revenue that you have. Now what ... I think is [that in] many ways what has come to happen over particularly over the last 10 years has been that model unravelling. It unravels because your state is weak and sometimes it is consciously weakened.

47. Mr Jonas went on to explain that the unravelling of this system created tensions across the three layers that are usually mutually supported, and this became the basis of rampant corruption and the fertile ground upon which state capture could occur. He stressed that the easiest vehicle through which the state can be captured is the capture of the ruling party, where the party becomes an instrument used for the project of financial accumulation that state capture is concerned with animating.

48. In his evidence to the Commission, President Cyril Ramaphosa provided his understanding of state capture, which was informed to a large extent by the work of Prof Hellman et al. He sought to distinguish influence from state capture. He asserted, in reference to the work of Prof Lodge:

> The existence of a multiplicity of interest groups within any given political environment is neither original nor in itself problematic. State capture occurs when one of these interests dominates public power for their own ends. This results in the undermining of the democratic process and the national interest.

49. Mr Ramaphosa stressed the dynamics of a modern democratic society that consists of varying interests. A state functioning within a democratic system must seek to accommodate divergent interests. This must be reflected in the broader national interest, through the policies and practices of an economic developmental framework. State capture occurs when the national interest is undermined by the interests of a small and confined set of actors. State capture is therefore fundamentally connected to the undermining of the democratic system.

50. In summary, President Ramaphosa's understanding is that state capture involves: 1. one of many forms of corruption; 2. an organised, systemic process or project; 3. a network of actors within and outside the state, acting in concert; 4. the redirection of public resources away from the public good and towards private financial gain; 5. the shaping of the basic rules of the game (laws, rules, regulations, policy-making processes etc.) of government; 6. the appointment of agents of state

[27] State Capacity Research Project, "Betrayal of the Promise", 5.

capture to governance structures, so they are positioned to disperse government benefits to select groups; 7. the use of ideological arguments in order to question legitimate institutions and conceal state capture under the guise of transformation; 8. the deliberate weakening and exploitation of law enforcement agencies;[28] 9. entrenchment in the state; 10. the distribution of benefits to small vested interests at the expense of the country, and her citizens, as a whole; and 11. an assault on the democratic process undermining the democratic constitutional order.

51. In a constitutionally enshrined democratic order, private citizens or formations are necessarily enabled to influence the political process. In fact, active efforts to do so are fundamental to any functioning democracy. However, there are checks and balances built into the system to ensure that this influence does not subsume the democratically elected government and the institutions of the state that practically administer actions impacting on citizens. The crucial point about state capture is the combination of corrupt and unlawful actions that subvert the entire democratic political system.

52. President Ramaphosa believed that a definition of state capture penned by Ms Catrina Godinho and Ms Lauren Hermanus, both South African-based academics who have examined state capture with specific reference to the conditions prevalent in South Africa was particularly useful for the Commission's purposes. They submit that state capture ought to be understood as:

> A political-economic project whereby public and private actors collude in establishing clandestine networks that cluster around state institutions in order to accumulate unchecked power, subverting the constitutional state and social contract by operating outside of the realm of public accountability.[29]

53. Against the backdrop of the preceding analysis, consideration can now be given to the TORs of the Commission.

THE COMMISSION'S TERMS OF REFERENCE

54. In compliance with the order of the Gauteng High Court, and by Proclamation No.3 of 23 January 2018, former President Zuma appointed this Commission. The Proclamation sets out the TORs in relevant part as follows:

> A Judicial Commission of Inquiry ("the Commission ") is hereby appointed in terms of Section 84(2)(f) of the Constitution of the Republic of South Africa, 1996. The Commission is appointed to investigate matters of public and national interest concerning allegations of state capture, corruption, and fraud.
>
> 1. The Commission shall inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector's state of capture report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016:
>
> 1.1 Whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOEs. In particular, the commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family.
>
> 1.2. Whether the President had any role in the alleged offers of Cabinet positions to Mr Mcebisi Jonas and Ms Mentor by the Gupta family the commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family.

[28] Transcript Day 12 August 2021 pp. 104–106.

[29] Catrina Godinho and Lauren Hermanus: "(Re)Conceptualising State Capture – With a Case Study of South African Power Company Eskom" (State Capture and Its Aftermath: Building Responsiveness Through State Reform, Public Affairs Research Institute, 2018).

1.3. Whether the appointment of any member of the National Executive, functionary and /or office bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and /or announced, and if so,

1.4. Whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state-owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or

1.5. The nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended.

1.6. Whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOEs.

1.7. Whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies.

1.8. Whether any advisers in the Ministry of Finance were appointed without proper procedures. In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures.

1.9. The nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest ...

55. Thus, paragraph 1 of the TORs sets out in nine sub-paragraphs particular topics of state capture that require investigation. The specific matters stipulated for investigation by the Commission provide particular content to the more generic term of state capture. Since it is merely invoked in the introductory paragraph of the TORs, but not in any particular TOR, state capture is as an overarching animating principle in relation to the subjects of investigation in the particular TORs. Reading paragraph 1 of the TORs in context, it is clear that, while the nine particular topics of investigation are key ingredients in establishing whether or not state capture had occurred, they do not necessarily exhaust that inquiry. State capture is a subject in its own right that the Commission is concerned with and it is not simply subsumed under the concept of corruption, or particular instances of that. The Commission's mandate is not to undertake a free-floating investigation into state capture of every imaginable kind, but rather to apply the concept in a focused manner when evaluating evidence on the particular subject-matter of the TORs.

56. Some of the TORs are narrow and specific but others very wide in scope. Findings and recommendations by the Commission are required and have been made in relation to all of them, which are set out in the different volumes of the Commission's report and are dealt with in the summation contained in this volume.

57. TORS 1.1, 1.2 and 1.3 narrowly focus on attempts to unduly influence politicians and public functionaries and directors of the boards of SOEs though the offer of inducements, including the offer of cabinet positions to two individuals, Mr Mcebisi Jonas and Ms Mentor, by the Gupta enterprise and on whether former President Zuma played any role in that regard; and in particular whether the appointment of any cabinet member or key public functionary was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and announced. TOR

1.8 continues with the theme of improper appointments by requiring investigation of whether any advisers in the Ministry of Finance were appointed without proper procedures - in particular, two senior advisers appointed by Minister Des Van Rooyen.

58. TORs 1.4 and 1.6 are also narrowly focussed on specific activities and events concerning the Gupta enterprise. The Commission is required to determine whether the former President, members of his executive or public functionaries breached or violated the law by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government and whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOEs. TOR 1.7 requires special investigation of whether any cabinet member of deputy minister unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for the Gupta enterprise.

59. TORs 1.5 and 1.9 are general and extensive in their ambit. They focus explicitly on corruption associated with procurement (the awarding of contracts and tenders to all service providers) in SOEs (public entities) and by government departments, agencies and entities. The public entities listed under Schedule 2 of the PFMA include those that have been the subject of detailed investigation in other volumes of this report, including: SAA; Transnet; Eskom; Denel; Alexkor and PRASA.

60. The TORs are thus concerned predominantly with the practices of executive members of the state, and the nature of their relationships with private individuals, and specifically the Gupta enterprise.

The Commission's definition of state capture

61. The Commission's investigation into state capture in South Africa in terms of the TORs is therefore concentrated on irregular public appointments, improper conduct by the national executive and public functionaries, the concerted efforts and activities of the Gupta enterprise in gaining control of governance and procurement in SOEs and government agencies and general corruption (including fraud, money laundering, racketeering and various other illegal activities) in public entities and government at all levels.

62. The element of corruption (in a wide sense) in procurement and tendering, as the centrepiece of state capture, accordingly demands examination of the conduct of the role players in terms of the constitutional requirement of an accountable public sector and the legal framework established to deal with corruption, fraud, money laundering and racketeering.

63. In addition to the constitutional principles of an accountable public sector, section 217(1) of the Constitution requires that, when an organ of state contracts for goods or services, it must do so in accordance with a tendering system that is fair, equitable, transparent, competitive and cost-effective. The PFMA gives some effect to these broad principles. Section 51(1)(a)(iii) of the PFMA obliges the board of a public entity to ensure that the public entity concerned has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. Section 50 and section 51 of the PFMA require the boards of public entities to exercise the duty of utmost care to ensure reasonable protection of the assets of the public entity and to act with fidelity, honesty, integrity and in the entity's best interests in managing its financial affairs.

64. Corruption is a statutory offence in South Africa in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA). Anybody who accepts any gratification from anybody else, or gives any gratification to anybody else, in order to influence the receiver to conduct himself in a way which amounts to the unlawful exercise of any duties, commits corruption. Gratification is broadly defined in PRECCA and includes essentially any valuable consideration. The gratification must be accepted or given as an inducement to act in a certain manner.

65. Section 4 of the Prevention of Organised Crime Act 121 of 1998 (POCA) outlaws the crime of money laundering. It prohibits any person from entering into any agreement, engaging in any arrangement or

transaction,[30] or performing any other act,[31] with anyone, in connection with property that is or forms part of the proceeds of unlawful activities (being any property or any service, advantage, benefit or reward which was derived, received or retained in connection with or as a result of any unlawful activity). The offence is committed if that person knows or ought reasonably to have known that the property constitutes the proceeds of unlawful activities. In addition, the agreement, arrangement or other act must have or be likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the property or the ownership of or interests in relation to it.[32] Section 5 of POCA creates the offence of assisting another to benefit from the proceeds of unlawful activities and section 6 of POCA prohibits any person from acquiring, using or possessing property that is or forms part of the proceeds of unlawful activities of another person.

66. Many instances of wrongdoing in public procurements in the period under review may constitute planned offences as part of a pattern of racketeering activity conducted by a racketeering enterprise (comprising a group of individuals and companies associated in fact) aligned with the Gupta family and its associated companies. In terms of POCA, a pattern of racketeering activity comprises two planned, ongoing, continuous or repeated offences contemplated in Schedule 1 of POCA including: 1. corruption; 2. the common law offences of extortion, theft, fraud, forgery and uttering; 3. offences related to exchange control; and 4. money laundering.

67. In the final analysis much of the evidence presented to the Commission indicates that state capture in the South African context evolved as a project by which a relatively small group of actors, together with their network of collaborators inside and outside of the state, conspired systematically (criminally and in defiance of the Constitution) to redirect resources from the state for their own gain. This was facilitated by a deliberate effort to exploit or weaken key state institutions and public entities, but also including law enforcement institutions and the intelligence services. As just intimated, to a large extent this occurred through strategic appointments and dismissals at public entities and a reorganisation of procurement processes. The process involved the undermining of oversight mechanisms, and the manipulation of the public narrative in favour of those who sought to capture the state. Moreover, the subversion of the democratic process which the process of state capture entailed was not simply about extracting resources but was further geared towards securing future power and consequently shaping and gaining control of the political order (or significant parts of that order) in a manner that was necessarily opaque and intrinsically unconstitutional.

68. A number of them will normally be present in the case of state capture: 1. the allocation and distribution of state power and resources, directed not for the public good but for private and corrupt advantage; 2. a network of persons outside and inside government acting illegally and unethically in furtherance of state capture; 3. improper influence over appointments and removals; 4. the manipulation of the rules and procedures of decision-making in government in order to facilitate corrupt advantage; 5. a deliberate effort to undermine or render ineffectual oversight bodies and to exploit regulatory weaknesses so as to avoid accountability for wrongdoing; 6. a deliberate effort to subvert and weaken law enforcement and intelligence agencies at the commanding levels so as to shield and sustain illicit activities, avoid accountability and to disempower opponents; 7. support and acquiescence by powerful actors in the political sphere, including members of the ruling party; 8. the assistance of professional service providers in the private sphere, such advisers, auditors, legal and consulting firms, in masking the corrupt nature of the project and protecting and even supporting illicit gains; and 9. the use of disinformation and propaganda to manipulate the public discourse, in order to divert attention away from their wrongdoing and discredit opponents.

69. The evidence discussed in the chapters of this summation, and in other volumes of this report, establishes that all these elements were present in the extensive scheme of corruption and wrongdoing that afflicted public entities, government departments and other state agencies in South Africa during the period under review, mostly, but not exclusively, at the instance of the Gupta enterprise. State capture as contemplated in the TORs occurred in the public sector in South Africa on an extensive scale. I do

[30] Section 4(a) of POCA.
[31] Section 4(b) of POCA.
[32] Section 4(a)-(b)(i) of POCA.

not propose to deal with all the state-owned entities. It will be enough to refer to all the state-owned entities. In my view a reading of the evidence of what happened at Eskom, Denel, SARS reveals quite clearly that state capture did take place in those entities. In Eskom the Guptas used President Zuma to remove certain executives and have their own associates appointed and thereafter carried out their scheme. In Transnet the Guptas used President Zuma to remove a Minister who would not have agreed to work with them and they got President Zuma to appoint their friend Minister Gigaba who then appointed their friend Brian Molefe. They later got Mr Siyabonga Gama to succeed Mr Brian Molefe when the latter was deployed to Eskom. What happened at Transnet under Mr Brian Molefe and Mr Gama is dealt with in Part II of this Commission's Report. At Denel the Guptas also pushed out Mr Riaz Saloojee and two others so that they could have Mr Ntshepe appointed CEO as Mr Ntshepe was prepared to work with them. In SARS it is also clear that Bain captured the Head of State, President Zuma, as well as the Commissioner of SARS, Mr Tom Moyane. BOSASA captured President Zuma and Commissioner of Correctional Services Mr Mti as well as other officials. So, there can be no double that state capture happened in South Africa. A discussion of the evidence of state capture in Transnet, BOSASA and SARS is discussed below.

STATE CAPTURE: TRANSNET

70. State capture at Transnet involved a systematic scheme of securing illicit and corrupt influence or control over decision-making. Collusion between individuals inside and outside of Transnet, as part of a co-ordinated effort to access and re-direct funds and benefits in substantial procurements, resulted in the strategic positioning of particular individuals in positions of power. A small group of senior executives and directors were positioned to collude in the award of key contracts. The evidence further shows that key employees at an operational level in Transnet were disempowered or marginalised from participation in important procurement decisions which affected their work.

71. The extensive scheme of wrongdoing that afflicted Transnet between 2009 and 2018 was conducted by an enterprise (comprising a group of individuals and companies associated in fact) aligned with the Gupta family and its associated companies. The relationship of the events at Transnet to one another point to the existence of a common objective that establishes a pattern. The evidence therefore establishes convincingly that state capture occurred at Transnet in the period between 2009 and 2018.

72. The central elements of state capture at Transnet comprised: i) the appointment of Gupta associates to key positions within Transnet; ii) the kickback agreements between CNR/CSR/CRRC and Mr Essa's companies; iii) the inclusion of Gupta linked companies as supplier development partners (SDPs) on Transnet contracts; iv) the money laundering arrangements between Regiments and the companies associated with Mr Essa and Mr Moodley; and v) the payment of cash bribes to officials and employees associated with Transnet presumably for their role in facilitating transactions that favoured the Gupta enterprise.

73. State capture at Transnet began after the resignation of Ms Ramos as GCEO in 2009. Thereafter, President Zuma thwarted the efforts of Ms Hogan to appoint a GCEO for a period of 18 months because he preferred Mr Gama, the then CEO of TFR who was facing serious charges of misconduct, until he replaced her in November 2010 as Minister of Public Enterprises with Mr Gigaba, an admitted associate of the Gupta enterprise who had regular and frequent contact with Gupta family members.

74. Mr Gigaba immediately reconstituted the board of Transnet with his preferred appointees and initiated the process that led to the appointment of Mr Molefe as GCEO. There is clear and convincing evidence that Mr Molefe was an associate of the Guptas and a regular visitor to the Gupta Saxonwold compound and that the Gupta's had some involvement in his appointment as GCEO at Transnet and later at Eskom. Mr Molefe's appointment was accurately predicted by the Gupta owned newspaper, the New Age, and he was recommended for appointment by Mr Sharma who Mr Gigaba attempted unsuccessfully to have appointed as chairman of the Transnet board. Mr Sharma was a business associate of Mr Essa, a key associate of the Gupta enterprise. Around about the same time, Mr

Gigaba appointed Mr Essa as a director of BBI (an SOE in the IT sector), which played some role in attempting to secure IT contracts from Transnet for the benefit of the Gupta enterprise.

75. Thus, Mr Gigaba (a friend of the Guptas) was instrumental in the appointment of Mr Molefe (another friend of the Guptas), with his appointment predicted in the Gupta owned newspaper, the New Age, and initiated by Mr Sharma (another Gupta associate).

76. Mr Sharma went on to serve as the chairperson of BADC, which was established in February 2011 as a subcommittee of the board. Prior to the establishment of the BADC in February 2011, the board of Transnet was not directly involved in procurement. Many of the procurement transactions which favoured the Gupta enterprise after 2011 arose in the context of the Market Demand Strategy (the MDS) which was developed by Mr Molefe and Mr Singh (then the acting GCFO) and approved by the BADC (chaired by Mr Sharma under its increased authority) in 2011.

77. One week after Mr Molefe was appointed, Mr Gama, who had been dismissed for serious irregularities in 2010, was reinstated as CEO of TFR on 23 February 2011, in terms of a wholly indefensible settlement agreement that included a payment of R17 million to Mr Gama for benefits and legal costs. Mr Gama's early efforts to be appointed as GCEO in 2009 (despite the allegations of impropriety against him and the board of Transnet considering him unsuitable for the position) was vocally and publicly supported by members of President Zuma's cabinet, Mr Gwede Mantashe (then the Secretary-General of the ANC), other high-profile persons associated with the ANC, and presumably by the deployment committee of the ANC. After his reinstatement, Mr Gama was centrally involved in key transactions that favoured the Gupta enterprise. The evidence on record gives rise to reasonable grounds to believe that Mr Gama was reinstated as a consequence of an instruction or direction by President Zuma.

78. It is undisputed that from July 2011 Mr Molefe intensified his contact with the Gupta family, frequently visited the Gupta compound in Saxonwold and was in regular contact with Mr Ajay Gupta in particular. Mr Molefe's driver testified that in the period between July 2011 and August 2014, he transported Mr Molefe to the Gupta compound and reasonably suspected that Mr Molefe received substantial cash payments during those visits. The testimony of the drivers of Mr Gama, Mr Gigaba, Mr Singh and Mr Pita (who replaced Mr Singh as the GCFO) gives rise to reasonable grounds to believe (or suspect in the case of Mr Pita) that they too received cash payments from the Gupta enterprise during the period under consideration.

79. The first transactions tainted by corruption and advancing the interests of the Gupta enterprise concerned the procurement of cranes from ZPMC and Liebherr which were procured in 2011-2014 by corrupt payments to the Gupta enterprise.

80. The procurement of 95 electric locomotives from CSR, shortly after the appointment of Mr Molefe as GCEO and the reinstatement of Mr Gama as CEO of TFR, was the first significant locomotive transaction tainted by corruption. The board approved the acquisition of 95 electric locomotives at its meeting of 31 August 2011. The transaction was approved by Mr Gigaba on 21 December 2011 at an ETC of R2.7 billion.

81. The evidence in relation to the procurement of the 95 locomotives founds reasonable grounds to believe that it was attended by irregularities including: 1. a prior decision by Mr Molefe to favour CSR as a bidder; 2. inappropriate communication with CSR prior to the closing of the bid; 3. communication between CSR and the Gupta enterprise during the bidding process; 4. the failure to disqualify the bid by CSR on the grounds of it being non-responsive by not furnishing returnable documents; 5. the improper changing of the evaluation criteria to favour CSR; 6. the failure to obtain the authorisation of the Minister for a cost overrun of R700 million; and 7. the non-recovery of late delivery penalties.

82. All these irregularities favoured CSR and were against the best interests of Transnet and preceded a corrupt payment of USD 16.7 million (made in terms of an agency agreement concluded in relation to the "95 project" in April 2012) by CSR (Hong Kong) to Regiments Asia (Pty) Ltd (a company associated with Mr Essa) and the subsequent laundering of these unlawful proceeds onto companies forming part of the Gupta enterprise.

83. During 2011, work had commenced on the business case of the 1064 locomotives transaction. This transaction was tainted by various irregularities which mostly advanced the interests of the Gupta enterprise.

84. In May 2012, Mr Molefe approved the confinement to the McKinsey consortium of the contract for advisory services related to the acquisition of the 1064 locomotives aimed at strengthening the business case by validating the market demand, reviewing funding options and mitigation of various risks. The contract was only signed in August 2014, but McKinsey commenced work in 2012 in terms of a LOI dated 6 December 2012. On 30 November 2013 the LOI expired with the consequence that although work continued to be performed by the McKinsey consortium there was no valid agreement governing its services to Transnet from that date. Moreover, the contract should never have been awarded to McKinsey as its bid was non-responsive on account of it refusing to furnish its financial statements.

85. The RFPs for the acquisition of the 1064 locomotives was issued in July 2012. Mr Singh (a Gupta associate) was appointed as GCFO in July 2012 and Mr Sharma (another Gupta associate) was appointed chairperson of the BADC in August 2012. The BADC's authority was increased to R2 billion at the same time. The board in August 2012 also approved the use of a loan facility from the China Development Bank ("the CDB") to fund the 1064 acquisition.

86. In October 2012, McKinsey agreed to appoint Regiments as its SDP subject to Regiments agreeing to share with Mr Essa (or one of his companies) 30% (later increased to 50%) and Mr Moodley (or one of his companies) 5% of all income received from Transnet. Neither Mr Essa nor Mr Moodley (or any of their companies) rendered any services of any kind to McKinsey or Transnet beyond the introduction of Regiments to McKinsey.

87. In December 2012, Mr Essa facilitated a meeting between Mr Singh and Mr Pillay of Regiments, after which Regiments replaced Letsema in the McKinsey consortium in terms of the LOI. Regiments thus became a member of the consortium without having tendered as part of it.

88. The board approved the business case for the 1064 locomotive acquisition on 25 April 2013. The closing date for the bids was 30 April 2013 and the evaluation commenced in May 2013. During March 2013 to May 2013, prior to the submission of the bids for the 1064 locomotive procurement, Transnet engaged in direct negotiations with CSR and the CDB with a view to concluding a tripartite agreement, the original draft of which explicitly provided for cooperation on the procurement of the locomotives. This is again an indication that the senior executives of Transnet were favourably disposed to CSR and CNR. The final version of the agreement merely provided for Transnet and the CDB to identify opportunities for CDB to participate in funding. Even then, given the relationship between the CDB and CSR, the perception that Transnet was favourably disposed to the Chinese OEMs is inescapable. Mr Gigaba, the Minister of Public Enterprises, approved the business case for the 1064 locomotive procurement in August 2013.

89. The modus operandi of the Gupta enterprise was revealed in another transaction involving Transnet at this time. During July and August 2013, Mr Singh and Mr Essa engaged with Hatch, a bidder for work on Transnet's Manganese Expansion Project (the MEP) in an attempt to strong arm it into agreeing to their preferred companies, DEC and PMA, being included as SDPs in the successful consortium that bid for the tender. The evidence in relation to these incidents provides reasonable grounds to suspect corruption in that Mr Essa and Mr Singh attempted to make the award of the tender conditional on Hatch's appointment of their preferred SDPs, which were to be paid an inflated fee of R80 million (later to be increased to R350 million) that would be laundered onto the Gupta enterprise. Hatch resisted these efforts to involve it in the corrupt scheme.

90. Besides the evident corruption in relation to the MEP tender, the proven association of Mr Singh and Mr Essa with the Gupta enterprise at this time, the manipulation of the supplier development component in the transaction by Mr Singh, Mr Essa's disclosure at a meeting with Hatch of the modus operandi of inflating the price of Transnet tenders for illegal purposes and a claim by him that he and his associates would have influence in the subsequent appointment of Mr Molefe as CEO of Eskom, all point to state capture and a pattern of racketeering activity involving the Gupta enterprise.

91. In late 2013 Mr Singh agreed to an increased scope of work for Regiments on the financial services contract in relation to the 1064 locomotive procurement by replacing Nedbank with Regiments in the McKinsey consortium. This increased the scope of work of Regiments on the contract to 30% and thus the fee paid to it, 55% of which was intended to be laundered onto the Gupta enterprise. Around the same time, Regiments presented the so-called "R5 billion proposal" proposing a R5 billion loan facility to be funded by Nedbank through an "in-between structure" which had the potential to cause Transnet a R750 million loss and from which only Regiments would have benefitted in fees. Although the proposal was not implemented, it again evidences a pattern of conduct consistent with the scheme of state capture.

92. In October 2013, the board approved the business case for the second significant locomotive transaction, being the procurement of 100 additional locomotives for use on the coal export line aimed also at the release of older locomotives from the coal export line for use in general freight business. The original intention was to acquire the locomotives by confinement on grounds of urgency and standardization from Mitsui which had supplied similar locomotives in the recent past. The evidence reveals that Mr Molefe, Mr Singh, Mr Pita and Mr Sharma all played a role in altering the confinement memorandum to award the contract to CSR which undermined the rationale of urgency and standardization as CSR had not produced similar locomotives.

93. The alleged wrongdoing in relation to the procurement of the 100 locomotives during the course of 2014 included: 1. management misled the BADC and the board in early 2014 by misstating the rationale by confinement and not disclosing the concerns of the technical staff about CSR's inability to deliver the 100 locomotives in accordance with the required specifications; 2. non-compliance with the urgent delivery requirement; 3. non-compliance with the local content requirement; 4. the payment of excessive advance payments (60%) prior to the delivery of any locomotives; 5. the payment of the advance payments without CSR furnishing the requisite security (advance payment guarantee); 6. the unjustifiable increase in the price of the procurement by R740 million without prior authorization of the board; and vii) the unjustifiable inflation of the base price of the locomotives and the reliance on incorrect assumptions in relation to cost factors and escalations. CSR (or CRRC) paid a kickback of R925 million on this contract to one of Mr Essa's companies, JJ Trading FZE.

94. The most significant locomotive transaction was the procurement of the 1064 locomotives at a cost of R54.5 billion. As mentioned, the board approved the business case for the 1064 locomotives on 25 April 2013. The evaluation process and best and final offer (BAFO) stage of the procurement process for the 1064 locomotives endured from May 2013 to January 2014. On 24 January 2014, the BADC and the board resolved to split the procurement into four contracts and appointed four OEMs as preferred bidders. Post tender negotiations took place in February 2014 and the locomotive supply agreements (the LSAs) were concluded on 17 March 2014.

95. While the post tender negotiations in relation to the 1064 procurement were under way, on 5 February 2014, McKinsey purported to cede its rights under the contract for the provision of advisory services to Regiments and informed Transnet that all the work related to the mandate had in fact been performed by Regiments – all of which was for the benefit of the Gupta enterprise, through the money laundering fee share agreement with Mr Essa and Mr Moodley's companies.

96. During the evaluation process, CSR's bid was favoured through the irregular adjustment of its price to account for its use of Transnet Engineering ("TE") as a subcontractor and CNR was favoured by the exclusion of key costs from its BAFO that normally would have been included. There are thus reasonable grounds to believe that but for these irregular adjustments, CSR and CNR would not have succeeded as bidders.

97. During the post tender negotiations in relation to the 1064 locomotives, the price of the procurement increased substantially to the detriment of Transnet's interests, partly as a result of an improper agreement by Mr Singh and Mr Jiyane (overriding Mr Laher) to include batch pricing at a cost of R2.7 billion in the agreed price. In addition, the negotiations team, led by Mr Singh and Mr Wood of Regiments, imprudently agreed to excessive advance payments particularly to favour CSR and CNR which negatively impacted Transnet's cash flow going forward. Furthermore, the negotiations team

agreed to terms of the contract contrary to the local content requirement of the RFPs that should have disqualified the bidders at that stage.

98. As stated, the LSAs were concluded on 17 March 2014 at an increased price of R54.5 billion, being R15.9 billion more than the ETC stipulated in the business case. On 28 May 2014, the board accepted the recommendation of Mr Molefe and Mr Singh to increase the ETC from R38.6 billion to R54.5 billion on the premise that the original ETC stipulated in the business case had excluded forex and escalation costs. This was a false premise, following a misrepresentation by Mr Molefe and Mr Singh in a memorandum dated 18 April 2013, in that the ETC had in fact included forex and escalation costs in an amount of R5.9 billion. Mr Singh repeated the misrepresentation in correspondence to Mr Gigaba the Minister of Public Enterprises on 31 March 2014. Mr Singh and Mr Molefe furthermore failed to obtain the approval and authorization from the Minister for the price increase in contravention of section 54 of the PFMA with the result that the legality of the LSA is brought into question.

99. Mr Molefe and Mr Singh, in their memorandum to the board dated 23 May 2014 justifying the price increase of the procurement of the 1064 locomotives, also misrepresented the profitability of the procurement. The business case provided for a positive net present value (NPV) of R2.7 billion based on the original ETC using a hurdle rate of 18.56%. The increase in price to R54.5 billion produced a negative NPV. Mr Molefe and Mr Singh however informed the board that the NPV remained positive using a changed hurdle rate of 15.2%. Mr Singh, in his capacity as GCFO, had changed the rate from 18.56% to 16.24% on 20 May 2014, but rather than use that reduced rate, he used an even lesser rate of 15.2% in his submission to the board. There are reasonable grounds to believe that Mr Singh used this lower hurdle rate to ensure a positive NPV, in the context of the 41% increase in the price of the procurement, in order to persuade the board that the NPV remained positive when in fact there were doubts about the profitability of the project overall.

100. The actuarial evidence presented to the Commission provides a reasonable basis to conclude that the increase in the ETC by R15.9 billion included amounts totalling R9.124 billion that were unjustifiable expenditure. The unjustifiable amounts related to inflated provision for backward and forward forex and escalation costs, batch pricing and an excessive provision for contingencies. The evidence further indicates that Regiments, led by Mr Wood, played a key role in finalising and agreeing the unjustifiable forex and escalation costs during the post tender negotiations. The memorandum of 23 May 2014 submitted by Mr Molefe to the board justifying the increase specifically stated that the escalations had been verified by Regiments “using their intellectual property methodology and techniques”.

101. CSR paid a R3.81 billion kickback in respect of the 359 electric locomotives awarded to it as part of the 1064 locomotive transaction (of which 85% was laundered further onto companies associated with the Gupta enterprise). It is also reasonable to conclude that the unjustifiable expenditure of R9.124 billion which increased the price paid to CSR probably facilitated the ability of CSR to make the kickback payment. The kickback in this instance was made in terms of a BDSA concluded in May 2015 by Mr Essa acting on behalf of Tequesta and CSR (Hong Kong) and in terms of an earlier agreement between CSR Zhuzhou Electric Locomotive Co Ltd and JJ Trading FZE.

102. A kickback of R2.088 billion was paid by CNR to Mr Essa’s company Tequesta in terms of an exclusive agency agreement (which superseded an earlier agreement of 8 July 2013 between CNR and CGT). This kickback was in respect of the 232 diesel locomotives awarded to CNR as part of the 1064 locomotive procurement.

103. Thus, CSR and CNR (later amalgamated as CRRC) paid approximately R5.9 billion in kickbacks in relation to the 1064 locomotive procurement. This amount fell within the R9.124 billion margin of unjustifiable expenditure in respect of all the 1064 locomotives.

104. In March 2014, shortly before the conclusion of the LSA in relation to the 1064 locomotives, a decision was taken to locate the manufacturing and assembly of the CNR and Bombardier locomotives in Durban. The initial costing of the relocation of CNR was estimated to be R9.8 million. Transnet eventually agreed to pay approximately R647 million to CNR (CNRRSSA) and approximately R618 million to Bombardier, a total of R1.261 billion of which R617.6 million was actually paid. Further in-

vestigation is required to definitively determine the justifiability of these costs. However, the available evidence establishes strong grounds to believe that CNRRSSA made a corrupt payment of approximately R77 million to BEX (a company associated with the Gupta enterprise) which was laundered onto other shell companies including Integrated Capital Management of which Mr Shane (a director of Transnet who succeeded Mr Sharma as chairperson of the BADC) was a director. The payment to BEX was ostensibly for services rendered in relation to the relocation. However, the BDSA with BEX resembled the other kickback BDSAs facilitated by Mr Essa in relation to the locomotive transactions with the services rendered being of dubious value. The inclusion of BEX in the arrangement was consistent with the methodology of the Gupta enterprise of inflating the value of tenders to enable payments to the enterprise via chosen SDPs that were typically shell companies.

105. The LSA concluded between CSR and Transnet in relation to the 359 locomotives as part of the 1064 locomotive transaction envisaged the parties concluding a maintenance services agreement for the locomotives supplied. In June 2015, CSR concluded a BDSA with Mr Essa's company, Regiments Asia, in relation to a proposed 12-year maintenance plan in terms of which Regiments Asia would supposedly provide advisory consulting services in exchange for a fee of 21% of the contract price of the maintenance services amounting potentially to R1.3 billion. The Transnet board approved the conclusion of a 12 year maintenance plan for an amount of R6.18 billion on 28 July 2016. Transnet paid CSR an advance payment of approximately R705 million in terms of this agreement in October 2016. The evidence indicates that R9.4 million of this was paid to Tequesta (another company associated with Mr Essa). Amidst allegations of corruption, Transnet terminated this agreement in October 2017 and sought repayment of the monies that had been advanced. In December 2018, CSR refunded Transnet R618 million. It is unclear whether CSR has repaid to Transnet the VAT and interest in the amount of R223 million in respect of the R705 million advanced.

106. The wrongdoing in relation to the 1064 locomotive procurement comprised, *inter alia*: 1. the misrepresentation to the board of the components of the ETC; 2. non-compliance with the preferential points system; 3. the unfair favouring of CSR through the TE adjustment; 4. the factoring of a R2.01 million discount for TE back into the price of CSR's locomotives; 5. the irregular understating of CNR's BAFO price by approximately R13 million per locomotive; 6. the marginalizing of Transnet's treasury by unnecessarily outsourcing tasks to Regiments; 7. the inflation of the price through the inappropriate use of batch pricing; 8. the inappropriate calculation of escalation costs, forex and contingencies; 9. the manipulation of the delivery schedule; 10. the payment of excessive advance payments favouring CSR and CNR; 11. non-compliance with the local content requirements; 12. the failure to obtain the approval of the Minister for the substantial increase; 13. the misrepresentation to the board of the NPV by using the wrong hurdle rate; 14. the dubious maintenance services agreement and the failure to recoup the excessive advance payment timeously and the VAT and interest on it; and 15. the BDSA kickbacks.

107. Regiments began to assume a greater role at Transnet in the immediate period leading up to the conclusion of the LSA's in respect of the procurement of the 1064 locomotives and the 100 locomotives confined to CSR on 17 March 2014 and in the subsequent period in which the financing of the 1064 transaction was finalised. On 23 January 2014, Mr Singh, without appropriate authority concluded a contract with Regiments in relation to the 1064 locomotive procurement. This was followed on 4 February 2014 by Mr Singh concluding with Regiments a third addendum to the LOI with McKinsey. McKinsey then purported to cede its rights to Regiments on 5 February 2014 in terms of an invalid cession. Regiments was then paid R36.77 million between 18 February 2014 and 7 April 2014 in terms of the purported invalid third amendment to the LOI concluded on 4 February 2014. An additional payment of R79.23 million without any legal basis was paid by Transnet to Regiments on 30 April 2014.

108. During 2014-2015, McKinsey and Regiments were awarded contracts valued at R2.2 billion by way of confinement rather than by open public tender. Half of the revenue received by Regiments under these contracts was directed to Homix, a Gupta associated company, in terms of the money laundering agreement with Mr Essa and Mr Moodley. The evidence establishes that McKinsey and Regiments were irregularly in possession of the confinement memoranda prior to making the bids

on their contracts. Four of the confinements were approved by Mr Molefe over a period of four days between 31 March 2014 and 3 April 2014. These contracts all appointed Homix and Albatime (Gupta linked laundry vehicles) as SDPs. Fee payments (in an unknown amount) were irregularly made to McKinsey and Regiments in July 2014 in terms of these contracts prior to the conclusion of the tender process. Correspondence of 13 June 2014 confirms that provision for fee payments to Homix and Albatime in excess of R100 million were to be made in terms of these contracts. Mr Fine of McKinsey confirmed in a statement to Parliament that neither Homix nor Albatime were involved in providing any services on any project in which McKinsey was involved.

109. In April 2014, shortly after the conclusion of the LSAs in respect of the 1064 locomotives, negotiations began in earnest with the CDB for the financing of the procurement of the locomotives from the Chinese companies. Regiments assumed a lead role in the negotiations while the Group Treasurer and treasury team of Transnet were side-lined. The Group Treasurer, Ms Makgatho, valiantly challenged the relegation of the Transnet treasury team. She repeatedly raised her concerns about her marginalisation and the unsatisfactory proposed terms of the CDB facility with Mr Molefe and Mr Singh, but to no avail. Ms Makgatho resigned from Transnet in November 2014 as she feared for her safety and wellbeing. She was replaced by Mr Ramosebudi who had links with the Gupta enterprise.

110. During August 2014, Mr Singh, with the assistance of Regiments, presented misleading information to the board which committed Transnet to a loan of USD1.5 billion from the CDB on relatively unfavourable terms.

111. During this period, on 4 August 2014, Mr Molefe signed a deed of settlement agreeing that Transnet would pay the costs of GNS/Abalozi and its directors (including General Nyanda, a member of President Zuma's cabinet) on a punitive scale in litigation about the termination of a services contract with GNS /Abalozi, which had led to the dismissal of Mr Gama in 2010. The deed was apparently signed on behalf of GNS/Abalozi by General Nyanda, who was a friendly acquaintance of Mr Gama. The agreement to pay these costs was unjustifiable in a number of respects and should not have been concluded. Moreover, properly taxed the costs envisaged in the questionable settlement agreement would not have exceeded R200 000 at that particular stage of the litigation between Transnet and GNS/Abalozi. Yet, on 16 January 2016, Mr Molefe agreed to pay GNS/Abalozi R20 million to settle all legal claims against Transnet. The amount paid was an excessively inflated assessment of the legal costs payable and was paid to settle claims that had already been settled or had prescribed. This expenditure was wholly unjustifiable.

112. On 17 April 2015, consistent with what Mr Essa had told Mr Bester of Hatch during the course of 2014, Mr Molefe was seconded from Transnet and became acting CEO of Eskom. On 20 April 2015, the board of Transnet appointed Mr Gama as acting GCEO of Transnet. Four days earlier, on 16 April 2015, Transnet paid Mr Gama's attorneys R1.4 million in relation to his dismissal and reinstatement in 2010/2011 (four years previously). This payment was without any legal basis as it was probably a duplication of a costs payment made to Mr Gama's attorneys earlier which itself should never have been paid for various reasons, including the fact that it related in part to costs that had been awarded to Transnet in Mr Gama's failed High Court application and moreover was in any event not due in terms of the indefensible settlement agreement to reinstate Mr Gama.

113. A week after Mr Gama's appointment as acting GCEO, Mr Ramosebudi who had succeeded Ms Makgatho as Group Treasurer of Transnet, compiled a memorandum seeking inter alia approval from the BADC for the payment to Regiments of R189.24 million as a "success fee" in relation to the USD1.5 billion facility with CDB (concluded eventually on 4 June 2015). The proposal was supported by Mr Gama, Mr Singh and Mr Pita. The BADC approved the request on 29 April 2015. Mr Gama approved the additional fee on 16 July 2015. Before the conclusion of the CDB loan, Regiments submitted an invoice for R189.24 million on 3 June 2015. The evidence discloses that the work performed in respect of this fee fell within the scope of an earlier agreed fee of R15 million. Additionally, the expert evidence of Dr Bloom confirms that the fee of R189.24 million was 10-15 times greater than the market norm for the work supposedly performed by Regiments and was probably inflated by an amount of between R90 million and R140 million. The fee was paid to Regiments on 11 June 2015 and the record shows that R147.6 million of it was paid to Albatime (the Gupta linked laundry vehicle) of which

R122 million was laundered further to Sahara Computers, another company in the Gupta enterprise.

114. As discussed earlier in this report, USD1 billion of the USD2.5 billion CDB loan facility was shelved and Regiments advised and arranged for Transnet to conclude a ZAR12 billion club loan instead. Regiments originally replaced JP Morgan as the lead arranger on this loan. However, when Mr Wood moved from Regiments to Trillian Capital (Pty) Ltd (a company which Mr Wood helped to establish and in which Mr Essa was a controlling shareholder), Mr Gama submitted a memorandum to the BADC on 22 September 2015 recommending that the BADC approve the appointment of Trillian to replace JP Morgan as the lead arranger on the ZAR club loan.

115. The proposal to appoint Trillian was supported by Mr Ramosebudi, Mr Pita and Mr Thomas. It was initially intended to pay Regiments a success fee of R50.2 million. However, Trillian was eventually paid a success fee of R93.48 million. Mr Thomas in an email to Mr Ramosebudi and Mr Pita challenged the propriety of the proposal on the grounds that prior payments to Regiments had covered the services supposedly performed by Trillian and expressed doubt that the newly incorporated Trillian had the capacity to underwrite the loan. Trillian was not a bank with significant assets but a company recently conceptualized by Mr Wood.

116. On 14 September 2015, a few days before Mr Gama submitted the proposal to the BADC, Mr Ramosebudi forwarded an email to Mr Wood to which he attached an order to Land Rover Waterford (a dealership partly owned by Mr Wood's partner, Mr Nyhonyha) for a Range Rover Sport valued at R1.23 million in the corrupt hope that Mr Wood could "do something for him".

117. On 18 November 2015, Mr Gama and Mr Pita concluded a mandate with Mr Roy of Trillian engaging it as the lead arranger for the ZAR12 billion club loan. On the same day Trillian issued an invoice for R93.48 million. The next day, 19 November 2015, Mr Gama and Mr Pita signed a payment advice. Four days later on 23 November 2015, the ZAR club loan was concluded. The next day, 24 November 2015, Mr Ramosebudi compiled a memorandum requesting Mr Gama and Mr Singh to sign off on the Trillian invoice which they did in early December 2015. The money was paid into Trillian's account on 4 December 2015, a mere 16 days after the mandate was concluded. Four days later on 8 December 2015, R74.8 million of that fee was transferred by Trillian to the Gupta money laundering vehicle Albatime.

118. The evidence convincingly confirms that Trillian had not in fact performed any services in relation to the ZAR club loan and that the lead arranging work had been performed earlier by JP Morgan and Regiments. In addition, Trillian could not have practically done the work in the limited time available to it as it would have needed to be done in the months leading up to the conclusion of the ZAR club loan.

119. Shortly after Mr Gama approved the wholly unjustifiable payment of R93.48 million to Trillian, he met with Mr Essa at the Oberoi Hotel in Dubai on 23 January 2016. Evidence before the Commission confirms that Mr Gama's hotel bill in Dubai was either paid or was intended to be paid by Sahara Computers or Mr Essa, both associates of the Gupta enterprise. A few weeks later, on 24 February 2016, Ms Mabaso, the chairperson of the Transnet board recommended the appointment of Mr Gama as GCEO to replace Mr Molefe (who had resigned in September 2015 to assume the position of CEO at Eskom). Ms Mabaso recommended the appointment of Mr Gama without any formal, competitive recruitment process. Ms Brown, the then Minister of Public Enterprises (appointed by President Zuma) appointed Mr Gama as GCEO on 12 March 2016, despite the fact that Mr Gama had on two prior occasions been found unsuitable for the post by the Transnet board.

120. On the same day that Mr Gama authorized the unjustifiable payment of R93.48 million to Trillian – and just 10 days after the conclusion of the ZAR12 billion club loan, at a floating interest rate – Mr Ramosebudi submitted a memorandum to Mr Pita, the then acting GCFO, seeking approval for hedging the interest rate exposure from a floating rate to a fixed rate and permission to instruct Regiments to execute the hedges with approved counterparties. Mr Gama approved the proposal and two tranches of interest rate swaps were executed by Regiments on the ZAR club loan. R4.5 billion was swapped to a fixed rate of 11.83% for 15 years on 4 December 2015. Seven months later, on 7 March 2016, R7.5 billion was swapped to a fixed rate of 12.27% for 15 years.

121. These interest rate swaps were highly imprudent for various reasons, caused substantial losses to Transnet, and should never have been concluded. The realised total negative cash flow for Transnet on these interest rate swaps was R850.5 million by 2019. This amount would not have been payable had Transnet not effected the interest rate swaps. As of 14 May 2019, the amount of the cost of exit (an unrealised negative cash flow) would have been an additional R918.48 million, giving a total negative cash flow of R1.83 billion at that date.

122. . Other interest rate swaps executed by Regiments on Transnet debt in the amount of R11.3 billion, not directly related to financing the 1064 locomotive transaction, and unusually using the Transnet Second Defined Benefit Fund as a counterparty, resulted in an additional realised cash flow loss of R720.8 million and an unrealised loss of R815.7 million, totalling R1.5 billion, for Transnet. Regiments received a fee of R229 million in respect of these transactions.

123. Other transactions in relation to Transnet's IT and data network were tainted with corruption and irregularity. In October 2013, the acting GCEO of Transnet awarded the tender for Transnet's network services to Neotel when Mr Molefe, the GCEO, was absent on business elsewhere. On his return, and most likely in contravention of the PFMA, Mr Molefe revised the award and granted the tender to T-Systems which had bid for the contract in conjunction with BBI, the SOE to which Mr Essa had been appointed as a director by Mr Gigaba. T-Systems was linked to the Gupta enterprise via Sechaba Computer Systems, its SDP, which made various payments to Gupta laundry vehicles (including Homix and Albatime) and which during 2015 and 2016 paid Zestilor (a company owned by Mr Essa's wife) a monthly retainer of R228 000.

124. Mr Molefe's decision was subsequently reversed and the award to Neotel was reinstated after Transnet received a negative opinion from its auditors and legal advice that Mr Molefe's decision was irregular.

125. The evidence establishes convincingly that during 2014-2015, Neotel made two corrupt payments to Homix (a Gupta enterprise laundry vehicle), in the amount of approximately R75 million. The first payment of R34.5 million was in respect of the acquisition of equipment from Cisco for use in the Transnet IT network and another payment of R41 million supposedly for services rendered over two days in concluding the Master Services Agreement for the network services between Neotel and Transnet. Neotel also agreed to pay R25 million to Homix for services it supposedly rendered (over the same two-day period) in relation to an asset buy back agreement between Transnet and Neotel. The amounts paid to Homix by Neotel were then laundered onto the Gupta enterprises in contravention to the exchange control regulations.

126. A further unsuccessful attempt to favour T-Systems was made in 2017. On that occasion, the BADC chaired by Mr Shane (seemingly supported by Mr Gama) refused on dubious grounds to award the tender to the first placed bidder, Gijima, and instead awarded it to T-Systems, the lowest scoring bidder whose bid was R1 billion more expensive. The decision was eventually reversed and the tender was awarded to Gijima, but the conduct of the members of the BADC, particularly Mr Shane and Mr Nagdee (both with links to the Gupta enterprise) evinced a clear intention to favour T-Systems. There are reasonable grounds to believe that their conduct contravened section 50 of the PFMA and is evidence establishing their links to the Gupta racketeering enterprise.

127. Transnet ultimately was the primary site of state capture in financial terms. Transnet contracts to the value of approximately R41.204 billion were irregularly awarded for the benefit of entities linked to the Gupta enterprise or Mr Essa. This amount represents 72.21% of the total state payments in respect of contracts tainted by state capture. The overall impact on Transnet was to burden it with the huge financial losses that resulted from the excesses, fraud and corruption.

128. Much of looting of Transnet by the Gupta enterprise took place during Mr Gigaba's tenure as the Minister of Public Enterprises (November 2010 to May 2014) in President Zuma's cabinet. The fact that both President Zuma and Mr Gigaba had strong ties to the Guptas underpins the conclusion that Transnet was a site of state capture.

STATE CAPTURE: BOSASA

129. The Bosasa evidence overwhelmingly establishes that Bosasa, its leadership, employees and associates were able to gain illicit control over the procurement processes of departments and organs of state, through the systematic and aggressive targeting of public officials with offers of gratification in the form of bribes and a range of other material benefits. As part of its strategy, it sought out officials across different levels of seniority within the state, ranging from the former President Zuma at one end of the spectrum, to municipal officials and employees of SOEs at the other end of the spectrum. It also sought to identify and influence individuals that wielded the greatest influence within the ruling party.

130. Mr Angelo Agrizzi, former Bosasa chief operating officer, testified that Bosasa relied heavily on government contracts worth approximately R2.5 billion per annum, particularly from the Departments of Correctional Services (DCS), Justice and Constitutional Development (DOJCD), and Transport. Bosasa set up a system whereby gratification was provided on an ongoing basis through regular payments of cash bribes to numerous officials within a department or entity. Mr Agrizzi estimated that bribes to the scale of around R75 million per annum were paid out.

131. Although the primary mechanism for attempting to influence public office bearers was the payment of these cash bribes, Bosasa also provided benefits in the form of building houses, providing various furnishings for homes, installing several home security systems, purchasing and hiring of motor vehicles, buying gifts (from premium luxury gifts to food and grocery items) and paying for travel and accommodation. By spreading benefits widely in this manner, Bosasa was able to maintain an advantage in fresh tender and contract extension processes, eliminate the risk of whistleblowing and ensure the early provision of confidential information that would enable it to have an advantage in any tender process.

132. The evidence demonstrates that Bosasa and the Watson family established a reasonably well-organised network of well-placed, well-connected and powerful people whose loyalty was secured with financial and other material incentives and bribes. It was through this network that they were able to promote and protect the private interests of Bosasa by irregular procurement practices to extract money from the state in very substantial amounts. In addition, there was a very close relationship between the company's main shareholder and chief executive, the late Mr Gavin Watson, and Mr Zuma. They met frequently.

133. Bosasa and the entities falling within the Bosasa group were the primary beneficiaries of the facilitation of the unlawful award of tenders, as a corporate entity doing business with government and organs of state. Senior Bosasa employees (such as Mr Agrizzi), Mr Gavin Watson and the Watson family also benefitted.

134. The clearest example of Bosasa's organised project to redirect state resources into private or individual hands and to protect the actors and beneficiaries from any accountability or consequence is its contracts with the DCS.

    134.1 The evidence shows that Bosasa was awarded numerous contracts with the DCS that were later renewed or expanded. These contracts were secured through Bosasa's relationship with, and bribes to, various key officials at the DCS, including the former National Commissioner, Mr Linda Mti, and the former Chief Financial Officer, Mr Patrick Gillingham. These relationships were frequently initiated through Mr Gavin Watson. The extent of the influence was such that Bosasa was able to gain substantial control over the drafting of tender specifications so as to ensure that it would be awarded the contracts.

    134.2 In addition, Bosasa was able to limit the level of scrutiny on the various contracts awarded to it by offering and paying gratification in the form of bribes to members of parliament and by making threats against members of parliament who did not toe the line. As a result, attempts by some Members of the Parliamentary Portfolio Committee on correctional services to interrogate the award of further contracts and extensions to Bosasa gained little traction.

134.3 In line with its modus operandi outlined above, Bosasa secured influence in the DCS in a systematic manner and to a substantial degree through the unlawful and use of bribes or other gratification to influence decision-making on tenders and contracts. The evidence revealed provision of gratification in the form of monthly cash payments; the purchase of motor vehicles; travel and vehicle hire; building houses; fittings, furnishings and the installation of security systems; and paying for the studies of children of officials and members of parliament.

135. Various contracts between the DCS and Bosasa or Bosasa-related companies were subject to an investigation by the Special Investigating Unit (SIU). The SIU investigation made significant findings of a corrupt relationship between Bosasa and the DCS, concluded that the award of the contracts was irregular and that there was no lawful basis for benefits that were provided to senior DCS officials, Mr Mti and Mr Gillingham. The SIU provided the report as well as all of the evidence in their possession to the National Prosecuting Authority (NPA). Despite the nature of the findings made by the SIU, none of its recommendations were implemented by the DCS apart from the disciplinary proceedings eventually instituted against Mr Gillingham. Instead, the contracts between Bosasa and the DCS continued.

136. There was a concerted effort by Bosasa to avoid prosecution by the NPA for its corrupt relationship with the DCS.

136.1 Mr Agrizzi testified that he and Mr Gavin Watson made monthly payments to Mr Mti that were intended for officials at the NPA in return for which Bosasa was provided with documents and information regarding ongoing investigations into Bosasa, which allowed interference in the investigation and possible future prosecutions.

136.2 Various confidential NPA documents relating to the investigation and prosecution of persons linked to the Bosasa-DCS contracts were in Mr Agrizzi's possession and had been leaked in an attempt to interfere with the investigations and to harm the prosecution. Mr Agrizzi also alleged that Ms Myeni obtained confidential documents from the NPA on the progress of the investigation, including the docket, and allowed Bosasa to view them.

137. Overall, the evidence shows wrongful attempts to close down the Bosasa investigation and prosecutions and a substantial degree of control over the decision-making of the law enforcement and oversight bodies. For example, Mr Agrizzi alleged that Mr Zuma arranged for a meeting between a senior Hawks official and Bosasa Director Mr Joe Gumede, which Mr Gumede claimed did take place. Furthermore, the NPA did not act against Bosasa for over ten years, despite clear evidence of extensive corruption uncovered by the SIU in its report.

138. The DCS was not the only state department in respect of which Bosasa sought to gain illicit control over procurement processes. The evidence considered shows that contracts awarded to Bosasa and its affiliates by the DOJCD, the Airports Company of South Africa (ACSA) and the South African Post Office (SAPO) were similarly irregular and that certain officials received bribes.

138.1 Around 2013, Sondolo IT was awarded the contract with the DOJCD at an approximate value of R601 million to install a security access control system for close on 110 courts nationally. The Commission heard evidence that Sondolo IT paid 2.5% of all money received to certain individuals in the DOJCD as bribes in the form of car repairs, furniture and the payment of cash amounts; further, that certain officials received cash payments to overlook the problems with the infrastructure provided by Sondolo IT and sign off on the monthly maintenance fee that was charged by it. The 2.5% was paid over and above other monies that were being paid to officials in the DOJCD.

138.2 Bosasa (Sondolo IT) also paid Mr Seopela R1.9 million as a fee for corruptly arranging the DoJCD security upgrades contract at the SALU building.

138.3 Mr Agrizzi testified that he was advised that Bosasa would be awarded a five-year, renewable contract by ACSA for carpark protection and guarding services at OR Tambo International Airport when the tender bid was drafted. Further, he testified that security bags filled with money were

regularly taken to the airport for "certain people", including the procurement officer. Various irregularities were exposed by the Auditor-General in departments contracting with Bosasa.

138.4 Mr Agrizzi testified that Mr Watson had informed him to start the logistical preparations for the SAPO security contract before the tender was submitted. Mr Watson was alleged to have known that Bosasa would be the successful bidder months before the contract was awarded. The contract operated for a three-year period with a further extension of two years. The evidence was that cash payments were made to the then CEO of SAPO, Mr Maanda Manyatshe, as well as the head of security, Mr Siviwe Mapisa. Premium gifts were also purchased for these individuals in exchange for the security contract.

139. The scope of corrupt influence Bosasa sought to maintain was not limited to officials within state departments. Its efforts to secure substantial, corrupt influence over administrative decision-making targeted the executive at the levels of the presidency, the cabinet and deputy-ministers. It also sought corruptly to exercise influence through gratification provided in various forms to high-ranking members of the ruling party, the ANC as an entity itself and persons within law enforcement agencies. It also targeted certain SOEs.

139.1 The Commission heard evidence that Bosasa provided corrupt gratification in various forms to Mr Zuma, the ANC and at least one minister (Ms Mokonyane) and deputy minister (Mr Makwetla). Bosasa also catered for one of Mr Zuma's birthdays. Mr Agrizzi alleged that Mr Watson paid R300,000 cash per month to the Jacob Zuma Foundation, usually through the Chair, Ms Myeni, but once directly to Mr Zuma. The payment directly to Mr Zuma was made at a meeting where Mr Watson requested Mr Zuma's intervention in potential prosecution facing Bosasa.

139.2 Bosasa provided free catering for certain ANC events as well as large donations to the party.

139.3 Bosasa provided and operated sophisticated war rooms to assist the ANC in the running of elections, clearly aimed at assisting the ANC in retaining its position as majority party. The ANC furthermore accepted donations from Bosasa without investigating the source of the funds, this despite Bosasa being heavily reliant on government contracts and despite there being information in the public domain about Bosasa which raised serious concerns regarding its business dealings.

139.4 Ms Nomvula Mokonyane, a senior ANC politician who became Minister of Water Affairs and Sanitation in 2014, was given very substantial food and drinks deliveries annually, monthly cash payments, paid-for social events, security systems and maintenance and even car hire on occasion for her daughter – all because she "had a lot of clout".

139.5 Ms Dudu Myeni, Mr Gwede Mantashe, Mr Vincent Smith and Deputy Minister of Correctional Services, Mr Thabang Makwetla, all received free security system installations or upgrades and, in some instances, maintenance services for their private homes. The evidence shows the influence that Ms Myeni was able to exert over Mr Zuma and the closeness of her association with him.

140. The evidence before the Commission in relation to Bosasa directly implicates members or former members of the executive, the legislature and heads of SOEs in corruptly providing direct or indirect assistance to Bosasa in relation to the award to, or retention by, Bosasa of state tenders. This includes, amongst others:

140.1 Members of the executive who were found to have breached their constitutional, statutory and ethical duties. For example, the evidence established a prima facie case of corruption against Mr Makwetla in relation to his conduct in agreeing to Mr Watson's request to discuss increasing the payment rates under the Bosasa catering contract with the accounting office of the DCS.

140.2 Ms Myeni, who was involved in corrupt activities pertaining to facilitating access to and influence over Mr Zuma, co-ordinating Bosasa's arrangement of high-end functions for Mr Zuma, including a birthday party, arranging a meeting with the then acting CEO of South African Airways, Mr Bezuidenhout, with a view to Bosasa taking over a security contract and a catering contract

with SAA (although nothing came of it) and providing confidential information pertaining to the NPA's investigation into Bosasa's dealings with the DCS. All of these constituted corrupt activities intended to benefit Bosasa in doing business with the state and retaining existing and securing new tenders. Ms Myeni corruptly received benefits in return.

140.3 Members of the parliamentary portfolio committee responsible for oversight of the DCS, who were found to have participated in the facilitation of the unlawful award or tenders in return for corrupt payment, inter alia by protecting Bosasa from proper scrutiny when the portfolio was considering the affairs of the DCS.

141. In other instances, while there is less evidence (and in the case of Mr Mantashe, no evidence) of the provision of a corrupt *quid pro quo*, there is clear evidence that Bosasa corruptly sought to influence decision-making structures of the state to favour it, to the knowledge of the person targeted.

141.1 Although there is no evidence to suggest direct facilitation by the then President Zuma of the unlawful award of any tenders to Bosasa, there is evidence of interference directly by Mr Zuma in the investigation of Bosasa by the Hawks. On a conspectus of the evidence there are reasonable grounds to suspect that Mr Zuma corruptly provided the facilitation in order to benefit Bosasa and to benefit himself and his Foundation as the recipients of Bosasa's material and monetary largesse.

141.2 On the evidence, there is a reasonable suspicion that Mr Mantashe received the free security installations, knowing that Mr Leshabane sought through him to influence unspecified or unnamed office bearers in the lead departments that Bosasa did, or sought to do, business with.

141.3 There were, on a balance of probabilities, extensive efforts by Bosasa and its leaders, through a range of generous and lavish inducements and gratification, corruptly to influence and benefit Ms Mokonyane in her position as a member of, at various times, the national executive, the provincial executive and office bearer in organs of state. It is significant that Ms Mokonyane was dishonest in her evidence pertaining to the birthday function organised by Bosasa for her. There is evidence of the incomplete facilitation provided by Ms Mokonyane in relation to a possible tender for security for dams, when she was Minister of Water Affairs, a tender that did not materialise. The answer to the question in relation to facilitation by her is likely to be found in Mr Watson's explanation that "she has a lot of clout" and that "we needed her support for the protection from the SIU investigation, the Hawks and the NPA". Clearly, Ms Mokonyane did benefit herself in that she continued to receive benefits from Bosasa on a lavish scale over an extended period and would have been well aware of their corrupt purpose.

142. The foregoing represents a brief summary of some of the main aspects of the Bosasa evidence. The authoritative and binding source of the Commission's analysis and reasoning in relation to the Bosasa evidence is to be found in Part III of the Report.

Was there state capture at Bosasa?

143. From the evidence, it can be concluded that Bosasa and its leadership, employees and associates were indeed involved in the systematic attainment of unlawful and corrupt influence, to a substantial degree, over the decision-making of certain organs of state, for their own private purposes and gain, in conflict with the constitutional duty of the state and its organs to operate exclusively in the best socio-economic interests of its people and the sustainable management of its natural resources, for the benefit of current and future generations, consistent with the rights in the Bill of Rights and the values underlying it.

144. The corrupt activities of Bosasa thus brought about state capture, with its own defining features and modus operandi. The "captors" included:

144.1 Mr Gavin Watson, Mr Angelo Agrizzi and a number of individuals associated with the Bosasa network, mostly employees and directors of Bosasa and affiliated companies; and

144.2 The Watson family, who were the main beneficiaries through Bosasa and related companies from the corrupt relationships established with various public officials and who exerted various forms of pressure or influence on others, to their and Bosasa's benefit.

145. Those who were targeted or "captured" within the state, and who facilitated the process, included:

145.1 Members of the National Executive and Provincial Executives, such as Mr Jacob Zuma, Mr Thabang Makwetla and Ms Nomvulo Mokonyane, to whom Bosasa provided inducements aimed at gaining substantial influence. The evidence shows that these officials accepted gratification from Bosasa which held and sought to obtain and retain contracts with government

145.2 Senior board members and executives in SOEs, such as Ms Dudu Myeni, who had a relationship with Mr Gavin Watson and used her position to facilitate various procurements which would benefit Bosasa, and potentially SAA. Ms Myeni also benefitted in her personal capacity. There were also senior persons in the SAPO and ACSA who were successfully targeted

145.3 Members of Parliament who received regular monthly cash payments from Bosasa in return for adopting a favourable attitude towards Bosasa in the portfolio committee on correctional services; and

145.4 The ANC and some of its senior leadership who received benefits from Bosasa which were aimed at ensuring that the ANC would remain the majority party and be in a position to appoint to positions of public office, persons whom Bosasa was able to influence or would seek to influence, and members of the ANC deployed to senior positions in state institutions, organs of state and SOEs whom Bosasa sought to ensure would remain well-disposed towards Bosasa in its business dealings.

146. The modus operandi of Bosasa in gaining substantial influence over the decision-making processes of the relevant organs of state, is apparent from the foregoing summary and Part III of the report. It had as a distinguishing feature the regular payment of cash bribes and other forms of gratification, to a wide range of officials on a substantial scale, thus ensuing ongoing, corrupt influence over decision-making processes to favour Bosasa and to avoid detection and prosecution.

147. Those targeted were all in a position to have prevented Bosasa's corrupt activities, by declining to accept the bribes and other gratification provided, reporting the offers of gratification to the police and prosecuting authorities, and ensuring that those authorities followed up on their reports. The members of Parliament targeted had available to them the wide range of mechanisms for holding both the private and public sector actors involved to account. Yet the MPs involved did not use the mechanisms available to them. Instead, they worked to ensure that the portfolio committee did not expose the corruption.

148. The NPA and SIU were also in a position to put a stop to the corrupt activities by investigating and prosecuting the strong cases they had against the perpetrators. Bosasa used its corrupt influence over members of the executive, amongst others, to intervene with the investigating and prosecuting authorities in order to ensure that prosecutions never took place.

149. One may ask what features of the South African situation allowed Bosasa's state capture to take hold.

149.1 A particular component of the system of corruption-based business developed by Bosasa, and in particular the late Mr Gavin Watson and Mr Agrizzi, is that they traded on the Watson family's "struggle credentials". There can be no doubt that the Watson family were a beacon of hope during the apartheid era. They bravely crossed the racial divide to play non-racial sport in a society aggressively focused on building impenetrable and oppressive legislative, social and economic barriers between the race groups in every walk of life. For their stance, the Watson family gained justifiable admiration.

149.2 Sadly, however, it has become clear from all of the evidence, that the late Mr Gavin Watson and Mr Agrizzi perceived the potential for illicit economic gain to be derived from the influence the family had come to wield in the post-apartheid era. The evidence of Mr Vincent Smith is revealing in this regard. It demonstrated how a relationship forged in the struggle for democracy,

could be manipulated and transformed into an instrument for corrupt gain. The influence derived from the family's role in the struggle also meant that they enjoyed a competitive advantage in knowing who within the ruling party wielded the greatest levels of influence and where optimal opportunities for corrupt gain were to be found.

149.3 Other features of the South African situation that rendered the state vulnerable to capture of the kind exploited by Bosasa include:

149.3.1 The absence of a culture of ethical dealing in the private business sector

149.3.2 Problematic social trends in South African society today that tend to place a higher value on individual, material gain and the conspicuous accumulation of wealth, than the value placed on the pursuit of communitarian, developmental, charitable and egalitarian goals, that characterised the struggle for freedom; and

149.3.3 The failure of the state fully and effectively to implement section 195 of the Constitution, which provides:

> 195 Basic values and principles governing public administration
>
> (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained
>
> (b) Efficient, economic and effective use of resources must be promoted
>
> (c) Public administration must be development-oriented
>
> (d) Services must be provided impartially, fairly, equitably and without bias
>
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making
>
> (f) Public administration must be accountable
>
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information
>
> (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated; and
>
> (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

STATE CAPTURE: SARS

150. The ultimate question for the Commission to answer is whether there was an organised project of state capture in respect of the various institutions which it investigated.

151. In order to establish whether a particular institution fell victim to state capture the Commission directed its attention to a number of core themes summarised below.

152. First, the Commission was mindful of the fact that the strategic positioning of key individuals in positions of responsibility is central to the repurposing of State institutions. It was thus important for the Commission to focus on the relationships upon which the alleged state capture networks were forged and to examine how the repurposing of SOEs was co-ordinated. It was also important to establish who it was who nominated the various individuals to their positions of power and what process was followed which culminated in their appointment to senior positions in the affected SOEs.

153. Many of the individuals who were implicated before the Commission share some or other connection to the Gupta and/or Zuma families. It was thus clear that these relationships were important for

understanding what role a broader network of implicated persons may have played in the project of state capture. Significant in this regard is that Mr Zuma appears to have been determined to see particular individuals fill CEO positions at various SOEs, regardless of whether other candidates had been nominated or even proposed by the Minister of Public Enterprises.

154. Second, it was important for the Commission to examine the circumstances which led to the irregular suspension of apparently well-performing senior executives at SOEs, either so as to remove them as stumbling blocks to state capture, or for allegedly resisting inappropriate agendas and instructions. The Commission looked at any patterns which might be indicative of the potential collusion between Board members and officials within a SOE in effecting these changes. In this regard, the similarities between several significant departures of senior people at various SOEs were obvious.

155. Third, the Commission examined whether SOE governance structures were deliberately changed to facilitate irregular procurement or other decisions for the benefit of particular individuals and entities.

156. Fourth, the Commission took account of evidence from several witnesses claiming that they were unfairly smeared in public statements, in the press, and on social media after resisting what they understood to be a project of state capture. These individuals contended that smear campaigns were used as a tactic to silence and discredit those who opposed or threatened to expose state capture. In particular, the Commission heard evidence that false or misleading information was leaked to certain journalists at the Sunday Times in order to discredit specific individuals. It was alleged that these stories put false allegations in the public domain in order to justify suspending these individuals and investigating the false allegations.

157. In pursuing all these lines of inquiry, the Commission paid particular attention to the impact of private sector consultancy arrangements on the effectiveness of internal controls in SOEs and the role which external consultants played in facilitating state capture. It became clear that the increasing reliance on consulting and advisory services was accompanied by the side-lining or weakening of internal controls, either by diluting their role in key transactions or operational matters or by entirely outsourcing their functions to third parties.

158. All of these over-arching considerations featured in the evidence lead as part of the SARS Workstream and the findings ultimately made by the Commission. These themes and findings as they relate to SARS are highlighted below. The Commission finds that, cumulatively, they demonstrate a very clear case of state capture at the Revenue Service.

The role played by Bain

159. When Mr Moyane took over as Commissioner of SARS it was internationally recognised as one of the best and most efficient tax administration services in the world. Despite this, the consulting firm, Bain, was contracted to perform consulting services at SARS and ultimately recommended and implemented what it called a “profound strategy refresh” and complete organisational restructure in the organisation. Objectively speaking, there was no need for this invasive intervention. Instead, it is apparent there was a plan conceived between Bain and the Executive, particularly Mr Moyane and former President Zuma, to seize SARS for other purposes. The Bain contract with Ambrobrite makes plain that the SOE sector was seen as a strategic priority and would be the subject of leadership and strategic changes for illegitimate purposes. That is precisely what happened at SARS.

160. The high number of meetings between August 2012 in July 2014 between Bain and Mr Zuma demonstrates the level of collaboration between them. Over the period 2012 to 2015, Bain created a series of documents containing far-reaching plans not only to restructure certain State agencies but also to restructure entire sectors of the South African of economy.

161. SARS was a central part of this scheme. Bain developed a restructuring plan with Mr Moyane, which he presented to President Zuma. All of this happened before Mr Moyane had even been appointed as Commissioner.

162. The reality is that there was no need for consultancy services since SARS was a well-functioning,

highly effective organisation. The appointment of Bain was a convenient pretext to facilitate the re-purposing of SARS.

The appointment of Mr Tom Moyane as SARS Commissioner

163. SARS was a clear example of where former President Zuma was himself directly and personally involved in the plans to take over an SOE.

164. Mr Zuma obviously earmarked Mr Moyane for the position of Commissioner at the outset of the selection process and paid only lip-service to the statutorily mandated appointment procedure. Mr Moyane conceded that President Zuma had informed him at a very early stage that he intended to appoint him to the position of SARS Commissioner. This happened well in advance of the actual appointment, despite the process then underway to select the appropriate person from amongst a large number of candidates.

165. It was Mr Moyane who would do former President Zuma's bidding at SARS.

The axing of key, long serving individuals

166. In the "First 100 Days" document created by Bain and Mr Moyane, one of the "key immediate actions for discussion" was to take control of SARS. Amongst the identified ways to achieve this was to "build a healthy sponsorship spine to accelerate change and identify individuals to neutralise".

167. One of Mr Moyane's first actions, only two weeks after taking over at SARS in September 2014, was to disband SARS's entire executive committee on the basis of the apparent expose in the Sunday Times about the existence of a so-called "rogue unit". The repeated contention over a period of years that an illegitimate unit existed was eventually definitively debunked by the High Court.

168. Mr Moyane also side-lined senior officials. In August 2015 when a new model for SARS (designed by Bain) was presented to its senior management, this was done as a fait accompli and they were never even consulted about it.

169. Mr Moyane also systematically removed key individuals from SARS who he regarded as potential obstacles to his plans and who therefore needed to be "neutralised". Dramatically, he removed Mr Barry Hore, then chief operating officer, who was key to SARS's proper functioning. Mr Hore had been specifically named in the 100 Days document as a target. After only a few months in his position as Commissioner, Mr Moyane had engineered the resignation of one of SARS's most vital employees.

170. By the end of his first year at SARS, Mr Moyane succeeded in working out of the system at least six other key officials who were crucial to the proper functioning of SARS but who were obstacles to Mr Moyane and his plans.

The appointment of compliant individuals

171. In the place of these long-serving, loyal officials, Mr Moyane appointed people who were happy to go along with his "restructuring" plans and who provided no obstacle to his repurposing objective.

The disassembling of SARS' compliance units

172. At the time when Mr Moyane took over at SARS there were a large number of dedicated, specialist units within the organisation which were mandated to assist law-enforcement agencies to control organised crime from a revenue and customs and excise perspective. They had proved to be highly effective and were well functioning enforcement units. However, Mr Moyane's "restructuring" plans involved the dismantlement of enforcement capabilities of a number of these key units.

173. By 2015 the PEMTS subdivision of SARS was at the forefront of investigating organised-crime and was running at least 87 projects. These included investigations into smuggling activities with specific emphasis on tobacco and alcohol related products.

174. Under Mr Moyane's leadership, PEMTS was dismantled and its projects were brought to a close in a very short space of time. The net effect of this was that pending investigations were negatively affected and, in some cases, stopped altogether. The beneficiaries of this where in the vast majority of cases persons who had connections to high-ranking politicians.

175. Project Honey Badger is a good example. It focused on the illicit tobacco trade. The project was making good progress at the time of Mr Moyane's appointment. However, it came to a halt under Mr Moyane's tenure. There is no rational explanation for this other than that it was done in an attempt to protect wrongdoers.

CONCLUSION

176. Having considered the evidence led before it, the Commission has concluded that it gives a very clear picture of state capture.

MR MALUSI GIGABA AND THE EVIDENCE OF MS NOMACHULE MNGOMA

INTRODUCTION

1. This part of the report deals with the evidence given by Ms Nomachule Mngoma implicating her husband, Mr Malusi Gigaba, in state capture and corruption. Her evidence is assessed in the light of Mr Gigaba's own evidence and that of other witnesses, with a view to determining the extent of Mr Gigaba's links to the Guptas and the role that he may have played in the Gupta enterprise.

2. From 1996 to 2004 Mr Gigaba was the President of the ANC Youth League. He went on to hold five ministerial posts: 1. Deputy-Minister of Home Affairs (29 April 2004 – 31 October 2010); 2. Minister of Public Enterprises (1 November 2010 – 25 May 2014); 3. Minister of Home Affairs (26 May 2014 – 31 March 2017); 4. Minister of Finance (31 March 2017 – 27 February 2018); and 5. Minister of Home Affairs (28 February 2018 – about 13 November 2018).

3. Mr Gigaba was appointed to his first post by President Thabo Mbeki, to his second, third and fourth posts by President Zuma, and to his fifth post by President Ramaphosa.

4. The bulk of the Commission's investigation into the conduct of Mr Gigaba relates to the three-and-a-half years that he was the Minister of Public Enterprises within President Zuma's cabinet. Extensive findings have already been made about Mr Gigaba in those sections of this Report dealing with SAA, The New Age, Transnet, Denel and Eskom.

MS MNGOMA'S EVIDENCE

5. Mr Gigaba and Ms Mngoma met in 2009 when Mr Gigaba was the Deputy Minister of Home Affairs. They moved in together in 2009 and were married in August 2014.

Meetings and interactions with the Guptas

6. From the time that Ms Mngoma met him, Mr Gigaba would regularly visit persons whom he described as his "advisors", but for some time she did not know their identities.

7. About two to three months before Mr Gigaba was appointed as the Minister of Public Enterprises and following a meeting at the Gupta residence in Saxonwold, Mr Gigaba told her that Mr Ajay Gupta

had advised him that he would be moved from the Department of Home Affairs to the Department of Public Enterprises (DPE).

8. After his appointment as the Minister of Public Enterprises (in November 2010), Mr Gigaba would visit the Guptas regularly. When Parliament was in session, Mr Gigaba would meet with them on Mondays (before flying to Cape Town) and on Friday evenings or sometimes on Saturdays (upon his return from Cape Town). When Parliament was in recess, meetings would take place on any day of the week, after Mr Gigaba was phoned by Mr Ajay Gupta.
9. During late 2011, Mr Gigaba told Ms Mngoma that his "advisors" – whom he described as "long-time friends" – wanted to meet her and their eldest son. The meeting took place at the Gupta residence, where Ms Mngoma met Mr Ajay Gupta, his wife and their son. Mr Ajay Gupta gifted their son a gold necklace. Ms Mngoma learnt from the meeting that Mr Gigaba's "advisors" were the Guptas.
10. Ms Mngoma went on to visit the Gupta residence on several occasions during 2012 together with Mr Gigaba. She did so again a few months after their second child was born (in December 2012) at the request of the Guptas.
11. The Gigabas attended the Gupta wedding in Sun City in 2013. The day before the wedding they attended the Waterkloof Air Force Base to receive the Gupta aircraft. Although they had planned to stay over at Sun City on the night of the wedding, they travelled home at around midnight because of negative media reporting.
12. After this, Ms Mngoma went to the Gupta residence on many occasions together with Mr Gigaba. She described the procedure that would be followed when she accompanied Mr Gigaba for meetings. They would be escorted to the lounge area and asked to hand over their cell phones by one of the security personnel. Mr Ajay Gupta would then arrive and brief Mr Gigaba before they met in an adjacent private meeting room. Topics for discussion that Mr Gigaba was briefed on included matters relating to Transnet, Eskom and SAA. Mr Siyabonga Mahlangu and / or Mr Thamsanqa Msomi (Mr Gigaba's special advisor and chief of staff, respectively, while he was the Minister of Public Enterprises) were often in attendance at these meetings, and what appeared to be official government vehicles were often parked at the residence. Ms Mngoma also often saw Mr Duduzane Zuma at the Gupta residence.
13. When Ms Mngoma questioned Mr Gigaba about why she had to hand in her cell phone at the Gupta residence, he said that this was because the matters for discussion were confidential and sensitive.
14. From an overall perspective, Ms Mngoma estimated that she had gone with Mr Gigaba to the Gupta residence at least twenty times from late 2011 (her first visit) until after Mr Gigaba returned to Home Affairs in 2014. That would be in a period of about three years. They would go there: (i) when Mr Gigaba had meetings; (ii) for lunch with Mr Ajay Gupta and his wife; and (iii) occasionally for events, like Diwali.
15. According to Ms Mngoma, during 2013, Mr Ajay Gupta twice visited their official residence in Waterkloof. Mr Gigaba told her that the meetings related to Transnet and Eskom.

Tensions rising in the first half of 2014

16. As Mr Gigaba's tenure as the Minister of Public Enterprises progressed, he told Ms Mngoma that the Guptas were putting pressure on him to take decisions that he did not agree with.
17. During early 2014, Mr Gigaba's relationship with the Guptas began to appear strained. The Guptas wanted Mr Gigaba to get rid of Mr Brian Dames as the CEO of Eskom because he was not doing what the Guptas wanted him to do, but Mr Gigaba did not agree with the instruction. Mr Gigaba then started avoiding phone calls from the Guptas and was reluctant to meet with them. In this context, Mr Gigaba told Ms Mngoma that Mr Ajay Gupta had advised him that if he wanted to run the DPE as he wished, he would be moved back to the Department of Home Affairs.

18. In this context, Mr Gigaba told Ms Mngoma that, when he did not want to follow the instructions of Mr Ajay Gupta or Ms Myeni, they would phone President Zuma and complain about him. As Mr Ajay Gupta had done, Ms Myeni told Mr Gigaba that, if he did not do as he was told, he would go back to the Department of Home Affairs.

Mr Gigaba's return to the Department of Home Affairs

19. On 26 May 2014, and following the 2014 elections, Mr Gigaba was transferred back to the Department of Home Affairs.

20. According to Ms Mngoma, Mr Gigaba did not think that President Zuma would do this because he believed that they shared a close relationship. He appeared shocked and hurt when his transfer was announced. He relayed to Ms Mngoma that President Zuma had informed him that the move was motivated by the need to strengthen border controls, but that he knew this was not the real reason.

21. Ms Mngoma went on to testify about two matters that occurred during this ministerial appointment. The first related to a trip to India which Ms Mngoma accompanied Mr Gigaba on during 2015. In the run up to the trip, he mentioned that he would create an official state visit to India so that he could meet with India nationals that Mr Ajay Gupta wanted him to meet in relation to the cancellation of SAA's Johannesburg / Mumbai route – an issue that arose while Mr Gigaba was the Minister of Public Enterprises. Ms Mngoma said in this regard that during 2010, Mr Gigaba had told her that the Guptas wanted to introduce their own airline to service the Johannesburg / Mumbai route and that they were demanding that he compel SAA to cancel its route.

22. The second matter related to the Guptas' application for South African citizenship, which Mr Gigaba told Ms Mngoma he was assisting them with. According to Ms Mngoma, sometime during 2015, she went with Mr Gigaba to the Gupta residence, where official documents were apparently signed and brought back home by Mr Gigaba.

Mr Gigaba's appointment as Minister of Finance

23. 25. On 30 March 2017, Mr Gigaba told Ms Mngoma that he had received a phone call from President Zuma who informed him that he had decided to reshuffle his Cabinet and that Mr Gigaba would be appointed as the Minister of Finance. 26. This change in portfolio also appeared to upset Mr Gigaba. He informed Ms Mngoma that President Zuma had told him that he initially wanted to appoint Mr Brian Molefe as the Minister of Finance but had decided to appoint Mr Gigaba instead at the request of other NEC members. 27. According to Ms Mngoma, by this time Mr Gigaba's relationship with the Guptas had deteriorated and his visits to the Gupta residence had become infrequent.

Appointments at SOEs

24. Mr Gigaba told Ms Mngoma that Mr Molefe was going to be moved from Transnet to Eskom. Ms Mngoma testified that Mr Gigaba told her this before Mr Brian Molefe was actually moved. As a matter of fact, Mr Molefe moved from Transnet to Eskom in April 2015. He said that the Guptas wanted Mr Molefe at Eskom and not Mr Dames. According to Ms Mngoma, she was told this at a time when Mr Gigaba was the Minister of Public Enterprises.

25. While also the Minister of Public Enterprises, Mr Gigaba shared with Ms Mngoma that Mr Siyabonga Gama was going to be reinstated as the CEO of Transnet Freight Rail before this occurred.

26. On the topic of Mr Gama, Ms Mngoma said that Mr Gigaba had told her that he intended to speak to Mr Gama about employing his sister, Ms Gugu Gigaba, at Transnet. She went on to be employed by Transnet and remains employed there.

Gifts, cash and benefits received from the Guptas

27. A few months before Mr Gigaba took office as the Minister of Public Enterprises in November 2010, Mr Ajay Gupta gave Mr Gigaba a white 3-series BMW, which he handed over, in Ms Mngoma's presence, at the offices of Sahara Computers. Ms Mngoma used the BMW as her private vehicle for one-and-a-half to two years, with it having been registered in her name for a short while before Mr Gigaba arranged for it to be registered in the name of a friend of his. After the vehicle was sent in for repairs by a friend of Mr Gigaba, it was never returned.

28. As mentioned above, the Gigabas were married in August 2014, at a time when Mr Gigaba was the Minister of Home Affairs. According to Ms Mngoma, the Guptas were invited to the wedding but did not attend. However, from what she was told by Mr Gigaba, the Guptas gave a cash donation towards the cost of the wedding and paid for their honeymoon in Dubai (a week-long stay at the Waldorf). Ms Mngoma estimated that the wedding cost between R4 and R5 million and said that she paid all the expenses (caterers and the like) in cash given to her by Mr Gigaba.

29. Ms Mngoma also testified about Mr Gigaba carrying a leather bag into and out of private meetings at the Gupta residence on several occasions. He would phone one of his close protection officers who would take the bag out of the boot of his vehicle and leave it at the door of the residence. She subsequently came to learn that the bag contained cash.

30. Under cross-examination, Ms Mngoma was confronted with the transcript of her ENCA interview on 17 December 2020, which reflects her having stated: "So then they will give him money. It was a lot of cash, all the time." In response to it being put to her that this contradicted her version that she never actually saw the Guptas giving Mr Gigaba cash, Ms Mngoma said that this captured what Mr Gigaba had told her about the Guptas paying for their wedding, assisting his sister with her bad debts, and assisting him with building renovations (dealt with below). Ms Mngoma was also confronted with this statement made during her ENCA interview: "Because every time when we go there he used to carry a bag and they will give him money." Her response appears to have been to the effect that she had not meant that Mr Gigaba was given money every time they went to the Gupta residence; she also accepted that she had not actually seen Mr Gigaba being given money.

31. Ms Mngoma was also confronted with the evidence of Witness 3. He served as one of Mr Gigaba's close protection officers for six months (July – December 2013) while Mr Gigaba was the Minister of Public Enterprises and testified about Mr Gigaba receiving cash at the Gupta residence (a deduction that he made by "connecting the dots"). It was put to Ms Mngoma that Witness 3 had not testified about Mr Gigaba having called for his bag at the Gupta residence and it being returned to the boot of his vehicle; nor about Ms Mngoma having been at the Gupta residence. In response, Ms Mngoma said that Mr Gigaba had four close protection officers, and that he would not always go to the Gupta residence with all of them. Although Ms Mngoma did not refer to this, Witness 3 did in fact testify that he had taken Mr Gigaba and Ms Mngoma to the Gupta residence on one occasion for dinner.

32. Ms Mngoma went on to say that Mr Gigaba bought her a Louis Vuitton handbag in Sandton City which he paid for in cash and gave her between R100 000 and R150 000 in cash for shopping when she went on holiday overseas.

33. Ms Mngoma also gave evidence about the Guptas having paid off the debts of Ms Nozipho Gigaba, Mr Gigaba's eldest sister, who appears to have been blacklisted by credit bureaus. According to Ms Mngoma, after meeting with his father sometime in 2013, Mr Gigaba told her that his father had asked him to assist his sister to settle a R850 000 bad debt. Mr Gigaba told her that he would ask Mr Ajay Gupta for the money. At a later stage, Mr Gigaba told her that Mr Ajay Gupta had agreed to give him the money, that Mr Mahlangu would collect the initial amount of R425 000, and that Mr Mahlangu would assist in removing the blacklisting. She was subsequently told that this was achieved. According to Ms Mngoma, at around this time, Ms Nozipho Gigaba came to stay with them in Pretoria, during which time she worked for Sahara Computers for a number of months.

34. Ms Mngoma went on to testify about the Guptas also paying for extensive renovations to Mr Gigaba's flat situated on his family's property in Mandeni, KwaZulu-Natal – this in 2013 and early 2014. Mr

Gigaba told her about fetching money from Mr Ajay Gupta to pay the builder, and she said that she was present on a few occasions when Mr Gigaba paid the builder in bundles of cash. Ms Mngoma disputed that Mr Gigaba's father could have paid for the renovations.

35. In her oral evidence, Ms Mngoma also said that Mr Ajay Gupta had given Mr Gigaba two watches on a trip to Dubai sometime during the period 2013-2015.

Confiscation of devices and destruction of evidence

36. During February 2020, Ms Mngoma asked Mr Gigaba for a divorce. In response, Mr Gigaba asked her to delay the proceedings until after he appeared before the Commission, so as not to forfeit spousal privilege. Ms Mngoma agreed to do so. Mr Gigaba also requested her not to speak to the Commission or the law enforcement agencies about Gupta visits, cash and gifts.

37. Around June 2020, Mr Gigaba arranged for an IT expert to come to the Gigaba residence to assist in deleting information from Ms Mngoma's electronic devices (cell phone, iPad and laptop), but she refused to hand them over. Mr Gigaba wanted to delete proof of him having visited the Gupta residence regularly, and photographs of their trip to India, and honeymoon in Mauritius and Dubai.

38. On 20 July 2020, a domestic incident occurred at the Gigaba residence. Following this, on 22 July 2020, two members of the Hawks (including Captain Mavuso), who were called by Mr Gigaba to their home, confiscated her electronic devices and demanded all the usernames and passwords.

39. On 31 July 2020, arising from the domestic incident, Ms Mngoma was arrested by the Hawks. Sometime after this, she secured bail and was released from custody, whereupon her devices were returned to her. Upon their return, Ms Mngoma discovered that all photographs and emails relating to her overseas trips, visits to the Guptas, etc had been deleted from her devices.

40. In a judgment delivered on 11 February 2021, the High Court found Ms Mngoma's arrest and the confiscation of her devices to have been unlawful and ordered the respondents (including Captain Mavuso) to restore all information unlawfully removed from the devices.

41. Finally, Ms Mngoma said that she believed that Mr Gigaba was responsible for the disappearance of her and their children's passports, which went missing in March 2021.

MR GIGABA'S VERSION

42. From an overall perspective, Mr Gigaba disputed the vast majority of what Ms Mngoma had to say. He described her as having a creative imagination and being a pathological liar and contended that she was a bitter spouse with her evidence being aimed at extorting a divorce settlement (which Ms Mngoma denied). As far as he was concerned, her evidence was mainly stitched together from things already in the public domain.

The one area of commonality

43. The one area where there was a degree of commonality between them related to Mr Gigaba's general relationship with the Guptas.

44. On Mr Gigaba's own version, he had a long-standing association with the Guptas, having met them in the early 2000s while he was still the President of the ANC Youth League. For at least the first decade of him being in Government (2004 – 2014), he would visit the Gupta residence for cultural functions and social luncheons. He did so on not more than twenty occasions, and never once for business. He knew all three of the Gupta brothers well, had been introduced to their mother, and attended the Gupta wedding at Sun City. Over time, he fostered a friendship with Mr Ajay Gupta – this to the extent that he instructed Mr Mahlangu to manage the Guptas to avoid a conflict of interest. In this capacity, Mr Gigaba permitted Mr Mahlangu to attend a Gupta wedding in India shortly after he took up employment as his special advisor. The friendship between them was of such a nature

that Mr Gigaba admitted that Mr Ajay Gupta had gifted his eldest son a gold necklace (which was presented at the Gupta residence).

45. Mr Gigaba's evidence was also punctuated with references to the Gupta-owned Sahara Computers. He would occasionally go there to collect invitations to cultural functions at the Gupta residence, and visit Mr Ajay Gupta, including for lunch. Sahara Computers also paid for Mr Mahlangu's trip to the Gupta wedding in India and employed Mr Gigaba's eldest sister for a period of time, which Mr Gigaba said he had nothing to do with.

46. According to Mr Gigaba (and again consistent with Ms Mngoma's version), he scaled down his interactions with the Guptas significantly from about 2014, which importantly, was the year when he moved from being the Minister of Public Enterprises to the Minister of Home Affairs. Mr Gigaba said that their relationship cooled off after he became concerned about name dropping and their image becoming tainted.

Meetings and interactions with the Guptas

47. Save as stated above, Mr Gigaba effectively denied all of Ms Mngoma's evidence about meetings and interactions with the Guptas. In particular, he denied having been told by Mr Ajay Gupta (in the latter part of 2010) of his impending appointment as the Minister of Public Enterprise; denied that he frequented the Gupta residence on a weekly basis (or more) while holding that ministerial post; denied that the Guptas were his advisors; denied that he had taken each of his two sons to the Gupta residence shortly after their births; denied that he went to the Waterkloof Air Force Base before the Gupta wedding in Sun City and that he did not stay over at Sun City because of media hype; denied that Ms Mngoma had gone to the Gupta residence on at least twenty occasions (stating that she had not met the Guptas on more than four occasions); denied that she had ever accompanied him to business meetings at the Gupta residence as well as her version of what transpired during such visits, including that cell phones were turned in; denied that he had ever been shown an automated teller machine at the Gupta residence; and denied that Mr Ajay Gupta had ever visited his home in Waterkloof.

Tensions rising during the first half of 2014

48. The only thing which the Gigabas agreed upon is that Mr Gigaba's relationship with the Guptas cooled off during 2014, albeit that they advanced different reasons for this.

49. Other than for this, Mr Gigaba denied Ms Mngoma's version set out above. In particular, he denied that he was advised by Mr Ajay Gupta and Ms Myeni that, if he did not do as he was told, he would be moved back to the Department of Home Affairs.

50. In the context of dealing with Ms Mngoma's evidence that Ms Myeni had facilitated their trip to Mauritius, which he denied, Mr Gigaba said – for the first time in oral evidence – that he was of the view that Ms Mngoma had paid for the trip herself and that she was independently wealthy (or portrayed herself as such).

Mr Gigaba's return to the Department of Home Affairs

51. In relation to his tenure as Minister of Home Affairs, he denied that his Ministerial trip to India in 2015 had anything to do with the cancellation of SAA's Johannesburg / Mumbai route (which was now outside his portfolio) and denied that he had assisted the Guptas with their application for South African citizenship.

Mr Gigaba's appointment as Minister of Finance

52. While admitting that he was informed telephonically by President Zuma on 30 March 2017 that he would be appointed as the Minister of Finance, Mr Gigaba denied Ms Mngoma's evidence that he was "upset" about being appointed as the Minister of Finance.

Appointments at SOEs

53. Mr Gigaba denied having told Ms Mngoma about Mr Molefe's move to Eskom or about Mr Gama's reinstatement at Transnet Freight Rail before they occurred.

54. Although Mr Gigaba claimed not to have known in 2014 that Mr Molefe would be moved to Eskom (which occurred in April 2015), he was faced with the evidence of Mr Henk Bester of Hatch to the effect that Mr Salim Essa had said this to him sometime after April 2014. Mr Gigaba denied any knowledge of this.

55. Mr Gigaba also denied having told Ms Mngoma that he intended to speak to Mr Gama about employing his sister (Ms Gugu Gigaba) at Transnet. Mr Gigaba did, however, accept that he forwarded her CV to Mr Mlamuli Buthelezi (the COO of Transnet who reported to Mr Gama when he was the GCEO of Transnet) on 25 June 2016 and that his sister went on to be employed at Transnet Freight Rail.

Gifts, cash and benefits received from the Guptas

56. Mr Gigaba denied that he was given a white 3-series BMW by Mr Ajay Gupta (in 2010) and said that he had never seen Ms Mngoma driving such a vehicle. Ms Mngoma's version in regard to the BMW is, to say the least, very doubtful.

57. Turning to the Gigaba wedding in August 2014, although he was uncertain, Mr Gigaba did not believe that he would have invited the Guptas because his relationship with them had cooled off at this time, but he did not rule out the possibility that Ms Mngoma may have invited them. He was, however, categorical in his denial that they made a cash donation towards the wedding and paid for their honeymoon. According to Mr Gigaba, they honeymooned in Mauritius and subsequently undertook a trip to Dubai in 2014 or 2015. He funded the air tickets to Dubai using frequent flyer credits and they stayed in the Hilton and not the Waldorf.

58. In response to Ms Mngoma's evidence that the wedding cost between R4 and R5 million and that she paid for it in cash given to her by him, Mr Gigaba said that, while he was responsible for their customary wedding (which he described as a modest affair), Ms Mngoma and her family were responsible for the "white wedding". Although he questioned whether it cost as much, as far as Mr Gigaba was concerned, if Ms Mngoma paid R4m to R5 million, she used her own money and it had nothing to do with him. A question that arises from the fact that Mr Gigaba did not categorically deny their wedding cost about R4 million to R5 million and all he did was to question those figures is: how could he not have known how much at least more or less their wedding had cost?

59. While admitting that he had bought Ms Mngoma a Louis Vuitton handbag using cash, Mr Gigaba denied having given her large sums of cash for shopping overseas and denied having provided her with a credit card with a limit of R100 000. In relation to the latter, Mr Gigaba said that he had instead provided her with a debit card with a R3000 cash withdrawal limit, which she used for a couple of years.

60. In relation to Ms Nozipho Gigaba, while Mr Gigaba admitted that she was in debt to the tune of R850 000, that he had asked Mr Mahlangu to advise on how to deal with credit bureaus, and that she went on to be employed (on his version, without his involvement) by Sahara Computers for a short while. He said that no money was obtained from the Guptas.

61. Mr Gigaba's evidence in relation to the renovations undertaken to his family home in Mandeni also produced a stark dispute of fact. According to Mr Gigaba, except for some tiling and plumbing for which he paid for, his late father paid for everything. The money for the renovations did not come from the Guptas, and Ms Mngoma was not present when Mr Gigaba paid the builder (which he admitted doing for tiling and plumbing).

62. Mr Gigaba also denied that Mr Ajay Gupta bought him two watches in Dubai.

Confiscation of devices and destruction of evidence

63. Mr Gigaba denied Ms Mngoma's version that he asked her in February 2020 to delay their divorce until after he appeared before the Commission, so as not to forfeit spousal privilege, and that she agreed to do so.

64. According to Mr Gigaba, to the contrary, Ms Mngoma attempted to use her appearance before the Commission to strong-arm him into a divorce settlement. In this regard, he said that, in January 2021, Ms Mngoma advised him that she had been approached by the Commission to testify (following her ENCA interview on 17 December 2020) but that she would refuse to do so if a suitable divorce settlement was reached, and Mr Gigaba withdrew a criminal complaint that had been opened in July 2020 against her for malicious damage to property. When he refused, Ms Mngoma became annoyed and threatening. Thereafter and right up until the end of March 2021, Ms Mngoma repeatedly stated that if he offered her a suitable divorce settlement, she would drop the whole Commission issue, and pretend that the divorce proceedings had been withdrawn until the Commission completed its work.

65. Mr Gigaba also denied Ms Mngoma's version that he secured an IT expert in around June 2020 to assist in deleting information from her electronic devices. According to Mr Gigaba, no such person had come to their home.

66. Regarding the domestic incident, the confiscation of Ms Mngoma's devices and her arrest, the following sequence of events emerged from Mr Gigaba's evidence: in April / May 2020, Mr Gigaba gave a statement to Captain Mavuso of the Hawks in relation to an SMS that he had received informing him that Ms Mngoma had hired people to kill him; on 20 July 2020, a domestic incident occurred at the Gigaba residence (involving Ms Mngoma damaging a vehicle belonging to a friend of Mr Gigaba and a complaint of crimen injuria); on 22 July 2020, the Hawks (Captain Mavuso and another) attended upon the Gigaba residence and confiscated Ms Mngoma's devices; on Friday, 31 July 2020, the Hawks returned to the Gigaba residence and arrested Ms Mngoma; Ms Mngoma was granted bail and released from custody on Saturday, 1 August 2020 on 4 August 2020, Ms Mngoma's devices were returned to her; and on 11 February 2021, the High Court delivered judgment in which it found as stated above.

67. While the High Court judgment was scathing of Mr Gigaba (it having found that the Hawks' actions "appeared to have been motivated by an abuse of power by a former minister and member of the executive"), in fairness to him, he was not joined as a party to the litigation, and thus not afforded an opportunity to present his version of events to the court.

68. In his evidence, Mr Gigaba denied that he abused his power, pointing out that he was no longer a minister, and stating that Captain Mavuso's intervention stemmed from their earlier interaction about the plot to kill him. Mr Gigaba was unable to comment on the removal of information from Ms Mngoma's devices – the issue not having been brought to his attention or knowledge at the time of the High Court litigation.

69. Turning to the disappearance of Ms Mngoma's and their children's passports, Mr Gigaba also denied any involvement in this.

FINDINGS FROM THE EVIDENCE

70. As appears from the above, save for the one area of commonality, the evidence of the Gigabas produced stark disputes of fact at almost every turn.

71. In circumstances where Ms Mngoma's motivation for testifying against her husband has been placed in issue, where she signed her affidavit under oath without paying proper attention to the contents and where there are various aspects of her evidence that are questionable, a measure of caution in relation to the acceptance of her evidence over that of Mr Gigaba is called for.

The one area of commonality

72. There are important aspects of Ms Mngoma's evidence that materially accord with that of Mr Gigaba. As appears from that section, on Mr Gigaba's own version – significantly in accordance with that of Ms Mngoma – he had a long-standing and close association with the Guptas and was particularly friendly with Mr Ajay Gupta.

73. As dealt with elsewhere in this Report, when judged against Mr Gigaba's own evidence, his statement made to Fundudzi that he had no relationship with the Guptas was untruthful. The fact that he chose to cover it up in 2019 is telling.

74. Mr Gigaba was clearly not fully transparent in his evidence and appears to have continued to attempt to cover up the extent of his relationship with the Guptas, resulting in him making implausible denials.

Visits to the Gupta residence and happenings there

75. The extent of the relationship between Mr Gigaba and the Guptas is reflected by the visits that Mr Gigaba and Ms Mngoma made to the Gupta residence and the happenings there. On Ms Mngoma's version, it appears that what accounted for many of her visits to the Gupta residence were instances of her accompanying Mr Gigaba there for business meetings. On Mr Gigaba's version, he only ever went to the Gupta residence for cultural and social events – and never for business meetings.

76. Ms Mngoma's version is, however, corroborated by the evidence of Mr Riaz Saloojee, which is dealt with elsewhere in this Report. He was appointed as the new CEO of Denel with effect from January 2012. In the first quarter of 2012, Mr Essa took him to the Gupta residence, where he met Mr Tony Gupta, Mr Atul Gupta and Mr Gigaba. Upon Mr Saloojee being introduced to him by Mr Atul Gupta, Mr Gigaba said, "these are my friends" and "if at some point there is something you can do together with them in Denel it would be good". While Mr Gigaba denied his presence at this meeting, there is no basis upon which to reject the evidence of Mr Saloojee. It shows that Mr Gigaba – as Ms Mngoma said – attended business meetings at the Gupta residence and that their relationship was not purely social.

77. Also corroborative of Ms Mngoma's version about business meetings at the Gupta residence is the evidence of Garry Pita, who replaced Mr Anoj Singh as the GCFO of Transnet. He said that on two occasions when he attended business meetings at the Gupta residence (when Mr Essa was also present) in 2016/2017, he was asked to first turn in his cell phone. This appears to have been a long-running practice, because the same happened to Mr Vuyisile Kona (then both the acting chairperson of the board and acting CEO of SAA) when he visited the Gupta residence in late 2012. The evidence of both of these witnesses accords with Ms Mngoma's version of what transpired when she accompanied Mr Gigaba to business meetings at the Gupta residence. This serves as a basis to accept Ms Mngoma's version, from which it can reasonably be inferred that Mr Gigaba engaged in sensitive discussions during business meetings at the Gupta residence.

78. Then there is the evidence of Witness 3, who served as Mr Gigaba's close protection officer when he was the Minister of Public Enterprises. His evidence is dealt with elsewhere in this Report, with the conclusion being that, based on it, there are reasonable grounds to believe that Mr Gigaba received cash payments at the Gupta residence. Despite the fact that aspects of Ms Mngoma's evidence are open to criticism here and that the evidence of Witness 3 and Ms Mngoma is not entirely aligned, it is sufficiently corroborative to at least give rise to a reasonable suspicion that Mr Gigaba received cash (on two occasions) at the Gupta residence, when Ms Mngoma accompanied him there.

79. In addition, the fact that it has been found elsewhere in this Report that there are reasonable grounds to believe (or suspect) that Mr Molefe, Mr Singh, Mr Gama, Mr Pita, and Mr Thamsanqa Jiyane (the chief procurement officer at Transnet Freight Rail) also all received cash from the Guptas further corroborates, at least indirectly, Ms Mngoma's version about the happenings at the Gupta residence.

Gupta-captured ministers

80. From an overall perspective, Ms Mngoma's evidence about Mr Gigaba's relationship with the Guptas was to the effect that Mr Gigaba was captured by the Guptas – he was at their beck and call and was given instructions by them.

81. While Mr Gigaba denied this, Ms Mngoma's version accords with the evidence of Mr Themba Maseko, the former DG and CEO of the GCIS. Mr Maseko was called to a meeting at the Gupta residence in the latter part of 2010, where he was instructed by Mr Ajay Gupta to ensure that advertising budgets across all departments were transferred to GCIS' account and then spent with The New Age. According to Mr Maseko, this is what transpired after he told Mr Ajay Gupta in response that he had no power to instruct ministers to transfer funds:

> He said, no, and I quote: "That is how the system works now. If there is any Minister who is not co-operative, I tell him and by that he meant, tell President Zuma and he sorts them out." I did ask him how will he sort them out, he then volunteered information that he as Ajay Gupta, has regular meetings with the President and that if there is a Minister who is not co-operating, the Minister is then summoned to ... So if he speaks to the President, the Minister is either spoken to by the President or summoned to Saxonwold where they are given instructions of what to do.

82. On the evidence presented to the Commission, no other minister had a longer standing or closer relationship with the Guptas than Mr Gigaba, and he occupied the key post of the Minister of Public Enterprises who had oversight over of Transnet, which was the main target of the Gupta money-laundering enterprise. If ever there was a Minister that the Guptas would have wanted on their side, it was surely Mr Gigaba.

83. Returning to the evidence of Mr Saloojee, as found elsewhere in this Report, the reason why the Guptas brought Mr Gigaba to the meeting (in 2012) was to show Mr Saloojee that Mr Gigaba was a mere tool in their hands, a dupe who would do their bidding and from whom Mr Saloojee could expect no protection. That Mr Gigaba was prepared to participate in the meeting on this basis demonstrates that the Guptas had procured his cooperation.

84. The fact that, by 2014, Mr Gigaba's relationship with the Guptas had (by his own admission) cooled down serves as a reasonable basis to believe that this may have played a role in him being moved back to the Department of Home Affairs with effect from 26 May 2014. By then, the looting of Transnet by the Gupta enterprise – which occurred under Mr Gigaba's watch as the Minister of Public Enterprises – had also been substantially completed.

85. However, Mr Gigaba was never really out of the Gupta fold. In 2017, President Zuma appointed Mr Gigaba as the Minister of Finance.

Ignorant or complicit?

86. This brings one to a key question raised with Mr Gigaba during his evidence: given that he, in his capacity as the Minister of Public Enterprises, had oversight over Transnet and was part of the Gupta environment, how is it that he was unaware of their involvement in the widespread looting of Transnet, in particular? One of two possibilities arise – either Mr Gigaba was genuinely unaware of their nefarious dealings, or he was complicit therein, at least to some extent. In his evidence, Mr Gigaba opted for the former, stating that, in his capacity as the Minister of Public Enterprises, he received limited information (by way of formal reports) and that any nefarious dealings by the Guptas under his watch was "purely coincidental".

87. The difficulty confronting Mr Gigaba is that not only was he close to the Guptas, but he was also involved directly or indirectly in a number of acts or decisions – many questionable – that were linked to the Gupta enterprise and ultimately benefited it (or was intended to). These include the following, also discussed elsewhere in the Reports.

    87.1 Mr Gigaba's meeting with Mr Saloojee and the Guptas in the first quarter of 2012 discussed above. When Mr Saloojee showed that he would not dance to the Guptas' tune, steps were

taken to gain control of Denel and oust Mr Saloojee. This all started with Mr Gigaba seeking to facilitate cooperation between the Guptas and Mr Saloojee.

87.2 Mr Gigaba provided the Guptas with direct access to the Department of Public Enterprises by appointing Mr Mahlangu to manage the Guptas on his behalf, which entailed him interacting with the Guptas and helping them. The Commission is not aware of any other Minster whose relationship with the Guptas was such that he or she felt the need to appoint someone to serve as a buffer between him and the Guptas. A month or two after Mr Mahlangu's appointment), Mr Gigaba permitted Mr Mahlangu to attend a Gupta wedding in India, which was paid for by Sahara Computers. Mr Mahlangu was of the view that the trip was of "great political value". The fact that the Guptas saw value in inviting Mr Mahlangu to the wedding and sponsoring his trip, and the fact that he attended under Mr Gigaba's watch, speaks volumes – and was a sign of things to come.

87.2.1 In October 2012, Mr Mahlangu went on to arrange (and attended) a meeting between Mr Kona and the Guptas at their residence. As dealt with elsewhere in this Report, at this meeting, Mr Tony Gupta offered Mr Kona large sums of money (R100 000 and then R500 000), which he refused. This was the prelude to a discussion about the appointment of a consultant by SAA. Although Mr Mahlangu denied that cash was offered at this meeting, his version has been rejected. Mr Gigaba's denial that Mr Mahlangu gave him any feedback on the meeting appears improbable; but if he did not do so, it may have been because the events of the meeting were simply business as usual.

87.2.2 Amongst the various other meetings that Mr Mahlangu arranged (and attended) was a meeting between Mr Tony Gupta and Mr Dames (CEO of Eskom) at Sahara Computers. The meeting involved another pure operational issue – the supply of coal by the Guptas to Eskom. Mr Mahlangu's presence at this meeting (and similar ones) – in his capacity as Mr Gigaba's representative – was likely to have created the impression that the Guptas had Mr Gigaba's backing.

87.3 Mr Gigaba's involvement in the appointment of Mr Molefe (a friend of the Guptas) as the GCEO of Transnet in 2011. The appointment of Mr Molefe was predicted well in advance by The New Age (Gupta owned), he was nominated by Mr Sharma (another Gupta associate) and he was not even the highest-scoring candidate.

87.4 Mr Gigaba's involvement in the appointment of Mr Sharma as a director of Transnet in 2010 and attempt to have him appointed as the chairperson of the Transnet board in 2011 (only a year after his initial appointment). Mr Sharma had a matrix of business relationships with Mr Essa. Mr Sharma went on to become the chairperson of the BADC at Transnet, which took key decisions that favoured the Gupta enterprise.

87.5 Mr Gigaba's involvement in the irregular reinstatement of Mr Gama as the CEO of Transnet Freight Rail in 2011. As already found, here Mr Gigaba probably acted on the instruction of President Zuma, who was himself closely connected to the Gupta enterprise. After his reinstatement, Mr Gama was also centrally involved in key transactions that favoured the Gupta enterprise.

87.6 Mr Gigaba's appointment of Mr Essa as a director of BBI in 2011. As mentioned, Mr Essa was the Gupta money-laundering kingpin and had a matrix of business relationships with Mr Sharma. While Mr Essa was a director of BBI, it collaborated with T-Systems (also linked to the Gupta enterprise) in a contentious tender at Transnet.

87.7 Mr Gigaba's involvement in the appointment of Dr Rajesh Naithani as a director of SAA in 2012. Dr Naithani had been nominated by Mr Rajesh (Tony) Gupta, Mr Ashu Chawla (the CEO of Sahara Computers) appears to have modified a document explaining his qualifications, and Mr Mahlangu had raised with Mr Gigaba his misgivings about making the appointment, but he went ahead. According to Mr Gigaba, he was unaware of the first two points, and could not recall Mr Mahlangu raising his misgivings. Like with Mr Essa, there is no evidence of a proper vetting

process having been conducted on Dr Naithani before his appointment.

87.8 Mr Gigaba's appointment of Mr Rafique Bagus as the chairperson of the board of Alexkor in 2012. Mr Bagus attended the Gupta wedding in Sun City in 2013, and his cell phone records reflect him having been in contact with Mr Sharma, Mr Chawla, Mr Ajay Gupta and Mr Tony Gupta over different periods of time. Mr Bagus was instrumental in the irregular award of a tender to SSI granting it exclusive rights to market and sell diamonds produced by the Alexkor joint venture. The majority shareholder in SSI was Mr Kubentheran Moodley (through his company Kimomode), who had no diamond industry background. Together with Mr Essa, Mr Moodley was a key role player in the Gupta enterprise.

87.9 Mr Gigaba's appointment of Mr Colin Matjila as the acting CEO of Eskom in March / April 2014 over Dr Steve Lennon (a divisional executive at Eskom) – the board's candidate who Mr Gigaba consented to before changing his mind for some reason. Following his appointment, Mr Matjila became embroiled in the irregular award of a contract to the Gupta owned TNA In the process, Mr Tony Gupta asked Mr Zola Tsotsi (the chairperson of the Eskom board) to make the investigation into Mr Matjila "go away". Mr Matjila was also prepared to sign a certain contract that Mr Essa was pursuing, which Eskom's financial director refused to sign.

87.10 Mr Gigaba issued an instruction in 2011 for Eskom to conclude a contract with TNA for the sponsorship of Business Breakfasts. In so doing, he interfered in the internal operations of Eskom to the benefit of the Guptas. (As dealt with elsewhere in this Report, there is evidence of Mr Gigaba (at least through Mr Mahlangu) also interfering in operational matters at SAA.)

88. With reference to the appointments mentioned above, Mr Gigaba contended that none of them was influenced by the Guptas, and, in effect, that any favouring by the persons concerned of the Guptas after their appointment was coincidental. This would be a remarkable coincidence.

89. It warrants mention here that evidence was presented by Mr Ernest Nekhavhambe of Fundudzi relating to an investigation undertaken by Fundudzi, which dealt in part with board appointments made while Mr Gigaba was the Minister of Public Enterprises. During the investigation, Ms Matsietsi Mokholo (an acting DG within the DPE) advised that Mr Gigaba introduced an informal way of making board appointments, with there being no framework or policy in place, and that this resulted in almost all names in respect of board appointments originating from Mr Gigaba's office. The Fundudzi investigation also revealed that the motivations for appointments to boards were sent by Mr Mahlangu to Mr Gigaba.

90. In sum, given the links between Mr Gigaba and the Guptas, the variety of acts or decisions that he was involved in that ultimately favoured them (or was intended to) and the fact that Mr Gigaba was prepared (on occasion) to do wrong for the Guptas, there are reasonable grounds to believe that Mr Gigaba was complicit to some extent in the operation of the Gupta enterprise. This conclusion is fortified by the fact that he received gratification from the Guptas, which is dealt with next.

Gratification from the Guptas

91. To recap, it has been found above that the Guptas employed Ms Nozipho Gigaba as a favour to Mr Gigaba and that there are reasonable grounds to believe or suspect (on the evidence of Witness 3 and Ms Mngoma) that Mr Gigaba received cash payments at the Gupta residence.

92. On a conspectus of the evidence, there are reasonable grounds to believe that this was a quid pro quo for Mr Gigaba's facilitation of co-operation, appointment of directors and executives and on occasion, his (or Mr Mahlangu's) intervention in the internal operations of SOEs falling under the DPE.

93. In relation to the other forms of gratification testified to by Ms Mngoma (a cash donation of R4 to R5 million towards the Gigaba wedding, a week-long trip to Dubai, cash used for the renovations to the home of Mr Gigaba's late father, the payment of at least R425 000 to settle the debts of Ms Nozipho Gigaba, and two watches), there are aspects of Ms Mngoma's evidence that are open to criticism. However, the findings in relation to Ms Nozipho Gigaba and the receipt of cash payments at the Gupta

residence, give rise to there being at least a reasonable suspicion that such gratification was received by Mr Gigaba.

94. It warrants highlighting here that Mr Gigaba's belated version that Ms Mngoma is a woman of financial means and was able to fork out millions on their wedding is unsatisfactory.

The balance of Ms Mngoma's evidence

95. As for the balance of Ms Mngoma's evidence, there exists no need to make findings on an issue-by-issue basis; nor can they be reliably resolved.

96. While some of the specifics are thus left undetermined, reasonable grounds exist to accept the general tenor of Ms Mngoma's evidence. If she was hell bent on harming Mr Gigaba (as he alleged), she could certainly have done more damage in her evidence. Instead, she was circumspect in key aspects of her evidence – for example, by making it clear that Mr Gigaba only received cash while at the Gupta residence on two occasions.

School fees

97. In her evidence, Ms Mngoma said that Mr Gigaba would pay their children's school fees in cash. The Commission obtained an affidavit from the school bursar, Ms Johanna Rossouw, who stated that these cash payments of fees were made to the school: (i) 2015 – R22 450; (ii) 2016 – R136 404; (iii) 2017 – R143 668; (iv) 2018 – R154 328; (v) 2019 – R318 399; (vi) 2020 – R229 418; and (vii) 2021 – R14 461.

98. Mr Gigaba admitted making the cash payments and said that the source of the funds was from a stokvel and related investment in a livestock business, both of which were run by a friend of his, Mr Sduduzo Gumede.

99. Although Mr Gigaba put up a bland confirmatory affidavit by Mr Gumede, he tendered no proof of the source of money that he used to invest in the stokvel (or any financial records). In the years 2015 to 2018, Mr Gigaba was still a minister, and two additional large payments were made in the two years immediately following his resignation.

100. In the light of the finding that there are reasonable grounds to believe that Mr Gigaba received cash payments from the Guptas, in the absence of such proof, there exists at least a reasonable suspicion that the source of the cash for the school fees may have been the Guptas.

RECOMMENDATIONS

101. It has already been recommended (in the Report on Transnet) that, based on the evidence of Witness 3, the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to the cash payments allegedly received by him during visits to the Gupta residence in Saxonwold (during the period July to December 2013).

102. Similarly, it is recommended that, based on the evidence of Ms Mngoma, the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to the cash payments received by him during visits to the Gupta residence in Saxonwold in or about 2013.

103. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA

in relation to the employment of his sister, Ms Nozipho Gigaba, by Sahara Computers in or about 2013.

104. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on a charge of corruption in terms of Chapter 2 of PRECCA and/or a racketeering charge in terms of Chapter 2 of POCA, to determine whether:

    104.1 The Guptas gave Mr Gigaba about R4 to R5 million in cash that was used to pay for the Gigaba wedding in August 2014

    104.2 The Guptas paid for the trip taken by Mr Gigaba and Ms Mngoma to Dubai in or about 2014 / 2015

    104.3 The Guptas gave Mr Gigaba cash used to effect renovations to his late father's home in Mandeni, KwaZulu-Natal in or about 2013 / 2014

    104.4 The Guptas gave Mr Gigaba R425 000 (or more) to pay off the debts of his sister, Ms Nozipho Gigaba, in or about 2013

    104.5 Mr Ajay Gupta gave Mr Gigaba two watches in Dubai during a trip there in or about 2013 – 2015; and

    104.6 The cash (or part thereof) used by Mr Gigaba to pay his children's school fees (or part thereof) in 2015 - 2021 emanated from the Guptas.

PRESIDENT CYRIL RAMAPHOSA

INTRODUCTION

1. Matamela Cyril Ramaphosa is the President of the Republic of South Africa and has held this position since former President Jacob Zuma resigned on 15 February 2018. This report deals with the evidence of President Ramaphosa as President of the country and as Deputy President of South Africa from 26 May 2014, during Mr Zuma's second term. Many of the events investigated by this Commission took place during this period.

2. He is also the President of the African National Congress (ANC), a position he has held since his election at the ANC's 54th National Conference in December 2017. He was the Deputy President of the ANC from December 2012 and previously the Secretary-General of the ANC from 1991 to 1997. Between 1997 and 2012, he held no official political position, but was a member of the ANC's National Executive Committee (NEC).

3. President Ramaphosa testified at the Commission in his capacity as the President of the ANC and former Deputy President of the ANC on 28 and 29 April 2021. He also testified at the Commission in his capacity as the President of South Africa, and former Deputy President of South Africa, on 11 and 12 August 2021.

4. President Ramaphosa summarised the three central questions posed to him as "what I knew, when I knew, what I did in response." These questions are critical to the work of the Commission. As the Deputy President and a member of Cabinet between 2014 and 2018, he was at the heart of the National Executive and privy to various events the Commission was mandated to investigate. In this capacity he worked with many individuals directly or indirectly implicated in corruption and state capture.

PRESIDENT RAMAPHOSA'S UNDERSTANDING OF STATE CAPTURE

5. The President spoke about his understanding of state capture. He confirmed that he believed state capture exists and emphasised the importance of the Commission's work in bringing it to light.
6. In summary, President Ramaphosa's understanding is that state capture:
   - 6.1 Is one of many forms of corruption
   - 6.2 Is an organised, systemic process or project
   - 6.3 Is conducted by a network of actors within and outside the state, acting in concert
   - 6.4 Involves the redirection of public resources away from the public good and towards private financial gain
   - 6.5 Involves the shaping of the "basic rules of the game" (laws, rules, regulations, policy-making processes etc.) of government
   - 6.6 Involves the repurposing of governance through the appointments of agents of state capture to governance structures, so they are positioned to disperse government benefits to select groups
   - 6.7 Does not include interest groups' influence over policy decisions where no illicit benefits are accrued
   - 6.8 Involves the use of ideological arguments in order to question legitimate institutions and conceal state capture under the guise of transformation
   - 6.9 Is facilitated by the deliberate weakening and exploitation of law enforcement agencies, which fail to hold the perpetrators accountable and are used to persecute the opponents of the state capture project
   - 6.10 Has become entrenched or embedded in the state
   - 6.11 Results in benefits to vested interests at the expense of the country, and her citizens, as a whole; and
   - 6.12 Is an assault on the democratic process and undermines the democratic constitutional order.

PRESIDENT RAMAPHOSA'S KNOWLEDGE OF AND RESPONSE TO STATE CAPTURE

The "sign posts"

7. He stated that many of the incidents of corruption or state capture became known to him through investigative journalism/reporting; Chapter 9 institutions; court cases and disciplinary proceedings; the Gupta leaks; and whistle-blowers. He made no mention of the security establishment or law enforcement agencies.
8. He was asked to detail the "sign posts along the way" that alerted him to state capture. He conceded that: there were a number of sign posts and you are absolutely right and if the impression was ever put forward that we really did not know that would be the wrong impression, because there were signs.
9. He dealt with three events in detail: the removal of Mr Nene, the removal of Mr Gordhan and the attempt to establish a commission of inquiry into the banks.
10. President Ramaphosa cited the admission made by Mr Fikile Mbalula, in an NEC meeting in 2011, that he had heard about his appointment to Cabinet from the Gupta family as one such sign post. This was not heeded, although it "startled many of us". He admitted that the NEC should have been more alert to such warning signs.

11. He cited the 2013 use of Waterkloof air force base by the Gupta's as a sign of state capture but could not offer any more examples. He stressed that those involved in state capture "hid their machinations".

The "five options" President Ramaphosa felt were available to him

12. President Ramaphosa explained his response to state capture revelations during his Deputy Presidency. He felt he had five options: resign; speak out; acquiesce and abet; remain and keep silent; or remain and resist. He chose to "remain and resist". He believed this to be the only way he could contribute to ending state capture and corruption in government.
13. The Chairperson commented that, although he could have been fired from the Executive, he would have remained as Deputy President of the ruling party, which is powerful position. He responded that the Deputy President is still "part of the collective". He did not acknowledge who would have removed him from his position. Only former President Jacob Zuma had the power to dismiss him but he gave no evidence why he believed he might be dismissed by former President Zuma.
14. The implication of his whole argument is that he believed that the former President was complicit in the state capture project and would abuse his power to further it and that he could not count on the ruling party to defend him.
15. He felt by remaining in office he could bring about change. His ability to "resist" was curtailed by the political reality of the time. His decision to remain as Deputy President – and subsequently to run for President of the ANC – was based on his desire to "shift the balance of forces".
16. His remarks imply that state capture involved a political project and not isolated, opportunistic acts of corruption. They imply that the project enjoyed powerful support in the state and in the ANC, as he was forced to 'resist' within government, choosing his battles, without challenging state capture outright. The natural conclusion is that the most dominant political faction – the ANC under President Zuma – permitted, supported and enabled corruption and state capture.
17. There is a pattern in the testimony of President Ramaphosa. He repeatedly testified to the existence of state capture and the role of the ANC therein, without providing any specific detail, and without implicating any individual members of his party.
18. President Ramaphosa was asked to elaborate on what actions he took to resist state capture as part of his strategy to "remain and resist". He cited his actions after the removal of Minister Nene, after the removal of Minister Gordhan and the attempt to set up a commission of inquiry into the banks. He testified that there were many "silent" battles fought behind the scenes but did not provide examples.
19. When asked why, if a substantial part of the executive were not complicit in state capture, was their opposition not more vocal and more frequent? His response was that they chose to be strategic by working within the system and "chose their battles" carefully.
20. He stated that their apparent silence should not be construed as complicity, as they had to carefully to choose when to act to make the largest impact. He did not dispute that the ruling party and the Executive were firmly controlled by those complicit in state capture.
21. President Ramaphosa deposed to an affidavit on 2 July 2019, which details his interactions with the Gupta family. He met the Gupta brothers on three or four occasions. In the same affidavit, he only mentioned Bosasa's funding of the ANC and his internal campaign for President of the ANC.

MINISTERIAL APPOINTMENTS AND DISMISSALS

22. President Ramaphosa was asked to address Cabinet appointments and removals relevant to the Commission's TORs.

The removal of Mr Nene

23. Former Finance Minister Nhlanhla Nene testified at the Commission that he was removed from this position by former President Zuma because of his opposition to certain corrupt deals, including the nuclear deal, the Denel Asia deal, and the SAA Airbus swap transaction. He provided substantial evidence of facts and circumstances corroborated by documentary and other evidence. He was informed by the former President that the decision to remove him was taken by the "Top Six" - reference to the six ANC officials of the NEC.

24. President Ramaphosa stated that he was not consulted by the former President, nor involved in any discussion, and this was not a decision taken by the "Top Six".

25. He said he believed that former Minister Nene's resistance to the nuclear deal may have informed the former President's decision to replace him. His removal signalled to President Ramaphosa that "the process of state capture had now succeeded to an extent that the most strategic organ of the state, Treasury, had now been captured." He did not indicate who he believed to be doing the 'capturing', although he conceded during his testimony that it was ". . . former President Jacob Zuma who did dismiss the minister."

26. He was asked about "Operation Spiderweb", a purported intelligence report that claimed Treasury had been captured by Apartheid-era intelligence operatives and "white monopoly capital" to control the country's finances. President Ramaphosa stated he did not know its origin but that the report was false and used to discredit those who were resisting the capture of Treasury.

The appointment of Mr Des van Rooyen as Minister of Finance

27. President Ramaphosa stated he was never consulted on the appointment of Mr van Rooyen and was notified as a matter of courtesy on 9 December 2015, shortly before the appointment was announced.

The appointment of Mr Pravin Gordhan as Minister of Finance

28. Shortly after the appointment of Mr van Rooyen, Mr Lungisa Fuzile, then Director-General of National Treasury, met with then Deputy President Ramaphosa. They discussed Mr Fuzile's interactions with Minister van Rooyen and the advisers he arrived with. Mr Fuzile expressed concern about the impact this development would have on the future ability of National Treasury to properly exercise its functions. President Ramaphosa was concerned by Mr Fuzile's account and the negative impact the announcement had on the markets, thus prompting him to act.

29. President Ramaphosa met with Ms Duarte, the Deputy Secretary-General of the ANC, and informed her that he would resign his position as Deputy President of the Republic as he believed that "the process of state capture had now succeeded to an extent that the most strategic organ of the state, Treasury had now been captured." Ms Duarte conveyed his message to former President Zuma.

30. He stated there was then a "flurry of consultations" that involved some ANC officials, expressing disquiet about Mr van Rooyen's appointment.

31. President Ramaphosa, Ms Duarte and Mr Mantashe informed the former President that he should instead appoint Mr Gordhan as Minister of Finance. President Ramaphosa argued that Mr Gordhan's appointment would be in the country's best interests and help to calm the financial markets.

32. When asked why Mr Nene was not reappointed, President Ramaphosa believed that the former President "would no longer be able to have a relationship of trust with Mr Nene." The Chairperson noted that this was inconsistent with a public statement issued by former President Zuma at the time, in which he spoke very highly of Mr Nene. President Ramaphosa stated this was "political speak."

33. President Ramaphosa cited his intervention in this case as one successful example of his "resistance" to state capture while Deputy President.

The removal of Mr Gordhan and Mr Jonas

34. President Ramaphosa stated he knew no more about the alleged targeting of Minister Gordhan by law enforcement agencies than anyone else, and that it was not within his power to do anything about the decisions of those agencies. He Ramaphosa testified that he was merely informed of the Cabinet reshuffle announced by former President Zuma on 30 March 2017, in which Mr Gordhan and Mr Jonas were removed from the Ministry of Finance.

35. President Ramaphosa detailed his recollection of the events leading up to and including that reshuffle:

    35.1 He had observed some deterioration of the relationship between the Mr Gordhan and Mr Zuma and that "it did not just suddenly happen".

    35.2 Before effecting the Cabinet reshuffle, former President Zuma met with the ANC officials (this contradicts his statement above).

    35.3 In this meeting, former President Zuma referred to what he described as an intelligence report, which asserted that Minister Gordhan and Mr Jonas were plotting to undermine the government. Their removal was purportedly as a result of the allegations contained in this report.

    35.4 The report was a "photographed piece of paper" which was "3 pages in very large font" and "very badly drafted". The document is known as 'Operation Checkmate'.

    35.5 He raised his concerns – that the Minister and Deputy Minister were being removed based on an unsubstantiated and spurious intelligence report – directly with former President Zuma during this meeting:

    35.6 At this meeting, former President Zuma proposed appointing Mr Brian Molefe to the position. The officials objected as Mr Molefe did not have the right "profile" and had left Eskom under a cloud.

    35.7 On 31 March, he stated publicly that he did not support President Zuma's decision to fire Minister Gordhan and some other ANC Officials also publicly objected.

36. President Ramaphosa considered this case to be another example of his resistance to state capture from within the state and party.

CABINET

37. The detail of how the Cabinet works and the role of Cabinet structures is set out in a statement by Dr Cassius Lubisi who was Cabinet Secretary for a decade, ending in August 2020.

38. Dr Lubisi explained the principles of collective responsibility, cabinet solidarity and cabinet confidentiality in his affidavit. When Cabinet decisions are taken in situations where, for example, vital members of the executive are not in attendance (as in the bank accounts matter) and important issues are discussed on a walk-in basis and without the required preparatory materials and discussions in sub-committees (as in the bank accounts and nuclear matters), these decisions must still be defended and protected by all members of the Cabinet. The public would have no way of knowing that these processes had been manipulated, had the Commission not investigated.

39. The evidence of Mr Ismail Momoniat concerning the functioning of Cabinet was put to President Ramaphosa. He had stated that in certain important occasions – the nuclear deal, the appointment of the SARS Commissioner, the Gupta bank accounts matter and others – the procedures ordinarily followed by Cabinet by way of preparation were not followed.

40. President Ramaphosa confirmed this statement. He agreed that Cabinet processes had been manipulated in this and other instances.

41. This evidence is important. It shows that under former President Zuma, decision making processes at the highest level were abused in order to facilitate a certain agenda. The way the Cabinet was

run under the previous administration therefore provides an important insight into how state capture could have occurred.

42. President Ramaphosa stated that this has been improved under his Presidency.

MATTERS CONCERNING NATIONAL TREASURY

The Nuclear New Build Programme

43. President Ramaphosa detailed his knowledge of the nuclear programme in his statement. Unfortunately, there was no time to discuss this matter during his appearances.

44. President Ramaphosa noted: "In essence, the decision made by Cabinet at the time was that the project [NNBP] would not go ahead until and unless we were sure of its affordability." President Ramaphosa's characterisation of the situation is somewhat problematic. The problems with his version are detailed hereunder. Time constraints prevented the questioning of President Ramaphosa on these matters.

    44.1 The decision to proceed with the procurement process cannot reasonably be described as a decision to "not go ahead".

    44.2 Treasury had already determined that the procurement was unaffordable when this decision was made. Treasury had already strongly contested the viability of the 9.6GW procurement, and had provided feasibility, affordability and sustainability studies advising against procurement. President Ramaphosa did not explain why Cabinet decided to proceed.

    44.3 Cabinet minutes, cited by President Ramaphosa, reflect that the exchange rates cited in the Cabinet memorandum be updated to reflect current values. However, the gross underestimation of the exchange rates led to the cost implications of the memorandum being understated by about 40%. This would necessarily have a material impact on the conclusions and the recommendations of that memorandum.

    44.4 Documents provided to Parliament as well as the testimony of Mr Nene and Mr Fuzile show that the Department of Energy deliberately misled the Cabinet about the costs and risks of the nuclear energy project and misrepresented the findings of various cost analysis and feasibility studies.

    44.5 Cabinet did not ensure that adequate consultation had occurred.

    44.6 The public statement released on the Cabinet meeting makes no mention of the decision on the nuclear procurement. When confronted, the Cabinet spokesperson was unaware of the decision.

45. President Ramaphosa did not comment on whether the former President was personally driving the process forward with "reckless urgency", as testified to by Mr Nene, Mr Fuzile and Mr Gordhan. He did not overtly state whether he considered the nuclear deal to be corrupt or a part of state capture but he believed that the deal would have proceeded if Mr Nene had not resisted.

The Oakbay bank accounts matter

46. The Commission has heard extensive evidence on the closure by banks of bank accounts of Gupta owned entities, which is the subject of the Commissions TOR number 1.7.

47. President Ramaphosa's evidence, Mr Gordhan's evidence, as well as the statement provided to the Commission by Mr Momoniat to which President Ramaphosa refers, provide the most comprehensive account of Cabinet's intervention in the matter.

48. President Ramaphosa's recollection is that:

    48.1 The issue was raised on 13 April 2016 Cabinet meeting by then Ministers Zwane and van Rooyen, who conveyed their "dismay" in relation to what they considered to be the unequal

treatment by banks and auditing firms of clients and advocated for the urgent reform of the banking system. President Ramaphosa considered it highly unusual for a matter relating to a private company to be raised and decided on by the Cabinet.

48.2 Cabinet decided that Ministers Zwane, Oliphant and Gordhan (not present at this meeting) would prepare a briefing memorandum on the implications of the decision of certain banks and auditing firms to close or withdraw services to Oakbay Investments.

48.3 The matter was discussed at a meeting held between the ANC Top Six and the Gupta brothers after the Cabinet meeting.

48.4 On 22 June 2016, President Ramaphosa was requested to chair the Cabinet meeting, despite the President being in attendance. Minister Zwane submitted a memorandum during the meeting which suggested that a commission of inquiry be established to inquire into the conduct of the banks. President Ramaphosa objected to this proposal as: it would be wholly inappropriate for a Commission of Inquiry to be established for the purpose of addressing unique challenges faced by one private company in the banking sector.

48.5 The memorandum was withdrawn before it could be discussed. Cabinet approved that the relevant Ministers brief the President and the Deputy President prior to the memorandum being brought back to Cabinet for discussion, but no such briefing took place.

48.6 At the following Cabinet meeting, 6 July 2016, the same agenda item was tabled, and a reformulated memorandum submitted. Mr Zwane briefed the Cabinet on the memorandum and referred to this as an Inter-Ministerial Committee (IMC), but it was actually a task-team. Cabinet noted the progress made and that the memorandum required more work to be done. It was agreed that several further memoranda be prepared by Mr Gordhan relating to the banking and finance sector.

48.7 President Ramaphosa chaired the Cabinet meeting on 31 August 2016, in his capacity as Acting President. Cabinet noted that the memorandum had been leaked and published in the media that morning. It was agreed that the Cabinet Secretary would, in collaboration with the State Security Agency (SSA), investigate the security breach and report back to the Cabinet. Dr Lubisi indicates in his statement that he met with the then DG of State Security, Mr Arthur Fraser, and requested the matter be investigated, but no report was forthcoming despite multiple reminders sent to the DG. Allegedly, Bell Pottinger and the Gupta family were involved in this leak.

48.8 On 2 September 2016 Mr Zwane issued a statement with several “inaccuracies”. Later that day the Presidency issued a statement clarifying that Mr Zwane’s statement did not reflect government’s position and was issued in his personal capacity and not on behalf of the task team or Cabinet.

48.9 Former Finance Minister Gordhan took several steps to prevent government intervention, including making a court application in October 2016 to seek a declaration that he cannot interfere with banks’ decisions on account facilities. Before taking this step, Mr Gordhan sought the advice of President Ramaphosa, who agreed and gave him his full support.

49. President Ramaphosa describes the intervention sought regarding the banks “as an attempt to abuse state power in favour of a private company and in furtherance of its interests”. He also considered his opposition to Cabinet’s intervention in the matter to be an example of his resistance to state capture although Cabinet has no power to appoint a judicial inquiry, as this power resides solely with the President.

50. He, and others, resisted by insisting that “we should instead just find out exactly why these accounts are being closed”. It is not clear why President Ramaphosa thought it was acceptable for Cabinet to make such inquiries of the banks, nor did he explain what he thought would result from this process. As was made clear in the testimonies of Mr Ian Sinton and others, this process was used to intimidate the banks’ representatives and legitimate a narrative being used by the Gupta family. The involvement of Cabinet is thus highly questionable.

51. President Ramaphosa did not say why he believed there was such a strong push to establish a commission of inquiry into the conduct of the banks. The Cabinet minute of 22 June 2016, provided by President Ramaphosa, states that Cabinet approved the development of measures ensuring the "effective transformation of the financial and banking sectors" and Cabinet mandated the Minister of Finance to submit further memoranda.

52. President Ramaphosa did not include Mr Zwane's memorandum in his statement. (Mr Momoniat noted in his affidavit that neither Mr Gordhan nor the Treasury have ever seen this memorandum.)

53. Although former President Zuma repudiated Mr Zwane's statement on 2 September 2016, its contents were never disputed, and are somewhat similar to the Cabinet minute. Mr Zwane's statement provides insight as to the motivations behind the proposals which were adopted by Cabinet, and what the proposed commission of inquiry would be mandated to cover.

54. Mr Momoniat's affidavit, to which President Ramaphosa refers and does not dispute, notes that not only were the Guptas in dire need of banking services at the time, but they were simultaneously attempting to purchase a bank, a process which is controlled by National Treasury and the Reserve Bank. In fact, the Guptas had applied to purchase a private bank (Vardospan) to the Reserve Bank the day before then Minister Zwane's statement was released.

55. Elaborating on the leak during his testimony, President Ramaphosa said:

> It was one of those furious events where a cabinet memo was leaked, and we have never really had such in our cabinet system, that all of a sudden this one was leaked and it was leaked to achieve a particular end and a particular narrative which was being directed from somewhere.

56. While he did not specify who he believed to be directing this particular narrative, the natural inference is that the memo was leaked by the Gupta family, with the assistance of one of more members of Cabinet, possibly Mr Zwane and/or Mr van Rooyen.

57. The ANC in this case was acting knowingly in concert with Cabinet in this unlawful intervention into the affairs of the banks. The Top Six, which directed the ANC to engage with the banks at the behest of Oakbay included President Zuma and Deputy President Ramaphosa, who were party to the actions of Cabinet and the IMC. It is difficult for the Commission to believe that the ANC Officials acted completely independently of the Cabinet "task team".

58. President Ramaphosa did not provide evidence about former President Zuma's involvement in these events and did not testify about the motivations behind the actions of Mr Zwane and others. He did, however, characterise the saga as an example of state capture, and an example of successful push-back against state capture. The inference is that he considered Mr Zwane and the other Ministers, and possibly Mr Zuma, to be abusing their power to benefit the Gupta family.

LAW ENFORCEMENT

59. President Ramaphosa described in strong terms the role of law enforcement agencies in state capture.

60. He stated he had no knowledge of the reasons for the delays or failures of the Anti-Corruption Task Team and National Anti-Corruption Forum.

61. He detailed a number of steps he had taken as President to address this situation as part of his process of renewal and combating corruption by improving leadership and appointment processes and establishing various commissions of investigation.

INTELLIGENCE

The High Level Review Panel

62. President Ramaphosa gave evidence about his appointment of the HLRP into the conduct at the SSA, chaired by Dr Sydney Mufamadi. He claimed that the implementation of the HLRP recommendations are "at an advanced stage." It was put to him that the claim made in his statement – that the implementation of HLRP recommendations is at an advanced stage – was not a fair description, as the investigations have been halted, the documents have been put under lock and key, and the investigations must start again. President Ramaphosa agreed.

63. President Ramaphosa was asked why it was necessary for the HLRP to be established; surely the government should have known what was going on at the SSA. He responded that many state institutions were debilitated by state capture, and that the SSA was "compromised and operating under the milieu of state capture".

64. He was also asked about the hampering of the Veza investigation into the SSA, including how essential evidence and documentation were not made available to investigators.

65. It was put to President Ramaphosa that the state of the SSA was in fact a direct result of those in charge of State Security, which he conceded.

66. He was asked about the SSA's refusal to cooperate with law enforcement agencies and to withhold evidence from them. He characterised the issue as a problem of implementation and coordination between government entities, which occurred because each law enforcement agency has a "sense of proprietorship" over what they control. He confirmed that the documents were safe and that "the various processes that need to unfold will unfold."

67. President Ramaphosa was also asked if the unrest which occurred in July 2021 could be linked to operatives trained and armed by the SSA presidential security project. He felt that this proposition was "not unreasonable" and that there is a need to investigate the "lapse" of the SSA and how it "manifested itself from a certain beginning right up till what happened in July."

68. It was put to him that the events of the state security saga over a period from 2007 to now could hardly be termed a lapse. He did not disagree.

69. Ultimately, his evidence shows that that HLRP recommendations regarding internal investigations have come to a halt. The reason seems to be interference from the highest powers in the SSA and the Ministry, without apparent consequences.

70. Despite very serious findings made by the HLRP and the Veza investigation, against Mr Mahlobo, he was appointed into President Ramaphosa's cabinet as Deputy Minister of Water, Sanitation and Housing in May 2019. President Ramaphosa was asked to explain this appointment. He stated he was awaiting the outcome of the Commission's work. It was put to him that the question was not whether Mr Mahlobo was guilty, but whether he was suitable for such an appointment. President Ramaphosa repeated that he was awaiting this Commission's report.

71. The HLRP cited as a key finding that the Mr Mahlobo had presided over the SSA at a time when it showed "an almost complete disregard for the Constitution, policy, legislation and other prescripts" and that "there was more than enough information ... that former Minister Mahlobo, ..., involved himself directly in operations." It is unclear why President Ramaphosa would await further investigation.

72. Very serious findings were made against Mr Fraser over his co-ordination of the Principal Agent Network (PAN) and later during his tenure as DG of the SSA. Yet, in April 2018, he was redeployed by President Ramaphosa to be the DG of Correctional Services. When asked to explain this President Ramaphosa confirmed knowledge of some of the allegations against Mr Fraser, but said he was waiting for the Commission's report.

73. Three investigations have found evidence implicating Mr Fraser – the PAN report, the HLRP report

and the Veza investigation. The PAN report recommends criminal prosecution of Mr Fraser. It is unclear why President Ramaphosa would not act until this Commission has made its recommendation.

74. The Chairperson noted that the release of the Commission's report is in no way a final end point, and that there is a high risk that nothing will be done for a long time while legal processes are ongoing. The President acknowledged that there might be delays but merely asserted that "we are going to take your findings very seriously."

75. The President's position is that it is acceptable to retain and actively appoint persons against whom serious allegations have been made, and against whom more than one official investigation has implicated serious misconduct and criminality.

76. The President's position is of great concern, particularly given his admission that the SSA, under the leadership of Mr Mahlobo and Mr Fraser, "was compromised and operating under the milieu of state capture." It is difficult to understand how he could reasonably consider them as suitable for appointment to senior positions.

77. President Ramaphosa was asked why he decided to take the SSA under his direct control within the Presidency. He explained that he was seeking to "realign" state security, to protect, professionalise and "disinfect it of any partisanship".

The Inspector-General of Intelligence

78. President Ramaphosa was asked to respond to allegations made by the Inspector General of Intelligence (IGI), Dr Dintwe, concerning the consultation process that took place before Dr Dintwe gave evidence at the Commission. He did so in his statement, but there was no time to discuss this during the hearings.

79. Section 7(8) of the Intelligence Services Oversight Act 40 of 1994 regulates the IGIs access to, and disclosure of, intelligence and information related to the performance of his functions.

    79.1 It is self-evident that the IGI may disclose any unrestricted intelligence or information without notifying any Service or the President. However, section 7(8)(b) sets three constraints on the IGI's power to disclose restricted intelligence or information. Applied to the present context, the IGI had a duty to consult the President and the Ministers before disclosing any restricted intelligence or information. This required that he engage in good faith and demonstrate a receptiveness to any concerns they may arise about disclosure of classified intelligence or information to the Commission.

    79.2 This duty to consult requires more than mere written notice, but it does not require approval for the intended disclosure. The IGI retains the discretion to disclose the relevant intelligence or information after consultation notwithstanding any disagreement that may arise.

80. Prior to any consultation with the Ministers, Dr Dintwe was approached by this Commission, and engaged with the investigators and the legal team. On 22 July 2020 the IGI sent a letter to the relevant Ministers and President in which he stated that the letter "serves to discharge the onus of consultation with the relevant persons as provided for in section 7(8)(b)(i) of the Oversight Act".

81. During his cooperation with the Commission's investigations, the IGI handed over three lever arch files on 28 July 2021. He retrieved these files from the Commission on 8 August 2020. The ensuing consultation with the President and Ministers was lengthy and difficult.

82. Dr Dintwe said that "an accusation" was made that he disclosed information to the Commission prior to the consultative process. Allegedly three Ministers lodged a complaint against him with the President and recommended his suspension. He received a letter from President Ramaphosa informing him that this complaint had been referred to the JSCI. Dr Dintwe believed this was done to intimidate him and prevent him from testifying at the Commission.

83. President Ramaphosa disagreed with the IGI's version. He believes that the IGI was not blameless, because he was in breach of the governing legislation by handing over files to the Commission "in

blatant disregard of the legislative prescripts". He also said that it was "uniquely unfortunate that the IGI chose in his statement to this Commission to insinuate improper conduct on my part" and denied that he had taken any steps to intimidate Dr Dintwe or prevent him from testifying.

84. On the facts, the IGI disclosed information to the Commission prior to consultation. His letter to the Minister on 22 July 2020 did not discharge his legislative obligations of consultation. In this respect, the IGI was admittedly at fault, and the "accusation" that he had disclosed information prematurely was not baseless. However, it must be noted that in four days and 211 pages of evidence, the strongest language used by President Ramaphosa was that against Dr Dintwe. No other wrongdoer has been subject to such clear condemnation. Most have not even been named. Dr Dintwe's only fault was to release information to the Commission before consulting the President and three ministers. The following should be borne in mind:

    84.1 The Commission has a fact-finding mandate, and relies on the cooperation of witnesses, especially public functionaries. The IGI's co-operation with the Commission is consistent with its duty to act within the constraints of the law and its complementary duty to report criminal activity. It further reflects the openness and accountability that is characteristic of our new constitutional order based on a culture of justification rather than a culture of authority.

    84.2 The Commission's mandate is focused on inquiring into and reporting on criminal activity albeit particularly allegations of state capture, corruption and fraud. The SSA evidence, including that of the IGI, is critical to the Commission's work as allegations of state capture concern the kinds of activity that would pose a threat to national security and thus fall within the SSA's mandate. The IGI had a duty to cooperate with the Commission.

    84.3 In addition, the Constitution and the law does not afford protection to criminal activity in the security services under the guise of national security. On the contrary, the Constitution requires the security services to act in compliance with the law and, where it falls short, to be held to account.

    84.4 This has historically not been followed. There has been an overreliance on secrecy in the SSA, often to conceal criminality.

    84.5 It was only "restricted" information which the IGI consulted on. However, some of the evidence which the IGI shared with the Commission revealed criminality.

    84.6 Furthermore, on 7 October 2020, the Commission received a letter from the Presidency which stated, inter alia, that "declassification of the information they [the Commission] refer to or seek to make use of in fulfilling their terms of reference is not a prerequisite to them having access to or making use of the information at issue".

85. Dr Dintwe has a specific oversight mandate, as well as a duty to assist the Commission. In ensuring that the information did not reveal trade craft of the SSA or the names of any operatives, Dr Dintwe considered national security concerns. The corruption and criminality, he claimed, continued unabated. The response by the Ministers and the President therefore appears to be disproportionate, and the evidence suggests that the conduct of the Ministers amounted to intimidation and obstruction of the investigations.

86. It is remarkable that President Ramaphosa reserved his only harsh words and outright condemnation for Dr Dintwe. This position is starkly different to his position on Mr Mahlobo and Mr Fraser, who have had the benefit of waiting for the outcome of years of investigations, which have been obstructed at seemingly every turn – and possibly years of review proceedings after the release of the Commission's report – despite substantial evidence that they both have been complicit in compromising national security and subverting the SSA. President Ramaphosa appears to have no desire to act promptly in these cases.

THE PUBLIC DISCOURSE

87. After presenting his understanding of state capture, President Ramaphosa was asked to comment on the role of disinformation and misinformation in state capture. A 2017 statement he made concerning the terms “Radical Economic Transformation” (RET) and “White Monopoly Capital” (WMC) was put to him.

88. He stated that RET is a legitimate term describing a programme fostered by the governing party, but that it has been bastardised and mutated by “people doing wrong things”. He said that this was spread by media entities outside South Africa in order to achieve certain political objectives and advance state capture, and referred to Bell Pottinger, a UK-based firm which has been implicated in driving the spread of these narratives on behalf of the Gupta family. He added that these narratives had been used to destroy certain people, particularly through the spread of rumours on social media and media leaks.

ESKOM

Allegations made by Mr Brian Molefe and Mr Matshela Koko concerning Eskom

89. Mr Brian Molefe and Mr Matshela Koko, in their testimonies at the Commission, made certain allegations against President Ramaphosa. In the main, President Ramaphosa responded to three allegations:

    89.1 That his involvement in Optimum was designed to leverage his political influence to favour Glencore in its dealings with Eskom

    89.2 That his involvement in the "War Room" presented a conflict of interest due to his past interest in Optimum; and

    89.3 That he improperly interfered with the Eskom board in order to ensure the removal of Mr Koko in 2018, a decision which was motivated by state capture.

90. President Ramaphosa confirmed that he indirectly held 9.64% of Optimum Coal Holdings (OCH) through his company, Lexshell, from June 2012 to 22 May 2014. He was a non-executive chairperson of OCH from June 2012 until he resigned on 6 June 2013. He asserts that he had no operational involvement on OCH or Optimum Coal Mine (OCM) during this time.

91. President Ramaphosa refuted as false the allegation by Mr Molefe and Mr Koko that Glencore had sought to involve him in a business relationship with OCM in return for his political influence, as Glencore did not first acquire shares in OCH /OCM and then sell a percentage to him. Rather, President Ramaphosa was, through Lexshell, part of a consortium with Glencore that acquired shares in OCH jointly.

92. Mr Molefe and Mr Koko further alleged that Glencore/OCH failed to conduct a due diligence when they acquired OCM because they knew they could rely on President Ramaphosa’s political influence to ensure Eskom treated them favourably.

93. President Ramaphosa testified that he was not in government at the time Glencore acquired OCH. Furthermore, according to him, listed entities are often purchased without due diligence exercises as they rely on published information; and OCM was merely a subsidiary of OCH, so a due diligence wouldn’t have been performed on (potentially one of many) subsidiaries.

94. President Ramaphosa sought to clarify some confusion on the matter of the "War Room".

    94.1 The former President assigned him to oversee two intervention measures decided upon by Cabinet in December 2014.

    94.2 The first intervention measure concerned the establishment and implementation of turnaround strategies for Eskom and two other SOEs (South African Airways and South African Post Of-

fice). President Ramaphosa emphasised this was a supervisory role and he was not involved in operational decisions.

94.3 The second intervention measure was a five-point plan for Eskom in order to address the pressure on the country's electricity system. A "Technical Implementation War-room on the Electricity Crisis", known as the "War Room", was established to focus on issues that required collaboration between departments and entities concerned, and resolve blockages where they occurred, relating to Eskom's electricity supply shortages. War Room matters were dealt with by department officials, overseen in day-to-day matters by a set of Deputy Ministers.

94.4 President Ramaphosa provided political leadership, as he was the Chair of the IMC on Energy, which functioned above the War Room, to coordinate the relevant work at cabinet and ministerial level.

95. President Ramaphosa testified that, as he had no operational involvement in the "War Room" he had no conflict of interest.

96. Mr Molefe further alleged that President Ramaphosa had failed to allow for a "cooling off" period after he disposed of his interests in Optimum, so that any potential conflict of interest could be dissipated. President Ramaphosa said he was appointed by former President Zuma, who had full knowledge of his past and present financial interests. He considered his disposal of assets and declaration of interests to be sufficient to rule out any conflict of interest.

97. He testified that he and Ms Lynne Brown, the former Minister of Public Enterprises, took the decision to remove Mr Matshela Koko. He said that this was an exceptional situation as Eskom was in "dire straits" which justified the government "taking control of the impending crisis". He further asserted that Mr Koko's removal was part of a package of reforms intended to avert a crisis.

The suspension of Eskom executives and the appointment of Brian Molefe

98. President Ramaphosa testified that he was unaware of the meeting between former President Zuma, Ms Dudu Myeni, Mr Zola Tsotsi and others in March 2015, in which a plan was conceived to establish an inquiry within Eskom and suspend certain Executives.

99. When asked whether he inquired into these suspensions, given his stated decision to resist activities related to corruption or state capture, he stated that that the suspensions caused him to realise that "there were just too many initiatives that were all happening at the same time". Although he was frustrated with the situation at Eskom, he did not suspect anything untoward at the time, and was unaware of the appointments of persons linked to the Gupta family.

100. He stated that, subsequent to the suspension of Eskom's CEO, Mr Matona, he had suggested the appointment of Mr Brian Molefe as CEO to the former President. He had no knowledge of Mr Molefe's connection to the Gupta family.

101. He was asked to explain why things "went south" at Eskom when the IMC was supposed to oversee the turnaround, which he claimed made notable progress in 2015. He responded that the IMC had only dealt with 'strategic issues', not operational issues, and that Eskom was a complex operation.

PRASA

Allegations made by Mr Popo Molefe, former Chairperson of the PRASA Board

102. President Ramaphosa was asked to address Mr Popo Molefe's evidence that he was informed as a member of the ANC Top Six about corruption and state capture at Public Rail Association of South Africa (PRASA) and failed to act.

103. He testified that he attended a meeting with Mr Molefe, as a member of the Top Six, in July or August 2015. He recalled that Mr Molefe raised acts of corruption at PRASA as well as attacks against himself and the board by Mr Lucky Montana. He did not recall that Mr Molefe raised the issue of a

beneficiary of a R3,5 billion locomotive contract who had been asked to donate R79 million to the ANC.

104. Mr Molefe had testified that the ANC leadership had remained silent and failed to act against ongoing attacks on PRASA and the board, which he had been deployed to lead by the ANC. President Ramaphosa testified that Mr Molefe "received nothing else but support" and that the ANC leadership was of the view that Mr Molefe had to use the structures of the state, and not the party, to deal with these challenges:

105. President Ramaphosa said that Mr Molefe had the capability to act, and that it was disingenuous to suggest that he needed support from the ANC leadership. The Chairperson noted that Mr Molefe had indeed attempted to use the means at his disposal to address the issues at PRASA, but that the state machinery was not operating as it should, and that he therefore may have sought the help of the party.

106. President Ramaphosa denied as "inconceivable" the allegation made by Mr Molefe that the ANC leadership remained inactive because they wanted the board to collapse.

107. The evidence shows that Mr Molefe tried to address corruption at PRASA through all the means available to him. He approached the Top Six and the Deputy President, who did nothing. President Ramaphosa did not adequately explain why he and the Top Six failed to support Mr Molefe.

The failure to appoint the Board and CEO

108. President Ramaphosa was questioned on the failure of the minister and cabinet to appoint a PRASA board for more than three years (until forced to do so by the High Court), and the failure to appoint a CEO for more than five years. The consequent instability in the institution had "contributed to the collapse of the control environment of PRASA" during a period of ballooning irregular expenditure.

109. President Ramaphosa responded that it is the responsibility of the Minister to make these appointments. The Chairperson of the Commission pointed out that a minister is under the supervision of the President and Cabinet, "so if the minister failed to do her job, then the President ought to pick that up."

110. President Ramaphosa conceded that "errors have occurred" because of the "silo style of work" in the Executive. He claimed his reforms would prevent lapses in the future.

TRANSNET

Implicated persons

111. President Ramaphosa was questioned in relation to four individuals: Mr Siyabonga Gama, Mr Brian Molefe, Mr Iqbal Sharma and Mr Malusi Gigaba.

112. He stated that he had no knowledge of former President Zuma's support for Mr Gama. In relation to Mr Gama's appointment as Group CEO in 2016, he confirmed that his appointment was discussed by the ANC Deployment Committee and that he was the only candidate considered.

113. He confirmed that he had proposed to former President Zuma his secondment from Transnet to Eskom as he was unaware of Mr Molefe's links to the Guptas, despite the relationship not being secret.

114. President Ramaphosa stated that it was not unusual that Mr Gigaba was promoted from Deputy Minister of Home Affairs to Minister of Public Enterprises. President Ramaphosa averred that he had no knowledge of Mr Gigaba's links to the Guptas and the evidence that Mr Gigaba acted in their interests.

115. It was put to the President that "the Transnet experience shows abuse by unscrupulous individuals and organisations of the supplier development partner initiative." President Ramaphosa testified that his SOE council would look at the management of the BEE process.

116. He was asked to address the unnecessary use of consultants where state institutions have the expertise and capacity to do the work. He agreed that this should be addressed by the SOE council and by the government generally.

117. Given the scale and circumstances of the looting identified by the Commission he was asked: "How is it possible that no-one in a position of power that was not complicit identified this and raised the red flag as you call it? How is it conceivably possible?"

118. President Ramaphosa responded:

> It is possible and conceivable in a state capture type of environment, where the capture of the state goes through a number of structures, and where those who will then (sic) everything into action have got protection. They have got the connections. They have got the access and made sure that people who are going to implement this [are] also their appointed people.

OTHER ISSUES

Mr Nkwinti

119. The legal team had intended to deal with issues related to the affidavit of Mr Gugile Nkwinti and the Department of Rural Development and Land Reform (DRDLR). Unfortunately, there was no time to do so. Mr Nkwinti's allegations are summarised here, although President Ramaphosa did not have an opportunity to respond.

    119.1 Mr Nkwinti claimed he had informed President Ramaphosa (and other ANC officials) of a scheme called 'Project Mangaung', to raise funds for former President Zuma's campaign to be re-elected at the 2012 National Conference of the ANC, by using the DRDLR to purchase certain farms at inflated prices. Nothing came of his report.

    119.2 He gave evidence about his attempt to discipline his former Director-General, Mr Mduduzi Shabane. He received permission from President Ramaphosa but claimed that President Ramaphosa later asked him to withdraw disciplinary action as he was "in trouble" with the former President.

    119.3 Mr Nkwinti also expressed concern that President Ramaphosa had appointed Mr Shabane as DG in 2019, even though he had been dismissed in 2017 and had been implicated in an SIU corruption report.

SAA

120. President Ramaphosa briefly addressed the 2016 SAA board in his statement:

> On 31 August 2016 . . . the Cabinet agreed to a new Board being appointed for SAA. . . . Since President Zuma was overseas at the time and I was Acting President, I discussed the matter with him over the phone . . . , and the resulting decision was made with his concurrence. Ms Dudu Myeni was retained on the Board and as chairperson, on the understanding that her final term on the Board would end in 2018.

121. Unfortunately, there was no time to pursue this issue with President Ramaphosa. His preliminary evidence shows that former President Zuma was personally involved in the appointment of the SAA board in August 2016.

ADDRESSING STATE CAPTURE

122. President Ramaphosa detailed a number of steps taken to address both the causes and consequences of corruption and state capture.

123. In his estimation, the primary means of preventing corruption is through the appointment of "fit for purpose" persons, strengthening of procurement systems, and systematic implementation of the legislation controlling public funds, such as the PFMA and MFMA.

124. The National Anti-Corruption Strategy was approved by Cabinet in November 2020. It has six pillars which he believes will address and prevent future corruption.

Institutional changes

125. President Ramaphosa stressed the “critical need to strengthen the capacity of the state, at all its levels”. Many steps have already been taken to this end and have been discussed here and in other testimonies. Others have not been finalised and appear to remain proposals.

As Deputy President

126. In terms of SOE reforms, President Ramaphosa detailed the following processes and reforms:

    126.1 In December 2014 he was tasked to oversee the turnaround of SAA, SAPO and Eskom.

    126.2 In February 2015, Cabinet approved twelve reforms drawn from the report of the Presidential Review Committee (PRCs) on SOEs and established an IMC to build on the work done in respect of SAA, SAPO and Eskom. The SOE IMC was to report back to Cabinet in June 2015.

127. By the Cabinet lekgotla of August 2016, the following had been done:

    127.1 A draft shareholder policy had been drafted

    127.2 A draft handbook for SOE board appointments had been drafted

    127.3 A draft policy to address the empowerment of SOE boards had been produced

    127.4 The Committee of DGs and a Technical Committee to support the IMC had been established and was operational

    127.5 A draft framework for private-public partnerships for infrastructure projects had been drafted; and

    127.6 An SOE Council had been established.

WHAT DID HE KNOW, WHEN DID HE KNOW IT, AND WHAT DID HE DO ABOUT IT?

128. The President’s answers go some way towards answering these questions, but unfortunately leave some important gaps.

129. He readily acknowledges the existence of state capture as a coordinated project and has made much of his drive to right the wrongs of state capture. But the question of what he knew is still opaque. He mentioned very little in the way of personal, first-hand evidence, and stressed that those involved in state capture conducted their business in secret. He claims to have only known as much as the general public.

130. Yet, he was at the heart of government from May 2014. His version was that he saw nothing during this time – except for the removal of Minister Nene, the removal of Minister Gordhan, and the attempt by some Ministers to intervene in the bank accounts matter – that raised any alarm bells. As Deputy President he purports he had no real insight into the workings of government. Given how many other

senior government officials, including former ministers, have testified to witnessing blatant corruption, however, it is difficult to accept this explanation as complete.

131. He failed to give a concrete answer to the question of when he knew that state capture was occurring. Given the evidence above, it must have been before December 2015, It is not clear what occurred between the Waterkloof landing in April 2013, which he conceded was not adequately responded to, and December 2015 that led the him to this conclusion.

132. The when is important. His first act of "resistance", according to him, occurred in December 2015. The ruling party failed to respond in any significant way until 2017. How long was he aware of state capture before he decided to act? Was he aware of various corrupt activities during his term as Deputy President, but not yet cognisant of state capture? If so, what did he do about them? The Commission must understand the when in order to determine whether those at the very centre of the Executive were complicit, negligent, or ignorant of what was occurring.

133. Serious and credible allegations of corruption against the Gupta family and several powerful individuals, including former President Zuma, were consistently raised by journalists and civil society as early as 2010. It is unclear when President Ramaphosa concluded that these concerns were valid and needed to be acted upon, and what was the tipping point in his reaching that conclusion.

134. The question what did he know must be accompanied by another question: ought he to have known? The wealth of evidence before this Commission suggests that the answer is yes. There was surely enough credible information in the public domain, long before December 2015, to at least prompt him to inquire and perhaps act on a number of serious allegations. As the Deputy President, he surely had the responsibility to do so.

135. The next question is: what did he do about it? He claimed that he chose to remain within government in order to resist state capture. Yet, he only gave three examples of his resistance.

136. He claimed that he would have been dismissed if he had been more confrontational. Yet he provided no evidence as to why he believed this was the case.

137. He must have believed that the ruling party would not defend him and that the ANC would have protected a President who fired his Deputy President for the crime of confronting corruption. This aligns with his broader contention that his ability to act was curtailed by the political reality of the time – the "balance of forces" in power in the ruling party and in the National Executive. This is an indictment on the party and its leadership.

138. However, his intervention in preventing the permanent appointment of Mr van Rooyen as Finance Minister was confrontational and effective. It worked, despite the balance of power. He was not dismissed and did not face any consequences for his action. It is difficult, then, to understand why other allegations in the public domain continued to go unaddressed for so long.

139. He asserted that those who pushed back from within were able to curb some of the excesses of state capture. Was this enough? It is indisputable that state capture continued during the years that he was "resisting", and that the consequences (to the economy, to government, to South African society) have been severe. Considering the dire straits the country finds itself in, the effectiveness of President Ramaphosa's decision to remain and resist within the state and party is not a given.

140. While no counterfactual can be proven, we must ask whether these processes could have been arrested sooner had powerful figures, like President Ramaphosa, been willing to act immediately. The crux of President Ramaphosa's "balance of forces" explanation is that any other approach would not have been allowed by the ruling party, and he and others were unwilling to damage the ANC by publicly going against it.

141. This is one of the reasons we must now turn our attention to the role of the ANC in state capture - the subject of the next section of this report.

THE ROLE OF THE RULING PARTY

INTRODUCTION

1. Understanding the role of the African National Congress (ANC) is vital to understanding state capture in South Africa. It has been the only governing party since the advent of democracy in South Africa in 1994, and specifically during the years under review. It has been responsible for deploying persons to the highest positions in the state. It has a significant majority in Parliament, allowing it effectively to control oversight of the Executive. State capture happened under its watch.
2. In addition, various ANC leaders have been implicated by witness testimony at the Commission. There has also been substantial evidence that the party itself was a beneficiary of state capture, as it received payments from third parties who are alleged to have corruptly acquired government contracts.
3. It is necessary therefore to interrogate the role of the party in:
   3.1 Actively engaging in corrupt activities for its own gain
   3.2 Allowing corrupt activities to continue under its watch and failing to intervene to prevent or halt such activities; and
   3.3 Creating the framework for corruption and state capture to flourish.

STRUCTURES OF THE ANC

4. The National Conference is the supreme ruling and controlling body of the ANC and is convened every five years. It decides on and determines the policies and programmes of the ANC.
5. The National Executive Committee (NEC) is the highest organ of the ANC between National Conferences and has the authority to lead the organisation, subject to the provisions of its Constitution.
6. The President, Deputy President, National Chairperson, Secretary-General, Deputy Secretary-General and Treasurer-General of the ANC are known collectively as the National Officials or, informally, the "Top Six".
7. The National Working Committee (NWC) is elected by the NEC and is expected to conduct the current work of the ANC and to ensure ANC structures carry out the decisions of the party. It is composed of the Top Six, up to twenty directly elected NEC members, and one representative from the Women's League and one from the Youth League. The NWC meets every two weeks.

THE RELATIONSHIP BETWEEN PARTY AND STATE

8. In his first appearance before the Commission on behalf of the party, the ANC's Secretary-General Gwede Mantashe stated that "the ANC believes that a key outlook of the Commission should be the relationship between the party and the state."
9. As correctly noted by Mr Mantashe and President Ramaphosa, the party is an essential part of South Africa's democratic framework, which is that of a multiparty system with proportional representation. It is not in question that the ruling party, by virtue of its election, sets the policy of the government of the day. However, the interface between the party and state is of concern to the Commission.
10. It is clear that the ANC took on the responsibility of being the leader in society, in the process of liberation, in the establishment of the constitutional and democratic state, and the furtherance of the interests of the population as a whole. This is evident from this statement made by President Ramaphosa:

In such circumstances, political parties do not merely represent their members, but often act as instruments to advance the needs and interests of entire sections of society. ... This is among the reasons that the ANC describes itself as a "liberation movement" first and foremost that, among other things, contests elections as a registered political party.

10.1 However, the decision by the ANC to ignore a number of allegations directed at Mr Jacob Zuma and the influence of the Gupta family on key functions in the state, as well as obstructing various avenues to achieve accountability in this regard, has seen the ANC sacrifice its public duty in order to protect itself.

10.2 The justification for the latter is the belief that the fate of the ANC is inextricably linked to that of the public or society. Mr Mantashe told the Commission that “Impulsive action, I believe, could unleash a set of negative forces which would have a detrimental impact on the democratic gains we have made thus far. The ANC can never take the Samson option.”

11. Mr Mantashe was also unequivocal about the role of the party in terms of state power. He said: “Our immediate goal is to deepen the hold of the liberation movement over the levers of the state.” He explained that the ANC did not cease to govern after it is elected, and that it must meaningfully engage in governing, and that in fact “state entities are tools in the hands of the governing party in order to execute its programs.”

12. President Ramaphosa said that some degree of political involvement in administration is “essential for the proper functioning of a democracy” as the political administration needs to be able to change policy direction. However, he said that the ANC recognises that political involvement in administration should be “circumscribed by legislation, convention and practice.” He said that there needed to be a “balance” between political considerations, technical proficiency, and objectivity.

13. Mr Mcebisi Jonas gave his opinion during his evidence on the conflation of party and state. He stated that the easiest vehicle through which to capture the state is through the capture of the ruling party, where the party becomes an instrument for the project of wealth accumulation. State institutions, particularly the public service, are the product of and are bound to the political life cycle where elections are the beginning and the end. He said that even within the elected ruling party there exist factions and contests which affect the constitution of the public service. Mr Jonas said:

> It is what I would call the political system that we have. ... In our system, if you kind of cut out the frills again, you have a particular relationship between the state and the party. Now firstly the – you go into elections and elect a party. And normally whilst the party gets elected of course, the party goes to its own conference. Once it goes to its own conference, it takes power to provinces, it takes to provincial executives, it notionally takes it to the national executive. Ultimately power then gets taken to the working committee, and at a later point then power gets taken to another committee, the Top Six. Then later on it gets taken to the President basically. ... I think ultimately you going to have a problem where capturing the party is the easy vehicle of capturing the state.

CORRUPTION AND STATE CAPTURE

14. President Ramaphosa has conceded the existence of corruption, the existence of state capture, and the role of the ANC therein. He has conceded not only that there has been corruption, but that it is both continuing and pervasive, in government and in the party.

15. A particularly clear example of this appears in a letter written by President Ramaphosa to ANC members in August 2020, titled "Let this be a turning point in our fight against corruption". The letter discusses the corruption problem at length and says that the ANC “needs to take responsibility.” In the letter he continued:

> We must acknowledge that our movement, the African National Congress, has been and remains deeply implicated in South Africa’s corruption problem. ... Today the ANC and its leaders stand

accused of corruption. The ANC may not stand alone in the dock, but it does stand as Accused No.1. This is the stark reality that we must now confront.

16. President Ramaphosa repeatedly emphasised that the party has "drawn a line in the sand" and is committed to renewal and change. However, these statements – acknowledging corruption within the party and promising to fight it – are not new. As he put it in his statement, the ANC has long recognised the existence of corruption within the democratic state, that some members of the ANC are complicit in this corruption, and that such corruption undermines our democracy and the integrity of the ANC.

17. It is uncontested that:

    17.1 Corruption, within the ranks of the ANC, had been recognised and acknowledged for over twenty years.

    17.2 The various forms of corruption so acknowledged included: the looting of public resources; the abuse of state power; patronage; bribery; vote-buying; nepotism; state capture; and others.

    17.3 Corruption has not declined but worsened as evidenced in the media.

    17.4 The ANC as a "leader of society," as controller of the "levers of power," has been unable to halt or even significantly slow down corruption.

18. Unfortunately, neither President Ramaphosa nor Mr Mantashe offered any explanation of why the party's previous attempts to deal with these problems have failed, and why any such attempts might now succeed. If Mr Mantashe gave any explanation, it would be that he said that the ANC is a very "slow" organisation.

THE ANC'S RESPONSE TO STATE CAPTURE

19. In his opening statement to the Commission, President Ramaphosa said:

> State capture took place under our watch as the governing party. It involves some members and leaders of our organisation and had fertile ground in the divisions and weaknesses and the tendencies that have developed in our organisation since 1994. ... We all acknowledge that the organisation could and should have done more to prevent the abuse of power and the misappropriation of resources that defined the era of state capture.
>
> Particularly the period under review by this Commission, the ANC does admit that it made mistakes as we have admitted in our various conferences. We made mistakes as it sought to execute the mandate that it was given by the voters. It had shortcomings and living up to the expectations of the people of South Africa in relation to enforcing accountability and in generating a culture of effective of consequence management.

20. Despite the general acknowledgement by President Ramaphosa that the ANC was itself 'implicated' in relation to corruption and state capture, both he and Mr Mantashe also denied that the party itself was complicit in state capture.

    20.1 Mr Mantashe was emphatic that individual members may have been 'captured' but that the party remains innocent. However, it appears that the party did little to prevent the abuse of power from those "captured" members.

21. The party's failure to act against state capture for an extensive period of time was discussed during both President Ramaphosa's and Mr Mantashe's evidence.

22. The early warning signs of state capture included the following:

    22.1 It is clear that the particular issue of the influence of the Gupta family was being discussed within the party as early as 2011.

22.2 Mr Fikile Mbalula reported to the NEC in 2011 that the Guptas had foreknowledge of his appointment to as Minister of Sport and Recreation.

22.3 The Waterkloof landing in April 2013 caused much consternation.

22.4 Various newspaper articles demonstrated that credible allegations that the Gupta family were engaged in corruption were publicly known since at least 2011.

23. The ANC failed to act on these claims in any way over a span of at least five years. President Ramaphosa conceded that "there was a dropping of the ball," and that, in hindsight, the party should have been more alert to such warning signs. President Ramaphosa remarked in his statement that the ANC did not have direct evidence of state capture "at the time" and did not have the investigative capacity to probe various allegations as they emerged.

24. Mr Mantashe testified that the Integrity Commission of the ANC had recommended that Mr Zuma step down in 2013, following the Waterkloof incident. Nothing came of this recommendation.

25. Dr Popo Molefe testified that he had met with the ANC Top Six to inform them of serious corruption at PRASA. Dr Molefe had testified that the ANC leadership had remained silent and failed to act against ongoing attacks on PRASA and the Board, which he had been deployed to lead by the ANC. President Ramaphosa admitted that that meeting took place. He said that Mr Molefe had said he was going to use to state institutions to deal with corruption at Prasa and that was supported. The ANC leadership was of the view that Dr Molefe had to use the structures of the state, and not the party, to deal with these challenges:

25.1 President Ramaphosa said that Dr Molefe, as Board chairman, had the capability to act, and that it was disingenuous to suggest that he needed support from the ANC leadership to do so. However, the fact is that Dr Molefe did try to address corruption at PRASA through the means available to him is borne out by the evidence. Mr Molefe and his Board approached the courts to deal with corrupt contracts. They received no support from the Minister, the Portfolio Committee, nor the Speaker of Parliament. The Hawks failed to act. He approached the ANC leadership for support in light of the obstacles they were facing.

25.2 President Ramaphosa denied as "inconceivable" the allegation made by Dr Molefe that the ANC leadership remained inactive because they wanted the Board to collapse.

26. In December 2015, the former President, Mr Zuma, dismissed the finance Minister, Mr Nene, and replaced him with Mr Des van Rooyen. President Ramaphosa, with other senior ANC officials, managed to convince the former President to appoint Mr Gordhan in the position instead. Despite President Ramaphosa's conviction that this was a clear sign of state capture, and their apparent success in resisting it, the party did not act further, in relation to other matters.

27. In 2016 various approaches were made to the ANC to report corruption and state capture, or to call for action from the party.

27.1 In March 2016, Mr Mcebisi Jonas issued a media statement that the Guptas had attempted to bribe him. Mr Jonas's revelation was swiftly followed by others, including reports by Ms Barbara Hogan, Ms Vytjie Mentor and Mr Themba Maseko.

27.2 Party veterans Mr Jeff Maqetuka, Mr Moe Shaik, General Siphiwe Nyanda and Mr Jabu Moleketi met with Ms Jessie Duarte, Mr Gwede Mantashe and Mr Zweli Mkhize at ANC Headquarters, Luthuli House on 31 March 2016 to discuss their concerns. These included a view that ANC polices were being subordinated due to the influence of a few comrades and that many people working in state institutions were beholden to the Gupta family; and that many members of the NEC expressed the view that the environment was such that they were afraid to speak out about what was happening in the ANC.

27.3 In March 2016, the Oliver and Adelaide Tambo Foundation, the Nelson Mandela Foundation and the Ahmed Kathrada Foundation wrote jointly to the NEC, calling for "urgent corrective action". The letter reads in part as follows:

> All South Africans have a living memory of the freedoms we have won and experienced. We cannot sit back and watch those freedoms being taken away. It is in this respect that it seems to us that the ANC has significantly drifted away from the ideals to which our Founders and many others, dedicated their lives. We are disturbed by accounts we receive from students, religious leaders, members of our community, the media and from civil society organisations about the disillusionment of our people and their waning trust in the ANC as a result of the unfolding events. We believe we have reached a watershed moment. We appeal to the National Executive Committee of the ANC as they meet over the weekend to take note of the mood of the people across the country, to reflect deeply on their solemn responsibilities, to make urgent choices, and to take urgent corrective actions in the best interest of South Africa and its peoples. We make this call to remain true to our Founders and to continue their life's work to champion the cause of freedom and democracy for our people. It is for these that they were "prepared to die". History will judge the ANC leadership harshly if it fails to take the decisions that will restore the trust and confidence of the people of South Africa. In the true spirit of our Founders we offer our experience and expertise in any manner that might assist in facilitating a critical process of dialogue in which South Africans can find one another in the restoration of visionary cohesion and nation-building at this hour of need. Our doors are open!

27.4 In March 2016, a memorandum was sent by 101 former members of uMkhonto we Sizwe to the Top Six of the ANC expressing their concerns about developments in the country and the ANC, in particular with regard to the Guptas.

27.5 In April 2016, a group of former Directors-General with histories in the liberation movement, wrote a letter to members of Cabinet calling for various interventions to address state capture. Nothing ever appeared to come of this and the group of former officials disbanded.

27.6 In May 2016, the Top Six met with General Anwa Dramat, Mr Robert McBride, Mr Ivan Pillay and others, all of whom held senior positions in law enforcement. They "provided details of efforts to isolate them and drive them out of their positions in the State."

27.7 Further meetings were held by members of the Top Six (Ms Duarte, Mr Mantashe and Mr Mkhize) with representatives of Business Leadership South Africa, with ANC veterans, the South African Council of Churches and senior ANC comrades where it appears all groups highlighted serious concerns about corruption and state capture.

27.8 President Ramaphosa also cited a number of other actions taken by those within the Tripartite Alliance.

28. This chronology reflects just how long the ANC waited to do anything, despite repeated calls from its own members and political allies to act.

The ANC acts

29. In March 2016, the ANC NEC published a media statement in which it rejected the notion of any business or family group seeking influence over the ANC. The NEC simultaneously mandated the Top Six and the NWC to gather information about the allegations concerning the Gupta family and their purported influence in the State appointments, in order to "enable the ANC to take appropriate action on this matter."

30. In May 2016, Mr Mantashe reported that, in response to the ANC's invitation to its members that those with knowledge of state capture should approach the Secretary General, only eight ANC members had made oral submissions, only one of whom made a written submission. Among the issues raised were:

30.1 The public allegations about the Gupta family offering cabinet positions to people

30.2 The fact that three former Directors-General had spoken about the authority that the Gupta family appeared to have; they firmly believed that failing to comply with instructions issued by

the Guptas would be career-limiting

30.3 Concerns that the "playing field" was not level in competing for business opportunities and that the BEE program was being undermined. (“If you are not working with the Guptas you get elbowed out”); and

30.4 The systematic corroding of SOEs such as Transnet, Eskom, Safcol, South African Airways and Alexkor.

31. Mr Mantashe also reported that ANC members believed that making submissions to the ANC would have the effect of exposing them instead of helping the organisation to deal with the problem, and that “for their own protection” they would rather make their submissions to an independent body. Mr Mantashe said that ultimately, the NEC “accepted that eight comrades should make their submissions to an independent body, and we accepted that. That was the beginning of the process of discussing ANC supporting the establishment of a Commission.” The NEC did not further address the submissions made to them.

32. President Ramaphosa told the Commission that the ANC had realised that the problem was much bigger than they could deal with. He also stated that the complainants had wanted a more formal process so that a thorough investigation could be conducted, and so that they could be shielded.

33. The statement which announced the NEC’s inquiry simultaneously affirmed the NEC’s confidence in President Jacob Zuma. This was clearly not an independent or neutral space.

34. It should be noted that President Ramaphosa had, at the time, publicly promised that the ANC would conduct a further methodical and rigorous investigation. This clearly did not occur. There is in fact no evidence that the ANC ever proactively sought to make even basic inquiries.

35. The ANC had the opportunity to get Parliament to initiate a public inquiry in terms of the Rules of Parliament to look into the allegations of the influence of the Gupta family on President Zuma but, not only did they not do so but even when another political party, the DA tabled a motion for the initiation of such enquiry the ANC opposed that motion. It was only in 2017 that the ANC changed its position and began to support the idea of public inquiries.

36. In November 2016 the Public Protector’s State of Capture report was released. When the report was discussed by the NEC, that Committee resolved not to support the call for the former President to step down. The NEC felt that “it was more urgent to direct the energies of the ANC in its entirety to working towards the unity of the movement.” On some occasions the NEC would criticise state capture and corruption and say how unacceptable corruption is but in the next sentence they would reaffirm their confidence in President Zuma.

37. The evidence heard by the Commission has revealed that it was the approach taken by the ANC as the majority party in Parliament which prevented Parliament from establishing public inquiries before 2017. If the ANC had supported the motions for the initiation of public inquiries into the allegations of undue influence of the Gupta family on President Zuma, state capture may have been stopped in its tracks. However, the ANC opposed those motions and this resulted in the Gupta brothers and Mr Zuma continuing with their state capture project.

38. The implication of all of this evidence is that the NEC decided to prioritise the survival and success of the party over acting on the allegations of state capture. This is consistent with President Ramaphosa’s own evidence before the Commission as to why he had been constrained from speaking out earlier than he did.

39. In May 2017 the NEC again decided not to act against Mr Zuma. It did, however, endorse the proposal for a judicial commission of inquiry.

40. The ANC’s 54th National Conference in December 2017, at which President Ramaphosa was elected as President of the ANC, the Conference adopted a resolution noting the following:

> an increase in corruption, factionalism, dishonesty and other negative practices that seriously threaten the goals and support of the ANC;

that the lack of integrity perceived by the public has seriously damaged the ANC's image, the people's trust in the ANC, its ability to occupy the moral high ground, and its position as leader of society;

that current leadership structures seem helpless to arrest these practices, either because they lack the means or the will, or are themselves held hostage by them;

that the state investigative and prosecutorial authorities appear to be weakened and affected by factional battles, and unable to perform their functions.

41. The Conference resolved that:

41.1 ANC members accused of corruption must account to the Integrity Commission or face disciplinary processes.

41.2 Those who fail to give an acceptable explanation must voluntarily step down while they face disciplinary, investigative or prosecutorial procedures, or must be suspended.

41.3 The party should publicly disassociate itself from anyone accused of corruption.

41.4 Party members and structures must cooperate with law enforcement agencies.

41.5 ANC deployees to Cabinet must strengthen state capacity to successfully prosecute corruption and account for any failure to do so.

42 In February 2018, the ANC NEC decided to recall Mr Zuma from his position as President. Mr Zuma resigned as President of the country on 14 February 2018 and on 15 February 2018 President Ramaphosa was elected as President of South Africa.

THE ANC IN PARLIAMENT

42. President Ramaphosa remarked that the ANC did not have direct evidence of state capture "at the time" and did not have the investigative capacity to probe various allegations as they emerged. It was put to him in evidence that Parliament would have this investigative capacity, which he conceded.

43. A number of allegations against the Guptas had surfaced since 2011, but Parliament failed to investigate these claims in any way over a period of about five years. He said that the party did eventually realise it could not sufficiently investigate on its own and referred the matter to Parliamentary structures.

44. President Ramaphosa agreed that the ANC's opposition to a proposed Parliamentary investigation into allegations of state capture in March 2016 was "ill-advised". This error, he claimed, was later corrected. He said that the ANC had opposed the proposal, earlier because there was contestation between the political parties.

45. The ANC's counter motion in Parliament was to direct all allegations of state capture to law enforcement authorities or Chapter Nine institutions. According to President Ramaphosa, at the time they believed that these structures would be more effective than Parliament. Although there was initial inertia, President Ramaphosa stated that ultimately the ANC was determined to let the allegations be probed by Parliament.

46. Despite the explanations offered by President Ramaphosa and Mr Mantashe, the evidence shows that there was a determined resistance and unwillingness on the part of the ANC in Parliament for Parliament to investigate and exercise oversight in relation to allegations of state capture.

47. Further questions were raised over the role of 'party discipline' and the ANC's insistence that its MPs must vote against a motion of no confidence in Mr Zuma. President Ramaphosa and Mr Mantashe both emphasised the need for party discipline and the idea that MPs were supposed to represent the party position.

48. This is part of the problem which enabled the Gupta-Zuma state capture to happen, flourish and allow the Guptas to steal billions of the taxpayers' money. It is this idea that an opposition party can never be justified in calling for a President of the ruling party to be removed from his or her position as President of the country. The ruling party needs to abandon the idea that whenever an opposition party moves a motion of no confidence in the President, the motion is wrong and unjustified irrespective of the facts. It is this attitude that allowed state capture to continue under former President Zuma.

49. Mr Mantashe and President Ramaphosa also stressed the need to avoid dividing the party. Mr Mantashe testified:

> I have a responsibility to keep the ANC intact for it to have the vibrancy and the capacity to govern. ... obviously it will be a huge call for any ANC member to destroy the ANC because he thinks it is in the interest of the country ... I can tell you with my eyes closed, you allow an opposition party to remove your president and you remove that president there will be a massive split in the ANC and collapse.

50. The natural conclusion of this particular argument is the recurring theme that the ANC prioritises its own survival and strength over the interests of the country. It seems that Mr Mantashe was preoccupied with the survival of the ANC irrespective of what happened to the country and its economy. The Guptas were alleged to be involved in all kinds of wrong things abusing their proximity to President Zuma and President Zuma did not want to end his friendship with the Guptas but Mr Mantashe was not prepared to let Parliament hold President Zuma to account or to let Parliament initiate a public inquiry.

51. The constitutional framework – including Members of Parliament's oaths of office – does not allow MPs to vote according to the party's wishes if they believed that to do so would be against the interests of the people of South Africa. The oaths of office of the President, Deputy President, and Members of the National Assembly includes these words: "I, A.B, swear / solemnly affirm that I will be faithful to the Republic of South Africa. . . ." This suggests that, if the interests of the Republic clash with the interests of your party, then a person who has taken that oath should choose to be faithful to the Republic. When they do something else, prefer their political party over the Republic, they will be in breach of their oath of office.

52. The Chairperson posited that the imposition of a party decision on MPs in a vote of no confidence would render this mechanism of accountability ineffective, given that the President would enjoy majority support in the party and therefore in Parliament.

53. President Ramaphosa said that, while a motion of no confidence is an important "check and balance" embedded in the Constitution, the party system is a part of our constitutional architecture and also provides important checks and balances. 54 Unfortunately, this approach fails to grapple with the core issue, which is that the ANC's internal checks and balances failed, and that the party sought to prevent the proper exercise of a constitutional mechanism of accountability by forcing its members to vote according to the party line.

54. Mr Mantashe highlighted that "the effectiveness of legislative oversight is not a function of oversight capacity but of political will." That is the crux of the matter. Although Mr Mantashe stated that the ANC had the political will to "make Parliament work and to ensure effective oversight and accountability," the evidence shows that there was no political will to act by Parliament until 2017. This was because the ANC majority had no political will to deal with the Guptas.

Was it enough?

55. When asked to be specific about the party's shortcomings, President Ramaphosa had this to say:

    55.1 In the context of inequality in South Africa, political office presents one of the few opportunities for material advancement, which could lead to political patronage. This is an issue where the ANC "made some huge missteps on."

55.2 There was a “decline of organisational integrity” in which internal party processes were manipulated in order to advance the interests of certain individuals and people.

55.3 Divisions and factionalism compromised the party’s ability to tackle corruption. Factionalism “led to a number of people having a vested interest in maintaining certain wrong practices.”

55.4 A system of patronage emerged within the party’s ranks.

55.5 The lack of an official policy on party funding led to “enormous problems” within the organisation.

55.6 The party’s internal problems led to the weakening of institutions, including government institutions, which themselves became factionalised.

56. Concerning state capture specifically, President Ramaphosa stated that “there was some action but it was not enough.” Mr Mantashe explained that the ANC had to move slowly and with care in order to protect itself.

57. President Ramaphosa agreed that there was a “delay” in the party’s response to allegations which “did not service our country well.” He attributed this delay to the ANC’s nature as a “political organism” beset with continuous debates and contestations. He said it was the ‘balance of power’ within ANC structures which was responsible for the slow response.

58. President Ramaphosa spoke in his evidence about what he referred to as contestation concerning the meaning of state capture as a concept. He did not elaborate. This contestation meant that it was not easy to have agreement on certain issues connected with allegations of state capture.

59. The "contestations" referred to by President Ramaphosa allowed competing factions and persons to paralyse (in the words of the Party itself) the organisation where the leadership was unable or unwilling to hold them accountable for their actions.

60. President Ramaphosa testified that the party lost significant support due to corruption, which made addressing those allegations an “existential challenge”.

61. The characterisation of the party’s seven years of inaction as a “delay” is itself problematic. The party did not simply take a long time to consider the allegations and arrive at decisions. This was not one continuous process. As is made clear by the evidence, the party made a series of decisions over a number of years not to act against Mr Zuma and other complicit parties. That the party later decided otherwise does not absolve it of accountability for those earlier decisions.

CADRE DEPLOYMENT POLICY

The political-administrative interface

62. The Constitution envisages a public administration that maintains a high standard of professional ethics; that is efficient, economic and effective in its use of resources; is development-oriented; provides services in a manner that is impartial, fair, equitable and without bias; encourages participation in policymaking; and is accountable and transparent. It should support good human-resource management and career development. It should promote "employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation."

63. Section 197 requires the public service to “loyally execute the lawful policies of the government of the day”, while also stipulating that “no employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.” There is no provision for political criteria to enter into decisions about appointments to fixed posts within the public administration.

The ANC’s version

64. Mr Mantashe and President Ramaphosa testified about “cadre deployment”.

65. The ANC is guided in this regard by the ANC Cadre Development and Deployment Policy, as well as other party documents. The Deployment Committee (the Committee) is headed by the ANC Deputy President and comprises fifteen NEC members, including the Deputy Secretary-General.

66. According to Mr Mantashe, the strategic deployment of ANC members is an important part of the ANC's strategy to control the levers of power in the state. The party seeks to exercise control over the public administration, including the public service and the state-owned enterprises. According to both Mr Mantashe and President Ramaphosa, the ANC accepts the principle that the public service is required to be non-partisan, but they say that there is no conflict or tension between this principle and the ANC's policy.

67. According to President Ramaphosa, the deployment policy is aimed at ensuring that the person most "fit-for-purpose" is appointed whatever critical position has been identified. He stated in his evidence that the relevant policy aims to ensure the transformation of South Africa's institutions following the end of apartheid. He said that Deployment ensures that these institutions reflect the demographics of the country. He said that some of the considerations of the Deployment Committee were political, regarding "key positions where we seek to advance the mandate of the governing party."

68. President Ramaphosa stressed that this policy was not unique to the ANC and was practised in various forms worldwide and by other parties in South Africa.

69. The version put forward by President Ramaphosa and Mr Mantashe is that the ANC's Deployment Committee is a "recommending structure" that:

    69.1 Identifies vacancies in strategic positions in the state

    69.2 Encourages suitable persons to apply for positions; and

    69.3 Provides advice and recommendations to appointing authorities (such as Ministers) on important appointments.

70. They contend that the Committee has no power to decide on appointments and issues no instructions. They said that the Committee simply presents recommendations based on the outcomes of the mandated appointment processes.

71. However, the above evidence is not borne out by other evidence before the Commission.

Records and minutes

72. The Commission requested the minutes of the ANC Deployment Committee under the chairmanship of President Ramaphosa. The Commission was informed that there were no minutes for the period 2012 to 2017. The Commission then requested to be provided with Deployment Committee minutes for the later period. These records were received shortly before the President Ramaphosa's second appearance before the Commission in August 2021.

73. President Ramaphosa was asked whether minutes were lost or destroyed or were simply never taken. He responded that he did not recall minutes ever being taken, which he attributed to "unfortunate record-keeping processes."

74. It is concerning that basic record-keeping, arguably a necessity for ensuring transparency and good governance, may have been neglected for at least five years under President Ramaphosa. It is difficult to conceive how the Party would have any oversight over the Committee without any records. It is also difficult to conceive how the Committee would report on its activities to the party membership and leaders. Finally. only with an accurate and comprehensive written record could the Committee be held accountable for its decisions and recommendations.

What is the scope of the Deployment Committee?

75. There is a difference between the deployment of public representatives to elected positions in legislative and executive bodies in government, and the deployment of cadres to strategic positions in the

state and state employment. The appointment and election of public representatives (for example, to Parliament or Provincial Legislatures or Municipal councils) is the prerogative of the party. The Commission is concerned largely with the deployment of party cadres to positions in state institutions and in the civil service.

76. According to President Ramaphosa and Mr Mantashe, the ANC deployment policy applies to senior positions in government such as Directors-General and Deputy Directors-General as well as leadership in critical institutions including the private sector. It does not apply to the appointment of Ministers, which is the prerogative of the President.

77. The ANC Cadre Deployment Policy contains the following provisions:

> 10. The following are the key centres of authority and responsibility within the state that should be given priority:
>
> 10.1 Cabinet
>
> 10.2 The entire civil service, but most importantly from director level upwards
>
> 10.3 Premiers and provincial administrations
>
> 10.4 Legislatures
>
> 10.5 Local Government
>
> 10.6 Parastatals
>
> 10.7 Educational institutions
>
> 10.8 Independent statutory committees, agencies, boards and institutes
>
> 10.9 Ambassadorial appointments; and
>
> 10.10 International organisations and institutions ...
>
> 20. A core or pool of comrades needs to be identified for deployment in each of the key strategic centres of authority and responsibility, particularly in relation to the legislatures, civil service, parastatals, independent bodies and ambassadorial appointments.

78. President Ramaphosa confirmed that this list falls within the scope of activity for the Deployment Committee, although in practice the Committee did not consider all of these categories. The Committee, he said, "has set itself its own limit." He said that of the above categories, the Committee tends to focus on civil servants of DDG level and above and SOE executives and Board members only.

79. The question of judicial appointments was a contentious issue. It was eventually conceded that the Committee does sometimes make recommendations on judicial appointments. There is a danger that this could compromise the transparency and independence of the Judicial Service Commission (JSC) process, and that internal party concerns such as factionalism could be carried into the judiciary.

Does the Committee give recommendations or instructions?

80. Echoing Mr Mantashe, President Ramaphosa testified that the Deployment Committee operates "like a recommendations committee" and does not make appointments or instruct appointing authorities to appoint certain persons.

81. However, the Committee may have more power in reality than it does on paper. The Chairperson noted that appointing authorities, who are themselves ANC members and therefore bound to the decisions of the party, such as Ministers, might feel pressured to appoint the Committee's chosen candidate, and that this would give such candidate an unfair advantage.

82. President Ramaphosa testified in response to this proposition that Ministers often convince the Committee to support their choice. President Ramaphosa's argument was that the Committee therefore

served as a “filter” or a type of “quality assurance” in order to ensure that the Minister’s candidate was fit-for-purpose.

83. The Deployment Committee records (2017 - 2021), which were carefully reviewed by the Commission, showed the following trends:

    83.1 While the language is consistent in part with the Committee making recommendations, in other parts the language is peremptory.

    83.2 The Ministers make recommendations to the Deployment Committee and seek permission to appoint their chosen candidates, which the Committee “approves” or sends back for “refinement”.

    83.3 Ministers have been taken to task by the Deployment Committee for presenting their choices as final and irrevocable, or presenting names to Cabinet which were not approved by the Committee.

    83.4 The Committee insists that even before posts are advertised the Deployment Committee should be notified.

84. It therefore appears that the Committee does not always merely make recommendations but in fact often instructs appointing authorities on whom to appoint.

85. President Ramaphosa insisted that cadre deployment is “safe” as the Committee has no formal power to appoint, and appointments are still governed by the legally mandated processes. However, this sidesteps the question of how deployment actually functions in reality, and whether appointing authorities have to accept or rubber-stamp decisions made by the Committee.

86. The minutes reveal that the Committee has been frustrated that people accountable to the Committee do not really understand the principle of “democratic centralism”. President Ramaphosa explained that, according to democratic centralism, party members are bound by decisions taken by higher bodies. It is therefore “a sign of indiscipline” in the ANC to disobey and not follow the decisions of a higher structure. It is also notable that the party’s deployment policy states that “decisions of the organisation . . . are final and a breach of this policy shall constitute a serious offence.” Democratic centralism, applied to the system of deployment, would ensure that the power to appoint did indeed lie with the party, in its higher echelons.

87. Other witnesses have testified to the effect that the Deployment Committee has and exercises more power than the Party would like to concede:

    87.1 In her testimony, Ms Hogan claimed that the Committee determines who gets certain positions in government, and that the NWC instructs Ministers on appointments, which is an abuse of power.

    87.2 Ms Lynne Brown, in her affidavits to the Commission, made repeated references to consultations with the Deployment Committee concerning appointments to SOEs. For example, she stated that “before the names of proposed Directors were relayed to Cabinet for approval, the ANC Deployment Committee had to give its endorsement first” and “all appointments to the boards of State-owned Entities must also be approved by the African National Congress’ Deployment Committee whereafter it gets approved by Cabinet.”

    87.3 Dr Ben Ngubane spoke about cadre deployment unprompted. He said:

        > There has been a very strong deployment of cadres. So it may be competitive, but when the elite, the governing party, knows someone they think can fulfil their objectives, they will make sure that person gets it . . . people are earmarked for some type of jobs.

    87.4 Ambassador Francis Moloi said that ambassadorial and Head of Mission positions have consistently been dominated by political appointees and party deployees to the exclusion of professional diplomats, and that this is driven by the ANC’s policy of cadre deployment.

88. The evidence referred to above gives credence to the proposition that appointing authorities, including Cabinet, are de facto bound by the decisions of the Committee, which means that its "recommendations" are in fact instructions.

What are the Committee's selection criteria?

89. Appointments in the public service are governed by a number of laws and policies, most significantly the Public Service Act, which seeks to ensure that appointment processes are fair, effective, and in line with the Constitution. If appointment decisions are not made within this governance regime, but made behind the closed doors of the party, these checks and balances are circumvented.

90. Furthermore, if the party does have the power to decide appointments, the concern is that the Party can abuse this power to achieve ends which are not in the best interests of the country. If the Party prioritises loyalty or party membership as selection criteria, there is a risk that it will not select the best person for the job, and moreover that deployees will serve the interests of the party even to the detriment of the country.

91. In her testimony, Ms Hogan claimed that the Committee did have power and deliberately chose candidates for their loyalty to the party, and after the ANC 2007 Polokwane conference, for loyalty to a particular faction.

92. President Ramaphosa responded that appointing authorities, such as Ministers, do use selection committees or panels and external entities as a "layer" in the appointment process. He also asserted that the Committee is composed of diverse and knowledgeable persons, which produces a "wealth of wisdom".

93. Mr Zuma stated that, of course, they would want people who are known to the party, who "would implement the policies appropriately" and that this was normal in other countries where the winning party would "remove everybody out and put their people." He also stated that the party could not take people they did not know and "of course" there were people who were there because they were loyal to the party and believe in its policies.

94. Furthermore, many of the minutes scrutinised by the Commission show that the Committee did consider loyalty and party membership when evaluating candidates. This would give an unfair advantage to ANC members, which would effectively contravene section 197(3) of the Constitution, which states that "[n]o employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause."

The possible role of deployment in state capture

95. Even if it is true that the Committee has no formal power, and that it does not issue explicit instructions to appointing authorities, the evidence shows that this is not the end of the matter.

96. The ANC recognises that "there are several instances where individuals appointed to positions may not have been fit for purpose." The ANC claims to have addressed this problem at its 54th National Conference by resolving that "the merit principle must apply in the deployment to senior appointments, based on legislated prescripts and in line with the minimum competency standards." The unfortunate implication is that the merit principle did not apply to such deployments until the resolution in December 2017, thus rendering the resolution necessary.

97. The danger of political influence in appointments is perhaps best articulated in the ANC's "Eye of a needle" document from 2001:

> Because leadership in structures of the ANC affords opportunities to assume positions of authority in government, some individuals then compete for ANC leadership positions in order to get into government. Many such members view positions in government as a source of material riches for themselves. Thus resources, prestige and authority of government positions become the driving force in competition for leadership positions in the ANC.
>
> Government positions also go hand-in-hand with the possibility to issue contracts to commercial companies. Some of these companies identify ANC members that they can promote in ANC structures and into government, so that they can get contracts by hook or by crook.

> Positions in government also mean the possibility to appoint individuals in all kinds of capacities. As such, some members make promises to friends, that once elected and ensconced in government, they would return the favour. Cliques and factions then emerge within the movement, around personal loyalties driven by corrupt intentions. Members become voting fodder to serve individuals' self-interest.

98. President Ramaphosa was asked about the appointments of specific individuals who have been implicated in corruption and state capture at the Commission, and whether these individuals were "deployed". He responded:

> Let us accept, Chairperson, that some of those deployments were done in a particular era and in a particular way and right now as we look at that past slate we were able to look at it and say we actually need to do things differently.

99. He went on to say that the Deployment Committee "would not have dealt with a whole lot of those" appointments during his chairmanship of the Deployment Committee. There were some cases where former President Zuma bypassed the Committee entirely, which he believed was unintentional. In these cases, President Ramaphosa would approach Mr Zuma to ask why the Deployment Committee was not consulted on an appointment and Mr Zuma who would take responsibility and apologise.

100. It must be noted that President Ramaphosa was the Chairperson of the Deployment Committee for a period of five years, between December 2012 and December 2017, and that many of these appointments (and indeed the excesses of state capture) occurred during this period. Notably, this is also the period for which the party could produce no minutes or records. It is not sufficient for President Ramaphosa to focus on the future of the party and his envisaged renewal process. Responsibility ought also to be taken for the events of the previous "era." He did so, partially and only in the most general terms.

101. According to President Ramaphosa, some of those appointments did go through the Deployment Committee, but the Committee did not know that those individuals would engage in any corrupt acts. If this was the case, Deployment Committee had been unable to select or recommend individuals who were "fit for purpose." What is true is that during a certain period many people who occupied senior positions in SOEs and government departments as well as in Boards of SOEs would have been appointed to those positions after their names were put forward and approved by the Deployment Committee. Many of these are people who enabled state capture.

102. Yet President Ramaphosa repeatedly stressed the importance of cadre deployment and said that the Deployment Committee process is "vigorous" and adds an extra level of scrutiny (a "filter") to the selection process. His argument was that the deployment process makes appointments processes more, not less, rigorous.

103. President Ramaphosa conceded that there was "massive system failure" in the state and SOEs and some of that occurred because "certain people were put in certain positions to advance certain agendas." He also conceded that there was a practice of "poorly qualified individuals being parachuted into positions of authority through political patronage." It may be that many politically motivated appointments in fact occurred independently of the Deployment Committee. The party has indeed had to struggle with factions and divisions.

104. The evidence has demonstrated that state capture has been facilitated by the appointment of pliant individuals to powerful positions in state entities. The danger remains that appointment processes which are conducted behind closed doors and outside of the constitutionally and legally stipulated processes are open to abuse.

The legislative scheme rendering the deployment policy unlawful

105. To begin with the Constitution, certain provisions of section 195 of the Constitution are paramount in this regard. These are the provisions of section 195(1)(a), (b), (f), (g), (i). They read:

> Basic values and principles governing public administration -

195(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

106. Section 195(2) and (3) of the Constitution provides:

(2) The above principles apply to -

(a) Administration in every sphere of government;

(b) Organs of state; and

(c) Public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

107. Section 196 of the Constitution establishes the Public Service Commission for the Republic whose powers and functions are set out in section 196(4). Section 196(2) and (3) reads:

(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.

(3) Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.

108. Section 196(4) of the Constitution reads as follows as far as it is relevant:

(4) The powers and functions of the Commission are -

(a) To promote the values and principles set out in section 195, throughout the public service;

(b) To investigate, monitor and evaluate the organisation and administration, and the personnel practices of the public service;

(c) To propose measures to ensure effective and efficient performance within the public service;

(d) To give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;

(e) To report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and

(f) Either of its own accord or on receipt of any complaint—

(i) To investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;

(ii) To investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;

(iii) To monitor and investigate adherence to applicable procedures in the public service; and

(iv) To advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service; and

(g) To exercise or perform the additional powers or functions prescribed by an Act of Parliament.

109. In terms of section 196(5) of the Constitution, the Public Service Commission "is accountable to the National Assembly".

110. Section 197(1) of the Constitution provides:

> Public Service
>
> 197(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

111. Very importantly, section 197(3) of the Constitution precludes the favouring and prejudicing of any employee for supporting a particular political party or cause. The section reads:

> No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

112. Apart from the Constitution, it is also necessary to consider certain provisions of the Public Service Act, 1994 (PSA). Section 9 reads:

> 9. Powers of executing authority -
>
> (1) The appointment of any person or the promotion or transfer of any officer or employee in the employ of a department shall be made by the relevant executing authority or by an officer or officers to whom the said authority has delegated his or her power of appointment, promotion or transfer.
>
> (2) Subject to the provisions of this Chapter, appointments and promotions in, and transfers in or to, the public service shall be made in such manner and on such conditions as may be prescribed.

113. In the PSA, the word "prescribed" is defined as meaning "prescribed by or under this Act". In other words, no appointment, promotion or transfer may be made, effected, or decided upon in a manner that is not prescribed by or under the PSA. Anything in the appointment, promotion or transfer of an officer or employee in the public service that is not prescribed by or under the PSA is unlawful or renders the appointment, promotion or transfer unlawful.

114. A particularly important provision of the PSA concerning appointments and the filling of posts is section 11. It provides:

> 11. Appointments and filling of posts -
>
> (1) In the making of appointments and the filling of posts in the public service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.

115. What this provision does is to direct anyone who seeks to make an appointment or to fill a post in the public service to have due regard to "equality and the other democratic values and principles enshrined in the Constitution." The phrase "democratic values" means or at least includes within its ambit the democratic values referred to in section 7 of the Constitution, namely "human dignity, equality and freedom". Equality is already expressly mentioned in section 11(1) of the PSA. The reference to democratic values may well also include some of the values listed in section 1 of the Constitution:

> (a) Human dignity, the achievement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

116. The term "principles" in section 11 of the PSA is qualified by the phrase "enshrined in the Constitution". Those principles must include the principles listed in section 195 of the Constitution (see above). It may well be that the principles to which section 11 refers go beyond those listed in section 195 of the Constitution. The constitutional and statutory framework reflected in section 11 includes the following requirements in the context of the appointment and filling of posts:

    116.1 There must be equality in the treatment of candidates

    116.2 There must be transparency

    116.3 There must be accountability; and

    116.4 There must be fairness.

117. Section 11(2) of the PSA reads:

> In the making of any appointment or the filling of any post in the public service -
>
> (a) All persons who qualify for the appointment, transfer or promotion concerned shall be considered; and
>
> (b) The evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.

118. Section 11(2)(b) is of cardinal importance because it prescribes which matters count in the evaluation of candidates for appointment to a post. In other words, anyone who decides to recommend or appoint a particular candidate among candidates who are competing for appointment to a particular position can only base his or her decision on the matters listed in section 11(2)(b) and on no other matter. Those matters listed in section 11(2)(b) are:

    118.1 Training

    118.2 Skills

    118.3 Competence

    118.4 Knowledge; and

    118.5 The need to redress the imbalances of the past to achieve a public service broadly representative of the South African people including representation according to race, gender and disability.

119. There is no mention in section 11(2) of membership of a political party including the ANC or current ruling party, nor is there mention of a recommendation made by the Deployment Committee of the ANC or any political party. It is only the policies of the government that may legitimately be taken into account if they are relevant to a particular post. Any policy or policies that are ANC policies or policies of any political party that have not been adopted by the government may not be considered. Taking it or them into account would be unlawful since that would fall outside of section 11(2) of the PSA.

120. Section 11(3) of the PSA reads:

> Notwithstanding the provisions of subsection (2), the relevant executing authority may, subject to the prescribed conditions, approve the appointment, transfer or promotion of persons to promote the basic values and principles referred to in section 195 (1) of the Constitution.

121. The reference to "prescribed conditions" is a reference to conditions prescribed by or under the PSA.

122. For purposes of determining whether the ANC's Deployment Policy or its implementation is unlawful, section 11(3) does not contain anything that would make it lawful to consider a recommendation of the ANC's Deployment Committee or recommendation of any committee or official of any other political party in evaluating various candidates for appointment.

123. The MSA contains provisions that are similar to those contained in the PSA. Section 54A deals with the appointment of a municipal manager and acting municipal manager. Section 54A (2) provides:

> A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.

124. The term "prescribed" means "prescribe[d] by regulation or guidelines in terms of section 120" of the MSA.

125. Section 54A(3)(a) goes on to provide that a decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if "the person appointed does not have the prescribed skills, expertise, competencies or qualifications".

126. Importantly, section 54A (4) and (5) of the MSA provides:

> (4) If the post of municipal manager becomes vacant, the municipal council must-
>
> (a) Advertise the post nationally to attract a pool of candidates nationwide; and
>
> (b) Select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.
>
> (5) The municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.

127. Section 56 of the MSA deals with the appointment of managers directly accountable to municipal managers. It contains provisions that replicate those outlined above in relation to the appointment of municipal managers.

128. The findings made above in relation to the PSA are equally applicable to the provisions of the MSA. In short, a recommendation by the Deployment Committee would fall outside the scope of legitimate selection criteria (unless expressly prescribed as a requirement).

129. Turning finally to the provisions of the LRA, section 186(2) defines an "unfair labour practice" as including:

> (a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.

130. If a government official were to make an appointment regulated by the PSA or MSA based on the recommendation of the ANC Deployment Committee, which would be an impermissible consideration, and pass over an internal candidate for promotion on this basis, this would be actionable as an unfair labour practice.

131. What is said above makes it clear that within the current constitutional and statutory framework it is unlawful and unconstitutional for a President of this country and any Minister, Deputy Minister or Director-General or other government official, including those in parastatals, to take into account recommendations of the ANC Deployment Committee or any deployment committee or any similar committee of any other political party in deciding who should be appointed to a position in the public service or in organs of state or parastatals.

President Ramaphosa's evidence: Undue weight will be attached to recommendations

132. Reverting to the evidence of President Ramaphosa, the composition of the Deployment Committee exacerbates concerns about the legality of the Deployment Policy.

133. The Deployment Committee is of high status within the structures of the ANC. It is a committee that is chaired by the second-in-command in the ANC, the ANC's Deputy President. That is the second highest ranking office-bearer or official of the organisation. In the period of about 28 years since 1994

except for one, every one of those who occupied the position of Deputy President of the ANC became President of the ANC.

134. The significance of the fact that the Deployment Committee is chaired by the Deputy President of the ANC, and this is the second point, is that it naturally will make it very difficult for any Cabinet Minister – not to speak of a Deputy Minister or Director-General – who is an ANC member to go against a position taken by a Committee headed by the Deputy President of the organisation. To deviate from such a position may be a career limiting decision.

Problems with equality, fairness and transparency arising from President Ramaphosa's evidence

135. Out of President Ramaphosa's evidence as contained in his affidavit, there are certain additional features that need special consideration. President Ramaphosa said that in the case of the deployment of candidates to positions in the state and society – as opposed to the deployment of candidates to legislative bodies and executive bodies – the ANC identifies candidates who would be suitable, by virtue of their skills, experience and personal attributes, to be considered for positions in various entities in the public sector.

136. President Ramaphosa testified that the ANC's Deployment Committee does not decide who should assume specific positions. He said that it discusses who should be encouraged to apply for various positions and makes recommendations to the persons making the appointments. There were, however, certain indications during the hearing that the Deployment Committee effectively decides who must be appointed to certain positions, unless there is a strong reason that emerges why their decision should not be given effect to even if their decisions may be dressed up as recommendations.

137. Part of the difficulty with the recommendation of the Deployment Committee is that it is made by a Committee that would not have interviewed the other candidates who would have applied for a particular position. Indeed, it is made by a Committee that will not have considered any information about other candidates against whom the candidate it recommends is competing. The Commission was not told that the Deployment Committee ensures that it has seen the CVs of other candidates applying for the same position.

138. Since the Deployment Committee makes its recommendations in favour of a particular candidate without having compared the credentials of that candidate with the credentials of other candidates, its recommendations cannot sensibly and legitimately be taken into account. If it is considered when it was made by a body that knew nothing about the credentials of the other candidates, that is unfair and is in breach of, amongst others, the injunction in section 195 of the Constitution and section 11 of the Public Service Act that there must be equality and fairness in the appointment of persons and the filling of posts in the public service. Indeed, when a Minister and Director-General, for example, takes into account such a recommendation, he or she will be in breach of the constitutional principle of transparency to be found in section 195 of the Constitution because that recommendation will not have been made known to all concerned including the other candidates. So, the other candidates would not know that there is a candidate who, apart from what is in his or her CV, profile and supporting documents that are official, also carries the special advantage of a recommendation of the ANC's Deployment Committee. The considering of such a recommendation also means that the candidates are not treated equally because they would not have been given an opportunity to compete with that candidate for the recommendation of the Deployment Committee.

139. Furthermore, as is reflected elsewhere in this section of the Report, recommendations of the ANC's Deployment Committee fall outside the constitutional and statutory framework for the appointment, promotion and transfer of public servants or candidates. Our law does not provide for any government official or body or Minister or the President to take into account a recommendation of the ANC's Deployment Committee or similar body of any political party in filling posts in the public service or in parastatals. If the ANC or any political party wants the recommendations of its Deployment Committee or similar body to be considered in the filling of posts in the public service and in parastatals, it should take steps to ensure that the relevant legislation is amended to include a provision accommodating

such a recommendation. Otherwise, taking such a recommendation into account while it is outside the legal framework is unlawful.

140. President Ramaphosa pointed out that, because the ANC's view is that the practice of cadre deployment should not be inconsistent with the principles of fairness, transparency and merit, it seeks to continually revise its cadre deployment policies and practices. He said that that was also why his administration had proceeded to implement ANC resolutions on the professionalisation of the public service.

141. However, if the ANC wants the most fit-for-purpose candidate to be appointed, making a recommendation through its Deployment Committee in the way it does at the moment and in the way it has been doing all these years is not the way to go. The way to go, if that is what it wants, is to allow government officials and bodies to make appointments in accordance with the Constitution and the law. After all, many of those officials who will make those decisions are its deployees such as the President, Deputy President, Ministers, Deputy Ministers, Directors-General, Deputy Directors-General, etc. At the moment, when the ANC insists that these officials should consider its Deployment Committee's recommendations in making certain appointments in the public service or in parastatals, it requires them to consider something that is not provided for in the law that governs those appointments and, therefore, requires them to act unlawfully.

Why the need for the Deployment Committee?

142. An important question that arises about the ANC's Deployment Committee and its role in the implementation of the ANC's Deployment Policy is why it is necessary for there to be a Deployment Committee that makes recommendations to the President, Deputy President, Cabinet Ministers, Deputy Ministers, Directors-General and other Government officials most of whom would be ANC leaders and members and, therefore, would understand ANC policies very well? In other words, why can the ANC not leave its President, Cabinet Ministers and Directors-General to make the staff appointments that need to be made without any recommendation by the Deployment Committee, on the basis that they trust those ANC Ministers etc to make the right decisions?

143. It is difficult to understand this alleged need because, if the need is said to be justified on the basis that an ANC government needs personnel who understand the ANC's policy very well and can implement them effectively, there is no reason why the President, Ministers and Directors-General who are ANC deployees cannot be trusted to have due regard to that factor in making appointments if it is lawful to have due regard to it.

144. It could be said that the advantage or benefit which the ANC obtains if it has a Deployment Committee that makes recommendations to those in government as to who should be appointed to certain positions is that the ANC individuals who get appointed will feel grateful to the party for giving them such jobs. That may strengthen their loyalty to the party and may make them beholden to the party. This may be particularly so in the case of senior officials such as Directors-General and SOE Chief Executive Officers who are appointed on fixed-term contracts of five years, because at the end of the contract they would be needing the support of the party in the form of another Deployment Committee recommendation for appointment to another post. So, such people become beholden to the party. That is highly undesirable because such an official should put the interests of the people of South Africa first and there should be no risk that he or she may put the interests of the party above those of the country or of the people, if a conflict arose between the interests of the party and the interest of the country or of the people.

PARTY FUNDING

145. The Commission has heard evidence that suggests that the ANC may have been the recipient of donations from individuals and companies that received contracts from the state, including instances where the awarding of those contracts is alleged to have been unlawful.

The Political Party Funding Act

146. In his evidence, President Ramaphosa addressed the legislative framework for political party funding in South Africa, including the recently adopted Political Party Funding Act (PPFA). He noted that, until the adoption of the PPFA, there were few restrictions on donations to political parties and no reporting requirements. Political party donations were previously only subject to the general laws relating to financial transactions, taxation and the prevention of corruption, money laundering and other financial crimes.

147. President Ramaphosa noted that a lack of transparency in this regard increased the potential for corruption, and that the ANC had therefore resolved to address this at its 52nd National Conference in December 2007. The Political Party Funding Bill, however, was not formally introduced into Parliament until November 2017, ten years later. President Ramaphosa assented to the Political Party Funding Bill in January 2019 to make it the Political Party Funding Act 6 of 2018 (PPFA). The PPFA did not take effect for another two years and came into operation on 1 April 2021.

148. President Ramaphosa also noted that the Promotion of Access to Information Amendment Act, which also took effect on 1 April 2021, makes political party finances subject to applications for information in terms of that Act.

Evidence of money flows to the ANC

149. The Commission heard evidence that the ANC received donations from persons and entities which had benefitted from corrupt government contracts.

    149.1 The Guptas sponsored various events, including buying tables at fundraising dinners. The ANC received substantial donations from entities linked to the Gupta enterprise.

    149.2 Bosasa bribed government officials to the tune of around R66 million per annum. Bosasa directed extensive benefits to the ANC, by catering for rallies, setting up a "war room" for elections, hosting parties, and donating money.

    149.3 Blackhead Consulting received payments from the Department of Human Settlements in excess of R1 billion over the 12 year period 2008-2019; whilst outflows show that between 2013 and 2018 payments to the ANC by Blackhead alone was in excess of R10 million for the period in question. There were also payments to the ANC for T-shirts and for volunteers amounting to R3.5 million; some of it was paid directly to the ruling party, some of it to pay service providers.

150. The EOH Group donated money to the ANC and ANC Youth League (Greater Johannesburg branch), coinciding with contracts being awarded to EOH at the Johannesburg municipality. Of particular note was R50 million donated to the ANC for the 2016 local government elections.

151. A former Group CEO of Prasa, Mr Lucky Montana, claimed that the ANC had a history (not limited to the period under Mr Zuma) of its leaders putting pressure on CEOs of public entities to assist with funding – including through asking their contractors to contribute to the party, and of organising meetings for business with government in return for being paid facilitation fees. Mr Montana said that Prasa buses had been used to transport supporters to ANC events.

The ANC's donations policy

152. President Ramaphosa stated that ANC relies on several sources of funding, including funds allocated from the Represented Political Parties' Fund, membership subscriptions and levies, fundraising initiatives like the Progressive Business Forum, fundraising dinners and other events, and donations from individuals and companies.

153. The finances of the ANC are the responsibility of the Treasurer-General, and corresponding Treasurers in sub-national structures. An NEC sub-committee, the Finance Committee, supports the Treasurer-General in managing the party's finances.

154. Ms Nomvula Mokonyane testified that ANC fundraising could not be conducted without the involvement of party leadership, and specifically the Treasurer-General. Although her testimony concerned Bosasa specifically, she spoke about ANC funding processes generally. She said:

> The fund-raising committee of the ANC is headed by the Treasurer-General of the ANC. There is a fund-raising committee and there are fund-raising initiatives it is not the individual, no individual has the capacity and the ability to go all out and go and look for resources, you have to actually work and even be led by a Treasurer-General of the African National Congress. ... The ANC has never hidden its fund raising initiatives, people have come to the gala dinners of the ANC, people have been acknowledged.

155. In 2017, when asked about donations from the Guptas, the then-ANC Treasurer, Dr Zweli Mkhize, told the media: "There is not a single donor who can claim to control the ANC ... We will not accept a donation we can't accept publicly." However, this was clearly not always the case.

156. President Ramaphosa confirmed that the ANC has no official policy on donations. He stated:

> There is an expectation – based on the ANC Constitution, its principles and its values – that the ANC would not knowingly accept monies that are the product of a criminal act, are offered in exchange for favours or are from a source known to engage in illegal or unethical activities.

157. When asked to explain how breaches in respect of this principle occur, President Ramaphosa posited that these breaches happened when the unlawful or unethical conduct of a donor only became known after the donation was made. So, the breach happened "after the fact".

158. The evidence shows that the ANC had accepted donations from companies that were heavily reliant on government contracts, such as Bosasa, without investigating them. It was put to President Ramaphosa that the unlawful activities of Bosasa had been the subject of media reports since at least 2009, and that it was difficult to accept that vigilant members of the ANC would not have been aware that Bosasa was the recipient of large government contracts under dubious circumstances. How, then, it may be asked, could the party continue to accept donations and other benefits from Bosasa?

159. President Ramaphosa conceded that this "should be regarded as a major lapse" on the part of the ANC, and that, in hindsight, the party should have been more alert and should have become aware of the issue earlier.

160. It was put to President Ramaphosa that it was difficult to believe that the issue only became clear in hindsight, and that party leaders must have known at the time the donations were received.

161. It was put to President Ramaphosa that the reason for this lapse must have been that Mr Zuma was in control of the party. President Ramaphosa did not dispute this proposition, although he did not directly answer the question. He said: "Yes, certainly the President plays a very key role in the life the party, it leads or she leads the party and provides leadership and gives direction. That is so."

162. President Ramaphosa agreed that the donations received by the ANC from the Gupta's and Bosasa should have been investigated or examined by the party, as there was enough information in the public domain about these entities to raise suspicions.

Internal elections

163. According to President Ramaphosa, the ANC has for many years been concerned about the role of money within the organisation, and particularly in the contestation for leadership positions. The ANC, he stated, has identified weaknesses in its approach to the funding of internal contests and has initiated a process to review its policies. In raising this issue during an NEC meeting in July 2019, President Ramaphosa stated:

> In the absence of clear, appropriate and realistic guidelines, our leadership contests will continue to play themselves out in the shadows, in conditions of secrecy and mistrust, encouraging patronage and factionalism.

164. President Ramaphosa also cited the ANC's 2020 review of "Through the eye of a needle", one of the discussion documents for that year's National General Council (NGC). The document notes that "something deeper has gone wrong in the movement":

> There has emerged a strong tendency for the emergence of leaders whose sole objective is to use the membership of the ANC as a means to advance their personal ambitions to attain positions of power and access to resources for their own individual gratification.

165. This is a clear admission that the role of money in contests for ANC leadership positions contributed to the conditions in which corruption and state capture could take place. Given the dominance of the ANC in national elections over the past twenty-eight years or so, those in party leadership hold significant power in both the party and state. Patronage relationships do not have to involve donations to the party itself in order to flourish. The PPFA therefore does not alleviate the risk posed by these internal electoral contests and the financing thereof.

Levies

166. President Ramaphosa was questioned on the affidavit of Ambassador Moloi, a career diplomat at DIRCO who had made substantial allegations about the role of the party in appointing ambassadors and soliciting payments from diplomats. One of his allegations was that ambassadors were required to sign debit forms for monthly payments to the ANC.

167. President Ramaphosa testified that it is standard for members of the ANC to sign a levy form in order to pay a certain amount from their monthly salaries or accounts to the party. This occurs in both public and private sectors, and includes all persons deployed into public office.

168. However, this does not address Ambassador Moloi's allegation that persons who were not members of the ANC were persistently solicited for levies. This was put to President Ramaphosa. His response was that "I do not know anything about that, I would have a huge question mark around that."

169. The party plays a decisive role in appointing ambassadors through its Deployment Committee. As Ambassador Moloi contended in his affidavit, this allowed the party to appoint its members to high-paying positions and consequently to benefit financially from those appointments.

DISCIPLINE AND ACCOUNTABILITY

170. President Ramaphosa addressed the issue of accountability in his opening statement on his first day of testimony:

> The position of the ANC on leaders and members who have been complicit in acts of corruption and other crimes is clear. Their actions are a direct violation, not only of the laws of the land, but also of the ANC Constitution, its values and principles, and the resolutions and decisions of the ANC's constitutional structures. Such members must face the full legal consequences of their actions. They cannot rely on the ANC for support or protection, nor may they appeal to the principle of collective responsibility. In accounting for their actions they must be accountable for their actions themselves because the ANC did not and could never direct its members of leaders to commit acts of corruption.

171. However, if members of the party are not so held accountable it is inevitable that they would continue to exploit the advantages of party membership and all that that entails for their own unlawful gain.

172. Furthermore, as admitted by President Ramaphosa, law enforcement institutions were themselves weakened and rendered unable to ensure corrupt individuals are held accountable. Parliament too, has failed to use the oversight and accountability measures at its disposal.

173. In these circumstances, but not only in these circumstances, party discipline could and should play a significant role in curtailing corruption where it is likely to continue to occur and in ensuring that state capture does not recur.

Internal disciplinary proceedings

174. President Ramaphosa remarked in his statement that:

> Members of the ANC also affirm that they join the organisation selflessly, without anticipation of any personal reward. Clearly, any member that is involved in corrupt activities or seeks in any other way to use their position for undue self-enrichment is in violation of this basic undertaking.

175. Rule 25.27.9 of the ANC Constitution prohibits the "abuse of elected or employed office in the Organisation or in the State to obtain any direct or indirect undue advantage or enrichment." Rule 25.17.4 prohibits "Engaging in any unethical or immoral conduct which detracts from the character, values and integrity of the ANC, as may be determined by the Integrity Commission, which brings or could bring or has the potential to bring or as a consequence thereof brings the ANC into disrepute." Other offences include being convicted of fraud, theft, corruption, or other acts of financial impropriety (rule 25.17.18), soliciting or accepting a bribe (rule 25.17.19), and bringing the organisation into disrepute (rule 25.17.5).

176. The ANC Constitution mandates that ANC members who violate its rules must be subject to disciplinary proceedings. The Commission requested the ANC disciplinary records. It received records of the ANC's National Disciplinary Committee (NDC) and National Disciplinary Committee of Appeal (NDCA) for the period 2014-2021.

    176.1 In respect of all of the records of disciplinary proceedings which were made available to the Commission, the most serious sanction was (temporary) suspension from the party. This was often only after numerous appeals.

    176.2 The cases provided to the Commission concerned misconduct such as: disrupting meetings or conferences, issuing unauthorised statements to the press, taking the party to court, assault and sexual assault, theft, failure to comply with party policy, insulting other ANC members, participating in "organised factional activity", and bringing the party into disrepute.

    176.3 None of the cases concerned corruption. It is remarkable that the ANC has been grappling with corruption within its ranks for years and has promised change and renewal but has not held a single person to account since at least 2014.

177. The above was put to President Ramaphosa during his evidence. He stated in response that discipline had been taken in some cases but did not surface at the level of the NDC and NDCA. He conceded that these mechanisms had "not been as robust as they should be and they have not been overarching as they should be." He also reiterated that the ANC has "drawn a line in the sand" and would now deal with corruption seriously.

178. The disciplinary records received encompass a period up to and including August 2021. The Commission is unable to conclude if the proverbial line has indeed been drawn, and what that might mean for ensuring accountability within the party.

Concurrent criminal proceedings

179. In his statement, President Ramaphosa stated that, in certain instances, particularly concerning corruption and fraud, "the institution of disciplinary proceedings is dependent on a conviction in a court of law." He stated that the organisation had therefore been unable to act against members facing serious charges of financial impropriety until the completion of court processes, which could often be lengthy.

180. However, it is not true that the organisation cannot act. While rule 25.17.18 refers to those convicted of specific offences, many other rules relate directly to corruption and are not dependent on prosecutions. It was pointed out that there was no necessary legal barrier to internal disciplinary proceedings being instituted and completed before criminal conviction.

181. President Ramaphosa responded that it would pose a problem for the ANC if they disciplined a member for an offence that they were later found not guilty of in a court of law. He explained that this was the reason for the party's "step-aside" rule, which requires members who have been charged with

a serious crime to step aside from their positions until they cleared their names. This was determined by the ANC to be the safest route.

182. While there may be certain cases that the ANC disciplinary bodies are ill-equipped to consider, this cannot be true for all alleged instances of corruption. It may be that a disciplinary committee will conclude in a particular case that it cannot make a finding based on the evidence available to it. However, for the ANC to decide not to consider any corruption cases is not acceptable. One would also expect that the ANC would hold its members, and especially its leaders, to higher standards than "has not been convicted in a court of law".

183. Furthermore, President Ramaphosa himself admitted that "the weakening of law enforcement agencies allowed corruption to go unpunished, perpetrators to be protected and the public purse to be looted without consequence." It was known to the party that the criminal justice system could not be relied upon to act against corrupt individuals. Yet the party has continually abdicated its responsibility to its members and voters to enforce its own rules and preserve the integrity of the organisation.

184. It is clearly against the party's best interest to allow its leadership positions to be occupied by those credibly accused of corruption and other crimes. Not only does this practice bring the ANC into disrepute, but there is an elevated risk that corrupt persons in powerful positions will continue to abuse their offices. This is a risk that the party, by failing to discipline those accused of corruption, has deemed acceptable. This certainly does not augur well for the prevention of corruption in the future. Nor does it give positive reassurance that state capture will not recur. The "step aside' rule will not address this problem.

The Integrity Commission

185. In addition to disciplinary processes, the ANC has another structure called the Integrity Commission which can recommend action against leaders and members of the ANC who face allegations of improper conduct. President Ramaphosa stated that "while the work of the Integrity Commission would not substitute for disciplinary action, it was established with the expectation that it would assist in dealing with allegations that had not yet been tested in court."

186. In resolving on the establishment of the Integrity Commission, the 53rd National Conference noted the following:

> More urgent steps should be taken to protect the image of the organisation and enhance its standing in society by ensuring among others, that urgent action is taken to deal with public officials, leaders and members of the ANC who face damaging allegations of improper conduct. In addition, measures should be put in place to prevent abuse of power or office for private gain or factional interests. The ANC can no longer allow prolonged processes that damage its integrity.

187. What is clear is that the Integrity Commission does not have the power to discipline any member. Since 2018, the Integrity Commission has had the power to make recommendations on alleged unethical conduct by ANC members, including recommendations for disciplinary action. There is no evidence that Integrity Commission recommendations have resulted in disciplinary action against any ANC member accused of corruption, save for recommendations that certain individuals should step aside from their positions.

The absence of accountability

188. It was noted in the ANC's 2020 "Through the eye of a needle" review that the party has been unable to deal with various challenges identified in 2001 – of patronage, factionalism, money politics, corruption, among others – because "little emphasis has been placed on consequence management for dereliction of duty and the undermining of the value system of the movement." The document attributes the failures of the party to a lack of accountability:

The failure of the ANC to fully implement the guidelines in Through the Eye of a Needle and other documents arises from, amongst others, the inability to exercise political and organizational leadership functions. It is the inability to act when members deviate from established policy positions and ill-discipline. The tone is not being set from the top. The ANC is engulfed with paralysis in decision-making. The notion of democratic centralism suggests that while there is a need to allow for democratic expressions at different levels of the organization, the exercise of leadership is an important variable in the mix. The preponderance of factional activities has resulted in the emergence of what can be characterized as organizational populism: that is, the inclination to shy away from taking difficult decisions and to cave in to the conduct and demands of rogue elements.

Related to the above, there is a lack of accountability for our actions as leaders and members, in terms of owning up when we deviate from the values/culture of the ANC and our struggle for the attainment of a new society. And arising out of this is the inability to effect consequence management. The organization is ceasing to act as an integral whole, but a collection of individuals pursuing their own self-interest.

Accountability also means holding our leaders, cadres and general member's feet to fire. It is to ensure that they do what they were elected to do – serving the people of South Africa. It is also to ensure that everybody is accountable for his or her actions.

THE "RENEWAL" OF THE PARTY

189. President Ramaphosa spoke frequently of the "process of renewal" upon which the ANC had ostensibly embarked. He spoke at length in evidence about the party's process of renewal and the corrective measures he stated are being implemented. This includes the "cleansing" of certain government institutions, the strengthening of the party's Integrity Commission, the new legislation on party funding, and processes such as lifestyle audits.

190. The ANC takes the position that it will not take disciplinary action against its members who are accused of corruption until they have been convicted by a court of law. As long as that is the ANC position no disciplinary action will be taken against them timeously. It is difficult to see how the ANC will succeed in getting the people to think that it is serious about fighting corruption if it continues to adopt this position. 192 What needs to be said about the ANC and its contribution to state capture is that it opposed proposals by opposition parties for Parliament to establish public inquiries to investigate allegations of corruption and wrong doing by the Guptas and yet it did not itself make any investigations because it said it did not have capacity to investigate the allegations against President Zuma and the Guptas. In that way the Guptas continued to pursue state capture to the detriment of the people of South Africa.

191. Furthermore, the ANC's deployment policy has ensured that many institutions of state are weakened because very often the people who are appointed to certain positions are either not qualified for the positions they occupy or do not have the necessary experience to perform the work all of which provide fertile ground for corruption and state capture.

192. The ANC's further contribution to state capture is that when opposition parties tabled motions of no confidence in President Zuma because of the allegations of corruption and state capture and what the Guptas were reported to be doing such as summoning Ministers to their home, the ANC protected President Zuma and ensured that he remained in office as President. If the ANC had not protected President Zuma and had he been removed from office, the Guptas would probably have fled as they did in 2018 and therefore would not have continued looting the way they did.

PARLIAMENTARY OVERSIGHT

INTRODUCTION

1. Parliament has a constitutional duty to exercise oversight over the Executive branch of government, including organs of state such as State-Owned Entities (SOEs); and the executive is accountable to Parliament. The matter considered in this section of the Commission's report is whether Parliament exercised effective oversight over the executive and SOEs in respect of allegations of state capture or corruption; whether it held the executive properly accountable; and, if not, whether this failure contributed to the perpetuation or scale of state capture or corruption.

CONSTITUTIONAL PROVISIONS

2. The Constitution is explicit that Parliament is obliged to exercise oversight over the executive and that the executive is accountable to Parliament.

3. Section 42(3) of the Constitution provides: The National Assembly (NA) is elected to represent the people and to ensure government by the people. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

4. The parliamentary oversight model adopted by Parliament indicates that:

> oversight entails the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the Constitution. It also oversees the effective management of government departments by members of Cabinet for improved service delivery for the achievement of a better quality of life for all citizens.

5. Section 55(2) of the Constitution provides that:

> The NA must provide for mechanisms- (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.

6. Section 56 of the Constitution reads:

> The NA or any of its committees may – (a) summon any person to give evidence on oath or affirmation, or to produce documents; (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions.

7. Other examples of Parliamentary oversight includes Section 89(1) that empowers the NA, by a resolution adopted with a supporting vote of at least two thirds of its members, to remove the President from office on specified grounds. Section 102 empowers the NA, by a vote supported by a majority, to pass a vote of no confidence in the Cabinet excluding the President, or in the President. Section 92(2) provides that members of the Cabinet are "accountable" collectively and individually to Parliament for the exercise of their powers and the performance of their functions. Section 92(3) provides that members of the cabinet must provide Parliament with full and regular reports.

   7.1 The constitutional duties of oversight and accountability must be seen in conjunction with schedule 2 to the Constitution, to be sworn or affirmed when members of the NA and delegates to the National Council of Provinces (NCOP) assume office. Item 4(1) of that schedule provides that Members of the NA, permanent delegates to the NCOP and members of provincial legislatures,

before the Chief Justice or a judge designated by the Chief Justice, must swear or affirm as follows:

> *I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic*, and I solemnly promise to perform my functions as a member of the NA/permanent delegate to the NCOP/member of the legislature of the province of C.D. to the best of my ability [in the case of an oath: So help me God] (emphasis added).

THE CORDER REPORT

8. Parliament (1994-1999) commissioned a report entitled “Report on Parliamentary Oversight and Accountability” (“the Corder report”) by Hugh Corder, Saras Jagwanth and Fred Soltau to advise it on how to exercise its oversight responsibilities.
9. The Corder Report’s recommendations were, in summary:
   9.1 Legislation in the form of an Accountability Standards Act and an Accountability and Independence of Constitutional Institutions Act
   9.2 Amendment to the Rules of the NA and the NCOP, for the regulation of reporting to parliamentary committees; and
   9.3 The establishment of a Standing Committee on Constitutional Institutions.

The “Oversight and Accountability Model” adopted by Parliament

10. Some of the recommendations in the Corder report and proposed legislation were not implemented according to a report submitted by Professor Richard Calland (“the Calland report”). Consequently, a parliamentary joint committee established a “Task Team on Oversight and Accountability”, to develop a “model” for Parliament’s oversight function. The task team proposed an “Oversight and Accountability (‘OVAC’) Model”, which was adopted by the Joint Rules Committee and the NA and NCOP in 2009. The OVAC Model expresses Parliament’s view of how it should go about implementing its constitutional oversight and accountability responsibilities.
11. The Calland Report summarises some of the principal recommendations contained in the OVAC model as follows:
   11.1 The establishment of a Joint Parliamentary Oversight and Government Assurance Committee
   11.2 An Oversight and Advisory Section to "provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of Members of Parliament and the committees”
   11.3 Development of rules to assist Parliament "further in sanctioning Cabinet members for non-compliance after all established existing avenues and protocols have been exhausted”
   11.4 Improved reporting of committees to the House
   11.5 Ensuring sufficient and appropriate resourcing and capacity to develop specialised committees to deal with crosscutting issues of departments and ministries
   11.6 Splitting training between legislative and oversight work, and increasing training for members in core competencies, including use and application of the OVAC model and budget analysis; and
   11.7 Parliament’s public participation function should be integrated within its overall oversight mechanism.
12. Some recommendations must still be implemented but this will be dealt with later in this report. However, both before and after the adoption of the OVAC report, the rules of the NA were adapted to facilitate oversight taking place, primarily in portfolio committees.

THE IMPORTANCE OF PARLIAMENT'S PORTFOLIO COMMITTEES

13. Many commentators have referred to portfolio committees as the "engine room" in relation to parliamentary oversight, while Prof Calland felt that the parliamentary committee system is "the most important institutional infrastructure for exercising meaningful executive oversight".

RELEVANT RULES OF THE NATIONAL ASSEMBLY

14. The current version of the Rules of the NA is the 9th edition (26 May 2016) and this report will refer to the rules as presently numbered.

    14.1 Rule 225 provides for the establishment by the Speaker of a range of portfolio committees and the assignment of a portfolio of government affairs to each such committee.

    14.2 Rule 227(1) sets out the functions of portfolio committees as follows:

> *A portfolio committee —*
>
> (a) Must deal with Bills and other matters falling within its portfolio as are referred to it in terms of the Constitution, legislation, these rules, the Joint Rules or by resolution of the Assembly
>
> *(b) Must maintain oversight of — (i) The exercise within its portfolio of national executive authority, including the implementation of legislation (ii) Any executive organ of state falling within its portfolio (iii) Any constitutional institution falling within its portfolio; and (iv) Any other body or institution in respect of which oversight was assigned to it*
>
> *(c) May monitor, investigate, enquire into and make recommendations concerning any such executive organ of state, constitutional institution or other body or institution*, including the legislative programme, budget, rationalisation, restructuring, functioning, organisation, structure, staff and policies of such organ of state, institution or other body or institution
>
> (d) May consult and liaise with any executive organ of state or constitutional institution; and
>
> (e) Must perform any other functions, tasks or duties assigned to it in terms of the Constitution, legislation, these rules, the Joint Rules or resolutions of the Assembly, including functions, tasks and duties concerning parliamentary oversight or supervision of such executive organs of state, constitutional institutions or other bodies or institutions (emphasis added).

15. Portfolio committees also have the general powers conferred on parliamentary committees by Rule 167. This rule provides:

> For the purposes of performing its functions a committee may, subject to the Constitution, legislation, the other provisions of these rules and resolutions of the Assembly —
>
> (a) Summons any person to appear before it to give evidence on oath or affirmation, or to produce documents
>
> (b) Receive petitions, representations or submissions from interested persons or institutions (c) Permit oral evidence on petitions, representations, submissions and any other matter before the committee
>
> (d) Conduct public hearings
>
> (e) Consult any Assembly or Council committee or subcommittee, or any joint committee or subcommittee
>
> (f) Determine its own working arrangements
>
> (g) Meet at a venue determined by it, which may be a venue beyond the seat of Parliament

(h) Meet on any day and at any time, including — (i) On a day which is not a working day (ii) On a day on which the Assembly is not sitting (iii) At a time when the Assembly is sitting; or (iv) During a recess; and

(i) Exercise any other powers assigned to it by the Constitution, legislation, the other provisions of these rules or resolutions of the Assembly.

The official stance of the majority party on parliamentary oversight

16. The official stance of the ANC, as articulated by its conference resolutions and statements by its leaders, has been at times to encourage vigorous parliamentary oversight. For example:

    16.1 The ANC's then Secretary General, Mr G Mantashe, was reported in a newspaper article (22 May 2009) as having given the ANC's MPs strict instructions to be robust and not to be afraid of holding cabinet ministers to account for their actions.

    16.2 President Ramaphosa testified that the ANC decided at its December 2012 conference "that we now need to get our parliamentary structures to be more activist, to be more alert when it comes to the issue of oversight, to exercise more accountability or to demand more accountability on the executive. . . "

17. However, the official stance on parliamentary oversight by both the "ordinary" ANC Members of Parliament and members of the executive, including cabinet ministers has often not been reflected in practice.

DID PARLIAMENT HAVE A DUTY TO INVESTIGATE OR ENQUIRE INTO ALLEGATIONS

18. Parliament is not a law enforcement agency nor is it primarily an investigatory body. It is therefore fair to ask whether Parliament, or any of its committees, could properly have been expected to investigate or enquire into allegations in the public domain of state capture, corruption in the public sector or the like, where the facts were not uncontested.

19. Parliament is simply not obliged to investigate or enquire into every allegation of public-sector corruption or every allegation of malfeasance but Parliament does have obligations under the Constitution to scrutinise and oversee executive action and to ensure that all executive organs of state are accountable to it.

20. It is the Commission's view that Parliament must exercise oversight over the executive and senior representatives of the executive and hold it to account and that this duty includes to investigate or enquire where there is reasonable cause to suspect unconstitutional, unlawful or improper conduct on the part of a senior representative of the executive.

21. President Ramaphosa, testifying in his capacity as the President of the ANC and former Deputy President of the ANC, accepted the proposition that, where there is information in the public domain which – if true – would implicate a president in conduct which is allegedly unconstitutional, illegal or improper, the NA is obliged to do what it can, firstly to establish whether there is any merit in the allegations and, secondly, if it finds that there is, to take appropriate action.

22. Ms Modise (who served as Speaker of the NA and previously served as Chairperson of the NCOP), accepted the propositions that it is it is incumbent on MPs, when serious allegations of corruption have been made known to them within their respective portfolios, to investigate it accordingly, and when members of portfolio committees become aware of media reports that fall within their portfolios "they need to consider them and if serious enough, they need to investigate accordingly".

23. Ms Mbete, the former Speaker, accepted that Parliament could not wait until a court of law had made a finding, provided enough grounds could be shown to justify Parliament investigating a matter.

PARLIAMENTARY OVERSIGHT IN RELATION TO ALLEGATIONS OF STATE CAPTURE

Events in 2011

24. Allegations of state capture and / or of improper influence by the Gupta brothers have long been in the public domain. It is acknowledged that some degree of effective parliamentary oversight commenced in about mid-2017, but it was still patchy. Before that, the record is disturbing.

25. Although allegations of an improper relationship between the Gupta and Zuma families had started to appear before 2011, this report's examination starts with articles that appeared in the Sunday Times newspaper on 30 January 2011 ("the Guptarisation of South Africa") and 27 February 2011 ("Zuma faces revolt over Guptas") alleging improper influence by members of the Gupta family. Essentially, the allegations the articles made about the Gupta brothers were among other that they had so much power that they often summoned cabinet ministers and senior government officials to their family compound in Saxonwold; they told ministers that they were to be promoted or that their jobs were secure ahead of President Zuma's announcement; and that they pressured several government officials at the government communications section, and directors of communications at various departments to place advertisements in their newspaper *The New Age*.

26. President Ramaphosa in his testimony at the Commission reiterated that the appointment of ministers and deputy ministers and the announcement thereof, should be the sole preserve of the President. President Ramaphosa said that it would be a subversion if people who have no real role either in the executive or in the party have influence in the appointment of CEOs and chairpersons of SOEs.

27. Mr Mantashe, who served as Secretary General of the ANC at that time also accepted that the allegations should have been investigated but Mr Mantashe indicated that the NWC after a meeting issued a statement dismissing criticism of the Gupta family's political influence as "racial prejudice". However, President Ramaphosa accepted, with the benefit of hindsight, that there was no basis for the dismissal of the allegations as racist because they had been "blinded by the events of the time".

28. In an NEC meeting (August 2011), Mr Fikile Mbalula also made claims that the Guptas should have been investigated because they informed him of his imminent appointment as Minister before the official announcement by President Zuma. President Ramaphosa stated in an affidavit submitted to the Commission that he recalled the incident but did not "prompt any specific concerns about the capture of the state". However, in his oral evidence President Ramaphosa conceded that "we should have been more alert at looking at them, but we did not at the time".

29. Although Mr Mantashe repeatedly indicated that the ANC, including the Secretary General's office, does not have investigatory powers, Parliament does have the power to investigate the allegations referred to above, including allegations as to what had transpired at the NEC meeting, already in the public eye. Ms Modise accepted in her evidence, there was no reason why an MP should not have questioned Mr Mbalula about his reported allegations or should not have put the question to President Zuma himself. However, there is no evidence that the allegations above were probed in Parliament in 2011 or in the immediate aftermath.

30. Ms Z. Rantho, who became a member of the ANC's Parliamentary caucus from mid-2009, gave evidence that the 2011 press reports were not discussed in the caucus, nor between the party leadership and its MP's in any portfolio committees before the Waterkloof incident of March 2013.

Events in 2013

31. In 2013, further developments should have prompted closer and more effective parliamentary scrutiny or action because it was openly acknowledged that public monies, including monies from SOEs, were being directed towards the Gupta's media empire, including *The New Age*. This was not due to Parliament's inability to find out the truth, but the ANC's stance that there was nothing wrong with this.

32. The *Sunday Times* published a report (17 March 2013) alleging that Mr Rajesh Gupta offered a bribe of R100 000, later increased to R500 000, to the then chairperson and acting CEO of SAA, Mr V. Kona, and that this was rejected by Mr Kona. The Waterkloof saga (late April 2013) also raised allegations of improper influence of the Guptas when they made use of the Waterkloof airforce base that was allegedly approved by President Zuma. Unfortunately, no parliamentary inquiry into the allegations of improper Gupta influence took place, in 2013 or indeed before mid-2017. This is concerning despite Mr Mantashe's evidence in 2013 that the ANC's Integrity Commission submitted a report "connected to the Gupta influence", recommending that President Zuma should step down. It is therefore difficult to accept that MPs did not yet have sufficient cause to probe the serious allegations of improper Gupta influence by 2013.

Events in 2014-2015

33. Between 2014 and 2015 several reports alleged improper Gupta influence. For example, the *Mail & Guardian* (4 July 2014) reported the R50 billion locomotive tender at Transnet and the AmaBhungane report (31 July 2015) reflected on the Kickback scandal that engulfed Transnet. There were reports about the Guptas and their companies' dealings with Eskom. All this prompted opposition parties such as the Democratic Alliance (DA) to start asking questions. Consequently, eight motions of no confidence were proposed in President Zuma but all were unsuccessful because all ANC MPs were instructed by their party to vote against these motions.

Events in January to March 2016

34. Widely publicised allegations of state capture came to a head in early 2016 and Mr Mantashe was quoted in *The Sowetan* as saying that the Guptas had "captured" individual ANC leaders but not the party itself. He confirmed this in his evidence.

35. On 14 February 2016, then Deputy President Ramaphosa also confirmed that he had been correctly quoted in an interview with a Sunday Times journalist that he believed that politically connected people had been involved in the "capture" of government institutions.

36. Several other allegations against the Guptas were made between January and March 2016. For example, Mr Mcebisi Jonas then deputy finance minister alleged that he was offered a position of finance minister by the Guptas. Mr Themba Maseko alleged that he had been forced to resign from the Government Communication and Information Service (GCIS) after a threat from Mr Ajay Gupta and pressure to place government advertisements. Ms Vytjie Mentor alleged that the Guptas offered her the position of Minister of Public Enterprises on condition that she would drop the SAA route to India in favour of Jet Airways.

37. These events prompted the DA's Ms N Mazzone to push on 8 March 2016 for an inquiry by the Portfolio Committee on Public Enterprises (PCPE) when she wrote to the then chairperson of the PCPE, Ms Dipuo Letsatsi-Duba to summon the Gupta brothers to answer about their undue influence over President Zuma, the government and its officials. Ms N Mazzone also followed up with another letter to Ms Letsatsi-Duba requesting that the PCPE conduct an inquiry "into the capture of SOE's by the Guptas". Essentially, she requested that PCPE 1) summon the Guptas to provide answers for the allegations, 2) call former Ministers of Public Enterprises, Barbara Hogan and Malusi Gigaba, to provide full details of their relationship with the Guptas, and 3) summon the CEOs and Chairpersons of the largest SOEs to appear before it to answer questions about their ties to the Guptas. At the time, Dr Ben Ngubane was the Chairperson of the Eskom Board, Mr DL Mantsha, the Chairperson of the Denel Board, Ms Linda Mabaso, Chairperson of the Transnet Board, and Ms Dudu Myeni, the Chairperson of the SAA Board. Dr Ngubane, Mr Mantsha and Ms Mabaso had links to the Guptas or their associates. Ms Myeni is close to President Zuma.

38. It is against this background that the NEC of the ANC on 20 March 2016 issued a statement on the "Alleged Business Influence of the State". In this statement the NEC 1) recognized the allegations surrounding the Gupta family and its purported influence in the appointment of ministers as "serious"

and 2) mandated the Officials and the NWC to “gather all pertinent information about the allegations” to enable the ANC to take appropriate action. However, no support was given to an inquiry by Parliament or any of its committees into the allegations. The newly appointed chief whip Mr Jackson Mthembu was also quoted in the Mail & Guardian (29 March 2016) that allegations against the Guptas should be investigated by the Hawks and the Public Protector. Despite the seriousness of the allegations the ANC continued to confirm its full confidence in then President Jacob Zuma.

39. On 31 March 2016, the Constitutional Court handed down its "Nkandla" judgment. This case concerned the constitutional obligations of the NA to implement remedial action against President Zuma recommended by the Public Protector, then Adv Thuli Madonsela. The Public Protector had found that President Zuma and his family had been unduly enriched by an upgrade of his private residence and ordered that the President repay a to-be-determined percentage of the undue enrichment. The NA, having conducted its own investigation of the matter, adopted a resolution absolving the President from all liability.

40. The Constitutional Court’s finding that the NA had failed to comply with its constitutional obligation to hold the executive accountable attracted considerable attention, including from MPs; but it did not cause the NA to change its approach in respect of the allegations of state capture and corruption.

41. On 5 April 2016, another DA-proposed motion of no confidence, this time based on President Zuma’s failure to comply with the Public Protector’s Secure in Comfort (Nkandla) report, was opposed by the ANC and consequently failed to attract majority support.

Refusal of request by the PCPE for an enquiry

42. On 6 April 2016, Ms Letsatsi-Duba, the chair of the PCPE, replied to Ms Mazzone’s request for an enquiry by that committee, stating that, according to the legal advice that she obtained from the Parliamentary Legal Service that the 1) NA Rule 138 "requires a House resolution to initiate an investigation"; 2) The PCPE "is not authorised by law to initiate such a parliamentary inquiry on its own"; and 3) Any member of the NA may move a motion to have a draft resolution pertaining to a parliamentary inquiry put before the NA for approval as a resolution of the NA in terms of rule 94.

43. Ms Mazzone replied in writing on 6 April 2016, disputing the Parliamentary legal advice by indicating that NA Rules 138 and 201, read with section 56 of the Constitution, empowered the committee to summon members of the Gupta family to give evidence and to produce documents, without any requirement of a resolution of the NA. It may be noted that all witnesses asked about the legal advice that the PCPE was not empowered to decide to conduct the inquiry requested without a House resolution agreed that this was clearly wrong.

44. Further exchanges between the Commission’s evidence leader and Ms Letsatsi-Duba about the period during her tenure as chairperson of the PCPE (May 2014 to March 2017) revealed that the PCPE did not effectively exercise its oversight powers and that the ANC members of the PCPE had no willingness to conduct an inquiry as requested by Ms Mazzone. A similar view was expressed by Ms Rantho in her affidavit that little effective oversight took place in respect of allegations of fraud or corruption. It became clear that ANC MPs acted in accordance with what was or may have been decided in party structures. Consequently, the ANC’s attempt at an internal investigation after its March 2016 NEC meeting had failed.

45. Eight submissions were made; but only Mr Themba Maseko was willing to put his evidence in writing. Mr Mantashe’s stated in evidence that was there was “suspicion in the ANC people do not want to do anything that is career limiting, they fear being persecuted.” The ANC did not move to support any type of parliamentary inquiry into the allegations of state capture.

46. Even when President Zuma was blamed in August 2016 for the decrease in the ANC’s share of the national vote (from 62% in 2011 to 54% in 2016) in the municipal elections, Mr Mantashe, then secretary general of the ANC, issued a statement after an NEC meeting that indicated that “all of us within the NEC must take responsibility, all of us. We don’t point fingers.”

Rejection of the DA motion in 2016 to establish an ad hoc committee

47. Having failed in its attempt to bring about a portfolio committee inquiry, the DA attempted to get support from the NA for a resolution appointing an ad hoc committee to investigate the alleged capture of state resources and undue influence over the government. Mr D Maynier (DA MP) therefore proposed a motion on 8 September 2016 to establish an ad hoc committee in terms of Rule 253(1)(a) that would, among others, investigate alleged capture of state resources and undue influence over the government; recommend measures in line with the NA's oversight mandate to prevent such incidents from occurring and exercise the powers in rule 167 as it may deem necessary for the performance of its task; and report to the Assembly by no later than 30 October 2016. However, the DA failed in its attempts to get the allegations of state capture investigated.

48. It became clear that the ANC adopted the stance that it was not Parliament that should investigate the allegations of state capture but SAPS or the Chapter 9 institutions. Nevertheless, President Ramaphosa conceded in response to the question why Parliament should not have investigated the allegations at the Commission that "... if you look at it with hindsight, I would say the two would not be mutually exclusive and if anything, both checks could easily have been followed".

49. The Commission agreed that Parliament was constitutionally obliged to oversee and hold the executive to account and not leave it exclusively to other agencies to investigate.

Events up to May 2017

50. Allegations of state capture had been made to the Public Protector, Ms Thuli Madonsela, by several persons. Her report entitled "State of Capture" was made public on 2 November 2016. The Public Protector made multiple "observations" such as the possible involvement of the Guptas in the removal and replacement of the finance minister in December 2015; apparent failures to investigate the allegations made by Mr Jonas, Ms Mentor and Mr Maseko and allegations of an cosy relationship between Mr Brian Molefe and the Gupta family; possible improprieties in the award of state contracts or tenders to Gupta-linked companies or persons; and possible improper interference by President Zuma or members of his cabinet in the relationship between banks and Gupta-owned companies.

51. The remedial action that the Public Protector took included inter alia directing that President Zuma should, within thirty days, appoint a commission of inquiry headed by a judge solely selected by the Chief Justice. She directed that the commission of inquiry should complete its task within 180 days. Because of delays the present Commission was only appointed on 23 January 2018.

52. In contrast to the above challenges and delays, the case of the SABC is a good example of appropriate parliamentary oversight. On 3 November 2016 the NA resolved to establish an ad hoc committee into the fitness of the SABC board and related matters after concerns expressed about the SABC's ability to exercise its mandate as the public broadcaster. The committee considered the SABC's financial status and sustainability; its response to a report by the Public Protector entitled "When Governance and Ethics Fail"; its response to recent judgments affecting it; the SABC board's ability to take legally binding decisions following the resignation of several of its non-executive board members; the SABC's adherence to the Broadcasting Charter; and its ability to carry out its duties under its governing legislation. The committee also held public hearings in which numerous witnesses gave evidence that the SABC's primary mandate as a national public broadcaster had been compromised by a lapse of governance and that the board had not discharged its fiduciary duties.

53. Further allegations of state capture and corruption in the public sector continued to mount. For instance, on or about 6 November 2016, Ms Mazzone attempted to have Mr Brian Molefe summoned to testify before the PCPE concerning developments at Eskom, without success. The DA on 10 November 2016 also proposed a vote of no confidence in President Zuma which was defeated.

PCPE decision on 23 May 2017 to conduct an enquiry

54. Significant developments took place within the PCPE in May 2017 when Ms Zukiswa Rantho was appointed as acting chair and Mr Gordhan also joined the PCPE. On 17 May Ms Rantho acceded to a request by Ms Mazzone that the Minister of Public Enterprises, Ms Lynne Brown, and the Eskom board be required to attend a PCPE meeting on 23 May where the minister and board members explained the circumstances of Mr Molefe's resignation, retirement, pension, leave, and re-appointment.

55. All members of the PCPE found the explanations to be unsatisfactory and took a decision in favour of conducting an inquiry and its members decided to invoke the power under the rules of the NA to summon witnesses and documents.

56. In the testimony that followed, Ms Mazzone made it clear that it is "evident that there had been a change of view on the part of the representatives of the ANC on the Committee and this change of view can be attributed to the shifting balance of factional forces within the ANC."

The "Gupta leaks" and the "Frolick letters"

57. A further turning point was reached with the publication of the voluminous set of Gupta-linked emails (the so-called "Gupta leaks"). It was asserted that these emails substantiated allegations of state capture and prompted senior ANC representatives in Parliament that four portfolio committees should be directed to enquire into the allegations insofar as they pertained to their portfolios.

58. On or about 15 June 2017, Mr Cedric Frolick, the House Chairperson of Committees, addressed letters ("the Frolick letters") to the chairpersons of four portfolio committees, namely the Portfolio Committees on Public Enterprises, Transport (in relation to Prasa), Home Affairs and Mineral Resources. In essence, Mr Frolick asked the chairpersons to, within the parameters of the NA Rules governing the business of committees and consistent with the Constitutionally enshrined oversight function of Parliament, ensure immediate engagement with the concerned Ministers to ensure that Parliament gets to the bottom of the allegations.

What explains the shift in stance?

59. The ANC as an organisation was unwilling before mid-2017 to initiate or to support a parliamentary inquiry or inquiries into the allegations concerned. The allegations implicated senior ANC leaders, right up to the President, as well as others regarded by the ANC as its cadres and deployees. However, the ANC leadership was unwilling to expose the allegations of malfeasance to transparent public scrutiny. It is also argued that those who supported proper parliamentary investigation of the allegations may, not unreasonably, have feared the personal and political consequences if they should deviate from the "party line". The Commission believes that the balance of power between competing factions within the ANC played a significant role in support of an inquiry.

The role played by the ANC's Political Committee

60. President Ramaphosa, who, as Deputy President at the time chaired the Political Committee, informed the Commission that when the Gupta Leak emails came out it was clear that there needed to be a response and that Parliament would be one of the structures to deal with it. If the delay in Parliament taking the decision to institute inquiries into allegations of state capture was attributable to the balance of power within the ANC, then it must mean that the balance of power initially favoured those in the ANC who did not want such inquiries to be held and that there was a change in the balance of power in the ANC in 2017 which favoured those who wanted such inquiries to be held. The two views were held, respectively, by those within the ANC who supported Mr Jacob Zuma and those who supported Mr Cyril Ramaphosa. Apart from the Gupta leaks the ANC elective conference in which a new president of the organisation would be elected also played a key role in shifting the balance of power.

61. As will appear below, the struggle as to whether to support or suppress parliamentary inquiries and effective oversight over the executive continued even after mid-2017. This is demonstrated by the way in which the four committees to whose chairs Mr Frolick addressed his letters dealt with his requests.

The PCPE's Eskom inquiry

62. The PCPE had already decided to commence an inquiry on 23 May 2017, before it received its "Frolick letter" of 15 June 2017. However, after numerous delays and problems regarding resources an evidence leader was appointed, and a decision was taken that the inquiry would focus on Eskom, Transnet and Denel, starting with Eskom. The inquiry proper commenced on 17 October 2017.

63. There was considerable resistance to the inquiry, both from within the ranks of the ANC caucus and from those under scrutiny. Notwithstanding the divisions in the caucus, the Chief Whip, Mr Mthembu, supported the inquiry, told PCPE members that there was support for the inquiry from influential members of the ANC's leadership and gave what assistance he could. There was resistance against committee members; in particular Ms Rantho and her family were subjected to threats and intimidation. There were baseless legal challenges and attempts to delay and subvert investigations by persons and organisations to undermine the authority and function of the Committee.

64. Despite the difficulties, the inquiry heard evidence from numerous witnesses and considered numerous documents. Because the present Commission had been established and was well under way, it was eventually decided not to proceed with the intended inquiries in relation to Transnet and Denel. On 28 November 2018 the PCPE unanimously adopted, with amendments, its final report was made available to the Commission and has been of considerable assistance to it.

Failure by the PCT to act on its "Frolick letter"

65. The Chairperson of the Portfolio Committee on Transport (PCT), Ms PD Magadzi, received a letter dated 15 June 2017 from Mr Frolick about allegations of state capture that involved members of the board of the Passenger Rail Agency of South Africa (Prasa). It requested the committee to investigate these allegations and report back to the NA as a matter of urgency. However, evidence by Mr MS F de Freitas revealed that Ms Magadzi did not table Mr Frolick's letter before the Committee.

66. Based on the evidence presented at the Committee, it appears doubtful that Ms Magadzi tabled the letters of 15 June 2017 or 27 August 2017 before the PCT. Mr Frolick says in his affidavit that the PCT "failed to implement" the decision conveyed in his letter of 15 June 2017. This illustrates the Commission's view that there seems to be continued resistance to the parliamentary oversight in relation to the allegations of state capture and corruption. A discussion of the general inadequacy and ineffectiveness of oversight exercised by the PCS in relation Prasa (as distinct from the way it dealt with Mr Frolick's letters) will follow later in this report.

Portfolio Committee on Minerals

67. The chairperson of the Portfolio Committee on Minerals (PCM), Mr S Lusipo, also received his "Frolick letter". Like the PCT, the PCM ultimately failed to inquire effectively into the allegations of state capture because several PCM ANC members expressed concerns regarding what the committee was being asked to do. PCM also felt that the Minister of Mineral Resources, Mr M Zwane, should be called to attend a meeting but Minister Zwane was evasive and only attended the PCM meeting on 18 October 2017.

68. After a lengthy delay, the TORs for an inquiry were finalised at a meeting on 25 April 2018 where it was agreed that the inquiry would focus, inter alia, on the role of Minster Zwane and the Department of Mineral Resources (DMR) in facilitating the sale of Glencore assets; non-compliance with the PFMA resulting in fruitless and wasteful expenditure; an alleged conflict of interest on the part of the Minister; and whether officials had been subject to outside influence. The inquiry never got off the ground because there was no budget for support staff to travel to interview witnesses.

69. It appears to the Commission that, by the time that the PCM lost patience with the Minister's evasiveness and decided to commence a formal inquiry, the reason for its failure to proceed was that the resources required and requested were not made available. This raised concerns about the extent of resources available for necessary parliamentary oversight as well as how committed Mr Frolick and the ANC's parliamentary leadership were to the investigative process sought in Mr Frolick's letters of June 2017. In essence, very little of substance occurred within the PCM by way of parliamentary oversight.

Portfolio Committee on Home Affairs

70. The letter of 15 June 2017 from Mr Frolick to the chairperson of the Portfolio Committee on Home Affairs (PCHA), Mr B Mashile, requested the PCHA to investigate allegations involving the former Minister of Home Affairs, Mr Malusi Gigaba, in the granting of citizenship to non-South Africans and to report its findings to the NA "as a matter of urgency".

71. The PCHA discussed the letter on 20 June 2017 and invited former Minister Gigaba, and the then minister, Ms HB Mkhize to attend a meeting with the committee on 22 June. Both ministers failed to attend, but the director-general presented an overview of the processes with respect to applications for naturalisation by the Gupta families. Nevertheless, the proceedings of the PCHA progressed slowly and on 28 February 2018 the PCHA requested support of Parliament's research and legal services to engage with the documentation submitted to the committee. On 6 March 2018 Mr Gigaba made a presentation to the committee, on 12 September 2018 the formal hearings commenced, and on 13 March 2019, the PCHA discussed and adopted its final report. Amongst its concluding "observations" was that the approval of the early naturalisation application of Mr Ajay Gupta's family by Mr Gigaba was "incorrect" and that criminal charges should be laid against Mr Ashu Chawla and members of the Gupta family relating to false information submitted in their early naturalisation applications.

72. Ms Modise, the Speaker of the NA, mostly blamed Mr Frolick for the long delay but it may be prudent to spell out in the rules where accountability lies for the delay to ensure that appropriate oversight is being carried out.

Other evidence of inadequate parliamentary oversight

73. The problem of inadequate parliamentary oversight has not been confined to the way Parliament dealt, or failed to deal, with the relatively recent allegations of state capture and corruption. Another long-standing failure as regards parliamentary oversight, which will be reverted to shortly, relates to multiple allegedly corruptly-procured contracts between the Bosasa group of companies and (amongst others) the Department of Correctional Services (DCS), despite evidence of corruption which appeared in the press from 2006 onwards, the apparent veracity of which was confirmed by an SIU investigation reported to Parliament in November 2009.

74. A further example is the Nkandla affair. As referred to above, the CC found that the NA's resolution in 2015 absolving President Zuma from liability for any of the expenditure incurred in relation to Nkandla was inconsistent with the Constitution and unlawful. It is doubtful that this failure on the part of the NA was unconnected to a fear on the part of at least some majority-party MPs of the consequences to them should they step out of line.

75. Leaving aside for the moment the fallout of her stance as regards the vote of no confidence, the evidence of Dr Khoza on her experience in relation to the prevailing culture on parliamentary oversight is also disturbing and will be referred to below.

76. These instances of a regrettable political culture fail to be distinguished from those instances where there is a genuine will to exercise oversight; but difficulties are experienced in making such oversight effective. That is a separate topic.

Pressure to "look the other way" regarding Bosasa corruption allegations

77. Mr A Agrizzi testified about extensive corruption involving the Bosasa group of companies and the DCS from about 2004. Allegations were widely reported in the press and some allegations were eventually investigated by the SIU which – as it made clear to the Portfolio Committee for Correctional Services (PCCS) at a hearing on 16 November 2009 – found them to be well-founded and recommended prosecution. Mr Agrizzi also testified that he had been party to the payment of bribes to MPs on the PCCS to look the other way.

78. However, much of the work of the PCCS was done under severe pressure from a former minister and chief whip not to scrutinise the Bosasa allegations. For example, Mr Dennis Bloem, then an ANC MP and Chairperson of the PCCS, testified before the Commission that he personally raised his concerns in meetings with the Minister but was told not to "interfere". Mr Bloem also testified that the ANC's PCCS study group in the presence of the minister and chief whip were told: "Do not fight, because this is an ANC Government. Do not fight Comrades." Mr Bloem said it was quite clear that Mr Mti, the then Commissioner of the DCS, had the support and protection of the Minister.

79. Pressure on Mr Bloem continued and is supported by the testimony of Mr J Selfe, a DA MP who served for many years on the PCCS with Mr Bloem. Mr Selfe testified that Mr Bloem would telephone him from time to time to tell him about the difficulties he had with his own organisation, to pass on certain information, to encourage him to ask certain questions and to pursue certain issues in the committee.

Bribing of PCCS members by Bosasa

80. Mr Agrizzi also testified about outright bribes he said were paid by Bosasa to Mr Vincent Smith, Ms Winnie Ngwenya and Mr VV Magagula, all ANC MPs on the PCCS at the time of the payment of the bribes, as well as to Mr C Frolick, to whom much reference has been made above. Mr Frolick denies this.

81. An MP who takes a bribe to influence the manner in which a portfolio committee discharges its duties not only commits a serious criminal offence but is also guilty of a gross dereliction of his or her constitutional oversight responsibilities as an MP.

Evidence of Dr M Khoza on the culture regarding oversight and accountability

82. Dr Makhosi Khoza was an ANC MP from May 2014 to September 2017 and served on the Standing Committee on Finance ("the SCOF") from June 2014 to February 2017, the Ad Hoc Committee on the Inquiry into the Fitness of the SABC Board ("the SABC inquiry") and as chairperson of the Portfolio Committee on Public Service Administration from February to September 2017.

83. Dr Khoza essentially testified that she received criticism from some ANC members because she asked pointed questions or made critical comments. Her criticisms concerned issues relating to accountability, corporate governance, and the like. Dr Khoza said that, whilst she received some support from Mr J Mthembu, the then Minister of Communications, for her stance during the SABC inquiry, she also received a great deal of criticism within the ANC.

84. Dr Khoza fell out with the ANC over the stance it adopted in relation to a motion of no confidence in President Zuma on 8 August 2017. It is therefore not surprising that an ANC study group meeting asserted that Dr Khoza had brought the name of the ANC into disrepute. Dr Khoza was eventually told that those present at the study group meeting had decided to remove her as chairperson of the portfolio committee.

85. The removal of Dr Khoza occurred a month after Mr Frolick's letters of 15 June had been sent to the chairpersons of four portfolio committees and supports the views already alluded to above (i) that there was serious factional division within the ANC regarding the approach to be adopted in relation to parliamentary oversight and holding the executive accountable; and (ii) that this persisted after the distribution of the Frolick letters.

Party discipline

86. Party discipline is a legitimate and indispensable feature of a party-based democratic system. However, there can be a tension between party discipline and the oversight obligations of MPs under the Constitution. This has been recognised by the Constitutional Court. Compare the judgment of the CC sometimes referred to as the "secret ballot" judgment:

> Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail.

87. Having regard to the applicable provisions of the Constitution and the above judgments of the CC, the Commission is of the view that every MP takes an oath or solemn affirmation to uphold.

88. It follows that:

88.1 Party discipline may not legitimately be directed at obstructing Members of Parliament from doing what they believe to be appropriate in order to address concerns as to allegations of corruption or state capture.

88.2 It is unacceptable for a minister or fellow party members to castigate a member of Parliament for attempting to hold a minister to account, or for asking difficult questions of persons regarded as comrades or deployees of the same party.

88.3 It is inappropriate for a party caucus to resolve not to permit, or to discourage, conduct amounting to legitimate parliamentary oversight over the executive.

88.4 It is inappropriate for members of Parliament not to enquire into allegations of misconduct for which there appears to be plausible evidence, on the basis that to do so could cause embarrassment to, or divisions within, a political party.

89. The question as to how these principles have application where a motion of no confidence is under consideration by Parliament is dealt with separately below.

HOLDING THE PRESIDENT ACCOUNTABLE

90. Parliament is obliged to exercise oversight over the executive and hold it accountable. There are various constitutional mechanisms for holding the President as head of the national executive accountable.

91. The President may, by a resolution adopted with a supporting vote of at least two-thirds of its members, be removed from office by the NA on certain specified grounds. Alternatively, the NA can, by a vote of a majority of its members, pass a vote of no confidence in the President; if it does this, the President and the other members of the Cabinet must resign.

92. The President can also be held accountable to answer specific questions raised by Parliament.

93. However, there are no portfolio or other parliamentary committees whose function is, or includes, oversight over the President.

Instructions not to support a vote of no confidence

94. During the presidency of President Zuma eight votes of no confidence were proposed by opposition parties in the NA. None succeeded. The ANC instructed its members to vote against them and, in general, they complied. However, the eighth vote of no confidence in President Zuma, held on 8 August 2017, was somewhat different because the Speaker (Baleka Mbete from 21 May 2014 to 22 May 2019) determined that the vote would this time be by secret ballot based on a decision of the

Constitutional Court. Because the vote was secret it appeared that several ANC MPs acted in breach of the instruction received from the party and supported the motion. Most did so without disclosing their identities.

Conflict between MP's oath / affirmation and party instructions

95. The Commission heard evidence of numerous persons on the legitimacy of party instructions by the ANC, as the majority party, to its MPs not to support an opposition-proposed vote of no confidence in a President of the country as well as leader of the ANC. On the whole members of the ANC defended the right of the party to issue such an instruction and its right to expect compliance with such an instruction by its MPs.

96. However, it is the Commission's view that there must be some limit to the power of a political party to discipline an MP. Even President Ramaphosa conceded that there must be limits and that MPs have got to put the interests of the people of South Africa first.

A parliamentary committee to exercise oversight over the President?

97. The Commission heard the views of several witnesses on whether there would be merit in Parliament establishing a committee whose function would be, or would include, oversight over the President. It became apparent that this is a contested issue with some suggesting that there is little need for such a committee, as all executive functions are delegated by the President to a department led by a minister, which is overseen by a portfolio committee.

98. Questions put to the President at question time in the NA also serve as an important and useful method of exercising oversight and holding to account.

99. In short, the Commission is of the view that Parliament should consider whether it is appropriate for it to establish a committee whose function is, or includes, oversight over acts or omissions by the President and Presidency which are not overseen by existing portfolio committees. If it supports this in principle, it will need to determine the details as to how this is to be done and whether it need to operate in the same manner as the existing portfolio committees.

ELECTORAL REFORM?

100. Under the South African party-list system of proportional representation, MPs do not represent a particular constituency. However, there is a view that under the constituency-based system of proportional representation MPs will be more responsive to the political views and interests of their constituents and less beholden to "party bosses". This would strengthen the capacity and resolve of MPs accountable to a constituency to exercise better oversight over the executive.

101. Both the majority report of the Electoral Task Team chaired by Dr Van Zyl Slabbert in 2003 and the 2017 High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change recommended that Parliament should advocate for an electoral system that makes MPs more accountable.

Section 47(3)(c) of the Constitution

102. As previously noted, section 47(3) (c) of the Constitution has the effect that a person loses membership of the NA if that person ceases to be a member of the party that nominated him or her as a member of the Assembly. Given South Africa's party-based, proportional representation electoral system, the existence of such a provision is understandable.

103. Parliament should consider whether it would be desirable to enact legislation which protects MPs from losing their party membership (and therefore their seats in Parliament) merely for exercising

their oversight duties. Consideration should be given to whether such protection should be limited to the duration of the Parliament to which a member has been elected.

THE PROBLEM OF INEFFECTIVENESS

104. In contrast to the above where ANC members were unwilling to exercise parliamentary oversight, the Commission found that even where the will has existed, parliamentary oversight was often ineffective. It is to that issue the problem of ineffectiveness, even where the will to oversee exists, that this report now turns.

SCOPA's inability to resolve serious failures of financial control

105. The Standing Committee on Public Accounts (SCOPA) is required by Rule 245 of the NA to consider the financial statements of all organs of state, any audit reports issued on those statements and any reports issued by the Auditor-General (AGSA) on the affairs of any organ of state. It may report on any of these financial statements or reports to the NA and may initiate an inquiry in its area of competence. It is traditionally chaired by an opposition MP. Despite excellently discharging its functions the chairperson of SCOPA Mr Godi felt there is not sufficient political and administrative will to do what is right for the country to stop the looting of public funds. SCOPA had consistently called out the malfeasance at SABC, SAA, Eskom, the Compensation Fund, Correctional Services, Water and Sanitation, Public Works, Transnet, SAPS, PIC, among others, to no avail.

106. Parliamentary oversight was also ineffective in addressing the staggering annual increases in irregular expenditure on the part of Prasa from 2014 to 2018. An exponential increase in irregular expenditure serves as a "red flag" and as a "warning sign". Yet despite this being well understood by the AGSA and SCOPA, amongst others, Parliamentary oversight proved to be unable to resolve this problem.

107. Mr Godi also indicated that SCOPA through its reports regularly made recommendations with regards to corrective actions. According to Mr Godi the non-implementation by the executive of remedial measures required by SCOPA reports remained a significant problem, right up to the end of his tenure as chair of SCOPA.

108. The evidence heard by the Commission indicates that there is merit in the view that the executive all too frequently 1. failed to ensure adherence to financial controls in the first place; and 2. was also not sufficiently responsive to Parliament's recommendations to address such concerns when they came to light. This is extremely disturbing because it implies that our country's system of financial control in respect of public expenditure became untenably ineffective. Regrettably it also seems clear that parliamentary oversight, whether via SCOPA or via the portfolio committees, did not manage to resolve this problem.

THE JOINT STANDING COMMITTEE ON INTELLIGENCE

109. The Intelligence Services Oversight Act 40 of 1994 is national legislation which establishes a parliamentary committee, to be known as the Joint Standing Committee on Intelligence (JSCI) and determines its oversight role over the security services. The JSCI is required to perform the oversight functions set out in that Act in relation to the intelligence and counter-intelligence functions of the State Security Agency (SSA), the National Defence Force (SANDF) and the South African Police Service (SAPS) and to report thereon to Parliament.

110. The Oversight Act also provides for the appointment of an Inspector-General of Intelligence (IGI), accountable to, and required to report to, the JSCI. The IGI's functions in terms of the Oversight Act include to monitor compliance by the security services with the Constitution, applicable laws and relevant policies and to submit certain "certificates" to relevant ministers. These certificates are central to the scheme of the Oversight Act to address unlawful activities which may occur within the intelligence services.

111. The JSCI's primary duty is to report its concerns and recommendations to Parliament. The issue presently of concern to the Commission is whether the JSCI has been shown to be ineffective in performing its oversight duties in respect of such abuse. The Commission concluded that, while the evidence available to it is insufficient to draw firm conclusions, there is nonetheless reason to be concerned that it has not been effective.

Dr Dintwe's evidence

112. Dr Setlhomamaru Dintwe was appointed by the NA as IGI in November 2016 and assumed office in March 2017.

113. Dr Dintwe made available to the Commission redacted versions of certificates which had been made available to the JSCI in respect of the SSA, the SANDF (Defence Intelligence) and the SAPS (Crime intelligence) for the years 2017/17, 2017/18 and 2018/19. The first set of certificates he issued in terms of section 7(7) of the Oversight Act related to the year ending March 2017.

114. In a nutshell, Dr Dintwe reported that the SSA resisted oversight and denied him access to information and that the DG of the SSA made it impossible for the OIGI to fulfil its legislative mandate.

115. Matters deteriorated to the extent that, in April 2018, Mr Fraser revoked Dr Dintwe's security clearance. Dr Dintwe brought an urgent court application for reinstatement of his security clearance. The Minister intervened and the security clearance was reinstated.

116. According to Dr Dintwe, he could "confidently say" that oversight by the JSCI (during the 2014-2019 parliament) was "never adequate" and that "our recommendations are just being ignored willy nilly".

117. Dr Dintwe said that recommendations he made, and reports produced by the OIGI are largely ignored by the Ministry, the DGs of the intelligence services and the JSCI. He made the point that, where the accounting officers concerned have not implemented the IGI's recommendations and reports, the JSCI ought to exercise oversight, in addition to the Ministers' superintendence role.

Mr Jafta's evidence

118. Mr Loyiso Jafta, who served as Acting DG of the SSA from 17 April 2018, also indicated that oversight by the JSCI had been "uneven and ineffective" and that it lacks necessary research capacity but was unable to go into much detail regarding this when testifying.

The High-Level Review Panel's report

119. In June 2018 President Ramaphosa set up a High-Level Review Panel (HLPR) on the SSA, chaired by Dr Sydney Mufamadi, with the key objective to reconstruct a professional national intelligence capability for South Africa that would respect and uphold the Constitution and the relevant legislative prescripts.

120. The Panel completed its work in December 2018 and reported that the JSCI over the past few years has been largely ineffective and impacted by the factionalism of the ANC.

Reports of the JSCI to Parliament

121. Several affidavits submitted to the Commission and an affidavit from the former Speaker, Ms Mbete, show that, during the Fifth Parliament, the JSCI tabled an initial report to Parliament on 25 February 2015, followed by reports in respect of the years ending 31 March 2015, 2016, 2017 and 2018 but no report was submitted in respect of the year ending 31 March 2019.

Ms September's affidavit

122. Ms September correctly points out that Dr Dintwe's certificates relate to periods after she had ceased to chair the JSCI and can therefore not comment on them. As to the allegations regarding the Principal Agent Network (PAN) programme, she says that, without access to classified material she is unable to respond to this issue. She says, however, that one of the recommendations in the JSCI's 2015 report was for the JSCI and SSA to address challenges related to companies owned by former intelligence officers.

123. She also makes the point that Mr Arthur Fraser was appointed as DG of the SSA in or about September 2016, after she had resigned from the JSCI.

Mr Nqakula's affidavit

124. Mr Nqakula emphasised the secrecy obligations of members of the JSCI, particularly those imposed by section 5 of the Oversight Act.

125. As regards the IGI's certificates referred to above, Mr Nqakula said that the IGI did not revert to the JSCI regarding this issue until his departure from Parliament on 15 June 2018.

126. Mr Nqakula confirmed that the JSCI received the report from the PAN and that the Committee engaged with the report at one or more of its meetings.

127. Mr Nqakula stated in his affidavit that the JSCI had made a case, in its December 2018 report, for the reconstruction of the state security agencies given the many weaknesses within the entity, but that the inner workings of the Committee could not be revealed.

128. Asked to comment on the various criticisms of the effectiveness of the JSCI his response was that the recommendations made by the HLRP were informed by the findings of the JSCI. Mr Ngakula said that it was "simply disingenuous and opportunistic to blame the ANC and the purported factionalism within the JSCI, as contributing to unsubstantiated grounds for its purported ineffectiveness" and said that he could only account for the 21 months period in which he was the chairperson of the JSCI. He said that the JSCI had made meaningful contributions to the President and Parliament.

Mr Gamede's affidavit

129. Mr Gamede said in his affidavit that in his experience the JSCI is unable to function without a chairperson and that the period Mr Nqakula stepped down until Mr Masondo was appointed to replace him contributed to the lack of a report in respect of the financial year ending 31 March 2019.

130. Mr Gamede said that Dr Dintwe had raised with the committee the breakdown of his working relationship with the then DG, Mr Arthur Fraser. He said that the JSCI had discussed this matter with President Ramaphosa and that Mr Fraser had, as a consequence, been transferred to a position outside the intelligence agencies and this intervention contributed to Dr Dintwe's security clearance being reinstated.

131. Mr Gamede also said that most if not all problems raised by the IGI were also raised by other structures like the Auditor-General. The JSCI could only recommend for action. The implementation was/is with the accounting officer or the political head.

132. As regards the criticisms levelled by the HLRP's report, Mr Gamede said that it was the JSCI which had recommended that panel's appointment. He disputed almost all of the criticisms of the JSCI in the report. Mr Gamede also agreed that the Committee was "divided and unable to articulate a coherent collective response on the state of intelligence in the country".

Mr Schmidt's affidavit

133. Mr Schmidt's said that the certificates from Dr Dintwe in respect of 2018-19 would only have been submitted to the committee after termination of his membership of the committee in May 2019. He could

not recall whether the certificates for the preceding two years had been produced in the (redacted) format later disclosed to the Commission but said that certificates submitted by the IGI were submitted to the committee without reference to the names of intelligence operatives, methods used and organisational weaknesses, as testified by Dr Dintwe.

134. Mr Schmidt said that of significant concern is the strong presumption which existed with members of the JSCI during the relevant period (at least with certain members) that the Minister of the SSA and the Chairperson of the JSCI controlled the information served before the JSCI. This pre-supposes that the Chairperson and the Minister of the SSA had the necessary authority to prevent information being provided to the SSA, which is not in accordance with the legislation nor the Constitution. It is, therefore, to be expected that oversight over the Services by the JSCI would be negatively affected by not having access to information.

135. As to the adequacy of the Committee's reports to Parliament, Mr Schmidt said that when the content of the IGI certificates for 2016/2017 are compared to the annual reports of the JSCI for the same financial year, the lack of accountability to Parliament is indicated. It appears that limited information was provided to Parliament on the issues discussed by the JSCI.

136. Mr Schmidt could not recall whether the JSCI had submitted an annual report for 2017-2018.

137. As regards the JSCI'S task of considering and making recommendations on the reports and certificates submitted by the IGI, Mr Schmidt said that the recommendations of the JSCI ". . . were indicated primarily in closed committee sessions to the IGI and various services after conclusion of the closed committee briefings to the Committee".

138. Mr Schmidt said that the JSCI on which he served had received a report on a previous investigation during the term of the previous JSCI (2009-2014) into the PAN, despite "certain members, in particular ANC members" not wanting the PAN report to be discussed by the JSCI. At approximately the same time the IGI had reported to the JSCI on the PAN investigation. Both these reports had directly implicated the then director-general of the SSA, Mr Arthur Fraser, in alleged activities which, if proven to be true, constituted serious criminal conduct. They also alleged a prevalence within the SSA of fraud and theft of large sums of cash.

139. Mr Schmidt alleged that the JSCI functioned in a politically partisan manner.

140. Asked to comment on whether the annual report by the JSCI for the year ending 31 March 2017 adequately addressed the issues which had been reported to the JSCI by the IGI, Mr Schmidt said that it failed to do so because the level of reporting to Parliament was more generic due to the lack of security clearance and the level of accountability by the IGI to the JSCI was on a lower level than would be expected because the IGI redacted certificates to exclude the names of individuals, methods used, and organisational weaknesses as testified by the IGI.

141. Mr Schmidt also indicated that despite the JSCI having oversight responsibility for the SSA and a duty to make recommendations, it has no decision-making power in respect of the Services nor any other institution. He also said that members of the JSCI from the majority party were often hesitant to criticise senior office bearers in the executive or the departments due to political considerations.

Evaluation

142. The issues on which the Commission primarily focussed were whether the oversight by the JSCI was ineffective with regards to Mr Fraser allegedly seeking to avoid oversight by the IGI and allegations of criminal conduct within the security services.

Mr Fraser and oversight by the IGI

143. The issues related to the SSA are dealt in another section of this report. This section thus contains only a summary of issues related to parliament's oversight function.

144. Mr Fraser was appointed as director general in or about September 2016. Dr Dintwe assumed office as IGI in March 2017 and his 2016/2017 certificate alluding to the conflict between himself and the SSA, led by Mr Fraser, appears to have been completed in about February 2018. In April 2018, Dr Dintwe's security clearance was revoked by Mr Fraser but was shortly thereafter reinstated by the Minister. In the same month, Mr Fraser was removed by President Ramaphosa as DG of the SSA and transferred to the DCS.

145. The affidavits of Mr Nqakula, Mr Gamede and Mr Schmidt indicate that the JSCI met President Ramaphosa to discuss concerns regarding the relationship between Dr Dintwe and Mr Fraser; and that this may have contributed to the President's decision to remove Mr Fraser as DG of the SSA. In the Commission's view, the JSCI can therefore not fairly be criticised for failing to exercise appropriate oversight as regards the concerns expressed in Mr Dintwe's certificates about Mr Fraser's avoidance of IGI oversight.

146. The JSCI can also not be faulted for failing to alert Parliament to this issue in its 2016/7 report that was tabled in Parliament on 31 October 2017, which was before Dr Dintwe's 2016/2017 SSA certificate had been finalised. The issue was alluded to in the JSCI's 2017/2018 report and tabled in Parliament on 12 December 2018.

147. Parliament was informed in that report that a "major presentation" by the IGI "related to the submission of certificates issued by him regarding an assessment of the intelligence community"; that this had "generated substantial discussion and raised questions, in particular to matters of principle as well as governance relating to how the process had been managed"; and that it was suggested that time be found for a thorough engagement between the IGI and the Ministers in the cluster.

148. In the view of the Committee the following assessment was made:

    148.1 The IGi did not consult the relevant Ministers before presenting the certificates to the JSCI

    148.2 The IGI exceeded the reporting on the mandate of the period under review

    148.3 The report painted a compromised intelligence services, an intelligence community rife with corruption, unqualified people doing the job and questionable undercover fraud; and

    148.4 The Committee is expecting a report with regards to the suggested interface.

149. The Commission is not in a position on the evidence available to it to accept or reject the criticism made that the IGI failed first to submit his certificates to the Minister. It is, however, of the view that, broadly speaking, the JSCI cannot be criticised for the manner in which it reported to Parliament on the conflict which arose between Dr Dintwe and Mr Fraser.

Allegations of criminal conduct within the intelligence services

150. Having regard to the limited evidence that the Commission received as to the effectiveness of the manner in which the JSCI addressed allegations of criminal misconduct within the intelligence services, the Commission is not in a position to make any conclusive finding but thinks it is appropriate to express its prima facie concerns in this regard.

151. The evidence does appear to show prima facie 1. that the JSCI was made aware of allegedly criminal conduct within the intelligence services; and 2. that the JSCI failed to ensure that adequate steps were taken to address this timeously.

152. Of particular concern in this regard is the evidence of Dr Dintwe, not least his allegations of criminal conduct associated with the PAN 1 project and the JSCI's failure to deal effectively with this issue. Dr Dintwe asserted that the allegations of criminal conduct associated with the PAN 1 project were long-standing and that recommendations made by his predecessor remained unimplemented. The answering affidavits confirm that these issues were drawn to the Committee's attention and discussed by it. But little concrete was done over the years to resolve the problem. The Committee seems to have been fobbed off by assurances that investigations remained ongoing and appears to have left it to the affected services themselves to refer matters for prosecution if appropriate.

153. The Commission is not impressed by the stance adopted by Mr Nqakula When asked whether the committee had received reports from the IGI in respect of the PAN which disclosed criminal conduct or conduct reasonably suspected of being criminal and, if so, what steps if any the Committee took or recommended, his response was that this is classified as confidential and cannot be divulged.

154. Mr Nqakula cannot be faulted for drawing attention to – and adhering to – section 5 and other provisions of the Oversight Act which bear on secrecy. The Commission does not accept however that, interpreted in line with the Constitution, section 5 renders it unlawful to disclose to the Commission whether criminal conduct was reported to the Committee and, if it was, to disclose what steps, if any, the Committee took or recommended to ensure that such criminal conduct was addressed. This could be disclosed without having to "disclose any intelligence, information or document the publication of which is restricted by law. . . ", as referred to in section 5(2).

155. It should be borne in mind that section 6(3) of the Oversight Act requires the Committee, when reporting to Parliament, not to include anything in its report "the inclusion of which will be more harmful to the national security than its exclusion would be to the national interest". The national interest would lie in disclosing to Parliament whether criminal conduct was reported to the JSCI and, if so, what steps it took in this regard. Whatever is disclosed to Parliament is disclosed to the public at large. Information that can lawfully be provided to Parliament can lawfully be disclosed to this Commission.

156. Whilst it is true that the Oversight Act does not empower the JSCI to make executive decisions and only explicitly empowers it to make recommendations or to issue reports, the JSCI's fundamental role is, in terms of the Constitution, to "have oversight of" all security services. If the security agencies or their ministers fail to ensure that those services operate lawfully, the JSCI is, in the Commission's view, duty bound to "blow the whistle" on this by drawing it to the attention of Parliament. The object sought to be achieved by section 198(8) of the Constitution is that there should be "accountability" in respect of the security services to Parliament. Impotent deference or abdication is the antithesis of holding accountable.

157. A difficult balance must undoubtedly be drawn between the need to protect national security and the need to hold the intelligence services to account. But the JSCI cannot properly adopt a supine attitude and defer to whatever may be decided as regards the security services by the accounting officer or Minister.

Inadequacy of reports to Parliament

158. If, in the JSCI's judgement, the accounting officer or Minister is acting unconstitutionally or unlawfully or is not taking effective steps to address such conduct, the JSCI is not only entitled to alert Parliament of this; it is under a duty to do so.

159. The annual reports to Parliament during the Fifth Parliament did very little, if anything, to alert Parliament to malfeasance within the intelligence services of the type and degree revealed to the Commission and revealed in the IGI's reports to the JSCI. The JSCI is meant to serve as Parliament's "watchdog"; but it failed to act.

160. This was compounded by the JSCI's failure to submit any report to Parliament in respect of the year ending March 2019. That was a breach of a legal obligation imposed by section 6(1) of the Oversight Act. If it is correct, as Mr Gamede says, that the reason for this was the failure to appoint a chairperson to replace Mr Nqakula timeously, this would not excuse the JSCI. It may, however, suggest that the fault also lies with the appointing authority.

NO PARLIAMENTARY MECHANISM TO "TRACK AND MONITOR"

161. One of the primary practical problems to which various witnesses drew attention was the absence of any parliamentary system to "track and monitor" implementation or non-implementation by the

executive of undertakings given by the executive or of corrective action proposed in reports adopted by Parliament.

162. Mr Godi referred to an occasion, during the fourth Parliament, when he approached Mr Frolick about this problem and was given an assurance that the office of the Speaker would configure a "dashboard" which would keep track of deadlines and follow up and ensure compliance with House resolutions. However, no such dashboard was configured and no alternative mechanism was adopted to monitor and enforce House resolutions. As Mr Godi pointed out, this is not a new problem. Paragraph 4.1.4 of the OVAC model adopted by Parliament in 2009 commences:

> In developing the oversight model, the need was identified for support services relating to the monitoring and tracking of issues between Parliament and the Executive, and on all other related matters within Parliament's broader mandate. An Oversight and Advisory Section ought to be created in response to the need identified. Its main functions will be to provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of members of Parliament and the committees to which they belong.

163. Virtually all the witnesses – and there were many – who were asked about this agreed on the need to implement, as a matter of priority, a suitable "tracking and monitoring system". For example, in an affidavit submitted on behalf of the ANC by its (suspended) Secretary General, Mr Elias Sekgobelo ("Ace") Magashule the following was stated: To monitor and track issues between parliament and the executive, the ANC proposes the establishment of an Oversight Advisory Section in parliament that will include a financial scrutiny unit, tracking and monitoring unit, an advisory unit and a system to capture and manage information within Portfolio Committees.

164. Mr Gwede Mantashe, also a former Secretary-General of the ANC who is now its Chairperson, associated himself with this. Ms Modise, former Speaker, agreed that this was a priority and testified that "we have actually started with that".

165. The Commission welcomes this and recommends that this be given the urgent priority that it requires.

ABSENCE OF CONSEQUENCES

166. Much more difficult is what Parliament can and should do to address the complaint about frequent and persistent failures by ministers and other representatives of the executive to ensure that corrective action, required by committee reports adopted by the Assembly, is implemented.

167. Some Members of Parliament displayed a resigned acceptance of Parliament's impotence to fix problems. For example, Mr Vincent Smith said as follows in an affidavit: "Under the current practice, Parliament and/or the legislature can only persuade and not instruct nor micro-manage the department or the Executive Authority." Underlying this view is, one supposes, a recognition that the separation of powers between the legislative and executive branches of government requires the legislative branch to refrain from exercising executive authority. The question that arises is: is Parliament so impotent? What does the Constitution mean when it provides that the NA is elected to ensure government by the people "by scrutinising and overseeing executive action"; that it must ensure that executive organs of state "are accountable to it"; and that members of the Cabinet are "accountable", "collectively and individually" to Parliament for the exercise of their powers and the performance of their functions? How should these provisions be interpreted, given not only the doctrine of the separation of powers, but also the foundational constitutional values of "accountability, responsiveness and openness" (emphasis added) which underlie our democracy?

168. Amongst the recommendations made in the Corder report was the enactment of legislation, including an Accountability Standards Act. In Professor Corder's evidence to the Commission he expressed the view that legislative reform remains desirable to "flesh out the skeleton", so to speak, of the provisions in the Constitution which provided for Parliamentary oversight and accountability to Parliament. An Accountability Standards Act would, he said, serve the purposes of (i) partially fulfilling the NA's

constitutional obligations for establishing accountability mechanisms; (ii) setting the broad framework and minimum requirements for accountability; and (iii) providing an authoritative and mandatory framework within which committee members can perform their oversight task.

169. In his view the Act should provide for "amendatory accountability" which should oblige executive and organs of state to answer and submit to scrutiny, as well as imposing on them an obligation to redress grievances. This means that remedial action should be authorised for exposed errors, defects of policy or maladministration. This form of amendatory accountability is essential for an effective system of reporting.

170. Prof Corder also said at present there seem to be few if any mechanisms in place, short of the tabling of a motion of no confidence in either the President or his Cabinet (s 102 of the Constitution), an admittedly radical step, which should not be lightly countenanced. What is necessary are steps short of a motion of no confidence, through which individual or groups of ministers may be required to take amendatory action, sufficient to satisfy Parliament.

171. The official submission of the ANC to the Commission on parliamentary oversight said that the ANC proposes that the recommendations of the Hugh Corder Report be considered to further strengthen parliament's accountability and oversight model, in particular a key recommendation that accountability also requires that a person, in addition to explaining and justifying decisions and actions, goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future.

172. The Commission recommends that Parliament should consider whether it supports the principle of "amendatory accountability" and, if it does, whether it would be desirable to give detailed substance to this principle in an Act of Parliament along the lines suggested in the Corder report. In doing so, it will be necessary for Parliament to consider the implications of the separation of powers between the legislative and executive branches of government under the Constitution. However, the Commission believes that it should not be beyond the ingenuity of Parliament to devise mechanisms which promote responsiveness and effective accountability in a manner which does not infringe the separation of powers.

173. If Parliament does not agree to enact legislation of the above type, the Commission is of the view that serious consideration should be given by Parliament to amendments to its own rules to address the problem of ministers who fail to report back to Parliament on what if anything has been done in respect of remedial measures proposed by Parliament or on alternative methods preferred by them to address defective performance highlighted by Parliament.

174. In particular, the Commission supports the recommendation made in para 4.1.9 of the OVAC model - which has not yet been implemented since 2009 - that Parliament develop rules to assist it further in sanctioning Cabinet members for non-compliance after all established avenues and protocols have been exhausted, for example naming the Cabinet member by the Speaker of the NA or the Chairperson of the NCOP.

175. Also worthy of consideration by Parliament is the suggestion made by Prof Corder in his affidavit that, with the support of a majority of members of a portfolio committee, a portfolio committee could put a minister to terms in respect of remedial action, and could thereafter, through the Speaker, intercede with the President, as head of the national executive, in the event of non-compliance. The Leader of Government Business could also play a role in such a process.

The critical role of "political will"

176. Several witnesses expressed the view that an absence of political will lay at the heart of Parliament's inability to effectively hold the executive to account. For example, in his affidavit Mr Godi contended that the lack of progress in implementation of remedial measures required by SCOPA reports can be attributed to "lack of political will, within the structures of the governing party at the time, to resolve the serious problems of financial mismanagement".

177. Prof Calland argued in his submission that ". . . the political attitude and disposition of the ruling party" will determine the extent to which Parliament makes use of its oversight and accountability powers.

178. To facilitate proper oversight over the executive, the Commission is of the view that leaders of political parties should provide the political space for individual MPs to ask difficult questions without prejudice to themselves, with the assurance that their concerns will be taken seriously and properly answered.

179. In his affidavit, Mr Magashule said "On behalf of the ANC I give an unconditional undertaking that the ANC has the political will to make parliament work and to ensure effective oversight and accountability".

180. This undertaking, which Mr Mantashe reiterated in his testimony, is welcomed. However, the force of this undertaking is diminished by Mr Mantashe's testimony that the ANC has always had the political will to make Parliament work and to ensure effective oversight and accountability. The evidence simply does not sustain this view. Much of the evidence referred to above shows a marked unwillingness to exercise vigorous and effective oversight.

181. It is idle to suppose that with the wave of a magic wand the requisite political will can be created. However, party leadership clearly plays an important role.

The vital importance of sound leadership

182. Prof Calland said the following about leadership in his submission:

> Where the leaders of the political party concerned are willing to set the tone and define a set of principles of accountability that parliamentarians, including backbench members of his or her own party, can freely enjoy. Such leadership will provide the political space for individual MPs to ask difficult questions of the executive without prejudice, and in the realistic expectation that they will be taken seriously and answered by the executive branch of government.

183. The Commission agrees with this view that sound leadership facilitates proper oversight and accountability.

RESOURCES

Financial resources

184. A constant refrain in the evidence of MP's was that Parliament's budget for conducting its oversight is inadequate. The Commission was told that, out of its total budget of in excess of R2 billion, Parliament allocates R50 to 60 million to cover all the financial requirements of portfolio committees. These include costs of their regular meetings, advertisements, inviting public comment on legislation, oversight visits (including travel and accommodation costs, hall hire and refreshments), etc.

185. The OVAC model adopted by Parliament in or about 2009 also referred to the need to ensure sufficient and appropriate resourcing of committees to enable effective oversight.

186. Mr Frolick testified that, when a need was identified in 2017 for four committees to do specific oversight work, the Secretary of Parliament had to be approached for money to fund those activities, which had to be taken from other programmes which had not been implemented or not implemented in full. As he correctly observed: ". . . this is not sustainable to exercise oversight".

187. The Speaker during the fifth Parliament, Ms Mbete, addressing the question of inadequacy of parliamentary oversight in respect of allegations of state capture and corruption, said that it may have been inadequate, but that this was actually because of inadequate resources.

188. Inadequacy of financial resources is, in the Commission's view, not an adequate explanation for all the failures of parliamentary oversight; but it is nonetheless a concern. It goes without saying that, where a portfolio or other committee of Parliament needs to incur reasonable expenses to enable it to discharge its oversight obligations, sufficient money needs to be made available for this.

189. It is therefore recommended that Parliament ensures that adequate funds are allocated, particularly to portfolio committees, to enable effective parliamentary oversight.

Skills

190. The present Speaker, Ms Modise, also referred to the resource constraints but highlighted in this regard the need to capacitate MPs. The evidence seems to support the view that many MPs lack the training and skills which are essential for Parliament to discharge its oversight responsibilities effectively. This aspect should perhaps be borne in mind when candidates are being selected for party lists and when new members are inducted and prepared for the responsibilities associated with the committees to which they are allocated.

Research and technical assistance

191. Though this aspect was not investigated by the Commission – being only indirectly relevant to its TORs – it would appear from the evidence heard that, to the extent that available resources permit, it would be desirable to enhance the scale and skills of the research and technical assistance made available to portfolio committees. It is recommended that this issue be considered by Parliament.

INADEQUATE REPORTS AND PRESENTATIONS FROM DEPARTMENTS AND ENTITIES

192. Regular, timeous and proper reporting to Parliament by representatives of the executive (including SOEs and other organs of state) is essential if Parliament is to exercise proper oversight. This was recognised some years ago by the Corder report. Though considerable reporting by representatives of the executive to portfolio committees does clearly take place, it appears to the Commission that such reporting is all too often not timeous and largely inadequate.

193. It is important that, if written presentations are to be submitted, they should properly address the requirements of the committee and be submitted sufficiently long in advance of the relevant committee meetings to give the MPs enough time to read and consider the reports. The apparent frequency with which late submissions occurs makes one wonder whether it is sometimes done deliberately, precisely in order to obstruct proper oversight.

194. Parliament needs to make it clear that this type of practice will not be tolerated. It needs to ensure that consequences follow for those who, without adequate cause, make proper and timely oversight impossible. It is recommended that the Portfolio Committees must reject this culture where documents are only being made available to portfolio committees late or on the day of the presentation.

195. The Commission also recommends that Parliament should consider whether there is a need to legislate on the issue of reports by representatives of the executive to Parliament. It may be that, absent such legislation, the present sometimes unsatisfactory situation will persist.

196. An alternative might be to amend the Rules of Parliament to deal with this. However, since the objects to be achieved include placing duties on persons outside of Parliament and possibly visiting appropriate sanctions on those who are recalcitrant or unacceptably inefficient, the Commission's prima facie view is that legislation would probably be preferable to amending Parliament's rules.

MINISTERS AND OTHERS WHO FAIL TO ARRIVE AT SCHEDULED MEETINGS

197. Another refrain repeatedly heard is that far too frequently ministers and others scheduled to appear at meetings of portfolio committees fail to arrive, with or without belatedly tendered excuses.

198. President Ramaphosa admitted that, when he served as Leader of Government Business, he became aware of quite a few instances when ministers were due to attend meetings of portfolio committees and simply did not turn up. He saw it as part of his role at the time to exert pressure on ministers to fulfil their obligations.

199. Once again, it is for Parliament to make clear that absence without reason from portfolio meetings will not be tolerated and to there will be consequences for those who offend without adequate cause.

200. It has been suggested above that Parliament should consider legislating on the issue of reporting by the executive to portfolio committees. The same legislation could, if this is deemed appropriate, regulate non-appearance without adequate cause of persons scheduled to attend committee meetings.

MINISTERS WHO FAIL TO ANSWER QUESTIONS

201. Under the Rules, ministers are obliged to answer questions put to them and to do so within ten working days but the Commission heard evidence that this is frequently not happening.

202. Another complaint heard is that ministers who purport to answer questions do so evasively and in a manner which does not actually answer the substance of the question put. This appears to be a significant problem, for a minister who fails to answer the substance of a clearly put question breaches his or her constitutional obligation of accountability. Ms Mbete, the former Speaker, acknowledged the existence of this problem but adopted the stance that there was nothing the Speaker could or should do about this and that the only remedy is for the member to “ask a follow up question”.

203. If a minister is permitted to evade answering a direct question, one wonders how asking a follow up question resolves the problem? Why is there not a similar duty to the duty acknowledged above, that the Speaker and Leader of Government should ensure that the minister is “named and shamed” if he or she is unwilling to fulfil his or her obligation?

THE IMPORTANCE OF THE ROLE OF COMMITTEE CHAIRS

204. Many witnesses agreed that the role played by the chair of a portfolio committee is influential in determining the extent to which a committee succeeds or fails in its oversight mandate. It is a matter of considerable concern that not all persons appointed as committee chairs have the requisite inclinations or demonstrated capacities.

205. Traditionally, only SCOPA is chaired by an opposition MP but several witnesses suggested that chairpersons of portfolio committees should be appointed from parties represented in the NA according to a proportional formula.

206. One witness who regularly observes portfolio committees stated that, once presentations have been made to portfolio committees, “opposition party members tend to ask questions very directly, but what happened here, why is this not here?” By contrast when ruling party MPs get their chance “it is inevitably, you have done so well and only the good side and I really have to praise you for this”.

207. It is recommended that Parliament should consider whether representatives of opposition parties should be appointed as chairs of portfolio committees.

IMPLEMENTATION OF OTHER PROPOSALS MADE IN THE CORDER REPORT AND OVAC MODEL

208. There was widespread agreement from witnesses that the recommendations in the Corder report should be given serious reconsideration. The Commission also agrees that Parliament should consider the Corder recommendations, but also the other recommendations made.

209. The same applies to those parts of the OVAC model that have not yet been adopted. That would include the establishment of an Oversight and Advisory Section, development of rules to assist Parliament "further in sanctioning Cabinet members for non-compliance after all established existing avenues and protocols have been exhausted and ensuring sufficient and appropriate resourcing and capacity to develop specialised committees to deal with issues that cut across departments and ministries".

PARLIAMENT'S ROLE IN APPOINTMENT PROCESSES

210. Corruption Watch made a submission to the Commission dealing with the appointment processes of leaders of key institutions, with recommendations in relation to parliamentary appointment processes. It referred to evidence which had been submitted to this Commission and other recently established commissions of inquiry highlighting how the appointments of certain compromised persons to prominent leadership positions within the criminal justice system led to the manipulation of these agencies and to the harmful effects of these politically motivated appointments. It noted Judge Nugent's proposal for an open, transparent and apolitical selection process for the SARS commissioner to ensure that the best possible candidate is selected for that position; and noted that this is not dissimilar to the process taken by the Judicial Services Commission (JSC).

211. After describing the processes followed in the appointment of a Public Protector and regarding renewal of an IPID executive director's term, it asserted that there is a need for selection processes to be amended. In summary, it suggested a review of the necessary legislation to ensure that it provides guidance on fair and objective appointment processes, the development of multi-stakeholder structures to oversee the appointment proceedings, ensure that all parliamentary selection processes are transparent and open, and that candidates must be tested for integrity and ethics as well as their skills and expertise, using clear, merit-based, and objective criteria.

212. The commission endorses these recommendations, which are spelt out in more detail both in the Corruption Watch submission and in the testimony of its executive director, Mr David Lewis. It is recommended that Parliament consider whether it is desirable to amend its rules to give effect to the proposals by Corruption Watch on appointments by Parliament.

CONCLUSIONS

213. In what follows the Commission summarises many of the primary findings made by it above. The Commission essentially concerned itself with determining whether state capture, corruption or fraud occurred in the public sector, the nature and scale thereof and who participated in this. To make recommendations to prevent similar problems in the future, there is a need to explain why it became so entrenched and persistent over an extended period and to establish why institutions tasked to detect or address these maladies may not have been so effective as one would have hoped. Amongst these institutions is Parliament.

214. Parliament has a constitutional duty to exercise oversight over the executive branch of government, including organs of state such as SOEs. The executive is accountable to Parliament.

215. Key to the performance of parliamentary oversight over the executive in South Africa is the institution of the portfolio committee.

216. Despite room for improvement, parliamentary committees have, throughout the period of concern to the Commission, enjoyed the essential powers required to exercise oversight over the executive and SOEs and to hold them accountable.

217. Since 1994, the ANC has enjoyed majority representation in Parliament and this has influenced the practical implementation of parliamentary oversight, throughout the democratic era, and the stance adopted by the ANC towards every structure of Parliament, including the NA, as well as portfolio, joint, and ad hoc committees.

218. The official stance of the ANC, according to conference resolutions and statements, has been to encourage vigorous parliamentary oversight but this has all too often not been reflected by the ANC's representatives' conduct in practice.

219. Parliament is not obliged to investigate or enquire into every allegation of public-sector corruption or every allegation of malfeasance within the executive, particularly where the evidence available is scant. Parliament's duty to exercise oversight over the executive and to hold it to account does, however, include a duty to investigate where there is reasonable cause to suspect unconstitutional, unlawful or improper conduct on the part of a senior representative of the executive.

220. The same applies where there is reasonable cause to suspect a failure by a senior representative of the executive to ensure that other persons reasonably suspected of such conduct are not themselves being appropriately dealt with. The oath of office by every MP to "respect and uphold the Constitution and all other law of the Republic" requires nothing less.

221. Allegations of state capture and/or of improper influence by the Gupta brothers have long been in the public domain. It is therefore unacceptable that MPs did not yet have sufficient cause to probe the veracity of the allegations of improper Gupta influence by 2013, at the latest.

222. Widely publicised allegations of state capture came to a head in early 2016; but the ANC was unwilling to support requests by opposition parties for a portfolio or an ad hoc committee to inquire into these allegations.

223. The fact that the allegations had been referred to the SAPS or chapter 9 institutions does not excuse Parliament's inaction. The issue were serious and plausible allegations which, if found to be substantiated, revealed a threat to our constitutional democracy. The exclusive reliance on other agencies to investigate the allegations of state capture at the time was not consistent with Parliament's constitutional responsibilities.

224. Another turning point was reached with the publication in the press of what were claimed to be a voluminous set of Gupta-linked emails (the so-called "Gupta leaks"). It was asserted, by some, that these emails substantiated allegations of state capture which had long been in the public domain.

225. On or about 15 June 2017 Mr Cedric Frolick, the House Chairperson of Committees, addressed letters to the chairpersons of four portfolio committees, namely the Portfolio Committees on Public Enterprises ("PCPE"), Transport ("PCT", in relation to PRASA), Home Affairs ("PCHA") and Mineral Resources ("PCMR"), calling on them to investigate allegations of state capture that had appeared in the media recently and report their findings to the NA as matter of urgency.

226. Up to this time, the ANC as an organisation has been unwilling to initiate or to support a parliamentary inquiry or inquiries into the allegations concerned. The allegations implicated senior ANC leaders, right up to the President, as well as others regarded by the ANC as its cadres and deployees but the leadership of the ANC was unwilling to expose the allegations of malfeasance to public scrutiny.

227. The ANC has been divided between those allegedly implicated together with their supporters, on the one hand, and those who would be more inclined to support proper parliamentary oversight but who lacked sufficient support within party structures, on the other hand. Those who supported proper parliamentary investigation of the allegations may, not unreasonably, have feared the personal and political consequences to them if they should deviate from the "party line".

228. The decision to implement portfolio committees to investigate allegations of state capture must have been preceded by, or at least endorsed by, a decision of the ANC's Political Committee. In regard to President Ramaphosa's evidence that the delay in Parliament's decision to institute inquiries into allegations of state capture was attributable to the balance of power within the ANC, then this implies that the balance of power initially favoured those in the ANC who did not want such inquiries to be held and that there was a change in the balance of power in the ANC in 2017. While the Gupta leaks may have been an important factor in the shift in the balance of power, another important factor was probably knowledge of the elective conference in which a new president of the organisation would be elected.

229. The struggle to support or suppress parliamentary inquiries and effective oversight over the executive in respect of allegations of state capture or corruption continued after mid-2017. This is demonstrated by the way in which the four committees to whose chairs Mr Frolick addressed his letters dealt with his requests.

230. In short:

    230.1 The Portfolio Committee on Public Enterprises showed courage and determination and managed to conduct an effective enquiry into the allegations relating to Eskom. Because of the time taken by its Eskom enquiry and the establishment of the present Commission, its inquiry did not, as it had intended, reach the issues relating to Transnet and Denel.

    230.2 The Portfolio Committee on Transport failed to conduct any inquiry and may not even have been informed by its chairperson of Mr Frolick's letter.

    230.3 The Portfolio Committee on Mineral Resources failed to hold an adequate inquiry, initially due to evasive conduct on the part of Minister Zwane and thereafter because of (i) a failure to provide required resources when the committee finally decided that it wanted to hold a formal inquiry; and (ii) the establishment of the present Commission.

    230.4 The Portfolio Committee on Home Affairs did not demonstrate much willingness to proceed with due expedition. Although it did ultimately conduct an effective enquiry, it acted far too slowly.

231. Similar failures to exercise adequate oversight took place from 2006 onwards in respect of allegations of corruption on the part of companies in the Bosasa group of companies and the DCS. There is evidence that a minister and the chief whip placed the chair of the PCCS under pressure not to scrutinise these allegations. There is also evidence that Bosasa paid bribes to members of the PCCS (Mr Vincent Smith, Ms Winnie Ngwenya and Mr VV Magagula) and Mr C Frolick, all with a view to avoiding proper parliamentary scrutiny of Bosasa.

232. Party discipline is a legitimate and indispensable feature of our party-based democratic system. But there can be a tension between party discipline and the oversight obligations of MPs under the Constitution.

233. Having regard to the applicable provisions of the Constitution and relevant judgments of the Constitutional Court, the Commission is of the view that:

    233.1 Corruption is the antithesis of the Constitutional values that every MP takes an oath or solemn affirmation to uphold. So too is conduct which may be described as "state capture".

    233.2 Promoting, facilitating, or conniving with corruption or state capture cannot be a lawfully adopted policy of a political party.

    233.3 It follows that party discipline may not legitimately be directed at obstructing MPs from doing what they believe, in good faith and on reasonable grounds, to be appropriate to address concerns as to allegations of corruption or state capture.

    233.4 It is also unacceptable for a minister or fellow party members to castigate a MP for attempting to hold a minister to account, or for asking difficult questions of persons regarded as comrades or deployees of the same party.

    233.5 It is inappropriate for a party caucus to resolve not to permit, or to discourage, conduct amounting to legitimate parliamentary oversight over the executive.

    233.6 It is also inappropriate for MPs not to enquire into allegations of misconduct for which there appears to be plausible evidence, on the basis that it could cause embarrassment to, or divisions within, a political party.

234. However, even where the will to oversee the executive existed, parliamentary oversight was often ineffective. This is illustrated by the Parliament's ineffectiveness in addressing the staggering annual increases in irregular expenditure on the part of Prasa in 2014 to 2018, which were disclosed to the SCOPA and to the PCT. Although SCOPA made repeated recommendations to address the problem

of increasing irregular expenditure (both within Prasa and elsewhere), the executive all too frequently failed to implement such recommendations.

235. The failure of the executive to implement recommendations in parliamentary reports seems to be attributable to a lack of political will to address the problems identified. That Parliament failed to compel the executive to address the problems identified in its reports suggests a similar lack of political will on its part.

236. Broadly speaking, the JSCI cannot be criticised for how they reported to Parliament on the conflict which arose between the IGI, Dr S Dintwe and the then DG of the SSA, Mr A. Fraser. However, the JSCI was made aware of allegedly criminal conduct within the intelligence services and prima facie appears to have failed to ensure that adequate steps were taken to address this timeously.

237. A balance must be found between the need to protect national security and the need to hold the intelligence services accountable. But the JSCI cannot properly adopt a supine attitude and defer to whatever may be decided as regards the security services by the accounting officer or minister.

238. The annual reports to Parliament during the Fifth Parliament did very little to alert Parliament to malfeasance within the intelligence services of the type and degree revealed to the Commission and revealed in the IGI's reports to the JSCI. If, in the JSCI's judgement, the relevant accounting officer or minister is acting unconstitutionally or unlawfully or is not taking effective steps to address such conduct, the JSCI is not only entitled to alert Parliament of this; it is under a duty to do so.

239. The criticisms expressed by the Commission should not be construed as any more than prima facie views, based on what is recognised by it as being insufficient evidence on which to base a reliable conclusion. However, the available evidence to it gives it no reasons to reject the conclusion reached by the High-Level Review Panel that the JSCI was ineffective and dysfunctional.

240. One of the primary practical problems to which various witnesses drew attention was the absence of any parliamentary system to "track and monitor" implementation or non-implementation by the executive of corrective action proposed in reports adopted by Parliament. The Commission recommends implementing such a system as a matter of priority.

241. To facilitate proper oversight over the executive, the Commission believes that leaders of political parties should provide the political space for individual MPs to ask difficult questions without prejudice to themselves, with the assurance that their concerns will be taken seriously and properly answered.

242. Inadequacy of financial resources is, in the Commission's view, not an adequate explanation for all the failures of parliamentary oversight noted, but it is nonetheless a concern.

243. Presentations to portfolio committees are often submitted late, or often frequently at the time of the very same meeting at which they are then presented. This makes it impossible for the MPs to read and consider the reports and is clearly unsatisfactory. The apparent frequency with which this occurs makes one wonder whether it is done deliberately, precisely to obstruct proper oversight.

FLOW OF FUNDS

PART A: PUBLIC FUNDS DIVERTED TO THE GUPTA ENTERPRISE

INTRODUCTION

1. From at least 2011 onwards, government departments and SOE's were targeted for capture by the Gupta Enterprise. This led to the awarding of a vast array of contracts and the payment of billions of rand to entities paying kickbacks to, or controlled by, the Gupta Enterprise. This chapter details the flow of funds from SOE's or government departments in this regard.

THE CAPTURE OF PROVINCIAL GOVERNMENT IN THE FREE STATE

2. In the earliest phase of state capture, the Gupta Enterprise operated according to a crude modus operandi, namely, to work with officials to generate projects from which the Gupta Enterprise would directly steal funds that were directed to the Gupta's offshore network. This model was used most notably in the provincial governments of the Free State and North-West Province.

The Free State Government contract with Nulane Investments

3. On 31 October 2011, the Free State Department of Agriculture and Rural Development entered into a contract with Nulane Management Services.
4. The contract was irregularly awarded without any competitive bidding process and appears to have been designed primarily as a device to funnel Free State public funds into the Gupta Enterprise.
5. Nulane was paid R24,984,240 by the Free State Department of Agriculture. The only apparent deliverable work provided by Nulane to the Free State Department of Agriculture in respect of this contract appears to have been performed by Deloitte who concluded a subcontract with Nulane to provide consulting services on the core topics covered by the project.
6. Deloitte received an amount of R1 538 547 from Nulane in relation to the Free State project. Nulane thus earned a profit of R23 445 693 on the contract.
7. Mr Holden shows that after being received by Nulane, R21 300 000 of the R23 445 693 profit was laundered through several companies controlled by the Gupta family before being expatriated to the Dubai Gupta family company, Gateway Limited in Nulane payments of $1 067 500 and $1 227 500 on received aggregate amounts of Nulane made on 3 and 7 July 2012 respectively.

The Free State Government and the Estina / Vrede Dairy Project

8. A separate chapter of this report addresses the irregularities relating to the Estina / Vrede Dairy Project and the payment of hundreds of millions of Free State government funds to the Gupta enterprise under cover of that project.
9. For present purposes it noted merely that of the total amount of R287 220 534.88 in payments from the Free State government to Estina aggregating to R280 202 653.00 and accumulated interest on these payments.
    9.1 R229 038 271.82 was transferred to Gateway and Vargafield, two companies forming part of the Gupta enterprise.
    9.2 A further R34 563 580.12 was transferred to SARS to settle Estina's VAT obligations.
    9.3 A mere R21 746 697.18 was transferred to accounts or recipients other than SARS, Gateway and Vargafield. Many of these transfers, moreover, were made as salary or other payments to individuals closely associated with the Gupta enterprise such as Messrs Kamal Vasram and Chandrama Prasad.

The Free State Government and the purchase of laptops from Sunbay Trading

10. The contract concluded by the Free State Government with Sunbay Trading was another contract irregularly concluded with a Gupta enterprise company.
11. As part of a "laptops for bursaries" program announced in Premier Ace Magashule's State of the Province address in March 2012, the Free State government ordered laptops from Sunbay Trading for distribution to learners. Sunbay Trading was nominally controlled by Mr Kamal Vasram, who also nominally controlled Estina.

12. The laptops for bursaries program was directed out of the Office of the Premier where Mr Ashok Narayan was an advisor to Premier Magashule, and, to the knowledge of the parties driving the program in the Premier's Office, actively involved on the Sunbay Trading side of the contract with the Free State.

13. While Sunbay Trading was the contracting party, the actual supplier of laptops was Sahara Computers. The price paid per laptop by the Free State government was considerably more than Sahara's standard retail price.

14. Sunbay Trading was paid R28 500 000.00 by the Free State Department of Education in 3 payments in September 2012. It was paid a further R4 578 810.00 by the Free State Office of the Premier on 28 May 2014.

15. Sunbay Trading's bank records reflect that it received no other large inward payments from other suppliers following these payments, nor was the account properly active from its opening on the 29th of June 2011 until the first Free State government payment on the 6th of September 2012.

16. Of the R33 078 810.00 paid to Sunbay Trading by the Free State government, R32 211 030.00 was paid to Sahara Computers.

Contracts placed with Dinovert / Cureva / Mediosa

17. Dinovert (Pty) Ltd was a Gupta enterprise company that was incorporated on 13 March 2015, and changed its name to Cureva in September 2015 before changing it again to Mediosa in late 2017.

18. With the assistance of Mr Ashok Narayan and Mr Tony Gupta, Dinovert / Cureva / Mediosa appears to have been irregularly awarded contracts to provide mobile medical services to the Free State and North West Provincial Governments at inflated prices.

19. Dinovert / Cureva / Mediosa was paid R25 111 188.00 by the Free State Department of Health and R30 000 000.00 by the North West Province's Department of Health.

20. Cureva paid aggregate amounts of R15 960 000.00 and R1 000 000.00 respectively to the Gupta enterprise laundry vehicles Shacob Commerce and Albatime. It also made aggregate payments of R1 556 561 49 to the Gupta enterprise company Sechaba Computers and paid Mr Kuben Moodley, the sole director of Albatime, R1 538 948.00.

The Free State contracts with Tsebo Business Intelligence Services and Pygma Consulting

21. Following a recommendation made by the Free State Department of Agriculture and Rural Development Bid Evaluation Committee at its meeting of 8 June 2012, the Department awarded a contract to Tsebo Business Intelligence Services (Tsebo) to provide engineering services to the Department.

22. The award of the contract to Tsebo was manifestly irregular because the Bid Evaluation Committee scored Sebogo Maloka and Viljoen Civil Engineers (Pty) Ltd considerably higher than Tsebo, but decided nevertheless to award the contract to Tsebo "as that is what the Department requires".

23. In total, Tsebo Business Intelligence was paid R12 492 500.00 in relation to this contract out of which it transferred a total of R9 390 350.89 to Innova Management Services.

24. Innova Management Solutions ("Innova") was owned by Ms Chwayita Mabude who was an Eskom board member from 2011 to 2017 and whose conduct in that capacity is discussed in the Eskom Chapter of this report. Innova appears to have been managed by Mr Salim Essa and Mr Ashok Narayan. Thus, Mr Narayan used the email address innova.management2012@gmail.com and the Free State Department of Tourism and Economic Affairs treated Mr Essa as Innova's representative.

25. At the same meeting of 8 June 2012, the Free State Department of Department of Agriculture and Rural Development Bid Evaluation Committee also awarded a bid to Pygma Consulting. This bid was to assist the Department in relation to the rollout of broadband internet across the Free State Province.

26. The Department of Agriculture had no budget for the roll-out of broadband in the Free State which would not ordinarily have fallen within its mandate. So, it ended up having to fund the Pygma Consulting contract by means of a budget allocated to its Mohoma Mobung project which appears to have functioned as a slush fund for payments to the Gupta enterprise.

27. There is no evidence that Pygma was party to, or aware of, any irregularity in the award of the Free State contract to it. However, after Pygma received its letter of appointment, Mr Narayan, ostensibly in his capacity as advisor to the Premier, convened meetings between Pygma and the Free State government at which Pygma was persuaded to conclude a sub-contract with Innova.

28. Pygma was paid a total of R2,487,480 by the Free State Department of Agriculture of which R1,271,920 was paid on to Innova Management Services under the subcontract that Pygma had been pressurised to sign.

29. Innova laundered on to Aerohaven, a Gupta enterprise company, R8,900,000.00 of the payments made to it by Pygma and Tsebo.

30. On 15 November 2013, Aerohaven Trading returned the R8 900 000 into Innova's account by means of bank transfer. The payment commingled with a deposit of R1 052 631.58 paid in by Tsebo on 3 October 2013. Later on 15 November 2013, Innova transferred R9 756 500.00 ($950 000.00) to Gateway Limited, the Gupta enterprise entity in Dubai.

31. Of the amounts transferred by Tsebo and Pygma to Innova that were not paid to Aerohaven/Gateway, R470 000.00 was paid by Innova to Mr Tau Mahumapelo, then North West Premier Supra Mahumapelo's younger brother of who was elevated by Minister Lynne Brown to the Denel Board in July 2015.

The Free State contract with Innova

32. In 2014, the Free State Department of Economic Development, Tourism and Environmental Affairs awarded Innova a contract with a total value of R6 972 395.04.

33. Of the R6 972 395.04 paid to Innova under this contract, an aggregate amount of R6 384 000 was immediately paid by Innova to Homix, a primary Gupta enterprise laundering vehicle.

TRANSNET CONTRACTS AND OFFSHORE KICKBACKS

34. The Gupta enterprise received kickbacks that were paid offshore in respect of at least six major contracts:

    34.1 The ZPMC cranes contract in respect of which kickbacks were paid to JJ Trading

    34.2 The Liebherr cranes contract in respect of which kickbacks were paid to Accurate Investments; and

    34.3 The four Chinese locomotive contracts in respect of which kickbacks were paid to JJ Trading, Century General Trading, Regiments Asia and Tequesta:

        34.3.1 The China South Rail 95 locomotives contract

        34.3.2 The China South Rail 100 locomotives contract

        34.3.3 The China South Rail 359 locomotives contract; and

        34.3.4 The China North Rail 232 locomotives contract.

35. Apart from the offshore kickbacks paid in respect of the China North Rail 232 locomotives contract, kickbacks aggregating to R76 586 903.16 were paid inside South Africa by China North Rail to Business Expansion Structured Services. These kickbacks were for the contract concluded by Transnet and China North Rail to relocate the local workshops on the 232 locomotives contract to Durban. CRRC (the entity into which China South Rail and China North Rail merged) also paid kickbacks

aggregating to R7 892 226.77 inside South Africa to the Gupta enterprise laundry vehicle, Fortime Consultants.

36. The irregularities in all of the Transnet locomotive and crane contracts are discussed elsewhere in this Report. For present purposes we merely record that Transnet paid a total amount of R28 046 227 991.66 in respect of these contracts, made up as follows:

Contract	**Total amount (ZAR)**
95 Locomotives (CSR)	3 432 869 565.21
232 Locomotives all-in cost incl. Durban relocation (CNR)	2 823 869 773.71
100 Locomotives all-in cost (CSR)	5 159 831 654.92
359 Locomotives all-in cost (CSR)	14 910 751 921.66
Sub-total: Locomotive contracts	**26 327 322 915.50**
Liebherr crane contract	841 098 842.64
ZPMC crane contract	877 806 234.00
TOTAL	**28 046 227 991.66**

37. Over and above the R76 586 903.16 paid inside South Africa by China North Rail to Business Expansion Structured Services and the R7 892 226.77 paid to Fortime Consulting by CRRC, Holden calculates that an aggregate amount of R7 305 156 943.30 was paid to the Gupta enterprise in offshore kickbacks on these Transnet contracts, made up as follows:

Project	**Kickback amount (ZAR)**
Purchase of Liebherr Cranes	26 586 799.49
Purchase of ZPMC Cranes	33 379 031.04
95, 100, 359, 232 Locomotive procurements including maintenance contracts: Payments confirmed by primary documentation	3 400 558 016.24
CNR relocation contract	76 586 903.13
95, 100, 359, 232 Locomotive procurements including maintenance contracts: Suspected further kickbacks	3 768 046 193.40
TOTAL	**7 305 156 943.30**

REGIMENTS CONTRACTS AND PAYMENT OF KICKBACKS

38. In 2012, the Regiments group of companies concluded an arrangement with Issar Capital, the then company of Mr Iqbal Sharma and Mr Essa in terms of which Regiments would pay substantial kickbacks to Issar in return for Messrs Sharma and Essa's assistance in securing Regiments' appointments to contracts with organs of state. Issar was ultimately sold to the Gupta family company Islandsite for the nominal amount of R100 and it appears that the arrangement with Issar was a vehicle for the Gupta enterprise to take substantial kickbacks on contracts that they procured for Regiments with organs of state.

39. Pursuant to this original arrangement:

    39.1 Regiments went on to pay laundry vehicles nominated by Mr Essa or Mr Narayan "business development" fees in the form of commissions ranging between 50% and 95% on payments made to it by organs of state who had apparently been influenced by the Gupta enterprise to appoint Regiments; and

    39.2 Regiments also paid much smaller commission on these payments (between 1% and 5%) to Albatime, the company of Mr Kuben Moodley who had introduced Regiments to Messrs Essa and Sharma.

40. This arrangement was plainly unlawful from the beginning.

41. There are no legitimate "business development" services that could justify commissions of 50% and

more for assistance to obtain appointments by organs of state who are constitutionally bound to make those appointments on the basis of procurement systems that are "fair, equitable, transparent, competitive and cost-effective."

42. Furthermore, many of the original "opportunities" identified by Issar and Regiments were appointments to be made by Transnet where Mr Sharma chaired the Board Acquisitions and Disposals Committee, and the bulk of the fees ultimately extracted by Regiment out of this kickback arrangement were fees paid by Transnet. So Issar was, for the most part, selling Mr Sharma's influence over Transnet procurement.

43. Pursuant to the kickback arrangement that it originally concluded with Messrs Essa and Sharma in 2012, Regiments ultimately was paid aggregate amounts of R1 303 272 979.09 in fees paid by various organs of state and amounts misappropriated from the Transnet Second Defined Benefit Fund by Regiments Fund Managers. Holden provides full details of the payments by these organs of state to Regiments and the onward kickbacks aggregating to R666 364 807.09 from Regiments to laundry vehicles nominated by Messrs Essa and Narayan and to Albatime. For present purposes, the Commission merely documents the aggregate amounts paid to Regiments by each organ of state in the contracts governed by these kickbacks:

SOE	**Amount (ZAR)**
Transnet	1 023 161 529.89
Transnet Defined Benefit Pension Fund (amounts misappropriated by Regiments Fund Managers and paid to Regiments Securities)	248 729 210.00
SA Airways	6 241 500.00
SA Express	8 218 123.20
Free State Provident Fund	2 319 216.00
SAFCOL	6 623 400.00
Denel	7 980 000.00
TOTAL	**1 303 272 979.09**

TRILLIAN CONTRACTS WITH ORGANS OF STATE

44. With effect from 1 March 2016, Mr Eric Wood left Regiments to join Trillian with Mr Essa. Mr Wood took with him to Trillian the Transnet, Eskom and SA Express advisory mandates which had been procured through the unlawful kickback arrangement originally concluded with Messrs Sharma and Essa in 2012. On his own version, the then Group CFO of Transnet, Mr Gary Pita met Mr Essa at the Gupta compound in Saxonwold to discuss the cession of Transnet's Regiments contracts to Trillian. Trillian continued to pay kickbacks in respect of these contracts to laundry vehicles nominated by Mr Narayan.

45. In addition, Mr Essa and Trillian used the Gupta enterprise's influence over Transnet and Eskom to secure Trillian new contracts with the two SOEs. Details of the irregularity of these contracts are traversed in the respective volumes of the Commission's Report dealing with Transnet and Eskom.

46. Trillian ultimately secured an aggregate amount of R935 319 263.28 in fees from Transnet, Eskom and SA Express and amounts misappropriated by Regiments Fund Managers from the Transnet Second Defined Benefit Fund. Holden provides full details of the payments by these organs of state to Trillian and the onward kickbacks aggregating to R192 649 514.00 from Trillian to laundry vehicles nominated by Essa and Narayan and to Albatime. For present purposes, the Commission merely documents the aggregate amounts paid to Regiments by each organ of state in the contracts governed by these kickbacks:

SOE	Amount (ZAR)
Eskom	595 228 913.29
Transnet (net total)	169 859 999.91
Transnet Defined Benefit Pension Fund	185 530 350.08 (included in the 228 983 985 misappropriated by Regiments Fund Managers)
SA Express	5 700 000.00
TOTAL	**956 319 263.28**

PAYMENTS MADE TO MCKINSEY

47. Pursuant to the kickback arrangement originally reached between Regiments and Issar Capital, Regiments and Trillian secured considerable work as a partner to McKinsey in contracts with Transnet and Eskom in a succession of contracts awarded to McKinsey without any competitive process.

48. The McKinsey partner, Mr Vikas Sagar, appears to have been aware of the impropriety linked to Regiments and Trillian's appointments at Eskom and Transnet. Mr Sagar had a longstanding relationship with Mr Sharma and was dealing with Mr Essa in relation to McKinsey fees and contracts at Transnet as early as February 2014. Mr Sagar met regularly with Mr Essa from 2014 to 2016 and dealt directly with Mr Essa in November 2015 in relation to the proposed McKinsey appointment at Eskom for the MSA contract. Other irregularities in McKinsey's appointments at Transnet and Eskom are discussed in detail in the Transnet and Eskom chapters of this report.

49. A Regiments / McKinsey consortium secured a contract at SAA through the corrupt relationship between Mr Wood and Mr Phetolo Ramosebudi who was the then SAA Treasurer although the Commission could find no evidence that McKinsey, as opposed to Regiments, was aware of this corrupt relationship.

50. In total, McKinsey was paid R1 898 695 074.26 with regards to contracts shared with Regiments or Trillian and tainted by state capture, as set out below:

SOE	Amount (ZAR)
Eskom	1 108 164 558.26
Transnet	784 287 306.00
SAA	6 243 210.00
TOTAL	**1 898 695 074.26**

51. After being informed by the Commission of the irregularities underlying its Transnet and SAA contracts, McKinsey undertook to repay these amount in full to the two SOEs and has now done so. It had previously repaid the full amount of the fees it was paid by Eskom. McKinsey is the only beneficiary of contracts tainted by state capture to have taken this position. It is to be commended for doing so.

THE T-SYSTEMS CONTRACTS WITH TRANSNET AND ESKOM

52. On 19 December 2009, T-Systems and Transnet concluded a contract for the provision by T-Systems of IT equipment and data services to Transnet for a period of 5 years. The contract provided for Transnet to have a two year right of renewal. T-Systems appears to have used Gupta enterprise connections to secure its position at Transnet and to more than double the term and value of its MSA contract.

53. Over the period August 2012 until mid-July 2015 T-Systems paid an aggregate amount of R3 051 639.21 to Zestilor, the company of Ms Zeenat Osmany who is married to Mr Essa. This amount was paid in made regular monthly payments of R81 830.91.

54. T-Systems relationship with Mr Essa and Zestilor was cemented when T-Systems ceded to Zestilor the equipment sale and rental elements of the MSA with effect from 19 May 2015 after Transnet agreed to extend the MSA for the full two years allowed for extension under the MSA. The cession agreement between T-Systems and Zestilor was concluded on 1 December 2014, less than a month before the original term of the T-Systems MSA would have expired. Pursuant to the cession, Zestilor was paid aggregate amounts of R13 407 883.18 directly by Transnet and R222 839 809.93 by Innovent Rental and Asset Management Solutions, a SASFIN subsidiary to which it on-ceded the agreement in mid-2015 when it experienced difficulties delivering on the obligations to Transnet which it had taken over from T-Systems.

55. In November 2015 Transnet initiated a new procurement process to replace the MSA. As the procurement process dragged on, the MSA was extended with a succession of short term extensions. In February 2017, Transnet resolved to re-appoint T-Systems despite the fact that Gijima had submitted a higher ranked bid at a substantially lower price than T-Systems. The manifest irregularity of the Transnet decision is discussed in detail elsewhere in this Report.

56. During the period in which T-Systems derived income from the extension of its contract with Transnet, it not only ceded the equipment sales and rentals business to Zestilor, but also facilitated the diversion of Transnet funds to the Gupta enterprise Sechaba, the Gupta family company which was appointed as T-Systems' supplier development partner. In total T-Systems transferred R323 413 332.51 to Sechaba between February 2015 and December 2017.

57. Transnet rewarded T-Systems for its new relationship with the Gupta enterprise, not only by extending the term of the T-Systems MSA, but also by dramatically increasing the value of the payments made under the MSA. In the five years of the original term of the MSA, Transnet made MSA payments to T-Systems in the aggregate amount of R1 317 043 801.63. In the two-year extension of the MSA from 1 January 2015 to 31 December 2016, Transnet made MSA payments to T-Systems which aggregated to R1 533 626 953.39, almost 3 times as much in annual payments as it had made in the original term of the MSA, despite the fact that from May 2015 the T-Systems MSA turnover no longer included any equipment rental or sale business because that had been ceded to Zestilor. This trend continued over the additional extensions of the MSA until its termination in December 2018. So in the four years of extensions of the MSA from January 2015 to December 2018, T-Systems received aggregate payments of R3 213 333 995.83 from Transnet.

58. At Eskom, T-Systems exploited its relationship with the Gupta enterprise to even greater effect. Events at Eskom followed a pattern strikingly similar to those at Transnet.

59. On 10 November 2009, the Eskom Board Tender Committee approved the award to T-Systems of five year MSA from January 2000 to December 2014 for an amount of R2 575 642 000.00 exclusive of VAT (R2 936 231 880.00 inclusive of VAT).

60. The MSA was ultimately modified and extended repeatedly so that the total amount Eskom paid T-Systems under the MSA rose to R7 805 558 985.49. In the period 2014 to 2019, Eskom repeatedly cancelled the RFPs that it had issued to replace the T-Systems MSA and the T-Systems contract was renewed five times.

61. These extraordinary extensions and modifications of the MSA took place notwithstanding the fact that Eskom repeatedly decided not to extend the MSA beyond its original 5-year term and twice notified T-Systems of this fact.

62. The payment of just under R8 billion to T-Systems on a contract which had been awarded pursuant to an open tender process for an amount of less than R3 billion was, on its own terms, irregular. However, the irregularity went much further. An internal T-Systems Group compliance report dated 24 June 2015 shows that T-Systems flouted their own internal rules informally to engage Salim Essa as a consultant inter alia because T-Systems recognised that he "has a strong network to Eskom officials and its stakeholders". The informal engagement of Salim Essa occurred after T-Systems had taken advice on its exposure under the Prevention and Combating of Corrupt Activities Act 12 of 2004 and "decided not to formally engage with S.E. [Essa] as a sales agent but to informally use his

network".

63. The "informal" use of Mr Essa's network appears to have involved the T-Systems' payments to Zestilor and subcontract with Sechaba that have been mentioned above and that straddled both the Eskom and Transnet contracts. It also involved T-Systems' cession of part of its contract back to Eskom so that Eskom could contract directly with T-System's service providers in respect of Wide Area Network services. Through this device, Eskom paid Zestilor an amount of R2 490 484.50 over the period 2015 to 2018.

THE SAP CONTRACTS WITH TRANSNET AND ESKOM

64. Transnet and Eskom awarded Systems Applications Products (SAP) for contracts for which SAP paid kickbacks in the form of sales commission fees to Gupta enterprise companies, Global Softech Solutions and Cad House. The total contract value of these four contracts was R790 616 247.45.

65. The first contract was awarded to SAP on the 27th of December 2014 by Transnet. SAP South Africa were contracted to deliver services related to a Software License and Support Agreement. The total value of the contract (excluding annual support fees) was R98 132 000 plus VAT (R111 870 480.00) against which a VAT exclusive Transnet credit of R33,132,000 was set off leaving an amount of R74 100 000 to be paid (R65 million plus VAT). On 23 June 2015, SAP South Africa paid Global Softech Solutions R7 410 000 – a 10% commission on the payment made by Transnet.

66. The second contract was awarded to SAP on 30 September 2015 by Transnet. SAP South Africa were contracted to deliver services related to a Software License and Support Agreement related to Hybris and Remix software. The total contract value (excluding annual support fees) was R114 012 644.88 inclusive of VAT and was paid by Transnet on 1 April 2016.

67. The third contract was awarded to SAP on 31st of March 2016 by Eskom. SAP South Africa were contracted to deliver services related to a Software License and Support Agreement. The total contract value (excluding annual support fees) was R70 158 284.70 and was paid by Eskom on 17 June 2016.

68. The fourth contract was awarded to SAP on the 25th of November 2016 by Eskom. SAP South Africa was contracted to deliver services related to a Software License and Support Agreement. The total contract value (excluding maintenance) was R494 574 837.87 and was paid by Eskom on 23 December 2016.

69. On the second to fourth contracts, SAP paid CAD House aggregate amounts of R99 924 993.94 in sales commission payments over the period 8 April 2016 to 28 December 2016.

CONTRACTS AWARDED BY ESKOM AND TRANSNET TO NKONKI

70. In 2016, Trillian acquired the auditing firm Nkonki. In the same period, Nkonki was appointed as supplier development partner to a series of contracts at Eskom in which the primary partner was Deloitte, KPMG or PWC. All of these contracts were irregular.

71. Deloitte have acknowledged as much in respect of Eskom task orders SM002 and SM004 on which Deloitte engaged Nkonki as a subcontractor and have agreed to repay Eskom R150 million from the R207,716,243.80 fees paid to them on the relevant contracts.

72. PWC's Eskom contract with Nkonki was the "Capital Scrubbing" contract. PWC's engagement of Nkonki on the Eskom Capital Scrubbing contract followed an unsuccessful attempt in September 2016 by Trillian to partner directly with PWC. Eskom allowed Nkonki to be considered for partnering with PWC despite the fact that Nkonki had not met the requirements for Eskom's Panel B – the pool from which partner firms previously were to be drawn. It appears that Eskom constituted a Panel C specifically to accommodate the position of Nkonki. Eskom then concluded a "risk based" contract with the PWC Nkonki consortium. This was irregular because Eskom had not obtained the necessary

Treasury approval for such a contract but Eskom misrepresented to PWC that it had obtained the necessary Treasury approval.

73. KPMG's Eskom contract with Nkonki was in respect of task order SM008. The process for task order SM008 was manifestly irregular and appears to have been designed to ensure that 40% of the value of the contract would be allocated to Nkonki. KPMG ended up submitting proposals for this Task Order four times as the requirements kept on changing. KPMG was appointed on the basis of its fourth submission which proposed subcontracting to four different subcontractors, Nkonki who (as pointed out above) had failed to qualify for Eskom's Panel B and three other subcontractors who had qualified for Eskom's Panel B. After being appointed KPMG were told by Eskom that they could subcontract only to subcontractors on Eskom's Panel C. This effectively ensured that the full 40% value for subcontractors was subcontracted by KPMG to Nkonki.

74. Aggregate amounts of R85 447 833.60 were paid to Nkonki by Deloitte, KPMG, PWC and Eskom in relation to these contracts:

Period	**Lead auditing firm**	**Value (ZAR)**
Jan to Dec 2017	PWC	16 031 535.00
Oct 2017 to Mar 2019	KPMG	11 379 802.62
Oct 2016 to Dec 2017	Deloitte	42 401 008.38
Mar to Jun 2017	KPMG (Nkonki invoices paid directly by Eskom)	5 141 894.00
	Total (VAT excl)	**74 954 240.00**
	VAT	**10 493 593.60**
	TOTAL (VAT incl)	**85 447 833.60**

75. The aggregate amount paid by Eskom to Deloitte, KPMG, PWC and Nkonki in relation to these contracts (which include all amounts that Deloitte, KPMG and PWC paid on to Nkonki and to other subcontractors) was R413 142 093.15 inclusive of VAT made up as follows:

Source	**Amount (ZAR) (VAT exclusive)**	**Amount (ZAR) (VAT inclusive)**
Payments to PwC by Eskom	94 538 104.00	107 773 438.56
Payments to Deloitte by Eskom	207 216 243.80	236 226 517.93
Payments to KPMG by Eskom	55 509 103.07	63 280 377.50
Direct payments to Nkonki by Eskom	5 141 894.00	5 861 759.16
TOTAL	**362 405 344.87**	**413 142 093.15**

76. Prior to its acquisition by Trillian, Nkonki was appointed as service provider to Transnet for an internal audit function which went out on open tender in 2013. The total contract was for R500 million over five years.

77. In January 2017 Transnet received unsolicited bids from Nkonki and Oliver Wyman for a variety of proposed non-audit services. The Transnet executives proposed that Transnet utilise the existing internal audit contract with Nkonki for these unsolicited proposals, many of which duplicated services that were supposed to be rendered by McKinsey and Regiments. This was patently unlawful and the contention that the existing contract allowed for non-audit "ancillary services" was simply false.

78. To facilitate the new mandate, the Nkonki internal audit contract was extended by 20 months to March 2020. The value of the contract was also increased by R500 million (100%). This contract extension was in violation and contravention of Transnet's procurement rules, the PFMA, and the National Treasury instruction and practice notes.

79. Transnet had paid R26.1 million to Nkonki in respect of these irregularly procured non-audit services.

THE TRANSNET NEOTEL CONTRACTS

80. Neotel received two contracts from Transnet, from which payments aggregating to R75 573 519.88 were made to the Gupta enterprise laundry vehicle, Homix. These contracts were a Cisco equipment

contract concluded on 21 February 2014 and an MSA concluded on 19 December 2014 to provide Network Services to Transnet (including provision for an asset buy back). In addition to these contracts, in May 2014 and March 2015, Neotel concluded two CCTV contracts with Transnet, from which payments aggregating to R286 635 487.77 were made to the Gupta enterprise company, Techpro. Techpro then paid R119 700 000.00 on to Homix directly and another R51 300 000.00 indirectly to Homix via Digital Video Solutions trading as Central High Trading.

81. The irregularities in the awards of the Neotel contracts are addressed in Chapter 10 of Part 2 of this Report. For present purposes it suffices to point out that Neotel's auditors, Deloitte, identified payments made by Neotel to Homix in connection with these contracts as reportable irregularities that gave rise to reasonable inferences of corruption. Indeed, it was through Deloitte's professional approach to their auditing responsibilities in their Neotel audit, that the Gupta enterprise's corrupt influence over public enterprises first came to light.

82. The payments made by Transnet to Neotel on these contracts aggregated to R5 581 955 471.63, made up as follows:

Date / Period	**Contract**	**Payment**
7 March 2014	Cisco equipment	69 067 039.72
14 May 2014	Cisco equipment	276 268 158.90
23 December 2014	MSA asset buy-back fee	228 000 000.00
23 December 2014	MSA mobilisation fee	256 500 000.00
2015-2018	CCTV	827 441 799.18
2015-2019	MSA fees	3 924 678 473.83
TOTAL		**5 581 955 471.63**

SECURITY SERVICES CONTRACTS AWARDED TO CPI

83. Combined Private Investigations (CPI) is a security services provider that received a large number of contracts from organs of state. Between January 2013 and the January 2016, CPI paid aggregate amount of R47 475 362.22 to the Gupta enterprise laundry vehicles Homix, Forsure Consulting, Medjoul and Fortime Consultants. The payments were made monthly. Initially the monthly amount was R500,000. This increased to R1,459,200 per month from October 2013, and to R1,575,760.37 from 17 November 2015 until the final payment at the end of January 2016.

84. On its own version, CPI states that it was approached in late 2012 by Mr Salim Essa on behalf of Chivita. Mr Essa indicated that he could assist CPI secure further business as he was "well-connected", and a "deal broker" and "rainmaker". CPI further alleges that Mr Essa worked alongside and with Mr John Duarte (the son of Mrs Jesse Duarte) and Mr Malcolm Mabaso, the latter a former advisor to Mr Mosebenzi Zwane, and that the three members would provide "consultancy services" through Chivita to CPI to help it secure business.

85. CPI did not provide any detail in relation to the precise services provided by Chivita or any of the other laundry vehicles to which it subsequently made payments. The invoices against which Chivita and other entities were paid simply stated that they provided "consultancy services", or undertook the "management of information" and provided "logistic support services". CPI's attorneys state that the commercial rationale for contracting the Gupta enterprise entities was that "the team presented to our client that it was 'well connected' and could add commercial value to our client's business." CPI does not indicate whether "the team" assisted in securing any contracts, nor do CPI provide any indication of what services could have been legitimately provided by Mr Essa et al. in securing work for CPI.

86. Over the period that CPI paid kickbacks to laundry vehicles designated by Mr Salim Essa, organs of state paid it an aggregate amount of R426 453 577.70 made up as follows:

State entity / SOE	Amount (ZAR)
Eskom	71 937 415.05
City Power (City of Johannesburg)	47 802 005.78
City of Tshwane	59 269 561.31
City of Ekurhuleni	95 746 222.42
Transnet	151 698 373.17
TOTAL	**426 453 577.70**

CONTRACTS AWARDED TO DENTONS SOUTH AFRICA

87. Kapditwala Incorporated is a law firm that trades as Dentons South Africa. Dentons' senior partner, Mr Noor Kapdi, has deposed to an affidavit in which he approached Rafique Bagus, a client of Dentons South Africa and then Chairperson of Alexcor, to "advertise" Dentons to the public sector.

88. On 17 April 2015, Dentons was appointed by Eskom to perform a forensic investigation. The contract was referred to by Dentons and Eskom as "Project Picardie".

89. Mr Kapdi states that, subsequent to being awarded the Project Picardi contract, he contacted Mr Bagus to "thank him for his efforts to market the Firm [Dentons]. I also raised the issue of remuneration to which I believed he would be entitled for work done in marketing the Firm." According to Mr Kapdi, Mr Bagus indicated that he would not require any remuneration but that a third party would contact Dentons in relation to payment for marketing their services.

90. Mr Kapdi was subsequently contacted by Mr Ashok Narayan to discuss arranging payment. Mr Kapdi states that he then entered into a consultancy agreement with an entity designated by Mr Narayan to provide for payment to Mr Narayan in relation to the Eskom contract. The entity designated by Mr Narayan was Fortime Consultants, which was the then current laundry vehicle used by the Gupta enterprise to receive kickbacks on public contracts.

91. Mr Bagus admits to introducing Mr Kapdi to the Guptas but denies Mr Kapdi's version in relation to the Dentons contracts. In particular, he denies agreeing to advertise Dentons, knowing Mr Ashok Narayan or being aware of the fact that Dentons was tendering for an Eskom contract.

92. Dentons SA was paid R20 892 885.56 by Eskom Holdings in relation to Project Picardie. On 22 August 2015, it paid Fortime R1 231 200.00 in relation to this contract.

93. In 2015, Dentons was appointed to Denel's legal panel. According to Mr Kapdi, he was approached in September 2015 by the Head of Legal at Denel and informed that Dentons had been selected to submit a Request for Proposal in relation to an investigation that was required by Denel. Dentons submitted a bid for the work, quoting a fee capped at R4 100 000.00. On 9 October 2015, Dentons was formally appointed by Denel to undertake the work under the name "Project Betty".

94. Dentons invoiced Denel R5 971 266.24 under Project Betty. This exceeded the capped fee of R4,100,000 in the bid.

95. According to Mr Kapdi, in January 2016, following the completion of the work at Denel, Dentons was once again approached by Mr Narayan to negotiate a marketing fee in relation to this contract. Mr Kapdi agreed to negotiate a fee with Fortime. Fortime was ultimately paid R642 588.36 in relation to this contract in three payments between December 2015 and February 2016.

96. It is not possible to resolve the dispute of fact between Mr Bagus and Mr Kapdi as to how Mr Ashok Narayan was introduced to Dentons. This is a matter that must be investigated further by the appropriate authorities. For present purposes, it suffices to point out that on any version, the involvement of Mr Ashok Narayan and Fortime points to irregularity in relation to the appointment of Dentons at Eskom and Denel:

    96.1 In both cases, the "marketing fees" paid by Dentons to Fortime were only negotiated after the relevant contracts had been awarded.

96.2 There was no written agreement between Dentons and Fortime in relation to the Denel contract. In the case of the Eskom contract, the written agreement that was concluded was backdated to 1 February 2015 to give the appearance of an agreement that was signed prior to the award of the contract to Dentons. However, it is clear that the agreement was signed long after the contract had been awarded because the parties were still exchanging drafts of the agreement as late as 21 August 2015.

96.3 The backdated agreement contained detailed provisions purporting to regulate the services that Fortime was to provide but on Mr Kapdi's version any "services" provided by Fortime had been provided before he or Dentons was aware of the existence of Mr Narayan and Fortime.

96.4 Dentons was unable to produce any marketing material or reports that Mr Narayan or Fortime had ever produced for Dentons. So, it appears that the "marketing" work performed by Mr Narayan could only have been influence peddling. Given the identity of Mr Narayan, that influence would have been the influence of the Gupta enterprise over Eskom and Denel.

PAYMENTS MADE BY SABC TO LORNAVISION

97. In 2017, the Special Investigating Unit successfully procured a high court judgment to set aside a contract entered into between Lornavision and the SABC. Lornavision, of whom Mr Kuben Moodley was a director, were contracted by the SABC to provide debt collection services.

98. Lornavision was ultimately paid R62 733 557.24 by the SABC between September 2015 and February 2017. Out of these funds Lornavision diverted an aggregate amount of R8,799,544.63 to, to Shacob Commerce and Birsaa Projects, two Gupta enterprise laundry vehicles.

PAYMENTS TO COMPANIES UNDER DIRECT GUPTA CONTROL

99. The irregularities in the award of contracts by state departments directly to companies under the direct control of the Gupta enterprise are traversed in other sections of this Report. This section documents the amounts paid out of public funds pursuant to these contracts:

99.1 Eskom paid an aggregate amount of R2 442 523 980.56 to Tegeta Resources and Exploration.

99.2 In the period from 14 April 2016, after Optimum Coal Holdings passed into the hands of the Gupta enterprise, Eskom made aggregate payments of R1 682 026 066.26 to Optimum.

99.3 On 11 April 2010, the Industrial Development Corporation advanced R250 000 000.00 to Oakbay Resources and Energy to enable it to purchase Shiva Uranium from the erstwhile owner, Uranium 1.

99.4 *The New Age* Media ("TNA") was paid R254 752 699.30 by Eskom, Transnet, Department of Water and Sanitation, the Offices of the Premier for Free State, North West and Mpumalanga, and the Free State Provincial Treasury through irregular procurement practices between February 2011 and May 2016.

99.5 Denel paid VR Laser aggregate amounts of R242 425 736.70 in respect of the following irregularly procured contracts:

99.5.1 The platform hulls contract awarded to VR Laser Services in October 2014

99.5.2 The single source supplier contract awarded by Denel Land Systems ("DLS") to VR Laser in May 2015; and

99.5.3 the single source supplier contract awarded by Denel Vehicle Systems ("DVS") to VR Laser in December 2015.

99.6 After Sahara Systems acquired a 50% share in Global Softech Solutions in 2014, Transnet Awarded Global Softech Solutions the Wagon Performance Optimisation Contract which was

valued by Transnet at R500 000 000 but ultimately resulted only in the payment of a once off fee to Global Softech Solutions of R16 199 400.00 on 11 April 2017.

99.7 After Sahara Holdings acquired a controlling interest in Cutting Edge Commerce (previously known as Leonardo Business Consulting) in 2014:

99.7.1 Transnet concluded a two-year contract with Cutting Edge to provide Transnet with a "Solution for a Systems Analytical Tool and capability to Report on Key Procurement Metrics". The contract was awarded to Cutting Edge on a confinement basis without any competitive bidding and resulted in aggregate payments of R41 294 949.60 from Transnet to Cutting Edge

99.7.2 On 9 May 2016 Eskom concluded a contract with Cutting Edge in the amount of R71 166 780.00 on the basis of an unsolicited proposal that was not subject to competitive bidding and in respect of which the full contract price of R71 166 780 was paid by Eskom to Cutting Edge within 17 days of submission of the unsolicited proposal.

99.7.3 Eskom paid Cutting Edge additional amounts aggregate to R24 432 133.44 in the course of 2017 under ad hoc appointments of Cutting Edge to contracts by virtue of its position on the Eskom IT Panel of service providers.

99.8 The Commission has identified payments aggregating to just over R102 million made to Sahara by organs of state who have been unable to produce evidence to the Commission to show that these payments were made in terms of acceptable procurement practices. The Commission is not in possession of evidence that proves that these payments were the product of irregular procurement practices, so they are not included in the overall totals of irregular payments made to the Gupta enterprise.

STATE CAPTURE: THE AGGREGATE AMOUNTS

100. Mr Holden has produced a detailed analysis of the payments from public funds affected by state capture. On the basis of his analysis, the Commission estimates that the total amount disbursed by organs of state in expenditure tainted by state capture was R57 387 681 029.74,[33] broken down as follows:

Government entity	Paid to	Total state expenditure (ZAR)	Percentage of total
FS Department of Agriculture and Rural Development	Nulane Investments 204	24 984 240.00	0.04
FS Department of Agriculture and Rural Development	Estina	280 202 652.00	0.49
FS Department of Education	Sunbay Trading	28 500 000.00	0.05
FS Office of the Premier	Sunbay Trading	4 578 810.00	0.01
FS Department of Health	Cureva / Mediosa Health	25 111 188.00	0.04
NW Department of Health	Cureva / Mediosa Health	30 000 000.00	0.05
FS Department of Agriculture and Rural Development	Tsebo Business Intelligence	12 492 500.00	0.02
FS Department of Agriculture and Rural Development	Pygma Consulting	2 487 480	0.00

[33] This figure differs slightly from Mr Holden's figure of R57,269,900,004.43 in his Table 73 because Holden appears to have transposed incorrect figures into his table in respect of the Transnet McKinsey payments, the Transnet Cutting Edge payments and the Denel Dentons payments. His table also did not take account of the R26.1 million aggregate payment made by Transnet to Nkonki in respect of the non-audit services because he was not aware of the amount paid in this regard. All of the relevant discrepancies are noted in the table below.

FS Department of Economic Development, Tourism and Environmental Affairs	Innova Management Consulting	6 972 395.04	0.01
SAA	Regiments Capital	6 241 500	0.01
SA Express	Regiments Capital	8 218 123.20	0.01
Transnet	Regiments Capital	1 023 161 529.89	1.78
FS Provident Fund	Regiments Capital	2 319 216 132.00	0.00
Denel	Regiments Capital	7 980 000.00	0.01
SAFCOL	Regiments Capital	6 623 400.00	0.01
Transnet Defined Benefit Pension Fund	Regiments Capital	248 729 210 138.00	0.43
Transnet	Trillian Group	169 859 999.91	0.30
Eskom	Trillian Group	595 228 913.29	1.04
SA Express	Trillian Group	5 700 000.00	0.01
Transnet	Neotel	5 581 955 471.63	9.73
Eskom	McKinsey Inc	1 108 164 558.26	1.93
Transnet	McKinsey Inc[34]	784 287 306.00	1.37
SAA	McKinsey Inc	6 243 210.00	0.01
Eskom	Combined Private Investigations	71 937 415.05	0.13
Transnet	Combined Private Investigations	151 698 373.17	0.26
City of Johannesburg	Combined Private Investigations	74 802 005.78	0.13
City of Tshwane	Combined Private Investigations	59 269 561.31	0.10
City of Ekurhuleni	Combined Private Investigations	95 746 222.42	0.17
Transnet	Nkonki Inc[35]	26 100 000.00	0.05
Eskom	Nkonki Inc	5 861 759.16	0.01
Eskom	Deloitte	236 226 517.93	0.41
Eskom	KPMG	63 280 377.50	0.11
Eskom	PWC	107 773 438.56	0.19
Transnet	Cutting Edge[36]	41 294 949.60	0.07
Eskom	Cutting Edge	95 598 913.44	0.17
Eskom	SAP	564 733 122.57	0.98
Transnet	SAP	225 883 124.88	0.39
Transnet	Zestilor	13 407 883.18	0.02
Transnet	Zestilor (via Innovent Asset Management)	222 839 809.93	0.39
Eskom	T-Systems	7 805 558 985.49	13.61
Transnet	T-Systems	4 529 377 797.46	7.90
Eskom	Zestilor	2 490 484.50	0.00
Eskom	Dentons South Africa	20 892 885.56	0.04
Denel	Dentons South Africa [37]	5 971 266.24	0.01

[34] Holden's Table 73 uses the incorrect figure of R687 970 961.05.
[35] Holden's Table 73 did not include this figure.
[36] Holden's Table 73 uses the incorrect figure of R45 904 113.24.
[37] Holden's Table 73 uses the incorrect figure of R5 997 422.24.

SABC	Lornavision	62 733 557.24	0.11
Eskom	Tegeta Resources	2 442 523 980.95	4.26
Eskom	Optimum Coal	1 682 026 066.26	2.93
IDC	Oakbay	250 000 000.00	0.44
Eskom	TNA Media	35 401 246.60	0.06
Transnet	TNA Media	144 147 790.00	0.25
Department of Water and Sanitation	TNA Media	5 924 333.64	0.01
Office of the Premier: FS	TNA Media	42 062 906.36	0.07
FS Treasury	TNA Media	11 331 233.68	0.02
Office of the Premier: Mpumalanga	TNA Media	6 581 301.20	0.01
Office of the Premier: NW	TNA Media	9 308 888.02	0.02
Denel	VR Laser	242 425 736.70	0.42
Transnet	Global Softech Solutions	16 199 400.00	0.03
Transnet (95 Locos)	CSR	3 432 869 565.21	5.99
Transnet (100 Locos)	CSR	5 159 831 654.92	8.99
Transnet (359 Locos)	CSR / CRRC	14 910 751 921.66	25.98
Transnet (232 Locos)	CNR / CRRC	2 823 869 773.71	4.92
Transnet	Liebherr Cranes	841 098 842.64	1.47
Transnet	ZPMC	877 806 234.00	1.53
TOTAL		**57 387 681 029.74**	

101. A wide range of organs of state experienced the impact of state capture, but the financial effect was focused on Transnet and Eskom, which together account for more than 97% of all the expenditure tainted by state capture. The full breakdown of state capture tainted expenditure by organ of state is the following:

SOE / Government department	**Total amount disbursed related to state capture (ZAR)**	**Percentage of total**
Transnet incl. Transnet Second Defined Benefit Fund	41 225 170 637.79	71.84
Eskom	14 837 698 665.23	25.86
FS Provincial Government	441 042 621.08	0.77
Denel	256 377 002.94	0.45
IDC	250 000 000.00	0.44
City of Ekurhuleni	95 746 222.42	0.17
City of Johannesburg	74 802 005.78	0.13
SABC	62 733 557.24	0.11
City of Tshwane	59 269 561.31	0.10
NW Provincial Government	39 308 888.02	0.07
SAA and SA Express	26 402 833.20	0.05
Mpumalanga Provincial Government	6 581 301.20	0.01
SAFCOL	6 623 400.00	0.01
Department of Water and Sanitation	5 924 333.64	0.01
TOTAL	**57 387 681 029.74**	

102. Holden calculates that the Gupta enterprise was paid directly or indirectly via money laundering vehicles, a total of R16 217 793 047.18 out of public funds tainted by state capture. The Commission has performed its own independent calculations and concluded that the Gupta enterprise benefited at least to the amount of R15 543 960 171.22. There are two primary reasons for the discrepancy

between the Commission's figure and the figure reached by Holden.

102.1 First, the Commission has erred on the side of caution in relation to the risk of double counting amounts.

102.2 Second, for the purposes of his calculation, Holden does not treat Trillian, or its subsidiary, Nkonki as Gupta enterprise entities and, instead, accounts only for the amounts traceable as having been paid out of Trillian or Nkonki to known Gupta enterprise subcontractors or laundry vehicles. Given the fact that Mr Essa at all relevant times held a controlling interest in Trillian, the Commission sees no basis for treating Trillian as an entity independent of the Gupta enterprise. So in this report, for the purposes of calculating amounts paid to the Gupta enterprise in relation to state capture contracts, payments to Trillian and Nkonki are included in the calculation.

103. The full breakdown of the Commission's amount of R15 543 960 171.22 is shown in the following four tables.

Direct payments to the Gupta enterprise[38]

Organ of State	Gupta enterprise recipient	Amount (ZAR)
FS Department of Agriculture and Rural Development	Nulane	24,984,240.00
FS Department of Agriculture and Rural Development	Estina	280,202,652.00
FS Department of Education	Sunbay Trading	28,500,000.00
FS Office of the Premier	Sunbay Trading	4,578,810.00
Transnet	Cutting Edge[39]	41 294 949.60
Eskom	Cutting Edge	95 598 913.44
Transnet	Trillian	169 859 999.91
Eskom	Trillian	595 228 913.29
SA Express	Trillian[40]	5 700 000.00
Transnet	Nkonki	26 100 000.00
Eskom	Nkonki[41]	5 861 759.16
Transnet	Zestilor	13,407,883.18
Transnet	Zestilor (via Innovent Asset Management)	222,839,809.93
Eskom	Zestilor	2,490,484.50
Eskom	Tegeta Resources	2,442,523,980.95
Eskom	Optimum Coal	1,682,026,066.26
IDC	Oakbay Investments / Oakbay Resources / Action Investments	250,000,000.00
Eskom	TNA Media	35,401,246.60
Transnet	TNA Media	144,147,790.00
Office of the Premier: FS	TNA Media	42,062,906.36
FS Treasury	TNA Media	11,331,233.68
Office of the Premier: Mpumalanga	TNA Media	6,581,301.20
Office of the Premier: NW	TNA Media	9,308,888.02
Denel	VR Laser	242,425,736.70
Transnet	Global Softech Solutions	16,199,400.00
Sub-total: Direct payments to Gupta enterprise		6 398 656 964.78

Payments by state contractors derived from state capture contracts

[38] Holden's Table 248 erroneously includes amounts paid to SAP under this heading.

Payee and project	Recipient	Amount (ZAR)
Tsebo / Innova Management / Free State Department of Agriculture and Rural Development	Gateway Limited	9 756 500.00
Regiments Transnet TSDBF Interest Swaps	Trillian	185 530 350.08
T-Systems	Zestilor[42]	3 051 639.21
T-Systems Supplier Development Agreement	Sechaba Computer Systems	323 413 332.51
Neotel	Technology and Procurement[43] Holdings	286 535 487.77
SAP	Global Softech Solutions	7 410 000.00
SAP	CAD House	99 924 993.94
Deloitte	Nkonki	48 337 149.55
KPMG	Nkonki	12 972 974.99
PWC	Nkonki[44]	18 275 949.90
Cureva / Mediosa	Sechaba Computer Systems	1 556 561.49
Sub-total: Indirect payments via state contractors (including Innova contracts in Free State)		**996 764 939.44**

Payments to first-level laundry entities by state capture partners

104. With reference to the following table, Holden's Table 248 includes amounts paid to laundry vehicles by the Gupta Enterprise companies Trillian, Sechaba Computers, Zestilor, Techpro and CAD House. Now that the primary payments to these companies have already been included in this table in the two categories above, the laundry payments by those vehicles have been removed from the table to avoid double counting. Similarly, the amounts under the heading "Regiments and Trillian laundry cases" in Holden's Table 248 have been removed from this table to avoid double counting now that the primary payments are already included in this table under earlier categories.

[42] Holden's Table 248 includes amounts paid to Zestilor by Trillian and Sechaba Computer Systems. These have been removed to avoid double counting.

[43] Holden's Table 248 does not include the Techpro figures.

[44] Holden's Table 248 does not include the Nkonki figures.

Partner and project	Recipient	Amount (ZAR)
Cureva / Mediosa	Shacob Commerce	15 960 000.00
Cureva / Mediosa	Albatime / Moodley	2 538 948.00
CNR Durban Relocation / Bex	Medjoul	15 228 070.98
CNR Durban Relocation / Bex	Ismer	14 147 400.00
CNR Durban Relocation / Bex	Fortime Consultants	18 140 820.00
CNR Durban Relocation / Bex	Maher Strategy	18 605 940.00
CNR Durban Relocation / Bex	Block Mania	10 154 226.18
Regiments (all projects)	Albatime	232 267 385.20
Regiments (all projects)	Chivita Trading	129 299 827.25
Regiments (all projects)	Forsure Consultants	16 890 928.70
Regiments (all projects)	Fortime Consultants	53 880 753.93
Regiments (all projects)	Homix	179 506 583.48
Regiments (all projects)	Maher Strategy	10 322 510.00
Regiments (all projects)	Medjoul	29 558 898.91
Regiments (all projects)	Hastauf	12 360 769.62
Regiments (all projects)	Birsaa Projects	2 277 150.00
Liebherr: Burlington Cranes	Homix	1 800 000.00
Neotel: Transnet	Homix	75 573 519.88
Combined Private Investigations	Chivita	14 673 600.00
Combined Private Investigations	Homix	17 510 400.00
Combined Private Investigations	Forsure Consulting	2 918 400.00
Combined Private Investigations	Medjoul	12 372 962.22
Dentons	Fortime Consultants	1 873 788.36
Lornavision	Birsaa Projects	3 019 868.23
Lornavision	Schacob Commerce	5 779 676.40
CRRC	Fortime Consultants	7 892 226.77
Sub-total: Payments to first-level laundry entities by state capture partners		**919 968 226.83**

Kickbacks to the Gupta enterprise[45]

Project	Kickback amount (ZAR)
Purchase of Liebherr Cranes	26 586 799.49
Purchase of ZPMC Cranes	33 379 031.04
95, 100, 359, 232 Locomotive procurements including maintenance contracts: Payments confirmed by primary documentation	3 400 558 016.24
95, 100, 359, 232 Locomotive procurements including maintenance contracts: Suspected further kickbacks	3 768 046 193.40
Sub-total: Kickbacks to the Gupta enterprise	**7 228 570 040.17**

105. The grand total of these three payments and the kickbacks - direct payments to the Gupta enterprise by organs of state, payments by state contractors derived from state capture contracts, payments to first-level laundry entities by state capture partners, and kickbacks to the Gupta enterprise - amounts to **R15 543 960 171.22**.

[45]The amount in Holden's Table 248 under the heading "CNR Relocation Contract" has been removed because it is already included under the CNR Durban Relocation/Bex line items above.

ASSESSING THE FINANCIAL COST OF STATE CAPTURE

106. The amounts set out above do not represent the full loss suffered by the state as a result of Gupta enterprise related state capture. The first amount of R57 269 900 004.43 is the aggregate amount of total payments made to contractors in contracts with the state in which the Gupta enterprise was involved in state capture activities. The second amount of R15 543 960 171.22 is the aggregate amount of total payments to the Gupta enterprise made by the state itself, or by contractors in contracts with the state in which the Gupta enterprise was involved in state capture activities. In order to calculate the total cost to the state of state capture activities it would be necessary to conduct eight different quantification exercises:

106.1 The total value of kickbacks paid to the Gupta enterprise by third party contractors who concluded contracts with the state whether in the form of direct kickbacks or indirect kickback paid to laundry entities. This amount can be assumed to be a loss by the state because in an open and honest competitive procurement process without interference by the Gupta enterprise or other corrupt parties, it can be assumed that bidders would have fixed prices at a level that did not need to accommodate the kickbacks that they had committed to pay to the Gupta enterprise.

106.2 The total value of gratuitous expenditure where such expenditure was incurred with little motivation beyond ensuring the enrichment of the Gupta enterprise.

106.2.1 By way of illustration, organs of state made aggregate payments of R248 833 365.86 to TNA for advertising, marketing and newspapers. It can safely be assumed that most, if not all of this expenditure would have been avoided if the Gupta enterprise had not exercised the influence over the state that it did, and that very little of this expenditure resulted in any real value for the state.

106.2.2 Likewise, the entire Estina Dairy project seems to have been conceived for the primary purpose not of providing any value to the Free State Provincial Government and the residents of the Free State but rather to provide a pretext for the transfer of public funds to the Gupta enterprise. There was little, if any value that the province derived from the project.

106.3 The total value of gratuitous expenditure where entities were entities linked to the Gupta enterprise were given new contracts for which they had already been paid or for which other entities linked to the Gupta enterprise had already been paid. The state capture at Transnet abounds with examples in this category:

106.3.1 The R189 million “success fee” paid to Regiments in relation to the China Development Bank loan when Regiments had already been paid for all services relating to this work

106.3.2 The R93 million paid to Trillian for services for which Regiments had already been paid in respect of the Club Loan; and

106.3.3 The R26.1 million paid to Nkonki for services for which Regiments and McKinsey had already been paid.

106.4 The payment by organs of state of amounts far in excess of the contract values awarded to entities linked to the Gupta enterprise. The most obvious example of this is the 745% increase in the payments made to Regiments Capital for its services relating to funding for the 1064 locomotive procurement. So Regiments fees escalated from the R35.2 million in the initial contract to R265.5 million.

106.5 The price inflation attendant on contracts made with the Gupta enterprise by state entities, especially in the cases where no competitive bidding process took place, where such contracts incurred significantly higher costs for the delivery of goods and services compared with going market rates, or even the usual rates charged by the Gupta enterprise for its non-state clients. An obvious example of this is the case of Sunbay Trading and its contracts with the Free State government to supply laptops for needy learners. As set out above, Sunbay Trading was paid an aggregate amount of R33,078,810.00 to deliver laptops. Almost all of this was transferred

to Sahara Computers, who supplied the laptops. Sunbay Trading was effectively a front company for Sahara. The unit price charged by Sunbay Trading/Sahara Computers in this regard was nearly double the unit price charged by Sahara Computers to its commercial and corporate clients. There was no competitive bidding process for the award of the contracts.

106.6 The price inflation in the contract prices charged to the state by third party contractors who did business with the state in circumstances where they were protected by their relationship with the Guptas, over and above the value of the kickbacks those third party contractors paid to the Gupta enterprise.

106.6.1 Gupta enterprise state capture created a culture of corruption and indifference to cost in many State Owned Enterprises and government departments. There is reason to believe that third party contractors who were protected by their relationship with the Gupta enterprise, exploited this culture to charge the state excess amounts even beyond those necessary to recover the cost of the kickbacks they were paying to the Gupta enterprise.

106.6.2 By way of illustration, T-Systems was awarded a five-year MSA agreement with Transnet from January 2010 to December 2014. T-Systems used its relationship with Mr Salim Essa to procure the extension of this contract from January 2015 to March 2019. Over the four-year period of the extension to December 2018, the average annual amount paid by Transnet to T-Systems was more than three times the average annual amount paid to T-Systems under the same contract from January 2010 to December 2014.

106.7 The total value of contractual damages suffered by organs of state in their contracts with the Gupta enterprise itself or with third party contractors who were protected by their relationship with the Gupta enterprise.

106.7.1 In some cases, the counterparties of the state would have properly performed their contractual obligations and the state would have suffered no contractual damages. In others, however, the Gupta enterprise linked counterparties would not have performed and the state would have suffered losses which may even have exceeded the amounts paid to the relevant counterparties.

106.8 The OCM Eskom state capture case illustrates the potential extent of such losses. In case 35689/20 in the Gauteng High Court, Pretoria, Eskom seeks to recover from parties implicated in state capture the losses that it alleges that it suffered as a result of OCM's failure to deliver the quantity and quality of coal it was obliged to deliver while under the control of the Gupta enterprise. It quantifies its losses at R2 441 161 443 in relation to coal quantity and at R89 335 464.07 in relation to coal quality.

106.9 These alleged losses far exceed the total amount of R1,682,026,066.26 that Eskom paid OCM while it was under the control of the Gupta enterprise.

106.10 Collateral wasteful expenditure incurred by organs of state to accommodate state capture contracts. Apart from the payments to Gupta enterprise companies and third party contractors paying premiums to Gupta enterprise companies, state capture caused indirect loss to the state in the form of excessive payments to "innocent" third party contractors so as to prevent the inflated payments to Gupta linked third party contractors from standing out. The 1064 locomotive procurement is an illustrative case – China North Rail and China South Rail were paid prices that accommodated kickbacks to the Gupta enterprise of amounts in excess of 20%. In order to make this possible, the prices paid to Bombadier and General Electric also had to be increased to levels where the China North Rail and China South Rail prices did not look excessive.

107. Of the eight categories of losses set out above, the Commission has been able to quantify the first category of losses. The amount of the kickbacks paid can be determined with some degree of accuracy. As is set out above the direct kickbacks aggregated to R7 228 570 040.17 and the indirect kickbacks aggregated to R919 968 226.83. So the total known value of kickbacks was R8 148 538 267.

108. The Commission has not, however, attempted to quantify the other seven categories of loss. So this report does not purport to quantify the total loss suffered by the state as a result of Gupta related state capture. It can safely be predicted, however, that this amount would far exceed the amount of R15 543 960 171.22 that was paid directly or indirectly from public funds to entities forming part of the Gupta enterprise.

PART B: DISSIPATION OF FUNDS THROUGH MONEY LAUNDERING NETWORKS

INTRODUCTION

109. The Gupta enterprise used a range of different money laundering networks to dissipate the funds it generated from state capture. These money laundering networks became more sophisticated over time:

110. To begin with, the Gupta enterprise externalised its state capture profits with extremely simple money laundering devices:

    110.1 Domestic Gupta companies that received irregular contracts with the South African State would transfer the benefits of those contracts directly into Gupta companies in the UAE whereafter they would circulate through offshore Gupta enterprise accounts before being reintroduced to Gupta companies in South Africa; and

    110.2 Kickbacks extracted from third party foreign contractors with Transnet would be paid directly into the accounts of Gupta companies in the UAE or to JJ Trading FZE and Century General Trading FZE. The latter were companies within the Worlds Window Network of companies and laundered these payments directly into UAE accounts of Gupta enterprise companies.

111. From around 2013, the Gupta enterprise started using sophisticated domestic and international money laundering networks to move its proceeds of crimes against the South African State:

    111.1 In respect of the Transnet locomotive kickbacks, CRRC and related companies paid offshore kickbacks into HSBC accounts of Tequesta and Regiments Asia in Hong Kong, out of which accounts the kickbacks were laundered through a Hong Kong / China money laundering network; and

    111.2 Domestic Gupta companies that received irregular contracts with the South African State would launder the proceeds of those contracts through established South African money laundering networks, which, in turn, would launder the relevant funds into international money laundering networks, including the Hong Kong China money laundering network referred to in the previous paragraph.

112. These domestic and international money laundering networks used by the Gupta enterprise to move proceeds of crime for around 2013, are independent of the Gupta enterprise. They seem to have pre-existed the Gupta enterprise and to have serviced a wide range of clients other than the Gupta enterprise.

113. Because the Commission had no extra territorial information gathering powers, it was able to investigate the domestic money laundering networks much more effectively than the international money laundering networks. The primary focus of this Chapter is accordingly on the domestic money laundering networks used to dissipate the proceeds of state capture and a range of remedial measures that should be considered to target these domestic money laundering networks. Before reaching this primary domestic focus of the chapter, however, it is possible to make some observations in relation to an international money laundering network that was used to launder billions of Rands of proceeds of state capture. This is the money laundering network based in Hong Kong / China that was used to launder the kickbacks paid to the Gupta enterprise by the Chinese locomotive companies in respect of the Transnet locomotive contracts. The same money laundering network also appears to have

been used to launder state capture kickbacks paid inside South Africa, after these were laundered out of the country through domestic money laundering networks.

USE OF HONG KONG / CHINA MONEY LAUNDERING NETWORK

114. Holden shows that, over the period 8 December 2014 to 1 September 2016, an aggregate amount of $145 177 086.91 was paid into the Hong Kong HSBC accounts of by CRRC and its related companies as kickbacks in respect of the Transnet locomotive contracts awarded to China South Rail and China North Rail, two locomotive companies which merged to create CRRC.

115. The kickbacks paid into the Regiments Asia and Tequesta HSBC accounts were dissipated through transactions which have obvious hallmarks of money laundering:

    115.1 The funds paid into the Regiments Asia and Tequesta HSBC accounts were dissipated almost immediately after they were received:

    115.2 A large proportion of the funds received by Regiments Asia and Tequesta were paid into Chinese textile and domestic appliance exporters, which were companies with which there was no plausible reason for Regiments Asia or Tequesta to be doing business

    115.3 There were obvious signs of "smurfing" in the dissipation of the payments made by the Chinese locomotive companies into the Regiments Asia or Tequesta HSBC accounts. Thus, individual payments from the Chinese locomotive companies were invariably broken up into a series of smaller payments out of Regiments Asia or Tequesta so as to avoid the attention and regulatory compliance checks that may have been drawn by the movement of single large amounts out of Regiments Asia or Tequesta; and

    115.4 Most of the amounts paid out of Regiments Asia and Tequesta were round number amounts.

116. Despite these obvious signs of money laundering, which were present from December 2014, HSBC Hong Kong allowed the Tequesta and Regiments Asia accounts to continue operating until well into 2017, long after all of the payments from the Chinese locomotive companies had been dissipated in full and the HSBC accounts had become empty shells with the Gupta enterprise having redirected kickbacks from the Chinese locomotive companies into Tequesta and Regiments Asia accounts at Habib Bank in Dubai.

117. The amounts paid out of Regiments Asia and Tequesta were paid into what appears to be a substantial pre-existing money laundering network operating out of Hong Kong and China.

    117.1 An internal HSBC investigation into HSBC's exposure to the Gupta enterprise with regards to Regiments Asia, Tequesta and Morningstar (another entity laundering kickbacks for the Gupta enterprise) showed that 92 of the companies receiving payments from these three entities held accounts at HSBC bank. As of late 2016, 60 of these accounts were active. HSBC's investigation revealed that just these 60 accounts received 50339 payments worth $4.2 billion. These 60 accounts made onward payments to 5576 further beneficiaries, of which 55 were also paid by Regiments Asia, Tequesta Morningstar. The total value of onward payments was $3.78bn in 32,653 transactions.

    117.2 HSBC's investigation was limited to only 60 accounts paid by Tequesta, Regiments Asia and Morningstar. It is likely that, as a result, HSBC's internal investigation only apprehended a portion or sliver of the entirety of this global money laundering network which appears to have been laundering billions of dollars internationally.

118. As we show below, the Hong Kong / China money laundering network identified by HSBC was also receiving laundered funds from a range of South African money laundering companies which performed the function of "onshore-offshore bridges" - joining domestic South African money laundering networks with international money laundering networks and laundering proceeds of state capture (and other criminal activity) in this way.

LOCAL MONEY LAUNDERING NETWORKS USED BY GUPTA ENTERPRISE

119. The preceding section has addressed the laundering of state capture-related kickbacks which were paid by the Chinese locomotive companies into accounts held by Gupta enterprise companies in Hong Kong. This section addresses the laundering of state capture related kickbacks that were paid within South Africa.

120. The first stage of the laundering of state capture-derived funds within South Africa involved payments to "first-level" laundry entities. The first-level laundry entities received kickback payments from third party companies in return for contracts that those companies had been awarded by state owned enterprises and government departments, apparently under the influence of the Gupta enterprise. The Gupta enterprise made use of 15 known first-level laundry entities. These first-level laundry entities were used in roughly chronological fashion, and made use of four separate laundering routes.

121. In total, R1,232,286,003.48 was paid by contractors to the state to the first level laundry entities, as follows:

Name	**Amount (ZAR)**
Albatime	320,596,621.86
Birsaa Projects	51,507,887.23
Block Mania	10,154,226.18
Chivita Trading	144,093,427.25
Forsure Consultants	19,809,329.70
Fortime Consultants	105,543,369.69
Hastauf	12,360,769.62
Homix	395,418,856.44
Ismer	14,147,400.00
Jacsha Trading	2,150,000.00
Maher Strategy	28,928,450.00
Matson Capital	1,970,000.00
Medjoul	96,724,132.11
Pactrade	4,291,766.00
Shacob Commerce	24,589,767.40
TOTAL	**1,232,286,003.48**

122. These entities received state capture-derived funds from:

122.1 Bex Structured Products

122.2 CAD House

122.3 Combined Private Investigations (CPI)

122.4 Cureva / Mediosa

122.5 CRRC

122.6 Dentons South Africa

122.7 Liebherr Cranes

122.8 Lornavision

122.9 Neotel

122.10 The Regiments group of companies

122.11 Sechaba Computers

122.12 Techpro/Digital Video Solutions

122.13 The Trillian groups of companies; and

122.14 Zestilor

123. The table below sets out the payments to each first-level laundry entity arranged by the source of the payment:

First-level laundry entity	**Amount [ZAR]**
Cureva / Mediosa	
Shacob	15,960,000.00
Albatime / Moodley	2,538,948
CNR Durban Relocation / Bex Structured Products	
Medjoul	15,228,070.98
Ismer	14,147,400.00
Fortime Consultants	18,140,820.00
Maher Strategy	18,605,940.00
Block Mania	10,154,226.18
Regiments Group (all state capture contracts)	
Albatime (paid from Regiments Capital)	232,267,385.20
Albatime (paid from Regiments Securities)	5,609,572.72
Birsaa Projects	2,277,150.00
Chivita Trading	129,229,827.25
Forsure Consultants	16,890,928.70
Fortime Consultants	53,880,753.93
Hastauf	12,360,769.62
Homix	179,506,583.48
Maher Strategy	10,322,510.00
Medjoul	29,558,898.91
Trillian Group – Transnet Club Loan Albatime	74,784,000.00
Trillian Group – Transnet Property Database	
Birsaa Projects	4,847,893.00
Medjoul	10,362,200.00
Fortime Consultants	4,981,800.00
Trillian Group – SA Express	
Birsaa Projects	3,420,000.00
Trillian Group – Transnet GFB and SWATII	
Albatime	3,500,000.00
Birsaa Projects	12,000,000.00
Medjoul	19,380,000.00
Fortime Consultants	4,959,000.00
T*rillian Group – Eskom Corporate Plan*	
Birsaa Projects	4,847,093.00
Trillian Group – August 2016 Eskom MSA	
Birsa Projects	17,045,000.00
Medjoul	9,822,000.00
Fortime Consultants	12,427,328.00
Matson Capital	1,970,000.00
Pactrade	3,030,000.00
Shacob Commerce	2,850,000.00
Jacsha	2,150,000.00
Neotel – Transnet R300m and R1.8bn Contracts	
Homix	75,573,519.00
Liebherr Cranes	
Homix	1,800,000.00

Sechaba Computers (Prior to T-Systems / Transnet Supplier Development Contract)	
Homix	828,569.10
Albatime	942,569.10
Sechaba Computers (As result of T-Systems Supplier Development Contract)	
Homix	499,783.00
Albatime	954,146.84
Fortime Consultants	1,387,652.63
Zestilor	
Chivita Trading	120,000.00
Birsa Projects	630,883.00
Pactrade	1,261,766.00
Combined Private Investigations	
Chivita	14,673,600.00
Homix	17,510,400.00
Forsure Consulting	2,918,400.00
Medjoul	12,372,962.22
Dentons South Africa	
Fortime Consultants	1,873,788.00
Lornavision	
Birsaa Projects	3,019,868.23
Schacob Commerce	5,779,767.40
Techpro / Digital Video Solutions from Neotel / Transnet CCTV Contract	
Homix	119,700,000.00
CRRC	
Fortime Consultants	7,892,226.77
SAP / CAD House	
Birsaa Projects	3,420,000
TOTAL	**1,232,286,003.48**

124. The Gupta enterprise made use of four roughly distinct local money laundering networks that were used chronologically or sequentially to receive and dissipate funds from 'first-level' laundry vehicles, a substantial portion of which was dissipated abroad into pre-existing international money laundering networks. The payments were made into the international laundry networks by what Holden calls 'onshore-offshore bridges.' These bridges acted as the final stop of the local money laundering chain. The bridges were used to receive payments from multiple sources and, once bulked, transfer the funds abroad into further international money laundering networks, in particular the Hong Kong/China money laundering network, which is described in further detail below.

The first money laundering network: Chivita, Ballatore Brands, Gamso Trading and Syngen Distribution, May 2013 to May 2014

125. The first money laundering network was centered on Chivita Trading and ran from May 2013 to May 2014. Chivita Trading operated as a high-volume laundry entity prior to its receipt of funds for the Gupta enterprise Chivita was paid R154,406,247 by Regiments, Combined Private Investigations, Zestilor, Homix and Denel.

126. The payments made to Chivita were dissipated in two streams. Firstly, Chivita paid funds into Ballatore Brands, which records show acted as a laundry entity prior to receiving payments from the Gupta enterprise. The Gupta enterprise funds commingled with an extremely large number of cash payments from mixed sources, and, once bulked, paid to an entity called Gamso Trading. In total, R5,321,776 was paid to Gamso Trading deriving from state capture funds.

127. Gamso Trading was an "onshore-offshore bridge". Gamso Trading received and bulked payments from multiple sources, but most notably Chivita, and paid vast sums abroad into the Hong Kong/China money laundering network. Gamso Trading made use of AngloRand Forex or Foremost Finance - forex brokers that were involved in movement of extraordinary sums from South Africa into, inter alia, the Hong Kong/China money laundering network. 366. In the second stream, Chivita paid funds directly into an entity called Syngen Distribution Pty Ltd (Syngen). Syngen acted as an onshore-offshore bridge. Syngen also made use of AngloRand Forex and Foremost Finance as its Forex broker. According to Holden's calculations, a total R141,959,811.61 was paid to Syngen by Chivita using state capture funds and approximately R1 million of commingled funds from other sources. These funds were then distributed into the same Hong Kong / China money laundering network that was used by Tequesta and Regiments Asia to launder the kickbacks paid into their HSBC Hong Kong bank accounts by CRRC and related parties in relation into the Transnet locomotive contracts.

The second money laundering network: Homix, Bapu, FGC Commodities and Morningstar International

128. The second local money laundering network ran from April 2014 to May 2015, during which time Homix acted as the Gupta enterprise's primary first-level laundry vehicle. In total, Homix was paid R395,418,856.44 from state capture proceeds.

129. Homix also used two separate streams to launder its funds.

130. First, Homix transferred state capture funds from its Standard Bank account into its Mercantile Bank account. From there, the funds were transferred to one of two Hong Kong-based companies, Morningstar International and YKA International. Bank records released by HSBC, who banked Morningstar, show that the funds paid into Morningstar were paid into, inter alia, the broader Hong Kong/China money laundering network described in the previous section. In total, Homix paid R66,329,001 into its Mercantile Bank account for transfer to YKA and Morningstar.

131. Second, Homix transferred R324,095,719.87 into an entity called Bapu Trading ("Bapu") in 130 transactions between September 2013 and June 2015. The only other sources of funds paid into Bapu were other first-level laundry entities. Holden suggests that this indicates that Bapu was used exclusively for laundering Gupta enterprise funds.

132. Bapu Trading made the following payments using state capture funds to known entities:

    132.1 R4,413,369 on 9 April 2014 to Hulley & Associates

    132.2 R2,830,000 on 10 April 2014 to Abbas Latib

    132.3 R1,000,000 in two payments of R500,000 on 8 and 9 April 2014 to Isidingo Personnel, a company with connections to the Gupta enterprise

    132.4 R450,000 on 30 September 2014 to Targatorque, of which Mr Salim Essa was a director

    132.5 R593,500 on 5 September 2014 to LSM Distributors, which acts as the sole distributor of luxury Bentley Cars in South Africa

    132.6 R590,000 in two payments of R550,000 and R40,000 on 30 September 2014 and 8 October 2014 to Land Rover Vereeniging; and

    132.7 R630,000 on 10 April 2014 to Union Motors Lowveld, a dealer in Mercedes Benz cars.

133. Of the R4,413,369 paid to Hulley & Associates, R200,000 was paid to Advocate Kemp J Kemp SC. Of this amount paid to Advocate Kemp SC, R60,676.37 settled an outstanding bill in respect of professional fees provided by Advocate Kemp SC to President Jacob Zuma in relation to President Zuma's unsuccessful attempt to oppose an application by the Democratic Alliance to overturn the NDPP's decision not to prosecute Zuma in relation to the Arms Deal.

134. A further R543,706.92 was paid to ENS by Hulley & Associates using funds paid to it by Bapu. This payment was made to settle an outstanding invoice issued by ENS to Nemascore (Pty) Ltd

(Nemascore). ENS conducted due diligence for Nemascore on Evraz Highveld Steel in the context of a possible acquisition of Evraz by Nemascore. At the time of the payment, one of the three directors of Nemascore was Linda Makatini, an associate of the Zuma family who served as President Zuma's legal advisor when President Zuma was then Deputy President. In 2014, Makatini became a co-director in Deviate Information Technology (Pty) Ltd alongside Mr Duduzane Zuma.

135. In addition to the above, Bapu paid R71,922,955.65 to Syngen, which was then transferred into the Hong Kong/China money laundering network described above.

136. Bapu also paid R10,900,000 to Bay Breeze Trading/Holdings, the majority of which was withdrawn in cash.

137. Finally, Bapu paid R186,700,560.81 to FGC Commodities (FGC) in 71 transactions between October 2014 and May 2015. FGC Commodities acted as an onshore-offshore bridge used to transfer funds into the Hong Kong/China money laundering network.

138. Of the R387,629,804.58 paid to Homix from state capture funds, Holden identifies that R324,952,517.46 was paid into the Hong Kong/China money laundering network by Homix directly, or via either Syngen Distribution or FGC Commodities.

The third money laundering network: Forsure Consultants and Hastauf, May to July 2015

139. In May 2015, Homix was subject to freezing orders issued by the South African Reserve Bank. Homix was thus jettisoned in favour of Forsure Consultants and Hastauf by the Gupta enterprise.

140. Forsure Consultants was paid R16,890,928.70 by Regiments in relation to state capture contracts. Hastauf was paid R12,360,369.62 by Regiments in relation to state capture contracts.

141. Forsure Consultants was also paid R14,820,000 by Albatime emanating from funds paid to Albatime in relation to the fee paid by Transnet to Regiments regarding the China Development Bank loan. Hastauf was paid R17,670,000 by Albatime from the same source.

142. The funds paid to Forsure and Hastauf were dissipated in two ways. Firstly, R4,105,000 was paid by Forsure and Hastauf to Bapu for onward payment into the Hong Kong/China money laundering network.

143. Secondly, Forsure paid R11,356,000 and Hastauf R14,201,614.53 to IPocket Global.

144. IPocket Global was an offshore-onshore bridge that was represented by, Ms. Tian Wang who was convicted in a sting arranged by SARB and DIPCI after Ms. Tian Wang had indicated she was willing to bribe a SARB official.

The fourth money laundering network: July 2015 to July 2017

145. From late July 2015 until July 2017, the Gupta enterprise made use of an extraordinarily busy and complex money laundering network. Holden dubbed this network the "spider web".

146. The "spider web" made use of four sets of first-level money laundering entities that were used roughly chronologically (monetary figures are from Holden's Table 114):

First-level entity	Period of operation as a first-Level laundry for the Gupta enterprise	Total paid from state capture contracts (ZAR)
Fortime Consultants	July 2015 to August 2016	105,543,369.69
Medjoul	August 2015 to August 2016	95,148,371.74
Birsaa Projects	January 2016 to September 2016	49,230,737.23
Maher Strategy	November 2015 to January 2017	28,928,450.00
Pactrade	October 2016	4,291,766.00
Matson	October 2016	1,970,000.00
Jacsha	October 2016	2,150,000.00
Shacob Commerce	October 2016 to July 2017	24,589,767.40
Birtusa	April 2017	3,097,200.00
TOTAL		**314,949,662.06**

147. Holden describes how the first-level laundry entities made payments into what he called 'intermediary' accounts. These accounts bulked payments from the first-level laundry vehicles and then made onward payments into streams that led to onshore-offshore bridges and the Hong Kong/China network, or into streams whose end-point was not traceable by Holden during the period of his inquiry.

148. The three primary intermediary accounts identified by Holden were Ismer, Saamed Bullion Group and Taraqhi Traders.

149. The sole director of Ismer was Mohamed Ismail Maher who also directed Maher Strategy. The sole director of Saamed Bullion Group was Sabbir Ahmed, who also directed Fortime, Medjoul and Birsaa. The sole director of Taraqhi Traders was Mohamed Patel.

150. The amounts these three intermediaries were paid by first-level laundry entities was as follows:

Name	Ismer (ZAR) [Holden Table 155]	Saamed Bullion Group (ZAR) [Holden Table 161]	Taraqhi Traders (ZAR) [Holden Table 172]	TOTAL (ZAR)
Bex Structured Products	14,147,400.00			14,147,400.00
Fortime Consultants	13,671,430.77	47,417,009.85		61,088,440.62
Medjoul	7,764,180.22	73,183,392.73		80,947,572.95
Ismer		5,238,299.74		5,238,299.74
Maher Strategy	6,722,019.94	900,000.00		7,622,019.94
Birsaa Projects		65,579,556.66		65,579,556.66
Pactrade			2,168,000.00	2,168,000.00
Jacsha Projects			2,147,843.14	2,147,843.14
Matson Capital			1,965,767.37	1,965,767.37
Shacob Commerce			17,111,444.82	17,111,444.82
Birtusa			3,049,915.00	3,049,915.00
TOTAL	**42,305,030.93**	**192,138,258.98**	**26,442,970.33**	**260,886,260.24**

151. The funds paid into Ismer, Saamed and Taraqi Traders were transferred into an extended web of individuals and companies, and also drawn out in cash. The Commission was unable to complete a full tracing of the onward flow of these funds. However, Holden identifies the that the following entities were paid by Ismer: Park Village Auctions, Mykatrade 87CC, Saiyan Textiles, Triple Desire Trading, Universal Auctions, Dial Square Commodities, Bongos Products, ERZ Telecom, Firzaz Cosmetics, I7 Trading, Matayo Trading, Rich Rewards Trading 409, Trend Mania 1123CC and Zak's Radio and TV.

152. Ismer also paid R5,143,000 to ENY International and R1,250,000 to Charly Wholesalers; both of which acted as conduits to onshore-offshore bridges and the Hong Kong/China money laundering network.

153. Holden also makes the following observations in relation to the onward distribution of the funds paid

into Saamed Bullion:

153.1 In total, R17,704,920 was paid to individuals from Saamed Bullion. Six payments of R1,000,000 were made to six individuals, who then immediately transferred the funds abroad. R2,000,000 of these funds were transferred into Morningstar International. R4,000,000 was paid into PAI International, a Hong Kong/China laundry vehicle.

153.2 Investigations undertaken by SARB indicate that the payments were actually overseen by Sheldon Jared Breet. Sheldon Breet is currently facing charges of conspiracy to commit murder and to commit housebreaking to commit murder related to the killing of Brian Wainstein, the so-called 'Steroid King' of the Western Cape. Sheldon's brother, Matthew, pleaded guilty to conspiring to kill Wainstein.

153.3 An aggregate of R20,665,754.47 was paid into entities that received a maximum of two payments. These entities included AC Cash & Carry, Calicom Trading, Centwise 66CC, Fouche Motors, Lappie Motor CC, Momobile Trading, Shibis Cash & Carry and Syed Cellular.

153.4 Most notably, an aggregate of R156,236,698.33 was paid into companies that acted either directly as onshore-offshore bridges, or as conduits that passed funds onto onshore-offshore bridges, as follows:

Entity	**Amount**	**Route offshore**
Pine Peak Wholesalers	58,003,894.70	Payments made directly to Hong Kong / China Laundry
ENY International / Studio De Pablo	35,174,496.46	Payments made directly to Hong Kong / China laundry
Shazari Trading	23,509,527.16	Payments made to Seattle Clothing Manufacturers or Lion Head Trading for payment into Hong Kong / China laundry
Graincor Distribution	11,637,501.85	Payments made to ENY International or Pine Peak Wholesalers for payment into Hong Kong / China laundry
Dial Square Commodities	10,033,078.16	Payments made to Damla Trading for payment into Hong Kong / China laundry
Zokubyte	9,175,000.00	Payments made into Varlozone, Coral General Traders or additional Zokubyte accounts at Sasfin for payment into Hong Kong / China laundry or Griffin Line Trading LLC
Charly Wholesalers	6,370,000.00	Payments made into Damla Trading for payment into Hong Kong / China laundry
ENG 38 Project	2,333,200.00	Payments made directly into Hong Kong / China laundry
TOTAL	**156,236,698.33**	

154. Saamed Bullion also paid R5,384,728.64 derived from state capture funds to Lechabile Technology. These funds were transferred outwards to a company called Success Stand Limited, which appears to be part of the Hong Kong / China laundry.

155. Lechabile Technology's two directors are Mr Zainul Abadeen Nagdee and Mr Sarfaraz Nagdee. Mr Nagdee was appointed to Transnet's notorious Board and Acquisitions Disposal Committee (BADC) on 11 December 2014. Mr Nagdee was thus receiving and dissipating state capture funds while

serving on the BADC. Mr Nagdee informed the Commission that the payments to Success Stand were for the purchase of I-Tunes vouchers.

The dissipation of payments from China North Rail to Bex Structured Products using the fourth money laundering network

156. Bex Structured Products was paid R76,586,903.16 by China North Rail pursuant to the CNR relocation contract on the 25th of September 2015.

157. R33,730,000 was paid to the Gupta family property company, Confident Concepts, from these funds. The funds were paid to Confident Concepts in three streams by three separate first-level laundry entities: Fortime, Medjoul and Ismer. Upon receipt of funds from Bex, these three entities paid funds onto a company by the name of Universal Auction. From Universal Auction, the funds were transferred to Confident Concepts.

158. Another notable recipient of funds from the CNR payment to Bex was Integrated Capital Management (ICM). ICM's directors at the time included Stanley Shane, a Transnet director. Holden calculates that ICM was paid R9,370,800 in November 2015 deriving from the payments made to Bex by CNR. The route to ICM was as follows: funds were paid from Bex into a company called Block Mania in three transfers, from where a portion was paid onwards to company called Green Blossom and, finally, from Green Blossom to ICM.

The onshore-offshore bridges

159. The act of tracing state capture funds has led to the identification and examination of twelve companies that performed the function of onshore-offshore bridges for established money laundering networks within South Africa. The volume of funds leaving South Africa through these routes is extremely alarming.

160. Holden calculates that **R388,630,198.41** emanating from state capture funds that were paid to onshore-offshore bridges, the vast majority of which was paid into the Hong Kong/China laundry. The funds followed the routes set out below:

Onshore-offshore bridge	**Route of funds**	**Amount (ZAR)**
FGC Commodities	Homix to FGC Commodities	186,700,560.81
IPocket	Hastauf to IPocket	14,201,614.53
IPocket	Forsure to IPocket	11,356,000
One Last Trading	Fortime to One Last Trading	34,919,987.01
ENY / Studio de Pablo	Ismer and Saamed Bullion directly to ENY	33,851,201.30
ENY / Studio De Pablo	Saamed Bullion to Graincor to ENY	6,287,522.61
ENY / Studio De Pablo	Saamed to Dial Square to ENY	3,584,078.16
Pine Peak Wholesalers	Saamed to Pine Peak Wholesalers and Saamed to Graincor to Pine Peak	43,536,506.83
Eng 38 Pty Ltd	Saamed to Eng 38 Pty Ltd	2,833,200.00
Damla Trading	Saamed to Dial Square and Charly Wholesalers to Damla Trading	19,175,000.00
Seattle Clothing Manufacturers / Lionhead	Saamed to Shazari to Seattle / Lionhead	23,509,527.16
Varlozone	Saamed to Zokubyte to Varlozone	7,675,000
CCE Holdings	Saamed to CMC to CCE Holdings	1,000,000
TOTAL		**388,630,198.41**

161. Certain features of these onshore-offshore bridges are worth noting:

161.1 A number of the onshore-offshore bridges, most notably Syngen Distribution, Gamso Trading and Studio de Pablo, made use of the Forex brokers AngloRand Forex and Foremost Finance. Foremost Finance was run by Shaheem Humby; Bank records provided by Mercantile Bank indicate that ENY International and Studio de Pablo were directed by the same person, Wesley Botha. However, further details provided by Mercantile Bank show that Botha was introduced to the Bank by Shaheem Humby of Foremost Finance. Mandate documents signed by Studio de Pablo appointed Foremost Finance as the company's treasury agent.

161.2 The links between the onshore-offshore bridges and other forms of criminality are striking. In the case of Ukuzuza, for example, the company was represented by Tian Wang, later convicted of attempting to bribe a SARB official during a 'string.' Upon SARB's seizure of Ukuzuza funds, Yusuf Omarjee, a convicted fraudster, presented himself as the company's representative.

161.3 On two occasions, onshore-offshore bridges made payments abroad to only one or two companies, rather than a raft of Chinese/Hong companies apparently forming part of the Hong Kong / China money laundering network. The company One Last Trading, which was paid R34,919,987.01 by Fortime Consultants and Medjoul, made all of its payments to an entity called Discovery Trading based in the UAE. Studio de Pablo transmitted the majority of its funds abroad to a company called Flybridge DMCC. Flybridge DMCC was one of the only companies that received funds from all of Regiments Asia, Tequesta Group and Morningstar. Studio de Pablo transferred R326,753,139.35 abroad between September 2007 and July 2016, of which R313,794,562.84 was paid to Flybridge between July 2015 and July 2016.

161.4 A large number of the onshore-offshore bridges were identified by SARB and were subject to seizure orders. The records appended to Holden's evidence from SARB indicates that SARB conducted substantial and detailed investigations into these entities and issued forfeiture orders in respect of funds held by several of these entities. However, the NPA does not appear to have instituted any money laundering prosecutions arising out the SARB investigations.

PAYMENTS THROUGH THE LOCAL LAUNDRY NETWORK AND ONSHORE-OFFSHORE BRIDGES

162. In most cases, the state capture funds laundered through the domestic money laundering networks were transferred through the onshore-offshore bridges into companies that appear to form part of offshore money laundering networks. Once funds cross over the border, it is not possible to follow their flow from within South Africa. So the Commission has not been able to trace these funds to their final destinations. However, there were cases where those responsible for laundering these funds became undisciplined and allowed them to be transferred directly into the offshore Gupta company, Griffin Line Trading.

162.1 Griffin Line Trading, was a Gupta family company registered in Dubai. Griffin Line funding was the ultimate source of R842 million of the purchase price paid by Tegeta for the Optimum Coal Mine.

162.2 On 22 April 2016, the onshore-offshore bridge Seattle transferred $200,000 emanating from state capture funds into Griffin Line Trading. The funds paid to Seattle for onward payment to Griffin Line were the unlawful proceeds of frauds on Transnet and thefts from the Transnet Second Defined Benefit Fund which had been laundered into a fixed deposit held by Albatime at the Bank of Baroda before being laundered domestically through to Seattle.

162.3 A further four payments equal to $245,416 were made to Griffin Line by the onshore-offshore bridge Varlozone between 22 and 26 April 2016. This amount also derived from the closure of Albatime's Fixed Deposit used to purchase Optimum Coal Holding, and thus also derived from by frauds on Transnet and thefts from the Transnet Second Defined Benefit Fund.

SCALE OF LOCAL FUNDS MOVED INTO HONG KONG / CHINA MONEY LAUNDERING NETWORK

163. The Gupta enterprise made use of multiple existing local money laundering networks, all paying into the Hong Kong/China laundry. The following table sets out the alarming scale of transfers into the Hong Kong/China laundry from South Africa:

Onshore-offshore bridge	Number of transactions	Value (ZAR)
Ukuzuza	1586	3,839,193,805.63
Syngen Distribution	409	1,325,007,774.56
FGC Commodities	360	1,030,605,584.68
Lionhead	613	940,048,019.02
CCE Motor Holdings	360	767,601,728.73
Studio De Pablo	185	328,326,130.97
Seattle Clothing Manufacturers	215	256,842,214.20
Truhaven	143	146,208,484.42
Pine Peak Wholesalers	53	116,676,411.57
Damla Trading	20	40,419,762.00
Varlozone	37	26,788,55.71
Eng 38 Pty Ltd	38	17,860,180.84
TOTAL	**4019**	**8,808,816,940.33**

LOCAL MONEY LAUNDERING NETWORKS AND KHANANI LAUNDERING ORGANISATION

164. The domestic South African money laundering networks clearly had international partners beyond the Hong Kong China money laundering network. As mentioned above, One Last Trading, made all of its onshore-offshore bridge payments to an entity called Discovery Trading based in the UAE. Studio de Pablo transmitted the majority of its funds abroad to a UAE based company, Flybridge DMCC which also received payments from Tequesta, Regiments Asia and Morningstar. So, it is possible that there is a separate UAE based money laundering network with which the South African domestic money laundering networks are interacting.

165. Moreover, at least South African laundry vehicles – Truhaven and Donsantel 133CC - were making payments both into the Hong Kong laundry and into companies that formed part of the Khanani money laundering organisation (MLO). The Khanani MLO was placed under US OFAC sanctions in 2016, along with its mastermind Altaf Khanani, described as the world's most wanted money launderer and his family. The Al Khanani MLO allegedly laundered money for international drug cartels and for terrorist groups including Al Qaeda. The US OFAC sanctions designated five companies associated with the MLO: Mazaka General Trading LLC, Jetlink Textiles Trading, Seven Sea Golden General Trading LLC, Aydah Trading LLC and Wadi Al Afrah Trading LLC.

166. SARB records show that Donsantel 133CC paid R23,966,952.69 ($2,060,231) in February and March 2015 to Seven Sea Golden Trading and R19,480,113.37 ($1,670,940) between February and May 2015 to Aydah Trading. Donsantel 133CC was simultaneously paying funds into Hong Kong/China laundry entities such as Pavantex HK, Samantha Trading, Champion Merit and Derik Fashion. Donsantel 133CC was subject of a SARB forfeiture order executed in 2018 for violations of exchange control regulations.

167. The director of Donsanetel 133CC also directed a company called StyleUp Fashions CC. StyleUp also made payments into the Hong Kong/China money laundering network, including payments to Paventex and Derik Fashion.

168. Truhaven transferred R52,202,220 ($3,945,000) to four different Khanani MLOs including Aydah Trading, Jetlink Trading, Seven Seas Golden Trading and Wadi Al Alfrah Golden Trading. Truhaven also

made payments to the Hong Kong/China laundry, including many of those paid by Donsantel 133CC such as Pavantex and Samantha Trading. Like Donsantel 133CC, Truhaven was subject to a SARB forfeiture order executed in 2018.

169. Holden shows that at the same time that Truhaven and Donsantel were using the Khanani MLO, they were also paying funds into the local laundry used by the Gupta enterprise.

RECOMMENDATIONS

The offshore laundering of state capture proceeds of crime

170. Billions of Rands were paid to the Gupta enterprise as kickbacks related to state capture contracts. If the South African state is to recover any of these amounts from offshore, it will first have to trace the current whereabouts of these funds. To this end it is recommended that:

    170.1 South African authorities should urgently engage with HSBC to require HSBC to assist in the tracing and dissipation of the funds out of Tequesta, Regiments Asia and Morningstar and into the Hong Kong/China laundry network using HSBC accounts.

    170.2 The Financial Intelligence Centre (FIC) and the National Prosecuting Authority (NPA) should engage with their counterparts in Hong Kong and China to seek their assistance in the tracing and dissipation of the funds out of Tequesta, Regiments Asia and Morningstar and into the Hong Kong / China laundry network using HSBC accounts.

    170.3 The FIC and the NPA should engage with their counterparts in the UAE to seek their assistance in the tracing and dissipation of the funds out of the Tequesta and Regiments Asia accounts in Dubai.

    170.4 If the current whereabouts of any proceeds of state capture payments made to Tequesta, Regiments Asia or Morningstar can be located, the Asset Forfeiture Unit (AFU) of the NPA should approach its counterparts in the relevant jurisdiction(s) with a view towards having those proceeds frozen and then forfeited to the South African State as proceeds of state capture crimes.

The South African laundering of state capture proceeds of crime

171. Tracing the flows of state capture proceeds of crime has revealed the existence of widespread sophisticated money laundering networks operating within South Africa. The money laundering networks used by the Gupta enterprise were complex, well established and embedded in a pre-existing milieu of criminality and wrongdoing. The money laundering networks appear to service criminal enterprises straddling offences currently regulated and policed by multiple enforcement agencies and have links with international money laundering networks with multi billion rand turnovers.

172. It appears that, thus far, enforcement action against these networks has been confined primarily to forfeiture orders issued by the South African Reserve Bank. Important though these forfeiture orders are, they are unlikely to have any significant deterrent effect on the domestic money laundering networks because the scale of their operations is such that forfeiture orders can be absorbed as a cost of doing business. If money laundering is to be brought under control in South Africa, it is essential that those controlling and participating in the domestic money laundering networks in South Africa are prosecuted and subjected to asset forfeiture proceedings so that the costs of the money laundering profession can be made to outweigh its benefits.

173. Sections 4 to 6 of the Prevention of Organised Crime Act 108 of 1998 create statutory money laundering offences in the following terms:

    > 4. Money laundering
    >
    > Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-

(a) Enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) Performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect-

(i) Of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) ...

shall be guilty of an offence.

5. Assisting another to benefit from proceeds of unlawful activities

Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby-

(a) The retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or

(b) The said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,

shall be guilty of an offence.

6. Acquisition, possession or use of proceeds of unlawful activities

Any person who-

(a) Acquires

(b) Uses; or

(c) Has possession of,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.

174. The evidence contained in the three reports of Mr Holden to the Commission should provide ample basis for the investigation and prosecution of a wide range of individuals under sections 4 to 6 of POCA for their role in laundering proceeds of state capture crimes. It is accordingly recommended that the National Prosecuting Authority consider the three reports of Mr Holden with a view to instituting criminal prosecutions under sections 4 to 6 of POCA against persons involved in laundering the proceeds of state capture crimes.

175. However, one of the hall marks of the money laundering networks that laundered proceeds of state capture crimes within South Africa was their flexibility. As soon as particular companies were exposed as laundry vehicles, the networks were able to bypass those companies and to reroute state capture funds through different entities built into different networks. So, prosecutions for historical contraventions alone, are unlikely to make much of an impact on the money laundering industry within South Africa unless they are part of a sustained ongoing process to target that criminal industry.

176. How best to target money laundering within South Africa is not something that this Commission can prescribe. It is possible however to make a number of general observations in this regard:

176.1 First, because the money laundering industry services a range of criminal enterprises operating across fields regulated or policed by different regulatory and law enforcement agencies, a holistic approach is required on the side of government. A co-ordinated and co-operative approach to targeting money laundering is required from all of the relevant enforcement agencies, and at least the:

176.1.1 Asset Forfeiture Unit of the NPA

176.1.2 Directorate of Priority Crime Investigation (Hawks)

176.1.3 Financial Intelligence Centre (FIC)

176.1.4 Investigating Directorate of the NPA (ID)

176.1.5 South African Revenue Service (SARS)

176.1.6 South African Reserve Bank (SARB); and

176.1.7 Special Investigating Unit.

176.2 Second, it is necessary to use the anti-money laundering resources of the banks in a more proactive manner than is currently the case. The South African Anti-Money Laundering Integrated Task Force (SAMLIT) has been set up under the auspices of the FIC to enable banks to share with each other and with the authorities anonymized information and to discuss general trends. However, the absence of a statutory framework providing for the controlled sharing of detailed anti-money laundering information by banks appears remain an obstacle to fighting financial crime.

176.3 Third, there is a need to investigate the effectiveness of the current system of suspicious transaction and cash threshold reporting to the FIC under the FIC Act. If banks are failing to make the necessary reports to the FIC, the FIC needs to take action against them, but if Banks are making the necessary reports to the FIC but no action is being taken against the money laundering networks, that suggests either a flaw in the current system or its implementation by the FIC and downstream enforcement agencies. In this context, the Commission recommends that the FIC should conduct an urgent review of:

176.3.1 The compliance of the South African banks with the FIC Act in relation to proceeds of state capture laundered through accounts held by them, identifying whether, and to what extent, the FIC was alerted to these activities by reports under the FIC Act

176.3.2 What action was taken by the FIC pursuant to any relevant reports received from South African banks in this regard

176.3.3 What reports or recommendations were made by the FIC to other law enforcement agencies; and

176.3.4 What steps, if any, were taken by those enforcement agencies to act on the recommendations of the FIC.

THE ACQUISITION OF THE OPTIMUM COAL MINE

INTRODUCTION

1. The acquisition of Optimum Coal Holdings Ltd (OCH) by Tegeta Exploration and Resources (Pty) Ltd (Tegeta) is part of what triggered the establishment of this Commission. That acquisition was the central focus of the Public Protector's investigation that culminated in her October 2016 "State of Capture" Report.
2. The investigations of the Commission have borne out the findings of the Public Protector in relation to the acquisition of OCH and have shown that this acquisition was a State Capture project pursued through unlawful means and funded almost entirely by proceeds of crime.

THE OWNERSHIP OF TEGETA

3. The ownership structure of Tegeta at the time of the acquisition was follows:
   3.1 29.05% was owned by the Gupta family company Oakbay Investments (Pty) Ltd.
   3.2 28.53% was owned by Mabengela Investments (Pty) Ltd in which:
      3.2.1 Mr Duduzane Zuma held a 45% interest
      3.2.2 Mr Rajesh "Tony" Gupta held a 25% interest
      3.2.3 Aerohaven Trading, a company wholly owned by Ms Ronica Ragavan, held a 15% interest
      3.2.4 The Gupta family UAE-based company Fidelity Enterprise Limited held a 10% interest; and
      3.2.5 Mr Ashu Chawla and other Gupta Enterprise employees held an aggregate 5% interest.
   3.3 21.5% was owned by Elgasolve (Pty) Ltd in which Mr Salim Essa held a 31.29% interest and Mabengela Investments (Pty) Ltd. held a 68.71% interest
   3.4 12.91% was held by the Gupta family UAE-based company Fidelity Enterprise Ltd.; and
   3.5 8.01% was held by the Gupta family UAE-based company Accurate Investments Ltd.
4. So, the ultimate beneficial ownership of Tegeta was the following:
   4.1 65.13% was owned directly or indirectly by Gupta family members and their companies
   4.2 19.49% was indirectly owned by Mr Duduzane Zuma
   4.3 6.73% was indirectly owned by Mr Salim Essa
   4.4 6.49% was indirectly owned by Ms Ronica Ragavan; and
   4.5 2.16% was indirectly owned by Mr Ashu Chawla and other Gupta enterprise employees.

THE CRIMINAL PROJECT TO ACQUIRE OCH

5. The criminal project to acquire OCH is described in the Eskom chapter of this report. It involved the following steps, all of which appear to have been performed under the improper influence of the Gupta family and / or Mr Salim Essa:
   5.1 In March 2015 four senior Eskom executives including the Group CEO of Eskom, Mr Tshediso Matona, were suspended.
   5.2 In April 2015, Mr Brian Molefe was seconded from Transnet to Eskom in April 2015 as Acting Group CEO.
   5.3 Mr Molefe immediately set about scuppering advanced settlement negotiations between Eskom and Glencore over a penalties claim by Eskom against OCH.
   5.4 In July 2015 the suspension of Mr Matshela Koko was lifted.
   5.5 Also in July 2015 Eskom demanded immediate payment from OCH of a R2.17 billion penalty claim, despite the fact that its own attorneys had questioned the merits and quantification of this claim.
   5.6 In September 2015 Mr Molefe and Eskom Board Chairperson, Dr Ben Ngubane, unsuccessfully attempted to persuade the then Minister of Mineral Resources, Mr Ngoako Ramatlhodi, to suspend all mining licences of Glencore.
   5.7 On 22 September 2015, President Zuma replaced Mr Ramathlodi as Minister of Mineral Resources with a long term friend of the Gupta family, Mr Mosebenzi Zwane.

5.8 In October 2015, Mr Brian Molefe scuppered the sale of OCH to Phembani Group (Pty) Ltd by insisting that Eskom would not consent to the transaction unless Phembani assumed responsibility for the full R2.15 billion penalty claim made by Eskom (a claim that would drop to R255 million after Tegeta had acquired control of OCH).

5.9 On 4 November 2015, Mr Koko leaked to Mr Essa's infoportal1@zoho.com address, legal advice given to Eskom that it could not remove the business rescue practitioners of OCH.

5.10 On 12 November 2015 Oakbay / Tegeta concluded a non-binding term sheet with the OCH business rescue practitioners for the sale of the OCH shares.

5.11 Later, in November 2015, the Department of Mineral Resources (DMR) and Mr Koko intervened to insist that the sale should relate not only to OCH but to all the subsidiaries of OCH which included Koornfontein Mine (Pty) Ltd and Optimum Coal Terminal (Pty) Ltd which held the lucrative coal export allocation at Richard Bay Coal Terminal.

5.12 On 22 November 2015, Eskom Board member, Mr Mark Pamensky, advised Mr Atul Gupta that Oakbay should ensure that a condition precedent for the OCH acquisition sale should be Eskom's withdrawal of the R2.17 billion penalty claim and his invitation to Mr Atul Gupta to involve him in the OCH acquisition.

5.13 On 25 November 2015, Mr Koko leaked to Mr Essa's infoportal1@zoho.com address, a confidential internal Eskom document setting out its investments in cost plus mines.

5.14 After Glencore rejected a R1 billion offer from Oakbay for OCH on 25 November 2016, the DMR issued a series of spurious notices under section 54 of the Mine Health and Safety Act 29 of 1996 to shut down operations at several Glencore owned mines between 26 and 30 November 2015.

5.15 Gupta family associates, Mr Kuben Moodley and Mr Malcolm Mabaso, attempted to direct the inspections that gave rise to the section 54 notices.

5.16 After Glencore decided on 29 November 2015 to fund OCH so as to take it out of business rescue, Minister Zwane met Mr Glasenberg of Glencore on 1 December 2015 in Zurich, urged Glencore to sell the Optimum mine to the Guptas and informed him that Mr Rajesh "Tony" Gupta wanted to meet Mr Glasenberg the following day in Zurich.

5.17 Mr Zwane's attended the meeting of Mr Tony Gupta and Mr Essa with Glencore in Zurich on 2 December 2015.

5.18 Mr Zwane accompanied Mr Tony Gupta and Mr Essa when they flew back from the Zurich meeting to India in the Gupta family jet.

5.19 Mr Zwane then flew with Mr Tony Gupta and Mr Essa to Dubai from India in the Gupta family jet and the Guptas paid for a chauffeured BMW for Mr Zwane in Dubai on 7 December 2015.

5.20 On 7 December 2015, the DMR addressed a letter to Eskom promising to fast track the transfer of mining rights application in relation to the Optimum transaction and making the unsolicited suggestion that Eskom should pre-pay Tegeta / Oakbay for a year's supply of coal.

5.21 On 7 December 2017, Mr Koko and Mr Singh prepared a motivation for Eskom to prepay Tegeta R1.68 billion for coal to be acquired from the Optimum mine.

5.22 A draft of the motivation was provided to Mr Essa, who sent instructions to Mr Eric Wood of Regiments to remove all references to the need for National Treasury approval for the prepayment as required under the Public Finance Management Act 1 of 1999 (PFMA).

5.23 The final motivation that served before the Board to support a round robin resolution made no reference to Treasury approval under the PFMA.

5.24 The motivation inexplicably sought approval for a pre-payment, not to OCH which would be supplying the coal to Eskom but rather to Tegeta, which was not yet the owner of OCH but which

was attempting to acquire it from Glencore. The motivation was transparently designed to benefit not Eskom, but Tegeta that would have to come up with a R2.1 billion purchase price if it was to acquire the mine.

5.25 To this end, the motivation contained several fraudulent misrepresentations designed to secure the pre-payment for the benefit of Tegeta:

5.25.1 It referred to a "potential proposal from the business rescue practitioner" for the prepayment when no such proposal had ever been contemplated by the business rescue practitioners

5.25.2 It invoked a risk of coal supply to the Hendrina power station when no such risk existed because OCH and Glencore had committed to honouring the Coal Supply Agreement and Eskom had concluded an interim arrangement with the business rescue practitioners that secured Eskom's coal supply to Hendrina until the end of July 2016. In fact, Hendrina appeared to be oversupplied because in January 2016, Eskom informed the business rescue practitioners that it did not require the minimum contracted supply of coal from OCH

5.25.3 It suggested an urgent need for prepayment (and hence the need for a special Board meeting by round robin resolution) when no apparent urgency was present for the reasons set out in the preceding paragraph; and

5.25.4 It invoked the spectre of liquidation and job losses at OCH when Glencore had already committed to Eskom that it would fund OCH and honour the terms of the coal supply agreement.

5.26 When some board members raised queries in relation to the motivation, Mr Singh forwarded those queries to Mr Wood, Mr Mohammed Bobat of Regiments, Mr Nazeem Howa of Oakbay and Mr Essa and then sent their responses to the board members as his own.

5.27 Despite the fact that the pre-payment was in the interests only of Tegeta, and not Eskom, it was unanimously adopted by the Board on 9 December 2015.

5.28 On 10 December 2015 the business rescue practitioners signed the Optimum sale agreement ("the Optimum agreement"). On the same day, Mr Essa emailed Mr Koko setting out the terms of a pre-purchase agreement he wanted Eskom to conclude with Tegeta and which would provide for a guarantee to be procured by Eskom in favour of Tegeta for the full pre-purchase amount.

5.29 Mr Koko forwarded the email to Ms Daniels, the Eskom legal advisor, and she instructed Eskom's attorneys, CDH, to draft a pre-purchase of coal agreement on the terms set out in Mr Essa's email. When the draft agreement was returned by CDH, Mr Singh forwarded it to Mr Wood who forwarded it on to Mr Essa.

5.30 The Board resolution made no provision of any guarantee and was predicated on an urgent need for the coal supply to Hendrina to be supplied immediately. Nevertheless, Mr Singh proceeded to conclude the guarantee agreement (which was not authorised by the Board) and which included suspensive conditions that could be fulfilled as late as 31 March 2016 thus negating the ostensibly acute urgency upon which the Board resolution had been predicated.

5.31 The purpose of the guarantee seems now to be clear. The guarantee was shown by the Guptas to the Bank of Baroda to persuade the Bank of Baroda to issue a letter of comfort for the consortium of banks to whom the purchase price under the Optimum agreement was to be paid, confirming that the Bank of Baroda would make payment of the Optimum acquisition purchase price of R2.15 billion.

5.32 On 18 December 2015, the Bank of Baroda issued the letter of comfort that Tegeta required and this served to persuade the consortium of banks to consent to the Optimum agreement.

5.33 Pursuant to the Optimum agreement, Eskom released OCH from its guarantee of the liabilities of OCH under the coal supply agreement, thus freeing Glencore from its exposure to the R2.17 billion penalty claim of Eskom. Although the Optimum agreement required Tegeta to provide a substitute guarantee for the obligations of OCH to Eskom, Eskom never required Tegeta to furnish such a guarantee.

5.34 By early April 2016, it was clear that Tegeta was R600 million short of the R2.15 billion purchase price it had to pay the consortium of banks by 14 April 2016 barring which the Optimum sale would fail.

5.35 After Glencore and the consortium of banks refused to assist Tegeta to come up with the R600 million shortfall, under the Optimum sale agreement, Tegeta contrived to procure the shortfall from Eskom by means of an immediate pre-payment of R659 million for coal sourced from Optimum, ostensibly to avert a potential coal supply crisis at the Arnot power station.

5.36 A Board Tender Committee was scheduled for 21h00 on 11 April 2016. At 20h17 the members of the committee were emailed a motivation prepared by Mr Koko for the prepayment.

5.37 Mr Koko's motivation was predicated on a central fraud – there was no shortage of coal for the Arnot power station in April 2016. In fact, the Arnot power station had healthy stock levels of coal until September 2016. Moreover, even if Arnot was in need of coal, the obvious way for Eskom to address that problem would have been to take up its full contractual entitlement from the Optimum Coal Mine (which was adjacent to the Arnot power station) under the Hendrina coal supply agreement rather than declining to do so and instead pre-paying Tegeta for coal that it would source directly from Optimum.

5.38 None of the Board Tender Committee members interrogated the alleged urgency that required them to consider a pre-payment of R659 million at an extraordinary meeting called for 21h00 on the strength of a motivation that had been emailed to them less than an hour before the meeting. Instead they duly authorised the pre-payment without demur and thereafter appear to have contrived to submit emailed questions to allow falsified minutes to be prepared to give the impression that they had interrogated the reasons for the prepayment prior to approving the resolution.

5.39 On 13 April 2016, Mr Singh belatedly disclosed to the Board Tender Committee that there was doubt whether Tegeta was able to continue as a going concern because of the refusal of the banking sector to provide Tegeta with banking facilities. With full knowledge of the insecure status of Tegeta, the Committee nevertheless proceeded to implement the pre-payment decision – thus extending R659 million credit to a company that may not be able to continue as a going concern.

5.40 The prepayment agreement was signed by Mr Singh and Mr Koko on 13 April 2016. By this stage, Eskom had already accepted a Tegeta invoice for the prepayment on 12 April 2016.

5.41 The payment was then rushed through on 13 April 2016 under pressure from Mr Molefe and Mr Singh.

6. Quite apart from the fact that the acquisition of the OCH was itself a criminal project, the funds used in this acquisition were, for the most part, proceeds of crime.

7. On 14 April 2016, Tegeta paid the amount of R2 084 210 as its share of the purchase price under the Optimum sale agreement.

8. Tegeta obtained the money to pay this purchase price from seven sources which are set out in the table reproduced from Holden's report below:

Date	Amount	Source
13/04/2016	660,000,000.00	Eskom pre-payment
13/04/2016	68,000,000.00	Eskom payment to Tegeta
13/04/2016	158,500,000.00	Oakbay "loan" to Tegeta
14/04/2014	104,500,000.00	Albatime "loan" to Tegeta
14/04/2016	152,000,000.00	Trillian "loan" to Tegeta
14/04/2016	842,231,000.00	Centaur Mining "loan" to Tegeta
	100,479,206.10	Residual funds in Tegeta's Bank of Baroda account derived from multiple sources
TOTAL	**2,085,710,206.10**	

9. It can be concluded that at least R1,758,942,861.16 of the R2,084,210,206.10 used to purchase Optimum derived from criminally sourced funds. These are all of the funds identified in the above table other than the R68 million Eskom payment, the Oakbay loan and the residual funds in Tegeta's Bank of Baroda account.

10. The Eskom prepayment of R660 million has been discussed above.

11. The R104 500 000.00 Albatime loan was sourced in two unlawful payments to Albatime (Pty) Ltd (Albatime):

    11.1 A payment of R42 000 000.00 from Regiments Capital. This was part of R56 179 779 stolen from the Transnet Second Defined Benefit Fund (TSDBF) on 4 December 2015.

    11.2 A payment of R74 784 000.00 from Trillian Asset Management. This was part of R93 400 000 fee unlawfully paid by Transnet pursuant to the so called Club Loan on which Trillian did not work whatsoever.

    11.3 Holden shows that from these two sources, Albatime transferred R110 000 000.00 into a fixed deposit account at the Bank of Baroda on 14 April 2016.

    11.4 This Albatime fixed deposit was then made available as security against which the Bank of Baroda advanced a loan of R104 500 000.00 to Tegeta on the same day.

12. Trillian contributed R152 000 000.00 to Tegeta's acquisition of Optimum. The funds for this loan are directly traceable to funds that Regiments Fund Manager stole from the TSDBF in the following tranches:

    12.1 R63 916 019.00 on 8 March 2016

    12.2 R1 093 115.00 on 9 March 2016

    12.3 R67 403 305.00 on 5 April 2016; and

    12.4 R39 851 767.00 on 11 April 2016.

13. Once stolen from the TSDBF, the funds moved from Regiments to Trillian group companies and into the Trillian Management Consulting account with the Bank of Baroda.

14. On 14 April 2016, Trillian Management Consulting transferred R160 246 000.00 of these funds, and interest thereon into a fixed deposit account with the Bank of Baroda. That fixed deposit was then made available as security against which the Bank of Baroda advanced a loan of R104 500 000.00 to Tegeta on the same day.

15. Centaur Mining contributed R842 231 000.00 towards the purchase of Optimum. It obtained the funds from back-to-back loan facilities. The modus operandi was as follows:

    15.1 Centaur Ventures Limited (CVL) is the parent company of Centaur Mining. CVL is a Bermuda-based joint venture between Mr Daniel McGowan's Centaur Group Limited and Mr Akash Gargh, the bridegroom at the Gupta Sun City Wedding.

15.2 Griffin Line was a Gupta family company in Dubai, nominally controlled by Mr Kamal Singhala, the son of Mr Ajay Gupta. It was set up between 12 October 2015 and 19 December 2015 in a process in which Mr Tony Gupta and Ms Ronica Ragavan played a central role.

15.3 Holden shows that Griffin Line was a recipient of laundered proceeds of crime relating to Gupta Enterprise contracts within South Africa.

15.4 Griffin Line provided CVL with a $100 million loan facility on which CVL drew down aggregate amounts of $48 801 642.39 between 16 February 2016 and 22 March 2016.

15.5 CVL used the drawdowns on the Griffin Line loan to fund the bulk of R885 449 000 aggregate payments that it made to Centaur Mining between 26 February and 1 April 2016.

15.6 From these payments and interest thereon, Centaur Mining transferred R886 559 781.00 into a fixed deposit with the Bank of Baroda on 12 April 2016.

15.7 On 14 April 2016, Bank of Baroda advanced a loan of R842 231 000 to Tegeta against security of the Centaur Mining Fixed Deposit.

BENEFICIARIES

16. If the interests of the ultimate beneficial owners of Tegeta are applied to the aggregate amount of R1,758,942,861.16 of the R2,084,210,206.10 Optimum purchase price derived from criminally sourced funds we see the following:

16.1 The 65.13% beneficial interest of Gupta family members and their companies equates to a benefit of R1 145 527 852.53 from criminally sourced funds

16.2 The 19.49% beneficial interest of Duduzane Zuma equates to a benefit of R342 750 991.89 from criminally sourced funds

16.3 The 6.73% beneficial interest of Salim Essa equates to a benefit of R118 330 242.57 from criminally sourced funds

16.4 The 6.49% beneficial interest of Ronica Ragavan equates to a benefit of R114 250 330.63 from criminally sourced funds; and

16.5 The 2.16% beneficial interest of Ashu Chawla and other Gupta enterprise employees equates to a benefit of R38 083 443.54 from criminally sourced funds.

17. The persons who benefited from the acquisition of OCH by Tegeta as shown above benefited from the proceeds of crime. They include:

17.1 Members of the Gupta family and their companies, who received R1 145 527 852, 53

17.2 Mr Duduzane Zuma, who received R342 750 991, 89

17.3 Mr Salim Essa, who received R118 330 242, 57

17.4 Ms Ronica Ragavan, who received R114 250 330, 63; and

17.5 Mr Ashu Chawla and other Gupta enterprise employees, who received R38 083 443, 54.

RECOMMENDATION

18. Section 2 of the Prevention of Organised Crime Act (POCA) makes it a criminal offence to receive proceeds of crime. It reads:

> 2. Offences
>
> (1) Any person who-

(a) Retains or receives any property derived, directly or indirectly from a pattern of racketeering activity ... within the Republic or elsewhere, shall be guilty of an offence.

19. There are reasonable grounds to believe that the persons referred to above, including Mr Duduzane Zuma, Mr Salim Essa, Ms Ronica Ragavan, Mr Ashu Chawla and members of the Gupta family, may be guilty of contravening section 2 of POCA. In the circumstances it is recommended that law enforcement agencies should conduct such further investigation as may be necessary with a view to the possible criminal prosecution of the said persons by the NPA.

SUMMARY OF THE COMMISSION'S RECOMMENDATIONS

SOUTH AFRICAN AIRWAYS AND ITS ASSOCIATED COMPANIES

1. Below are the recommendations made by this Commission regarding South African Airways (SAA) and its associated companies.
2. The Commission's Terms of Reference required it to establish the extent to which state capture, corruption and fraud was prevalent in the public sector. In particular, the Terms of Reference required the Commission to investigate, make findings and report on whether public officials or functionaries had unlawfully awarded tenders to benefit any family, individual or corporate entity (paragraph 1.4 of the Terms of Reference). The Terms of Reference also required the Commission to determine whether any officials or functionaries within the various SOEs had benefitted personally from acts of corruption (paragraph 1.9 of the Terms of Reference).
3. These key aspects of the mandate of the Commission guided the investigation undertaken into the affairs of SAA, its subsidiary SAAT, as well as SA Express.
4. The investigation endeavoured to uncover not only what had happened within these entities but also why and how it happened. The investigation therefore had a broad compass because it was motivated by a desire to understand the weakness within the public sector that makes it vulnerable to state capture, corruption and fraud.
5. As the findings set out above show, SAA declined during the tenure of Ms Myeni to an entity racked by corruption and fraud. Despite this, she was retained as its Chairperson well beyond the point at which she should have been removed. Two successive Finance Ministers have explained to the Commission that this was because of the personal preferences of former President Zuma. This is the antithesis of accountability. President Zuma fled the Commission because he knew there were questions that would be put to him which he would not have been able to answer. He could not have justified his insistence that Ms Myeni be retained at SAA nor could he have credibly denied Mr Gordhan's and Mr Nene's evidence that he wanted Ms Myeni retained at SAA.
6. The appointment of individuals to boards of SOEs should be justifiable based on their skills expertise, experience and knowledge.
7. Functionaries within SOEs should be held to the highest standards of accountability because they use public funds to manage the businesses they oversee.
8. Those responsible for governance at SAA, SAAT and SA Express displayed a wanton disregard for these standards. Rather than acting in the entities' best interests, they were motivated by their own personal interest. This should never be allowed to occur again. In particular, the Commission makes the following recommendations for action following this report.

Mr X's evidence

9. The Secretary of the Commission has already laid a criminal complaint against Ms Myeni for her disclosure of Mr X's identity during her testimony. This matter needs to be brought to finality by the law enforcement agencies and the National Prosecuting Authority.

10. The evidence of Mr X also merits further detailed investigation and possible charges of corruption being laid against all the individuals involved in the scheme to securing millions of Rands for the personal benefit of Ms Myeni and the Jacob Zuma Foundation.

Pembroke transaction

11. Ms Myeni knowingly misrepresented to the Minister of Public Enterprises that the Board of SAA had taken two decisions when it had not. Those misrepresentations caused financial losses to SAA. It is likely that her conduct constitutes the crime of fraud. The Commission recommends that the National Prosecuting Authority considers, subject to such further investigation as may be considered necessary, whether Ms Myeni should be prosecuted for fraud.

LSG SkyChefs

12. Ms Myeni and Ms Kwinana displayed a wanton disregard for the best interests of SAA in their decision-making on the lounge catering contract. They acted in gross disregard of their fiduciary duties to SAA when they took this decision. However, they both ceased being directors of SAA more than 24 months ago. Accordingly, the shareholder is not now in a position to bring proceedings to have them declared delinquent directors under section 162 of the Companies Act.

13. This time bar may be amended by Parliament in order to permit applications to be brought even after two years, on good cause shown. This will mean that in cases such as this one, where the true extent of the Board members' breaches of duty are only uncovered a number of years later, steps can still be taken by the executive to ensure that such directors are declared delinquent and are thereby prevented from serving on the boards of companies in the future.

Swissport

14. SAA's conclusion of a five-year ground handling contract took place a month after Swissport had concluded a service level agreement with JM Aviation in terms of which JM Aviation was paid R28.5 million. That money, according to Mr Daluxolo Peter, was then used to pay millions of Rands to those who had assisted in "facilitating" the finalisation of the SAA / Swissport contract. The people who received payments from that amount of R28.5 million were:

    14.1 Mr Daluxolo Peter

    14.2 Mr Vuyisile Ndzeku

    14.3 Mr Lester Peter; and

    14.4 Adv Nontsasa Memela.

15. These payments were therefore likely to have been kick-back payments to those who had secured the conclusion of the Swissport ground handling contract with SAA or were to be involved in its implementation. The Commission recommends that the law enforcement agencies should further investigate the role of Swissport in these dealings and where warranted, the National Prosecuting Authority should consider the prosecution of all those involved in criminal acts.

16. JM Aviation appears not to have paid VAT to SARS on the R28.5 million it received from Swissport prior to the ground handling contract being concluded with SAA. It is recommended that SARS should consider this matter further and take such steps as it may be advised to take.

AAR / JM Aviation components tender

17. The award of the components tender for five years to the Joint Venture of AAR and JM Aviation was unlawful, irregular and unfair.

18. AAR and JM Aviation were favoured during the process by the SAAT Head of Procurement, Adv Nontsasa Memela and its Board.

19. The then Head of Procurement, Adv Nontsasa Memela, and the Chairperson of the Board of SAAT, Ms Yakhe Kwinana, received payments from JM Aviation around the time that these decisions were taken.

20. The payments were likely kick-back payments to these officials. It is recommended that the National Prosecuting Authority should seriously consider prosecuting the JM Aviation directors, the members of the Board of SAAT at the time, and Ms Memela for corruption or related crimes. It should also consider engaging with the United States Department of Justice regarding the role played by AAR in this scheme.

The concealment

21. The Commission's investigations revealed that Mr Ndzeku, Ms Memela, and Ms Mbanjwa, conspired to try to hide the true nature of the payments made by JM Aviation to Adv Nontsasa Memela through Ms Mbanjwa and that Mr Ndzeku and Ms Kwinana tried to hide the payments made by or on behalf of JM Aviation or Mr Ndzeku to Ms Kwinana's company.

22. They did so by fabricating agreements in order to ensure that they appeared as though they were arms-length transactions unrelated to the decision-making that took place in SAAT at the time. This conduct probably constitutes fraud. The Commission recommends that the National Prosecuting Authority seriously considers to prosecute them after such investigation as the National Prosecuting Authority may decide should be conducted.

23. In addition, both Ms Memela and Ms Mbanjwa are officers of the court. Ms Memela is an advocate and Ms Mbanjwa, an attorney. Despite this, they have participated in a fraudulent scheme to try to hide money that was paid as a kick-back to Ms Memela. It is recommended that the Legal Practice Council should investigate whether the two should not be removed from the roll of attorneys, in the case Ms Mbanjwa, and, from the roll of advocates, in the case of Ms Memela.

24. Furthermore, Ms Mbanjwa continued to act on behalf of Ms Memela and Ms Kwinana in circumstances where she was personally implicated in their impugned conduct. At times, Ms Memela and Ms Kwinana implicated each other. There is a clear apparent conflict of interest in Ms Mbanjwa's representation of either of them in these proceedings, and a conflict in representing both of them. Ms Mbanjwa's independence and objectivity would have been compromised by her personal involvement. The personal involvement of a lawyer in a case in which she acts as a legal representative has been found by the courts to be an undesirable practice. Her conduct in this regard should also receive the attention of the Legal Practice Council.

State security matters

25. It is recommended that the President should take note of the involvement of the State Security Agency in security vetting and take such steps as may be necessary to ensure that services of the State Security Agency are not abused in the future to serve the interests or agenda of certain individuals.

External service providers

26. The ACSA interest swap contracts with Nedbank and Standard Bank were procured through the corrupt involvement of Regiments Capital, Mr Ramosebudi, Mr Wood and Mr Niven Pillay.

27. It is recommended that:

27.1 ACSA take steps to recover from Regiments Capital, Mr Ramosebudi, Mr Wood and Mr Niven Pillay and failing them, Nedbank and Standard Bank, the amounts paid to Regiments Capital under the interest swap contracts and any additional losses suffered by ACSA on those contracts

27.2 The law enforcement agencies investigate these contracts with a view to:

27.2.1 The National Prosecuting Authority prosecuting Mr Ramosebudi, Mr Wood, Mr Niven Pillay and Regiments Capital on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted

27.2.2 The Asset Forfeiture Unit of the National Prosecuting Authority recovering the amounts paid to Mr Ramosebudi by Regiments Capital under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998

27.2.3 The Asset Forfeiture Unit of the National Prosecuting Authority recovering the amounts paid to Regiments Capital by Nedbank and Standard Bank Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998

27.2.4 The law enforcement agencies investigate the role of Mr Brickman, Mr Visnenza and Nedbank in relation to these contracts with a view to the National Prosecuting Authority prosecuting Mr Brickman, Mr Visnenza and / or Nedbank on charges under section 6(b)(ii) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted; and

27.2.5 The Asset Forfeiture Unit of the National Prosecuting Authority recovering Nedbank's profits under the interest swap contracts under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 unless Nedbank has a valid defence to such recovery claims.

28. The SAA Working Capital tender awarded to the McKinsey and Regiments Capital Consortium under Bid No RFP 085/13 was procured through the corrupt involvement of Regiments Capital, Mr Ramosebudi, Mr Wood and possibly also Mr Indheran Pillay and Mr Tewedros Gebreselasie. There is no evidence that McKinsey was aware of any of the corrupt conduct linked to the award of Bid No RFP 085/13 and McKinsey has already repaid in full, the amount that it received from SAA in connection with its appointment under this tender.

29. It is recommended that:

29.1 The law enforcement agencies investigate the award of Bid No RFP 085/13 with a view to:

29.1.1 The National Prosecuting Authority prosecuting Mr Ramosebudi, Mr Wood and Regiments Capital on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted

29.1.2 The NPA prosecuting Mr Indheran Pillay and Mr Tewedros Gebreselasie on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted

29.1.3 The Asset Forfeiture Unit of the NPA recovering from Mr Ramosebudi under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 the amount of R375 606 paid to Riskmaths Solutions (Pty) Ltd by Regiments Capital on 7 November 2013; and

29.2 The Asset Forfeiture Unit of the NPA recovering under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 the amount of R6 241 500 paid to Regiments Capital by McKinsey in relation to the SAA Working Capital contract.

Proceeds of unlawful activities

30. Where the evidence before the Commission has revealed possible acts of corruption and fraud and has recommended that prosecutions take place, steps should be taken by the relevant authorities urgently to seek to recover the proceeds of these unlawful activities.

PRECCA reporting obligations

31. In order for the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA) to have any prospect of assisting in the fight against corruption, those who were duty-bound to report corruption but failed to do so, should also be held accountable.

32. Section 34(2) of PRECCA makes it an offence for anyone who holds a position of authority within an entity and who knows or ought reasonably to have known that an act of corruption has been perpetrated, to fail to report the conduct.

33. In her position as interim CFO, Ms Nhantsi held a position of authority within SAA. She ought, therefore, to have reported the BNP transaction and her suspicions concerning the true motives of Ms Duduzile Cynthia Myeni and Mr Masotsha Mngadi in pushing the transaction forward. Her failure to do so may constitute a crime. The Commission therefore recommends that the law enforcement agencies including the NPA should give the matter further consideration with a view to her possible prosecution.

Auditors

34. The Auditor-General's office should be further capacitated so that it can audit all public entities. To the extent that that is not practicable, serious consideration should be given to private firms being appointed to audit SOEs only if they can demonstrate that they have the requisite skills and also the requisite understanding of their obligations to the public at large when they audit an SOE. There should be a sufficient appreciation that, not only are the financial statements of cardinal importance, but also the entity's PFMA obligations are of great significance.

35. The South African Institute of Charted Accountants should investigate whether Ms Kwinana has the requisite knowledge and appreciation of her obligations as a Chartered Accountant and whether she is suitable to continue to practise the profession of a Chartered Accountant. The Commission believes that the answers she gave to certain questions during her evidence revealed either that she has no clue about some of the basic obligations that she should know as a Charted Accountant or she knew those obligations but dishonestly pretended that she did not know them because it was convenient for her to do so. In either case SAICA should be interested in investigating the matter because either explanation may mean she is not fit and proper to practise the profession of a Chartered Accountant. Her auditing firm's tax returns should also be investigated by SARS because there may have been a significant understatement of revenue (to the value of approximately R40 million) in the 2016 financial year. It is recommended that SARS should conduct its investigation in this regard.

SA Express

36. The Commission's investigations into SA Express's dealings with the North West Department of Transport has revealed an elaborate scheme of corruption, designed to take money out of the state's coffers for the benefit of those with power and influence who orchestrated the scheme.

37. The Commission recommends that all of the government and state officials, as well as private individuals who were involved in this looting scheme, should be brought to justice. There are investigations currently underway in this matter; the case has been open since 2016. They should be brought to a swift conclusion.

38. Mr Natasen's conduct should form an important part of the authorities' further investigations of this matter. The Commission recommends that serious consideration be given by the National Prosecuting Authority to charging Mr Natasen with money laundering and the use of the proceeds of crime after such further investigation as the law enforcement agencies may conduct and if the further investigations reveals possible contravention of the relevant law ; that his conduct be reported to the SAICA and that the South African Revenue Services should investigate the numerous respects in which Neo Solutions appears not to have accurately and fairly reported its income to the authorities.

39. The Reserve Bank should also investigate whether Ms Viljoen's AMFS operation was, in fact, a cash in transit business that merely failed to comply with its FICA obligations, or rather operating as a bank without any lawful licence to do so. The current SAPS investigation should also be extended to interrogate the role of AMFS in more detail. The question that needs to be answered is whether AFMS was providing general money laundering facilities to those who wished to have their proceeds converted to cash without the necessary checks required from the formal banking system.

40. Where prosecutions have been recommended in this section, it is also recommended that the Asset Forfeiture Unit of the National Prosecuting Authority takes steps to recover under Chapter 5 or Chapter 6 of Prevention of Organised Crime Act 121 of 1998 any amounts that constitute the proceeds of unlawful activities or the instrumentality of an offence.

THE NEW AGE

41. Below are the recommendations made by the Commission regarding *The New Age*.

42. It is recommended that the law enforcement agencies should investigate a possible crime of corruption against Mr Tony Gupta on the basis of Mr Kona's evidence that he offered him initially R100 000 and later R500 000 in their meeting at Saxonwold on or about 29 October 2012.

43. These matters should therefore be handed over to law enforcement agencies for further investigation and, where warranted, prosecution.

44. In so far as Eskom is concerned, the Commission's limited time and resources did not make it possible to consider the position of every one of the 2015 Eskom Board members. All of the 2015 Eskom Board members received rule 3.3 notices related to the Eskom TNA evidence presented at the Commission.

45. Only three responded:

    45.1 Ms Klein provided the statement that she had previously submitted to Parliament's Public Enterprises Portfolio Committee. She indicated that she had not supported the round robin resolution to ratify the third TNA contract.

    45.2 Both Dr Pathmanathan Naidoo and Ms Devapushpum Naidoo also responded to the Commission. Ms Naidoo explained that she was influenced by the Ledwaba Mazwai report in deciding to ratify the contract. In his affidavit, Dr Naidoo indicated that he was influenced by the impact the TNA contract had for the company's interim results.

46. The remaining board members did not respond to their rule 3.3 notices.

47. The position of each of the new 2015 Board members of Eskom will therefore need to be investigated further before any charges could be brought against any of them individually.

48. Given Mr Brian Molefe's role in the conclusion of the contracts referred to above between Transnet and TNA, particularly his misrepresentation that some of those contracts were partnerships when they were sponsorships, it is recommended that the law enforcement agencies conduct such further investigation as may be necessary with a view to the possible prosecution of Mr Brian Molefe by the National Prosecuting Authority for fraud and/or contravention of the PFMA.

49. Given Mr Collin Matjila's role in the conclusion of the contracts referred to above between Eskom and TNA, particularly his misrepresentation that one or more was a partnership or were partnerships when they were sponsorships, it is recommended that the law enforcement agencies conduct such further investigation as may be necessary with a view to the possible prosecution of Mr Collin Matjila by the National Prosecuting Authority for fraud and/or contravention of the PFMA.

SOUTH AFRICAN REVENUE SERVICE

50. Below are the recommendations made by this Commission regarding the South African Revenue Service (SARS) and its associated companies.

51. It is recommended that:

    51.1 In the light of the facts pertaining to Bain's unlawful role in SARS, all Bain's contracts with state departments and organs of state be re-examined for compliance with the relevant statutory and constitutional provisions

    51.2 Law enforcement agencies conduct such investigations as may be necessary with a view to enabling the National Prosecuting Authority to decide whether or not to initiate prosecutions in connection with the award of the Bain & Co contracts

    51.3 The SARS Act of 1997 as amended be amended to provide for an open, transparent and competitive process for the appointment of Commissioner of SARS; and

    51.4 Mr T Moyane be charged with perjury in relation to his false evidence to Parliament.

PUBLIC PROCUREMENT IN SOUTH AFRICA

52. The Commission makes the following recommendations for consideration by the President.

Recommendation 1: The National Charter against Corruption

53. The Government, in consultation with the business sector, should prepare and publish a National Charter against corruption in public procurement, such Charter to include a Code of Conduct setting out the ethical standards which apply in the procurement of goods and services for the public.

54. The National Charter should be signed by or on behalf of:

    54.1 The President and the Cabinet

    54.2 The Provincial Premiers and members of the Provincial Cabinets

    54.3 The local authorities

    54.4 All State-Owned enterprises

    54.5 The political parties represented in Parliament

    54.6 Constitutional entities

    54.7 The institutional representatives of the business sector

    54.8 Listed public companies

    54.9 Trade unions; and

    54.10 Anti-corruption bodies in civil society.

55. Every procurement officer in the public service shall, on assuming duty, be required to sign a commitment to observe and uphold the terms of the National Charter.

56. Every natural or juristic person tendering or contracting to supply goods or services by way of public procurement should sign a like commitment to uphold and to adhere to the terms of the Charter and its Code of Conduct.

57. The contents of the National Charter and the Code of Conduct should be widely publicised.

58. The National Charter and Code of Conduct should be given legal status and effect by an Act of Parliament.

Recommendation 2: The establishment of an independent agency against corruption in public procurement

59. The Government should introduce legislation for the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA).

60. Legislation should constitute the Agency:

    60.1 As an independent body subject only to the Constitution and the law

        60.1.1 Which has jurisdiction throughout the Republic

        60.1.2 Which is impartial and should perform its functions without fear, favour or prejudice; and

        60.1.3 Which is financed from:

            A. Money that is appropriated by Parliament for the Agency

            B. Fees payable to the Agency by all tenderers for public procurement contracts; and

            C. Money received from any other source.

61. Legislation should provide that the Agency comprises:

    61.1 The Council, consisting of five members:

        61.1.1 The chairperson, who shall be a senior legal practitioner with expertise in procurement matters; and

        61.1.2 Four members chosen for their special skills in accounting, finance and economics with expertise in public procurement matters one of whom shall be a member of the academic staff of a University who is a specialist in matters of public procurement.

62. The said members of the Council are to be selected by a panel consisting of the Chief Justice, the Auditor-General and the Minister of Finance following a public process, and include:

    62.1 An inspectorate

    62.2 A litigation unit

    62.3 A tribunal; and

    62.4 A Court.

63. The function of the Council is to:

    63.1 Initiate measures to protect procurement systems from corruption

    63.2 Issue guidelines for the betterment of procurement practice

    63.3 Prohibit any practice which facilitates corruption, fraud or undue influence in public procurement

    63.4 Formulate measures for the making of reports to the Agency by whistle blowers and for their protection and incentivisation

    63.5 Implement measures to increase the integrity and transparency of public procurement practices

    63.6 Negotiate agreements with any regulatory or oversight authority to co-ordinate and harmonise the exercise of jurisdiction over public procurement

    63.7 Participate in the proceedings of any regulatory or oversight authority and advise or receive advice from such authorities; and

    63.8 Issue regular reports for public and media attention, detailing the nature and extent of corruption, fraud and undue influence identified by the AACIPP.

64. The function of the Inspectorate is to:

    64.1 Monitor and inspect public procurement activity to detect and expose corruption

64.2 Establish, maintain and update a comprehensive and secure data base recording and listing:

64.2.1 Every public procuring entity, together with its procurement procedures and the names and qualifications of the procurement officials employed

64.2.2 Information obtained from whistle blowers and complaints registered by tenderers

64.2.3 Reports and information provided by oversight authorities

64.2.4 Reports of disciplinary proceedings relating to procurement officials conducted by any governmental, SOE or constitutional entity; and

64.2.5 Any other information in respect of the aforegoing

64.3 Institute electronic procedures to facilitate the monitoring and inspection of public procurement activity

64.4 Undertake in situ inspections, where necessary without notice, of public procurement activity by the procuring entities

64.5 Review the procurement systems utilised by the procuring entities to ensure the adequacy of in-built protections against corruption

64.6 Issue mandatory compliance notices requiring the prompt implementation of remedial measures by a procuring entity to address deficiencies or irregularities detected in any procurement system or in respect of any tender or the award of any contract calling upon the affected entity to take immediate steps to rectify same

64.7 Refer all instances of non-compliance with such notices to the Litigation Unit for further action

64.8 Promptly investigate any information received concerning fraud or corruption in the grant of tenders or contracts and take active steps to protect informants against intimidation or revenge

64.9 Investigate any circumstances suggesting the giving of a bribe or other gratification for the award of a tender or contract including the making of donations to political parties in connection with the award of tenders; and

64.10 Investigate all complaints concerning corruption made by tenderers or other informants and refer matters arising from such investigations to the Tribunal.

65. The function of the Litigation Unit is to:

65.1 Apply to the Tribunal for the giving of authority to the Inspectorate to exercise powers of search and seizure against any juristic or natural person including any political party in connection with any investigation into corruption, fraud or undue influence connected to public procurement

65.2 Receive and negotiate Deferred Prosecution Agreements and refer such Agreements to the Tribunal for approval

65.3 Seek remedial action from the Tribunal where Notices of Compliance issued by the Inspectorate have not been rectified

65.4 Institute proceedings before the Court for the recoupment of monies stolen from, or damages suffered by the State as a consequence of corruption, fraud or undue influence in the procurement process

65.5 Apply to the Tribunal for an order debarring any person from participating in any tender process or the grant of any procurement contract either permanently or for a stipulated time and either conditionally or unconditionally; and

65.6 Apply to the Tribunal for an order striking any procurement official from the roll of professional procurement officers either permanently or for a stated period and whether conditionally or unconditionally.

66. The function of the Tribunal is to:

66.1 Grant or refuse warrants of search and seizure of documents to the Inspectorate at the request of the Litigation Unit

66.2 Review and approve either with or without conditions any DPA or to reject same

66.3 Make any order requiring any procuring entity or other recipient of a compliance notice to comply forthwith or subject to such qualifications as the Tribunal may impose

66.4 Issue, where appropriate, an order interdicting any procurement entity from conducting any procurement activity until it has properly complied with any order issued by the Tribunal; and

66.5 Issue an order debarring any natural or legal person found guilty of corruption, fraud or exercising undue influence from again participating in any tender or receiving the grant of any procurement contract either for a period of time or permanently.

67. The function of the Court is to:

67.1 Determine civil actions instituted by the Litigation Unit for recompense to the State in respect of losses suffered through corrupt acts; and

67.2 Act as a Court of Appeal in respect of decisions of the Tribunal.

Recommendation 3: Protection for whistle blowers

68. The Government should introduce legislation or amend existing legislation:

68.1 To ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in article 32(2) of the United Nations Convention Against Corruption

68.2 Identifying the Inspectorate of the Agency as the correct channel for the making of such disclosure

68.3 Authorising the Litigation Unit of the Agency to incentivise such disclosures by entering into agreements to reward the giving of such information by way of a percentage of the proceeds recovered on the strength of such information; and

68.4 Authorising the offer of immunity from criminal or civil proceedings if there has been an honest disclosure of the information which might otherwise render the informant liable to prosecution or litigation.

Recommendation 4: Deferred prosecution agreements

69. The government should introduce legislation for the introduction of deferred prosecution agreements by which the prosecution of an accused corporation can be deferred on certain terms and conditions:

69.1 Where a company has self-reported facts from which criminal liability could be inferred and has co-operated fully in making such report

69.2 Where the company has agreed to engage in specific conduct intended to ensure that such conduct is not repeated

69.3 Where the company has paid a fine

69.3.1 Or been subject to other remedial action; or

69.4 Where the terms and conditions of the agreement have been sanctioned by the Tribunal of the Agency.

Recommendation 5: The creation of a procurement officer's profession

70. It is recommended that consideration be given to enacting legislation that will establish a professional body to which all officials who work in the area of public procurement should belong.

71. Such professional body will fix the qualifications and the necessary training and experience necessary for membership of the profession.

72. Such training and qualifications should include high standards of integrity and a commitment to resist mismanagement, waste and corruption.

73. The procurement system in every procuring entity should be managed by a duly qualified public procurement official who is a member in good standing in the profession.

74. The Tribunal of the Agency should act as the disciplinary committee of the profession with power to strike a member from the Roll or to impose such other disciplinary sanction as the case may require.

Recommendation 6: The enhancement of transparency

75. The Commission recommends that set standards of transparency consistent with the OECD principles for integrity in public procurement be formulated by National Treasury for compulsory inclusion in every procurement system adopted by a public procurement entity.

Recommendation 7: Protection for accounting officers / authorities acting in good faith

76. It is recommended that the legislation dealing with the duties and responsibilities of Accounting Officers/Authorities be amended to insert a provision which reads:

> No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act unless such person acts negligently.

Recommendation 8: Suggested amendment to the Prevention and Combating of Corrupt Activities Act 12 of 2004

77. In order to strengthen the duty of private sector entities to put in place measures against bribery it is recommended that PRECCA be amended by the introduction of a section 34A reading as follows:

> 34A Failure of persons or entities to prevent bribery
>
> (1) Any member of the private sector or any incorporated state-owned entity ('A') is guilty of an offence under this section if a person ('B') associated with A gives or agrees or offers to give any gratification prohibited under Chapter 2 to another person ('C') intending -
>
> > (a) To obtain or retain business for A; or
> >
> > (b) To obtain or retain an advantage in the conduct of business for A, save that no offence shall be committed where A had in place adequate procedures designed to prevent persons associated with A from giving, agreeing or offering to give any gratification prohibited under Chapter 2.
>
> (2) For the purposes of section 34A(1), a person ('B') is associated with A if (disregarding any gratification under consideration) B is a person who performs services for or on behalf of A. The capacity in which B performs services for or on behalf of A does not matter.

Recommendation 9: Suggested amendment to the Political Party Funding Act 6 of 2018

78. It is recommended that the Act be amended to criminalise the making of donations to political parties in the expectation of or with a view to the grant of procurement tenders or contracts as a reward for or in the recognition of such grants having been made.

Recommendation 10

79. It is recommended that consideration be given to the enactment of legislation for:

    79.1 The greater centralisation of public procurement in certain aspects

    79.2 The better harmonisation of the legislation applying to public procurement

    79.3 The better guidance of public procurement officials in applying the legislation governing public procurement

    79.4 The better training of public procurement officials; and

    79.5 The discontinuance of any deviation based on the concept of a sole source service provider.

TRANSNET

Recommendations in relation to the kickbacks and laundering of the proceeds of unlawful activities

80. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution here or abroad of Mr Essa and his various companies (Regiments Asia, Tequesta, JJ Trading FZE and Century General Trading FZE) and the relevant functionaries of CSR Zhuzhou Electric Locomotives Co, CNR and CRRC on charges of corruption as contemplated in any law, including Chapter 2 of PRECCA, and the racketeering offences and the offences relating to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA, in relation to the various contracts (including BDSAs and exclusive agency agreements) concluded between 2012 and 2016 that led to the payment of at least R7.34 billion in kickbacks to companies controlled by Mr Essa and the Gupta enterprise.

81. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with the view to the possible prosecution of Regiments Capital (Pty) Ltd, Mr Wood, Mr Essa (and any company under his control), Mr Moodley (and any company under his control) and Mr Singh, as well as any persons associated with them in illegal conduct, on charges of fraud, corruption as contemplated in Chapter 2 of PRECCA, and the racketeering offences and the offences related to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA in relation to the alleged arrangement and agreement whereby it was agreed to appoint Regiments as an SDP on Transnet contracts in exchange for Regiments paying 30-50% of its fees to Mr Essa and/or his associated companies and 5% of its fees to Mr Moodley and/or his associated companies amounting to more than R1 billion for little or no consideration.

Recommendations in relation to the receipt of gratification by individuals

82. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Gigaba, Mr Gama, Mr Pita and Mr Jiyane on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to cash payments allegedly received by them during visits to the Gupta compound in Saxonwold in the period 2010-2018.

83. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe and Mr Singh on charges of corruption as contemplated in Chapter 2 of PRECCA in relation to cash payments that were allegedly made to them at the Three Rivers Lodge, Vereeniging in July 2014 by two unidentified Chinese men.

84. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on charges of corruption as contemplated in Chapter 2 of PRECCA in relation to his Dubai travel expenses during the period between April 2014 and June 2015, which were allegedly paid for by Sahara Computers.

Recommendations in relation to the unjustifiable reinstatement of Mr Gama

85. It is recommended that steps should be taken by Transnet in terms of section 77 of the Companies Act 71 of 2008 to recover from those members of the board who supported the unjustifiable settlement agreement between Transnet and Mr Gama concluded on 23 February 2011, the amount of approximately R17 million paid to and for the benefit of Mr Gama pursuant to the agreement.

86. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine whether the crime of fraud was committed by any person in relation to the payment of R1 399 307.11 on 16 April 2015 by Transnet to Langa Attorneys (in respect of costs allegedly owed to Mr Gama).

87. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary, with a view to the possible prosecution on a charge of corruption in terms of Chapter 2 of PRECCA, and/or a racketeering charge in terms of Chapter 2 of POCA, to determine whether the reinstatement of Mr Gama as CEO of TFR at the instance of Mr Zuma, Mr Gigaba and Mr Mkwanazi constituted an improper inducement to Mr Gama to do anything, thus amounting to corruption.

Recommendation in relation to the settlement agreement with GNS / Abalozi

88. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine whether Mr Brian Molefe acted wilfully or grossly negligently in contravention of sections 50 or 51 of the PFMA with a view to his prosecution on a charge in terms of section 86(2) of the PFMA in relation to his agreement on 16 January 2016 to pay GNS/Abalozi an unjustifiable payment of R20 million.

Recommendations in relation to the procurement of the 95 locomotives

89. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe and Mr Gama on a charge of contravening section 50(1)(a) of the PFMA and/or on an offence relating to the proceeds of unlawful activities and/or racketeering as contemplated in Chapter 2 and 3 of POCA in relation to their decision to recommend to the board the change in the evaluation criteria in the procurement of the 95 locomotives so as to favour CSR as a bidder for the tender.

90. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine if the board (the accounting authority) of Transnet wilfully or grossly negligently contravened section 51(1)(b)(i) of the PFMA by failing to recover delay penalties allegedly due to Transnet in terms of the LSA concluded between Transnet and CSR in 2012 in respect of the procurement of the 95 electric locomotives.

Recommendations in relation to the procurement of the 100 locomotives

91. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Jiyane and Mr Gama on a charge in terms of section 86(2) of the PFMA of wilfully or grossly negligently contravening section 50 or 51 of the PFMA by presenting misleading information and failing to disclose material information to the board of Transnet in January 2014 regarding the acquisition of 100 electric locomotives from CSR by means of confinement.

92. It is recommended that the law enforcement agencies conduct such further investigations as may be required with a view to the possible prosecution of any official of Transnet in terms of section 86(2) of the PFMA in respect of the authorisation of advance payments of approximately R3 billion to CSR in the period between March 2014 and November 2014 with no security in the form of advance payment guarantees being in place.

93. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the board or any official of Transnet on a charge in terms of section 86(2) of the PFMA of wilfully or grossly negligently contravening section 50 or 51 of the PFMA by agreeing to or condoning an unjustifiable price increase in the amount of R740 million in relation to the procurement of 100 electric locomotives from CSR.

Recommendations in relation to the procurement of the 1,064 locomotives

94. It is recommended that the law enforcement agencies conduct such further investigations as may be required with a view to the possible prosecution of any official of Transnet on a charge in terms of section 86(2) of the PFMA by wilfully or grossly negligently contravening section 51 of the PFMA by wrongfully deviating from the evaluation criteria of the instruction note of National Treasury of 16 July 2012 and the provisions of regulations 5 and 6 of the PPPFA regulations in relation to the evaluation of the bids for the 1,064 locomotives.

95. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh and Mr Gama for fraud and on a charge in terms of section 86(2) of the PFMA of contravening section 50(1)(b) of the PFMA by misrepresenting to the board of Transnet in April 2013 and May 2014 that the ETC of R38.6 billion for the procurement of the 1,064 locomotives excluded provision for forex and escalations when it in fact did so in the amount of R5.892 billion.

96. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge of fraud by misrepresenting to the Minister of Public Enterprises in an email of 31 March 2014 that the ETC of R38.6 billion approved by the Minister in August 2013 excluded provision for the impacts of foreign exchange and escalations when it in fact included provision for such costs in the amount of R5.892 billion.

97. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any official or employee or former employee of Transnet on a charge of fraud or in terms of section 86(2) of the PFMA in wrongfully adjusting the prices of the bid of CSR by an irregular adjustment for the TE scope and by an inappropriate reduction of CNR's Best and Final Offer ("BAFO") price in the procurement of the 1,064 locomotives so as to favour them and with the result that their bids succeeded when they should not have.

98. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh and Mr Jiyane on a charge of fraud or in terms of section 86(2) of the PFMA by wrongfully agreeing to increase the price of the procurement of the 1,064 locomotives by including an unjustifiable provision of R2.7 billion for batch pricing when there was no contractual obligation to do so.

99. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the negotiations team that conducted the post tender negotiations on behalf of Transnet in relation to the procurement of the 1,064 locomotives on charges of corruption in terms of Chapter 2 of PRECCA, or in terms of section 86(2) of the PFMA for wilfully or grossly negligently contravening section 50(1)(b) of the PFMA, by acting corruptly or not acting in the best interests of Transnet in managing its financial affairs by agreeing to the payment of excessive advance payments to CSR and CNR and not complying with the local content requirements of the RFPs of the tender in relation to this transaction.

100. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge of fraud by misrepresenting to the board of Transnet that the 1,064 locomotive project was Net Present Value ("NPV") positive and profitable by applying an inappropriate hurdle rate of 15.2% when the project may in fact have had a negative NPV.

101. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the board or any official

of Transnet on a charge in terms of section 86(2) of the PFMA of wilfully or in a grossly negligent way contravening sections 50 or 51 of the PFMA by agreeing to or condoning an unjustifiable price increase in the amount of R9.124 billion in relation to the procurement of the 1,064 locomotives from the relevant OEMs.

102. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of the majority directors of CNRRSSA, BEX, Mr Shaw, Integrated Capital Management, Confident Concepts and any other associated persons and companies on a charge of corruption as contemplated in Chapter 2 of PRECCA, and the racketeering offences and the offences related to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA in relation to the payment of approximately R76.59 million made by CNRRSSA to BEX on 25 September 2015.

103. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Nair and the members of the negotiations team that represented Transnet in the negotiations with CNRRSSA and Bombardier concerning the relocation of the manufacturing and assembly lines to Durban in 2014-2015 on a charge in terms of section 86(2) of the PFMA for contravening section 50(1)(b) of the PFMA by failing to act in the best interests of Transnet in managing its financial affairs by negotiating and agreeing to variation orders in the total amount of approximately R1.2 billion, when there may in fact have been no proper basis for agreeing to the payment of that amount.

Recommendations in relation to the financial advisors

104. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Wood, Regiments and any other person associated with them in illegal conduct on charges of corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA, and in terms of section 86(2) of the PFMA (where appropriate) for contravening section 50(1)(b) of the PFMA by acting corruptly and receiving and laundering an amount of R79.23 million paid by Transnet to Regiments on 30 April 2014.

105. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama on a charge in terms of section 86(2) of the PFMA for contravening section 51(h) of the PFMA by concluding a contract in 2017 with Nkonki valued at R500 million in contravention of paragraph 9 of National Treasury Practice Note 3 of 2016 thereby not complying with legislation applicable to Transnet.

106. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge in terms of section 86(2) of the PFMA of contravening section 51(1)(b)(iii) of the PFMA in that on 27 August 2014 he breached his duty to prevent expenditure not complying with the operational policies of Transnet by recommending to the board a proposal made by Regiments that was not in line with Transnet's policy regarding the fixed-floating debt ratio.

107. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge in terms of section 86(2) of the PFMA of contravening section 50(1)(b) of the PFMA by not acting in the best interests of Transnet by recommending to the board the conclusion of a loan of USD1.5 billion on 4 June 2015 at a price substantially above the market norm.

108. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Singh, Regiments, Mr Wood, Mr Moodley, Albatime and Sahara Computers on charges of corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA and (where appropriate) in terms of section 86(2) of the PFMA in relation to the payment by Transnet to Regiments on 11 June 2015 of an amount of R189.24 million and the on

payment of R147.6 million of that amount to Albatime and Sahara Computers by Regiments.

109. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Ramosebudi, Mr Pita, Mr Wood, Mr Essa, Trillian and Albatime on charges of fraud, corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activities in terms of Chapter 2 and 3 of POCA in relation to the payment by Transnet to Trillian on 4 December 2015 of an amount of R93.48 million and the on payment of R74.78 million of that amount to Albatime.

110. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Ramosebudi and Mr Wood on a charge of corruption in terms of sections 12 and 13 of PRECCA and racketeering offences in terms of Chapter 2 of POCA in relation to his soliciting or offering to accept a gratification from Mr Wood, Trillian or Mr Nyhonyha on 12 September 2015 in the form of a discount or reduction of the price payable for a Range Rover Sport motor vehicle from Land Rover Waterford for his benefit as an inducement to award a contract appointing Trillian for a fee of R93.4 million to replace JP Morgan as the lead arranger of the ZAR12 billion club loan.

111. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Ramosebudi, Mr Pita, Regiments Capital (Pty) Ltd, Regiments Fund Managers (Pty) Ltd, Mr Wood, Mr Shane and any other persons associated with them in illegal activity on charges of fraud, corruption or in terms of Chapter 2 of PRECCA, racketeering and the offences relating to the proceeds of unlawful activity under Chapter 2 and 3 of POCA, or where appropriate in terms of section 86(2) read with section 50(1)(b) of the PFMA, in relation to the realised losses of more than R1.5 billion caused to Transnet and the fees paid to Regiments Fund Managers in the amount of R229 million in respect of various interest rate swaps, cross-currency swaps and credit default swaps executed by Regiments on behalf of Transnet in the period between 2015 and 2019.

Recommendations in relation to the MEP

112. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Reddy and Mr Padayachee with corruption as contemplated in section 3, section 12(1) or section 13 of PRECCA in their offering in July 2013 to accept a gratification (in the form of an appointment as an SDP) from Hatch as an inducement for influencing officials at Transnet to award Hatch the tender in relation to phase 1 of the Manganese Expansion Project ("MEP").

113. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Essa and Mr Singh on charges of corruption in terms of Chapter 2 of PRECCA and racketeering offences in terms of Chapter 2 of POCA in demanding or soliciting in early 2014 a gratification (an SDP appointment for a company favoured by Mr Essa) for the benefit of Mr Essa's company and himself and as an inducement (by influencing officials at Transnet) to award the tender in relation to a contract for performing work and providing services on phase 2 of the MEP to Hatch.

Recommendations in relation to the IT contracts

114. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Khan, Homix, Neotel and Mr Van der Merwe on charges of corruption in terms of section 13 of PRECCA and on racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA in relation to the offering by Mr Khan to accept 10% commission, in the amount of approximately R34 million, from Neotel as an inducement to influence officials at Transnet to award a tender to Neotel for supplying equipment to Transnet from Cisco and in relation to the on payment of such funds to the laundering vehicles of the Gupta enterprise.

115. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Neotel, Mr Joshi, Mr Van der Merwe, Mr Khan, Homix and any other person associated with them in illegal activity on charges of corruption in terms of Chapter 2 of PRECCA, racketeering offences in terms of Chapter 2 of POCA and offences relating to the proceeds of unlawful activity in terms of Chapter 3 of POCA, in relation to the payment by Neotel of R41.04 million to Homix and the promise by Neotel to pay R25 million to Homix in the period between December 2014 and February 2015 supposedly for services rendered in relation to the MSA and asset buyback agreement concluded between Neotel and Transnet in December 2014.

116. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Shane and Mr Nagdee on a charge in terms of section 86(2) of the PFMA for contravening section 50 of the PFMA by acting prejudicially to Transnet's financial interests in a meeting of the BADC on 13 February 2017 by unjustifiably favouring the bid of T-Systems on spurious grounds.

DENEL

117. The evidence heard by the Commission with regard to Denel is that at some stage this was a state owned entity that was highly regarded internationally. Yet now it is an entity that is almost on its knees. The question that arises is: how did this come about and why was it allowed to happen? It is quite clear that a very important reason relates to the quality of leadership or lack thereof that is given to these SOEs. By Minister Lynn Brown's own admission, the 2011-2015 Board of Directors performed its duties very well. She even said that their performance had placed Denel in a position which was "music" in her ears. By her own admission that Board had achieved 88% of its targets in the 2014/2015 financial year. That, by any standard was excellent performance. The Board only served one term and it could have been asked to serve another term. It was not. The question that arises is: why did Minister Brown not ask it to?

118. During the period 2011 to 2015 it was not only the Board that was performing excellently at Denel but also the Group CEO, Mr Riaz Saloojee. Early in 2014 the then Chairperson of the Board of Directors, Mr Z Kunene, had written to Mr Saloojee extending his term of appointment and had said in the letter that one of the reasons the Board was extending his term was that he had shown exceptional performance and leadership as Group CEO of Denel. Yet, the 2015 Board made sure that one of the first decisions it made was to suspend the Group CEO with the Group Chief Financial Officer and the Company Secretary. Consequently, from the second half of the new Board's first year in office and the whole of their second year Denel was without these exceptional performers, namely the 2011 Board and the Group CEO. The result in the year that followed tells it all. In media reports Denel is now associated with liquidation and business rescue.

119. The appointment of members of Boards of Directors and of Chief Executive Officers for state owned entities is a matter of serious concern. The evidence heard by the Commission in regard to not just Denel but also certain other state-owned entities has revealed that the Executive very often failed to appoint the right kind of people these positions in SOEs. In regard to Denel, Minister Brown appointed as Chair of the Board an attorney who had previously been struck off the roll of attorneys for a long lists of acts of misconduct. In SAA, as is reflected in Volume 1, Part 1 of this Commission's Report, the Executive appointed Ms Dudu Myeni who went on to do serious damage to the national airline. In Transnet the Executive appointed Mr Mafika Mkwanazi and certain other Board members in December 2010 who went on to enter into the strangest settlement agreement in regard to a dismissal dispute that has ever been seen which was very prejudicial to the interests of Transet and they reinstated Mr Gama as CEO of TFR in circumstances that even Mr Mkwanazi conceded made their decision indefensible. Also at Transnet the Executive appointed both Mr Brian Molefe and Mr Siyabonga Gama to the position of Group CEO one after the other and they caused serious damage to Transnet.

120. It was also the Executive who appointed Dr Ben Ngubane as Chairperson of the Eskom Board of Directors after Mr Zola Tsotsi had effectively been expelled by that Board and he went on to allow not

only himself but also his Board to be dictated to by the Guptas or their associates what resolutions it should pass and, of course, he and his Board caused serious damage to Eskom. Even though this does not relate to an SOE, it is, of course, also true that it was the Executive who appointed Mr Tom Moyane as Commissioner of SARS and he went on to cause untold damage to SARS, an organisation that was once the envy of other similar organisation internationally.

121. When regard is had to all of the above, it is quite clear that the appointment of members of Boards of Directors of SOEs as well as senior executives such as Chief Executive Officers and Chief Financial Officers can no longer be left solely in the hands of politicians because in the main they have failed dismally to give these SOEs members of Boards and Chief Executive Officers and Chief Financial Officers who have integrity and who have what it would take to lead these institutions successfully. They are all going down one by one and, quite often, they depend on bail outs.

122. It is therefore necessary that a body be established which will be tasked with the identification, recruitment and selection of the right kind of people who will be considered for appointment as members of Boards of SOEs and those who will be appointed as Chief Executive Officers and Chief Financial Officers at these SOEs.

123. It would be completely unacceptable to allow this situation to continue as before without any change in how members of Boards of SOEs and Chief Executive Officers and Chief Financial Officers are appointed. However, the actual recommendation of the body that will be recommended to play a key role in this regard will be dealt with in Part III of the Commission's Report when other SOEs which have not so far been covered in Part I and Part II of the Report will have been covered.

124. On the evidence heard by the Commission the 2015 Board of Directors of Denel that was led by Mr L D Mantsha failed to carry out its fiduciary duties in suspending the three executives, in failing to ensure that a disciplinary inquiry was or inquiries were held within a reasonable time, in failing to agree to reasonable proposals made by the suspended executives which were aimed at and would have ensured that the allegations against the executives were tested expeditiously and the matter was resolved without undue delays and in making the payments that the Board made to the Executives to get them to leave Denel. In this regard it is recommended that law enforcement agencies should conduct such further investigations as may be necessary with a view to possible prosecutions of members of the Board of Directors of Denel appointed in 2015 who supported the decisions taken by the Board in regard to the Executives for possible contravention of Section 51 and 51 of the Public Finance and Management Act 1 of 1999.

125. Mr Mantsha and the other directors who supported his campaign against the three executives have *prima facie* shown themselves unfit to be directors of a company. Section 162 of the Companies Act prescribes that certain specified persons and bodies may apply to court for an order declaring a director or former director delinquent or under probation, amongst other situations where the director or former director grossly abused the position of director, intentional or by gross negligence inflicted harm to a company of its subsidiary. The court on making a declaration of delinquency may make a range of consequential orders, including orders precluding such a person from exercising the office of a director or imposing conditions on the exercise of such an office.

126. However, all the persons and institutions entitled to apply for such orders should do so at the latest within 24 months after the director ceases to hold office as a director. The measure does not necessarily count this period from the time the director left the company where he misconducted himself. It is sufficient if the allegedly errant person was a director within 24 months of the institution of proceedings,

127. Denel itself, the DPE and the Companies and Intellectual Property Commission established by s 185 of the Companies Act would all have standing to consider bringing appropriate proceedings against Mr Mantsha and other erstwhile members of the 2015 Denel board shown to have abetted Mr Mantsha in his efforts to capture Denel for the Guptas. It is therefore recommended that they all be asked by the Government to consider bringing such proceedings.

128. The Legal Practice Council should be made aware of the findings made by the Commission against Mr

Mantsha so that that body may conduct such investigation as it may consider necessary to establish whether Mr Mantsha is fit and proper to practise as an attorney.

129. The facts before the Commission have shown the inadequacy of punitive measures which currently form part of our law. Egregious violations of the Constitution have been demonstrated. Two forms of that abuse have been demonstrated by the evidence regarding Denel: the constitution of a board of directors for the purpose of achieving a result in direct conflict with the obligations imposed on directors by the Companies Act and other applicable legislation and measures; and the use of the suspension power in an administrative context for improper purposes. The methods by which unscrupulous persons can abuse public power are legion and abuses of public power pervade our public life. The present case merely demonstrates two of the potential violations of the duties attendant on public power which can arise.

130. Abuse of public power per se is not a criminal offence and, as has been shown in the present case, egregious abuses of public power tend not to be identified by legal processes until the perpetrators or those that protect them are out of power and then the assessment of the relevant facts will be a cumbersome, time consuming exercise, requiring as it does procedural fairness towards those accused of such abuse.

131. It is therefore recommended that the Government give consideration to the creation of a statutory offence rendering it a criminal offence for any person vested with public power to abuse public power vested in that person by intentionally using that power otherwise than in good faith for a proper purpose. Such potential violations might range from the case of a president of the Republic who hands a large portion of the national wealth, or access to that wealth, to an unauthorised recipient to the junior official who suspends a colleague out of motives of envy or revenge.

132. Such a statutory offence would therefore require considerable sentencing powers and might provide as follows in the operative section of the statute creating the offence:

133. Any person who exercises or purports to exercise any public power, including any such power vested in such person by the Constitution, national or provincial legislation, any regulation made pursuant to national or provincial legislation or by municipal bylaw, otherwise than in good faith and for the purpose for which such power was conferred, shall be guilty of an offence and liable on conviction to a fine of up to R200 million or imprisonment for up to 20 years or to both such fine and imprisonment.

134. The Hulls contract, the Denel Land Services ("DLS") Single Source Contract and the DVS Single Source Contract (Land Systems South Africa (Pty) Ltd was renamed DVS) that Denel awarded to VR Laser were all irregularly awarded in breach of section 217 of the Constitution. It is recommended that the law enforcement agencies should conduct such investigations as may be necessary to establish whether the provisions of sections 38, 50 or 51 of the PFMA were contravened.

135. It is recommended that the law enforcement agencies should conduct such further investigations as may be necessary to determine whether those members of the Board of Directors of Denel who supported the suspensions of the three executives and failed to agree to the executives' proposal for an expedited process to test the allegations against them and failed to convene a disciplinary inquiry against the three executives and supported the decisions to pay out the large amounts that were paid out to the three executives did not act in breach of section 50(1)(a), (2) – and section 51 of the PFMA with a view to their possible criminal prosecution.

BOSASA

136. The evidence establishes a *prima facie* case of money laundering in terms of section 4 of POCA against the following persons in respect of whom the matter is referred for further investigation and prosecution:

136.1 Mr Angelo Agrizzi

136.2 Mr Andries Johannes van Tonder

136.3 Mr Carlos Bonifacio

136.4 Mr Jacques van Zyl

136.5 Mr Riaan Hoeksma

136.6 Mr Gregg Lacon-Allin; and

136.7 The entities AA Wholesalers, Riekele Konstruksie, Jumbo Liquor Wholesalers, Lamozest, Equal Trade 4 and Equal Food Traders.

137. The evidence establishes a *prima facie* case of corruption in terms of section 3 of PRECCA against the following persons in respect of whom the matter is referred for further investigation and prosecution:

137.1 Mr Angelo Agrizzi

137.2 Mr Andries Johannes van Tonder

137.3 Mr Jacques van Zyl

137.4 Mr Johannes Gumede

137.5 Mr Papa Leshabane

137.6 Mr Thandi Makoko

137.7 Mr Leon van Tonder

137.8 Mr Richard le Roux

137.9 Mr Petrus Venter

137.10 Mr William Daniel Mansell

137.11 Mr Sesinyi Seopela

137.12 Mr Linda Mti

137.13 Mr Frans Vorster

137.14 Mr Carlos Bonifacio; and

137.15 Mr Riaan Hoeksma.

138. The evidence establishes a *prima facie* case of fraud against the following persons in respect of whom the matter is referred for further investigation and prosecution:

138.1 Mr Angelo Agrizzi

138.2 Mr Andries Johannes van Tonder

138.3 Mr Carlos Bonifacio

138.4 Mr Jacques van Zyl

138.5 Mr Greg Lacon-Allin; and

138.6 Mr Riaan Hoeksma.

139. The evidence establishes that there is a reasonable prospect that further investigation will uncover a *prima facie* case of money laundering, corruption and/or fraud against the following persons and the matter is accordingly referred for further investigation:

139.1 Ms Carien Daubert

139.2 Ms Rieka Hundermark

139.3 Mr Gavin Hundermark

139.4 Mr Cedric Frolick

139.5 Mr Patrick Littler

139.6 Mr Danie van Tonder

139.7 Mr Ishmael Dikane

139.8 Mr Syvion Dlamini

139.9 Mr Trevor Mathenjwa; and

139.10 Mr Ryno Roode.

140. This should not, however, be taken as a finding by the Commission against any persons that did not receive rule 3.3 notices.

141. The evidence establishes a *prima facie* case of the failure to report suspicious or unusual transactions, in contravention of section 52 of FICA, against the following persons in respect of whom the matter is referred for further investigation and prosecution:

141.1 Mr Angelo Agrizzi

141.2 Mr Andries Johannes van Tonder

141.3 Mr Carlos Bonifacio

141.4 Mr Jacques van Zyl

141.5 Ms Carien Daubert

141.6 Ms Rieka Hundermark

141.7 Mr Gavin Hundermark

141.8 Mr Johannes Gumede

141.9 Mr Papa Leshabane; and

141.10 Ms Thandi Makoko.

142. The evidence establishes a *prima facie* case of assisting another to benefit from the proceeds of unlawful activities, in contravention of section 5 of POCA, against Mr Gregory Lawrence, in respect of whom the matter is referred for further investigation and prosecution.

143. The evidence establishes that Mr Petrus Venter was aware of the illegal transactions taking place at Bosasa and failed to report them. Further investigations should take place for a failure to comply with section 34 of PRECCA and other relevant legislative requirements. The matter is referred to the SAPS for this purpose. The matter is also referred to SARS and the SA Institute of Tax Practitioners ("SAIT") for further investigation.

144. The evidence establishes *prima facie* instances of various tax offences. These matters are referred to SARS for further investigation in conjunction with relevant law enforcement agencies.

145. Messrs Agrizzi, van Tonder and Bonifacio are facing pending charges of corruption, fraud and conspiracy to commit fraud. The matter is nonetheless referred to the SAPS, the DPCI and the Investigating Directorate, to ascertain whether those charges cover all instances of corruption revealed in the evidence before the Commission and, if not, for the charges to be expanded accordingly.

146. The matter of forms of inducement or gain being paid to persons in the NPA for Bosasa to have been able to gain possession of confidential documentation is referred for further investigation.

Analysis and findings with reference to TOR 1.4

Introduction

147. The questions raised by TOR 1.4 are:

    147.1 Whether any of the identified public office bearers facilitated the unlawful award of tenders in the governmental or SOE sectors

    147.2 Whether they thereby breached the Constitution, any relevant ethical code or legislation; and

    147.3 If so, whether they did so in order to benefit any family, individual or corporate entity doing business with government or any organ of state.

148. The range of potential facilitators in respect of whom the question is asked, includes the President, members of the National Executive, including deputy ministers, public officials, and employees of SOEs.

149. The focus thus moves from those seeking to influence, discussed in relation to TOR 1.1, to those subject to the attempts at influence. The question raised is, in effect, whether the targets of the attempts responded by facilitating the unlawful award of tenders in the governmental or SOE sectors, for their own or another person or family's benefit.

150. This term of reference is approached by assessing particular tender awards and then focussing on those implicated in facilitating them.

151. The analysis is best commenced with reference to the evidence of what took place in relation to the DCS tenders.

Contracts with the Department of Correctional Services

152. A supply management system should be fair, equitable, transparent and competitive. The system requires a department to conduct a needs assessment for the provision of goods or services and to prepare precise specifications for the services to be procured to ensure inter alia that value for money is achieved.

153. In the analysis that follows, the award of four contracts (and various renewals and an extension of these contracts) by the DCS to Bosasa and its affiliate companies is assessed for compliance with these requirements and in order to establish whether or not there was corrupt facilitation of the kind contemplated by TOR 1.4.

Mr Mti

154. Given that Mr Mti was implicated in the evidence of Messrs Agrizzi, le Roux, Vorster, van Tonder, Blake and Venter, he was issued with five notices in terms of rule 3.3 as detailed above. He was also issued with a regulation 10(6) directive. Mr Mti refused to comply with the directive, primarily because he stated that it infringed his right to remain silent and his right to a fair trial. Mr Mti's position and the Commission's response is set out above.

155. Mr Mti facilitated the unlawful award of tenders in breach of the Constitution and legislation in order to benefit himself, his family, Bosasa and its associates and the Watson family. Mr Mti's conduct thus falls squarely within that contemplated by TOR 1.4.

156. With reference to TOR 7, in addition to offences already referred to, there is a *prima facie* case against Mr Mti in respect of at least the following offences:

    156.1 The general offence of corruption in section 3 of PRECCA

    156.2 Offences in respect of corrupt activities relating to public officers in section 4 of PRECCA

    156.3 Offences in respect of corrupt activities relating to members of the prosecuting authority in section 9 of PRECCA

156.4 Offences in respect of corrupt activities relating to contracts in section 12 of PRECCA

156.5 Offences in respect of corrupt activities relating to procuring of tenders in section 13 of PRECCA; and

156.6 The common law offences of fraud, theft and perjury.

157. Mr Mti is already facing pending charges of corruption, fraud and conspiracy to commit fraud. The matter is nonetheless referred to the relevant authorities for investigation and prosecution, to the extent that the existing charges do not cover any of the conduct on the part of Mr Mti set out in this report.

Mr Gillingham

158. Mr Gillingham was summonsed to appear before the Commission but failed to do so. For the reasons given above, an adverse inference may be drawn from his failure to rebut the evidence that was given against him.

159. In the absence of Mr Gillingham appearing before the Commission to dispute the evidence implicating him, there is undisputed evidence that Mr Gillingham breached the Constitution and legislation by facilitating the unlawful award of tenders by the DCS to benefit himself, his family, the Watson family, Bosasa and its associated business entities.

160. It is established that Mr Gillingham facilitated the unlawful award of tenders as contemplated by TOR 1.4.

161. Based on the evidence, Mr Gillingham breached the following obligations applicable to him as a senior official of the DCS:

161.1 Sections 217 and 195 of the Constitution

161.2 The duty to ensure that the system of financial management and internal control established for DCS is carried out within his area of responsibility as CFO

161.3 The responsibility for the effective, efficient, economical and transparent use of financial and other resources within his area of responsibility

161.4 The obligation to take effective and appropriate steps to prevent irregular expenditure; and

161.5 The obligation to comply with the provisions of the PFMA.

162. In addition to the constitutional and statutory breaches detailed above, the evidence reveals a *prima facie* case that Mr Gillingham facilitated the award of tenders to benefit himself and his family in contravention of section 3, 4, 12 and 13 of PRECCA.

163. Mr Gillingham facilitated the unlawful award of tenders in breach of the Constitution and legislation in order to benefit himself, his family, Bosasa and its associates and the Watson family. Mr Gillingham's conduct thus falls squarely within that contemplated by TOR 1.4.

164. With reference to TOR 7, in addition to offences already referred to, there is a *prima facie* case against Mr Mti in respect of at least the following offences:

164.1 The general offence of corruption in section 3 of PRECCA

164.2 Offences in respect of corrupt activities relating to public officers in section 4 of PRECCA

164.3 Offences in respect of corrupt activities relating to members of the prosecuting authority in section 9 of PRECCA

164.4 Offences in respect of corrupt activities relating to contracts in section 12 of PRECCA

164.5 Offences in respect of corrupt activities relating to procuring of tenders in section 13 of PRECCA; and

164.6 The common law offences of fraud, theft and perjury.

165. Mr Gillingham is already facing pending charges of corruption, fraud and conspiracy to commit fraud. The matter is nonetheless referred to the relevant authorities for investigation and prosecution, to the extent that the existing charges do not cover any of the conduct on the part of Mr Gillingham set out in this report.

Other officials

Mr Cedric Frolick

166. Mr Agrizzi testified that Mr Frolick assisted Bosasa in resolving an impasse with Mr Smith who was, at the time, Chairperson of the Portfolio Committee on Correctional Services and was considered "anti-Bosasa". He testified that, in return for doing so, a payment was made to Mr Frolick at a meeting held with him and Mr Butana Komphela (then chair of the parliamentary Portfolio Committee on Sport) at the office park where Bosasa is situated, and that further monthly payments were made to Mr Frolick after that.

167. Taking all of this into account there are at least reasonable grounds for suspecting that Mr Frolick's conduct in assisting Bosasa in the respects set out above and in the summary of the evidence, was in return for payments corruptly made to him in contravention of section 3 and 7 of PRECCA. Section 7 of PRECCA deals with offences in respect of corrupt activities relating to members of the legislative authority as described in section 43 of the Constitution.

168. With reference to TOR 7, the matter is referred to the relevant investigative authorities on the basis that there is a reasonable prospect that further investigation will uncover a *prima facie* case of corruption in terms of sections 3 and 7 of PRECCA.

Ms Jolingana and other DCS officials

169. According to Mr Agrizzi, during the period from 2007 until approximately 2016 payments were made to the following DCS officials on a monthly basis: Mr Josiah Maako; Ms Maria Mabena; Mr Shishi Matabella; Mr Mandla Mkabela; Ms Dikeledi Tshabalala; Mr Zach Modise; and Mr Mollet Ngubo. These officials had been identified to look after Bosasa's DCS contracts and Ms Jolingana is said to have ensured the extension of the catering contract. All of the officials are recorded in the extracts from Mr Agrizzi's black book.

170. The payments to Ms Jolingana recorded in Mr Agrizzi's black book were quid pro quo for the extension of the catering contract. Such conduct is, in addition to the contraventions of the Treasury Regulations, *prima facie* in contravention of sections 3, 4, 12 and 13 of PRECCA for purposes of criminal liability. By receiving the corrupt payments, she benefitted herself and by facilitating the extension of the catering contract, she benefited Bosasa, its associates, and the Watson family. Her conduct falls squarely within TOR 1.4.

171. With reference to TOR 7 there is a *prima facie* case against Ms Jolingana of offences under PRECCA as listed above and the matter is referred to the relevant authorities for investigation and prosecution accordingly.

172. The remaining officials said to have received cash payments from Bosasa to ensure that they continued to "look after" its contracts with the DCS were issued with notices in terms of rule 3.3. Save for Mr Josiah Maako and Ms Dikeledi Tshabalala, no official has challenged the evidence against them. There is therefore undisputed evidence establishing that they facilitated the unlawful award of tenders in the DCS in return for corrupt payments, as contemplated in TOR 1.4.

173. With reference to TOR 7 there is a *prima facie* case against these officials of offences under sections 3, 4, 12 and 13 of PRECCA and the matter is referred to the relevant authorities for investigation and prosecution accordingly.

174. In relation to Mr Maako and Ms Tshabalala, while they have, through an attorney's letter, denied the allegations against them, they have not made an application in terms of rule 3.4, nor denied the allegations under oath. They have failed adequately to dispute the truth of Mr Agrizzi's evidence. On that basis it may be accepted that they facilitated the unlawful award of tenders in the DCS in return

for corrupt payments, as contemplated in TOR 1.4 and in *prima facie* contravention of sections 3, 4, 12 and 13 of PRECCA.

175. With reference to TOR 7, there is a *prima facie* case of offences under the said provisions of PRECCA, and the matter is referred to the relevant authorities for investigation and prosecution accordingly.

Ms Ngwenya

176. In Mr Bloem's evidence, he referred to a fellow Portfolio Committee member, Ms Ngwenya, having shown bias towards Bosasa during the deliberations of the Portfolio Committee on Correctional Services. According to Mr Bloem, Ms Ngwenya informed him that there was money involved in meeting with Bosasa.

177. For her and the other members of Parliament referred to above, given that they were holders of a public office, "public official" includes within its ambit a member of Parliament. Her conduct therefore falls squarely within TOR 1.4.

178. With reference to TOR 7, there is *prima facie* case of a contravention of sections 3 and 7 of PRECCA and the matter is referred to the relevant authorities for investigation and prosecution accordingly.

Mr Vincent Smith

179. Mr Smith deposed to an affidavit on 3 August 2020 and testified before the Commission on 4 September 2020. Mr Smith's evidence was in response to evidence given by Mr Agrizzi, Mr Richard le Roux and Mr Blake. Initially, in response to a 10(6) directive, Mr Smith had relied on his right to remain silent and right to a fair trial as a basis not to respond to the directive issued by the Commission compelling him to answer certain evidence against him. Despite assurances from the Commission, Mr Smith initially failed to place his version before the Commission in response to rule 3.3 notices dated 23 January, 28 March and 1 July 2020 (the latter was addressed to Mr Smith's daughter, Ms Brumilda Doreen Smith), as well as the 10(6) directive.

180. With reference to TOR 7, Mr Smith is already facing pending charges of corruption, fraud and conspiracy to commit fraud. The matter is nonetheless referred to the relevant authorities for investigation and prosecution, to the extent that the existing charges do not cover any of the conduct on the part of Mr Smith set out in this report.

Mr Mnikelwa Nxele

181. The evidence before the Commission is that the Regional Commissioner of the DCS in KwaZulu Natal, Mr Mnikelwa Nxele, received a monthly payment in exchange for ensuring that undue pressure was placed on Mr Petersen, the then National Commissioner of Correctional Services, and the DCS to continue the DCS's association with Bosasa.

182. Mr Nxele's name is recorded in the extracts from Mr Agrizzi's black book. Mr Nxele was issued with a notice in terms of rule 3.3 on 24 January 2019. He did not make an application in terms of rule 3.4 for leave to cross-examine Mr Agrizzi or present evidence at the Commission. This evidence implicating him in corrupt activities and in failing to discharge his duties as an official of the DCS in good faith is therefore unchallenged. He benefitted personally. His conduct is in breach of section 195 and 217 of the Constitution, section 45 and 57 of the PFMA and thus falls within the ambit of TOR 1.4.

183. With reference to TOR 7, this conduct gives rise to a *prima facie* case of corruption in terms of sections 3 and 4 of PRECCA. The matter is referred to the relevant authorities for investigation and prosecution accordingly.

<u>Contracts with the DoJ&CD</u>

184. Mr Agrizzi testified that he was instructed by Mr Watson to make cash available to Mr Seopela for purposes of making payments to influential persons.

185. Mr Agrizzi testified that Sondolo IT was awarded the contract with the DoJ&CD for the installation of access control across courts nationally, that the award of this contract was irregular and that cer-

tain officials received payments as lobbying fees or bribes. However, save for Mr Thobane and Ms Nyambuse, no particulars were given as to the identity of these officials.

186. Mr Thobane and Ms Nyambuse were implicated in Mr Agrizzi's evidence as having received bribes. He testified that he had direct evidence of these payments. Ms Nyambuse and Mr Thobane's names appear in Mr Agrizzi's black book. Neither Mr Thobane nor Ms Nyambuse was issued with a rule 3.3 notice informing them that Mr Agrizzi's evidence implicated them. No adverse findings are therefore made against them. Nevertheless, if Mr Agrizzi's evidence is true, Mr Thobane and Ms Nyambuse should be arrested and charged with corruption. However, it is up to the investigating authorities as to whether they decide to take the matter further insofar as these officials are concerned and, among other things, seek to obtain their version on this evidence if they elect to provide it. Although no finding is made against Ms Nyambuse and Mr Thobane, there is no reason why the law enforcement agencies should not have regard to this report, investigate the matter further including by taking statements from the two and if, thereafter, the law enforcement agencies believe no further investigation is warranted, terminate the investigation but, if they believe a further investigation is warranted, continue with the investigation.

Contracts with the Department of Transport

187. The evidence presented before the Commission by Mr Agrizzi that payments were made to a certain "Mlungise" at the Department of Transport in order to secure the award of the contract for fleet management to Kgwerano, and to other officials in that Department to secure the extension of the contract, is dealt with above in discussing TOR 1.1.

188. From the perspective of TOR 1.4, there is a lack of evidence about the identity of the persons alleged to have received corrupt payments from either Mr Leshabane or Mr Seopela and therefore of persons responsible for facilitation of the unlawful award of tenders. Further investigation would be required to ascertain their identities. No referral is made in this regard. It is up to the investigating authorities to decide whether to take the matter further.

Contracts with the Department of Health in Mpumalanga Province

189. In the light of Ms Kgasi and Ms Mogale's failure to respond to rule 3.3 notices and their failure to make an application in terms of rule 3.4, the evidence before the Commission is such that there are reasonable grounds for suspecting that their conduct fell within the ambit of TOR 1.4.

190. For purposes of TOR 7, there is a reasonable prospect that further investigation will uncover a *prima facie* case. The matter is referred to the relevant authorities for investigation accordingly.

Members of the National Executive

Mr Thabang Makwetla

191. Mr le Roux testified that Bosasa provided former Deputy Minister for Correctional Services Mr Thabang Makwetla, with a security installation and maintenance services to the value of more than R308,754.25. The installation was on the instruction of Mr Watson. Mr Agrizzi was not aware of the installation.

192. A rule 3.3 notice was issued to Deputy Minister Makwetla on 18 March 2019. Mr Makwetla testified before the Commission on 19 March and 5 July 2021.

193. In respect of the benefits conferred upon him by Bosasa he was in breach of his constitutional, legislative and ethical duties, as contemplated in TOR 1.4.

194. Mr Makwetla was also under a duty not to solicit or accept a gift or benefit in return for any benefit given in an official capacity and a duty to seek permission to receive and to disclose a gift worth more than R1,000. Mr Makwetla failed to do so.

195. With reference to TOR 7, despite the fact that Mr Makwetla's conduct in discussing the rates in terms of the Bosasa contract with the accounting office of the Department was not explored further in the course of Mr Makwetla's evidence, the evidence establishes a *prima facie* case of corruption in terms

of sections 3 and 4 of PRECCA against him. The matter is accordingly referred to the relevant authorities for investigation and prosecution.

Mr Jacob Zuma

196. Mr Zuma is the most senior public office bearer that Bosasa is said to have attempted to influence. Conduct falling within the Commission's terms of reference involving Mr Zuma is said to have occurred during his tenure as President of the Republic of South Africa.

197. Mr Zuma was issued with a notice in terms of rule 3.3 on 30 January 2019. On 30 April 2019, Mr Zuma was invited to appear before the Commission from 15 to 19 July 2020. The purpose of this appearance was to address the evidence of witnesses who had implicated him and to answer questions from the Commission.

198. With reference to TOR 1.1, Bosasa and its leadership clearly provided inducements and gain to Mr Zuma, aimed at gaining influence over him. Accordingly, on the basis of the evidence presented in relation to Mr Zuma, there was also conduct falling within TOR 1.1.

199. With reference to TOR 7, and based on the foregoing analysis, there is sufficient evidence to establish that (i) Mr Zuma accepted gratification; (ii) from another person, i.e. Bosasa (or its directors or employees), (iii) which held and sought to obtain contracts with government.

200. With reference to the presumption in section 24(1) of PRECCA, the state can likely show that, despite having taken reasonable steps, it was not able to link the acceptance of the gratification by Mr Zuma, to any lawful authority or excuse for receiving the gratification. This is because Mr Zuma, failed to provide evidence to the contrary to show a lawful authority or excuse for receiving the gratification, either at all or at a level that could give rise to a reasonable doubt. Indeed, he did not testify at all.

201. Section 24(1) of PRECCA would likely deem there to be sufficient evidence to establish that Mr Zuma accepted the gratification from Bosasa and in doing so breached his Constitutional and legislative duties as well as ethical obligations in order to act in one or more of the "manners" in paragraphs (aa) to (dd) of the PRECCA, being the different statutorily recognised forms of quid pro quo.

202. The matter is referred to the appropriate authorities for further investigation on the basis that there is a reasonable prospect that such further investigation will uncover a *prima facie* case in terms of section 3 and/or 4 and/or 11 and/or 12 and/or 13 of PRECCA. Section 11 of PRECCA deals with corrupt activities relating to witnesses and evidential material during certain proceedings.

Ms Nomvula Mokonyane

203. The evidence pertaining to Ms Mokonyane should be considered both from the perspective of TOR 1.1 and TOR 1.4. Whilst the focus of:

    203.1 TOR 1.1 is on whether there were "attempts through any form of inducement or for any gain ... to influence" public office bearers in the identified categories; and

    203.2 TOR 1.4 is on whether there was facilitation of the unlawful award of tenders by the listed office bearers,

    evidence about the inducements is relevant to both TOR 1.1 and TOR 1.4. This is because the conferral of benefits on a public office bearer by a person or entity doing business with the State or SOEs, particularly when the benefits are substantial, leads ineluctably to the question of whether anything was expected in return. The question is relevant to Ms Mokonyane because of the fact that there was evidence of substantial benefits having been conferred on her, some of which are not in dispute. Taking this into account, the evidence pertaining to Ms Mokonyane is dealt with under the rubric of TOR 1.4, whilst at the same time enquiring whether there was conduct as contemplated in TOR 1.1.

204. Ms Mokonyane falls squarely within the lists of public office bearers in both TOR 1.1 and TOR 1.4. She served in various senior roles in the executive at national and provincial level – Premier of Gauteng,

Minister of Water and Sanitation, Minister of Communications and Deputy Minister of Environmental Affairs.

Breaches

205. In her various positions in the executive, Ms Mokonyane was subject to the Constitution, her oath of office under the Constitution, the Executive Members Ethics Act, and the Executive Ethics Code referred to in Appendix 1.

206. In terms of section 96 of the Constitution, a member of Cabinet may not expose him/herself to any situation involving the risk of a conflict between his/her official responsibilities and his/her private interests. Further, he/she should act in accordance with a code of ethics prescribed by national legislation, i.e. the Executive Members' Ethics Act and the Executive Ethics Code published in terms of section 2 of that Act.

207. In terms of the Executive Ethics Code, she was not permitted to:

    207.1 Use her position or any information entrusted to her, to enrich herself or improperly benefit any other person

    207.2 Expose herself to any situation involving the risk of a conflict between her official responsibilities and her financial and/or personal interests; or

    207.3 Solicit or accept a gift or benefit which 1. Was in return for any benefit received from her in her official capacity; 2. Constituted improper influence over her; or 3. Constituted an attempt to influence her in the performance of her duties.

208. In respect of all of the benefits conferred upon her by Bosasa she was in breach of her constitutional, legislative and ethical duties, as contemplated in TOR 1.4.

209. The facilitation provided by Ms Mokonyane in relation to the dams report did not benefit Bosasa within the meaning of TOR 1.4. However, it did benefit Ms Mokonyane herself in that she continued to receive benefits from Bosasa and efforts such as this one would probably have given the impression that she was attempting to look after Bosasa's interests.

210. With reference to TOR 7, and based on the foregoing analysis, there is sufficient evidence to establish that 1. Ms Mokonyane accepted gratification; 2. From another person, i.e., Bosasa (or its directors or employees), 3. Which held and sought to obtain contracts with government.

211. With reference to the presumption in section 24(1) of PRECCA, the state can likely show that, despite having taken reasonable steps, it was not able to link the acceptance of the gratification by Ms Mokonyane, to any lawful authority or excuse for receiving the gratification. This is because Ms Mokonyane, failed to provide evidence to the contrary to show a lawful authority or excuse for receiving the gratification, either at all or at a level that could give rise to a reasonable doubt.

212. Section 24(1) of PRECCA would, in the Commission's view, deem there to be sufficient evidence to establish that Ms Mokonyane accepted the gratification from Bosasa and in doing so breached her Constitutional and legislative duties as well as ethical obligations in order to act in one or more of the "manners" in paragraphs (aa) to (dd) of the PRECCA, being the different statutorily recognised forms of quid pro quo.

213. The matter is referred to the appropriate authorities for further investigation and prosecution of Ms Mokonyane on charges of corruption in terms of section 3 and/or 4 and/or 11 and/or 12 and/or 13 of PRECCA.

Ms Dudu Myeni

214. The evidence pertaining to Ms Myeni is in certain respects also relevant to TOR 1.1. In this regard she is a director of the board of an SOE as contemplated in that TOR.

Analysis of the evidence: Facilitation

215. There is more than sufficient evidence to support a finding that Ms Myeni facilitated the meeting with President Zuma in relation to the oil and gas regulations. In fact, this has been established beyond reasonable doubt. The question, however, is whether that amounts to the facilitation of the unlawful award of a tender as contemplated in TOR 1.4. There is insufficient evidence to sustain such a finding. The incident serves rather as evidence of the influence that Ms Myeni was able to exert over President Zuma and of the closeness of her association with him.

216. Having regard to the foregoing, it is established, in respect of Ms Myeni, that there were attempts made through inducements and gain to influence both her, as Chairperson of the Jacob Zuma Foundation or as someone close to Mr Zuma and director of an SOE and, through her, Mr Zuma, as contemplated in TOR 1.1.

217. With reference to TOR 7, and based on the foregoing analysis, there is a *prima facie* case of corruption against Ms Myeni of corruption in terms section 3 and / or 4 and / or 9 and / or 11 and / or 12 and / or 13 of PRECCA.

218. The matter is accordingly referred to the appropriate authorities for further investigation and prosecution of Ms Myeni.

Analysis and findings with reference to TOR 1.5

Contracts with ACSA

219. With respect to TOR 7, the evidence establishes a *prima facie* case of corruption against the following persons in respect of whom the matter is referred for further investigation and prosecution:

    219.1 Mr Thele Lesetsa Moema, Mr Reuben Pillay and Mr Mohapi Johannes Serobe (employees or former employees of ACSA).

220. The evidence also establishes that there is a reasonable prospect that further investigation will uncover a *prima facie* case of corruption against Siza Thanda for the facilitation of the unlawful award of a contract or tender and the matter is referred for this purpose. In respect of the following persons (all employees of ACSA), it is up to the investigating authorities to decide whether or not to investigate the matter further (starting, if considered necessary, with obtaining statements from them about their side of the story if they agree to provide statements):

    220.1 Mr Bongi Mpungose

    220.2 Mr Jason Tshabalala; and

    220.3 Mr Mohammed Bashir.

Contracts with SAPO

221. With respect to TOR 7, The evidence establishes a *prima facie* case of corruption against the following persons in respect of whom the matter is referred for further investigation and prosecution:

    221.1 Mr Siviwe Luthando, Mr Bongani Mapisa and Mr Maanda Benjamin Manyatshe (employees or former employees of SAPO).

Conclusion and findings in relation to TOR 1.5

222. None of those persons implicated in the evidence in this section of the report who were issued with rule 3.3 notices responded to those notices. In the circumstances, the evidence in relation to them remains undisputed.

223. Although the evidence is based on the single witness testimony of Mr Agrizzi, it is corroborated in some instances by the recordal of names in Mr Agrizzi's black book. The evidence also implicates Mr Agrizzi in criminal activity and is to his detriment, and it is unlikely that he would lie to prejudice

himself. His evidence is also supported by the video evidence pertaining to the vaults and the safes where cash was stored and packaged for purposes of corrupt payments.

224. The evidence establishes that there was corruption in the award of contracts or tenders to Bosasa by Schedule 2 SOEs. The undisputed evidence was that the ACSA contract was unlawfully awarded in 2001 and was believed still to be in effect in 2019. The evidence of corruption was both for the facilitation of the original contract and the various extensions of the contract.

225. Returning to the questions arising from TOR 1.5, the evidence establishes that:

    225.1 There was corruption in the awarding of tenders in two SOEs that Bosasa had dealings with, ACSA and SAPO; and

    225.2 The corruption involved the payment of unlawful gratification by way of ongoing monthly payments to various persons to ensure the grant and extension of the contracts to provide security services.

226. An assessment of the extent of the corruption should await further investigation of the persons that did not receive rule 3.3 notices. A total of five implicated employees have received rule 3.3 notices and have not responded.

Analysis and findings with reference to TOR 1.9

227. The questions arising from TOR 1.9 are:

    227.1 Whether there was corruption in the award of contracts and tenders by government departments, agencies and entities, and if so

        227.1.1 What the nature of the corruption was

        227.1.2 What the extent of the corruption was; and

        227.1.3 Whether the corruption involved office bearers in the listed categories seeking to benefit themselves, their family members or entities in which they held a personal interest.

228. The focus of the enquiry required by TOR 1.9 is on corruption in the award of tenders by government departments, agencies and entities, as distinct from the major public entities. It also focuses on whether the relevant office bearers sought to benefit themselves, their family members or entities in which they had an interest.

229. To a significant degree, the questions whether there was corruption in the award of contracts and tenders by government departments, agencies and entities and whether the corruption involved office-bearers seeking to benefit themselves, their family members, or entities in which they held a personal interest, have already been answered in the analysis with reference to other terms of reference, particularly TOR 1.1 and TOR 1.4. That already establishes the existence and very substantial extent of the phenomenon of corruption in relation to the awarding of contracts and tenders by government departments involving office bearers in the categories concerned.

230. The analysis in this section will therefore focus on the nature and the extent of the corruption.

231. The evidence reveals that that there was widespread corruption in the awarding of contracts and tenders to Bosasa and its associated business entities or organisations, by Government departments, SOEs, agencies and entities. Members of the National Executive, public officials and functionaries of various organs of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.

232. Mr Agrizzi's evidence suggested that the aggregate value of contracts awarded to the Bosasa Group of Companies by various public departments and entities between 2000 and 2016 was at least R2,371,500,000.00. Mr Agrizzi estimated that approximately R75,700,000 was paid out in bribes. The breakdown of the various contracts within the Bosasa Group and an estimated value that was paid out in bribes annually, per contract, was provided earlier. These values do not include the value

of houses built, fixtures and fittings as well as furnishings, motor vehicles purchased and travel expenses incurred. Mr Agrizzi's estimations should be treated with a measure of caution. However, even on that basis, there was systemic corruption on what is described above as an industrial scale in the forms contemplated in TOR 1.9. Corruption was central to Bosasa's business model.

233. Mr Agrizzi, along with other witnesses, testified and demonstrated that Bosasa (and the Watson family) established a reasonably well-organised network of well-placed, well-connected and powerful people whose loyalty was secured with financial and other material incentives and bribes. It was through this network that they were able to promote and protect the private interests of Bosasa by irregular procurement and practices to extract money from the state in very substantial amounts. In Mr Agrizzi's experience, every one of the contracts in which Bosasa was involved was tainted with bribes and corruption. Where contracts were not awarded as a result of corruption, corruption would creep in once they had been awarded, to ensure their retention and their extension or renewal. These contracts spanned, at least, a 17-year period.

234. With respect to TOR 7, there was massive corruption in the awarding of tenders and contracts to Bosasa and its affiliates by government departments, agencies and entities. The corruption took the form of Bosasa through its directors and employees providing gratification in the form of cash payments and other material benefits to state office bearers as contemplated in TOR 1.9, in exchange for the unlawful award of tenders and contracts to Bosasa and its affiliates.

235. The referrals pursuant to TOR 1.9 are all covered by TOR 1.1 and 1.4.

Instances possibly not covered by terms of reference 1.1, 1.4, 1.5 and 1.9

236. The evidence reveals unlawful activities possibly not covered by the terms of reference detailed above. Those instances are detailed below and where appropriate, are referred for prosecution, further investigation or the convening of a separate enquiry to the appropriate body regarding the conduct of certain persons as contemplated in TOR 7.

237. There is evidence of corruption involving the following persons:

    237.1 Mr Simon Mofokeng, former General Secretary of CEPPWAWU for the acceptance of grocery items on a monthly basis to the value of R12,000 to R15,000 (for the offence of corrupt activities relating to the procuring and withdrawal of tenders in terms of section 13 of PRECCA); and

    237.2 Mr Sydney Mantata, who purchased and delivered the grocery items to Mr Mofokeng.

238. But it is not clear whether rule 3.3 notices were issued against them and, in any event, there is a possibility that any crimes committed by them before February 2002 may have prescribed in terms of section 18 of the Criminal Procedure Act No. 51 of 1977. This evidence may be considered by the relevant investigating authorities, but no referral is recommended in this regard.

239. There was evidence to suggest that a number of persons were involved in:

    239.1 The destruction of electronic data and files, as well as computer hardware, and documentation, to prevent this evidence being seized by the SIU

    239.2 The destruction of computers and invoicing books from Blake's Travel

    239.3 The destruction of files through the faked server crash

    239.4 The deletion of files because of the SIU investigation; and

    239.5 The intimidation of potential witnesses.

240. The persons implicated in this conduct were the following:

    240.1 Mr Angelo Agrizzi

    240.2 Mr Johannes Andries van Tonder

    240.3 Mr Leon van Tonder

240.4 Mr Matthew Robert Leeson (referred to by Mr Agrizzi as Max Leeson)

240.5 Mr William Brander; and

240.6 Mr Brian Blake.

241. Mr Brian Blake disputes that computers were removed from Blake's Travel, destroyed and later replaced. Mr Blake's version is improbable in the light of the corroborating evidence of Messrs Agrizzi, van Tonder and van der Bank. This is particularly the case as Mr Agrizzi and Mr van Tonder implicate themselves in criminal activity, to their own detriment. It is unlikely that they would lie to prejudice themselves. Mr Matthew Leeson and Mr William Brander failed to respond to rule 3.3 notices issued by the Commission in February and March 2019, respectively and the evidence against them is undisputed.

242. Accordingly, there are reasonable grounds for suspecting that the above conduct occurred and that the persons implicated are guilty of defeating or obstructing the course of justice and/or fraud and/or corrupt activities relating to witnesses and evidential material in terms of section 11 of PRECCA and / or unacceptable conduct relating to witnesses in terms of section 18 of PRECCA and / or unacceptable conduct relating to witnesses in terms of section 19 of PRECCA.

243. There is a reasonable prospect that further investigation will uncover a *prima facie* case. These matters are accordingly referred for further investigation and prosecution.

244. Having regard to the evidence pertaining to them, there is a reasonable prospect that further investigation by the relevant professional bodies will reveal a *prima facie* case of professional misconduct on the part of the following persons or firms:

244.1 Mr Brian Biebuyck, through an investigation by the Legal Practice Council ("LPC")

244.2 Mr Petrus Venter, through an investigation by the SAIT

244.3 The various attorneys whose trust accounts were used by Bosasa to make various unlawful payments, through an investigation by the LPC; and

244.4 Mr D'Arcy-Herrman, through an investigation by the Independent Regulatory Board for Auditors ("IRBA").

245. The Commission report should be made available to SARS so that it may exercise its investigative powers derived from the provisions of the Tax Administration Act 28 of 2011 ("TAA") to determine whether any tax offences were committed by Bosasa or its associates. In particular, the following issues are referred to SARS for further investigation:

245.1 Whether Mr Papadakis breached his obligations in terms of the TAA as an official and / or a former official of SARS

245.2 The failure to disclose income and false invoicing deriving from the various cash accumulation mechanisms developed and used by Bosasa

245.2.1 Including the cost of benefits provided to various individuals and state functionaries through the Special Projects Team as operational costs to be deducted from income in Bosasa's tax returns

245.3 The deduction of the invoices issued by Mr Mansell for "work" done as expenses

245.4 Bosasa's utilisation of SeaArk's assessed loss, the existence of the assessed loss in BSCM and Bosasa Operations and the equipment write-offs; and

245.5 Phezulu Fencing in respect of receipts being hidden under contingent liabilities in the balance sheet instead of the income statement to avoid paying tax of R10.3m.

NATIONAL TREASURY

246. It is recommended that the National Prosecuting Authority should give consideration to instituting criminal prosecutions against Mr Rajesh Tony Gupta for bribery / corruption arising out of his conduct in offering Mr Mcebisi Jonas millions of Rands if he agreed to be Minister of Finance and to work with the Gupta family.

EOH HOLDINGS AND THE CITY OF JOHANNESBURG

247. The law enforcement agencies should investigate the attempts of Mr Jehan Mackay described above to induce Mr Kodwa to interfere with procurement processes in the interests of EOH with a view to the prosecution of Mr Jehan Mackay and any other suspects identified in the investigation on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted.

248. The President should consider the position of Mr Kodwa as Deputy Minister of State Security having regard to the fact that Mr Kodwa appears to find himself in a position where he is beholden to Mr Jehan Mackay.

249. The terms of reference of the Commission are so wide that it was required to investigate even all kinds of allegations of corruption, state capture, fraud and other wrongdoing even in municipalities. The Commission did not engage in any investigations involving municipalities other than Johannesburg and even then only two or so tenders. However, when one realises what EOH and Mr Makhubo were doing, one realises that there may be many municipalities in which certain entities do exactly what EOH used to do in relation to the City of Johannesburg.

ALEXKOR

Introduction

250. The Commission investigated various allegations that certain Gupta linked individuals or entities were irregularly or corruptly awarded certain contracts at Alexkor. This part of the Report relates to such investigation as the Commission was able to make within the time available to it.

251. Various allegations have been made of state capture at Alexkor Ltd (“Alexkor”) and its associated companies. Only two witnesses testified before the Commission in relation to Alexkor, namely: 1. Mr Gavin Craythorne, a marine mining contractor and a founding member and office bearer of the Equitable Access Campaign (“the EAC”), an organisation that seeks to advance the interests of marine miners contracted to exploit the marine diamond rights in the Richtersveld; and 2. Mr Albert Torres, a director of Gobodo Forensic and Investigative Accounting (Pty) Ltd (“Gobodo”), which was appointed by the Department of Public Enterprises in July 2019 to conduct an investigation into the relationship of Alexkor and its marine mining contractors. In addition, two investigators of the Commission, Mr Peter Bishop and Mr Jakob Dekker, filed detailed affidavits elaborating on some of the evidence tendered by Mr Craythorne and Mr Torres. Although their affidavits were admitted into evidence, neither Mr Bishop nor Mr Dekker testified before the Commission.

252. During the course of its investigation into state capture at Alexkor, the Commission issued several Rule 3.3 notices and requests for information to various implicated and interested parties in relation to the evidence of Mr Craythorne, Mr Torres, Mr Bishop and Mr Dekker. This resulted in the Commission receiving more than 20 statements, requests for additional information, applications for specific directives and applications to cross-examine witnesses, amounting in total to about 8000 pages of documentary evidence. Unfortunately, the constraints of time and resources made it impracticable for the Commission to formally admit this voluminous information to the record and to afford all the implicated and interested parties an opportunity to testify or to cross examine any witness. As a

consequence, the Commission is not in a position to make definitive findings with regard to all relevant matters concerning state capture at Alexkor. There is however sufficient evidence in relation to certain matters that give rise to reasonable suspicion of wrongdoing that justifies recommendations for further investigation by the law enforcement agencies and the board of Alexkor and its associated companies.

Recommendations

253. It is recommended that the board of Alexkor conduct a full investigation into any contract with and fees paid to Regiments to determine the precise nature of any services rendered by Regiments and whether Alexkor received full consideration and value.

254. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, ABDC, Mr Daniel Nathan and the directors and employees of SSI, ABDC or any associated company on charges of contravening sections 18, 19, 20, 21, 44 or other relevant provisions of the Diamonds Act 56 of 1986.

255. It is recommended that the board of Alexkor and the PSJV investigate whether Mr Bagus, Dr Paul and Mr Korabie (the members of the tender committee) were in breach of their fiduciary duties as contemplated in section 76 of the Companies Act by making a misrepresentation to the board regarding SSI's compliance with the tender requirements with a view to an application to declare them delinquent in terms of section 162(5)(c) of the Companies Act.

256. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Bagus, Dr Paul and Mr Korabie (the members of the tender committee) for fraud or a contravention of section 214(1)(b) of the Companies Act by deliberately making a misrepresentation regarding SSI's compliance with the tender requirements.

257. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any director, executive or employee of SSI (ABDC) an/or DNT for a contravention of section 86 of the Diamonds Act by wilfully furnishing false information to the SADPMR or making a false or misleading statement in relation to the right of ABDC to obtain a diamond licence.

258. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Carstens and Ms Kellerman for fraud or a contravention of section 214(1)(b) of the Companies Act for making a misrepresentation to the board that a proper due diligence was performed prior to the award of the tender to SSI.

259. It is recommended that the board of Alexkor and the PSJV investigate whether Mr Carstens and Ms Kellerman were in breach of their fiduciary duties as contemplated in section 76 of the Companies Act by making a misrepresentation to the board regarding the performance of a due diligence on SSI with a view to an application to declare them delinquent in terms of section 162(5)(c) of the Companies Act.

260. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Bagus, Mr Korabie, Dr Paul and other persons who purported to act as board members of the PSJV for contempt of the court order issued by the Western Cape High Court on 4 September 2014.

261. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, Mr Daniel Nathan Trading CC, Daniel Nathan Trading House, Alexander Bay Diamond Company Trading House, Alexander Bay Diamond Company, and the directors, executives or employees of these companies, for a contravention of section 86(c) of the Diamonds Act, by falsely giving out in the registers of SSI that such persons were holders of the required licence when the diamonds were in fact traded by SSI, an unlicensed trader.

262. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, or any director, executive or employee

of SSI, on any relevant charge in relation to diamonds of 196.15 carats valued at R5.136 million allegedly not accounted for in the SSI register.

263. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, or any director, executive or employee of SSI on any relevant charge in relation to an alleged underpayment to the PSJV of an amount of R1.718 million in relation to a sale of the diamonds in parcel 248.

264. It is recommended that the SADPMR conduct an inquiry in terms of section 79 of the Diamonds Act to determine if all the buyers to whom SSI sold rough diamonds were in possession of the requisite licences as contemplated in Chapter IV of the Diamonds Act; and, where appropriate to refer any suspected contraventions of sections 18, 19, 20, 21 or other provisions of the Diamonds Act to the law enforcement agencies for any further investigations as may be necessary with a view to the possible prosecution of such persons for offences under the Diamonds Act or any other law.

THE FREE STATE ASBESTOS PROJECT DEBACLE

265. It is recommended that law enforcement agencies should conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Timothy Mokhesi by the National Prosecuting Authority for possible corruption arising out of his decision to enter into the agreement that he concluded with Blackhead Consulting/Diamond Hill Joint Venture and/or with a view to Mr Mokhesi's possible criminal prosecution for his possible contravention of sections 38(1)(a)(iii), 38(1)(b) and 38(1)(c)(ii) of the Public Finance Management Act 1 of 1999 in concluding the agreement that he concluded with Blackhead Consulting and Diamond Hill Joint Venture.

266. It is recommended that the Government seek a legal opinion with a view to possibly taking all necessary legal steps to recover from Mr Mokhesi and any other Government Officials who were involved in the conclusion and implementation of the agreement between the Department of Human Settlements, Free State Province, and Blackhead Consulting Joint Venture all monies paid by the Free State Department of Human Settlements to Blackhead Consulting and Diamond Hill Joint Venture for which the Department did not receive appropriate value.

267. It is recommended that the law enforcement agencies conduct such further investigations against Mr Mokhesi as may be considered with a view to his possible prosecution by the National Prosecuting Authority for a breach of any provisions of the Public Finance Management Act (PFMA) in the role he played in connection with the Asbestos Eradication Project.

268. It is recommended that every tender or contract between a government department and/or government entity and a service provider or a provider of goods or services should contain a prominent clause to the effect that no service provider may sub-contract or cede its/her/his right to provide the services or the goods to another person or entity or company unless the intended sub-contractor was disclosed in the bid documents as an entity to which the bidder would sub-contract. Consideration may also be given to whether there should not be a statutory provision to this effect that will apply to all tenders in the public service.

269. It is recommended that the Government obtains a legal opinion aimed at establishing whether it would not be able to successfully recover the moneys it paid to Blackhead Consulting and Diamond Hill Joint Venture in regard to the Asbestos Eradication Project for which it received no value or because Blackhead Consulting and Diamond Hill Joint Venture made a misrepresentation to the Department of Human Settlements that it had the qualifications or expertise or skills or experience necessary for the performance of the job when it had no such experience, qualifications, expertise or skills.

270. It is recommended that the National Prosecuting Authority gives serious consideration to instituting a charge of corruption or any other applicable crime or offense against Mr Edwin Sodi and his company, Blackhead Consulting (Pty) Ltd for their roles in paying an amount of R600 000,00 (Six hundred thousand Rand) to a car dealer based in Ballito, KwaZulu-Natal, for the benefit of Mr Thabani Zulu as

a reward for Mr Zulu's role in the Asbestos Project or as a bribe to Mr Zulu so that he could do certain favours for Blackhead Consulting or Diamond Hill or the Joint Venture or Mr Edwin Sodi.

271. is recommended that the National Prosecuting Authority gives serious consideration to instituting a criminal charge or criminal charges relating to corruption or any other applicable crime or offence against Mr Thabani Zulu for his arrangement with Mr Edwin Sodi and/or Blackhead Consulting (Pty) Ltd to be paid an amount of about R600 000,00 (Six hundred thousand Rand) by Mr Edwin Sodi and/or Blackhead Consulting (Pty) Ltd.

272. It is recommended that the National Prosecuting Authority should give serious consideration to instituting criminal charges of corruption or any other applicable crime or offence against Mr Edwin Sodi and/or Blackhead Consulting (Pty) Ltd arising out of the arrangement or agreement that was entered into between Mr Edwin Sodi and Blackhead Consulting (Pty) Ltd and Mr Timothy Mokhetsi for the payment of about R600 000,00 to a firm of attorneys in the Free State to enable Mr Mokhetsi or his family Trust to pay for a property in which he would live.

273. It is recommended that the National Prosecuting Authority should give serious consideration to instituting a charge of corruption or other applicable offences against Mr Timothy Mokhesi arising out of his role in the payment by Mr Edwin Sodi and / or Blackhead Consulting of an amount of about R600 000.00 into the trust account of a firm of attorneys in Bloemfontein to enable a property to be bought in which Mr Mokhesi was going to live.

274. It is recommended that to the extent that current legislation or government policies of state owned entities or companies do not prohibit the awarding of a tender or the concluding of a contract for the provision of services or delivery of goods by a person or entity or service provider that does not produce proof that it has the requisite educational qualifications, knowledge or skills and experience for the job awarded to it, consideration should be given to ensuring that legislation and policies of government departments or of state-owned entities require that no entity or person or service provider may be awarded a tender or may conclude any contract with a government department or a state-owned entity or company unless it has produced proof of relevant qualifications, skills experience or expertise required to perform the work.

275. It is recommended that consideration be given to the enactment of legislation that will make it a criminal offence for any official or office-bearer of a government department or of a state-owned entity or company to award a tender to or conclude a contract for the provision of services goods or with any person or entity unless he or she has satisfied himself or herself or itself that such person or entity has produced proof of possession of the minimum academic qualifications or experience or expertise.

276. It is recommended that the National Prosecuting Authority give serious consideration to instituting criminal proceedings against Mr Edwin Sodi and / or Blackhead Consulting for fraud or other applicable crimes arising out of the fact that, in order to obtain work from the Department of Human Settlements in the Free State, Mr Sodi and / or Blackhead Consulting (Pty) Ltd made a false representation to the Department of Human Settlements, Free State, that he or it had the knowledge, qualifications and/or experience, skills and expertise for the removal of asbestos when, to the knowledge of Mr Edwin Sodi, Blackhead Consulting, Mr Mpambani and Diamond Hill, neither of them had the qualifications, knowledge, expertise and experience needed for the removal of asbestos.

THE FREE STATE R1 BILLION HOUSING PROJECT DEBACLE

277. It is recommended that law enforcement agencies should conduct such further investigations as may be necessary with a view to a possible prosecution by the National Prosecuting Authority of Mr Moses Mpho "Gift" Mokoena, who was the Head of the Department of Human Settlements in the Free State in 2010 and early in 2011, for a possible contravention of sections 38(1)(a)(iii), (b), (c)(ii) and (g) of the Public Finance Management Act 1 of 1999 as amended arising out of the abandonment of the competitive tender process and the decision to implement and the actual implementation of the advance payment scheme.

278. Section 38 of the Public Finance Management Act provides:

> (1) The accounting officer for a department, trading entity or constitutional institution—
>
> (a) Should ensure that that department, trading entity or constitutional institution has and maintains—
>
> (iii) An appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.
>
> (b) Is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;
>
> (c) Should take effective and appropriate steps to—
>
> (ii) Prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct.
>
> (g) On discovery of any unauthorised, irregular or fruitless and wasteful expenditure, should immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board.

279. Section 86 of the PFMA provides:

> (1) An accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40.
>
> (2) An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.
>
> (3) Any person, other than a person mentioned in section 66 (2) or (3), who purports to borrow money or to issue a guarantee, indemnity or security for or on behalf of a department, public entity or constitutional institution, or who enters into any other contract which purports to bind a department, public entity or constitutional institution to any future financial commitment, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.

280. To the extent that money paid out by the Free State Department of Human Settlements for which the Department did not receive any value or that was paid out unlawfully in the implementation of the advance payment scheme has not been recovered, it is recommended that all steps that may lawfully be taken to recover such monies be taken against, among others, Mr Moses Mpho “Gift” Mokoena and Mr Mosebenzi Zwane for their respective roles in the approval and implementation of the advance payment scheme.

281. It is recommended that the law enforcement agencies should conduct such further investigations as may be necessary to enable the National Prosecuting Authority to determine whether it should not charge Mr Moses Mpho “Gift” Mokoena, former Head of the Free State Department of Human Settlements, Mr Mosebenzi Zwane and other officials in the Free State Department of Human Settlements with fraud arising out of the misrepresentation on which the advance payment scheme was based with regard to the number of houses that that Department said it could build between November / December 2010 and the end of March 2011 which was known to the Department not to be true and not to be achievable but was done in order to prevent the National Department of Human Settlements from taking part of their allocated funds and giving them to better performing provinces.

ESKOM

282. The Eskom executives used their positions of authority and power within Eskom to benefit Trillian - a corrupt activity under the Prevention and Combating of Corrupt Activities Act No. 12 of 2004. Messrs Molefe, Singh and Koko all benefited from the Guptas and / or Mr Salim Essa in various forms - Messrs Koko and Singh from an Eskom perspective and Mr Brian Molefe as already covered in other reports. This may have constituted the criminal offence of corruption. The conduct of Eskom officials, therefore, implicated several provisions of the Commission's terms of reference, namely ToR 1, ToR 4, ToR 5 and possibly ToR 6 (corrupt and irregular awarding of contracts to benefit the Gupta family or their associates) and ToR 9 (corruption to benefit the officials involved).

283. The conduct implicates ToR 1, in that some form of inducement or gain was offered to and received primarily by the three main executives at Eskom (Mr Brian Molefe, Mr Anoj Singh and Mr Koko), which would have served to influence them to act in the manner referred to above. ToR 4, regarding beach of the Constitution and legislation through the facilitation of unlawful awarding of contracts to McKinsey, is also implicated by the appointment of McKinsey on a sole-source basis and, in breach of section 217 of the Constitution, the National Treasury Instruction and Eskom's Policy on Cost Containment Measures. Also relevant are the provisions of ToR 5, ToR 6 and ToR 9 regarding corruption in the awarding of contracts by public entities to benefit the Gupta family and their associates and / or to benefit individual Eskom officials involved in the transactions. Rampant corruption is evident in the awarding of contracts and approval of payments to McKinsey and its BBBEE partner, Trillian, in circumstances described in this report.

284. It is recommended that the law enforcement agencies should conduct such investigations as may be necessary with a view to the possible prosecution by the National Prosecuting Authority of the former Eskom officials referred to above who are implicated in the facilitation of unlawful contracts, corruption and financial misconduct and breaches of the PFMA. It is also recommended that legal steps be taken by Eskom to recover from members of the 2014 Board and the former Eskom officials referred to above all losses that Eskom suffered as a result of their unlawful conduct.

285. Criminal prosecution should be extended to the 2014 Eskom Board, who failed to exercise their fiduciary duties and prevent financial prejudice to Eskom, as required in Sections 50 and 51 of the PFMA. They instead allowed irregular procurement in breach of both the law and Eskom policies, and allowed irregular, fruitless and wasteful expenditure in the face of legal instruments that enjoined them to act otherwise. The Board members acted unlawfully and committed financial misconduct, as envisaged in section 83 of the PFMA. Messrs Molefe and Singh were *ex officio* members of the Board and therefore equally responsible for the Board's various breaches of its fiduciary duties.

STATE SECURITY AGENCY

286. On the basis of the oral and documentary evidence placed before it, the Commission sets out below its Findings and Recommendations regarding certain aspects of the State Security Agency in line with the Commission's Terms of Reference. They are not made in any order of importance. The evidence revealed a plethora of problems that bedevilled the SSA; they are almost innumerable. It would serve no purpose to engage in a hair-splitting exercise. Therefore, in making both the Findings and the Recommendations, the Commission will address at least some of the root causes, and not the consequent symptoms.

Regarding the amalgamation, restructuring and re-organization of the erstwhile National Intelligence Agency (NIA) and the South African Secret Service (SASS) into the State Security Agency (SSA)

Findings

287. The period under consideration by the Commission is the period from 2009. Evidence was placed before the Commission presenting the organograms of the national intelligence services in three

stages: the period from 1994 to 1997; and then for the period 1997 to 2009; and lastly, for the period 2009 to 2019. The last organogram reflects the structure brought about by former President Zuma through Proclamation 59 of 2009, 11 September 2019. It amalgamated the National Intelligence Agency (NIA) and the South African Secret Service (SASS) into a new structure, namely, the State Security Agency. Until then, the NIA's mandate was domestic intelligence, while the SASS mandate was foreign intelligence.

288. On the evidence presented to the Commission, it has to be accepted that the new intelligence regime resulted in a shift from the spirit, philosophy, and some principles of the Intelligence White Paper, which were reflected in the Constitution. The virtues of the Intelligence White Paper were articulated by amongst others Ambassador Maqetuka, the first Director General of the SSA, who had extensive experience in the field of intelligence, and Mr Shaik. Under the new intelligence regime there was for the first time a dedicated Minister of Security ("Minister of State Security") as opposed to the past, when a deputy Minister of Justice was only assigned to be responsible for the administration of the NIA but not involved in its working; there was therefore no reporting to a Minister, but directly to the President as also apparent from the two previous organograms.

289. The new 2009 regime also for the first time introduced the concept of "State Security" as opposed to "National Security". This brought in a paradigm shift: The emphasis fell on the security of the State, as opposed to National Security which laid emphasis on the security of the people; that is, the welfare of the people. As the evidence indicated, that paradigm shift paved the way for the use of the SSA to serve the power and interests of the incumbents, including especially former President Zuma. In fact, members of the SSA were made to take an additional oath in terms of which they swore allegiance to the President and also to recognize the authority of the Minister of State Authority who was Dr Siyabonga Cwele at the time whereas, prior to that, members only took oath of allegiance to the Constitution and to the Agency.

290. A special section, namely, the Presidential Security Support Services (PSSS) was created by Ambassador Thulani Dlomo within the DSCO to protect former President Zuma, a task that properly belonged to the SAPS; he also irregularly removed the President's health services from the SANDF to the DSCO. There was also political overreach by the Minister of State Security, Mr David Mahlobo, in becoming involved directly in the operations of the SSA as will be shown below. One of the consequences of the amalgamation was that the powers that were enjoyed separately by the Director General of the NIA, and the Director General of the SASS, were put in the hands of one person, namely, the Director General of the SSA. The result was the potential for its abuse. The evidence before the Commission has shown that such abuse did in fact occur. Most of the problems that beset the SSA were the consequence of the amalgamation. It indeed constituted a paradigm shift from what was espoused by the Intelligence White Paper. That abuse manifested itself in various ways; for example, using the SSA and its resources for political ends; being involved in the ANC's factional battles or to improve its political fortunes etc –more about which later. The proclamation also usurped the powers of Parliament; and the intelligence services were made to report directly to the Minister and no longer to the President.

291. The High-Level Review Panel, as testified to by Dr FS Mufamadi, the chair thereof, also made similar findings regarding the paradigm shift from the Intelligence White Paper.

Recommendations

292. The period prior to 2009 might have had its own challenges and therefore not perfect but the Commission has not been told of any major problems that existed prior to the amalgamation of the NIA with the SASS into the SSA. As already mentioned, in that period there was no dedicated "Minister of State Security" and there was no notion of "State Security", but of "National Security"; all these were in line with the Intelligence White Paper and the Constitution. The Commission therefore recommends a close look once more at the spirit, guidelines and principles of the Intelligence White Paper, while recognizing that it, too, might need to the adapted. As said in the evidence, it is still important and sound. Therefore, there is no need to reinvent the wheel. One of the characteristics

of the pre-2019 era was that there being no dedicated Minister of intelligence, the NIA and the SASS reported directly to the President who directed their activities. Since about August 2021, the country seems to have reverted to that. However, concerns have been expressed, especially in the media, about the concentration of such powers in the President. It is not for the Commission to adjudicate on this, save to state that, in the course of discussions about the Intelligence White Paper, no doubt all the views would be heard and considered.

293. A lot of commendable work was done by the High-Level Review Panel. The Commission therefore commends the recommendations it made for consideration, together with the Intelligence White Paper, which the Panel's Report holds in high regard.

Regarding the barring or discontinuation of investigations against the Guptas and its probable consequences

Findings

294. The State Security Agency under the leadership of Ambassador Maqetuka as the Director General, Mr Shaik as Head of the Foreign Branch and Mr Njenje as the Head of the Domestic Branch (the trio) wanted to conduct investigations into the Guptas. This followed information that the Guptas had informed Minister Mbalula of his then forthcoming appointment as Minister of Sport and Recreation. In the trio's view, there were three possible sources of information to the Guptas, all of which warranted investigation. Firstly, whether there was a breach of national security in the office of the President in that there was a leak; secondly, whether the Guptas had overheard a discussion where the then President, Mr Zuma, was consulting someone, and they were peddling the information for their own benefit. Thirdly, whether they had suggested Mr Mbalula's appointment to the former President. All the three scenarios would have been serious, with the latter even more so because it would have meant foreign nationals suggested who should be in the Cabinet of another country. All the three issues fell within the purview of national security. The other concern was that, by informing Minister Mbalula in advance, the Guptas would be creating dependency on the part of Mr Mbalula as Minister of Sport on them that would make him feel beholden to them. This was serious as the Guptas had interests in businesses that included stadia. The Commission's finding is that the investigations were justified.

295. The Commission was, however, told that the investigations were stopped by Minister Cwele, then as Minister of State Security. With regard to President Zuma, although the trio agreed that he never instructed them to stop the investigation, it was clear from what he said and his body language that he disapproved of the investigation. In his evidence, Minister Cwele denied giving instructions that the investigations be stopped. Probabilities are, however, overwhelming that he did not want the investigations into the Guptas to continue and therefore that they be discontinued; for example, his version would not explain why the trio, would have decided of their own to stop the investigation if he did not make it clear to them that the investigation should be stopped or if he did not show himself to be against the investigation. Secondly, it would not explain why the three decided to go and see former President Zuma to pursue the matter; furthermore, at no stage did Minister Cwele ask for an update or progress report on the investigation. Moreover, Minister Cwele's position towards the investigation was given as one of the reasons for the breakdown of their relationship with Minister Cwele. It is also the Commission's finding that former President Zuma did not want the investigation to go on. He said, according to the evidence, that there was no need to investigate the Guptas and said that they were good people with whom he had a good relationship. He defended his friendship with them. Although Mr Zuma may not have given instructions that the investigation be stopped, he said enough at the meeting with the trio to make it clear to them that his view was that there was no justification for the investigation and, in his view, it should not be pursued.

296. It is also the Commission's finding that a Minister, in the person of Dr Cwele, involved himself in operations of the SSA by interfering with the investigation.

297. The stopping of the investigations into the Guptas demoralized at least some members of the SSA; not least the top three: Ambassador Maqetuka, Mr Shaik and Mr Njenje, to the point that they decided

to leave, more or less at the same time for that matter. A question arises as to what otherwise would have prompted all three of them to decide to leave and more or less at the same time.

298. The stopping of the investigation into the Guptas was not a small matter. In all probability, considering all the evidence relating to, for example, their involvement in the businesses of State-Owned Enterprises such as Eskom, timeous investigations could probably have prevented at least some of their activities that led to the state capture and, by all indications, the loss of billions of Rands.

Recommendations

299. The basic reason why the investigation was discontinued was the interference by Minister Cwele; that is, it was discontinued through conduct which amounted to Ministerial interference in the operations of the country's intelligence services. The Commission recommends in the appropriate section and for the reasons therein stated, that a Minister should not be involved in the operations of the country's intelligence services.

300. The Commission's finding that former President Zuma also inhibited if not stopped the investigations might, as alluded to earlier, itself prompt debates about the President being involved inasmuch as the SSA reports to him/her and she/he directs their operations. It may, indeed, be an issue for debate, leading to discussions about appropriate checks and balances. This view is, moreover, based on the Commission's finding that a sitting President did in fact himself contribute significantly to the discontinuation of the investigation with serious consequences to the country; that is a sitting President himself interfered with legitimate operations by the country's three most senior intelligence officers who by all indications had legitimate reasons to pursue the investigation.

Executive / Ministerial involvement in operational issues and its probable consequences

Findings

301. The creation of the Ministry of State Security and the consequent appointment of "Minister of State Security" through the 11 September 2009 proclamation caused the SSA to report to a Minister, at the time Dr Siyabonga Cwele, who was later followed by Mr David Mahlobo; that paved the way for a Minister's involvement in the operations of the SSA, and that was exactly what happened. The evidence is overwhelming that both Ministers in particular did just that.

302. One of the ways in which that happened was when Minister Cwele, on the weight of the evidence before the Commission by the country's then top intelligence chiefs, interfered in the investigation against the Guptas; he said investigating them would amount to investigating former President Zuma. He was also against the Hawks investigating Mr Arthur Fraser. This issue is dealt with separately later.

303. Minister David Mahlobo, on the evidence, not only involved himself in the operations, but also directed them. He was actively involved in for example projects under Project Mayibuye such as Project Wave (about the media), Project Justice about alleged attempts to bribe some judges. Above all, there was a letter entitled "Projects approved by the Minister" which involved the spending of some R130m. In fact, one of his responses was that the law did not prohibit him from being involved. If what he says is correct, the situation would certainly require a very close look. However, even more worrying, was his involvement in the withdrawals, handling and distribution of large sums of money, an aspect that is dealt with separately herein. Former Minister Bongo also involved himself to some extent in the operations.

304. Some of the dangers attendant upon a Minister's involvement in operational matters were clearly articulated by witnesses, in particular, the top three. A few examples were given. The Minister of State Security would have knowledge of the identities of operatives, which knowledge the Minister would take along with upon leaving office; secondly, that he/she might acquire information about other fellow Ministers, which would make him/her better placed than them. Nothing further really needs to be said to make the point that a Minister should not be involved in operations, except to add

political bias in favour of his or her own party or own faction in intra-party politics; all of which, on the evidence before the Commission, did happen.

Recommendations

305. Whether the two former Ministers deny involvement in operations or not does not detract from the importance of the principle against Ministerial involvement. The recommendation, therefore, holds good: the Commission recommends that a Minister should not be involved in the operations of the intelligence services.

Illegal operations by the State Security Agency (SSA)

Findings

306. Section 199(7) of the Constitution prohibits a security service or a member thereof, in the performance of their functions, to prejudice the interests of a political party that is legitimate in terms of the Constitution, or to further any interests of a political party in a partisan manner. Yet, there was evidence that some of the activities of the SSA did just that. There was evidence, for example, that SSA money was withdrawn, at the instance of Ambassador Dlomo, and used to transport, accommodate and feed ANC MK veterans, for the party's January 8 rally in Rustenburg in 2016.

307. A member of the SSA ("Dorothy") was also used to assist at the ANC NASREC Conference, for which she withdrew subsistence allowance. There were also some activities undertaken to improve the fortunes of the ANC in the Western Cape, Eastern Cape and Northern Cape amongst the Coloured people.

308. The Special Operations Unit (SOU) of the SSA, particularly under the direction of Ambassador Thulani Dlomo, was a law unto itself, launching many projects that operated illegally as indicated above.

309. Not only were the activities against the Constitution, but there is a strong indication that some of them contravened legislation governing intelligence services.

Recommendations

310. Investigations should be carried out internally for disciplinary action against members, and also by law enforcement agencies against possible criminal statutory contraventions. The use of the resources and services of national intelligence agencies to destabilize opposition parties, to benefit a ruling party and to fan intra-party factions in order to influence political or electoral outcomes amounts to a serious threat to democracy. Steps therefore need to be taken to deal with this.

Cash withdrawals, movement of cash and accountability for cash

Findings

311. In terms of cash withdrawals, large sums of money were withdrawn. Given the covert operations of the SSA, withdrawal in cash was inevitable. However, what was striking was the huge amounts at any one time - running literally into millions. There was a case where cash in the amount of R145m was stolen within the SSA offices. Varying amounts were withdrawn; for example R38.5m over the period March 2014 to September 2016; money withdrawn by then Minister Mahlobo for, allegedly, former President Zuma at R2.5 pm in 2015/2016 which was later raised to R4.5 pm in 2016/2017. Ambassador Dlomo approved and caused the withdrawal of cash in large amounts; for example, R5m, R13.5m and R4.510m. Mr Arthur Frazer instructed a junior to receive and take cash in the amount of R1.5m to the then Minister Mahlobo; signed in approval the withdrawal of R4.510m to be taken to the then Minister Mahlobo, and for yet another R4.510 the following month to be taken to the then Minister. All these are

312. In terms of the advance payment system, money would be paid in advance and in cash for operations. There were many problems with this; for example, the purpose for the money would be obscure or not set out, nor was the final destination (supposedly some operatives). To sum up, the motivation would be inadequate; and financial controls, such as were there, were poor or not adequately enforced.

313. In terms of accountability, there would be no verification as to what the money was used on because, to start with, the intended use would itself be obscure; no verification as to whether the intended recipient actually got the money, such as in the form of receipts; one of the service providers was found to be non-existent. Lack of accountability manifested itself in various ways; to give two astonishing examples: Firstly, whereas the person to whom an advance payment was made was disqualified from taking a further advance before accounting for the first one, this rule would be circumvented. A different person would be used in whose name the money was withdrawn and handed over to the one disqualified; one of the people whose name was used in this manner told the Commission as much. The second example was where a person simply acknowledged debt in terms of the money they were unable to account for – with the money amounting to millions – without any effective recovery of the money. Instead, the money, amounting to millions, would be offset against the person's pension; in some instances, such people simply resigned thereafter. A witness estimated that over the period 2012 to 2018 an amount of R1.5b was lost.

314. As shown above, Ambassador Thulani Dlomo, in his capacity as the Head of the Special Operations Unit, handled a lot of cash; in many respects, the use and destination of the monies remained obscure.

315. Minister Mahlobo, too, as shown above, then as Minister of State Security handled large sums of cash. For example, on the evidence, there was a time when he received R2.5m a month, later increased to R4.5 m a month, which he allegedly said was for former President Zuma. Details were given by two witnesses that in the presence of both of them on at least two occasions, millions in cash were delivered to Mr Mahlobo, and counted, apart from an earlier occasion when that was done by only one of them. The Commission noted the denials by Mr Mahlobo, now Deputy Minister Mahlobo. However, as said, there were at least two eyewitnesses; secondly, the details were too much to be a figment of their imagination. Probabilities are overwhelming against Mr David Mahlobo. After his appointment, the budget of the SSA increased hugely. This conclusion was based on the scrutiny of the budget as documentary evidence relating to the budget.

316. Mr Arthur Fraser, then DG of the SSA, also handled and caused a lot of cash to be withdrawn, as shown above. After his appointment, budgetary allocations increased from about R42m in the 2016/2017 financial year to about R303m in the 2017/2018 financial year, approximately 74% (R225m) of which was used for covert operations from his office. It was said by the Project Veza investigation team that an amount of about R125m remained accounted for by Mr Fraser, even as investigations were still going on. Add to all these, the findings of the PAN Report that were referred to the Hawks and the NPA.

Recommendations

317. To state the obvious, financial controls and accountability need to be tightened.

318. As already said, the handling and use of cash is inevitable, especially in covert operations. However, consideration should be given to minimising the amounts involved.

319. There should be consequence management, including the recovery of the monies lost.

320. There was a report, the PAN report, that had been compiled by an internal investigation team which revealed, amongst others, at least *prima facie* criminal activities, which recommended criminal investigations that could have involved Mr Fraser. After the report had been handed over to the Directorate of Special Crime Intelligence Unit (the Hawks), Minister Cwele ordered that the matter be taken from the Hawks. The resumption of the investigations should be reconsidered by the Hawks; it might be that whoever were involved, including Mr Fraser, get absolved; but the investigations should be allowed to take their normal course. The Commission has noted Ambassador Cwele's denial that he

ordered the discontinuance of the investigations, but it would remain a puzzle why they stopped. In any event, the denial is irrelevant to the Commission's recommendations.

321. The role played by Ambassador Thulani Dlomo, Mr Mahlobo, Mr Arthur Fraser and other people involved in the withdrawal, handling and distribution of SSA's money should be looked into by the law enforcement agencies. 74. The Inspector General of Intelligence should be allowed greater access to the activities of the country's intelligence services. There has been evidence by the current IGI that attempts were made to frustrate some of his investigations.

322. Consideration should be given to allowing the Auditor-General adequate access to audit the country's intelligence agencies; without prescribing, consideration may be given to giving top clearance certificate to some staff of the Auditor-General; consultations with the IGI and the Auditor-General should be considered by the SSA. The Commission notes as commendable the efforts of Mr L Jafta, the former Acting Director-General of the SSA, that he has opened the door to the Auditor-General to audit the SSA. It is a step in the right direction and an indication that this recommendation is implementable, particularly subject to other conditions such as security clearance at the appropriate level.

Maintenance of secrecy: A balancing act

Findings

323. The Commission appreciates and agrees that there is a need for secrecy regarding covert operations. However, there is also a need to balance that with transparency and, in particular, accountability; be it in the form of financial accountability or accountability in respect of activities carried out to ensure compliance with the law; for example, that intelligence services are not abused to serve the personal interests of some individuals. As was said in the evidence, which should be accepted, not everything should be locked up in the vaults.

324. Various instances of the abuse of the secrecy principle were mentioned. The Commission gives a few examples of them. To start with, there was a ridiculous case in which SAPS Crime Intelligence reportedly withheld information in respect of the purchase of curtains for a house on the basis of secrecy, whereas details of the purchase could have been given without disclosing the address of the house such as where the curtains were bought. Regarding the SSA, it was as a result of reliance on the secrecy principle that no verification could be made that intended beneficiaries did receive monies intended for them; that some service providers were found to be non-existent; that attempts were made to thwart investigations by the Inspector-General of Intelligence; that the Auditor-General arranged with the SSA for a qualified audit annually; and the Hawks were taken off criminal investigations against certain people including Mr Arthur Fraser for the reason that it would not be in the interests of the State or national security to prosecute him, despite Mr Njenje's firm stance that that would not be the case.

Recommendations

325. The Commission recognizes the difficulty in balancing the maintenance of secrecy, on the one hand, with transparency and accountability, on the other.

326. The evidence has revealed abuse of secrecy. The situation should not be left entirely in the hands of the intelligence agencies themselves. There should be some measures to hold them to account, otherwise they would become law unto themselves. The role of the IGI, the AG, and Parliament through its Joint Standing Committee on Intelligence, should be sharpened. Secrecy should not be used to hide criminal activity; law enforcement agencies should therefore be able to investigate and, where appropriate, the NPA should prosecute, otherwise there would be criminal impurity under the cover of secrecy. A situation cannot be allowed where intelligence officers are their own guardian.

The use of SSA firearms and their disappearance

Findings

327. A few witnesses testified that firearms and ammunition were taken out of the SSA's Armoury, Musanda. On one occasion, they were taken out at the instance of Ambassador Dlomo, the person who collected them did not even have the competence to handle a firearm. They were therefore issued to that person in contravention of prescripts and the law. It was an assortment of firearms including rifles and submachine guns. When instructions were later given by Mr Fraser for their return, only some were brought back; some were still outstanding at the time of the evidence. The purpose for the arms was not explained. Issuing firearms under those circumstances amounted to the abuse of the assets of the SSA. One Johan, who was at the armoury, played a major role in facilitating the irregular issuance of the firearms.

328. The release and distribution of weapons from the SSA armoury appeared to have been laxed; for example, it would not be clear what they were to be used for or by whom, or whether the people for whom they were meant had the necessary competence to handle them.

Recommendations

329. The involvement of Ambassador Thulani Dlomo and Johan, constitute, *prima facie*, criminal conduct in violation of the Firearms Control Act, and the SSA prescripts governing the issuance and control of the SSA armoury. The matter calls to be referred to the law enforcement agencies for further and thorough investigation, particularly as some of the firearms and ammunition have not been returned. It is noted, in this respect, that the witness (Dorothy) who was involved in the collection of the firearms on the instructions of Ambassador Thulani Dlomo, testified that she opened a case of missing firearms with the police; the question is: what have the police done with that matter?

330. The process for the issuance of firearms out of the SSA armoury needs to be tightened up, bearing in mind that even rifles and sub-machine guns were issued. These are weapons of war. The country presently has a problem with the illegal possession and use of firearms. As indicated earlier, the emphasis of intelligence services should not be on the security of the State (State Security) but on the interests of the citizens (National Security). The wanton distribution of SSA weapons by the SSA undermines its very core function to ensure the security of the citizens.

The abuse of the vetting system

Findings

331. One of the issues before the Commission was the manner, and the purpose for which, the vetting system was conducted.

332. Firstly, the evidence established that, apart from the normal vetting system of the SSA, Ambassador Thulani Dlomo established a parallel vetting system which may well have been probably illegal. He also actually recruited somebody from outside the SSA to do the vetting of certain people. This created a potential danger to the country in that people who did not qualify were given security clearance. Evidence was further that the process of vetting was flawed in many ways. For example, some forms not being properly completed, a person being interviewed by more than one person thereby breaking the consistency; and names and information not being loaded onto the official system.

333. Then there was the abuse of the vetting system. For example, questions were asked about the regularity of Mr Arthur Fraser himself, the former DG of the SSA, regarding his top-secret clearance certificate which was said to have been issued on an expedited basis; while the practice of expedited clearance was acknowledged, questions arose about the need to do so in his case. Then there was the most glaring abuse of the vetting system by Mr Fraser himself. Once the Inspector General of Intelligence, Dr Dintwe, told him that he was investigating him because of certain activities, Mr Fraser invoked Dr Dintwe's clearance certificate! Dr Dintwe had to go to court to have his certificate restored

but the matter was resolved without the Court deciding the matter. Another case of apparent abuse of the vetting system was the withdrawal, or refusal, of the security clearance certificate to the former National Director of Public Prosecutions, Mr Mxolisi Nxasana, who Mr Zuma may have feared was poised to reinstate criminal charges against former President Zuma.

Recommendations

334. It appears from the evidence that the parallel vetting system created and implemented by Ambassador Thulani Dlomo was discontinued. However, given the danger posed to national security by issuing security clearance certificates to people who might not have qualified, makes for a serious matter; moreover, Ambassador Dlomo and those involved might have transgressed the law. An investigation by law enforcement agencies is warranted. An internal investigation should also be conducted in respect of those whose certificates are suspect.

On the irregular recruitments and appointments to Intelligence Services

Findings

335. Evidence tendered was that there were no clear criteria for the recruitment of non-SSA members. Ministers were even involved in the recruitment of their relatives or people they knew. Ambassador Thulani Dlomo also became involved in the recruitment even before his appointment as General Manager: Special Operations on 18 January 2012. The danger with the recruitment based on connectivity was its potential to make the recruited people beholden to those who brought them in; they might tell those who recruited them only what the latter wanted to hear, thus compromising the objectivity of information. The recruitment was therefore not always done in the best interests of the SSA, but primarily to benefit individuals.

336. Cogent evidence was placed before the Commission by Dr Dintwe, the IGI, regarding irregular appointments, also as to their possible motive and impact on the issue of state capture. There were irregular appointments to both the SSA and to Crime Intelligence. Such appointments, said Dr Dintwe, created instability and a potential for state capture; in some instances, no criteria were either used or were not there. He gave a few examples, which also indicated executive overreach. In one instance, former Minister Bongani Bongo ordered the National Intelligence Co-ordinating Committee ("NICC") to appoint someone to a senior position on the basis that the person was personally known to him; shortly after the appointment, the person was promoted, again irregularly, to a higher position. In another instance a senior person caused the advertisement of a vacant post to be withdrawn because his preferred candidate was not shortlisted for interview. The many other instances mentioned by Dr Dintwe demonstrated beyond doubt that irregular appointments were made to intelligence services.

337. Despite queries raised with her, including *prima facie* evidence that her predecessor (Mr Bongo) contravened the provisions of the Intelligence Services Act, Minister Letsatsi-Duba, then Minister of State Security, failed to respond. There was nepotism including recruitment of families of Ministers. Former Minister Mahlobo, then Minister of State Security, also selected people for recruitment. Such instances were also found with Crime Intelligence; one General in the Free State acknowledged the practice and cited the recruitment of a girlfriend. Dr Dintwe indicated that the people appointed in that way later feel beholden to those who recruited them. The Commission is satisfied that, on the basis of the evidence before it, irregular appointments were made; that Ministers involved themselves in the recruitment and that such appointments were not in the best interests of the intelligence services as they held the potential of non-meritorious appointments; and also that the people would feel beholden to those who brought them in. It is also possible that at least some of them, especially those recruited by Ministers, could have contributed to state capture; at least such a suspicion, would be well founded. Such appointments should therefore be frowned upon. In one instance, the Director-General refused to recommend, but the Minister made the appointment anyway; in another, 26 people were irregularly promoted during the period of Minister Ayanda Dlodlo.

Recommendations

338. The recruitment criteria should be clear and be strictly adhered to; and certainly there should be no Executive involvement, let alone by bringing in people on familial or other non-professional considerations.

The use of questionable intelligence reports

Findings

339. Convincing evidence was placed before the Commission of the danger posed by the use of questionable Intelligence Reports. Those that were referred to as examples were by SAPS Crime Intelligence;

340. At his meeting with Ambassador Maqetuka, Mr Shaik and Mr Njenje to discuss the investigation into the Guptas, President Zuma first raised what was called the Mdluli Report, which was not even on the agenda. It was a report by Police Crime Intelligence which was at the time headed by General Richard Mdluli. The report alleged that there was a plan to topple President Zuma. It turned out that it had been rejected by the trio after a thorough analysis; despite that, former President Zuma told them that he believed it. In fact the people who prepared it were junior to the three.

341. In Mr Shaik's view, the raising of the Mdluli Report bore direct relevance to the issue of the investigation of the Guptas: the fact that the President believed Mr Mdluli over the three most senior intelligence chiefs at the time was an expression of lack of confidence in them meant to impact on the discussion they had come for, namely, the issue of the investigation of the Guptas. As Mr Shaik was to put it later in his evidence before this Commission, the discussion of the Mdluli Report, set the tone for the discussion; the rest is now history! A thoroughly discredited intelligence report had a bearing on that history. The Commission has already noted the probable consequences of the stopping of the investigations into the Guptas in relation to state capture.

342. The other discredited police crime intelligence report by General Mdluli also played a role in the breakdown of the relationships between former President Zuma and the above trio. The report was given to Ambassador Maqetuka by the then Minister of State Security, Dr Cwele, on the instructions of the former President for the SSA to have a look at. It alleged that there was a conspiracy by some generals within the SAPS to remove General Mdluli, at the time the Head of Crime Intelligence. After looking at it, the trio rejected it for a number of reasons such as that it was full of inaccuracies and, importantly, that it had been commissioned and prepared by General Mdluli himself thereby raising the issue of a conflict of interest; he should have stood aside and asked one of his senior colleagues to investigate.

343. The well-known alleged intelligence "report" was canvassed by the IGI, Dr Dintwe. It was a report on the basis of which Minister Pravin Gordhan and his then deputy Mr Jonas were recalled by former President Zuma from a trip abroad. The report was to the effect that Mr Gordhan and Mr Jonas were overseas to meet with some foreign agents who were calling for regime change in the country. Dr Dintwe received a complaint about the report from the Democratic Alliance and the South African Communist Party. What he set out to investigate was the origin, authenticity and veracity of the alleged intelligence report. Former President Zuma, according to Dr Dintwe, was the only person who said he had the report. Dr Dintwe set up a meeting with him to ask for the report. He said the former President did not say there was a report; the only thing he said was that, when the time was ripe, he would explain in order for Dr Dintwe to understand; he did not commit himself on whether the report existed or not. Soon after the meeting Dr Dintwe wrote to President Zuma to indicate he was awaiting further engagement to conclude his investigation.

344. As at the date of Dr Dintwe's evidence before the Commission, he has not heard from the former President; he did not furnish him with a copy of the alleged intelligence report, except to see a badly written document on social media which he could not act on as the former President had not taken ownership of it. Importantly, all the country's three intelligence agencies told Dr Dintwe that the report was not given by them. Based on all these, the Commission doubts the existence of any authentic intelligence report on the basis of which former President Zuma removed Mr Gordhan as Minister of

Finance and his then Deputy Mr Jonas. It is to be noted that President Ramaphosa criticised the intelligence report when he spoke publicly about Mr Gordhan's removal.

345. Two more questionable intelligence reports were referred to and criticized by Dr Dintwe. They were also issued by Crime Intelligence during the time of Mr General Mdluli. The first report alleged a plot by General Shadrack Sibiya, Mr Robert McBride and Mr Paul O'Sullivan and others to overthrow the government. The second one related to the alleged unlawful rendition of foreign nationals involving Generals Sibiya and Dramat.

346. Dr Dintwe said both reports turned out to be untrue. The criminal charges against General Sibiya and General Dramat relating to the rendition matter were withdrawn. From the Commission's point of view, there was a relevant and important angle to this second report: at the time it was compiled, General Sibiya was, according to Dr Dintwe, involved in investigations against General Mdluli, then Head of Crime Intelligence.

347. Dr Dintwe had serious criticism of the two reports; for example, that they were incoherent, prepared in a clumsy manner, full of spelling errors and unintelligible and too substandard to be submitted to the Head of State. These reports were not put through the vigorous process of checks and balances. Yet, he said, they were dealing with the lives and rights of people. It is not for the Commission to adjudicate on the veracity of the two reports but there are three worrying things about them. Firstly, that General Sibiya was investigating General Mdluli who, incidentally, has since been convicted of some crime or crimes which might or might not be related to his investigation by General Sibiya. Secondly, the poor standard of the reports and, thirdly, the fact that not only did no prosecution ensure, but that, on the contrary, regarding the rendition matter, the charges were withdrawn. These considerations remind all and sundry, let alone those in power, to be cautious with intelligence reports. Again, as a matter of interest to the Commission, Dr Dintwe's view was that those who compiled the reports did so in the knowledge that their reports would not stand scrutiny before the courts, but were compiled to remove people from their positions who stood in the way of state capture or corruption and looting of state resources.

Recommendations

348. The peddling of false and unsubstantiated so-called intelligence reports can destabilize the country. The country's intelligence structures, as well as those in power to whom they report, need to be alive to those dangers. The bottom line is that sound and effective mechanisms should be in place to be able to sift out false reports. The Commission was told that former President Mandela rejected an intelligence report that there were people planning to overthrow him. A great deal of prudence is required in dealing with intelligence reports. You need to have professional people, appointed on the basis of merit, to be in charge of intelligence services.

South African Police Service: Crime Intelligence

Findings

349. Although there was not much evidence about the SAPS Crime Intelligence, enough evidence was given to enable the Commission to make adverse findings on the SAPS Crime Intelligence reports under the leadership of General Richard Mdluli; they were discredited. The danger of such false intelligence reports has already been pointed out. The findings and the recommendations have already been made. 102. It is SAPS Crime Intelligence which was allegedly involved in attempts to procure the grabber. The grabber was to be used at the ANC's NASREC Conference where the ANC's national leadership elections were to be held. The evidence was to the effect that part of the excessive price that was to be paid for the grabber would be used to buy votes at the conference. This would, of course, interfere in the internal politics of the party. The Commission finds that the attempts were indeed made as alleged, although it can't make a finding that Crime Intelligence was officially involved; there were, however, strong indicators that that was the case because the intention to procure the grabber was confirmed by a Divisional Commissioner to Dr Dintwe. 103. It is also the

Commission's finding that there were irregular recruitments into the Crime Intelligence, because no less than a General admitted that much.

Recommendations

350. The recommendations made in respect of false reports, irregular recruitments and abuse of secrecy made earlier in this report in respect of the SSA, also hold good with regard to SAPS Crime Intelligence.

The role of Parliament as an authority of oversight

Findings

351. Section 3 of the Intelligence Services Oversight Act 40 of 1994 deals with the functions of the Joint Standing Committee on Intelligence (JSCI), namely, to exercise some oversight over the functions and activities of the intelligence services. In executing its duties, the Committee may, amongst others, request relevant officials to explain any aspect of reports furnished it, including reports by the SSA, Police Crime Intelligence, Defence intelligence and the Inspector General of Intelligence. Parliament's Joint Standing Committee on Intelligence (JSCI) failed to properly perform its oversight duty in respect of the SSA; to mention some examples: It is so that through the 11 September 2009 Proclamation, former President Zuma restructured the country's intelligence services. He did that by amalgamating the NIA and the SASS into the SSA, something that could not be done through a mere proclamation but through national legislation; that is, through Parliament. In paragraph 5.1.1 of its Annual Report "For the Financial Year Ending 31 March 2020 Including the Period Up to December 2020" published on 13 September 2021, the following is recorded: "The proclamation was announced in July 2019 but only approved in October 2010. The legislation that amended the changes was only approved later in the form of the General Intelligence Laws Amendment Act, No. 11 of 2013. The gap between 2010 and 2013 resulted in serious concerns and illegal functioning of the SSA. The new structure created a powerful DG with powers concentrated on a single individual. The amalgamation also enabled some members of the executive to issue illegal instructions to members of the SSA. These instructions amounted to executive overreach." True, the report was issued by the JSCI of the Sixth Parliament, but there is no evidence before the Commission that any committee before it did anything about such illegal functioning of the SSA in the period 2010 to 2013 when the above Act was passed. A committee could not have justified its failure to raise its voice or to exercise its oversight on the excuse that it would have acted in breach of any law relating to secrecy. Nor is there any evidence that the JSCI dealt with the matter of the executives' illegal instructions and overreach. The report also confirms in its paragraph 5.1.4 that information was given about challenges such as corruption, irregular recruitment of some members of the Special Operations Unit, illegal proactive services, parallel vetting structure that issued fake top secret clearance certificates and sniper training for some non SSA members as was attested to by various witnesses.

352. There was a time when there was no IGI appointed for a period of about 22 months; that is, for all that period, Parliament failed to fill a national position which played a very important oversight role. The Commission was told that a lot of malpractice within the SSA occurred during that period. There can be absolutely no justification for this failure and Parliament should have ensured that this did not happen or that the executive was held to account for this.

353. The Committee failed to act on the reports submitted to it by the IGI, which set out amongst others the misuse of money, and attempts to procure a grabber (by Crime Intelligence) irregularly.

354. The Committee failed to act on the advice and information given to it by the country's three most senior intelligence officers. The then Director-General of the SSA briefed the Committee for two days about the problems the SSA was experiencing in the execution of its duties; as he put it, that they were in deep trouble. The then chair of the Committee said at the end of the briefing, that they would be called back but nothing further happened; there was not even a follow up.

355. There was a failure on the part of the JSCI to hold the Ministers of the time accountable, especially former Ministers Cwele and Mahlobo. If the Committee accepted that the Ministers had the right to be involved in operations, it failed to hold them accountable given the issues placed before it by the IGI or senior intelligence officers; if the Ministers did not have the right to be involved in operations, that was all the more reason why they should have been hauled before the Committee; either way, there was a failure by the Committee to carry out its oversight duties.

356. By failing to properly carry out its oversight role and to heed the call by the country's then intelligence chiefs, Parliament has, at least to some extent, contributed towards state capture. Because its failure to do its job meant that acts of state capture and corruption were allowed to spread and deepen. It should have stepped in to ensure the continuation of investigations against the Guptas.

357. In terms of some of the findings of the JSCI and its recommendations, naturally, the report deals with a number of issues some of which have no bearing on the mandate of this Commission. The Commission therefore mentions only some of the findings in the report which are pertinent to some of the issues raised; these are set out in paragraph 8 of the JSCI's report. The findings are significant in that they show that all was not well within the SSA, Crime Intelligence and to some extent Defence Intelligence; a few examples are mentioned below to illustrate the point.

358. Regarding the SSA, the slow implementation of the High-Level Review Panel Report, security breaches that led to intelligence failures, threats to the Veza investigation team that was investigating irregularities within the SSA, challenges in the financial statements, and instability in the SSA's senior management. The problem of finance management is confirmed by the qualified opinion of the Auditor-General, which is an annexure to the Committee's report.

359. Regarding Crime Intelligence, audited financial statements revealed irregularities: its annual report revealed that some senior managers were not vetted, so too over and under expenditures were not reported. Certificates of activities by the Office of the Inspector General of Intelligence reported looting of funds from the Secret Services Account, and also lack of operational directives.

360. Regarding Defence Intelligence, audited financial statements showed non-compliance with legislation; failure to comply with competitive bid processes for the procurement of goods; lack of compliance with the National Treasury policy; and weak financial controls. Its annual report revealed amongst other things vetting and human resource challenges. The certificate of activities showed a vetting backlog and that some generals and senior managers were not vetted.

361. Regarding the Office of the Inspector-General of Intelligence, the JSCI noted that the office had human resource challenges and also that only 0% to 2% of the OIG's recommendations were implemented. This means that between 98% and 100% of the IGI's recommendations are not implemented.

362. It is to be noted that the above findings of the JSCI are in line with the evidence tendered by various witnesses before the Commission regarding challenges that plagued the above intelligence services.

Recommendations

363. It hardly needs mentioning that Parliament should exercise its oversight role properly and fully.

364. Returning to the report of the JSCI, it is to be noted that, in paragraphs 9 and 10 respectively, the Committee makes generic and specific recommendations. These recommendations are aimed at ensuring a better service by the country's intelligence services. It is hoped that they will be seriously considered; the report having been tabled before Parliament for consideration. It is a public document for anybody to access.

Law enforcement agencies

Findings

365. An internal team of the SSA conducted an investigation into a project known as the Principal Agency Network (PAN) which had been launched by Mr Arthur Fraser. The report revealed some criminal

activity and was handed over to the Directorate for Priority Crime Investigation (the Hawks) and to the NPA for prosecution, both of which indicated at one stage that they were ready to do so. The Hawks even reduced the costs they would charge. The prosecution was, however, stopped by Minister Cwele, who said it was on the instructions of President Zuma, at the time, on the ground that prosecuting Mr Fraser would compromise national security, this notwithstanding Mr Njenje's insistence that that would not be the case as what was being investigated was pure crime. It is public knowledge that, after Mr Zuma had served a few weeks of his 15-month term of imprisonment imposed on him by the Constitutional Court for defying its order that he appear before this Commission, Mr Fraser who was the National Commissioner of Correctional Services, granted him medical parole under questionable circumstances and against the recommendations of the Parole Board. That matter is the subject of pending litigation in the Courts. However, the picture that emerges is that Mr Zuma put a stop to an investigation that could well have led to Mr Fraser's arrest, prosecution and maybe imprisonment and Mr Fraser put a stop to Mr Zuma's continued incarceration despite the fact that Mr Zuma's incarceration was in terms of an order of the Constitutional Court.

366. Ambassador Cwele's denial that he stopped the investigation as alleged, was noted. However, it boggles the mind why the matter would be taken away from the Hawks, who were ready and willing to proceed; why the top three would abandon the matter after, as they put it, so much effort and resources had gone into the investigation. It also boggles the mind why Ambassador Cwele, having supported the referral to the Hawks, did not demand progress reports when he did not receive any. It also boggles the mind that, thereafter, in September 2016, former President Zuma appointed Mr Arthur Fraser as DG of the SSA. On the basis of all the aforegoing, it is the Commission's finding that while Ambassador Cwele might not have personally wished for the criminal investigation by the Hawks and the prosecution to stop, he did say that the former President said it should stop and also that former President Zuma did give instructions for the investigation to stop.

Recommendations

367. It is recommended that the law enforcement agencies resume this investigation that was stopped by President Zuma on the basis that it would threaten national security as no evidence has been presented that pursuing the investigation would threaten national security with a view to the NPA possibly considering if there is enough evidence, possible criminal charges against all those implicated including Mr Arthur Fraser. The allegations are serious; they point to a massive abuse of the assets of the SSA, such as the purchase of some 300 vehicles now idling all over Gauteng, and many houses registered in the names of individuals. The issue of a possible compromise to national security can always be discussed with the National Prosecuting Authority with the appropriate intelligence heads, and should not be decided solely by politicians who might have other reasons, possibly political, not related to national security.

On the Inspector General of Intelligence

Findings

368. The Inspector General of Intelligence is meant to exercise oversight over the activities of the country's intelligence services; to that end, he or she accepts complaints from the public, including individuals, against such services. Yet it is the Commission's finding that obstacles were placed to inhibit the IGI in the execution of his duties. The current IGI has testified at length about such obstacles; for example, limited budget and no direct budget; being allowed only restricted or managed access to information by the DG's and other heads of intelligence services.

369. The IGI's complaints to Parliament's Joint Standing Committee on Intelligence would not attract adequate response and his reports were not acted upon. The office could only employ staff upon approval of the Minister through the DG of the SSA, the very body over which he was to exercise oversight; his office shared the IT system (the server) with the SSA, giving rise to some concern on the part of other intelligence services such as the Police Crime Intelligence.

370. The office of the IGI does not have enough personnel, with some important posts not filled even though funded. It has been indicated above how the Inspector General's security clearance was withdrawn by the then DG of the SSA, Mr Fraser, once the IGI had told Mr Fraser that he was investigating him. The budget of the office of the Inspector General is within that of the SSA, over which he is supposed to exercise oversight.

Recommendations

371. Instead of being weakened or undermined, the office of the Inspector-General needs to be strengthened in many ways. It needs more staff and a budget of its own. The Inspector General should enjoy unfettered access to classified information and be better equipped. The office of the IGI should be independent and respected.

372. The findings and reports of the IGI should be taken seriously by the Executive and Parliament. The IGI told the Commission that the issues he took to the JSCI Parliamentary were not being responded to.

373. The Commission cannot make an exhaustive list of all the steps that need to be taken to make the office of the IGI effective and capable of carrying out its duties; the bottom line is that all the necessary measures should be taken to achieve that objective.

374. The issue of the independence of the IGI is fundamental. In his evidence, Dr Dintwe made this point, and referred to the kind of independence enjoyed by the Hawks and IPID. In this respect, reference has to be made to the judgments of the Constitutional Court in the Glenister and the McBride cases.

375. In the Glenister case (popularly known as Glenister II), in which the independence of the Hawks was an issue, the Court made the point that it was a constitutional duty of the state, when creating an anti-corruption entity, to give it adequate independence. "We therefore find that to fulfil its duty to ensure that the rights in the Bill of Rights are protected and fulfilled, the state should create an anti-corruption entity with the necessary independence and that this obligation is constitutionally enforceable. It is an intrinsic part of the Constitution itself." The Court said that failure to create a sufficiently independent anti-corruption entity would infringe on people's fundamental rights, which would otherwise be corroded by corruption. It does not have to have full independence, but requires adequate levels of structural and operational autonomy to prevent undue political influence. Obviously, some of the issues that arose in the Glenister case do not arise with regard to the IGI: for example, security of tenure. The IGI does enjoy security of tenure, and the method of appointment is constitutionally sound. It is by the President, approved by a resolution of the National Assembly by at least two thirds of its members. However, there is one point that the Court made that applies with equal force, if not more, with regard to the IGI, namely, the issue of public perception as to whether or not the IGI is in fact independent. On this point, the Court said that the appearance or perception of independence plays an important role. In this respect, Dr Dintwe says that the other thing that compromises the independence of the office is that it is situated within the Ministry of State Security; the IGI is using the ICT infrastructure of the SSA and its server, which means that being the owner of the server, the SSA may access information that belongs to the IGI; this point also unsettles other intelligence services such as the SAP's Crime Intelligence and Defence Intelligence

376. The McBride case affirmed the principles set out in the Glenister case with regard to the importance of the independence of an anti-corruption entity. At issue was the power of the Minister of Police over and in relation to the Independent Police Investigative Directorate (IPID), in particular the power to unilaterally suspend its Executive Director and to institute disciplinary proceedings against him. The Court referred to and agreed with the majority judgment in the Glenister II judgment, that "a corruption-fighting entity will have the requisite independence if it can be established that the 'reasonably informed and reasonable member of the public will have confidence in an entity's autonomy protecting features'."

377. It is recommended that the Inspector General of Intelligence should enjoy adequate independence in line with the guidelines set out above.

On the Auditor-General

Findings

378. The evidence points to the need to have the Auditor-General authorised to audit the expenditure of the SSA. It has been pointed out already how large sums of money were not accounted for. Yet, the role of the Auditor-General is not properly fulfilled because some information is deemed classified for that office to access. The arrangement between that office and that of the Inspector General of Intelligence, in terms of which the Auditor-General directed the office of the Inspector General on how to carry out some audit, was not adequate; it amounted to a ticking box exercise without depth. An arrangement between the Auditor-General and the SSA to agree on a qualified report in respect of the so-called slush fund (which forms a substantial part of the budget) was also not acceptable. It is the Commission's view that the fact that there were the large sums of monies that could not be accounted for, was due at least largely to the fact that the office of the Auditor-General could not execute its duties as it should have, and that the implicated people acted with impunity as they were aware of the weaknesses in the system.

Recommendations

379. A way should be found to enable the auditing of the SSA by the Auditor-General while preserving the required secrecy; for example, by granting the appropriate security clearance to some staff within the office of the Auditor-General. As stated above, the Inspector General has indicated that his office does not have the expertise and capacity to audit the intelligence services. The bottom line is that the current situation cannot be left as it is; at the very least the office of the Inspector General should be properly capacitated – an exercise which might require a lot of resources. The Commission has noted that the former Acting Director-General of the SSA, Mr L Jafta had accepted that the SSA be audited by the Auditor-General.

The roles of some key players

Findings

380. In the midst of all the questionable activities of the SSA from the period after its formation in 2009, there are certain prominent role players. The role of each one of them was testified to by various witnesses, as appears in the summary of evidence. For the sake of convenience, the witnesses in respect of each such role player are grouped together, with their respective evidence being restated more or less as it appears in the summary.

381. One of the most important roles played by former President Jacob Zuma was to restructure the intelligence services by collapsing, through the 11 September 2009 Proclamation, the NIA and the SASS into the SSA. The amalgamation had disastrous consequences. For a start, it was not competent to do this through a mere proclamation; it concentrated powers of the former NIA and the former SASS in the hands of one person, namely, the Director-General of the SSA, Ambassador Maqetuka and later Mr Arthur Fraser; he, for the first time, created the Ministry of State Security and drifted away from the guidelines and principles of the Intelligence White Paper that were reflected in the Constitution; it was under him that Ministers of (of State Security) became involved in SSA's operational issues. Crucially, he discouraged the investigation against the Guptas, and stopped the Hawks investigations against *inter alia* Mr Arthur Fraser whom, some three years thereafter, he appointed Director-General of the SSA, notwithstanding the findings against him that were referred to the Hawks and the NPA which he knew about.

382. As it is known, former President Zuma failed to return to the Commission to put his own version with regard to evidence against him.

383. The Commission has already made a finding that stopping investigations against the Guptas was one of the factors that contributed towards state capture. Therefore, by discouraging investigations against the Guptas, former President Zuma, wittingly or unwittingly, contributed towards state capture.

In this respect, it may be convenient to restate and put together the evidence by the trio, Mr Shaik, Mr Njenje and Ambassador Maqetuka here.

384. In terms of Mr Shaik, the former President listened calmly; he did not scream or shout. In his response, he told them about his long-standing relationship with the Guptas; that they were business people; that they once assisted his son Duduzane Zuma when nobody was going to employ him; that they were introduced to the ANC by people associated with President Mbeki; that the relationship with them was of long standing, dating back to the Mbeki administration. To him there was no need to investigate. It was clear to them that he did not want the investigation to continue. President Zuma cast himself as a victim by peddling the narrative that the Gupta investigation was because they wanted to get at him, something that was hurtful to the three of them as they all had had a long relationship with him. Mr Shaik even had a feeling as though the three of them were seen as part of the people wanting to topple him. The bottom line of Mr Shaik's evidence was that former President Zuma did not want the investigation to go on as there was no need. His son stayed with the Guptas in India when he went there for studies; the relationship, according to the former President, was not on the basis of him being President; again, with the narrative of being a victim, he said people wanted to topple him. This narrative could also be linked to the Mdluli Report. However, although the former President did not in so many words instruct them to stop the investigation, he made it clear, by pointing to his long relationship with the Guptas that the investigation should stop. After the meeting with the President, they decided that the investigation should not continue; if it did, it would be at the cost of their jobs. He did not raise the issue of Mr Njenje's business interests as the Minister had done. With all the arguments the former President raised, he was making the point that it was not necessary to continue with the investigation. Mr Shaik's view was that from what the former President said, pushing the investigation would have made them appear as part of the people who wanted to topple the former President. The former President was very loyal to his friendship with the Guptas. The investigation did not continue, even though the top three wanted it to. However, Mr Shaik had no doubt that, had they proceeded with the investigation regardless, they would have been removed from office; he gave the case of one Billy Masetla, then Director General of the National Intelligence Agency, who was dismissed from a senior intelligence position.

385. Mr Njenje's evidence: Mr Njenje confirmed Mr Shaik's evidence that after the trio had had a difficult meeting with Mr Cwele when they insisted on investigating the Gupta family, they went to see the President to raise their concerns about Mr Cwele with President Zuma. At that meeting President Zuma confirmed his good relationship with the Guptas; how they had taken his son Duduzane into their company, and that they came from a good family. President Zuma's view was that the Guptas should not be investigated. The former President's statement that the Guptas did not need to be investigated had a negative effect on the morale of Njenje's teams The former President would say give me reports but on that occasion it was clear that he did not want the investigation to go on despite being told that those were intelligence matters justifying an investigation; he did not give adequate reasons but simply said that there was nothing wrong with the Gupta family.

386. In terms of the evidence of Ambassador Maqetuka, the former President listened throughout, though, according to the witness, his body language showed he did not like what he was being told; at one time he asked for the report which the witness said he could not give to him as he, the former President, was conflicted. The former President was calm, and also talked about his relationship with the Guptas; the meeting could have taken more than two hours; the former President would not rush them whenever they met with him. During the meeting the former President did not raise the issue of Mr Njenje's conflict of interest, even though he was told the Minister had raised it. According to the witness, the former President did not express a view as to whether the investigation should stop or not, except that he gave a long explanation about his relationship with the Guptas and how it started. When Mr Njenje briefed the former President, he was not presenting a formal report, but rather reading from his notes; nor did the witness see a formal report or a scoping report until he left in 2012 (the witness explained what a scoping report was).

387. The totality of the above evidence by the three witnesses shoes that although the witnesses differ on some details regarding what transpired at their meeting with the former President Zuma, they all

agree that it became clear that he did not want the investigations against the Guptas to continue; that was why he went on and on about the fact that they were good people, his friends and that they had helped his son. Moreover, there are other pointers. He never asked for a progress report. Also important was what Mr Njenje said earlier in his evidence. He testified about an occasion when he accompanied the then Minister of Mining, Susan Shabangu, to the Presidential residence where she was to meet with one of the Guptas at the behest or with the blessing of the former President. They were actually received by Mr Gupta in the President's study. In that meeting Mr Gupta hassled the former Minister into expediting their application for some mining, until Mr Njenje objected to the way Mr Gupta was treating the former Minister. The incident points strongly to the Guptas having enjoyed a special relationship with the former President, something which would be consistent with the evidence that he did not want any investigations to be conducted against them. Yet another indicator was the pressure that was brought to bear on Ms Mtshali and her business partner to part with their shares in a company in favour of the Guptas.

388. As said already, it is the view of this Commission that the stopping of the investigation at the behest of former President Zuma contributed to state capture in the country. This conclusion is not reached simply on a default basis, but after thorough consideration of all the evidence placed before it, including evidence relating to some SOEs.

389. Regarding the amalgamation of the NIA and the SASS into the SSA, through the proclamation, compelling evidence by the country's three former most senior intelligence officers that it resulted in problems some of which are referred to above; that it was the case of a faction (within the ruling party) asserting power by taking control of the country's intelligence; those who refused to serve that broader agenda, including those who had been in exile with former President Zuma such as the above three were – like them – replaced to enable the pursuance of the agenda; the difficulties that arose when the three wanted to investigate the Guptas such as the fallout they found themselves in as a result, was given to demonstrate the point. Some of the appointees are referred to below. As said already, it is the view of this Commission that the stopping of the investigation at the behest of former President Zuma, if not the fundamental cause of state capture, certainly one of them. In the absence of explanations by the former President which he chose not to proffer despite compulsion, the Commission agrees with the above view. This conclusion is not reached simply on a default basis, but after thorough consideration of all the evidence placed before it, including evidence relating to some State-Owned Enterprises. The evidence relating to the State Security Agency cannot and should not be considered in isolation.

390. The evidence regarding Ambassador Thulani Dlomo shows Mr Dlomo's massive involvement in operational issues and, secondly, the handling of cash. In terms of Witness K and Mr Y's affidavit, the affidavit of Mr Y, who was too ill to come and testify in person, together with the evidence of Ms K, which confirmed the contents thereof, show Ambassador Thulani Dlomo's massive involvement in the activities and operations of the SSA. He was appointed to the SSA on 18 January 2012 as General Manager Special Operations. Investigations by the Veza team established that some of the operations that were run by the Chief Directorate Special Operations under him fell outside the lawful mandate of the SSA; prescribed procedures were not followed and applicable governance, financial and operation directives of the SSA totally ignored. Shortly after Ambassador Dlomo's appointment on 18 January 2012 (as General Manager Special Operations) the scope of his authority was expanded further. Presidential Security Support Service and the Cover Support Unit were brought under his control as General Manager Special Operations. He recruited non-SSA people outside of the vetting procedures of the SSA. Through the Chief Directorate Special Operations (CDSO) under him, the SSA assumed responsibility for former President Zuma's food and toxin security, his physical security and the static protection of the President's aircraft; and sources that should have been used by legitimate intelligence structures were channelled through this parallel structure that served the interests of President Zuma rather than national interests.

391. On the evidence of Witness "Dorothy", Ambassador Dlomo's activities included the irregular issuance and distribution of firearms from the SSA Armoury, some of which were said to be still missing at the time of the hearing; in the process, not only infringing prescripts within the SSA, but also the

provisions of the Firearms Control Act 60 of 2000. He possibly could have contravened the law in terms of activities relating to the establishment of parallel vetting structures, providing protection to civilians, and taking away protection services to former President Zuma from the SAPS VIP protection services to the Special Operations Unit (SOU) he had created, thereby usurping the function of the SAPS; he did the same with the health services for former President Zuma that used to be the responsibility of the SANDF; his SOU also offered protection services to some private individuals, which should not have been given without a prior threat assessment by the SAPS; which protection could, at any rate, have only been given by the police once it was to be at the taxpayers' expense. Ambassador Dlomo, at least *prima facie*, acted irregularly.

392. Ambassador Dlomo was also involved in the withdrawal of large sums of cash and its movement, for which no proper accounting was made. This related largely to certain projects under the umbrella project, Project Mayibuye. There were a number of such smaller projects. Reference to only part of the evidence of Ms K will illustrate the point. The witness pointed out that, without describing activities for which the money was meant and without effective financial controls, an amount of R24million, over the initial R30million granted, was given without sufficient financial details, which was in contravention of the prescripts. Although she did not look at other units within the SSA to compare with, Ms K was sure that at least they would have indicated in their motivations the financial implication of their operation plans. It was also her evidence that regarding project Construcao, vague and undetailed invoices were paid (in cash). A company with pseudonym Carrot Export Company issued three invoices totalling R20million (R10m, R5m and R5m) using up almost all the money allocated within three months; the invoices simply said it was for services rendered; the point the witness was making was that no details were given on the invoices as to what was being paid for and the existence of the company could not be verified. How the monies were spent under the name of all the projects need to be looked into.

393. Minister Cwele was at the relevant time the Minister of State Security. He involved himself in operational issues; he, either alone or on the instructions of former President Zuma, inter alia, stopped investigations against the Guptas, and the criminal investigations by the Hawks against Mr Arthur Fraser and possibly others. The Commission has already dealt with the significance of the stopping of investigations against the Guptas, and the consequences thereof to the country. Regarding the stopping of criminal investigations and possible prosecution of Mr Fraser for his activities in relation to the PAN project, it is possible, without prejudging the outcome, that he might not have been appointed Director-General of the SSA, as it happened about three years after the criminal process had been stopped; therein might lie the significance of the stopping of the investigations against him. Minister Cwele was at the relevant time the Minister of State Security. He involved himself in operational issues. There were two vital investigations he was said to have stopped: Firstly, the investigation against the Guptas (acting alone or together with former President Zuma). Secondly, the investigations against, and possible prosecution of, Mr Arthur Fraser, the former DDG of the SSA. He also sought to argue that the well-known Proclamation 59 of September 2009 was a competent instrument by former President Zuma to amalgamate the former National Intelligence Agency (NIA) with the erstwhile South African Secret Service (SASS) into the State Security Agency (SSA).

Stopping investigations against the Guptas

394. *Mr Shaik's* evidence was that although in his affidavit Mr Maqetuka says he did not recall the Minister instructing directly that the investigation be stopped, his own recollection was that that was the case; but he contended that there was no debate that at the very least, the Minister did put pressure on them (which would be consistent with the fact that the trio sought to take the matter up with the President).

395. *Mr Njenje* said that Minister Cwele said that the investigations against the Guptas should stop because he felt that that would amount to investigating the former President, but the three told him that they were not investigating the President, but to help him and the Executive to know better how to deal with that family. Mr Cwele's view which he expressed forcefully, was that the investigations should not lead to the President. The Minister seemed to have had other interests in stopping the investigations other than national interests; in effect saying they would be investigating the President;

he did not give any other reasons. But the three of them indicated to the Minister that they were not convinced why the investigation should stop, and that they were going to continue with it; but he remained unpersuaded.

396. *Ambassador Maqetuka* too was clear that in their meeting with Minister Cwele, he said investigations against the Guptas should stop. Although the witness could not recall the Minister giving direct instructions that the investigation should stop, his clear attitude was that it should stop; he said the investigation was Mr Njenje's agenda to safeguard his own interests against the Guptas. The witness could not say how long the meeting lasted, possibly three hours. In all that period the witness was not given the opportunity to explain to the Minister as to what gave rise to the investigation; the discussion went back and forth about Mr Njenje's alleged conflict of interest and the Minister's contention that it was an investigation about former President Zuma. When they could not agree with him, they told him that they wanted to take the matter to the former President.

397. *Ambassador Cwele* denied stopping the investigations against the Guptas. We now know that he said he called the meeting because he was concerned that there was some surveillance of the Guptas without a judge's permit; and also Mr Njenje's conflict of interest in investigating them, not because he was opposed to the investigation of the Guptas. It was pointed out to Ambassador Cwele that his evidence before the Commission that he was not opposed to the investigation, contradicted his affidavit in which he said that the absence of a judge's directive made Mr Njenje's conflict of interests even more untenable. It was also pointed out by the evidence leader to him that there was another divergence between his evidence and what stood in his affidavit. In his evidence he said the issue he raised and was concerned about, was the electronic "interception" (without a judge's directive); however, in his affidavit, he said what he raised with the top three and was concerned about was the "surveillance". Ambassador Cwele's response was that there was no difference between the two, yet, as it was pointed out to him, surveillance did not necessarily take the form of electronic interception and therefore that if it did not take that form, it did not require a judge's permission. The difference was significant in that Ambassador Cwele's objection against the investigation would have been unfounded because whereas indeed "electronic interception" required a judge's permission, the top three denied conducting it; in other words, they told him that they were conducting the kind of surveillance which did not require a judge's approval since their surveillance was not in the form of "electronic interception" (which required a judge's directive). The premise of Ambassador Cwele's objection was therefore misconceived.

398. His self-contradictions aside, there is in any case overwhelming evidence that he told the trio to stop the investigation against the Guptas. For one thing, his version does not explain why the three witnesses would have wanted to take the matter up with the former President, which they in fact did. Furthermore, it appeared that he never asked for a report on the investigations. The Commission has already dealt with the significance of the stopping of investigations against the Guptas, and the consequences thereof to the country.

Stopping criminal investigations against Mr Arthur Fraser

399. There is also the matter of the former Minister having stopped criminal investigations by the Hawks and the National Prosecuting Authority against Mr Arthur Fraser and possibly others. These were investigations into the Principal Agency Network (PAN). By 2011 significant progress had been made with the investigation by Mr Njenje's team. On this aspect the evidence came mainly from Mr Njenje. Him and his team handed over their report to the Directorate for Priority Crime Investigation (the Hawks) and to the NPA and everybody was ready for the prosecution. The investigations involved mainly Mr Arthur Fraser. The crimes investigated were fraud and corruption; properties had been bought with ulterior motives which ended up with private individuals; people were employed without security clearance; 300 cars and computers were bought and not used. The PAN project was supposed to be an extension of the official intelligence structures, the domestic branch of the NIA. The cars were parked in warehouses all over Gauteng; had been bought by funds earmarked for other operations, thereby putting those operations at a disadvantage. The number of houses bought was substantial, all-over Gauteng; they were registered in the names of some private people including

children. In all, an amount of about R600 million was spent in that way. Mr Njenje held a meeting with the above law enforcement agencies, following which they were all ready to prosecute. However, he got a call from Mr Cwele for a meeting at OR International Airport. When they met, Mr Cwele said the prosecution of Mr Fraser should stop. Despite Mr Njenje's protest that a lot of time and money had been spent in investigations, the Minister insisted and said it was President Zuma's decision; Mr Cwele said the President said the prosecution would compromise national security, despite Mr Njenje's protest to the contrary, and that what was in issue was pure crime. The Minister knew that Mr Njenje had handed over the file to the NPA as he was being briefed at all steps, and he was the one who had asked for the investigation; Mr Njenje therefore believed the Minister that it was the President's decision.

400. Ambassador Cwele denied stopping the investigations; he said he did not that the matter had been taken away from the law enforcement agencies; even though he had interest in the matter so much so that he referred it to the Inspector General of Intelligence; indeed, he had initially shown interest in the investigations continuing, after the meeting referred to above he did not make any follow-up; he made no inquiries when he did not get any update. In all probability, that was because he was aware that the investigations had been stopped.

401. Regarding the stopping of criminal investigations and possible prosecution of Mr Fraser for his activities in relation to the PAN project, it is possible, without prejudging the outcome, that he might not have been appointed DG of the SSA, which appointment was made about three years after the criminal process was stopped; therein might lie the significance of the stopping of the investigations against him.

Defending the passing of the 11 September 2009 Proclamation

402. As indicated earlier, the effect of the Proclamation was to collapse the erstwhile National Intelligence Agency and the South African Secret Service into one intelligence structure, namely, the State Security Agency (SSA). It was the evidence of amongst others Mr Shaik that by doing so, the proclamation departed from the intention of the country's new dispensation not to concentrate power in one organization; that, in his view, took the country back to the period under the apartheid regime when there was excessive concentration of power in one organization (the National Intelligence Service that housed both the domestic and foreign operations); whereas under the new dispensation the country wanted separate by coordinated services; the proclamation was therefore contrary to the Intelligence White Paper, which had informed the intelligence laws in 1994. Importantly, it was pointed out to Ambassador Cwele that the Proclamation was not a competent legislation to bring about the above amalgamation; that it had to be through an Act of Parliament; which was why the General Intelligence Laws Amendment Act 11 of 2013 was passed in an attempt to remedy the situation. All these notwithstanding, Ambassador Cwele, in his response, contended that the passing of the Proclamation was competent. It was an unsustainable argument, begging the question why the Ambassador sought to maintain it.

403. *Minister Mahlobo* followed Ambassador Cwele as the Minister of State Security. There are two main issues about Ambassador Mahlobo: his involvement in operational issues, and his receipt and handling of large sums of cash. There is also the matter of his attitude towards the Intelligence White Paper.

404. Minister Mahlobo involved himself massively in the operations of the SSA, running a number of projects, such as Project Wave (to influence the media), Project Justice (alleged attempt to influence some judges), Project Tin Roof (which involved one of the wives of the former President), etc. Two documents may be referred to as examples indicative of his involvement in operations beyond doubt (there are others). Firstly, there was a letter indicating to be from him (which he said was not the case), asking for an amount of R130m for a project. A letter dated 4 November 2015 addressed to the Minister for State Security Agency, "Minister Mahlobo", which was filed of record as an exhibit, was canvassed with him. This was to contest his statement that he was never involved in operations. In that letter, he approved a request for budget reprioritisation and the utilisation of certain funds,

including the amount of R20m for “Projects approved by the Minister”. The total amount approved, including the other items, was R130m. In his response, Mr Mahlobo denied that there were any Minister’s projects; he said the term “Minister’s projects” was used incorrectly; the document, he said, was therefore fundamentally wrong; the Minister did not approve projects. But the letter spoke for itself in so many words, despite his protestations. But he admitted that he signed in approval of the movements of the funds indicated in the requesting letter and said, importantly, that without his approval, nobody would touch the money. Secondly, there was a letter, which was canvassed with him, filed of record dated 31 May 2016. The letter was a “Request for authorization: Renewal of Cover Project Mayibuye and payment of expenditure related to Project Mayibuye from 01 April 2016 – 31 March 2017”. He was still the Minster at the time as he only left in October 2017. The document says that the recommendation was made by the appropriate person on 31 May 2016 “As per instructions issued by Minister on 06/05/2016”. The Ambassador’s response was that he did not give any such instructions and anybody saying he did so would have to produce written prove as such an approval would have financial implications, in terms of the PFMA. There were other documents of a like nature which spoke for themselves, referring to the “Minister’s Project”, in particular relating to Project Mayibuye. 160. Ambassador Mahlobo’s response regarding the above documentation relating to the approval of all the projects therein mentioned was, when he was asked whether he had read it, that he had. But he argued that the purpose of the approval did not amount to the approval of the projects as therein described, this despite the fact that the nature and purpose of each project was clearly stated at the top of every page and that his signature of approval was in respect of each one of the projects, as the evidence leader pointed out to him. The Ambassador was shown a letter, filed of record, dated 28 November 2016. It was written by Dorothy (pseudo name) as Acting General Manager Special Operations, requesting authorisation for funds for the Project Mayibuye in the sum of R4,510,000.00. He said he had no comment on the letter. Ambassador Mahlobo’s involvement in the operational projects of the SSA is therefore beyond doubt.

405. Still on the issue of his involvement in operational issues, the contents of the affidavit by "Darryl" (pseudonym), attested to on 23 November 2020 and filed of record, were put to Mr Mahlobo for his response. There was a section in the affidavit headed “Minister Mahlobo’s involvement in operational activities”. Darryl says that one of the challenges he had as the General Manager of the CDSO was Mr Mahlobo involving himself directly in CDSO operations and his personal interest therein. Darryl said Mr Mahlobo used to boast about having his own sources; he would also report directly to the President. Darryl says he raised his concerns on more the one occasion and warned Mr Mahlobo against taking unverified information to the President. Mr Mahlobo’s response to Darryl’s affidavit was that he denied the allegations.

406. In terms of Minister Mahlobo’s involvement in the handling of large sums of cash, evidence was led relating to instances when large sums of cash were withdrawn and delivered to Mr Mahlobo.

407. The contents of an affidavit by "Dorothy", filed off record, was placed before Mr Mahlobo, in which Dorothy said that she confirmed that she had on three occasions withdrawn R4.5m on the instructions of one "Darryl" (pseudonym) to hand the money to him (Mr Mahlobo). He could not deny that the money was withdrawn as stated but denied receiving it. The evidence leader then drew Mr Mahlobo’s attention to yet another affidavit by Dorothy in response to an allegation by one Mr Mhlanga. This affidavit was also filed of record. The following part of the affidavit was read to Mr Mahlobo: “I have never told Mr Mhlanga that I have given the alleged cash withdrawals to Mr Mahlobo” - the point apparently being that she did not share what she knew with Mhlanga and not that what she alleged about Mr Mahlobo receiving money was not true. However, she went on to say that, in the absence of schedules of the cash withdrawals, she could recall only three such occasions; she made those “temporary” withdrawals in her name; went to the cashier with Lilly; money counted by cashier in front of Lilly as well who brought the bag for the money to be packed by both of them; the money would then be taken to the official residence of Mr Mahlobo in Waterkloof; twice she did so alone and twice with Lilly; she took over the task of delivering the money from Darryl, who had instructed her to use her own name; neither Darryl nor the Minister ever told her of the purpose of the money; Mr Mahlobo would usher her in the house, count the money to make sure it was R4.5m after which she would leave the money in the bag. Mr Mahlobo’s response to all these was that, to the extent that his name

was mentioned, he denied the allegations. Mr Mahlobo and his counsel objected to the use of this affidavit on the ground that it was just received that morning. I ruled in their favour and Mr Mahlobo said he was not going to deal with it.

408. Under the heading “Cash delivered to Minister Mahlobo”, witness "Darryl" says Ambassador Mahlobo would request money from the CDSO for his own project, something which did not sit well with him as he did not think that a Minister should be handling cash from CDSO. He says on one occasion he was required to deliver cash to Mr Mahlobo. He said that he noticed that SSA members, such as Frank (pseudonym), were withdrawing large amounts of money on a monthly basis. On one occasion he asked Frank what the money he had withdrawn was for and Frank counted the money into different bundles, allocating them to some projects until there was a surplus, which Darryl put in a safe in his office. Darryl assumed that Frank must have told Ambassador Mahlobo about the surplus because he later got a call from Mr Mahlobo requesting money for the ANC Women’s League. Darryl says that he handed over the money, on Mr Mahlobo’s instructions, to his Chief of Staff, one "Jay" (pseudonym), at OR Tambo Airport. Jay was in the company of someone else, one Vukhani; he did not make them sign any acknowledgement for the receipt of the funds because the delivery of the cash was on the Minister’s instructions. In his response to what Darryl said, Mr Mahlobo denied being involved in operations, or that Darryl delivered cash to him; he also denied requesting money for the ANC Women’s League.

409. Witness "Stevens’s" affidavit, attested to on 18 November 2020, was filed off record. Certain paragraphs, under the heading “Further information regarding the payment of Judges by Minister Mahlobo from SSA covert funds”, were put to Mr Mahlobo for his response. Stevens said that records showed that one Dr Langa (then Director of the Domestic Branch of the SSA) authorised the withdrawal of R12m cash from the Special Operations budget; Dr Langa himself also told him so. Dr Langa said the money, packed into paper bags, was received by SSA Special Operations Frank for delivery to Minister Mahlobo for payments to Judges to influence the Judiciary. Frank was the Project Manager of Project Justice with the CDSO under Mr Dlomo. In turn, Frank informed Stevens that he delivered the R12m to Minister Mahlobo who, in Frank’s presence, removed R4m cash saying was payment to judges who were his operatives. The rest of the money was for other Special Operations ran by Mr Mahlobo. Mr Mahlobo’s response to this evidence was that the allegations were false, and put the Judiciary into disrepute; he said the person who came up with those allegations was the same person who made false allegations against a certain politician and the head of a Chapter 9 institution and was continuing to do so before the Commission; Mr Mahlobo denied that there was any money delivered to him; he disputed all the above evidence. Stevens also said that he was aware of the pressure that Minister Mahlobo had successfully put on Ambassador Kudjoe and the Chief Financial officer, Matthew (pseudonym) for money routinely, without regard to SSA financial prescripts. Stevens said that Minister Mahlobo used to receive large sums of money for the special operations he ran.

410. It is clear from the above evidence that Minister Mahlobo received large sums of cash on some occasions. These monies cry out to be accounted for, and if they were legitimately expended, let it be so established.

411. Regarding the Intelligence White Paper, Minister Mahlobo tended not to give as much weight to the White Paper as other witnesses did, such as Mr Shaik and Ambassador Maqetuka; yet there is ample indication that it greatly informed the structure and organisation of the country’s intelligence in 1994.

412. Arising out of his heading and running of the Principal Agency Network (PAN), Mr Arther Fraser became the subject of internal investigation. A report that followed implicated him. The report was handed over to the SIU and the National Prosecuting Authority. As the Commission has as already mentioned, his prosecution was stopped by former President Zuma on the ground that it would compromise the security of the State. The extent of his alleged involvement has already been set out above when dealing with Ambassador Cwele. More evidence may be added as examples of his questionable activities.

413. Ambassador Maqetuka’s evidence was that there were several problems with the manner in which the PAN project was carried out by Mr Fraser. It was not linked to the headquarters, in that reports

did not go to the headquarters; data base or engine room was housed in Mr Arthur Fraser's house yet for security and other reasons reports should go to the headquarters; violating that would be a serious violation of security protocol. These procedures were not followed; the nerve centre that received the information was located in Mr Arthur Fraser's house, to the detriment of the security of the information and of the informants who were important assets as sources; it would also amount to undermining their trust in the system and that could be treasonable in other countries. The witness summed up the problems into three main categories. Firstly, the centralisation of power in Mr Arthur Fraser regarding the project (PAN): he acted as though he was the Director-General of the SSA. Secondly, lack of accountability: there was no control by the Director-General; it became a "free-for-all" and Mr Fraser was a law unto himself. The third problem was the ability to draw large amounts of cash, while there was no accountability for it. 170. There were also serious allegations against Mr Fraser relating to PAN about the irregular acquisition of properties, vehicles and the employment of people who were either members or non-members but part of the PAN programme; these allegations could be summed up as being about the abuse of funds. Mr Njenje was firm in his evidence that the prosecution of Mr Fraser would not have compromised any national security as the President said. Mr Njenje was an expert in issues of national security; he and his team were the ones who advised the President on security and, had there been any threat to national security, they would have picked it up. The issues raised by the investigation were pure crime. It was also his evidence that about three years later, former President Zuma appointed Mr Fraser as head of State Security Agency. This was despite serious allegations against him while running the PAN as Deputy Director General Operations, for which he was suspended and later resigned. His appointment as Director-General of the SSA by former President Zuma was to be followed by allegations of abuse of power made against him, examples of which have already been set out above; one or two more may be restated to refresh the mind. There was evidence by Dr Dintwe, the IGI, of a letter by Mr Fraser telling him that his clearance certificate had been withdrawn. This was simply because Dr Dintwe had dared to launch an investigation against him. There was also his involvement in the withdrawals and handling of cash, the involvement of the SSA in political matters and the abuse of the vetting system.

414. Mr Arthur Fraser chose not to present his version to the Commission, despite the fact that the opportunity was offered to him by the Commission.

415. "Ms K" confirmed that rather than fulfilling its function to protect the Agency from internal threats, the Chief Directorate Internal Security (CDIS was weakened during "Johan's" tenure; its vetting integrity was eroded; its members became complicit in facilitating the abuse of the SSA resources, which included enabling CDSO members' illegal access to firearms, the transport of cash for CDSO operations and involvement in a parallel vetting structure. CDIS members were implicated in the robbery of R17m from a safe inside the SSA complex at Musanda in December 2015. This was confirmed by Johan and that the people were within his unit, and they were still there at the time of the evidence. Johan also facilitated the irregular removal of firearms from the SSA Armoury, such as on the occasion already mentioned at the instance of Ambassador Thulani Dlomo. This is confirmed in his own affidavit too.

416. Though civilians, *members of the Gupta family* featured strongly as well; it would be no exaggeration to say that they were central to state capture, if not actual perpetrators. This is particularly so if evidence in other streams of state capture is taken into consideration, such as the evidence relating to their involvement with State Owned Enterprises. They cannot escape mentioning because their relationship with former President Zuma was a catalyst in the irretrievable breakdown of the relationships between the three top intelligence officers, on the one hand, and both Ambassador Cwele as the then Minister, and former President Zuma, on the other hand. The Guptas exploited their close relationship with former President Zuma, which enabled them to wield a lot of power, as demonstrated in one instance attested to Mr Njenje. While attending a Cabinet Lekgotla in 2011, Mr Njenje was asked by one Adv Nongxina, then Director General of the Department of Mining, to accompany him and his Minister, Minister Ms Susan Shabangu, to a meeting the latter was to have with Ajay Gupta; according to the DG, Mr Njenje was to protect them as Mr Gupta was exerting pressure on the Minister.

417. Mr Njenje agreed after approval by the Minister and was told the meeting was going to be at the

Sheraton Hotel; however, the Minister was later told by the former President that he knew about the meeting and that it was going to be at Mahlamba Ndlopfu (President's official residence) where, he told the Minister, Mr Ajay Gupta was waiting. When they arrived there, Mr Gupta ushered them into the President's study. The meeting was not a good one, said Mr Njenje. Mr Gupta was pressing Minister Shabangu to fast track their application for some mineral rights, in an overbearing manner. Mr Njenje intervened, reminding him that he was speaking to a Minister whereupon Mr Gupta apologized but kept on nagging. The Minister and Adv Nongxima told him that certain procedures had to be followed first and they would come back to him; he said he did not understand why things he wanted took so long; he wanted them to be done immediately. The meeting did not take long; the four of them were the only people in the meeting. The fact that the meeting was held at the President's official residence, and in his absence was, in Mr Njenje's view, for the Guptas to show how powerful they were; to show a Government Minister that she could be called to the President's study in his absence.

418. One of the witnesses, Mr Shaik, said that the country paid the price for the stopping of the investigations against the Guptas. It is probable that had investigations against them been allowed to continue, they possibly could have been deterred from engaging in some activities that amounted to state capture. They chose not to appear before the Commission to contest what was said about them.

Recommendations

419. It is recommended that the law enforcement agencies conduct such further investigations to establish whether any of the persons implicated in the wrong in this report did not commit one or other crime. In particular it is recommended that law enforcement agencies conduct further investigations with a view to the NPA possibly bringing criminal charges against such people including Mr Arthur Fraser in relation to the PAN programme and any other matter revealed by the evidence before the Commission and Mr David Mahlobo and Mr Thulani Dlomo in regard to State Security Agency cash received and / or illegitimately handled by each one of them.

CRIME INTELLIGENCE

Recommendations: *Quis custodiet ipsos custodes?*

420. While the evidence of Col Naidoo includes claims that two Ministers of Police, one former and one present, were implicated in corrupt conduct committed by Gen Lazarus, those allegations do not appear to be corroborated by any evidence produced to the Commission. This does not mean either that there is no such evidence or that there is. Whether those allegations, and the other allegations made by Col Naidoo, justify further action against any individual depend on the evidence uncovered by those investigating the allegations in accordance with law.

421. There is evidence that Gen Mdluli appealed to President Zuma to help him in his efforts to escape from the consequences of his crimes in return for the assistance of Gen Mdluli in getting President Zuma elected. There is no evidence, however, that President Zuma responded in any way to Gen Mdluli's overture.

422. The conduct of Adv Mrwebi and Adv Jiba in relation to the withdrawal of the charges preferred against Gen Mdluli gives rise to a suspicion that there was something more sinister behind the decision to withdraw than mere professional incompetence and ineptitude. However, the evidence before the Commission does not appear to go far enough to convert the suspicion into a conclusion adverse to these two officers on a balance of probabilities.

423. There is no evidence that either Gen Lazarus or Gen Mdluli conducted their criminal depredations of the secret funds entrusted to their custody for any purpose beyond their own personal enrichment and that of their friends and family and to provide largesse to certain of those who they feared might be in a position to uncover their wrongdoing; in other words to implicate such persons in their schemes as insurance against exposure.

424. This is to place in context the crimes exposed by the evidence before the Commission; not to mitigate or minimise the extent of crimes proved to have been committed and likely to have been committed. Those identified were placed in positions of the highest trust in an institution critical to the functioning and the protection of society. They abused that trust over long periods of time for personal gain. In the process they corrupted their subordinates who should have been able to look up to them for example and guidance.

425. This topic concerns alleged and in some instances established criminal conduct by high ranking officers in SAPS. Historically and structurally, the main obstacles to the law's taking its proper course in such cases have been that the tendency of SAPS to close ranks and obstruct the investigations into the conduct of their own and, particularly, to abuse the system of classification of documents described above.

426. It is clear too that where secret state funds fall under the control of scoundrels, as the present case makes clear, only strong oversight institutions can protect the public against the harm that such scoundrels can inflict by invoking, when their conduct is called into question, the very secrecy that should exist only for the public good.

427. *Quis custodiet ipsos custodes?* Who will guard the guardians themselves? This question, attributed to the 1st and 2nd century AD Roman poet Juvenal, is generally considered the embodiment of the philosophical question of how those in power can be held to account. The problem is as old as the institutions themselves, created to protect against wrongdoing but by their nature as such equipped to evade detection and retribution when they go rogue.

428. Since the allegations which Col Roelofse and his team set out with such commendable determination to investigate and place before the prosecuting authorities for further action consistent with law will have seen the light of day both in evidence before the Commission and in this report, no action is needed other than to ensure that the law takes its course.

429. It is recommended that the Inspector General of Intelligence and the Auditor-General be given such access to relevant SSA records and to the secret accounts referred to in this Report as may be lawful but still that would enable them to their work efficiently including such investigation including as the Inspector-General of Intelligence and the Auditor-General may each consider necessary.

    429.1 It is recommended that all and any investigations into corrupt conduct (in the wide sense) within Crime Intelligence continue without any obstruction and receive the appropriate support from all units within SAPS; and

    429.2 That those members of SAPS who have been tasked with investigating corrupt conduct within CI be given access by SAPS to all documents which may be relevant to establish whether any person may have committed any offence including corruption while at the same time ensuring that any legitimate state interest in preventing the wider dissemination of such documents is protected.

SABC

Conclusions and recommendations

430. The question to be answered is whether former President Zuma by involving himself in the formation and business activities of ANN7 acted unethically or contravened the Code of Ethics.

431. The Executive Ethics Code was published in terms of Government Gazette Notice No. 21399, Notice No. 41, Regulation 6853. The Executive Code was published in terms of section 2(1) of the Executive Members Ethics Act, 1998 (Act No. 82 of 1998). The Executive Ethics Code was published by the then Acting President JG Zuma. Members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils are obliged to comply with the Executive Members Code in performing their official responsibilities. Clause 2.3 of the Executive Ethics Code provides:

Members of the Executive may not –

(a) . . .

(b) . . .

(c) . . .

(d) Use their position or any information entrusted to them to enrich themselves or improperly benefit any other person

(e) . . .

(f) Expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.

Conflict of interest

A member should declare any personal or private financial or business interest that the member may have in a matter –

(a) That is before the cabinet or an Executive Council

(b) That is before a cabinet committee or Executive Council on which the member serves; or

(c) In relation to which the member is required to take a decision as a member of the Executive.

3.5 For the purposes of the paragraphs 3.1, 3.2, 3.3 and 3.4 the personal or private financial or business interests of a member includes any financial or business interests which to the member's knowledge, the member's spouse, permanent companion or family member has.

5. Disclosure of financial interests

5.1 Every member should disclose to the secretary particulars of all the financial interests, as set out in paragraph 6 of (a) the member; and (b) the member's spouse, permanent companion or dependent children, to the extent that the member is aware of those interests."

432. The Executive Members Ethics Act No. 82 of 1998 was intended to provide for a Code of Ethics governing the conduct of members of Cabinet, Deputy Ministers and members of Provincial Executive Councils and to provide for matters connected therewith. Its definition in section 1 provides that "Cabinet member" includes the President. The Code of Ethics that has been referred to above emanates from the provisions of section 2 of this Act as aforementioned. The Act provides –

The Code of Ethics should include provisions prohibiting cabinet members, Deputy Ministers and MECs from –

(a) (i) ...

(ii) Acting in a way that is inconsistent with their office

(iii) Exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests

(iv) Using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person; and

(v) Acting in way that may compromise the credibility or integrity of their office or of the government.

433. Section 2(c)(ii) provides –

The Code of Ethics should –

(a). . .

(b)...

(c) Require cabinet members and Deputy Ministers to disclose to an official in the office of the President designated for this purpose and MECs to disclose to an official in the office the Premier concerned designated for this purpose –

(i) All their financial interests when assuming office; and

(ii) Any financial interests acquired after their assumption of office, including any gifts, sponsored foreign travel, pensions, hospitality and other benefits of a material nature received by them or by such persons having a family or other relationship with them as may be determined in the Code of Ethics.

434. Section 3 of the Act provides that the Public Protector should investigate any alleged breach of the Code of Ethics on receipt of a complaint contemplated in section 4.

435. In this regard Term of Reference, 1.4 reads:

> Whether the President or any member of the present or previous members of his National Executive including Deputy Ministers of public official or employee of any State-owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family individual or corporate entity doing business with government or any organ of state.

436. The Public Protector in her report dated 14 October 2016 and in her executive summary stated at page 4(i) of the report:

> (i) “State of Capture” is my report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 3(1) of the Executive Members Ethics Act and section 8(1) of the Public Protector Act, 1994.

437. In her report at page 4(vi) she stated that:

> The investigation emanates from complaints lodged against the President by Father S Mayebe on behalf of the Dominican Order, a group of Catholic Priests, on 18 March 2016, (The First Complainant); Mr Mmusi Maimane the leader of the Democratic Alliance and Leader of the Opposition in Parliament on 18 March 2016, (The Second Complainant), in terms of section 4 of the Executive Members’ Ethics Act, 82 of 1998 (“EMEA”); and a member of the public on 22 April 2016, (The Third Complainant), whose name I have withheld.

438. At page 6 she stated the following:

> 6 (vii) In his complaint Mr Maimane stated amongst other things that – "section 2.3 of the Code of Ethics states that members of the Executive may not –
>
> (a) Wilfully mislead the legislator to which they are accountable;
>
> (b)...
>
> (c) Act in a way that is inconsistent with their position
>
> (d) Use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.”
>
> (b) It is our contention that President Jacob Zuma may have breached the Executive Ethics Code by – (i) Exposing himself to any situation involving the risk of a conflict between their official responsibilities and their “private interests (ii) Acted in a way that is inconsistent with his position; and (iii) Used their position or any information entrusted to them to enrich themselves or improperly benefit any other person.

439. At page 9 she stated:

439.1 The complaint relates to allegations of improper conduct in state affairs and unethical conduct by the President of the Republic and other state functionaries and accordingly falls within my ambit as the Public Protector. None of the parties challenge the jurisdiction of the Public Protector.

440. Section 96(1) of the Constitution provides:

> (a) Members of the cabinet and deputy ministers should act in accordance with a Code of Ethics prescribed by National Legislation
>
> (b) Members of the cabinet and deputy ministers may not act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibility and private interests; or
>
> (c) Use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.

441. There can be no doubt that in acting as he did, in relation to the TNA and the ANN7 TV station, President Zuma acted in breach of the Executive Ethics Code. He, as President, abused his office for his own benefit, that of his son and that of his friends, the Guptas. He placed himself in a situation of a conflict of interest and abused his position as President of the country.

442. Mr Sundaram is, according to the evidence, the only witness that placed the former President in the same room with the members of the Gupta family and the managers of their entities who were attending to the formation of the ANN7.

443. The evidence of Mr Sundaram is reliable and credible. It has not been challenged by any of the implicated persons in a manner that would create doubt in its veracity. It has been confirmed by some of the implicated persons, including the former President, in many respects.

444. The members of the Gupta family had used their close relationship with President Zuma to facilitate and extend their business interests from India to South Africa. The extension of Infinity Media and the birth of the ANN7 demonstrate the broadening of such interests.

445. President Zuma had enabled the extension of such business interests for the benefit of his son, Mr Duduzane Zuma.

446. The Gupta family and in turn the President's son, Mr Duduzane Zuma, benefitted from the relationship that the Gupta family had with the President Zuma in that they entered into contracts with various State organs and, in particular the SABC, to the detriment of other potential competitors who operated within the same media space.

447. The Gupta family abused their relationship with President Zuma in that they used one of their employees, Mr Ashu Chawla, to access the Presidential residence as he pleased to liaise directly with the President and arrange and secure meetings for the members of the Gupta Family contrary to the applicable security measures within the Presidency or State protocol.

448. President Zuma enabled the members of the Gupta family as business people to occupy a place of prominence over other businessmen, to the detriment of the empowerment legislative imperatives of the Republic of South Africa.

449. President Zuma enabled, indirectly, the members of the Gupta family to abuse their relationship to the extent of flouting visa and labour laws of the country. It is not denied that through Mr Ashu Chawla visas for the Indian nationals were facilitated in a way that was contrary to law. For instance, Mr Sundaram admitted that his visa was not processed according to law.

450. The allegations made by Mr Sundaram that some of the Indian nationals were employed by the ANN7 without permits were not far-fetched because, after investigations which were conducted by the Department of Home Affairs, it was found that four employees of ANN7 who were Indian nationals had violated the conditions of their permits and were accordingly ordered to leave the country. It is not deemed necessary for the Commission to recommend any steps to be taken in this regard since such persons were ordered to leave the country way back in 2013.

451. In the light of the admitted evidence by President Zuma as stated above, President Zuma acted in breach of the provisions of section 96(1)(a); (b) and (c) of the Constitution.

452. A finding that President Zuma acted in breach of the provisions of section 2 (ii); (iii); (iv); (v); section 3.1 and 3.5 of the Executive Members Ethics Act 82 of 1998, should be made as it is consistent with President Zuma's own evidence and that of Mr Sundaram.

453. By involving himself in the conception and formation of the ANN7, President Zuma breached clauses 2.2 (d) and (f) of the Executive Ethics Code.

454. The costs incurred by the SABC for the TNA broadcasts, coupled with the provision of the relevant services to TNA by the SABC, in the amount of approximately R4 268 887.00 excluding VAT, between 01 April 2011 and 31 March 2017, should be recovered from any of the assets belonging to TNA or any assets held by the members of the Gupta Family.

455. In this regard President Zuma breached his obligations as the President of the country and those that are entrusted in him in terms of the Members Ethics Act.

456. Lastly, the evidence led and dealt with herein above justifies a finding that the investigations of the Commission have, on the established facts, proved and answered Clause 4.1 of the Terms of Reference, positively, that:

> 1.4 Whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state.

457. Many of the events described in this section of the Report occurred even before 2010 and much has changed, though the SABC is still in a dire financial situation. Many of the main actors have left the stage and obviously steps against them by internal processes can no longer be taken.

458. The Guptas have left South Africa and it is not known when extradition proceedings will ensure their return to face criminal proceedings.

459. *The New Age* newspaper has closed down and MultiChoice did not renew its contract with the ANN7 television channel.

460. There was evidence that the remedial actions proposed by the Public Protector in her report of February 2014 had not all been followed up.

461. At the very least the appropriate investigating and prosecuting authorities should attempt to recover all monies spent through unlawful and improper actions, if that can still be done. For instance, the ± R11 million "success fee" should be recovered from Mr Motsoeneng.

462. It is clear from the evidence relating to the New Age newspaper and the creation of the ANN7 television channel that the Gupta family and their associates had a close relationship with President Zuma and that he showed a particular interest in their ventures. Mr Motsoeneng, having regard to his own utterances as described by witnesses, and in some instances recorded, saw himself (and probably was) the facilitator between President Zuma and at the very least the news section of the SABC. Whether this was for President Zuma's personal benefit is impossible to say, but there is clear evidence that it benefited the ANC, and his son Mr Duduzane Zuma.

463. It is further recommended that the SABC should consider instituting civil proceedings against TNA Media or any of its Directors and recover all the costs incurred by the SABC including disgorgement of profits made by TNA Media in relation to the breakfast shows. Former President Zuma had a 30% share in Infinity Media, a Gupta family company.

464. A number of witnesses gave credible evidence of editorial interference with reference to specific events that were not allowed either to be broadcast or to be commented upon. Former Minister

Muthambi handed the reign over SABC editorials to Mr Motsoeneng, as it was put, and allowed him to act above the law.

465. One must wholly agree with the view expressed by Mr Makhathini, the Chairperson since 2017, that "depoliticizing is of paramount importance in the renewal, rehabilitation and strengthening of governance systems. Appointing competent and credible executives with the prerequisite skills and experience is at the heart of the renewal process."

466. A statutory offence with severe penalties should be created dealing with the abuse of power by public officials in all spheres of government and organs of state. Abuse of power has become endemic in South Africa. It is a recurrent theme almost everywhere, as it was at the SABC, be it by Ministers, members of the Board or Executives.

467. It is recommended that the law enforcement agencies conduct further investigations with a view to a possible criminal prosecution of Ms Lulama Mokhobo, former Group Chief Executive Officer of SABC, and Mr Hlaudi Motsoeneng for possible contravention of section 38(1)(b) and (c) of the Public Finance Management Act, in the case of Ms Mokhobo, and of section 45(b) and (c) of the PFMA, in the case of Mr Hlaudi Motsoeneng, in respect of their respective roles in the conclusion of the agreement between the SABC and TNA Media (Pty) Ltd in respect of the so-called TNA Breakfast Briefings.

WATERKLOOF

No recommendations.

PRASA

468. Insofar as the awards of the Swifambo and Siyangena tenders is concerned, it bears reiterating that according to the National Head of the DPCI, Lt General Lebeya, the investigations into the criminal complaints relating to those two matters is quite advanced. In the circumstances, as regards these matters, the following recommendations are made.

469. First, as regards the Swifambo matter, it is recommended that the President takes steps to ensure, through the relevant members of the Executive that the following happens:

    469.1 All DPCI investigations relating to possible criminal conduct at PRASA are finalised as soon as possible

    469.2 The NDPP immediately appoints a team to oversee the investigations and the prosecutions of those suspected of committing criminal offences in respect of wrongdoing at PRASA; and

    469.3 In deciding whom to prosecute, the DPCI and the NDPP, in addition to the documents that they have already collated or are in the process of collating, have due regard to the evidence led at Commission, the documents that served before the Commission, the documents that formed part of the record in the review application, and the documents that Mr Ramatlakane's current Board has uncovered recently.

470. Based on the foregoing, it is further recommended that:

    470.1 Serious consideration be given to prosecuting the following senior employees who played a role in the award of the locomotives contract to Swifambo: Mr Montana; Mr Mthimkulu; and Mr Chris Mbatha

    470.2 The roles of the following persons, who were members of the BEC that made the recommendation that the locomotives tender be awarded to Swifambo, be examined to determine whether they, or any of them, should be prosecuted: Ms Shezi; Mr Khumalo; Mr Mahlobogwane; Mr Nkosi; and Mr Magoro

470.3 The roles of the following persons, who were members of the CTPC, be investigated to determine whether they, or any of them, should be prosecuted: Mr Holele; Mr Mbatha; Mr Mathobela; Ms Motshologane; Mr Bopape; Ms Ngoye; Ms Shezi; and Mr Khuzwayo

470.4 The prosecutions of Mr Mashaba and Mr Mabunda be speeded up

470.5 The roles of others who may have received undue benefits from the award of the locomotives contract to Swifambo, as detailed in the Reports of Mr Sacks and the liquidators, be examined to determine whether or not they should be prosecuted; and

470.6 The NDPP consider instituting a prosecution, in terms of section 86(2) of the PFMA, against the following members of the PRASA Board which approved the recommendation that the locomotives contract be awarded to Swifambo: Mr Buthelezi; Dr Gasa; Mr Khena; Ms Moore; Mr Nkoenyane; Mr Salanje; and Mr Montana.

471. Second, as regards the Siyangena matter, it is recommended that the President take steps to ensure, through the relevant members of the Executive, that the following happens:

471.1 All DPCI investigations relating to possible criminal conduct at PRASA are finalised as soon as possible

471.2 The NDPP immediately appoints a team to oversee the investigations and the prosecutions of those suspected of committing criminal offences in respect of wrongdoing at PRASA; and

471.3 In deciding whom to prosecute, the DPCI and the NDPP, in addition to the documents that they have already collated or are in the process of collating, have due regard to the evidence led at Commission, the documents that served before the Commission, the documents that formed part of the record in the review application, and any further documents that the current PRASA Board may have uncovered recently.

472. Based on the foregoing, it is further recommended that serious consideration be given to prosecuting the following PRASA employees who played a role in the conclusion of the two impugned contracts: Mr Montana; Mr Gantsho; and Ms Ngubane.

473. It is further recommended that the NDPP considers instituting a prosecution, in terms of section 86(2) of the PFMA, against the PRASA Board or any of its members who approved the award of the contracts with Siyangena.

474. Third, as regards Mr Montana's property dealings, it is recommended that it is recommended that the President takes steps to ensure, through the relevant members of the Executive that the following happens:

474.1 The DPCI finalises as soon as possible its investigations into the sale by Mr Montana of the Parkwood Property to Mr Van der Walt's Precise Trade and the assistance that Precise Trade or Mr Van der Walt gave to Mr Montana to pay the deposit for the Hurlingham Property and any of the other properties he acquired or sought to acquire and the assistance that Mr Van der Walt gave to Mr Gantsho to acquire the property in the Point area in Durban; and

474.2 The NDPP immediately appoints a team to oversee the investigation into and the prosecution of Mr Montana, Mr Van der Walt and Siyangena (and/or its associated companies) for possible contraventions of sections 12 and/or 13 of the Prevention and Combating of Corrupt Activities Act.

475. In conclusion, it should be noted that many, many days of the Commission's hearings have been devoted to allegations of the capture of PRASA and strident denials thereof, especially by Mr Montana. However, this leaves one with the uneasy perception that there is much about the ills at PRASA that has not yet been uncovered. That perception is reinforced by what has been set out in the previous sections relating to the instability at PRASA, which was exacerbated by the unacceptable delays in having no permanent Board or a permanent Group CEO appointed for more than three years and five years, respectively, and also what appears of late to be a harking back to the Montana-style of leadership. If a general recommendation is not made about these matters, it is unlikely that PRASA

will recover. A special commission of inquiry should therefore be appointed to examine specifically the following matters: why PRASA was allowed to slide into almost total ruin; who should be held responsible for that; and who could have benefited from that unacceptable state of affairs.

VREDE INTEGRATED DAIRY PROJECT

No recommendations.

THE CLOSURE OF THE BANK ACCOUNTS OF THE GUPTAS

Conclusions

476. In December 2015 and 2016 four banks closed the bank accounts of companies owned or controlled by or linked to the Gupta family. They were First National Bank, Standard Bank, ABSA and Nedbank. Term of Reference 7.1 required the Commission to investigate, inquire and determine:

> Whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies.

477. Some of the banks which closed the bank accounts of the Gupta companies were prepared to have a discussion with their clients before they could terminate their relationship with them but others appeared not to have been prepared to have such a discussion and thought that all they needed to do was to give their client a reasonable notice of the termination of the relationship. In Bredenkamp and Others v Standard Bank of SA Ltd the Supreme Court of Appeal decided that a bank was not obliged to hear its client's side of the story before the bank could terminate the relationship. It seems that the Supreme Court of Appeal's basis for this decision was that the relationship between a bank and a client is a contractual one.

478. Representatives of banks who testified before this Commission revealed that the banking industry is regulated or is subject to many laws. Banks possess an enormous amount of power. This would become very clear if all the banks were to refuse that you hold an account with them. You would not be able to run any serious business without being able to open a bank account. If you already had a bank account and all the banks in which you have accounts terminated their relationship with you that would be devastating. If you were running a serious business, you would need to close down that may result in job losses. Depending on the size of the business one may be talking about hundreds or thousands of people who would lose jobs. The workers would have to suffer serious consequences even though they may not have done anything wrong themselves.

479. In this day and age in South Africa it is unacceptable that an institution as powerful as a bank should have no obligation to hear – whether in a discussion or in writing - what a client has to say before the bank may close that client's account on suspicion that the client may be involved in illegal or corrupt transactions. It does not appear to be in line with the kind of society that our Constitutional democracy envisages. A decision to close a client's bank account on those grounds is a decision that could have far reaching consequences for the client and others and it is only fair that banks be required to afford their clients the opportunity to be heard or to make representations to show if they are able to, that there are no grounds for the bank to be concerned. The bank may be persuaded or it may not be persuaded. The bank would need to afford the client a proper opportunity to be heard and should not just go through the motions or pay lip service to the principle of *audi alteram partem* (hear the other side).

480. The fact that the relationship between a bank and a client may be contractual is neither here nor there because there are other relationships which are or were at some stage contractual in nature and Parliament intervened in order to infuse the notion of fairness in the relationship. The first of those is the employment relationship. Under the common law an employer had all the power to terminate an employment relationship for a good reason or for a bad reason or for no reason at all and there

was very little that an employee could do about such a termination. Labour legislation was enacted to infuse fairness into the employer-employee relationship and, now, an employer must have a fair reason to terminate the relationship and must follow a fair process to do so. The same applies to certain leases. Some legislation requires that certain tenants be treated fairly. Illegal occupiers of land also need to be treated fairly. In our legal system even those who are accused of rape and murder are not sent to jail without being given an opportunity to tell their side of the story. There is no reason why Banks should not be required to observe this basic principle.

Recommendations

481. It is therefore recommended that relevant existing legislation governing banks be amended to introduce this requirement of fairness or, if warranted, a new piece of legislation be enacted which will make this a requirement.

THE CONCEPT OF STATE CAPTURE

No recommendations.

MR MALUSI GIGABA AND THE EVIDENCE OF MS NOMACHULE MNGOMA

482. It has already been recommended (in the Report on Transnet) that, based on the evidence of Witness 3, the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to the cash payments allegedly received by him during visits to the Gupta residence in Saxonwold (during the period July to December 2013).

483. Similarly, it is recommended that, based on the evidence of Ms Mngoma, the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to the cash payments received by him during visits to the Gupta residence in Saxonwold in or about 2013.

484. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to the employment of his sister, Ms Nozipho Gigaba, by Sahara Computers in or about 2013.

485. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on a charge of corruption in terms of Chapter 2 of PRECCA and / or a racketeering charge in terms of Chapter 2 of POCA, to determine whether:

    485.1 The Guptas gave Mr Gigaba about R4 to R5 million in cash that was used to pay for the Gigaba wedding in August 2014

    485.2 The Guptas paid for the trip taken by Mr Gigaba and Ms Mngoma to Dubai in or about 2014 / 2015

    485.3 The Guptas gave Mr Gigaba cash used to effect renovations to his late father's home in Mandeni, KwaZulu-Natal in or about 2013 / 2014

    485.4 The Guptas gave Mr Gigaba R425 000 (or more) to pay off the debts of his sister, Ms Nozipho Gigaba, in or about 2013

485.5 Mr Ajay Gupta gave Mr Gigaba two watches in Dubai during a trip there in or about 2013 – 2015; and

485.6 The cash (or part thereof) used by Mr Gigaba to pay his children's school fees (or part thereof) in 2015 - 2021 emanated from the Guptas.

PRESIDENT CYRIL RAMAPHOSA

No recommendations.

THE ROLE OF THE RULING PARTY

No recommendations.

PARLIAMENTARY OVERSIGHT

Summary of recommendations

486. In what follows the Commission summarises the recommendations it has made above.

486.1 It is recommended that Parliament should consider whether it would be desirable for it to establish a committee whose function is, or includes, oversight over acts or omissions by the President and Presidency, which are not overseen by existing portfolio committees.

486.2 It is recommended that Parliament should consider whether introducing a constituency-based (but still proportionally representative) electoral system would enhance the capacity of Members of Parliament to hold the executive accountable. If Parliament considers that introducing a constituency-based system has this advantage, it is recommended that it should consider whether, when weighed against any possible disadvantages, this advantage justifies amending the existing electoral system.

486.3 It is recommended that Parliament should consider whether it would be desirable to enact legislation which protects Members of Parliament from losing their party membership (and therefore their seats in Parliament) merely for exercising their oversight duties reasonably and in good faith.

486.4 It is recommended that Parliament should consider amending section 6(1) of the Intelligence Services Oversight Act 40 of 1994, so as to ensure that, before an election, the outgoing JSCI is required to report to Parliament on as much as possible of the period preceding the election.

486.5 It is recommended that Parliament ensures that adequate funds are allocated, particularly to portfolio committees, to enable effective parliamentary oversight.

486.6 It is recommended that, subject to budgetary restraints, the scale and skills of the research and technical assistance made available to the portfolio committees be enhanced.

486.7 It is recommended that Parliament needs to make it clear that the practice of late submissions to portfolio committees will not be tolerated.

486.8 It is recommended that Parliament should consider whether there is a need to legislate on the issue of reports by representatives of the executive to Parliament.

486.9 It is recommended that Parliament needs to make clear that non-attendance by ministers and others scheduled to attend portfolio committee meetings will not be tolerated and to ensure that consequences are visited on those who offend without adequate cause. (Parliament should consider whether there is a need to legislate on this issue.

486.10 It is recommended that Parliament implement a system to "track and monitor" implementation (or non-implementation) by the executive of corrective action proposed in reports adopted by Parliament.

486.11 It is recommended that Parliament establish an Oversight and Advisory Section to provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of Members of Parliament and the committees to which they belong.

486.12 It is recommended that Parliament should consider whether it supports the principle of "amendatory accountability" and, if it does, whether it would be desirable to give detailed substance to this principle in an Act of Parliament, along the lines suggested in the Corder report.

486.13 If Parliament should not be minded to enact legislation of the above type, the Commission is of the view that consideration should be given by Parliament to amendments to its own rules, with a view to addressing the problem of ministers who fail to report back to Parliament on what if anything has been done in respect of remedial measures proposed by Parliament or on alternative methods preferred by them to address defective performance highlighted by Parliament.

487. The Commission supports the recommendation that, with the support of a majority of members of a portfolio committee, a portfolio committee could put a minister to terms in respect of remedial action, and could thereafter, through the Speaker, intercede with the President, as head of the national executive, in the event of non-compliance. The Leader of Government Business could also play a role in such a process.

488. It is recommended that Parliament should consider whether more representatives of opposition parties should be appointed as chairs of portfolio committees.

489. It is recommended that Parliament consider whether it is desirable to amend its rules to give effect to the proposals by Corruption Watch on appointments by Parliament.

STATE CAPTURE-DERIVED FUNDS

The offshore laundering of state capture proceeds of crime

490. Billions of Rands were paid to the Gupta Enterprise as kickbacks related to state capture contracts. If the South African state is to recover any of these amounts from offshore, it will first have to trace the current whereabouts of these funds. To this end it is recommended that:

490.1 South African authorities should urgently engage with HSBC to require HSBC to assist in the tracing and dissipation of the funds out of Tequesta, Regiments Asia and Morningstar and into the Hong Kong/China laundry network using HSBC accounts.

490.2 The Financial Intelligence Centre (FIC) and the National Prosecuting Authority (NPA) should engage with their counterparts in Hong Kong and China to seek their assistance in the tracing and dissipation of the funds out of Tequesta, Regiments Asia and Morningstar and into the Hong Kong / China laundry network using HSBC accounts.

490.3 The FIC and the NPA should engage with their counterparts in the UAE to seek their assistance in the tracing and dissipation of the funds out of the Tequesta and Regiments Asia accounts in Dubai.

490.4 If the current whereabouts of any proceeds of state capture payments made to Tequesta, Regiments Asia or Morningstar can be located, the Asset Forfeiture Unit (AFU) of the NPA should approach its counterparts in the relevant jurisdiction(s) with a view towards having those proceeds frozen and then forfeited to the South African State as proceeds of state capture crimes.

The South African laundering of state capture proceeds of crime

491. Tracing the flows of state capture proceeds of crime has revealed the existence of widespread sophisticated money laundering networks operating within South Africa. The money laundering networks used by the Gupta Enterprise were complex, well established and embedded in a pre-existing milieu of criminality and wrongdoing. The money laundering networks appear to service criminal enterprises straddling offences currently regulated and policed by multiple enforcement agencies and have links with international money laundering networks with multi billion rand turnovers.

492. It appears that thus far, enforcement action against these networks has been confined primarily to forfeiture orders issued by the South African Reserve Bank. Important though these forfeiture orders are, they are unlikely to have any significant deterrent effect on the domestic money laundering networks because the scale of their operations is such that forfeiture orders can be absorbed as a cost of doing business. If money laundering is to be brought under control in South Africa, it is essential that those controlling and participating in the domestic money laundering networks in South Africa are prosecuted and subjected to asset forfeiture proceedings so that the costs of the money laundering profession can be made to outweigh its benefits.

493. Sections 4 to 6 of the Prevention of Organised Crime Act 108 of 1998 create statutory money laundering offences in the following terms:

> 4. Money laundering
>
> Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-
>
> (a) Enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or (b) Performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect-
>
> (i) Of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or (ii) . . .
>
> shall be guilty of an offence.
>
> 5. Assisting another to benefit from proceeds of unlawful activities
>
> Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby-
>
> (a) The retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or
>
> (b) The said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way, shall be guilty of an offence.
>
> 6. Acquisition, possession or use of proceeds of unlawful activities
>
> Any person who-
>
> (a) Acquires
>
> (b) Uses; or
>
> (c) Has possession of,
>
> property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.

494. The evidence contained in the three reports of Mr Holden to the Commission should provide ample basis for the investigation and prosecution of a wide range of individuals under sections 4 to 6 of POCA for their role in laundering proceeds of state capture crimes. It is accordingly recommended that the National Prosecuting Authority consider the three reports of Mr Holden with a view to instituting criminal prosecutions under sections 4 to 6 of POCA against persons involved in laundering the proceeds of state capture crimes.

495. However, one of the hallmarks of the money laundering networks that laundered proceeds of state capture crimes within South Africa was their flexibility. As soon as particular companies were exposed as laundry vehicles, the networks were able to bypass those companies and to reroute state capture funds through different entities built into different networks. So, prosecutions for historical contraventions alone, are unlikely to make much of an impact on the money laundering industry within South Africa unless they are part of a sustained ongoing process to target that criminal industry.

496. How best to target money laundering within South Africa is not something that this Commission can prescribe. It is possible however to make a number of general observations in this regard:

496.1 First, because the money laundering industry services a range of criminal enterprises operating across fields regulated or policed by different regulatory and law enforcement agencies, a holistic approach is required on the side of government. A coordinated and co-operative approach to targeting money laundering is required from all of the relevant enforcement agencies, and at least the:

496.1.1 Asset Forfeiture Unit of the NPA

496.1.2 Directorate of Priority Crime Investigation (Hawks)

496.1.3 Financial Intelligence Centre (FIC)

496.1.4 Investigating Directorate of the NPA (ID)

496.1.5 South African Revenue Service (SARS)

496.1.6 South African Reserve Bank (SARB); and

496.1.7 Special Investigating Unit.

496.2 Second, it is necessary to use the anti-money laundering resources of the banks in a more proactive manner than is currently the case. The South African Anti-Money Laundering Integrated Task Force ("SAMLIT") has been set up under the auspices of the FIC to enable banks to share with each other and with the authorities anonymised information and to discuss general trends. However, the absence of a statutory framework providing for the controlled sharing of detailed anti-money laundering information by banks appears remain an obstacle to fighting financial crime.

496.3 Third, there is a need to investigate the effectiveness of the current system of suspicious transaction and cash threshold reporting to the FIC under the FIC Act. If banks are failing to make the necessary reports to the FIC, the FIC needs to take action against them, but if Banks are making the necessary reports to the FIC but no action is being taken against the money laundering networks, that suggests either a flaw in the current system or its implementation by the FIC and downstream enforcement agencies. In this context, the Commission recommends that the FIC should conduct an urgent review into:

496.3.1 The compliance of the South African banks with the FIC Act in relation to proceeds of state capture laundered through accounts held by them, identifying whether, and to what extent, the FIC was alerted to these activities by reports under the FIC Act

496.3.2 What action was taken by the FIC pursuant to any relevant reports received from South African banks in this regard

496.3.3 What reports or recommendations were made by the FIC to other law enforcement agencies; and

496.3.4 What steps, if any, were taken by those enforcement agencies to act on the recommendations of the FIC.

THE ACQUISITION OF OPTIMUM COAL MINE

497. There are reasonable grounds to believe that Mr Duduzane Zuma, Mr Salim Essa, Ms Ronica Ragavan, Mr Ashu Chawla and members of the Gupta family may be guilty of contravening section 2 of POCA. In the circumstances it is recommended that law enforcement agencies should conduct such further investigation as may be necessary with a view to the possible criminal prosecution of the said persons by the NPA.

THE EVIDENCE OF LORD PETER HAIN

498. Lord Hain was asked to comment on a possible recommendation that public officials above a certain level as well as executives of companies wishing to do business undergo compulsory and regular lifestyle audits. He commented favourably on the suggestion, noting that this would supplement the proposal in relation to unexplained wealth orders.

THE EVIDENCE RELATING TO MR DUDUZANE ZUMA

499. The outline of evidence above shows that Mr D Zuma was a shareholder in several Gupta-related companies and thereby stood to gain financially from contracts awarded to those companies. In some instances, Mr D Zuma appears to have taken part in the decision-making that would lead to the award of those contracts by SOEs to the Gupta-linked companies.

500. Mr D Zuma also seems to have been involved in the appointment of key individuals in SOEs, who in turn facilitated the capture of those SOEs. He also seems to have acted as a conduit between the Guptas and government, particularly his father, Mr JG Zuma. In several cases, Mr D Zuma was present when bribes were offered to individuals at the Guptas' Saxonwold residence.

501. It is recommended that the law enforcement agencies conduct investigations whether Mr D Zuma has not committed any offence by facilitating acts of corruption or by facilitating bribes or by failing to report corruption that may have been committed in his presence by Mr Tony Gupta when he offered a bribe to Mr Mcebisi Jonas, Mr Mxolisi Dukwana and Mr Vusi Kona.

GOVERNANCE OF SOEs

Evaluation of the File contents from the point of view of the Commission

502. Although the File documents envisage the formalisation of the appointment processes including a limited form of public involvement (the public may be invited to identify candidates) the Nomination and Selection of candidates remain firmly controlled by the relevant Government Minister. It is difficult to see why the proposed system will be any better placed to deal with state capture than it was before. There are no effective mechanisms which would prevent cronyism and cadre deployment from continuing to dominate appointment to the Boards and to senior executive officers.

503. The recommendations of the Commission, it is submitted, should insist on a truly independent and transparent process free from political manipulations so that the ultimate appointment made by a Minister is genuinely the result of a merit-based selection process.

AMENDED RECOMMENDATIONS: APPOINTMENTS TO BOARDS AND EXECUTIVE OFFICE OF STATE-OWNED ENTERPRISES

504. In the circumstances the Commission recommends the establishment of a Standing Appointment and Oversight Committee tasked to ensure, by way of a public hearing, that any person nominated for Board appointment or as the Chief Executive Officer, Chief Financial Officer, or Chief Procurement Officer of an SOE meets the professional, reputational and eligibility requirements for such a position. The Committee will also investigate and act upon any complaints received concerning the misconduct of any Board member or senior executive in the discharge of his or her duties.

505. The relevant recommendation reads as follows:

Recommendation for appointments to the boards and to executive office of state-owned enterprises

506. It is hereby recommended that in order to ensure a transparent process for the appointment of appropriately qualified and experienced persons of high integrity to the Boards of state-owned enterprises and to senior executive positions therein, the Government should introduce legislation:

506.1 To create a Standing Appointment and Oversight Committee having the powers and functions set out in 33.5 below:

506.1.1 To provide for the relevant shareholder Minister to make appointments to the Boards of SOEs and to senior executive office in accordance with 14 and 15.3 below

506.1.2 To appoint an Adjudicator having the powers and functions set out in 15 and 16 below.

506.2 The powers and functions of the Standing Appointment and Oversight Committee are:

506.2.1 To invite, receive and assess by way of a transparent and public process nominations for appropriately qualified and experienced persons of high integrity willing to accept appointment to fill any vacancy on the Board of a State-Owned enterprise or in a senior executive post

506.2.2 To recommend to the shareholder Minister concerned the names of at least one but not more than three of the best qualified candidates suitable for appointment for every vacancy on the Board or senior executive post

506.2.3 To follow the procedures set out in 15 below

506.2.4 To publish a Code of Conduct which will be binding on Board members and senior executives; and

506.2.5 To receive and investigate complaints relating to any misconduct alleged against a Board member or person holding a senior executive post and to pronounce on the merit of the complaint and the steps which should be taken to deal with it.

507. The relevant shareholder Minister shall, upon receipt of any nominations from the Committee, either:

507.1 Proceed to appoint the nominee, where a single nomination has been made, or one of the nominees, where more than one nomination has been made, to the Board or senior executive post in the relevant state-owned enterprise; or

507.2 Provide the Committee with a written explanation within thirty days from the receipt of the Committee's nomination/s setting out why, in the opinion of the Minister, the nominee/s is not or are not appropriately qualified or appropriately experienced or of high integrity.

507.3 If the shareholder Minister neither approves any candidate nominated by the Committee nor provides a written explanation for withholding such approval within the said thirty days the matter shall proceed in accordance with the process set out in 16 below.

508. Where the Minister:

508.1 Responds in terms of 14.2 above in the case of a single nomination made by the Committee, the Committee should proceed to identify and nominate an alternative candidate for such appointment, and if that alternative nomination is not approved by the Minister, the matter shall proceed in accordance with the process set out in 5 below

508.2 Responds in terms of 14.2 above in the case of two or three nominations having been made by the Committee, and has provided the reasons for not so approving then the Committee shall, if it regards the Minister's reasons as valid, proceed to identify and nominate alternative candidates for the Minister to consider for appointment, and again rank such further nominations in accordance with its preference, and if the shareholder Minister also rejects the alternative nominations the matter shall proceed in accordance with the process set out in 16 below; or

508.3 Where the Committee does not accept the written explanation of the Minister as constituting a valid objection to the lack of appropriate qualification or appropriate experience or to the integrity of the nomination/s, or if the Minister neither approves any candidate nominated by the Committee nor provides a written explanation for withholding such approval within the said thirty days the matter shall proceed in accordance with the process set out in 5 below.

509. Where the Minister has failed to make an appointment either from the original list of nominees or from any alternative list of nominees where such has been provided, then the person ranked first in the single list provided to the Minister, or the person ranked first in the alternative list provided to the Minister as the case may be shall be appointed by the Minister.

510. The Committee shall comprise the following persons who shall serve a term of three years:

510.1 A retired Judge, nominated by the Chief Justice, who will preside as Chairperson of the Committee

510.2 The Minister of Finance or his delegate

510.3 A senior legal practitioner appointed by the Chairperson of the Legal Practice Council

510.4 A senior representative from the business community appointed by The National Economic Development and Labour Council

510.5 A senior Trade Union representative appointed by The National Economic Development and Labour Council

510.6 A registered Auditor appointed by the Chairperson of the Independent Regulatory Board for Auditors

510.7 An industry expert appointed by the SOE concerned; and

510.8 A senior representative of an established anti-corruption non-profit organisation operating in the private sector such organisation to be identified by the Chairperson of the Committee.

ANTI-STATE CAPTURE AND CORRUPTION COMMISSION

511. It is recommended that a permanent Commission be established the main function of which will be to investigate, publicly expose acts of state capture and corruption in the way that this Commission did over the past four years, make findings and recommendations to the President. Such a Commission could be called the Anti-State Capture and Corruption Commission. In addition, since it has been found by this Commission that the failure of Parliament to hold the executive, particularly President Zuma, accountable contributed to the Gupta-Zuma state capture, it will be necessary for the Anti-State Capture and Corruption Commission to keep an eye on how Parliament performs its oversight function and whether, in respect of any particular matters, it is performing or it has performed its oversight function effectively and has held the Executive including the President, accountable. Where the Anti-State Capture and Corruption Commission is of the view that Parliament has failed or is failing to perform its oversight function effectively and has not effectively held the executive effectively to account, it should step in, investigate the matter itself properly and call upon anyone to appear

before it, testify and answer questions that may be put to him or her by the Chairperson of the Anti-State Capture and Corruption Commission in public and in the full glare of cameras unless the Chairperson decides in a particular matter that that should not happen in public. It should have power to call anyone within the National Executive and officials of government departments, state owned entities and members of Boards of Directors of state owned entities or anyone in the private sector including private businesses. However, it will be important for the Anti-State Capture and Corruption Commission to ensure that as a norm evidence before it and any questioning of persons who appear before it is done publicly and with the media including television being allowed in the hearing and that it is only in really exceptional cases that the Chairperson of the Commission may decide that the giving of certain evidence and / or the questioning of any person be done with the public excluded. An example of such cases is where the hearing of particular evidence publicly could endanger national security or where some other strong grounds exist to justify the hearing of such evidence with the public excluded.

512. That there should be a structure that can play this role in relation to Parliament arises out of the fact that the Gupta-Zuma state capture could have been prevented or stopped in its tracks quite early around 2012 and 2013 if Parliament had not been prevented by the ANC majority from performing its oversight function and from properly and effectively holding President Zuma to account. However, whenever the opposition parties tried to do the right thing for the country and the people of South Africa and sought answers from the President about his friendship with the Guptas the ANC majority shielded President Zuma and he was able to continue with his friendship with the Guptas to the detriment of South Africa.

513. With the Anti-State Capture and Corruption Commission, it will be possible for the Commission to call upon the President to appear before it and answer questions relating to certain matters. Anyone involved in acts of state capture and corruption should dread the day he or she may appear before the Commission and be subjected to intense questioning in front of the nation and in the full glare of TV cameras. That is not to say that the Commission will necessarily be hostile to those who appear before it but that it will take its job very seriously, it will act without fear or favour or prejudice and will ask the difficult questions that should be asked in the interest of the public and the country. Part of its job will be to expose acts of state capture and corruption and hopefully help to contribute to the significant lowering of the level of the corruption in the country.

Composition of the Anti-State Capture and Corruption Commission

514. The Anti-State Capture and Corruption Commission should be chaired by a Judge. Preferably, the Judge should be a retired Judge. While a Judge who is still in active service should preferably not chair the Commission or participate in it in any way, this should not be an immutable position. There is no reason why a Judge who is still in active service but is close to retirement and may be is left with one, two or three years and who is not going to be availing himself for promotion cannot be appointed to chair the Commission or to be part of the Commission for part of or the balance of the period of his or her active service. That, of course, may require that an acting Judge be appointed to perform the duties in Court that would have been performed by that Judge if he or she had not been appointed to the Anti-State Capture and Corruption Commission.

515. The Chairperson of the Anti-State Capture and Corruption Commission should have power to appoint evidence leaders and investigations and other personnel that he or she considers the Commission needs and will do a good job. The Composition of the Anti-State Capture and Corruption Commission should include a Secretary and such support staff as may be necessary in order to enable the Commission to perform its function effectively and competently. The evidence leaders and investigators should be people who will perform their respective functions without fear, favour or prejudice. It should not be people who may think that doing their job fearlessly in the Commission may mean that Government will no longer give them work when they leave the Commission.

516. When the President needs to appoint the Chairperson of the Commission, he should approach the Chief Justice and request him or her to give him the name of a Judge who should be appointed by

the President. The Chief Justice may then give the President one or two or three names and leave it to the President to choose one from those. The President should not himself or herself indicate any preference to the Chief Justice.

517. The Commission should prepare reports from time to time and submit them to the President at certain intervals.

THE PRESIDENT MUST BE ELECTED DIRECTLY BY THE PEOPLE

518. In terms of South Africa's electoral system the voters do not elect the President of the country. They vote for political parties. The political parties that get a sufficient number of voters during national and provincial elections send a certain number of people to Parliament in accordance with a certain formula. A political party represented in Parliament may withdraw any of its members serving in Parliament and replace him or her. There is not much an individual can do about it. With regard to a President, he or she first gets put on the list of a political party and takes an oath as a member of Parliament and, after he or she has become a member of the National Assembly, the National Assembly elects the President. When a member of the National Assembly gets elected by the National Assembly as the President, he or she ceases to be a member of the National Assembly.

519. After this Commission heard the kind of evidence it heard over a period of about four years, including the evidence played by President Zuma in helping the Guptas loot taxpayers' money in the way they did together with their associates, we are bound to ask the question: how did this country end up having as President someone who would act the way President Zuma acted? Someone that could remove as good a public servant as Mr Themba Maseko from his position just so that he could put someone else into that position who would co-operate with the Guptas and give them business? A President who would fire Minister of Finance just because his friends wanted someone else in that position who would co-operate with his friends and help them to capture the country and National Treasury? Indeed, a President who became party to a scheme created by the Guptas to remove a number of executives from their positions at Eskom so that the Guptas could put their own associates in those positions so as to facilitate the looting of Eskom?

520. The country got Mr Zuma as President because he was able to ascend to the position of President of the African National Congress and the majority of the voters in the 2009 national and provincial elections voted for the ANC. During the elections of 2009 it would have been clear to all that, if the ANC obtained the majority of voters, Mr Zuma would be the President of the country. It may well be that, despite having more than 700 charges pending against him, he would have won the majority of voters if it was a Presidential election where the voters voted for the President directly. However, there may have been voters who voted for the ANC but who would never have voted for Mr Zuma as President if they had had an opportunity not to vote for Mr Zuma and still vote for the ANC.

521. No single measure that can be recommended and put in place will on its own be adequate to prevent state capture in the future or will be adequate on its own to rid our country of corruption; it will take a number of measures that will each contribute in their own way towards that goal. As already suggested, Mr Zuma may have been helped by the fact that there may have been voters who wanted to vote for the ANC but not necessarily for Mr Zuma but felt that they had no choice but to help him because their votes helped the ANC with the election and effectively gave the ANC the prerogative to choose the President of the country. In other words, a voter who wanted to vote for the ANC but did not want Mr Zuma to be the President of the country was forced to choose between either not voting for the party that he or she liked, namely, the ANC, and thereby enhance the prospects of Mr Zuma being President of the country, or not voting at all for the political party for which he or she wanted to vote. That was a difficult choice to make. Many voters who may have found themselves in that situation may have ended up voting for the ANC and hoped that the ANC would not make Mr Zuma the President of the country. Of course, the ANC made Mr Zuma the President of the country.

522. The proposal that consideration be given to making necessary constitutional amendments to ensure that the President of the country is elected directly by the people is aimed at ensuring that anyone

who becomes President of the country does so on the basis of their own popularity with the people, not on the basis that, if voters vote for a particular party, that party will make him or her President. Of course, if this recommendation is accepted and the necessary constitutional and legislative changes are made and it is implemented, that will not necessarily give the people of this country any guarantee that somebody similar to Mr Jacob Zuma or even worse than Mr Jacob Zuma will ever be elected President of the country. That possibility will always be there. In the USA Mr Donald Trump won the Presidential election against all odds. That is a good reminder that a system where the voters vote for the President directly is no guarantee that a person of a wrong character will not win the Presidential election and become the President. However, if that were to happen in South Africa after this recommendation has been accepted and implemented, the consolation would be that the people elected their own queer character or a person who had no integrity and, if he or she ever facilitated a capture of the state by private individuals or entities as Mr Zuma did, the people could blame themselves for electing such a person to the highest office in the land. It would not be that the people voted for a party and it was that party that decided who should be the President of the country.

Electoral reform

523. It is recommended that serious consideration be given to the majority recommendation on electoral reforms as given in the Report of the Electoral Task Team of January 2003. The Task Team included Dr F Van Zyl Slabbert, who was the Chairperson.