PART 1: VOLUME III

CHAPTER 3 - SOUTH AFRICAN REVENUE SERVICE

TABLE OF CONTENTS

A: INTRODUCTION AND TERMS OF REFERENCE

1. The South African Revenue Service (SARS), as its name suggests, is the revenue service of the South African government. It is mandated to collect revenue and ensure compliance with tax and customs legislation.

2. Although the Public Protector's report: "State of Capture" did not mention SARS, the SARS evidence is central to the mandate of this Commission, namely, to inquire into allegations of state capture, corruption and fraud in the public sector. The Terms of Reference of this Commission that are relevant for present purposes include the obligation to investigate and report on the following issues:

> "[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.
>
> [1.4] Whether any public official breached or violated the Constitution or legislation by facilitating the unlawful awarding of tenders by organs of State to benefit any person or corporate entity doing business with government or any organ of State;
>
> [1.5] The nature and extent of corruption in the awarding of contracts to companies by public entities under Schedule 2 of the PFMA; and
>
> [1.6] The nature and extent of corruption, if any, in the awarding of contracts and tenders to companies by government departments, agencies and entities."

3. As an oversight body, SARS has featured prominently in allegations of state capture. The actors in question weakened and misdirected the revenue gathering function of SARS.

4. The Evidence Leader in his Opening Address told me that the repurposing of SARS followed familiar patterns and processes of state capture that had been observed in other state institutions and does so in emphatic fashion. SARS offers one of the clearest demonstrations of state capture as observed in other SOEs and state institutions. Reference can be made to the following features:

4.1. the collusion between SARS, the Executive (including President Zuma) ("**President. Zuma"**) and the management consultancy Bain and Company South Africa ("**Bain**"), with a planned and co-ordinated agenda to seize and restructure SARS, well in advance of the appointment of either Bain or Mr Tom Moyane ("**Mr Moyane**"), the former SARS commissioner;

4.2. the purging of competent top officials;

4.3. the strategic positioning of compliant individuals;

4.4. the restructuring and deliberate weakening of institutional functions; and

4.5. the climate of fear and bullying.

5. In addition, evidence bears out the pattern of procurement corruption which has dominated the evidence heard by this Commission. These include:

5.1. the collusion in the award of the contract between Bain and Mr Moyane;

5.2. the irregular use of confinement and condonation to avoid open competition, transparency and scrutiny; and

5.3. the use of consultants to justify changes that were necessary to advance the capture of SARS.

B: OVERLAP WITH THE NUGENT COMMISSION

6. A particular feature of the SARS evidence is its connection with the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service ("the Nugent Commission") that Commission operated under Terms of Reference published on 18 June 2018. The Nugent Commission was required to inquire into, make findings, report and make representations, on eighteen specific issues.[2583]

7. There is an overlap between the work of the two commissions. The Nugent Commission focused on irregularities at SARS, including the seizing of SARS by Mr Moyane and others, while this commission is investigating the state capture of public entities, including SARS. However, the central question to be answered by this commission fell outside the scope of the Nugent Commission's terms of reference.

8. To determine the correct dividing line between what is a permissible topic of enquiry and finding for this commission and what is not because it has already been dealt with, it is necessary to consider what was investigated and found in the Nugent Report.

9. In its final report the Nugent Commission made the following overarching findings:

9.1. there has been a massive failure of integrity and governance at SARS, demonstrated by what SARS once was and what it has become. That state of affairs was brought about by the (at least) reckless mismanagement of SARS on the part of Mr Moyane;

[2583] Transcript 23 March 2021, p 6, lines 14-18.

9.2. what occurred at SARS was inevitable the moment Mr Moyane set foot there. He dismantled the elements of governance one by one. This was more than mere mismanagement. It was seizing control of SARS as if it was his to have;

9.3. the failure of good governance was manifest inter alia from the fact that senior management was driven out or marginalised at SARS; senior management appointed by Mr Moyane were simply compliant and neglected their oversight function; the development of SARS' sophisticated Information Technology systems was summarily halted; the organisational structure of SARS that provided oversight was pulled apart; dissent was stamped out by instilling distrust and fear; accountability to other State authorities was defied; and capacity for investigating corruption was disabled; and

9.4. instead of fostering a culture of healthy dissent, Mr Moyane engendered a culture of fear and intimidation. There was a purging of competent officials.[2584]

10. 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.

11. While the remit of that report is wide, there are certain issues which were not investigated by Judge Nugent, which were the focus of this Commission's work in relation to SARS. Matters concerning SARS which were not within the remit of the Nugent Commission's work, or in respect of which evidence was not led and which are relevant to this commission's work, formed the subject matter of testimony before this Commission.

[2584] Transcript 23 March 2020, p 7–8.

12. The first focus was on Bain's actions in connection with SARS. The Nugent Commission concluded that Bain had not told the full story. In addition, there was emphasis on Mr Moyane's role in SARS. Mr Moyane did not give evidence before the Nugent Commission. Finally, evidence was brought before the Commission on the impact of the capture of SARS upon the institution, especially its compliance capabilities.

13. The Nugent Report makes detailed findings as to the institutional dismantling of SARS, but this commission's mandate requires that the strategic significance of this alleged "capture" of SARS be contextualised within the "big picture" of the state capture inquiry.[2585]

14. Adverse findings were made against Mr Moyane in the final report of the Nugent Commission. Despite this, in his testimony before this commission, Mr Moyane said that he "did not have time to read it, because [he] felt that it had nothing to do with [him]". He said it was "an inquiry that was done outside [his] scope".[2586]

15. When the conclusions of the report were put to Mr Moyane, he said that he did not "take this report seriously, because it was prepared in order to tarnish "[his] organisation".

16. Mr Moyane said that he was "denied the right of participation in the SARS Commission and subsequent to his "lodgement of legal objections to its processes," he was "legally precluded from such participation".[2587]

17. Initially, Mr Moyane denied having been invited to participate at all. After being shown communications between his lawyers and the Nugent Commission[2588] and a number of

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2585 Transcript 23 March 2020, p 8–10.

2586 Transcript 26 May 2021, p 50, line 5.

2587 Transcript 26 May 2021, p 71–72.

2588 Transcript 26 May 2021, p 77–78.

specific personal invitations, Mr Moyane eventually conceded that he was in fact on multiple occasions invited to attend and to make comments on or respond to the evidence which had been given.[2589] Mr Moyane's version was that he had declined to do so on the basis that there was a disciplinary hearing involving him which was taking place at the same time.[2590]

18. Mr Moyane raised various objections before the Nugent Commission, and sought relief on a number of grounds, including that the proceedings be discontinued.[2591] All these objections were dismissed but Mr Moyane still did not appear at the Commission thereafter.[2592]

19. Mr Moyane was also invited to furnish written submissions to the Nugent Commission as to why its preliminary findings and recommendations should not be made final. This invitation was not taken up either.[2593]

20. In the result, the commission of inquiry which had been set up in order to investigate SARS had to proceed to issue its final report without the benefit of the testimony of the sitting Commissioner.[2594] When asked why he did not go before the Nugent Commission and put his side of the story, Mr Moyane eventually said that he had no comment.[2595] That answer was telling! Mr Moyane knew that, from the moment the Nugent Commission was appointed, there was a lot he had to account for which he had done that was wrong in respect of which he would have no answers. He knew the meetings he had with Bain about SARS even before he was appointed as Commissioner of SARS.

2589 Transcript 26 May 2021, p 79–80.

2590 Transcript 26 May 2021, p 82 and 92.

2591 Transcript 26 May 2021, p 87–88.

2592 Transcript 26 May 2021, p 88, lines 10-13.

2593 Transcript 26 May 2021, p 90–91.

2594 Transcript 26 May 2021, p 91, lines 16-21.

2595 Transcript 26 May 2021, p 96, line 15.

He knew the plans he had made with Bain which were to dismantle SARS and he knew that the best thing for him was to avoid taking the witness stand in that Commission. He, therefore, decided to try all sorts of excuses to justify his refusal to appear before that Commission and account for how he had led SARS.

C: WITNESSES

21. This Commission heard evidence from a number of witnesses in relation to SARS.

Mr Athol Williams

22. First, Mr Athol Williams ("**Mr Williams**") gave evidence. He is a former employee of the management consultancy, Bain. He was engaged as an independent consultant from September 2018 to December 2019 to oversee an investigation that had been commissioned by Bain into the award of the contract with SARS and the work which it did at SARS. Mr Williams is highly qualified. He holds five Masters' degrees.

23. From January 2019 until May 2019 Mr Williams was employed as an independent advisor to develop a remedy plan for Bain.

24. From May 2019 until August 2019 he was employed on a part-time basis as a partner serving on the Bain Africa Oversight Board.

25. At the end of August 2019 he 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.

Mr Vlok Symington

26. Secondly, the Commission heard from Mr Vlok Symington ("**Mr Symington**"). Mr Symington is a senior employee of SARS.

27. Mr Symington was asked by the Commission to submit himself to an interview in connection with what has been described as a hostage incident that occurred at the SARS offices in October 2018.

Mr Johann Van Loggerenberg

28. Thirdly, Mr Johan Van Loggerenberg ("**Mr van Loggerenberg**"), a former SARS employee, gave evidence.

29. He was approached by the Commission regarding the Commission's investigations into compliance units at SARS and the fate of those units and how they had been affected by the restructuring which took place under Bain and Mr Moyane.

Mr Tom Moyane

30. Mr Moyane, the former Commissioner of SARS, was due to give evidence on the 24th of March 2021. However, the day before he was due to appear, the Commission was informed that Mr Moyane was too unwell to appear.

31. Mr Moyane's testimony was rescheduled for the 26 May 2021, and he appeared to give evidence on that day under subpoena.

Minister Gordhan

32. Mr Moyane was granted leave to cross examine Minister Pravin Gordhan ("**Minister Gordhan**"). He did so on two separate occasions.

33. Minister Gordhan's testimony is dealt with below.

D: METHODS OF CAPTURE

34. As stated above, the capture of SARS followed familiar patterns and processes of state capture that have been observed in other state institutions and does so in emphatic fashion. SARS offers one of the clearest demonstrations of the patterns of state capture observed in other SOEs and state institutions. In addition, evidence bears out the patterns of procurement corruption which dominated the evidence heard by the Commission. The various aspects of this will be discussed in further detail.

The collusion between SARS, the Executive and Bain with a planned and co-ordinated agenda to restructure SARS

35. Mr Symington told the Commission that by 2008/2009 SARS was recognised internationally as one of the best and most efficient tax administration services in the world.[2596] There is a tax administration diagnostic assessment tool which is used across the world as a measurement instrument. In 2013, SARS scored among the top five revenue and customs authorities in the world on the basis of this tool, Mr van

[2596] Transcript 25 March 2021, p 57, lines 11-14.

Loggerenberg told the Commission.[2597] As a result of how effective SARS became at enforcement and oversight, it was "praised and studied worldwide".[2598]

36. During this period, there were improvements in Information Technology, including what would later become known as eFiling, improvements in human resource management, fiscal management within the institution, productivity, and planning, and aligning that with the medium-term expenditure framework.[2599]

37. Mr van Loggerenberg told the Commission that there were dedicated units, creatures of statute, within SARS which were mandated to assist law enforcement agencies to control organised crime, from a revenue and customs and excise perspective.[2600] These units went on to make a marked impact against organised crime from a tax, customs, and excise perspective. What Mr Symington said about how highly regarded SARS was internationally before it was subjected to capture by Bain under Mr Moyane's leadership is no different from what I was told about SAA at some stage, Eskom at some stage and Denel at some stage each of which were subsequently run down considerably with rampant corruption and state capture. All of which happened under happened under the watch of the Government of the ruling party, the African National Congress. Most, if not all, of these entities were led by the Chief Executive Officers and Boards of Directors who would have been approved by the ruling party through its national deployment committee. These entities did not drop overnight from the internationally highly regarded entities that they once were to what they subsequently became. The decline happened over a number of years but both the government and the ruling party failed dismally to

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2597 Transcript 25 March 2021, p 90, lines 17 - 20.

2598 Transcript 25 March 2021, p 91, lines 1 - 2.

2599 Transcript 25 March 2021, p 65, lines 14 – 20.

2600 Transcript 25 March 2021, p 66, 14-24.

make any effective interventions to halt the decline. Either they did not care or they slept on the job or they had no clue what to do.

38. It is clear, therefore, that SARS was a highly effective service at both oversight and enforcement. Mr Williams said that no one, at that stage, could have legitimately described SARS as dysfunctional.[2601] Against this background, there was simply no need for the services of a management consultancy.

39. This notwithstanding, Mr Williams told the Commission about 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 and strategic plans and operations. Mr Williams said that one would be hard pressed to find any knowledgeable person who could justify the claim that this is what SARS needed.[2602]

40. It is Mr Williams's evidence, therefore, that there was a plan between Bain and the Executive, particularly Mr Moyane as the Commissioner of SARS and President Jacob Zuma ("**President Zuma**"), to enter SARS and to cause damage to this institution. Key to this from Bain's side was the managing partner, Mr Vittorio Massone ("**Mr Massone**"), who was Bain's senior representative in Johannesburg. This collusion was, without a doubt, unethical and improper, Mr Williams told the Commission.[2603]

2601 Transcript 23 March 2021, p 209, lines 8 - 9.

2602 Transcript 23 March 2021, p 210, lines 19-21.

2603 Transcript 24 March 2021, p 95, line 19.

41. In order to assess on what basis Mr Williams makes this contention, it is necessary to go back in time and to look at the detail of how, through a paid intermediary, Bain entered into the public sector and eventually formed a relationship with Mr Moyane and Mr Zuma.

Bain and Ambrobrite

42. On 1 November 2013, Bain entered into a "Business Development and Stakeholder Management Contract" with a company known as Ambrobrite (Pty) Ltd ("**Ambrobrite**"). By Bain's own due diligence, this company did not have any internet presence or website. It never filed any financial statements. It had a tax certificate which SARS seemed to think was fraudulent and it had no trading history.[2604]

43. The company was set up by Mr Duma Ndlovu, a TV producer, and Mr Mandla KaNozulu. Both men are artists who do creative work. So, together they describe their business as an events management company.[2605]

44. The written contract stated that Bain, in collaboration with Ambrobrite, had identified the government and State-Owned Enterprise ("**SOE**") sector as a "strategic priority". In addition, the contract states that, according to Ambrobrite intelligence, in the next few years a number of SOEs would be subject to leadership and strategic changes and would require "significant transformation and turnaround processes". The contract states that Bain was of the opinion that a collaboration with Ambrobrite would substantially benefit its business and the probability of success in this sector.[2606]

45. The contract talks about business development and giving Bain strategic advice, which is "bizarre" according to Mr Williams, because Bain was one of the preeminent strategy

[2604] Transcript 23 March 2021, p 115 –116.

[2605] Transcript 23 March 2021, p 115 –116.

[2606] Transcript 23 March 2021, p 118, lines 1 - 3.

consulting firms in the world. Seeking strategic advice from two artists does not make sense.[2607]

46. This aside, Mr Williams said that what is stated in the contract compared with what materialised is "shocking". The contract seemed to portray itself as one where local experts would help Bain to be successful in the public sector by facilitating the introduction or directly introducing Bain partners to key leaders and decision makers. Mr Williams said that the reality is that these were two individuals who were very close to politicians and were able to open doors to politicians for Bain.[2608] In Mr Williams's view, the real intent of the contract was for Bain to take advantage of Ambrobrite's proximity to President Zuma and other senior politicians and to use that to their advantage to gain non-public information for their commercial advantage. In other words, to gain access to consulting opportunities that took advantage of those relationships.[2609]

47. 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.[2610]

48. A formal contract was concluded on 1 November 2013, but Bain was doing work with Ambrobrite prior to the conclusion of this written contract. For example, in September 2013, Bain arranged a party with President Zuma. This shows that Bain had commenced a business relationship with Ambrobrite prior to having concluded the written contract.

2607 Transcript 23 March 2021, p 118.

2608 Transcript 23 March 2021, p 119, lines 3 - 5.

2609 Transcript 23 March 2021, p 150, lines 15 -17.

2610 Exhibit WW1, p 24.

Mr Williams commented that this in itself was extremely unusual for Bain, as a "highly professional organisation" that would "cross T's and dot I's".[2611]

49. 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 ("**Mr Smout**") and Ms Nicole Olmesdahl ("**Ms 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". Ms Olmesdahl responded that SARS suspected that Ambrobrite's Tax Compliance Certificate was fraudulent.[2612]

50. Ms Wendy Miller, (**"Ms Miller**") the global Head of Marketing for Bain, also raised serious concerns, including whether this arrangement would pass the so-called sunshine test. This test, Mr Williams explained, asks how something will appear if it becomes publicly known. The culture was always that Bain should only do things that they assume will become publicly known.[2613]

51. Mr Massone, in response to this concern, replied that:

> "it is simply business development arrangement where these people would inform us if they are aware of changes in the key positions in a few selected companies …".[2614]

52. Even this explanation was troubling, according to Mr Williams. This idea of seeking out information about SOEs that are going to make leadership changes is very unusual.[2615]

2611 Transcript 23 March 2020, p 128, lines 16-17.

2612 Exhibit WW1, p 193.

2613 Exhibit WW1, p 207.

2614 Exhibit WW1, page 213.

2615 Transcript 23 March 2020, p 132, lines 16-19.

53. Despite these concerns which were raised by very senior people at Bain, the contract was signed. This contract was renewed every six months up until June 2016.[2616] Mr Williams commented that the contract did not contain the type of wording or attention to detail that would normally be found in a standard Bain contract.[2617] It was not a document that Bain would normally produce, let alone sign.[2618]

54. In addition, there were a number of activities which Bain conducted with Ambrobrite, which seemed to fall outside of their contractual arrangement and which are unusual against what you would normally see a management consulting firm doing. These included arranging parties with political attendees and facilitating meetings between South African and Italian senior police officials.

55. Although Bain initially applied to cross examine Mr Williams, they later withdrew their application. They withdrew after I made it clear to them that, if they sought leave to cross-examine, they would have to give their full version. That is what Rule 3.3 of the Rules of the Commission required.

Interactions between President Zuma, Bain and SARS prior to the appointment of Mr Moyane as Commissioner of SARS

56. Records show that there were approximately 17 meetings between 11 August 2012 to July 2014 between Mr Massone and President Zuma. That is 17 meetings with the President of a country over two years. That means on average Bain was having a meeting with President Zuma every six weeks over a period of about two years (24 months). Those were very frequent meetings.

2616 Transcript 23 March 2020, p 138, lines 10-11.

2617 Transcript 23 March 2020, p 145, lines 7-6

2618 Transcript 23 March 2020, p 145, line 9

57. Mr Massone's explanation for this was that these were marketing meetings, where Bain was seeking to display their capabilities to President Zuma. There was no intent to gain any consulting work, but merely part of their strategy to gain access to the public sector, to have President Zuma aware of Bain's capabilities.[2619]

58. It is absurd, Mr Williams said, that it would take 17 odd meetings to market Bain. After assessing the documents that were discussed at these meetings, Mr Williams said that these were not designed as marketing materials. In addition, Bain removed all of their corporate identity from these documents, which does not make sense if the purpose of the meetings was marketing.[2620]

59. At this point, there was no formal contract between Bain and President Zuma, or Bain and the South African government. Indeed, this was before Mr Moyane was appointed to SARS. Despite this, there were at least 12 times that representatives from Bain met with President Zuma between 2012 and 2014. This frequency and the fact that they were all after hours and behind closed doors or at the President's official residence was, on the face of it, a cause for concern.[2621]

60. There is an email dated 26 February 2014 from Mr Massone to Fabrice Franzen ("**Mr Franzen**"), Mr Dutiro and Mr Nkano, all partners of Bain at the time. The subject is "Quick Note, please keep confidential". The body of the email reads:

> "Guys, met president yesterday night in CT. All good. There was also a Tom (a guy we met via SARS) and it really seems he is getting that job after election. He was very friendly with me and seems a smart guy to work with."

61. Mr Williams explained that Mr Massone had met Mr Moyane a few months before this Cape Town meeting, hence the reference here to "a Tom" who he had met "via SARS".

[2619] Transcript 23 March 2021, p 154, lines 6 – 10.

[2620] Transcript 23 March 2021, p 154 - 155.

[2621] Transcript 23 March 2021, p 149, lines 2 – 9.

This meeting in Cape Town was between Mr Massone and President Zuma. At this meeting Mr Massone was given some assurance or indication that Mr Moyane was going to get the SARS job, which was seven months before he was actually appointed.[2622] This appointment will be discussed in further detail below.

62. Not only is it highly irregular that Bain, let alone anyone else, should know of this appointment before it took place, Mr Williams said that it was highly unusual for a management consultancy like Bain to be meeting with the President of a country at all. This is just not the work that management consultants do.[2623] Typically, Bain works with executives of companies and with SOEs on operational issues. The relationship is usually with the Directors-General ("**DGs**"), or with the CEOs of SOEs.

63. Between 2012 and 2015, Bain created a series of documents containing far-reaching plans, not only to restructure certain government agencies and SOEs, but also to restructure entire sectors of the South African economy. The details of these plans will be discussed below, but, for present purposes, the point is that these documents were all presented to President Zuma. At these meetings were also various other senior politicians.[2624]

64. One of the plans in the documentation which Bain presented to President Zuma was that "a delivery agency could be set up to overcome execution roadblocks". Mr Williams' understanding was that this delivery agency would sit outside of the executive and report directly to the President. The idea was that the President would set up a special delivery agency filled with people who could deal with so-called "execution roadblocks". Some of their powers were that they could approve projects, supervise budgets and they

[2622] Transcript 23 March 2021, p 155 – 157.

[2623] Transcript 23 March 2021, p 148 – 149.

[2624] Transcript 23 March 2021, p 159, lines 8 – 19.

potentially had the power to intervene in cases of failure and even take over execution within Ministries of these projects. This reflects a direct line from the CEO to the President, without the intervention of a Minister.[2625]

65. Judging by the content of these documents, it appeared to Mr Williams that Bain (represented by Mr Massone) met with President Zuma to discuss, develop and strategize the execution of plans to reshape the economy and elements of government, including to have a centralised procurement system.[2626]

66. The identical approach was followed with Mr Moyane and SARS. Bain developed the SARS restructuring plan with Mr Moyane, which Mr Moyane presented to President Zuma, most likely with Bain in attendance.[2627]

67. This is reflected in Mr Massone's own performance assessment for December 2013. In that assessment he said:

> "we have been involved in preparing a high level outside-in 'strategic turnaround' document on the SA Revenue Services 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 agencies and a large Bain client in the previous dispensation." [2628]

68. In effect, about nine or ten months before Mr Moyane was appointed Commissioner of SARS, he had already pitched the Bain documentation to President Zuma.

[2625] Transcript 23 March 2021, p 180 – 181.

[2626] Transcript 23 March 2021, p 185, lines 1 – 8.

[2627] Transcript 23 March 2021, p 185, lines 12 – 16.

[2628] Transcript 23 March 2021, p 186 – 187.

69. If Bain were genuinely developing ideas to improve certain SOEs or sectors of the economy, Mr Williams said he would expect that they would present such plans to the DG of the appropriate Ministry, or to the Minister, not to the President.[2629]

70. There seems, Mr Williams thought, to have been a very specific, beneficial reason for presenting these to the President that one might not ordinarily expect. It is suggested in the documents that these projects be designated as a President's Program. The significance of designating a project in this way is that it removes governance and oversight. It allows the SOE or state organs to go directly to the President, bypassing the Minister's discretionary power.[2630]

71. In Bain's application to cross-examine, Mr Stuart Min ("**Mr Min**") deposed to an affidavit. Therein he said that there was nothing untoward at all about the series of meetings between Mr Massone and the former President. He said that there was also nothing untoward about the content of any of the plans proposed.[2631]

72. Mr Williams disagreed with this assessment and said that the context of these meetings and their frequency illustrate a level of familiarity which is not benign.[2632]

"Executive training"

73. Bain's explanation for its extensive engagement with Mr Moyane before he was appointed as SARS Commissioner was that this was simply CEO coaching, which Bain normally offers to people in his position.

[2629] Transcript 23 March 2021, p 191, lines 8 – 13.

[2630] Transcript 23 March 2021, p 191 – 192.

[2631] SEQ 44/2020 in Bundle 1, page 10.

[2632] Transcript 23 March 2021, p 198 - 199.

74. However, Mr Williams said that there are a number of points which render this explanation unconvincing, and which depart quite significantly from what Mr Williams would expect to see from CEO coaching. These are: the level of detail that is presented in these plans, the fact that Mr Massone never mentions CEO coaching in his internal emails or assessments, and the fact that the plan was presented to the former President. For these reasons, the interaction with Mr Moyane was in Williams' assessment more in line with a complete high-level strategic plan than with CEO coaching.[2633]

75. Emails from Mr Massone indicated not a description of coaching, but developing a high-level strategy plan with the expectation that, if this plan was approved and the senior executive got the job, Bain would most likely be hired to work with the CEO in its detailing and implementation.[2634]

76. Mr Williams made the point that CEO coaching is a big investment on the management consultant's part. Typically, this level of investment would only be made if there is already a relationship with the company, or when Bain has expertise in that area or where there is an assurance that the person to whom you are providing the coaching is actually going to get that job. However, Bain did not have a relationship with Mr Moyane, nor did they have expertise about SARS. What did seem to exist was a common understanding amongst some at Bain that Mr Moyane was going to get the job at SARS.[2635]

77. Mr Williams told the Commission that it was fairly standard for Bain, when working with a new CEO, to have a "First 100 Days Plan". The idea is to prepare to the extent that you can from the outside, what to expect in broad terms when you arrive in the new

[2633] Transcript 23 March 2021, p 211 – 212.

[2634] Exhibit WW1, p 482.

[2635] Transcript 23 March 2021, p 212 – 214.

position. Mr Williams said that Bain would typically only present this to an executive when Bain knows that he or she has got the job.

78. On 26 May 2014, months before Mr Moyane was appointed as Commissioner of SARS, he was presented with a First 100 Days Plan.

79. What surprised Mr Williams about this plan was the level of specific guidance it contained. This, he opined, suggested that it was not purely based on the outside in approach. It suggests instead that there might have been some inside information coming from inside SARS. This was information that no one outside of SARS could possibly know.

80. Additionally, across Africa Bain had no tax authority experience. So, the fact that Bain was able to develop a document with the level of detail which this one had raised a red flag.[2636]

81. Mr Franzen indicated in an email to Mr Chris Kennedy ("**Mr Kennedy**") of Bain on 3 September 2018 that Bain had multiple meetings with Mr Jonas Makwakwa ("**Mr Makwakwa**"), Head of Internal Audit at SARS. In addition, there are emails and documentation (including a document prepared by Mr Makwakwa which was fed to Bain) which show that there were meetings between Mr Massone and Mr Makwakwa.

82. It appears clear that this senior executive at SARS was feeding sensitive information to persons outside of SARS. Not only was this illegal, it also meant that Bain had access to confidential information which was not in the public domain.[2637]

[2636] Transcript 23 March 2021, p 201 - 202.

[2637] Transcript 24 March 2021, p 31, lines 10 – 15.

83. In Mr Moyane's First 100 Days document, under the heading "Key Immediate Actions for Discussion", there were three steps mentioned, namely:

1) keep the ball rolling;

2) gain the higher ground; and

3) take control.

84. In addition, the document noted that the plan was to "build a healthy sponsorship spine to accelerate change and **identify individuals to neutralise** …".[2638] (Emphasis added)

85. Mr Moyane said that the use of the word "neutralise" was unfortunate. He said that the word was confrontational and created a bad connotation, whereas he did not intend to create strife in the organisation.[2639] Mr Moyane said that he himself did not intend to neutralise anybody. Mr Moyane said that there would no doubt be people at SARS who were resistant to change, and this wording was part of the strategy to "bring them in and not leave them outside".[2640]

86. It was put to Mr Moyane that, despite what he said he had intended, what was written in the document conveyed that he would identify individuals who might hamper change and they would be regarded as "watch outs" and he would then have to neutralise them, i.e. by getting rid of them. He said he understood this but offered the suggestion that perhaps this wording was chosen because Mr Massone's native language was Italian and not English.[2641]

[2638] Exhibit WW1, p 493.

[2639] Transcript 26 May 2021, p 153, lines 1 – 17.

[2640] Transcript 26 May 2021, p 154 – 155.

[2641] Transcript 26 May 2021, p 157 – 158.

87. Mr Moyane was not, however, aware of an updated plan where these offending words were deleted.[2642]

88. Mr Williams said that in all his years at Bain he had never used in business or consulting the idea of "neutralising" someone. Bain's explanation for this was the idea of taking people who were detractors, people who might not support your plan and turn them into people who were neutral towards you.

89. The attempts by Bain and Moyane to explain away the obvious intention behind the use of the words "neutralise" were unconvincing. The clear intention signified in plain language was to identify people within SARS to get rid of. The significance of this aspect of the plan will be discussed in further detail in a later section.

Bain's actual plan: restructuring SARS and centralising procurement

90. While Mr Massone and others insinuated that what was happening with SARS was merely CEO coaching, the evidence suggests something much broader and more sinister.

91. Mr Moyane's response to this was that there was an Annual Performance Plan of 2014/2015 which spoke of the re-organisation of SARS. Parliament in its wisdom was aware of certain shortfalls in the organisation, said Mr Moyane.[2643] This document was not produced to the Commission by Mr Moyane.

92. The consistent theme in the documents that Bain created is that of restructuring. It was Mr Williams' view that this was aimed at bringing as many organisations and as many

[2642] Transcript 26 May 2021, p 161 – 162.

[2643] Transcript 26 May 2021, p 149 and 193.

financial resources under more concentrated control as possible, which could greatly facilitate state capture.[2644]

93. This type of work is not within the expertise that management consultants typically would have. One would expect an economist or policy advisor to be doing this type of work.[2645]

94. Mr Williams says that restructuring an organisation is something that you do with utmost care and you always want to find other ways of improving before you restructure. In fact, it is the last thing that you do in an organisation because of the institutional memory which is lost if you restructure an entity like SARS.[2646]

95. Mr Symington told the Commission that in around August 2015 the new model for SARS (designed by Bain) was presented to the executives of SARS as a *fait accompli.* He said that they were never even consulted "about their divisions or their expertise or anything". When they saw this model, they said that it was foreign to them and they could not see themselves in that model. He said that they could not see how the new model was going to be more efficient than what they had at the time.[2647]

96. Mr Moyane, however, said that he could confirm without contradiction that he ran a consultative organisation in which everything was put before a team for discussion and approval. He said that he never took a "dictatorial position".[2648]

97. Bain did not limit its plans just to SARS – the documents speak of reshaping the South African economy through restructuring organisations and sectors.[2649] Mr Williams

[2644] Transcript 23 March 2021, p 159 – 162.

[2645] Transcript 23 March 2021, p 160, line 17.

[2646] Transcript 23 March 2021, p 161, line 21 – 25.

[2647] Transcript 25 March 2021, p 55, lines 10 – 20.

[2648] Transcript 26 May 2021, p 62, line 21.

[2649] Transcript 26 May 2021, p 160, lines 10 – 19.

pointed to eight documented plans which were labelled "reshaping the South African Economy".[2650] These included plans to reshape various sectors like ICT, energy and infrastructure.

98. These plans included a vision of how various SOEs were imagined to be dismantled and reassembled "like a puzzle" into a particular operating model.[2651]

99. In one of these documents Bain identified that one of the opportunities for change would be to centralise procurement. The argument was that, given the large infrastructure spend across these entities, efficiencies would come from better procurement processes. Procurement seems to have been a big focus of these plans.[2652] In the light of the critical role that procurement abuse has played in state capture in the evidence before the Commission, this focus takes on an extra significance.

100. Mr Williams said that there were cases where centralising would make sense. When one centralises different business, the common wisdom is that there has to be real strategic synergy between them. Just "lumping them together" is not always a wise idea.[2653]

101. Mr Williams said that centralise all government departments, nationally, provincially and locally is "absurd". There are very few countries in the world that centralise their procurement across government. It could lead to serious delays and blockages in terms of service delivery. In addition, Mr Williams thought that, in the context of state capture, it was particularly nefarious.[2654]

[2650] Exhibit WW1, p 40.

[2651] Transcript 23 March 2021, p 167, lines 13 – 23.

[2652] Transcript 23 March 2021, p 168, lines 1 – 9.

[2653] Transcript 23 March 2021, p 183.

[2654] Transcript 23 March 2021, p 183 - 184.

102. Mr Williams identified what he thought were the various stages in the strategy. Stage A is to create a new macro structure in the target sector. Stage B is to restructure individual organisations within the macro structure. Stage C is to exert control of those repurposed originations and pursue private, financial enrichment through corrupt procurement and other means.[2655]

103. There were also documents which spoke of plans of an entirely different nature. These were entitled "ANC Manifesto implementation". According to the records of meetings, Mr Massone had "3 – 5" meetings to discuss the topic of the ANC manifesto and what he called a "100 days' plan". This was presumably a blueprint of action for the ANC, much like the blueprint created for Mr Moyane at SARS. These ANC manifesto documents include a discussion relating to the Cabinet planning process and performance agreements for Ministers and Directors-Generals (DGs). The documents make explicit reference to the ANC Top 6 and DGs in the Presidency.[2656]

104. It is a notable feature of the SARS evidence, in contrast to the rest of the evidence which the Commission heard, that this is one of the few instances where President Zuma was himself directly and personally involved in the activities and plans to take over a government entity, namely, SARS. Another was Eskom which is discussed elsewhere in this Report.

Bain's knowledge of Mr Moyane's appointment

105. In a response to a query about how a meeting had gone, Mr Massone sent an email to Mr Franzen on 4 April 2014, which said:

> "Thank you, Fabrice, it went very well
> SARS is aa go, right after the elections

[2655] Transcript 23 March 2021, 189 – 190.

[2656] Exhibit WW1, p 32, paragraph 74.3

> Central procurement agency: he loves it, wants an implementation plan
>
> . . .
>
> asked us to organise a workshop with the new cabinet of ministries after the elections . . .
>
> So I would say very well. ."[2657]

That must have been President Zuma that Mr Massone was talking about.

106. Mr Williams' understanding of this meeting was that it was one that took place between Mr Massone and President Zuma. From that meeting, Mr Massone was giving the impression that SARS was a "go", meaning that Bain was expecting to be doing work with SARS and that they were given some assurance of that. Also, Mr Massone seems to have been assured that Mr Moyane was going to be the Commissioner and, therefore, that Bain would be given that work by him.[2658]

107. By this point, Mr Massone had presented the Central Procurement Agency plan and they had seen that President Zuma seemed to like that and supported the concept.

108. Then on the 28 August 2014 Mr Massone sent an internal email which said:

> "Guys, just had a call and heard that the SARS announcement should happen tomorrow or Monday. Meeting later in the office to also discuss a procurement process."[2659]

109. This is further evidence that Bain was privy to information about the appointment of the new Commissioner of SARS months before the public of South Africa knew about it.

[2657] Exhibit WW1, p 470

[2658] Transcript 23 March 2021, p 157

[2659] Transcript 24 March 2021, p 24-25, lines 24-5, 1-3

Tender procedure: the irregular use of confinement to avoid open competition, transparency and scrutiny

110. All of the interactions described above took place before Bain had any contractual agreement in place between itself and SARS or the South African government.

111. Due to the fact that SARS is a public institution, it is required by law to conduct an open tender process before it procures any goods or services. Bain was appointed to perform consultancy services in January 2015. There are a number of irregularities in the procedure which preceded this appointment.

112. The Request for Proposals (RFP) that SARS issued in October 2014 described in detail the scope of work that was to be performed, including a comprehensive organisational and strategy review of SARS and a redesign of SARS. The document contemplated the appointment of an external consultant. The process was recorded to be by a closed tender – meaning it would only be sent to a closed list of consulting firms.[2660]

113. The first problem is one that was dealt with right at the start of this section of the Report: the need for consultancy services at all. At that point in time, SARS was a well-functioning and highly effective organisation. There was no justifiable reason for it to hire external consultants to perform the stated services. In addition, the deliverables (like how to improve SARS's collection capability and enhance SARS' operational performance through restructuring) were ones which were far-reaching and extreme.

114. Organisations hire management consultants for their particular expertise. In this instance, Mr Massone said in an email dated 18 November 2014:

[2660] Transcript 24 March 2021, p 38, line 10

> "As much as it is 'designed for us' . . . we need to make sure they feel comfortable with the team and our expertise (and we know that we can't claim to have done much on the specific topic)".[2661]

115. Bain knew that they did not have the necessary expertise. They must have thought South Africa did not know this or did not care whether they had the necessary expertise. I think President Zuma and Mr Moyane neither knew nor cared.

116. This is Bain admitting that they did not have the necessary expertise to be awarded this contract, and that, despite this, they were almost assured that they were going to get the work.

117. In addition, there are emails from various Bain employees (sent to the whistle-blower email address set up by Baker McKenzie, the firm tasked with investigating Bain's involvement in SARS) which explain what the experience of working at SARS was like at this time. She says:

> "it was apparent to me that we were not in fact creating any value for the client and that the clients were largely uninterested in us. . . [O]ur work there was effectively a sham. . . [S]omething was simply not quite right. . . [T]he work they were doing was unethical".[2662]

118. Secondly, investigations have shown that the RFP which was issued by SARS was based on a draft compiled by Mr Franzen, a Bain executive. This is obviously a document which SARS should have drafted itself, as a public institution. To have one of the potential consultants themselves draft the "rules of the game" by which they were going to be judged was anticompetitive and contrary to the prescripts which govern procurement.[2663]

[2661] Exhibit WW1, p 573

[2662] Transcript 24 March 2021, p 66, lines 2-12.

[2663] Transcript 24 March 2021, p 66, lines 1-17.

119. Thirdly, evidence shows that there was a request for information and references from Bain at a time prior to the RFP having been issued.[2664] Communication with potential bidders prior to the issuing of an RFP is irregular, in terms of the governing legislation. The communication was a request for references regarding any public entity relationships which Bain had.

120. The communications were from a Ms Mogogodi Dioka, a person from SARS' executive procurement department. She deposed to an affidavit to the Commission in which she denied any irregularity in relation to having asked Bain for references.[2665] On her own version, she did not deny that the references requested were for procurement purposes. She said that the references were related to the piggybacking procedure (discussed below). It still raises the question of why SARS was seeking references from Bain before any tender process or contracting process had begun.

121. This exchange suggests that SARS had already decided as early as 2 December 2014 that Bain would be their consultant.

122. Fourth, there was an attempt to "piggyback" off the contract that Telkom had with Bain, in order to give a mandate to Bain. Piggybacking is the process when one uses an existing contract to acquire the same services on the strength of another public entity contract. In an email from Mr Massone to Mr Sipho Maseko, the then Chief Executive Officer of Telkom, on 4 December 2014, it was acknowledged that this was explicitly to "enable an immediate start avoiding long and complicated tender processes".[2666]

123. As it turned out, this method was not used. It was determined by Mr Maseko and Telkom that this was not an appropriate arrangement. In any event, the discussion of this as an

[2664] Exhibit WW1, p 580.

[2665] Exhibit WW7, p 42.

[2666] Exhibit WW1, p 582.

option shows an attempt to circumvent the regular open tender procedures which should have been followed.

124. SARS issued an RFP in December 2014 to which Bain and other consulting firms responded. It was for a six-week piece of work which they referred to as the diagnostic.

125. In January 2015 Bain made a submission to SARS in response to the RFP which SARS had sent out. The document was headed "The Bain team brings considerable experience and expertise to the table".[2667] This was clearly an attempt by Bain to demonstrate their apparent expertise that might be applicable to the work at SARS.

126. However, when one conducts a consulting project, the main source of the expertise on the consultant team derives from the partners and the most senior people on the team. Mr Massone and Mr Franzen were the partners on this team and Mr Williams said that they had no apparent expertise working with tax authorities around the world, in Africa or at SARS. Mr Massone's expertise was in telecommunications and Mr Franzen's was in financial services, mainly banking.[2668]

127. It was put to Mr Moyane that the Bain leadership that was ultimately appointed by SARS as consultants had no revenue authority experience. Mr Moyane responded that, based on the discussions that he had with them, they had done consultancy with other organisations – specifically benchmarking with international revenue organisations in the world.[2669] He said that he would not know that the consultants did not have experience in the relevant field.

[2667] Exhibit WW1, p 620.

[2668] Transcript 24 March 2021, p 44 - 45, lines 21-25.

[2669] Transcript 26 May 2021, p 190 - 1911.

128. The Bid Adjudication Committee at SARS expressed some discomfort with parts of Bain's proposal. Despite this, Bain was awarded their first contract in January 2015. However, the Committee made it very clear that, if there were to be any additional work, SARS had to go back to the market to open tender.[2670]

129. This work began in January 2015 and continued until March 2015.

130. Fifth, when the first contract came to an end, there was a flouting of the procurement legislation 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.[2671]

131. Email communications between Bain and SARS show that there was collusion between the consultants and SARS to get around the procurement process which was required for a valid extension of the original contract. The Commissioner, at this point Mr Moyane, apparently had communications with the people involved in the procurement decision making. Mr Makwakwa told Bain "do not worry" about the extension because they were "going to make a plan" because the Commissioner had "gone to see" the people in procurement.[2672]

132. After back-and-forth communications, a solution – a "legal way" to get around having to have the work go out to open tender - was arrived at.[2673] This was for SARS to declare the Bain project an emergency or 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 said that no one could say

[2670] Transcript 24 March 2021, p 48 - 49.

[2671] Transcript 24 March 2021, p 49, lines 10 - 5.

[2672] Transcript 24 March 2021, p 50, lines 4 - 7.

[2673] Transcript 24 March 2021, p 54, lines 12 - 4.

that SARS “drastically and urgently need to be restructured or that Bain was the only organisation in the country who could do that”.[2674] Nevertheless, the extension into phase two of the work took place via this procedure. This lasted until June 2016.

133. Once again, in June 2016 the issue of how to extend the contract arose. Mr Massone wrote an internal email that said Bain could not go to the market because “if we do go to the market, we know we will lose”. He was clear that Bain would not be awarded the work if the process were to be a competitive tender one.[2675]

134. 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. Those earlier phases, it was argued, would have no impact on SARS and it would render the expenditure thereon wasteful. National Treasury then had their hands tied because they did not want to incur wasteful expenditure. Mr Williams explained, however, that phase three was actually focused on something different from the earlier two phases. So in that sense, the argument held no water.[2676]

135. The upshot is that there was never an open tender process run in relation to phases two and following.[2677] Bain just continued to do work at SARS.

136. Despite all this, Mr Moyane said that there was nothing untoward or irregular about Bain’s subsequent appointment.

137. Bain issued a public statement on or about 17 December 2018, which read:

[2674] Transcript 24 March 2021, p 55, lines 6 - 8.

[2675] Transcript 24 March 2021, p 55 - 56, lines 24. – 5.

[2676] Transcript 24 March 2021, p 56 - 57, lines 21-25.

[2677] Transcript 24 March 2021, p 57, lines 5-6.

> "The past few months have been a highly challenging and sobering period for Bain South Africa and Bain globally . . . it has become painfully evident that the firm's involvement with the South African Revenue Service, SARS, was a serious failure for South Africa, for SARS and clearly for Bain too. The [Nugent] Commission's hearings and the final report published last week have laid bare the disarray in which SARS now finds itself with both morale and performance severely damaged."[2678]

138. Contrary to the explanation they give, the evidence shows that Bain did not arrive at SARS as an unwitting participant in the events that followed. In fact, Bain arrived at SARS, as Mr Moyane did, with a restructuring agenda. The evidence shows that that was designed months before either of the parties was formally appointed.

139. The scene was set for Mr Moyane to execute the plans which had been developed together with Bain and presented to and accepted by President Zuma.

140. Before examining what changes Mr Moyane made while Commissioner, the next section of the Report looks at how various strategic appointments and dismissals within SARS facilitated the execution of the plans which had been developed, prior to Mr Moyane arriving at SARS, starting, of course, with his own appointment.

The strategic positioning of compliant individuals

141. Minister Gordhan (whose evidence is recounted in greater detail later, in Section E) told the Commission that the post of SARS Commissioner was advertised by the Ministry of Finance in the latter half of 2013. The closing date for applications was 13 September 2013.[2679] The Ministry received more than 120 applications.[2680]

142. Minister Gordhan became aware that the former President wished to exercise his powers to appoint the new Commissioner. The Minister advised him that he may wish

[2678] Transcript 24 March 2021, p 73, lines 11 – 24.

[2679] Exhibit WW1, p 77.

[2680] Exhibit WW1, p 14, para 33.

to put his preferred candidate through the usual process (i.e. the interview and Cabinet consultation process).[2681] In the event, it would appear that he ignored this suggestion.

143. In the affidavit which he submitted to the Commission, Mr Moyane said:

> "At some point in the very early part of 2013, the President informed me, in strict confidence, that he intended to appoint me to the position of SARS Commissioner".[2682]

144. Only in the second half of 2013 was the position of SARS Commissioner advertised in the mass media. On his own version, Mr Moyane was informed that he was going to be appointed before the position was even advertised.

145. When asked about this during his testimony, Mr Moyane said that that was an error, and that it should be the later part of 2013, after September that he had this discussion with the President. His version became that the President spoke to him after he had submitted his application.[2683] Be that as it may, Mr Moyane was secretly assured by Mr Zuma that he would be given the post of Commissioner well in advance of the actual appointment. One gets reminded of Mr Brian Molefe whose appointment as Group Chief Executive Officer of Transnet was predicted by the New Age, the Gupta newspaper, before the position was advertised and whose later appointment as Group CEO of Eskom was told by Mr Salim Essa to Mr Henk Bester already in 2014.

146. Mr Moyane was formally appointed as Commissioner of SARS by President Zuma on the 23 September 2014.

[2681] See section 6 of the South African Revenue Services Act 34 of 1997.

[2682] Exhibit WW6, p 29; Transcript 24 March 2021, p 96, lines 12-5.

[2683] Transcript 26 May 202, p 108, lines 14-6.

147. In his evidence, Mr Moyane maintained his innocence and denied any involvement in state capture. His contention was that his human dignity had been "maliciously tarnished most probably for the sake of political expediency".[2684]

The purging of competent top officials

148. In addition to the appointment of the "pliant" Mr Moyane, this era was also characterised by the purging of competent officials at SARS.

149. Mr Barry Hore was the Chief Operating Officer (COO) of SARS. He had been brought to SARS by Minister Gordhan at the very early stages of the modernisation program. Mr Symington told the Commission that Mr Hore, together with Mr Ivan Pillay and Minister Gordhan drew SARS into a whole different direction, modernising the institution so much that by 2008/09 (as noted above) it was recognised internationally as one of the best in the world at tax administration.[2685]

150. Mr Hore had 70% of the SARS operations staff reporting to him – so he was the key person who made SARS function as it ought to.[2686]

151. Mr Hore was also the individual specified in the section of Mr Moyane's First 100 Days Document that he was advised to "neutralise." His name was specifically mentioned in this document which Bain had prepared for Mr Moyane, with the words "Test BH the COO", meaning test Mr Hore.[2687]

[2684] Transcript 26 May 202, p 46, lines 15-8.

[2685] Transcript 25 March 2021, p 57, lines 8-13.

[2686] Transcript 24 March 2021, p 62, lines 2-5.

[2687] Transcript 24 March 2021, p 59, lines 18-23.

152. Mr Moyane said that there was no intention to test Mr Hore. Mr Moyane conceded however as he had to, that that was what was written in the plan, but he testified simply that there was nothing to indicate that there was a need for them to test Mr Hore.[2688] Of course this begs the question why these words were used.

153. On 3 December 2014 Mr Franzen wrote to Mr Massone and said:

> "Good bye 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."[2689]

154. A mere matter of weeks after his appointment, Mr Moyane is alleged to have made Mr Hore, a highly competent executive, resign. This outcome appears to reflect exactly the intention that is recorded in the First 100 Days document. When pressed, Mr Moyane agreed that "on the face of it" the email suggests that Mr Massone thought he "took [Mr Hore] out".[2690]

155. Mr Moyane said that there was no acrimonious relationship between them, and that he was leaving because he "wanted his own time". He said that they "never had any fights".[2691] This explanation is not plausible when judged against the objective facts. Mr Hore's forced departure was part of the execution of the plan.

156. Later, Mr Makwakwa became the COO of SARS. This is the same individual who was allegedly feeding Bain sensitive, confidential information with which it was able to create its detailed plans for Mr Moyane.

2688 Transcript 26 May 2021, p 165, lines 7-20.

2689 Transcript 24 March 2021, p 59, lines 8-16.

2690 Transcript 26 May 2021, p 176, lines 1-10.

2691 Transcript 26 May 2021, p 167, lines 2-6.

157. The resignation of Mr Hore was not an isolated incident. It was part of a pattern. The following is a list of people from the top echelons of SARS who left before one year of Mr Moyane's tenure was up:

157.1. Mr Johann van Loggerenberg**,** Group Executive: Enforcement Investigations, resigned in February 2015;

157.2. Mr Adrian Lackay**,** Spokesman for SARS, resigned in March 2015;

157.3. Mr Ivan Pillay, the Acting Commissioner, resigned in May 2015;

157.4. Mr Peter Richer, Group Executive: Strategic Planning and Risk, Acting Chief Officer: Strategy Enablement and Communications, left in May 2015; and

157.5. Mr Gene Ravele, Chief Officer: Tax and Customs Enforcement Investigations, resigned in May 2015.

158. Importantly, too, Minister Gordhan was allegedly seen as an obstacle to parties involved in state capture. This is according to Mr Symington. The attempts to remove and discredit Minister Gordhan will be dealt with in further detail below. Suffice to say for present purposes that he was one of the individuals that Mr Moyane attempted to target.

159. In addition, two weeks after taking over in September 2014, Mr Moyane disbanded SARS's entire Executive Committee on the basis of an apparent Sunday Times exposé about a so called "Rogue Unit". This too will be dealt with in further detail in a later section. The "Rogue Unit" saga was hugely damaging to SARS and many of its people.

160. Mr Moyane took umbrage with the assertion that he was the reason for the departure of the senior personnel identified above. He said he played no role in them leaving.[2692] However, this is just not credible. An essential part of Mr Moyane's 100 Day Plan was to identify individuals that could hamper change and neutralise them. It would appear from the facts that this is precisely what Mr Moyane did. There is no other rational explanation for the sudden departure of so many senior people in such a short space of time.

The restructuring and deliberate weakening of institutional functions

SARS' oversight and enforcement function

161. At the time Mr Moyane was appointed as Commissioner of SARS, the revenue service had highly effective and well-functioning enforcement units. Mr van Loggerenberg told the Commission that there was "no doubt" in his mind that Mr Moyane had a clear brief to restructure SARS and to dismantle its enforcement capabilities as soon as possible.[2693]

162. One of the functions which SARS carried out was investigation of compliance with tax and customs legislation. There were various SARS units which were mandated to track and monitor ongoing investigations and audits of the then SARS Special Investigation offices, countrywide.

163. In 2000 as part of the modernisation process at SARS, Mr van Loggerenberg was tasked with starting an experimental unit known as the SARS Special Compliance Unit ("**SCU**").

2692 Transcript 26 May 2021, p 186 – 8.

2693 Exhibit WW2, p 74, para 208.

The SCU was mandated to assist law enforcement agencies to control organised crime, from a revenue and customs perspective.[2694]

164. This unit went on to make a marked impact against organised crime from a tax and customs and excise perspective. It worked closely with the South African Police Services ("**SAPS**"), National Prosecution Authority ("**NPA**"), National Intelligence Agency ("**NIA**"), South African Secret Service ("**SASS**"), Marine Coastal Management Asset Forfeiture Unit and the Metro Police Departments. There were operational agreements which existed between the revenue service and these state organisations, which gave guidance as to how the assistance should take place.[2695]

165. Mr van Loggerenberg also worked in the SARS Business Intelligence Unit ("**BIU**"). This unit grew in size and continued with the mandate of conducting case selection, tracking and monitoring of non-compliance, and investigations and audits and research into the so-called tax gap.

166. Mr van Loggerenberg explained that there were various sub-units or sub-groupings within this unit which were staffed with people who had particular skills or capabilities that would focus on tax compliance in different parts of the economy. This meant that the revenue service had a research capability that could collect, collate and analyse and distribute knowledge of specific areas of the economy, to those parts that had to either service, collect tax or enforce the tax, customs, or excise laws.[2696]

167. The BIU worked closely with Law Enforcement Agencies because what they examined included non-compliance with tax legislation which inevitably overlapped with people

[2694] Transcript 25 March 2021, p 65.

[2695] Transcript 25 March 2021, p 67.

[2696] Transcript 25 March 2021, p 68 – 69.

who were "not necessarily doing the right thing in society". This enabled government to address the non-compliance.[2697]

168. Around 2005 Mr van Loggerenberg was tasked with amalgamating the several enforcement units countrywide into a single unit, then named the SARS National Enforcement Unit ("**NEU**").[2698]

169. By 2010 Mr van Loggerenberg was promoted to the position of group executive and he oversaw the alignment and functions of five units which were housed under a sub-division called the Projects and Evidence Management and Technical Support Division ("**PEMTS**").[2699]

170. The first of the five units included a later iteration of the NEU (renamed the National Projects Unit) which was the largest investigative component at the time. They conducted civil and criminal investigative projects. The targets were organised crime and tax, customs and excise offenders. The focus was primarily on the "illicit economy", which includes all criminal activity which has an impact on the fiscus in South Africa.[2700]

171. There is a distinction in the revenue services between money supply that comes from legitimate economic activities in the formal and informal sectors. This is known as the licit economy. Superimposed onto this is the illicit economy, which refers to those activities within society which make money or cause money to be spent in some way, but which are unlawful. This essentially involves people committing crimes with the aim

[2697] Transcript 25 March 2021, p 69.

[2698] Transcript 25 March 2021, p 69.

[2699] Transcript 25 March 2021, p 71.

[2700] Transcript 25 March 2021, p 73 – 74.

of making money. In South African law, the source or the origin of income is not relevant for tax paying purposes. Any income is taxable, even if it is illicit.[2701]

172. In order to address the R100 billion which the illicit economy was costing the state each year, the SARS Illicit Economy Strategy was developed and approved by Parliament. It was in place from 2006 until 2013.[2702]

173. The second unit which Mr van Loggerenberg described was the Centralised Project Unit ("**CPU**") which was mandated to conduct civil investigative projects aimed at combatting and recovering tax, customs and excise losses in the illicit economy and criminal enterprises and to detain, seize and ensure forfeiture of illicitly controlled and smuggled goods associated therewith.[2703]

174. The third unit was the Tactical Intervention Unit ("**TIU**"), which was part of border control. Its members were based at the majority of ports of entry to South Africa and they conducted investigations at the point where goods may have entered the country as well as where goods were leaving the country. This is where smugglers of illegal goods like drugs or cigarettes would be detained and searched and raids conducted.[2704]

175. The fourth unit was the Evidence Management and Technical Support Unit ("**EMTSU**"), which drew together the country's best experts who provided auxiliary support services to the other three units. These were people with rare skills which would be made available on demand to the respective investigative units.

[2701] Transcript 25 March 2021, p 83.

[2702] Transcript 25 March 2021, p 92.

[2703] Transcript 25 March 2021, p 74.

[2704] Transcript 25 March 2021, p 84 – 85.

176. The last of the five units was the High-Risk Investigation Unit, which provided auxiliary support assistance to the other investigative units and also to the other law enforcement agencies.[2705]

177. These enforcement units had the overall aim of monitoring illicit activities and ensuring that revenue was collected as it ought to be and that persons who were not complying with the law were apprehended and dealt with.

178. SARS' ability to enforce the laws it oversaw and its capacity to do so became increasingly effective over the years, ultimately being praised and studied worldwide.[2706]

179. By 2015, when Mr van Loggerenberg resigned, the PEMTS sub-division was at the forefront of investigating organised crime and was running at least 87 projects. These included investigations into smuggling activities with specific emphases on tobacco and alcohol related products.[2707]

180. One of these was Project Honey Badger. This focused on the tobacco trade. The cigarette industry in particular, which is a sub-element of the tobacco trade, has always been a problem and government and legitimate businesses suffer as a result.[2708]

181. In the 2011/12 fiscal year SARS collected R10.8 billion in excise from the tobacco sector. In the 2013/14 fiscal year, as a result of the activities in the revenue services including Project Honey Badger, this amount increased to R11.5 billion. Then in 2013/14, it went up to R13.1 billion. For the period that Honey Badger was in operation, there was a 15%

[2705] Transcript 25 March 2021, p 87.

[2706] Transcript 25 March 2021, p 90 – 91.

[2707] Transcript 25 March 2021, p 94.

[2708] Transcript 25 March 2021, p 133 and 137.

year-on-year increase in excise flow attributable to just this small sector in the economy.[2709]

182. Mr van Loggerenberg did a test in December 2013 and January 2014 to measure Project Honey Badger's effect and the analysis showed that the illicit component of the total industry as a whole was not just halted, but it was turned back. This meant that there were people who had previously been cheating the system, but who were now voluntarily paying money to SARS without having to be pursued.[2710] The result was that they were "winning that war" and really making an impact.

Dismantling of PEMTS

183. Despite its effectiveness, or, perhaps because of it, the PEMTS was dismantled and its projects brought to a close in a very short space of time after Mr Moyane had taken over.

184. The net effect of dismantling PEMTS in particular was that all the cases which Mr van Loggerenberg described and many others were negatively affected in one way or another by slowing them down completely, allowing insight into SARS' evidence and giving those subjects under investigation an advantage over SARS. This ultimately led to SARS having no really effective means to address the illicit economy or organised crime from a tax and customs perspective.[2711]

185. There are some common features between all these cases. The first is that they came to a halt in and around 2014, when Mr Moyane was appointed Commissioner. Second, the beneficiaries affected in those cases were persons in virtually every single one of them had connections to politicians and politics. Third, all of them relate to sophisticated

[2709] Transcript 25 March 2021, p 137.

[2710] Transcript 25 March 2021, p 138.

[2711] Exhibit WW2, p 74, para 209.

and complicated criminal schemes. Finally, all of them allegedly involved state intelligence operatives.[2712]

186. The starkest example of the effect of dismantling PEMTS is what happened when Project Honey Badger came to a halt in late 2014 or early 2015 under Mr Moyane's tenure. In contrast to the previous three years where the quantum of excise duties which were being collected was increasing, in the 2015/16 and 2017/18 fiscal years, there was a 15% *drop* in the excise figures for tobacco. In addition, the illicit component of the industry increased to 30%.[2713]

187. It is clear that SARS' previously exceptional capabilities had been severely weakened. It seems, too, that this benefitted those persons whom SARS was investigating and pursuing.

188. Despite all of this, Mr Moyane told the Commission "without any fear of contradiction, that the Bain/SARS relationship yielded the best results ever recorded in the entire history of SARS".[2714]

189. When pressed about the vast chasm between his version and what Bain and the SARS witnesses said, Mr Moyane said that he accepted this difference because "we are talking from different perspectives".[2715] It is not clear what that answer was meant to mean.

[2712] Transcript 25 March 2021, p 144.

[2713] Transcript 25 March 2021, p 139.

[2714] Exhibit WW6, p 32, para 66.12.

[2715] Transcript 26 May 2021, p 58.

Resistance to SARS' investigations

190. Before the dismantling referred to above, the revenue services started making an impact in the early 2000s, by putting illegal drug dealers and drug manufacturers and cash in transit heist offenders in jail for tax evasion. At first, some of the "crooks and rogues" responded by trying to corrupt officials at SARS.[2716]

191. By the time the SCU was operating, these people had altered their response. Typically, they would delay when they were obliged to submit information or they would ask for extra time. They also would "name drop". They would insinuate that they had connections with Ministers and that, if they were pursued by SARS, SARS would be "touching" those important people, too.[2717]

192. There were also threats made against SARS employees. Mr van Loggerenberg said that this escalated by the mid-2000s to the point where SARS people were being held hostage, shot at, murdered, assaulted, their families threatened and their equipment stolen.[2718]

193. Mr van Loggerenberg said that, despite these threats, SARS were good at mitigating the risks as best they could. Because they were effective in countering these attacks, the resistance changed. It began to turn into personal attacks on individuals, usually in the form of rumours or an accusation contained in a dossier, which was completely unsubstantiated. This became "par for the course" by 2014.[2719]

[2716] Transcript 25 March 2021, p 95 – 96.

[2717] Transcript 25 March 2021, p 96 – 97.

[2718] Transcript 25 March 2021, p 97.

[2719] Transcript 25 March 2021, p 98 - 99.

194. The way that SARS would deal with these allegations was to take the dossier in which the allegation was found, analyse it in detail and demonstrate where the truth lay. This process took a lot of time. It also did not solve the problem of another dossier landing on SARS' doorstep the next day.

195. What SARS would say to the public, through official statements, was that they were:

> "… aware there are people who have a vested interest in creating confusion in state institutions. . . . certain individuals with an interest in perverting the course of justice by compiling dossiers, files and information which purport to uncover corruption but are in fact a concoction of some fact and much fiction. Such dossiers are then distributed to the media, certain LEAs and political players in the hope of disrupting or thwarting a SARS action. SARS now has significant and credible evidence showing incidents of spying, double agents, dirty tricks, leaking of false allegations and the discrediting of officials. SARS is collaborating with the directorate of priority crime investigations (The Hawks) and State Security. We are confident that soon many of the undesirable practices in the industry will come to light and the individuals will be held to account."[2720]

196. As the statement shows, SARS had begun at this stage to formally engage with the State Security Agency and the Hawks to address this problem.

The climate of fear and bullying

Attacks on SARS

197. Mr van Loggerenberg said that from the end of September 2014, when the appointment of Mr Moyane as Commissioner was announced "out of the blue", two things happened.[2721]

[2720] Exhibit WW2, p 33, para 85.

[2721] Transcript 25 March 2021, page 99.

198. First, almost “overnight” when Mr Moyane took over, 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.[2722]

199. 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.[2723]

200. 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.

201. 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.

202. In what he described as the final attack, Mr van Loggerenberg told the Commission that a dossier appeared on the 12th of 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

[2722] Transcript 25 March 2021, p 99 - 101.

[2723] Exhibit WW2 at page 33, para 86.

members of the Rogue Unit were illegally spying on President Zuma, and that they had bugged his home.[2724] Poor journalism at the Sunday Times allowed these allegations to appear in more than 30 articles published between August 2014 and April 2016. They have since been retracted.

203. The tenor of the allegations, which were published as fact, were that Rogue Unit members had broken into the former President's home and following this, listening devices had been found in his home.[2725]

204. 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.[2726]

205. Despite the serious allegations appearing in the Sunday Times over an extended period of time and allegations being made against senior officials within SARS, Mr Moyane never approached any of those officials against whom allegations were made in the press to establish their response to the allegations. This was strange behaviour on Mr Moyane's part as the Commissioner of SARS because, it would be expected that, if he knew nothing about the allegations in those articles, he would have raised the issue with the individuals concerned. One would not have expected him as the leader of SARS, concerned with the image and reputation of SARS to just keep quiet when there were so many articles in newspapers which were negative about SARS. The fact that he kept quiet suggests that he knew well where the allegations were coming from. In addition,

[2724] Transcript 25 March 2021, p 105.

[2725] Transcript 25 March 2021, p 105.

[2726] Transcript 25 March 2021, p 120.

despite the institution being under significant attack, there was no response from SARS itself. That, too, was strange behaviour on Mr Moyane's part.

206. The six members of the SARS High-Risk Investigations Unit (the so-called "rogue unit") wrote to Mr Moyane and other senior SARS officials on 16 October 2014. They indicated that all the claims in the newspaper were false, and they requested that an investigation be initiated. There was a number of requests which they made to Mr Moyane, including that SARS bring legal action against the Sunday Times. They offered to be polygraphed and made other suggestions aimed at demonstrating their innocence.[2727]

207. Instead of engaging with the implicated people who called for his assistance, Mr Moyane used the reports instead to launch an investigation into "rogue" activities at SARS and to suspend the former Acting Commissioner, Mr Ivan Pillay, as well as most of the agency's investigative staff, led by Mr van Loggerenberg. A large number of people was affected.

208. The sequel to the Rogue Unit saga is that each and every component of what turned out to be the false narrative in relation to the High-Risk Investigative Unit has been dismantled and there have been definitive judicial findings in respect thereof. The Sunday Times withdrew their allegations unconditionally and issued an apology. Mr van Loggerenberg said that the newspaper also admitted that they had been used as part of a project to cause harm to state institutions.[2728]

209. Most significantly, the Full Bench of the Gauteng Division of the High Court handed down a judgment in 2020 in relation to the lawfulness of the unit. The court said it could "…find no factual or legal basis upon which it can be concluded that the establishment of the

[2727] Transcript 25 March 2021, p 112. See also Exhibit WW2, p 84.

[2728] Transcript 25 March 2021, p 128.

unit was unlawful…".[2729] The court held that the manner in which the Public Protector determined that the unit was unlawful, was "…not only wrong in law, but irrational and falls to be reviewed and set aside".[2730]

210. The court also held that the conclusion reached by the Public Protector 'that the allegation that Minister Gordhan during his tenure as the Commissioner of SARS established an intelligence unit in violation of the South African Intelligence prescripts is substantiated", was "without foundation particularly as this conclusion is based on discredited reports and unsubstantiated facts. This finding is further wrong in law…".[2731]

211. Despite the definitive findings of a Court in the Full Bench judgment, Mr Moyane, even at the stage he gave oral evidence in March 2021, still maintained that the unit was unlawful.[2732] His stance has no rational basis. It is telling that he still clung to an entirely discredited view. He could not himself say why the Full Bench of the High Court was wrong. In any event, until that judgment is overruled, it set the legal position.

212. References to the "rogue unit" loomed large during Mr Moyane's tenure at SARS, and he raised it at every turn as a justification for his actions.[2733] The evidence suggests that as Commissioner Mr Moyane based a number of his decisions and actions on the propositions that there was an unlawful rogue unit. One of those decisions was the decision to disband the Executive Committee. The departure of a number of senior people discussed above was also connected with allegations of the existence of the so-called Rogue Unit. Mr Moyane's vehement denial of this assertion is at odds with the findings of the Nugent Commission.[2734] The alleged existence of the Rogue Unit was a

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2729 *Gordhan v Public Protector and others* [2020] JOL 49105 (GP), para 101.

2730 *Gordhan v Public Protector and others* 2020] JOL 49105 (GP), para 106.

2731 *Gordhan v Public Protector and others* [2020] JOL 49105 (GP), para 291

2732 Transcript 25 May 2021, p 206, line 2-10.

2733 Transcript 26 May 2021, p 205, line 21-24.

2734 Transcript 25 May 2021, p 206, line 2-10.

pretext under which to target people. The fact that Mr Moyane still asserts the establishment of the unit was unlawful is telling.

213. Mr van Loggerenberg expressed the view that the attacks on SARS were used as a reason to halt the work of the PEMTS and its effective oversight. Various investigations by SARS into politically connected persons and entities were terminated and were not taken any further during Mr Moyane's tenure as Commissioner of SARS.

214. In a public statement issued in December 2018, Bain said that, in hindsight, there was evidence to suggest that Mr Moyane was "pursuing a personal political agenda at SARS".[2735]

215. Mr Moyane's response to this statement was that this allegation was "preposterous". He said that SARS is a revenue service, not a political institution.[2736] In the light of the evidence canvassed above, the protestation rings hollow.

216. Mr van Loggerenberg said that he had no doubt that Mr Moyane had a clear brief to restructure SARS and to dismantle its enforcement capabilities. This was evident from his promotion of the false claims and attacks on SARS, his inactivity in protecting SARS and his public statements and newsflashes.

217. In his testimony set out later in this Report, Minister Gordhan also talks of the dismantling of SARS's compliance capabilities.

[2735] Transcript 26 May 2021, p 55, line 8-11.

[2736] Transcript 26 May 2021, p 55, line 16.

Mr Symington hostage situation: background

218. In what constituted an extreme example of the culture of fear and bullying that characterised Mr Moyane's tenure, Mr Symington found himself in the middle of efforts to criminally charge then Finance Minister Gordhan. It seems that by this stage, Minister Gordhan had fallen out of favour with President Zuma, as he was an obstacle to those parties involved in state capture.[2737] The alleged narrative was that President Zuma was trying to appoint an ally in Treasury and Minister Gordhan was an obstacle to controlling the public purse.

219. The Hawks and NPA were investigating a broad range of serious allegations against Minister Gordhan, which included him approving Mr Pillay's early retirement and for his involvement in the so-called "rogue unit" discussed above, established during his tenure at SARS.[2738]

220. On around the 28th of February 2016 General Berning Ntlemeza ("**General Ntlemeza**"), the former head of the Hawks, wrote a letter to Minister Gordhan requiring him to answer a list of 27 questions relating to the so-called "rogue unit ". Certain of those questions related to Mr Pillay and his functions at SARS, his early retirement and his engagement as an independent contractor.[2739] At the relevant time, he was the head of the enforcement function at SARS. The letter also referred to a specific criminal case number, which was in relation to charges laid in May 2015 by Mr Moyane against a number of people.

221. Minister Gordhan responded to these questions. Following this, on the 11th of October 2016, the then National Director of Public Prosecutions, Advocate Shaun Abrahams

[2737] Exhibit WW3, p 4, para 15.

[2738] Exhibit WW3, p 4, para 17.

[2739] Exhibit WW3, p 57.

("**Mr Abrahams**"), announced that various charges would be brought against Minister Gordhan, Mr Oupa Magashula ("**Mr Magashula**") and Mr Pillay. These charges related to the approval during 2009 of a request by Mr Pillay that he be allowed to take early retirement and that he thereafter he be appointed by SARS on a fixed term contract.[2740]

222. During March 2009 at around the time approval was sought, Mr Symington had furnished a memorandum to the then Commissioner of SARS (Minister Gordhan) regarding (i) the lawfulness of Mr Pillay taking early retirement, (ii) the waiving of the early retirement penalty and (iii) the lawfulness of Pillay being appointed on contract after his retirement. Mr Symington's advice, in broad terms, was that technically, the scheme would be lawful if certain conditions were met.[2741]

223. Minister Gordhan sought the then Finance Minister's approval of this arrangement, which was granted in 2010.

224. Six years later, in October 2016, summonses to appear on charges of fraud was served on Minister Gordhan, Mr Magashula and Mr Pillay, in relation to this permission. This prompted a letter from Freedom Under Law and the Helen Suzman Foundation ("**the NGOs**") to the NDPP on 14 October 2016, in which the NDPP was informed that the charges were not sustainable in law as Mr Pillay's retirement was lawful.[2742] Various documents were annexed to this letter, including Mr Symington's 2009 Memorandum and the recommendation made by the Commissioner to the Minister of Finance and ultimately an approval by the Minister. On the strength of these documents, the NGOs

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[2740] Exhibit WW3, p 6, para 21-23.

[2741] Exhibit WW3, p 163 – 176

[2742] Exhibit WW3, p 78 – 84.

called upon the NDPP unconditionally to withdraw the charges, failing which they would bring legal proceedings.[2743]

225. A Dr JP Pretorius ("**Dr Pretorius**"), employed by the NPA, was instructed by Mr Abrahams to reconsider the charges in the light of the allegations made in the letter from the NGOs. Dr Pretorius prepared a letter ("**the Pretorius letter**") which contained a set of questions to Mr Symington regarding his 2009 Memorandum. He instructed the Hawks, and in particular Brigadier Xaba of the Organised Crime Unit, to obtain an affidavit from Mr Symington with the information sought.[2744]

The events of the 18th of October 2016

226. Mr Symington testified before the Commission about the events of the 18th of October 2016, during which he said he unwittingly uncovered attempts to withhold information from the authorities investigating the charges against Minister Gordhan et al. The incident involved an attempt to coerce Mr Symington to hand over an email related to former deputy commissioner Mr Pillay's early retirement. Mr Symington testified that he was held hostage at SARS' Pretoria offices by the Hawks members and Mr Moyane's bodyguard, Mr Thabo Titi ("**Mr Titi**").

227. During mid-October 2016, Dr Pretorius had requested the Hawks to obtain further information from Mr Symington regarding the 2009 Memorandum. The first Mr Symington learned of this request was when his direct manager Mr Kosie Louw (**Mr Louw**"), the Chief Officer of the SARS Legal Counsel Division, phoned Mr Symington to attend at his office. Mr Louw handed Mr Symington a set of documents consisting of approximately four pages and advised him that the Hawks would be coming to see him

[2743] Exhibit WW3, p 84.

[2744] Exhibit WW3, p 141-142.

with a request that he provide his response in the form of an affidavit, sought by the NPA, in connection with the Pillay retirement matter. This type of request was not unusual in the course of Mr Symington's duties, especially because he was considered a specialist in this field of law at the time.[2745]

228. At 10am on the morning of 18 October Mr Symington duly met with four members of the Hawks (one being Brigadier Xaba and the other Colonel Maluleke). They went through the letter and made arrangements for Mr Symington to draft his affidavit and agreed that they would meet again at 1pm.

229. In this first meeting Mr Symington asked why it had taken the Hawks so long to ask him for the 2009 Memorandum, given the recent media coverage of the NGOs' application, which included this Memorandum. Colonel Maluleke informed him that they had only come into possession of the 2009 Memorandum after the charges had been announced, as a result of the NGOs' action. Mr Symington expressed surprise and said that the 2009 Memorandum had been in the public domain since 2014 when SARS suspended Mr Pillay on charges relating to his request for an early pension. In the normal course the memorandum would have been filed in various places, including the Office of the Commissioner, and on Pillay's HR file.

230. Brigadier Xaba then said that they had actually had the memorandum all along. At that stage, Mr Symington did not appreciate the gravity of the remark. The explanation made sense to him because in the normal course of any investigation, the 2009 Memorandum would have surfaced.

231. In this first meeting Brigadier Xaba added two further questions to the list of questions to be answered. The members of the Hawks then said that they would return at 1pm to

[2745] Exhibit WW3, p 10, para 38-40.

collect the affidavit. The four men thereupon asked to visit the offices of Mr Louw. Mr Symington asked Ms Els, his secretary, to accompany them there. The men did not in fact follow her all the way there, and were later seen in the vicinity of the office of Mr Moyane.

232. Shortly before 1pm when he was due to meet the Hawks again, Mr Symington was confronted in his office by an unidentified man wearing a suit. Mr Symington did not know who that man was at the time, but this was Mr Titi, Mr Moyane's bodyguard. Mr Titi asked Mr Symington to hand over the documents he had earlier been given by the Hawks. Mr Symington thought that he was referring to the affidavit, which he had not yet finished. He told Mr Titi this, and said that he was on his way to the 1pm meeting with the Hawks, in which he would inform them that he needed more time to complete the affidavit.

233. Mr Symington printed his incomplete affidavit, and took it together with the questions to the boardroom where the Hawks were waiting. Mr Titi was there too. Brigadier Xaba asked Mr Symington to hand over the Pretorius letter (the documents given to him by Mr Louw that morning, which had come from the offices of Mr Moyane) to him and in return he would hand Mr Symington his copy of the very same letter.

234. Mr Symington objected on the basis that he had not yet completed his affidavit in response to the questions. Mr Titi stood at the door to the boardroom, preventing Mr Symington from leaving. Mr Symington said that he was bewildered by the conduct of the people in the room, and could not understand why they were aggressively demanding the immediate return of the documents that he required in order to answer the questions they had posed. The situation escalated to the point that he called for his secretary and the SARS security for assistance. Mr Titi refused to allow him to leave or to allow the people that Mr Symington had phoned for help to enter. Mr Symington then

called 10111 to report that he was being held against his will. This elicited no response, as Colonel Maluleke informed the officer that there was no problem and that the Hawks had everything under control.

235. At some point Mr Symington began to video and audio record the events using his cell phone. He kept asking why the Hawks wanted the documents back, when he had not finished the affidavit answering the questions. He also could not understand why they would want to hand him a copy of the same bundle of documents in exchange for his bundle. At some point, Brigadier Xaba told him that it was not the NPA letter, but the attachments to the letter that they required.

236. Mr Symington was confused by this, and paged through the documents towards the attached emails which had by now become the documents that the Hawks actually wanted. In doing so, he recorded an email which unbeknown to him at the time contained evidence of possible criminal conduct.

237. Eventually, Mr Symington was allowed to leave the boardroom where he had been kept against his will, but, once he was outside the office, Titi physically grabbed Mr Symington's hand and took the documents from him and off he and the Hawks went.

238. Mr Symington's copy of the letter contained certain attached emails to which he had not paid any attention. From the videos he recorded, however, Mr Symington later came to realise that the emails included correspondence from Mr David Maphakela ("**Mr Maphakela**"), a partner at the law firm Mashiane, Moodley and Monama, who was advising SARS on pursuing criminal charges against Minister Gordhan and his colleagues. This email chain originated at the NPA, then went to the Hawks, then to Mr Maphakela and then to Mr Moyane's office.

239. Mr Maphakela had written, “On ethical reasons, I cannot be involved in this one, as I hold a different view to the one pursued by the NPA and the Hawks”.[2746]

240. In around April 2018, at a meeting (with the then acting Commissioner Mr Mark Kingon (“**Mr Kingon**”) and another SARS employee Mr Wayne Broughton (“**Mr Broughton**”) Mr Maphakela explained that he had given a written legal opinion to Mr Moyane in November 2014 when SARS wanted to know his view on the lawfulness of the early retirement of Mr Pillay. He had advised in his opinion that there was nothing unlawful about Pillay’s early retirement. This was the first time that Mr Symington had become aware of Mr Maphakela’s opinion, which supported the conclusion in his own 2009 Memorandum.

241. Mr Symington testified that not only was his 2009 Memorandum not revealed officially by SARS to the Hawks or the NPA, but the opinion by Mr Maphakela confirming the lawfulness of Mr Pillay’s early retirement was also not made available apparently to the Hawks or NPA or both.

The aftermath of the hostage situation

242. On the same day that he had been held against his will, Mr Symington emailed Messrs Moyane and Louw, in which he recorded the events of that day. He got no response from Mr Moyane.

243. On the 19th of October 2016 Mr Symington emailed Messrs Moyane and Louw, stressing that he saw a need to explain to the NPA why he had not completed the affidavit as requested. After receiving this mail, Mr Louw invited Mr Symington to a meeting on the 20th of October 2016, attended also by Mr Moyane, who expressed regret for what had

[2746] Exhibit WW3, p 162.

happened. He explained that he had sent his bodyguard to make sure that nobody made a copy of the NPA letter. This did not make sense to Mr Symington.[2747]

244. Mr Symington's conclusion was that the Hawks and Mr Moyane had an interest in retrieving the emails attached to the letter given to him by the Hawks, firstly because the November 2014 legal opinion was not known at that point, and secondly, because Mr Maphakela had said to Mr Kingon and Mr Broughton that he had shared his view with both the Hawks and the NPA. In his view then, if anyone were to see the mail, it would lead to questions being asked.

245. In the result, Mr Symington concluded that Mr Moyane had withheld critical evidence, including exculpatory evidence from the Hawks and/or the NPA relating to the criminal charges against Minister Gordhan *et al.* This is because the 2009 Memorandum was available to Mr Moyane on Mr Pillay's HR file which was held in his office. He was also aware of Mr Maphakela's legal opinion of November 2014.

246. Mr Moyane was given other opportunities to reveal the Maphakela memoranda, first when the 27 questions were given to Minister Gordhan in February 2016, and later, in October 2016, when Mr Abrahams invited Mr Moyane to make representations as to why the charges should not be withdrawn.

247. Essentially, Symington uncovered that SARS had either failed to share Mr Maphakela's discomfort on pursuing the charges against Minister Gordhan with the NPA and Hawks, or that the Hawks and NPA had seen it, but continued to investigate Minister Gordhan regardless.

[2747] Exhibit WW3, p 143.

248. Mr Symington reported the hostage incident to IPID.[2748] He also launched a grievance against Mr Titi. The latter was investigated by Mr Thipe Mothle, an attorney. Initially, Mr Mothle drew up a report which upheld Mr Symington's version and found that there was fault on the part of Mr Titi, and that an inquiry should be convened in relation to Mr Titi's conduct.[2749]

249. Thereafter, effectively out of the blue, Mr Symington received an "addendum report" in which his own conduct was scrutinised and he was found to have committed misconduct.

250. After consulting with certain SARS officials, Mr Symington said he found out that, after Mr Mothle had submitted his first report, he was called to a meeting at SARS' offices. He was instructed to prepare an additional report which also dealt with Mr Symington's behaviour. With regards to this addendum report, no additional evidence was presented prior to reaching the conclusions and recommendations. Mr Symington drew the conclusion that there was only one reason for the second report and that was effectively to remove him from SARS.

251. In a confirmatory affidavit lodged with the Commission, Mr Kingon said that at a meeting which was held with himself and Mr Mothle, he gained the impression that Mr Mothle had been coerced into preparing the addendum report. Given some of the words used during the engagement, it was his perception that the purpose of the instruction to prepare an addendum report was to "get" Symington by any means possible.[2750]

252. The NPA's pursuit of the charges against Minister Gordhan et al was eventually abandoned. On 31 October 2016, Mr Abrahams, on behalf of the NPA, withdrew all the

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[2748] Exhibit WW3, p 36-37.

[2749] Exhibit WW3, p 43 – 44.

[2750] Exhibit WW 7, p 576- 579, p 578

charges the*m*, with immediate effect. A key reason for this was that at the time of making the decision to prosecute, the NPA had been unaware of Mr Symington's 2009 Memorandum. Given its content, Mr Abrahams explained, he was of the view that it would be very difficult to prove the requisite *mens rea,* which is a necessary element of the charges of fraud.[2751]

253. Mr Abrahams, in his announcement, said that this matter could easily have been clarified had there been an engagement between the Hawks, Mr Magashula, Mr Pillay and Minister Gordhan. Mr Symington testified that this very well may have been so, but his memorandum dated March 2009 had been in the hands of Mr Moyane since December 2014. It had been kept in Mr Moyane's office, on Mr Pillay's HR file, under lock and key for about six months, so one would have expected that when the Hawks had talks with Mr Moyane, he could have made that memo available to them.

254. In correspondence exchanged between General Ntlemeza and Mr Abrahams pursuant to this decision, General Ntlemeza expressed scathing criticisms of Mr Abrahams' decision to withdraw the charges. In reply, Mr Abrahams queried why the Hawks had not disclosed the 2009 Memorandum to the NPA.[2752]

255. It was apparent to Mr Symington that the 2009 Memorandum was pivotal in the decision not to prosecute Minister Gordhan *et al*; that Mr Abrahams and Dr Pretorius were unaware of the 2009 Memorandum at the time that the charges were announced, and that, had they been aware of this Memorandum or any other relevant legal opinions, they would probably not have brought charges against Minister Gordhan *et al* relating to the approval of Mr Pillay's request for early retirement.[2753]

[2751] Exhibit WW3, p 106 – 131

[2752] Exhibit WW3, p 132-140

[2753] Exhibit WW3, p 9.

256. This saga illustrates an extreme example of the culture of fear and bullying which characterised Mr Moyane's tenure at SARS. It also illustrates the lengths that he went to have certain people, who were obstacles to state capture, removed. Mr Symington described this time as a "nightmare" time at SARS, and to visibly see the efficiency rate dropping during Mr Moyane's tenure was something he hoped would never happen again.

257. In an affidavit submitted to the Commission, Mr Moyane responded to Mr Symington's affidavit. Mr Moyane said in his affidavit that the thrust of Mr Symington's evidence (that had the Hawks been given his 2009 Memorandum and Mr Maphakela's legal opinion, the charges would not have been pursued and Minister Gordhan and others would not have been prosecuted) was based on a false premise, namely, that Mr Symington's memorandum had declared the Pillay retirement to be lawful and problem-free, apparently without any qualification. Mr Moyane said that this was "the biggest lie ever told in support of the unfounded allegations against me". In effect, he contended that the 2009 Memorandum did not in any way indicate that the Pillay retirement was lawful.[2754]

258. In his oral evidence, Mr Symington responded that there was no other reason for him to have done the research and written his memorandum than to address the lawfulness or otherwise of the retirement scheme. He said that he regarded it as "absurd" for Mr Moyane to say that the Memorandum did not speak to the lawfulness or otherwise of the scheme.[2755]

259. Mr Symington's description of the context within which the memorandum was drafted, and the reasons for it, bear out his explanation.

[2754] Exhibit WW 6, p 20.

[2755] Transcript 25 March 2021, p 39, line 10-12

E: MINISTER GORDHAN

260. Minister Gordhan initially testified before the Commission in 2018 before the commencement of the SARS workstream. However, Mr Moyane applied for and was granted permission to cross-examine him. His cross-examination took place on two separate occasions during the SARS workstream. The first was on **30 November 2020** and the second was on **23 March 2021**.

261. The prelude to this cross-examination was an exchange of affidavits in Mr Moyane's application for leave to cross-examine the Minister. That set the scene for the cross-examination itself. A great deal of what was said by each of them, both on affidavit and when testifying in person, did not contribute greatly to evidence of state capture but highlighted very graphically the obviously strongly held mutual antipathy between them.

262. Before dealing with Minister Gordhan's oral evidence, it is necessary to analyse Mr Moyane's application for leave to cross-examine and the content of the parties' respective affidavits.

Mr Moyane's application to cross-examine Minister Gordhan

263. Minister Gordhan, the former Minister of Finance and Commissioner of SARS, made a written statement to the Commission dated 11 October 2018 ("**the Gordhan Statement**"). In it, he implicated Mr Moyane in various different respects. In summary, Minister Gordhan stated that:

263.1. Mr Moyane refused in his capacity as Commissioner of SARS to account to him (Gordhan) as Finance Minister and refused to acknowledge his authority;

263.2. Minister Gordhan faced personal and institutional attacks from Mr Moyane which led to a deterioration in their relationship;2756

263.3. Mr Moyane falsely maintained that he had played no role in approving the appointment of a company called New Integrated Credit Solutions (Pty) Ltd ("**NICS**"), which was owned by a friend of his, Mr Patrick Monyeki ("**Monyeki**"), to provide debt collection services for SARS. In this regard, Mr Moyane provided Parliament with false information;[2757]

263.4. On 15 May 2015 Mr Moyane laid charges against Minister Gordhan relating to the High-Risk Investigations Unit within SARS (the so-called "**Rogue Unit**") formed years earlier. As a consequence, on or about 19 February 2016, in the week before his budget speech, Minister Gordhan received an envelope containing 27 questions addressed to him from the Hawks. This envelope was delivered with a demand that the questions be answered by 2 March 2016;[2758]

263.5. There was an orchestrated campaign against Minister Gordhan and other leaders of National Treasury within the Cabinet, the institutions of State and on certain media and social media platforms. As part of this campaign, Minister Gordhan became the target of malicious and seemingly politically motivated criminal charges;[2759] and

263.6. The filing of the charges and the demand from the Hawks that he answer the 27 questions was the beginning of what appeared to be a campaign to force

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2756 Exhibit N1, p 46.

2757 Exhibit N1, p 590 – 593.

2758 Exhibit N1, p 37.

2759 Exhibit N1, p 49.

him to resign as Minister of Finance and to continue the efforts to capture the National Treasury thereafter.[2760]

264. The Commission served a notice on Mr Moyane in terms of Rule 3.3 of its Rules informing him that he had been implicated (or may have been implicated) in the statement made by Minister Gordhan. The notice confined the respects in which Mr Moyane had been implicated to those relating to NICS.[2761] Mr Moyane was informed that, if he wished to give evidence himself, call any witness to give evidence on his behalf, or cross-examine Minister Gordhan, then he was to apply in writing to the Commission for leave to do so.[2762] He was informed that any such application had to be submitted with a statement from him in which he responded to the witness's statement as far as it implicated him and also to identify what parts of the witness' statement were disputed or denied and the grounds on which they were so disputed or denied.[2763]

265. On 13 December 2018 Mr Moyane lodged an application for leave to cross-examine Minister Gordhan. This was supported by an affidavit deposed to by him as well as a supplementary affidavit filed later. Minister Gordhan opposed the application and filed his own affidavit, to which Mr Moyane replied.

266. Having considered written and oral submissions on the application, I made a ruling on 16 April 2019 ("**the First Ruling**"). In it, I refused Mr Moyane leave to cross-examine on the various topics which Mr Moyane had identified. The basis for the ruling was in essence that Minister Gordhan had either not implicated Mr Moyane in the matters raised in Mr Moyane's affidavit and/or that Mr Moyane had failed to admit or deny

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2760 Exhibit N1, p 38.

2761 Exhibit N3, p 271-272

2762 Exhibit N3, p 272.

2763 Exhibit N3, p 272.

Minister Gordhan's implicating allegations or to set out his (Moyane's) version of the facts on those issues.

267. However, there was one issue which caused me some concern. It involved the laying of charges by Mr Moyane against Minister Gordhan. In his supplementary affidavit, Mr Moyane had said the following:

> "9. I intend to cross-examine Gordhan extensively on this issue [the laying of criminal charges] so as to assist the Commission in evaluating:
>
> 9.1. the actual events and evidential material which led me to lay the charges so as to assess whether or not there was probable cause, a reasonable person in my position would have performed differently, or whether, as implied by Gordhan, I was acting out of malice and personal vindictiveness and the like…".[2764]

268. I remarked that there were some parts of Minister Gordhan's statement in which he appeared to be suggesting that, in laying charges against him, Mr Moyane was part of a scheme that sought to capture the National Treasury, but that the affidavit was equivocal since there was no specific allegation by Minister Gordhan that Mr Moyane had acted with malice in laying the charge.[2765]

269. It was for this reason that I decided to get clarification from both parties before I took a final decision on whether to allow Mr Moyane to cross-examine Minister Gordhan on the point relating to malicious charges.

270. Following my directions issued in terms of Reg 10(6) Minister Gordhan filed what was intended as a clarificatory affidavit on 14 May 2019. His first point was that he had never alleged that Mr Moyane was motivated by malice when he laid the complaint that led to criminal charges being brought against him. He said that, rather, it was Mr Moyane who said that malice was implied in his (Minister Gordhan's) evidence.[2766] However, Minister

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[2764] Exhibit N3B, p 264.

[2765] Exhibit N3B, p 731- 760, 758.

[2766] Clarificatory Affidavit para 7 and 8 page 7.

Gordhan went on in his affidavit to make a number of further points based upon his statement as well as his oral evidence before the Commission on 19 – 21 November 2018. He said:

> "10. My evidence focussed on the overall pressure and political campaign which was part of the efforts to capture State institutions in recent years, that I was subjected to following my reappointment as Minister of Finance. I believe that the investigation, and later criminal charges, that both originated from Mr Moyane's complaint were a part of that campaign.
>
> 11. If I could be pressurised into resigning, I believe that efforts to capture the National Treasury by appointing a compliant Minister of Finance in my place, would have continued.
>
> …
>
> 15. The key point of my evidence was my personal belief that the entire process of investigation into Mr Moyane's complaint by the Hawks (the 27 questions), and the bringing and withdrawal of charges against me by the NPA, was part of the campaign to capture State institutions. In this instance, it sought to force me to resign as Minister of Finance to enable the capture of National Treasury.
>
> …
>
> 22. To be clear, I have no knowledge of Mr Moyane's state of mind when he laid the complaint and have considered his explanation for his conduct that he provided to the Commission.
>
> 22.1 In essence, he states that he acted as a reasonable person would have in the circumstances in which he found himself as Commissioner of SARS.
>
> 22.2 I, however, disagree with this and personally believe that Mr Moyane did abuse legal processes for reasons already explained in my evidence.
>
> …
>
> 22.4 To use the words of the Chairperson's directions, I therefore do mean that Mr Moyane "was motivated wholly or in part by, or he sought to advance, the objective of State Capture" and that "he was abusing a legal process for his own personal goals that had either nothing or little to do with a legitimate complaint relating to an alleged crime".
>
> 22.5 I believe that Mr Moyane's "personal goals" while he was SARS Commissioner included the advancement of the State Capture project.
>
> 22.6 This belief is founded on [the findings of the Nugent Commission of Inquiry].
>
> 22.7 I turn to highlight certain relevant findings by Justice Nugent below, which form the basis for my belief that Mr Moyane's actions as SARS Commissioner were part of the State Capture project.
>
> …
>
> 31 [M]y personal belief remains that Mr Moyane abused his position as the former SARS Commissioner to institute criminal proceedings against me and others… since there was no reasonable basis for him to do so."

271. Notwithstanding the above, Minister Gordhan expressed the view that his cross-examination of him by Mr Moyane's counsel regarding Mr Moyane's personal motive for filing the complaint that led to the criminal charges and his personal belief that those charges were part of a campaign to force his resignation from the post of Minister of Finance so as to facilitate the capture of National Treasury, "is unlikely to assist the important and urgent work of the Commission given its time and resource constraints".

272. The evidence put up by Minister Gordhan in his affidavit and his clarificatory affidavit was not entirely consistent on the issue of Mr Moyane's motivation in laying the charge.

273. On the one hand, as pointed out above, Minister Gordhan said he had not stated that Mr Moyane had acted maliciously. On the other hand, he said that Mr Moyane had acted without proper cause and in the advancement of State Capture. These two stances were not easily reconcilable.

273.1. In Mr Moyane's submissions filed in response to Minister Gordhan's clarificatory affidavit, Mr Moyane made the following main points:

273.2. it was clear from Minister Gordhan's affidavit that Minister Gordhan did in fact allege malice against him; and

273.3. furthermore, Minister Gordhan had repeatedly made it clear that his Mr Moyane's alleged malicious conduct was aimed at "advancing State Capture and the capture of the National Treasury in particular" and that the entire enterprise maliciously triggered by Mr Moyane was "part of the campaign to capture State institutions".[2767]

[2767] Moyane's Submissions dated 28 May 2019 para 7, 9 and 10.

274. The only version put up by Mr Moyane in his submissions was “that he acted bona fide and as any reasonable Commissioner of SARS would have in the circumstances”.

275. The Nugent Commission Report was also raised in various contexts in Mr Moyane’s application for leave to cross examine Minister Gordhan

276. Mr Moyane said in his founding affidavit[2768] that Minister Gordhan gave “foundational evidence” in the Nugent Commission aimed at portraying himself as the architect of good governance, on the one hand, and Mr Moyane as the destroyer of SARS, on the other. He described these as false and self-serving claims in pursuit of the “Moyane removal campaign”.[2769] Under the Eskom workstream of the Commission Mr Koko referred to what he called the “Koko hunt”.

277. So, too, Minister Gordhan in his various affidavits placed reliance on the Nugent Commission Report.[2770] The first point made in Minister Gordhan’s answering affidavit is that most of the areas of cross-examination identified by Mr Moyane in paragraphs 6 and 7 of his founding affidavit were already the subject of the Nugent Commission investigation and fell outside this Commission’s terms of reference.

278. More explicitly, in his clarificatory affidavit Minister Gordhan relied expressly on certain findings by Justice Nugent, which he said form the basis of my belief that Mr Moyane’s actions as SARS Commissioner were part of the State Capture project”.

279. I gave my second ruling in relation to Mr Moyane’s application on 25 November 2019. I pointed out, with reference to extracts from Minister Gordhan’s statement, why it could be said that Minister Gordhan had indeed alleged malice on the part of Mr Moyane. I

[2768] Exhibit N3.

[2769] Exhibit N3, p7.

[2770] Exhibit N3, p 389 at paras 13.5; p 390 at para 15; p 393 at para 23; p 394 at para 23; paras 28 -34 at p 394 – 397

also highlighted the fact that Minister Gordhan had said in his clarificatory affidavit that the laying of the criminal charge was part of a campaign aimed at putting pressure on him to resign as Minister of Finance so as to enable the capture of National Treasury under a different Minister. I observed that "… there can be no doubt that, if Mr Moyane's defiant attitude towards, and vilification of, Minister Gordhan were aimed at forcing or pressurising the latter into resigning as Minister of Finance so that the capture of the National Treasury could proceed under a different Minister of Finance, it would, generally speaking, be in the interests of the work of the Commission to grant Mr Moyane leave to cross-examine Minister Gordhan. Equally, there can be no doubt that if, in laying the criminal complaint against Minister Gordhan, Mr Moyane was "motivated wholly or in part by or he sought to advance, the objectives of State Capture", it would also, generally speaking, be in the interests of the work of this Commission that I grant Mr Moyane leave to cross-examine Minister Gordhan".[2771]

280. Having noted that Mr Moyane had failed to put up any version in answer to these allegations by Minister Gordhan,[2772] I concluded as follows:

> "I consider that, subject to the one condition, it is in the interests of the work of the Commission to grant Mr Moyane leave to cross-examine. Before this Commission, it must rank as the most serious allegation or statement for it to be said that you preformed your official duties in order to advance the objectives of State Capture and, speaking generally, such a person should be granted leave to cross-examine. The condition is that Mr Moyane will have to deliver an affidavit or affirmed declaration in response to Mr Gordhan's clarificatory affidavit so as to give this Commission his version on the issues raised in Mr Gordhan's affidavit. I will, therefore, grant Mr Moyane the required leave subject to that condition."[2773]

281. Subject to the direction that Mr Moyane file an affidavit, I granted him leave to cross-examine Minister Gordhan on the following topics:

> "(a) Whether, in laying the criminal complaint or charges against Mr Gordhan, Mr Moyane acted maliciously;

[2771] State Capture Commission Ruling of 25 November 2019 at para 18.

[2772] State Capture Commission Ruling of 25 November 2019 at para 22.

[2773] State Capture Commission Ruling of 25 November 2019 at para 27.

(b) Whether, in laying the criminal complaint against Mr Gordhan, Mr Moyane was motivated wholly or in part by, or, he sought to advance the objectives of State Capture;

(c) In laying the criminal complaint against Mr Gordhan, Mr Moyane was abusing a legal process for his own personal goals that had either or nothing or little to do with a legitimate complaint relating to an alleged crime;

(d) Whether, as Commissioner of SARS, Mr Moyane sought to advance "the State Capture project";

(e) Whether, Mr Moyane's "personal goals" while he was SARS Commissioner included the advancement of the State Capture project." ("the 5 topics").

282. Mr Moyane subsequently delivered the requisite affidavit in which he was to indicate which parts of Minister Gordhan's affidavit he admitted or denied, what the basis was for denying or disputing those that he denies, and giving his full version in regard to such allegations, as per paragraph 5 of my order. [2774]

283. What interested the Commission at that stage was whether, in laying the charges against Minister Gordhan, Mr Moyane was acting bona fide, or instead, maliciously in the interests of State Capture. So too, on a wider basis, under paragraphs 28 (d) and (e) of my second ruling, the Commission was also interested in the question whether in his capacity as Commissioner of SARS Mr Moyane had sought to advance the State Capture project.

284. As it turned out, a great deal of the cross examination of Minister Gordhan went far beyond the 5 topics, and concentrated on the clear personal animosity between the two men and the alleged origins thereof, which have no direct bearing on state capture. So too, a lot of what Minister Gordhan testified about concerning Mr Moyane's alleged involvement in state capture was either based on hearsay or on the so called "public narrative. Neither of these sources of information assisted the work of the Commission and no findings need be made thereon.

[2774] Exhibit WW6, p 13 – 19 at paras 15-30.

285. Nonetheless, the evidence that was heard by the Commission in regard to SARS revealed conclusively that Mr Moyane was involved in advancing the project of State Capture when he was Commissioner of SARS. In fact, the evidence revealed that he started planning for the capture of SARS long before he was appointed as Commissioner of SARS. Mr Moyane simply did not act with the interests of SARS at heart. He sought to advance Mr Zuma's and Bain's interests.

Cross-examination of Minister Gordhan

286. The first round of cross-examination took place on 30 November 2020. It was preceded by brief testimony in chief in elaboration of Minister Gordhan's clarificatory affidavit, in which Minister Gordhan confirmed he had personal knowledge of *inter alia*:

286.1. a meeting which he and the then Deputy Minister of Finance had with Mr Moyane on 14 December 2015 where they left Moyane with ten guidelines and requests, one being that the issue of the governance of SARS was a matter that had to be discussed;

286.2. His request for an opportunity to review what was then being called SARS' new operating model, because that concept was something foreign to both the Minister and Deputy Minister;

286.3. His attempt to establish whether any person at SARS was involved in leaking information to the Sunday Times and his clear indication that if that was so, it should stop because it was not in the best interests of SARS;

286.4. His message that as far as communications went, SARS should limit itself to customs and related matters of administration; and

286.5. The Minister's personal experience that the standing and capability of SARS in tax collection and putting an end to illicit trade had been compromised over the relevant period of Mr Moyane's tenure.

287. Minister Gordhan emphasised that he had personal knowledge of the fact that, as a consequence of the dismantling, or reorganisation, of the various capabilities and institutions he had been involved in setting up within SARS, which had advanced tax compliance and led to increased revenues being collected, tax compliance had deteriorated giving rise to what is known as "the tax gap". Minister Gordhan testified that the acts of dismantling and reorganization of SARS served the cause of state Capture and institutional deterioration and destruction.

288. Eliciting this evidence was necessary in order to establish whether Minister Gordhan based his belief that Mr Moyane was involved in state capture purely on the strength of the Nugent Commission findings, or whether there were also facts of which he had personal knowledge which supported that conclusion.

289. Under cross-examination, Minister Gordhan accepted that it is was by then common cause that Mr Moyane did not in fact lay a criminal complaint against him, Minister Gordhan, personally, but only against other named individuals. He explained that, until shortly before he gave evidence in this Commission in November 2020, he had not been in possession of the relevant documentation from the SAPS and the fact that Mr Moyane had not laid a complaint against him only became apparent when the relevant documentation became available through the offices of the Commission itself. Minister Gordhan accepted that issues (a), (b) and (c) in my ruling on cross-examination were therefor based on a supposition which turned out not to be correct. He explained that his error was based partly on the fact that the so-called 27 questions posed to him by the Hawks made reference to a case number which is the same as that under which the

complaint was lodged by Mr Moyane. He added to that explanation in re-examination, saying that when he testified in November 2018 for the first time before the Commission, he thought that Mr Moyane had laid charges against him because two former Ministers had said at a press conference in 2016 that Moyane had laid complaints against him and they named him specifically. The real facts only emerged once Mr Moyane's affidavit was made available, but in the prior period, Mr Moyane did not take the opportunity to clarify that in fact the Minister was not one of the people against whom the complaint had been lodged.[2775]

290. This notwithstanding, the point made by Minister Gordhan is that the complaint which Mr Moyane laid is what ultimately led to the criminal charges that were indeed later proffered against him in the sense that the complaint triggered a process that culminated in the charges. [2776] He stood by his evidence that in laying the initial criminal complaint against the others, Mr Moyane was abusing the legal process for his own goals, and that his actions had little to do with a legitimate complaint relating to an alleged crime. Instead, he said Mr Moyane was advancing State Capture and one of the methods was to lay a complaint against targeted individuals.[2777]

291. It was put to Minister Gordhan by Mr Moyane's counsel that before one accuses a person of the serious offence of state capture, one "better have evidence". It was suggested he had no evidence to back up that accusation against Mr Moyane which he denied. Minister Gordhan was also criticised for having "forgotten" that he had met with the Guptas.[2778]

[2775] Transcript 23 March 2021, p 315 line 12 – p 316 line 2

[2776] Transcript 30 November 2020, p 47 lines 12-16

[2777] Transcript 30 November 2020, p 53 lines 11 – 14.

[2778] Transcript 30 November 2020, p 62 lines 17 – 20 and p 67 lines 22-23.

292. Minister Gordhan agreed that during Mr Moyane's tenure as SARS Commissioner, at which time Mr Moyane was accountable to Minister Gordhan as the then Minister of Finance, hostilities between the two did develop.[2779]

293. It was put to Minister Gordhan that the animosity between them arose as follows. Firstly, it was as a consequence of Minister Gordhan's general arrogance towards him. Secondly, it was caused by petty jealousies about his role at SARS. Thirdly, it originated from Minister Gordhan's racism towards Mr Moyane specifically and perhaps towards African people in general. Fourthly, it was motivated by the Minister's desire to deflect from his own alleged involvement in State Capture and corruption. Fifthly, it was contended on Mr Moyane's behalf that there was hostility because he (Moyane) blew the whistle on the illegal and corrupt activities Minister Gordhan left behind at SARS, including that involving the so-called Rogue Unit and the issue of Mr Pillay's early retirement.[2780]

294. Minister Gordhan emphatically denied that any of those assertions had any foundation and contended that these issues were merely a cover-up for what Mr Moyane had really done at SARS. He denied in particular the charge of racism, pointing to his struggle credentials. Minister Gordhan contended that Mr Moyane "had connections" which in effect allowed him to feel protected at SARS and thus behaved towards Minister Gordhan as he did.[2781]

295. Of course, it is not for the Commission to investigate any of these issues summarised in the paragraph above except insofar as they might relate to State Capture. Indeed, what bedevilled much of the cross examination of Minister Gordhan was that the topics which

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[2779] Transcript 30 November 2020, p 74 lines 20-25.

[2780] Transcript 30 November 2020, p 82 line 17 – p 83 line 22.

[2781] Transcript 30 November 2020, p 85 line 17 – p 86 line 3

were pursued had little bearing on whether Mr Moyane was involved in State Capture and everything to do with the personal animosity between the two men. For instance, Minister Gordhan was taxed on whether he excluded Mr Moyane from a press briefing in advance of the February 2016 Budget.[2782]An instance of where Mr Moyane accused Minister Gordhan of racism centred on the transcript of a telephone conversation between the two which was scrutinised in detail. It was furthermore put to Minister Gordhan on the strength of the High Court judgments referred to above that it was his propensity (a) to insult people in a vitriolic, scandalous manner without evidence and (b) to be condescending towards them. This was emphatically denied.[2783] Mr Moyane's counsel moreover put it to Minister Gordhan that it was he who was guilty of criminal behaviour.[2784] This too was denied.

296. None of these issues form part of the terms of reference before me and I do not therefore deal with these accusations. I do however observe that to accuse the Minister of racism was not only unjustified but particularly unfortunate, given his struggle history.

297. More in point was the proposition put to Minister Gordhan that he had "gone around accusing every public official who has ever made an adverse decision against [him] as a practitioner of State Capture without a shred of evidence",[2785] and that he had no personal knowledge that Mr Moyane was part of state capture, apart from gossip.[2786] Minister Gordhan disagreed, saying that he did have evidence.

2782 Transcript 30 November 2020, p 128 line 9 - 130 line 19

2783 Transcript 23 March 2021, p 287 at line 3 – 11

2784 Transcript 23 March 2021, p 306 at line 1 – 307 at line 1

2785 Transcript 30 November 2020, p 95 lines 20-25.

2786 Transcript 30 November 2020, p 96, lines 5 – 9.

298. When pressed on what evidence he had, Minister Gordhan first referred to the Nugent Commission Report, but then also to matters within his personal knowledge. These are reflected in the paragraphs which follow.

299. Minister Gordhan highlighted specific instances after his appointment in December 2015 as Minister of Finance where Mr Moyane refused to submit to his authority. For example, Minister Gordhan said that, in respect of leave forms, Mr Moyane said he would submit them to the President and not to Minister Gordhan as the responsible Minister. When Minister Gordhan said it was necessary to review the so-called "new operating model", Mr Moyane simply went ahead with the appointment of new people without such review.[2787] When it came to the question of paying bonuses to SARS employees, Minister Gordhan told Mr Moyane to put a hold on them until the two of them had discussed whether their payment was justified but Mr Moyane simply went ahead and instructed that the bonuses be paid. It was clear to Minister Gordhan that Mr Moyane did not respect him as a person or his office as Minister of Finance and that he openly defied his authority.

300. Minister Gordhan said that he saw the classic signs of state capture at SARS, including where the perpetrators "get rid of good people", and, for example, give VAT refunds to family and friends.[2788]

301. According to Minister Gordhan, part of state capture is to take control of an institution either at Board level or CEO level as well as to protect yourself from questioning or transparency in relation to the damage caused within the institution. Minister Gordhan

[2787] Transcript 30 November 2020, p 24 line 12 – p 24 line 1.

[2788] Transcript 30 November 2020, p 107 lines 6 – 9.

testified that concrete examples in the case of Mr Moyane include refusing to discuss the operating model and his defiance on the question of bonuses.

302. In addition, Minister Gordhan said state capture is reflected in a person repurposing an institution particularly in the field of procurement and the institution's Treasury function.[2789] What was clear to him was that, as Commissioner at SARS, Mr Moyane ensured that he owed no accountability to the Minister of Finance and, therefore, did not allow any transparency within, and would not allow any kind of interrogation into, what was going on in the organisation.

303. Minister Gordhan gave his understanding of state capture as, for example, "hollowing out an institution of its senior and most capable people, hollowing out people who have institutional knowledge, breaking up those parts of the institution that in this instance have to deal with cigarette and tobacco smuggling and other forms of illicit trade which harm the South African economy…and dismantling the Executive Committee for example that existed at that particular time. And centralising power…So State Capture goes beyond "criminality" it is institutional damage on a wide scale in respect of governance, in respect of the operations of an organisation, in respect in this instance of the revenue collection and there are commentaries from the Treasury in that particular regard as well and damage caused to the Human Resources capability that an institution has."[2790]

304. With reference to the so-called "nine wasted years", the Minister testified that there was no doubt that from about 2011 onwards, when the first interventions began to take place in State-owned entities, it was clear that the country lost a lot of value and gravitas which existed in many State-owned enterprises, SARS included. There was a practice of

[2789] Transcript 30 November 2020, p 114 lines 20 – 24.

[2790] Transcript 23 March 2021, p 291 at line 5 – 292 at line 3.

chasing away black professionals who were honest and who had integrity and who refused to be manipulated in any kind of way either through procurement systems or other systems, which follows the pattern of state capture.[2791]

305. The Minister testified that his understanding of what was going on (regarding state capture) evolved over time and, if one had to point to a particular moment, it was the reporting by investigative journalists in the middle of 2017 who reported on the Gupta leaks, which exposed the role being played by various parties like Bell Pottinger.[2792] Thus, he said, "what we call state capture today evolved over time and when the Gupta leaks took place many connections and relationships became clear to him (he said he "joined the dots"). On the back of this, various people in Cabinet, including himself, ensured that certain decisions were not made or went to Court, for example, regarding the Gupta bank accounts and these efforts were continued through the Parliamentary committee when the Executive interrogated what was going on at Eskom. A report was adopted by the National Assembly which described the malfeasance and the capture of Eskom over that period of time and that there were those in the governing structures and in various political parties who were engaged in these corrupt activities and malfeasance. The point Minister Gordhan emphasised was that there were democratic activists like him around South Africa who objected to what was going on and made their objection known in various forms.[2793]

306. One of the instances highlighted by Minister Gordhan was the repeated changes to the Cabinet which he regarded as a manifestation of state capture.[2794] He also referred to the repeated changes to the Boards of State-owned companies and in the leadership of

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2791 Transcript 30 November 2020 p 202 line 17 – p 203 line 13.

2792 Transcript 30 November 2020, p 206 lines 2 – 25.

2793 Transcript 30 November 2020, p 208 lines 10 – 25.

2794 Transcript 30 November 2020, p 209 lines 14 – 18.

key institutions and organs of State, without a rational explanation, and which could only have been made in order to take control of such institutions.[2795] At the time it was President Zuma who had the discretion to appoint Cabinet Ministers. Minister Gordhan testified that control of a state entity in one form or another is a crucial part, and the start of, the process of repurposing institutions. The Minister testified that people like Mr Jonas, Mr Nhlanhla Nene and himself were amongst those who sought to fight State Capture.[2796] He took no responsibility for the role in the perpetration of State Capture over those years.

307. Minister Gordhan testified that in his view the four-day appointment of Mr Des Van Rooyen as Minister of Finance was an attempt to capture Treasury.[2797] He testified that former President Zuma appointed someone whose credentials were dubious (Van Rooyen). It is only because of the market reaction like the fallen Rand which caused the former President to approach him (Gordhan) and appoint him as Minister of Finance with a view to stabilising the situation. He gave this evidence in answer to a proposition that, if former President Zuma was perpetrating state capture, it made no sense to appoint Minister Gordhan (who opposed state capture) as Minister of Finance.

308. According to Minister Gordhan, the appointment of Mr Moyane at SARS followed the pattern described above and was made so as to ensure (as happened in other institutions) that there was a pliable person within the system who would facilitate it being repurposed.[2798]

309. Another issue on which Minister Gordhan was extensively cross-examined was the so-called Rogue Unit, and in particular, whether the criminal complaint laid by Mr Moyane

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[2795] Transcript 30 November 2020, p 210 line 23 – p 211 line 9.

[2796] Transcript 30 November 2020, p 213 line 24 – p 215 line 5.

[2797] Transcript 30 November 2020, p 223 lines 11 – 19.

[2798] Transcript 30 November 2020 p 225 line 17 – p 226 line 24.

concerning the so called Rogue Unit was motivated by state capture, or whether in laying the complaint, he was doing what any reasonable Commissioner of SARS would do when faced with the allegations against the unit.

310. In light of recent High Court judgments (referred to above), cross-examination regarding the lawfulness or otherwise of the unit takes the matter nowhere. The High Court has ruled that the existence of the unit was lawful and that finding stands. So too, the issue of whether Minister Gordhan played a role in establishing the unit is of little moment in the light of the finding that it was lawful. In any event, I ruled that the existence and lawfulness of the unit is not a topic for cross-examination because Minister Gordhan never implicated Mr Moyane in connection therewith.

311. Nevertheless, what is relevant is whether, before the pronouncements of the High Court, Mr Moyane had a genuine, bona fide basis to regard the establishment of the Unit as unlawful, such as to legitimately found the basis for a criminal complaint.

312. Minister Gordhan's testimony was that Mr Moyane did not have any such basis. According to him, Mr Moyane laid his complaint on 16 May 2015 but by at least September of 2015 he had access to legal opinions to the effect that the establishment of the unit was lawful and so he could (and ought to) have withdrawn the complaint.[2799] This is corroborated by the testimony of Mr Symington, summarised earlier.

313. In answer to the assertion on behalf of Mr Moyane that in laying the complaint he was simply acting as a reasonable Commissioner was obliged to act, Minister Gordhan explained what he would have done had he been Commissioner and seen the front-page story in the Sunday Times regarding the alleged existence of a rogue unit which had allegedly bugged former President Zuma's telephones. He explained that he would

[2799] Transcript 30 November 2020, 300 line 13 – p 301 line 6

have asked the people mentioned in the article to respond to the article and if he had found that there was cause for concern, he would have got somebody within SARS or an independent person to then establish whether there was cause for concern or not and if necessary, either have disciplined the relevant individuals or taken legal action against them. If legal advice was to that effect, he would have also laid charges.[2800] He indicated that he would have adopted the same course following the article on 9 November 2014 to the effect that the unit had run a brothel. He said that he would have tried to establish the true facts or whether they were just wild allegations and consulted legal and other persons within SARS senior management. This is precisely what Mr van Loggerenberg said Mr Moyane failed to do.

314. Minister Gordhan emphasised that Mr Moyane had exculpatory evidence that he failed to share with law enforcement agencies regarding the Pillay pension charges, namely, the opinion given by Mr Vlok Symington as well as the opinion by Mr Maphakela , an attorney for SARS.[2801]

315. In essence, Minister Gordhan contended that, although Mr Moyane took account of various reports (and in particular the Sikhakhane and Kroon Reports) he did not take account of any counterviews.[2802] This testimony corroborated that of Mr Symington analysed above.

316. In an attempt to show that Mr Moyane's tenure at SARS was characterised by great success, and not decline, it was put to Minister Gordhan that Mr Moyane was the first Commissioner of SARS to collect R1 Trillion.

[2800] Transcript 23 March 2021, p 317-318.

[2801] Transcript 23 March 2021, p 325-326.

[2802] Transcript 30 November 2020 p 298 at line 16 – p 299 line 13

317. Minister Gordhan agreed that this was true but explained the context as follows. SARS was going to reach the R1 Trillion mark at some stage because that is the logic of economic growth and of inflation and of tax compliance and economic activity within an economy and was logically going to happen whoever the Commissioner might have been at a particular time. To him, the more important question was whether there was an improvement in SARS's performance. According to Minister Gordhan, how could there be if the tax gap actually widened during Mr Moyane's tenure as Commissioner.[2803]

318. In my view, although he was accused of having no evidence that Mr Moyane was involved in state capture, and although he often relied on hearsay and what was found by the Nugent Commission, Minister Gordhan's evidence provides important general corroboration of the specific testimony of the other witnesses whose evidence is recounted above. He observed first hand that Mr Moyane refused to answer to him as the responsible Minister, instead running SARS as he wished, would not reveal and discuss what changes he was making at SARS, refused to discuss his new operational model, and carved out some of the institutions most senior people as well as SARS' compliance capacity. This is important evidence of the capture of the institution.

F: CONCLUSION

319. As I indicated earlier in my Report, the Nugent Commission made the following overarching findings which dovetail with the evidence led before me and the various findings I have made:

319.1. There was a massive failure of integrity and governance at SARS, demonstrated by what SARS once was and what it has become;

[2803] Transcript 23 March 2021, p 338-339.

319.2. That state of affairs was brought about by the (at least) reckless mismanagement of SARS on the part of Mr Moyane. What occurred at SARS was inevitable the moment Mr Moyane set foot there. He dismantled the elements of governance one by one. This was more than mere mismanagement. It was seizing control of SARS as if it was his to have;

319.3. The failure of good governance was manifest *inter alia* from the fact that senior management was driven out or marginalised at SARS; senior management appointed by Mr Moyane were simply compliant and neglected their oversight function; the development of SARS' sophisticated Information Technology systems was summarily halted; the organisational structure of SARS that provided oversight was pulled apart; dissent was stamped out by instilling distrust and fear; accountability to other State authorities was defied; and capacity for investigating corruption was disabled; and

319.4. Instead of fostering a culture of healthy dissent, Mr Moyane engendered a culture of fear and intimidation.

320. The SARS evidence is a clear example of how the private sector colluded with the Executive, including President Zuma, to capture an institution that was highly regarded internationally and render it ineffective.

321. 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 was a notable feature of the evidence led in regard to the capture of SARS.

322. SARS was systemically and deliberately weakened, chiefly through the restructuring of its institutional capacity, strategic appointments and dismissals of key individuals, and a pervasive culture of fear and bullying. It is a clear example of state capture.

323. That this is so is borne out by the evidence led before me and in particular the following:

323.1. Mr Moyane was promised the position of SARS Commissioner by President Zuma well in advance of his formal appointment and despite the process then underway to select the appropriate person from amongst a large number of candidates.

323.2. Bain met President Zuma and Mr Moyane before they had even been appointed as third-party consultants to SARS, and from an early stage it was obvious that they would be given the position, even though no tender process had even begun.

323.3. The purpose of these early “appointments” was to ensure that the necessary pre-planning could be done to redirect the resources of the organisation and assume control of the organisation..

323.4. Precisely such detailed planning was done by Bain and Mr Moyane before they even stepped foot into SARS. In reality there was no need for consultants, let alone a radical overhaul of what was then a world class institution. The “profound strategy refresh” was just a pretext for the assumption of control over SARS for ulterior purposes.

323.5. Exactly as the plan had contemplated, specific individuals at SARS were identified and neutralised once Mr Moyane took up his position. This included very senior people who had served the institution well for years.

323.6. A pretext was devised in order to target people, namely the existence of an allegedly unlawful (rogue) unit. Instead of interrogating the truth of this assertion and protecting SARS and its employees from what is now acknowledged to be an entirely false and misleading story, Mr Moyane treated it as the truth from the outset and dismantled his entire executive committee on the strength thereof. Furthermore, he relied on now discredited reports and ignored contrary views.

323.7. Some of SARS's most important units, which were set up to ensure tax compliance, were disbanded or restructured such that important projects were put on hold or abandoned, thus fundamentally weakening the revenue collection function.

324. All these actions and events cannot be coincidental. This is especially so in the light of the planning documents which the Commission has been shown. The only feasible conclusion is that the organization was deliberately captured and President Zuma and Mr Moyane played critical roles to in the capture of SARS and dismantling it in the way it was done during Mr Moyane's term as Commissioner.

325. Although the Commission wishes to thank all the witnesses who testified before it in regard to SARS, it particularly wishes to express its appreciation to Mr Williams for the evidence he gathered and placed before the Commission which revealed much about the interactions between Bain & Co and Mr Moyane and Bain & Co and President Zuma with regard to the plans for, and the execution of, the capture of SARS. He rejected numerous attempts from Bain & Co to give him large sums of money in return for his silence. The Commission highly appreciates his assistance.

G: RECOMMENDATIONS

326. It is recommended that:

326.1. 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.

326.2. 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.

326.3. that 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.

326.4. Mr T Moyane be charged with perjury in relation to his false evidence to Parliament.

CHAPTER 4 – PUBLIC PROCUREMENT IN SOUTH AFRICA

TABLE OF CONTENTS

A: Public Procurement in South Africa: The Mandate of the Commission

327. 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 through public procurement, which equates to 19.5% of the GDP.[2804] The estimated total procurement spend of government for goods and services is over R800 billion per year.[2805]

328. 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 of our Constitution, is fair, equitable, transparent, competitive and cost effective.[2806] It must simultaneously address the exclusions and the discrimination of the past. In sum, the Constitution requires the economic and efficient use of public funds in order to promote good service delivery, that is to say, value for money achieved by way of a fair process and an equitable outcome.

329. Section 217 reads as follows:

> "217 **Procurement**
>
> (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.

[2804]Brunette, R, Klaaren J & Nqaba P 'Reform in the contract state: embedded direction in public procurement regulation in South Africa' (2019) 36 *Development Southern Africa* 4at 537 – 554. 41

[2805] Transcript 21 August 2018, p 13, line 24. His evidence drew on information from a research report by Professor Geo Quinot of the Department of Public Law, Stellenbosch University. According to Mr Mathebula it was commissioned by National Treasury. See Quinot, G (2014) 'An Institutional Legal Structure for Regulating Public Procurement in South Africa': http://africanprocurementlaw.org/wp-content/uploads/2016/01/OCPO-Final-Report-APPRRU-Web-Secure.pdf.

[2806] Section 217 (1) of the Constitution, 1996.

(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."

330. International experience suggests that of all Government activities, public procurement is one of the most vulnerable to fraud and corruption.[2807] It is widely acknowledged that a public procurement system will only be fit for purpose 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.

331. One of the reasons this Commission was established was to enquire into the working 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 Terms of Reference, as follows:

[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:

[1.2] whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public officials or employees of any state owned entities (SOEs) breached or violated the

[2807] OECD (2009), 'Principles for Integrity in Public Procurement', OECD, Paris at page 9.

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;

[1.3] the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organisations by public entities listed under Schedule 2 of the Public Finance Management Act No.1 of 1999 as amended;

[1.4] whether there are any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licences, Government advertising in the New Age newspapers and any other Governmental services in the business dealings of the Gupta Family with Government Departments and SOEs;

[1.5] the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organisations 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.

332. In summary, one of the tasks of the Commission is to assess the impact of corruption[2808] (including fraud)[2809] and undue influence[2810] on public procurement and to make recommendations to curb irregularities and the corrupt manipulation of the procurement system.

333. This Chapter:

[2808] The general offence of corruption and offences in respect of corrupt activities relating to public officers are set out in sections 3, 4 and 13 of the Prevention and Combating of Corrupt Activities Act 12 of 2004. See further paragraph 183 of this Chapter.

[2809] Fraud is used in the sense of a wilful perversion of the truth made with the intent to deceive and resulting in actual or potential prejudice to another.

[2810] Undue influence involves one person bringing influence to bear on another to prevail on that other to act in breach of duty.

333.1. identifies the patterns of corruption which have been shown to exist in each stage and at every level of the procurement cycle;

333.2. calls attention to the associated collapse of governance in state departments and state owned enterprises;

333.3. identifies the primary risks to the integrity of the procurement system and calls attention to the lack of effective protection against those risks;

333.4. points to structural weaknesses in both the design and the implementation of procurement which facilitates corruption;

333.5. recommends remedial measures.

334. 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. The latter 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 marked decentralisation of our procurement system might seem to be far removed from the present enquiry until one considers how that decentralisation may have hampered effective monitoring and oversight whilst simultaneously involving a substantial increase in the number of trained procurement officials required to work the system. Hence the wide-ranging considerations that are here addressed.

335. For present purposes the procurement cycle may be said to cover three main stages: pre-tendering; tendering and post award.

336. Each of those stages covers a range of activities and in that regard, following international norms, each stage covers the following activities:

336.1. Pre-tendering

336.1.1. Needs assessment

336.1.2. Planning and budgeting

336.1.3. Definition of requirements

336.1.4. Choice of procedures

336.2. Tendering

336.2.1. Invitation to tender

336.2.2. Evaluation

336.2.3. Award

336.3. Post-award

336.3.1. Contract management

336.3.2. Order and payment

337. At the outset and to provide an introductory framework of reference it is helpful to bear in mind the 10 principles identified in the Organisation for Economic Co-operation and Development ("OECD") Report entitled Principles for Integrity in Public Procurement [2009] which are basic to any proper procurement system:

337.1. Transparency

337.1.1. **Principle 1.** Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

337.2. **Principle 2.** Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

337.3. Good Management

337.3.1. **Principle 3.** Ensure that public funds are used in public procurement according to the purposes intended.

337.3.2. **Principle 4.** Ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

337.4. Prevention of Misconduct, Compliance and Monitoring

337.4.1. **Principle 5.** Put mechanisms in place to prevent risks to integrity in public procurement.

337.4.2. **Principle 6.** Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.

337.4.3. **Principle 7.** Provide specific mechanisms to monitor public procurement a well as to detect misconduct and apply sanctions accordingly.

337.4.4. **Principle 8.** Establish a clear chain of responsibility together with effective control mechanisms.

337.4.5. **Principle 9.** Handle complaints from potential suppliers in a fair and timely manner.

337.4.6. **Principle 10.** Empower civil society organisations, media and the wider public to scrutinise public procurement.

338. To keep this Chapter within workable limits some recent examples have been selected which typify the kind of abuse manifesting itself in each stage of the procurement cycle. The entities featured in these examples are merely some amongst many whose conduct was of the type described.

B: Patterns of Abuse at each Stage of the Procurement Cycle

Pre-tendering phase

Procurement of goods/services which are not needed, or not intended to be supplied and duplication of contracts

339. 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

340. 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 requisite internal capacity and expertise and did not require such services.[2811]

[2811] Exhibit BB8 (d), p 11, 13; Exhibit BB3, p 18, para 5.5.9.

341. In some cases, advisory services were procured for certain projects without the participation, knowledge or approval of the business owners of those projects.[2812] In other cases, transaction advisory services were procured for activities which had already been competently executed by 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.[2813]

342. 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.[2814]

343. 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 event preceded this agreement and Regiments had no contractual relationship with Transnet.[2815] This meant that there were two contracts for the same work.

Eskom

344. In relation to Eskom, Ms Mosilo Mothepu ("Ms Mothepu"), former senior manager at Regiments (and later CEO at Trillian Financial Advisory), stated in her affidavit to the Commission: "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 absorbent (sic) fees that

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[2812] Exhibit BB10, p 31-32, paras 126 – 127.

[2813] Exhibit BB3, p 39, para 9.1.2.

[2814] Exhibit BB10, p 33-35, paras 131 – 140.

[2815] Exhibit BB3, p 7, para 5.1.14; Exhibit BB8(a), p 79.

TFA/TMC/TCP charged were unjustifiable and Eskom did not get any value for money".[2816]

Free State Provincial Government

345. The Commission heard evidence relating to the Free State/Estina Vrede Dairy to the effect that Mr Mosebenzi Zwane ("Mr 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, it could not be rolled over to the next financial year. He committed not to go on holiday and to oversee efforts to ensure the money was committed. In January, Mr Mosebenzi Zwane told his colleagues that 66% of the budget had been spent over the holidays in building houses.[2817]

346. In fact, this money was paid to supposed service providers before any work had been done, without any proper procurement process.[2818] 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. R631m was dispersed rapidly in early 2011 on these contracts. The department later struggled to find any housing that had been delivered in return.

SARS

347. 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

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[2816] Exhibit U31, p26-28, para.52.9-52.12.

[2817] Exhibit X5, p. 2

[2818] Transcript 28 August 2019, p.168, line 9-11.

tax administration services.[2819] There is a tax administration diagnostic assessment tool which is used across the world as a measurement instrument. In 2013 SARS scored among the top five revenue and customs authorities in the world on the basis of this tool, Mr Van Loggerenberg told the Commission.[2820] As a result of how effectively SARS became at enforcement and oversight, it was "praised and studied worldwide".[2821]

348. It is clear, therefore, that SARS was a highly effective service at both oversight and enforcement. Mr Athol Williams said that no one, at this stage, could legitimately have described SARS as dysfunctional.[2822] Against this background, the need for the services of a management consultancy is tenuous at best.

349. This notwithstanding, 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 and strategic plans and operations. Mr Williams said that one would be hard pressed to find any knowledgeable person who could justify the claim that this is what SARS needed.[2823]

City of Johannesburg

350. 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.

[2819] Transcript 25 March 2021, p. 57, line 9-15.

[2820] Transcript 25 March 2021, p. 90, line 17-20.

[2821] Mr Van Loggerenberg, Transcript 25 March 2021, p. 90-91.

[2822] Mr Williams, Transcript 23 March 2021, p. 209, line 8-10.

[2823] Transcript 23 March 2021, p. 210, 13-18.

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.

351. Evidence was given by EOH chief executive Mr Stephen van Coller[2824] who had tasked ENS law firm to investigate irregularities at EOH. Mr van Coller and Mr Steven Powell (who had led the ENS investigation)[2825] 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.

352. 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.

353. In total, ENS identified tens of millions 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 in blank or had nebulous content in which consulting services were described in terms which are "as broad as they can be".[2826]

[2824] Exhibit VV1 and Transcript 23 November 2020.

[2825] Exhibit VV2 and Transcript 25 November 2020.

[2826] Transcript 25 November 2020, p 35 – 36.

Frivolous use of deviation policy

354. The procurement mechanism that applies by default is the open-tender process.[2827] Regulation 16A6.4 of the Treasury Regulations provides for deviation from the normal procurement processes. Cases where deviation may be permitted are 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. Mr Mathebula gave a thorough explanation of the way that this has been abused, which is outlined in the subsequent paragraphs.[2828]

355. The Accounting Authority[2829] is required to report to the relevant Treasury and the Auditor General in the cases of deviation. Accounting Officers/Authorities are required to report within ten working days to the relevant Treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. 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 competitive bidding process.

356. Due to the abuse of Treasury Regulation 16A6.4, in 2008, National Treasury issued Practice Note No. 8 of 2007/8 with threshold values for the procurement of goods, works and services by means of petty cash, verbal/written price quotations or competitive bids. The Note informed Accounting Officers/Authorities of departments, constitutional institutions and public entities listed in Schedule 3 to the PFMA that should it be impractical to invite competitive bids for specific procurement (e.g. in urgent or emergency cases or where there is a sole supplier) the required goods or services may

[2827] Exhibit BB2, p 55, para 125 .

[2828] Exhibit B1, p 21, para 4.6.6.3 and its subparagraphs.

[2829] See further paragraph 153 of this Chapter.

be procured by other means such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. However, where any such exceptional case is identified, the affected accounting authority must report within 10 working days to the relevant Treasury and Auditor-General all transactions of more than R1 million where Treasury Regulation 16A6.4 was applied to procure goods and services. The objective of this practice note was to prevent the use of Treasury Regulation 16A6.4 to circumvent competitive bidding processes.

357. Following the issuance of Practice Note No. 8 of 2007/8, there was a trend that developed regarding expansion and variation of contracts which required another intervention. Consequently, National Treasury issued Instruction Note 32 on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management on 31 May 2011 directing departments, constitutional institutions and public entities listed in Schedule 3 to the PFMA on how to manage expansion or variations of orders against the original contract in exceptional cases as well as prescribing a 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 the set threshold will only be allowed subject to prior written approval of the relevant treasury.

358. However, the implementation of the provision for obtaining relevant treasury approval was postponed through a Supply Chain Management Circular dated 24 April 2012 until a revised instruction was issued. In the result, in the period April 2012 to 2016, the Accounting Officers/Authorities and authorities of departments, constitutional institutions and public entities listed in Schedule 3 to the PFMA had to report deviations above R1 million approved by that officer or authority to the Auditor General.

359. In 2016 National Treasury issued Instruction No. 3 2016/17 as the revised instruction to manage deviations and variations, directing departments, public entities listed in schedules 2 & 3 and constitutional institutions to only deviate from inviting competitive bids in cases of emergency or sole supplier status as well as re-emphasizing the limits set in Instruction Note No. 32 of May 2011 in terms of contract expansion or variations. Paragraph 8 of Instruction No. 3 of 2016/17 dealing with deviations from normal bidding process provides that departments, public entities and constitutional institutions may dispense with a competitive bidding process as long as it is an emergency (e.g. a natural disaster) or where there is a sole source service provider. Further, it means that departments, public entities and constitutional institutions may vary contracts as long as they remain within the set thresholds.

360. Deviations from normal competitive bidding processes are an 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 exception and this resulted in unintended institutionalisation of deviations which is contrary to section 217 of the Constitution, sections 38 and 51 of the PFMA.

361. 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.

362. In this regard the deviation in the case of a sole source service provider is particularly troubling. In effect it allows the procuring entity to place the supply contract privately where it believes, or claims to believe, that no second bidder would, if invited, come forward. In the view of the Commission this exception is poorly conceived and it invites abuse. Deviation from the fundamental principle of competitive bidding cannot be justified on this basis, and that is true even in the case where, as predicted, only one bidder responds. The time and incidental expense involved in going out to tender, even in the latter case, is necessary in the interests of good governance. It would be different if this was a case of genuine urgency but, if so, it must be justified on the basis of urgency alone. Nor is it appropriate to defend such a deviation from good practice on the basis that it is "impractical" to go out to tender. Basic good practice is not "impractical".

363. Despite numerous instructions that the National Treasury has issued 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. As a consequence, some government institutions apply deviations as the norm rather than the exception.

Free State Provincial Government

364. 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. She explained that: "if it is not practical to invite bids, the reasons should be recorded why you are deviating. So, I am saying with regard to the reasons that were recorded, I looked at the explanation of the job opportunities that the Vrede Dairy Project is going to bring in that area, I looked at the issue of the investment

that Paras was going to bring and because Paras was coming with an investment, for me it is not practical to subject somebody who is going to invest into a bidding process."

365. She was asked to explain why it was "impractical" to invite competitive bids. Ms Dlamini answered that she "found it not practical from the point where I was sitting to say how do I subject an investment to a bidding process". But in fact there was nothing impractical in this case to invite competitive bids.[2830] This was clearly a misuse of the deviation process, and Ms Dlamini eventually agreed that there was nothing that could have 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.

366. The Commission heard further evidence relating to the Estina Dairy Project, concerning unlawful deviations. Mr Albertus Venter, the Deputy Director General: Corporate Administration and Coordination in the Free State said that he was aware of a submission where the Head of the Department had approved the appointment of Estina on a deviation from the procurement process, authorised in terms of Treasury Regulation 16A.4. In that submission it was not clear what the reasons for the deviation were. The deviation requirements were not complied with, and there were compliance issues which the Auditor General had picked up.[2831]

367. Mr Mbana Peter Thabethe, Head of Department for Agriculture in the Free State, signed an agreement on 5 June 2012[2832] with Estina, but irregularities were later found by the Free State provincial Treasury, and a new version was drafted and signed on 5 July

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[2830] Transcript 2 September 2020, p. 193 – 202.

[2831] Transcript 22 July 2019, p 174, line 11-18.

[2832] Transcript 12 August 2019, p. 20.

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 were 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.[2833] 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;[2834] there was no proper procurement process followed,[2835] a deviation was signed off by the Chief Financial Officer, Mr Dlamini and by Mr Thabethe, as the accounting officer, despite stating no grounds for this; and lastly, the contract was signed after the project was already underway and without any existing budget – a serious violation of financial regulations.[2836]

Confinements

368. Confinements are a type of deviation from the default open procurement process and as such are to be approached with great circumspection. 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) standardization and (d) goods or services that are highly specialized and largely identical to those previously procured from the supplier.[2837] It is not the principle of restricted bidding, but rather it's potential for abuse that creates a

[2833] Transcript 20 August 2019, p. 95.

[2834] Transcript 20 August 2019, p. 102-103.

[2835] Transcript 20 August 2019, p. 10, para 10-20.

[2836] Transcript 22 July 2019, p. 157-158.

[2837] Exhibit BB2.1, p 17-18, para 45.4.

problem. Hence, confinements operate best in an environment with a strong compliance culture and where the potential for abuse is low.[2838]

Transnet

369. During the period 2012-2015, Transnet awarded at least seven contracts to McKinsey for various consultancy work by way of a confined tender process, in addition to the advisory contract. The combined value of the contracts, as well as 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 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.[2839] 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 *ex post facto* exercise to justify the award of business that had already occurred. This was part of a larger trend at Transnet.[2840]

370. For reasons of "confidentiality" some of the McKinsey confinements (such as the manganese, NMPP and iron ore transactions) did not follow the normal review and sign-off process. This meant that the confinements were taken to the Group CEO for sign off with little or no input from reviewing bodies. None of the memos, however, explained why they should be confidential; "confidentiality" seems to be a ruse used to bypass

[2838] Exhibit BB2.1, p18, para 45.4.1.

[2839] Exhibit BB2.1, p 57-60, para 125-131.

[2840] Exhibit BB2. p 60-62, paras. 132–137.

procurement procedures.[2841] Mr Volmink assessed the factual motivation for confidentiality of the specific McKinsey confinements to be baseless:

> "I think on any reasonable interpretation and reading of these confinement memos, it certainly does not appear that there was anything, not even an iota of information, contained that would convince a reasonable reader that there were grounds for confidentiality."[2842]

371. An added difficulty with the treatment of the McKinsey contracts is that confidentiality was sometimes cited as a ground for confinement itself, which is not recognised as among the four grounds for confinement in the PPM.[2843]

Eskom

372. At Eskom, in May 2015, Mr Molefe approved a proposal for the appointment of McKinsey & Company Africa 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. This was going 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.[2844] The proposal was approved by the relevant Executive Committee, including the approvals for a sole-source procurement.

373. 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

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[2841] Exhibit BB2, p 63-65, para 143-152.

[2842] Transcript 10 May 2019, p 72, line 7-11.

[2843] Exhibit BB2, p 65, para 151.

[2844] Affidavit by Brian Molefe dated 20 May 2020, p. 28 para. 109 and associated 'BM20' p.148.

Programme'. In her memorandum, Ms Daniels pointed 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.[2845]

374. 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 any specialised services.[2846] 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 actually brought to the programme.

Free State Provincial Government

375. In relation to the Free State evidence, Mr Albertus Venter explained his understanding of a sole provider to be the only entity at that point in time who could provide the service. Bearing in mind the relevant project under discussion, it is unclear why Paras Dairy, a dairy farm, could legitimately be considered a sole provider of this kind of service.[2847]

Transnet

376. 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 1064 acquisition to release locomotive to General

[2845] Exhibit U33, p 23-26.

[2846] Exhibit U31, p 30, paras 54.3-54.4.

[2847] Transcript 22 July 2019, p 177 - 181.

Freight.[2848] The TFR division had prepared a business case for the confined procurement of these locomotives from Mitsui & Co African Railway Solutions (Pty) Ltd (MARS).[2849] 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.[2850] This business case was approved for presentation to the Board Acquisition and Disposals Committee meeting held on 21 October 2012 but was withdrawn by Mr Molefe.[2851]

377. Three months later, a delay which calls into question the urgency justifying confinement,[2852] Mr Molefe submitted a request for confinement to the BADC in similar terms to the MARS memorandum.[2853] However , the original business case had been changed by Transnet Group executives and/or Freight Rail Supply Chain Services[2854] in one significant respect: it now recommended confinement to CSR rather than MARS.[2855] Notwithstanding this fundamental change, several grounds for confinement in the MARS memorandum were reproduced in the CSR memorandum.[2856] These factors included that the diesel locomotives were known, met the technical requirements, that prototyping and set-up costs were not required, and that facilities were available for immediate production. These grounds, while accurate in motivating for confinement to MARS do not appear apt in relation to CSR. At the same time, the very qualities that had earlier motivated for confinement to MARS were refuted and

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[2848] Exhibit BB4(a), p 5, para 23 ; Exhibit BB2, p 50, para 113.

[2849] Exhibit BB4(a), p 6, para 26.

[2850] Exhibit BB4(a), p 6, para 27; Exhibit BB2, p 50-51, para 114.

[2851] Exhibit BB4(a), p7, para 32.

[2852] Exhibit BB2, p 51, para 116.1.

[2853] Exhibit BB2, p 50, para 115.

[2854] Exhibit BB4(a), p 5, para 24.1.

[2855] Exhibit BB4(a), p 9-10, para 40.

[2856] Exhibit BB2, p 52, para 116.4.

claims to the contrary were advanced as reason why continuing with MARS would pose an unnecessary risk to Transnet.[2857] Commenting on the contradictions between these two memoranda, Mr Volmink observes that "the about turn on the part of management was inexplicable and the reasons for the change from MARS to CSR do not make sense." [2858]

378. 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.[2859] He contends that these changes were made without consulting him or his technical and operational colleagues. [2860]

379. 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.[2861] 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.[2862] Senior management actively created a false impression as to the validity of the confinement process involving CSR, and the minutes did not reflect that Mr Callard's concerns were conveyed to the BADC. As a result, the 100 locomotives were consequently confined to CSR.[2863]

[2857] Exhibit BB2, p 52-53, para 116.5.

[2858] Exhibit BB2, p 54, para 116.8.

[2859] Exhibit BB4(a), p 5, para 24.1.

[2860] Exhibit BB4(a), p 10, para 42 -43.

[2861] Exhibit BB4(a), p 11, para 46.

[2862] Exhibit BB4(a), p 12, para 50.

[2863] Exhibit BB4(a), p 13, para 53.

380. On 26 February 2014, Mr Molefe issued an RFP to CSR.[2864] 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.[2865] Notwithstanding 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 made the award to CSR in March 2014.

381. The acquisition of the wrong kind of locomotives caused delays in the delivery of the 100 locomotives, thus negating the urgent basis on which the confinement to CSR was justified. 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."[2866] The irregular confinement resulted in significant financial and operational harm to Transnet while unduly favouring CSR over a stronger competitor, MARS.

[2864] Exhibit BB8(a), p 29.

[2865] Exhibit BB4(a), p 14, para 59.

[2866] Exhibit BB4(a), p 17, paras 73.1-73.2.

The Tendering Phase

Parcelling

Transnet

382. 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 however its GCE was authorised to approve contracts below the upper limit without seeking board approval or following any of the procurement processes. This is explicitly against Transnet's procurement guidelines.[2867]

383. 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 explains how this happened at Transnet. Over a period of 4 days (31 March 2014 to 3 April 2014), the GCE approved four confinements to McKinsey: (1) the coal contract of R130 million; (2) the iron ore contract of R239 million; (3) the manganese contract of R150 million; (4) the NMPP contract of R100 million. 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 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 GCE (up to R250m), and so avoided the confinement approval process. This is explicitly against Transnet's procurement guidelines.[2868]

[2867] Exhibit BB2, p 62-63 paras. 138 – 142.

[2868] Exhibit BB2, p 62-63, paras. 138–142.

South African Police Service

384. Officials in the South African Police Service Supply Chain Management also abused parcelling. They split orders larger than R200,000 into separate procurements so that they did not have to go out on tender.[2869] None of the prices for goods/services ever exceeded R200,000.[2870]

Abuse of preferential procurement and "Supplier Development Partners" policies

385. 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.[2871] However, evidence shows that the ideals of empowerment were grossly manipulated and abused to advance the interests of a few individuals.[2872]

386. 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 B-BBEE rating. Supplier development helps to achieve high preferential procurement targets, by ensuring the development of capable suppliers in key areas.

Transnet

387. This system was abused at Transnet by companies partnering with larger suppliers, for example, Regiments, in order to "get a foot in the door" without having to go through as

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[2869] Transcript 20 January 2020, pp 85–88 and 104–105.

[2870] Transcript 20 January 2020, p 78-79.

[2871] Exhibit BB2, p 21-23, paras. 45.8-45.10.

[2872] Exhibit BB2, p 21-23, paras. 45.8-45.10.

rigorous evaluation process.[2873] The result is that 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

388. Another example of an abuse of preferential procurement occurred at SAA, according to the evidence of Dr Dahwa (the former Chief Procurement Officer).[2874] Dr Dahwa explained how from early 2015 the Board, particularly the Chair, Ms Duduzile Myeni and a fellow Board member, Ms Yakhe Kwinana, indicated that they were trying to align SAA to President Zuma's February 2015 State of the Nation Address ("**SONA**").

389. 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 at the time.

390. At that time there were certain contracts in place at SAA which were nearing their time of expiry. During July 2015, Ms Kwinana requested a list from Dr Dahwa of expiring contracts in various areas of the business. He was asked to populate tables for each of these areas indicating who the service provider was, when the contract was expiring, and the BBE status/black ownership of the service provider.

391. With regards to this matter Dr Dahwa continually tried to adhere to the SAA aligned procurement policies and legislation. He said this was not always easy. He received

[2873] Exhibit BB2, p 21-23, paras. 45.8-45.10.

[2874] Exhibit DD16, p 8 – 12.

much interference and intimidation, and in particular from Ms Myeni, and more so from Ms Kwinana. Their intimidation, he says, was purely to subdue him into submitting to appointment of certain service providers.

392. On 2 October 2015 Ms Kwinana and Ms Myeni kept Dr Dahwa at the office after normal working hours, where they instructed him to sign the letters of award to Swissport and Engen. Amongst others, Swissport and Engen were two of the companies thar the SAA Board had identified as having contracts ready for renewal. They were then approached to set aside 30% of their contract value to BBB-EE entities.

393. Ms Kwinana and Ms Myeni instructed Dr Dahwa not to leave the office until the letters of award were done for both. He was not willing to do so. He was concerned that the whole 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. Dr Dahwa raised this specific concern with the Head of Legal and asked how he was going to be able to justify appointing a pre-selected entity without having gone out on open tender to procure the most cost-effective service provider for SAA.

394. After Dr Dahwa refused to comply with this request, Ms Kwinana sent an email with a letter of complaint to Ms Myeni, regarding Dr Dahwa's alleged insubordination.

395. 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. BidAir was already a BBBEE company, at least 63% black owned. There was also no formal communication in writing to BidAir.

396. As a result of the demands from Ms Kwinana, Anton Alberts, an MP, wrote a letter to the BBBEE commission to register his concerns. This resulted in the BBBEE Commissioner advising SAA to stop demanding the 30% set aside from service providers, as described above.

Communication with bidders

Transnet

397. Mr Tshiamo Sedumedi (of MSN Attorneys)[2875] testified that in late 2011, Transnet issued a tender worth R2.7 million 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 the 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.[2876] In particular, Mr Molefe met and discussed the tender with CSR before the issuance of the RFP and Mr Pita (Group Chief Supply Chain Officer) played an active role in ensuring CSR was aware of the RFP documents.

SAA

398. Mr Schalk Human, the acting head of department for supply chain management at 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

[2875] Exhibit BB8(a), p 15-16.

[2876] Transcript 28 May 2019, pp 65-76.

process was underway. “It is commonly viewed”, he said, “in public sector procurement that when a tender process is running that interaction with suppliers are prohibited and it is explicitly stated like that in the Supply Chain Policy of SAA.”[2877]

SARS

399. At SARS, not only was there communication with Bain before a formal RFP was issued, Bain *itself* drafted the relevant RFP. Mr Williams told the Commission that Bain, as one of the potential consultants, was able to draft the rules of the game.[2878]

400. Mr Vittoro Massone, a managing partner at Bain, even went so far as to say in an email to a colleague in relation to the RFP, “as much as it is ‘designed for us’, we need to make sure they feel comfortable with […] our expertise (and we know that we cannot claim to have done much on this specific topic.”[2879]

401. 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.

402. SARS also sought reference from Bain for procurement purposes[2880] even before the RFP process had begun. In truth SARS had decided the outcome of the tender process before that process started.

[2877] Transcript 6 February 2020, pp 34 – 35.

[2878] Transcript 24 March 2021, pp 37- 38.

[2879] Transcript 24 March 2021, pp 39 – 40.

[2880] Transcript 24 March 2021, pp 34 – 47.

City of Johannesburg

403. Mr Powell 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.[2881] 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. This was to exclude other bidders or to make them more likely to win the tender.[2882]

404. 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 which were made, before and after certain contracts were awarded. Emails show that a month before a certain contract was awarded, Mr Makhubo (then Mayor of Johannesburg) asked EOH for a donation to the ANC. A week after the contract was awarded, Mr Makhubo asked for another donation. Of particular note was R50m donated to the ANC for the 2016 local government elections.[2883]

405. Mr Powell pointed to the elementary fact that tenderers should not be making any donations to political parties or their proxies in connection with the award of a tender during any 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

[2881] Transcript 25 November 2020, p. 63, line 4-10.

[2882] Transcript 23 November 2021, p. 37.

[2883] Transcript 23 November 2021, p. 47 and Transcript 25 November 2020, p. 14 onwards.

benefit to the party." The records show a number of donation requests that coincided with the award of tenders.[2884]

Free State Provincial Government

406. In relation to the Free State asbestos scheme, evidence shows Blackhead Consulting, owned by Mr Edwin Sodi ("Mr Sodi") had received a number of lucrative contracts from government departments, most notably the 2014 asbestos audit tender valued at R255 million from the Free State government. Bank accounts show millions of Rands in payments to the ANC by Blackhead alone between 2013-2018.[2885]

Retroactive changes to bid criteria

Transnet

407. 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 B-BBEE certificate was changed to benefit CSR which would otherwise have been disqualified in the evaluation process. CSR scored zero for B-BBEE by virtue of being a foreign company without the mandatory B-BBEE certificate. The retroactive change of the evaluation criteria was irregular as it compromised the fairness, transparency and competitiveness of the procurement process.[2886] Legitimate qualms about the evaluation criteria should have resulted in the tender being re-issued with the changed criteria.[2887]

[2884] Transcript 25 November 2020, p. 114.

[2885] Transcript 29 September 2020, p. 41.

[2886] Exhibit BB8(a), p 23.

[2887] Exhibit BB2, p 23.

Post Award

Contract variations and expansions

408. Mr Mathebula says that the existing prescripts provide Accounting Officers/Authorities and accounting authorities of departments, public entities and constitutional institutions 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.[2888]

409. The risks in approving contract expansions or variations beyond the above threshold is that relevant Treasuries may not have the full background, terms and conditions including risks involved in the conclusion of the original contract. At times it becomes very difficult to respond to the requests for variations without full details and background which are often lacking and this tends to delay responses and therefore impact turnaround time and service delivery.

Transnet

410. With reference to Transnet procuring consulting and advisory services from McKinsey, Regiments and Trillian,[2889] Mr Mohamed Mahomedy 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 event to be effected in terms of Transnet's procurement policies, which did not happen.

[2888] Exhibit B1, para 4.6.6.4 .

[2889] Exhibit BB3, p 16, para. 5.4.9.

SARS

411. The SARS evidence shows that there was a flouting of the procurement legislation 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.[2890]

412. Email communications between Bain and SARS show that there was collusion between the consultants and SARS to get around the procurement process which was required for a valid extension of the original contract.

413. After back and forth communications, a solution – a so-called "legal way" to sidestep the requirement that the work go out to open tender – was found.[2891] The solution was for SARS to declare the Bain project an emergency project and claim or 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 said that no one could say that SARS "drastically and urgently needed to be restructured" or that Bain was the only organisation in the country who could do that.[2892] Nevertheless, the extension into phase two of the work took place via this procedure.

414. Once again, in June 2016, the issue of how to extend the contract arose. Mr Massone wrote an internal email that said Bain cannot go to the market because "if we do go to the market, we know we will lose." He was clear that Bain would not be awarded the work if the process were to be a competitive tender one.[2893]

[2890] Transcript 24 March 2021, p 49 – 53.

[2891] Transcript 24 March 2021, p 54.

[2892] Transcript 24 March 2021, p 55.

[2893] Transcript 24 March 2021, p 55 – 56.

415. 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. Those earlier phases standing alone, it was argued, would have no value for SARS and the expenditure incurred would be wasted. National Treasury was thereby misled into authorising phase 3. Mr Williams explained, however, that phase 3 was actually focused on something different from the earlier two phases, so in that sense the argument held no water.[2894]

416. The upshot is that there was never an open tender process run in relation to phases 2 and following.[2895]

C: The collapse of governance in State Owned Enterprises

417. The patterns of abuse which appear in every stage of the procurement cycle evidence 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 needs to be detailed separately in order to understand to what extent the procurement system has been rendered unfit for purpose.

418. As the representative government shareholder, 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. The Board is responsible for directing and overseeing the affairs of the SOE to secure its long-term sustainability and is also responsible to ensure compliance with all legislative and regulatory requirements. 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 representative

[2894] Transcript 24 March 2021, p 56 – 57.

[2895] Transcript 24 March 2021, p 58.

shareholder. The CEO and senior management run the SOE but report to the Board with whom they have an employment contract.

419. The evidence received by the Commission demonstrates that in many cases and in fundamental respects, the Boards of the SOE's have shirked their responsibilities, or worse, used their powers to corrupt the SOEs which they have been appointed to protect.

420. This collective misconduct was often evidenced by the abuse of centralised procurement processes so that the approval authority for high value tenders becoming concentrated in the hands of a small group of top executives and Board members.

Transnet

421. 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.

422. 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 Proposal 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.

423. 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.[2896] During 2012, the BADC and the Board were given tender approval authority of up to R2 billion and above R2 billion, respectively. By 2016 these approval authorities had increased to R3 billion and above R3 billion, respectively.[2897]

424. The creation of the BADC and its creeping authority resulted in the concomitant 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. The mechanism of one-person acquisition councils further concentrated power in the hands of a few individuals, such as the CFO and GCEO.

425. 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.

426. 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 on irregular expenditure that Transnet

[2896] Exhibit BB2, p 10, para. 24.

[2897] Exhibit BB2, p 16, para. 45.1.

recently incurred 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. On the one hand there was a highly-ordered system with clear controls and procurement rules in place. However, those seem to have been applied more readily to relatively lower-value transactions. On the other hand there appears to have been [an] alternative system, where decisions were made with scant regard to applicable procurement rules. This alternative system seems to apply to high-value transactions within the Board or Exco's delegation."[2898]

Eskom

427. During his tenure as Minister of Mineral Resources ("**DMR**") Mr Mosebenzi Zwane centralised much of the work and reporting lines directly to the Ministry in particular to his own office. Former Director-General ("**DG**"), Dr Ramontja said that during Minister Ramathlodi's time at DMR his department's engagement over the Optimum mine issue was conducted by his officials and he was kept updated. After Minister Zwane had taken over, such engagements were centralised in Minister Zwane's office and Dr Ramontja, as DG, was no longer kept informed about what was happening with regards to the mine.[2899]

Free State Provincial Government

428. 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,

[2898] Exhibit BB2, p 31-32 para 78.2].

[2899] Transcript 14 March 2019, p.27.

particularly procurement, in an operation called "Operation Hlasela".[2900] Mr Mxolisi Dukwana suggests that the purpose of this was to enable Mr Magashule to bypass MECs and work directly with officials, and in particular getting control of procurement.[2901]

Strategic appointments and dismissals

429. The different configurations of Board directors and senior managers across the SOEs reveal how particular individuals were strategically positioned to repurpose the SOE. These implicated individuals oversaw the corrupt award of high-value contracts that allegedly enriched entities connected to them at great loss to the SOEs.

430. Dr Popo Molefe explained that there is a discernible pattern with Board appointments.[2902] 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.

431. Ms Barbara Hogan was the Minister of Public Enterprises, and therefore responsible for Transnet, from May 2009 to October 2010. She claims to have been removed for resisting repeated interference from President Jacob Zuma which was intended to ensure that his preferred SOE board and executive appointments were put in place, and also for resisting requests from the Guptas, which she regarded as reckless and

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[2900] Exhibit X5, p.28.

[2901] Transcript 28 August 2019, p.243.

[2902] Exhibit. BB1, p 7, paras 9.2 – 9.5.

inappropriate.[2903] After the removal of Ms Hogan as Minister, her successor 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.

432. In many ways, Transnet can be considered to have been the Gupta's pilot project at capturing an SOE and was a primary victim of State Capture. This is in keeping with the evidence given by 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".[2904]

Eskom

433. According to Mr Zola Tsotsi, former Chair of the Board of Eskom, when Mr Brian Dames resigned as Group CEO, the Board wished to appoint Mr Steve Lennon, a divisional executive at Eskom, as Acting CEO. This was broached with Minister Malusi Gigaba who originally agreed, but, later, Mr Gigaba changed his mind. According to Mr Tsotsi, Mr Gigaba phoned Mr Tsotsi and was irate, and said 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.[2905]

[2903]Exhibit L, p 24, paras. 108–109.

[2904] Exhibit L, para 106.

[2905] Transcript 23 January 2020, p.28-30.

434. 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"[2906]. Mr Gigaba in a subsequent conversation asked 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. (Mr Tsotsi also characterises this as an "instruction").[2907] While the rest of the Board members were unhappy on hearing this, they, nevertheless, saw to it that Mr Matjila was made Acting CEO.[2908] While he was acting Group CEO of Eskom, Mr Matjila helped the Guptas and their associates get contracts with Eskom. This include the New Age Breakfasts. He was also prepared to sign a certain contract that Mr Salim Essa was pursuing which Ms T Molefe who was the Financial Director of Eskom at the time, refused to sign. The appointment of Mr Matjila as Acting Group CEO is yet another instance where Mr Gigaba had a role in the appointment of someone who assisted the Guptas. Mr Brian Molefe is another. There are others.

SAA

435. 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.

436. There is a pattern of executive interference and political overreach at the SOEs. Evidence shows that Ministers, and even the former President, Mr Zuma, were regularly involved with operational matters.

[2906] Transcript 24 January 2020, p.44.

[2907] Transcript 23 January 2020, p.35.

[2908] Transcript 23 January 2020, p.28-32.

Transnet

437. According to Ms Hogan, Mr Zuma "thwarted all the legal and legitimate procedures [she] took to obtain Cabinet approval for any appointments whatsoever to Transnet, including the appointment of a CEO."[2909]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,[2910] and (2) Gama (who was the CEO of one of Transnet's subdivisions, Transnet Freight Rail) was facing serious allegations of misconduct including misconduct connected with irregularities in tenders at the time.[2911] Mr Zuma insisted that no appointment be made until after the disciplinary case against Gama had been concluded.[2912]

438. 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, which were arranged by his housekeeper. 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.[2913]

439. Ms Hogan describes "behind-the-scenes" processes running parallel to the official appointment processes. The ANC had expectations that they would influence board

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[2909] Exhibit L, p 8, para 28.

[2910] Exhibit L, p 9, para. 32.

[2911] Exhibit L, p 10, para. 36.

[2912] Exhibit L, p 10, para. 34.

[2913] Exhibit L, para. 93.

appointments via the ANC Deployment Committee.[2914] The practice of consultation with the ruling party was further tainted by a lack of transparency and the presence of conflicts of interest.[2915] She said that factional battles within the ANC encouraged and entrenched nepotism and patronage, which compromised the integrity of the deployment process and damaged SOEs.[2916]

440. According to Ms Hogan the ANC wanted Mr Gama and no-one else in that position.[2917] Ms Hogan was put under pressure to appoint Mr Gama by other cabinet ministers and senior ANC leaders (such as Mr Jeff Radebe, Mr Simphiwe Nyanda and Mr Gwede Mantashe). A number of media statements put out by organisations such as the ANC Youth League, the South African Transport Union and the SACP accused Transnet of persecuting Mr Gama and cast Ms Hogan and the board as "anti-transformation" and "racist". According to Ms Hogan, Mr Zuma did not protect her from these attacks, but had "hung [her] out to dry".[2918] She experienced this media exposure as "an enormous amount of pressure being put on [her] publicly to accede to their demands".[2919]

441. Mr Zuma did not allow the appointment of a CEO until Mr Gama's disciplinary process was finalised.[2920] After Gama had been found guilty and dismissed, President Zuma did not respond to Ms Hogan's correspondence or requests for a meeting concerning the appointments. She was dismissed three days after requesting that Mr Zuma expedite the placing of a memo concerning Transnet appointments onto the Cabinet agenda.[2921]

[2914] Exhibit L, p, 6, para. 22.

[2915] Transcript 21 November 2018, pp 39 – 45.

[2916] Exhibit L, p 7, para. 25.

[2917] Transcript 21 November 2018, p 105.

[2918] Transcript 21 November 2018, p 94 - 109.

[2919] Transcript 21 November 2018, p 102.

[2920] Transcript 21 November 2018, p 26.

[2921] Exhibit L, p 14-15, paras 52–57.

442. Ms Hogan was replaced by Mr Malusi Gigaba. Mr Gigaba was able to make the necessary appointments at Transnet without the delays from Mr Zuma and his cabinet that had effectively put a halt to the appointment process under Ms Hogan. A month into his term, cabinet approved Mr Gigaba's recommendations for the Transnet board, including Iqbal Sharma, an associate of Salim Essa[2922] and the Gupta Family.

443. Mr Gigaba appointed 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.[2923] Mr Gigaba appointed Mr Brian Molefe ahead of a candidate who had scored higher points than him in the interviews. Mr Gama was reinstated as CEO of TFR on the grounds that his misconduct had not been serious enough to warrant his dismissal. His reinstatement was on very strange terms that were very favourable to him and very prejudicial to the interests of Transnet. That matter is dealt with under Transnet.[2924]

SAA

444. Ms Mzimela described SAA under Barbara Hogan and 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

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[2922] Exhibit L, p 15, paras 59–62.

[2923] Transcript May 7 2019, p15.

As early as March 2011, COSATU had raised concerns about Brian Molefe's relationship with the Guptas, and the Gupta's apparently growing influence over government. Other board appointments had also been accurately predicted by *The New Age.* By March 2011, the media was reporting several anomalies associated with the "miraculously quick" appointment of Molefe as the new CEO of Transnet. Details of the appointment process suggested Molefe's appointment had been predetermined.

Prior to appointing Molefe, Gigaba tried to appoint Iqbal Sharma as chair of the board, but this was not approved by Cabinet. There are media reports that Cabinet was worried Sharma was too close to the Guptas – but this was denied by Gigaba. See National Assembly Portfolio Committee on Public Enterprises, "Eskom Inquiry: Malusi Gigaba" (Parliamentary Monitoring Group, March 13, 2018), https://pmg.org.za/committee-meeting/25974/.

[2924] Transcript 21 November 2018, p 118.

deliberately focused on ensuring good governance given “historical breakdowns” in the governance of the institution.[2925]

445. Ms Carolus characterised Minister Hogan’s approach in much the same way. According to Ms Carolus, Minister Hogan expected the board to adhere to the letter and the spirit of the relevant legislation and good governance policies. She also expected the Board to have due regard for the government’s wider objectives of economic growth, job creation, transformation and good governance. Ms Carolus emphasised that there was a clear separation of the three areas of responsibility and the respective responsibilities of the shareholder representative (the Minister), the Board, and the management team.[2926]

446. Communication under Minister Hogan was clear and transparent, and always took the form of formal written communication. This was enhanced by a clear delineation of roles within SAA and the DPE, so that it was always clear who one needed to contact for various issues. 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.[2927]

447. Ms Hogan was dismissed by Mr Zuma on 31 October 2010, which she believed was due to her resisting his attempts to appoint certain preferred candidates as board members or CEOs of state owned entities.[2928] She was replaced by Mr Gigaba.

[2925] Exhibit DD14, p 3-6, paras 4 -11.

[2926] Transcript 29 November 2018, p19–20;. See also exhibit R3, paras 4–6.

[2927] Transcript 13 September 2019, p 53–54, and 59.

[2928] Exhibit L124, para 108.

Demarcation between the Board and executive decision makers

448. Not only was there political involvement in the operations of the SOEs, 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

449. The evidence relating to the award of high-value contracts bears out Mr Volmink's evidence 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 Transnet Freight Rail (a subsidiary company) for operational advice.

450. The result was that high-value procurement decisions by the Board were often uninformed or made on the basis of questionable advice received from external advisors and consultants. For example, 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 heading and escalation.[2929]

451. There are examples at Transnet where the Board directly overruled recommendations made by the Executives. 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

[2929] Exhibit BB8(b), p11.

award.[2930] Mr van der Westhuizen, who was intimately involved with the procurement process, recounts that he was called to a meeting with Mr Molefe during November 2013 to discuss the network services tender. He recalls that he and the other attendees were requested to hand over their cellular phones before entering Mr Molefe's office. At this meeting, Mr Molefe indicated that he did not support the award to Neotel and that he instead intended to award the tender to T-Systems. Mr van der Westhuizen recounts that he was the only attendee who raised objections to Mr Molefe's reasoning in support of T-Systems. After realising that his comments were not being well received, he took no further part in the meeting since he felt that the continued "verbalisation of [his] objections would be tantamount to professional suicide." [2931]

452. The reasons put forward by Mr Molefe for overturning the award to Neotel are reflected in the memorandum that Mr van der Westhuizen was subsequently instructed to draft, notwithstanding his strong disagreement with the position he was required to justify. The reasons proffered were that the R248 million discount offered by T-Systems should have been taken into account; Neotel posed a "concentration risk" as Transnet was their biggest client; and that a complaint had been received that Neotel was diluting its shareholding to the detriment of its B-BBEE partners.

453. 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. Even assuming Mr Molefe had the power to rescind the award, his decision to rescind was taken in a procedurally unfair manner. Transnet's procurement Practice Manual states that an Acquisition Council cannot substitute its own decision for that of the evaluation

[2930] Exhibit BB7, p 22.

[2931] Exhibit BB7, p 28.

team which is what Mr Molefe did without following proper processes for resolving any dispute.

SAA

454. 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.

455. Following this meeting, the Board then passed a resolution to cancel the tender to LSG, and award it to Air Chefs. The letter informing LSG that their award had been retracted was then sent. Air Chefs was then given a letter of award for the contract.

Transnet

456. A slightly different issue, but also related to the demarcation between the board and the executive is the following. Evidence shows that executives presented propositions to the Board for approval which were misleading. From the record of the discussion about the acquisition of 100 locomotives at Transnet, it appears that the BADC was misled by senior management. First, the minutes do not reflect that Mr Callard's concerns were conveyed to the BADC so that the problems with procuring "20E type" locomotives from CSR were not disclosed. Secondly, it appears that senior management actively created the false impression that the confinement process involving CSR had been valid.[2932] Mr Brian Molefe used his position as Group CEO to override his own procurement and contract management teams.

[2932] Exhibit BB4(a), p 53.

D: Preliminary Observations

457. 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. The lessons to be learnt from these selected examples are discussed later in this Chapter but it may be helpful to note some of the headline concerns at this point.

458. The examples illustrate the involvement of senior Government officials (including the former President and members of the Cabinet) in questionable relationships, to say the least. 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 irregular arrangements involving:

458.1. McKinsey and Company in its relationship with Transnet and Eskom;

458.2. Trillian (a Gupta Family related entity) in its relationship with Transnet;

458.3. Regiments (a Gupta Family related entity) in its relationship with Transnet;

458.4. Bain in its relationship with SARS;

458.5. China South Rail in its relationship with Transnet;

458.6. EOH in its relationship with the City of Johannesburg.

459. 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.

460. These examples illustrate:

460.1. the use of political influence for malign purposes;

460.2. the appointment of pliable officials to oversee the improper grant of tenders or contracts;

460.3. the bullying or replacement of officials who objected to irregular practices;

460.4. the diversion of money, being the proceeds of corruption, to the benefit of the ANC;

460.5. the collapse of governance in the SOEs;

460.6. a lack of transparency;

460.7. the growth of a culture of impunity;

460.8. the ineffectual nature of oversight;

460.9. the absence of proper monitoring;

460.10. the absence of consequences;

460.11. 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.

461. All these matters need to be addressed if the procurement system is to be properly reformed. They are addressed in the subsequent sections of this Chapter.

E: Was the Procurement System Prone to Corruption Before State Capture?

462. 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 prior to State Capture, then one must face the sober reality that the procurement system as presently configured is not fit for purpose.

463. Academic writers and public interest bodies have been assessing the procurement system over the last 20 years and their conclusions bear directly on this question.

464. 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"[2933] PARI found that there were five major causes of the crisis:

464.1. public procurement is subject to extensive political interference;

464.2. there are major deficits in the capacity of public procurement functions at regulatory and operational levels;

464.3. public procurement is subject to a complicated, fragmented and often inconsistent regulatory regime;

[2933] Brunette. R, Klaaren. J (2002) Reforming the Public Procurement System in South Africa. *Position Papers on State Reform*. Public Affairs Research Institute

464.4. public procurement involves stark tradeoffs between the procedural integrity necessary for fairness and to protect public funds, and the flexibility associated with the operational substance of purchasing;

464.5. there is a mismatch between the formalistic approach to regulation and government's commitment to using public procurement to achieve social and developmental objectives.

465. 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?

466. In 2012 Ambe and Badenhorst-Weiss published their observations[2934] 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 broad based black economic empowerment.

[2934] Procurement challenges in the South African public sector published in the Journal of Transport and Supply Chain Management 2012.

467. In 2013 Tarisma Maharaj and Professor Anis Karodia examined the impact which supply chain management 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."[2935]

468. In 2017 Mazibuko and Fourie published their conclusions in an article titled "Manifestation of Unethical Procurement Practices in the South African Public Sector".[2936] 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.

469. 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.

[2935] Singaporean Journal of Business Economics and Management Studies Volume 2, No. 3, 2013.

[2936] African Journal of Public Affairs Volume 9 December 2017.

470. State capture, then, was not the beginning of the subversion of the procurement system albeit that it was the most concentrated and aggressive attack upon it. To use the analogy of the current pandemic, state capture aggressively attacked a system which was already weakened by long standing co-morbidities.

471. In the circumstances any serious attempt to address the problems which beset public procurement must go well beyond 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?

F: A Review of the Framework Design for Procurement in the National Legislation

472. 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 the 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.

473. There are two steps in the descriptive narrative which follows. First, the many relevant legislative enactments which contributed to the overall framework must be identified. Within that context it will be necessary to pay specific attention to the supply chain management policy (SCM).

474. 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**").

475. The PFMA prescribes the general system for public procurement that must be followed by national and provincial governments, the public entities listed in the Act, constitutional institutions, Parliament and provincial legislatures.

476. The MFMA regulates public procurement on local government level. It is to be read with the Local Government: Municipal Systems Act 32 of 2000.

477. The PPPFA provides the legislative scheme for preferential procurement pursuant to the provisions of section 217(2) and 217(3) of the Constitution. Section 217(2) and (3) of the Constitution provides:

> "(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."

478. The provisions of the PPPFA need to be harmonised with the more general provisions of the other statutes regulating public procurement.

<u>The PFMA</u>

479. 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.[2937] These principal statutes enable the National Treasury to play its crucial role in guiding and overseeing the otherwise highly decentralised system of public procurement.

480. 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.

481. The PFMA provides that every department, trading entity and constitutional institution on national and provincial level must have an accounting officer. [2938]The accounting officer has to ensure that the department, trading entity or constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.[2939] Every public entity must appoint an accounting authority which will be accountable in terms of the PFMA. This accounting authority fulfils the same role in public entities as the accounting officer fulfils in state departments, trading entities and constitutional institutions.[2940]

482. In the result, the institutional scheme that emerges from the PFMA in respect of public procurement is that organs of state (through their Accounting Officers/Authorities) 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.[2941]

[2937] Exhibit B1, para 4.6.4.9.

[2938] Section 36, PFMA.

[2939] Section 38 (1)(a)(iii), PFMA.

[2940] Section 49 (2), PFMA.

[2941] Exhibit B1, para 4.6.4.13.

483. As noted by Mr Mathebula, the particular rules which govern the procurement processes of individual entities are formulated at the entity or department level and are the responsibility of the accounting officer or the accounting authority. The same accounting officer/authority is also primarily tasked with ensuring compliance with the Rules.

484. The PFMA provides that National Treasury may issue National Treasury Regulations for the determination of a framework of appropriate procurement and provisioning systems.[2942] 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 for present purposes is Regulation 16A.

485. Regulation 16A binds entities to additional instructions from the National Treasury in implementing their supply chain management systems. These include the threshold values in terms of which particular methods of procurement must be adopted, the minimum training required of officials staffing supply chain management units, the procedure for appointment of consultants, and ethical standards to be adhered to.[2943]

486. The ethical standards to be adhered to are found in the Code of Conduct for SCM Practitioners. This includes requirements that an official 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

[2942] Section 76(4)(c), PFMA

[2943] Exhibit B1 para 4.6.5.4.

public property and assist Accounting Officers/Authorities in combating corruption and fraud in the SCM system.[2944]

487. There are provisions specifically aimed at preventing the abuse of the system, including that the accounting officer/authority must take all reasonable steps to prevent the 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 accounting officer/authority.[2945]

488. It is important to note that Regulation 16A has a limited scope of entity application and does not apply to institutions listed in schedules 2, 3B and 3D to the PFMA. The institutions are, respectively, major public entities, national government business enterprises and provincial enterprise. The regulation does, however, apply to transactions beyond procurement, and also includes transactions involving disposal and letting of state assets.[2946]

489. 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. The National Treasury has, for example, implemented this function through its Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management of 31 May 2011."[2947]

[2944] Regulation 16A 8.3 (a) – (f).

[2945] Regulation 16A9.1(a).

[2946] Exhibit B1, para 4.6.5.1.

[2947] Exhibit B1 para 4.6.5.5.

490. 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; whether it is sufficient to provide an accurate picture of what is happening on the ground and whether the oversight authority is properly equipped to respond appropriately to the red flags which the reports identify. Moreover, the macro-level oversight function cannot do the work of micro-level monitoring. This issue will be discussed later in the report.

The MFMA and the LGMS

491. The MFMA seeks to secure the sound and sustainable management of the financial affairs of Municipalities and other institutions in the local sphere of Government. Chapter 11 sets out the supply chain management policy which must be followed by Municipal entities in general terms which require the Municipality to cover a wide range of standards and protections which must be covered in that Municipality's procurement processes and which are intended, in the result, to ensure that the process is fair, equitable, transparent, competitive and cost effective.

492. Section 83(1) of the Local Government: Municipal Systems Act 32 of 2000 (LGMS Act) applies as amended whenever a municipality decides to provide a municipal service through a service delivery agreement other than with a national or provincial organ of state or another municipality or municipal entity. In terms of section 83(1) a municipality "must select the service provider through selection processes which –

(a) comply with Chapter 11 of the [MFMA];
(b) allow all prospective service providers to have equal and simultaneous access to information relevant to the bidding process;
(c) minimise the possibility of fraud and corruption;

(d) make the municipality accountable to the local community about progress with selecting a service provider, and the reasons for any decision in this regard; and

(e) takes into account the need to promote the empowerment of small and emerging enterprises."

493. Section 83 includes further provisions, which are dealt with below, aimed at ameliorating unfair discrimination.

The PPPFA and Related Legislation

494. Procurement preference as contemplated by s 217(2) of the Constitution and the consequent preference policy framework enacted by the PPPFA allows a degree of relaxation in the requirements of competitiveness and cost-effectiveness stipulated in s 217(1).

495. Section 2 of the PPPFA provides a framework for implementation of preferential procurement policy. According to this section, a preference point system must be followed.

496. The statutory points system and the allocation of points within it on a transparent basis is, obviously, intended to minimise subjective discretion and maximise the application of objective criteria in the awarding of contracts pursuant to tender.

497. In the legislative scheme of the PPPFA (although not clearly spelled out) a two-stage process is necessarily implied: a *threshold* stage and a stage of *further evaluation*. Only the tenders which comply with the specifications and conditions of the invitation to tender (without regard as yet to relative price or preference criteria) receive further evaluation. All the tenders so complying would be acceptable tenders for purposes of the point system set out in s 2 of the PPPFA. A criterion of *minimum* acceptable quality

or “functionality” (having regard to the invitation to tender) applies at the threshold stage. Those tenders which do not comply with the specifications and conditions of the invitation to tender are excluded from the second stage of further evaluation.

498. It is in the second stage that points are to be awarded in the evaluation of the *acceptable* tenders. It is here that the criterion of competitive price comes into play, along with the specific goals contemplated in s 2(1)*(d)*(i) and (ii) of the PPPFA[2948] that have been specified in the invitation to submit a tender.

499. The “specific goals” contemplated in s 2(1)*(d)*(i) relate to contracts with “historically disadvantaged persons”. The “specific goals” contemplated in s 2(1)*(d)*(ii) with reference to the Reconstruction and Development Programme were interpreted and articulated in the 2001 PPPFA Regulations[2949] as follows:

(a) the promotion of South African owned enterprises;
(b) the promotion of export orientated production to create jobs;
(c) the promotion of SMMEs;
(d) the creation of new jobs or the intensification of labour absorption;
(e) the promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;
(f) the promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;
(g) the promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;
(h) the promotion of enterprises located in rural areas;

[2948] the specific goals may include-

i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* No. 16085 dated 23 November 1994;

[2949] The Regulations are available on the Treasury’s website at http://www.treasury.gov.za/legislation/pfma/supplychain/gazette_22549.pdf

(i) the empowerment of the work force by standardising the level of skill and knowledge of workers;
(j) the development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and
(k) the upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.

500. The Broad-Based Black Economic Empowerment Act 53 of 2003 ("**the B-BBEE Act**") applies *inter alia* to public procurement. It promotes socio-economic strategies that include but are not limited to "preferential procurement from enterprises that are owned or managed by black people".[2950] Section 9(1) of the Act empowers the Minister of Trade and Industry to issue codes of good practice that may include "qualification criteria for preferential purposes for procurement and other economic activities". Section 10(1) of the B-BBEE Act provides:

> "Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in –
>
> (a) determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;
> (b) developing and implementing a preferential procurement policy;
> (c) determining qualification criteria for the sale of state-owned enterprises;
> (d) developing criteria for entering into partnerships with the private sector; and
> (e) determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.

[2950] Section 1 contains the definition of "broad-based black economic empowerment"

501. The B-BBEE Act is now a central feature of the procurement preference system. The incorporation of B-BBEE status in the regulations governing preferential procurement is dealt with in the next section.

502. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 also applies to public procurement. That Act seeks to give effect to the provisions of the Constitution which prevent and prohibit unfair discrimination and which promotes equality and eliminates unfair discrimination. Its guiding principles include the admonition set out in section 4(2)2951 which recognises the existence of systematic discrimination of the past and underscores the need to take measures at all levels to eliminate such discrimination and inequalities.

503. Section 83 of the LGMS also provides:

> "(2) Subject to the provisions of the [PPPFA], a municipality may determine a preference for categories of service providers in order to advance the interest of persons disadvantaged by unfair discrimination, as long as the manner in which such preference is exercised does not compromise or limit the quality, coverage, cost and development impact of the services.
>
> (3) The selection process referred to in subjection (1), must be fair, equitable, transparent, cost-effective and competitive, and as may be provided for in other applicable national legislation.
>
> (4) In selecting a service provider a municipality must apply the criteria listed in section 78 as well as any preference for categories of service providers referred to in subsection (2) of this section."

[2951] Section 4(2) reads:

> "In the application of this Act the following should be recognised and taken into account:
>
> (a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and
>
> (b) the need to take measures to all levels to eliminate such discrimination and inequalities."

Section 78 of the LGMS Act provides:

"Criteria and process for deciding on mechanisms to provide municipal services

(1) When a municipality has in terms of section 77 to decide on a mechanism to provide a municipal service in the municipality or a part of the municipality, or to review any existing mechanism—

(a) it must first assess—

(i) the direct and indirect costs and benefits associated with the project if the service is provided by the municipality through an internal mechanism, including the expected effect on the environment and on human health wellbeing and safety;

(ii) the municipality's capacity and potential future capacity to furnish the skills, expertise and resources necessary for the provision of the service through an internal mechanism mentioned in section 76(a);

(iii) the extent to which the re-organisation of its administration and the development of the human resource capacity within that administration as provided for in sections 51 and 68, respectively, could be utilised to provide a service through an internal mechanism mentioned in section 76(a);

(iv) the likely impact on development, job creation and employment patterns in the municipality; and

(v) the views of organised labour; and

(b) it may take into account any developing trends in the sustainable provision of municipal services generally.

(2) After having applied subsection (1), a municipality may—

(a) decide on an appropriate internal mechanism to provide the service; or

(b) before it takes a decision on an appropriate mechanism, explore the possibility of providing the service through an external mechanism mentioned in section 76(b).

(3) If a municipality decides in terms of subsection (2)(b) to explore the possibility of providing the municipal service through an external mechanism it must—

(a) give notice to the local community of its intention to explore the provision of the municipal service through an external mechanism;

(b) assess the different service delivery options in terms of section 76(b), taking into account—

(i) the direct and indirect costs and benefits associated with the project, including the expected effect of any service delivery mechanism on the environment and on human health, wellbeing and safety;

(ii) the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service;

(iii) the views of the local community;

(iv) the likely impact on development, job creation and employment patterns in the municipality; and

(v) the views of organised labour; and

(c) conduct or commission a feasibility study which must be taken into account and which must include—

(i) a clear identification of the municipal service for which the municipality intends to consider an external mechanism;

(ii) an indication of the number of years for which the provision of the municipal service through an external mechanism might be considered;

(iii) the projected outputs which the provision of the municipal service through an external mechanism might be expected to produce;

(iv) an assessment as to the extent to which the provision of the municipal service through an external mechanism will—

(aa) provide value for money;

(bb) address the needs of the poor;

(cc) be affordable for the municipality and residents; and

(dd) transfer appropriate technical, operational and financial risk;

(v) the projected impact on the municipality's staff, assets and liabilities;

(vi) the projected impact on the municipality's integrated development plan;

(vii) the projected impact on the municipality's budgets for the period for which an external mechanism might be used, including impacts on revenue, expenditure, borrowing, debt and tariffs; and

(viii) any other matter that may be prescribed.

(4) After having applied subsection (3), a municipality must decide on an appropriate internal or external mechanism, taking into account the requirements of section 73(2) in achieving the best outcome.

(5) When applying this section a municipality must comply with—

(a) any applicable legislation relating to the appointment of a service provider other than the municipality; and

(b) any additional requirements that may be prescribed by regulation.

(6) The national government or relevant provincial government may, in accordance with an agreement, assist municipalities in carrying out a feasibility study referred to in subsection (3)(c), or in preparing service delivery agreements."

Other Relevant Legislative Enactments

504. There are a wide range of legislative enactments which have either a broad and general or a limited and specific application to public procurement. They are identified under the appropriate topic headings.

Judicial Oversight

505. The public procurement process also falls generally within the purview of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

506. The facts of each case will determine what any shortfall in the requirement of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.[2952]

[2952] *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO SASSA and Others* 2014 (1) SA 604 (CC) 2014 (1) BCLR.

507. The provisions of this Act create general offences of corruption and also introduce a specific offence relating to the procuring and withdrawal of tenders. Sections 3, 4 and 13 read as follows:

"**3 General offence of corruption**

Any person who, directly or indirectly –

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner –

(i) that amounts to the –

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) 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;

(ii) that amounts to –

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

ìs guilty of the offence of corruption.

4 Offences in respect of corrupt activities relating to public officers

(1) Any –

(a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner –

(i) that amounts to the –

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) 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;

(ii) that amounts to –

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

ìs guilty of the offence of corrupt activities relation to public officers.

(2) Without derogating from the generality of section 2(4), 'to act' in subsection (1) includes –

(a) voting at any meeting of a public body;
(b) performing or not adequately performing any official functions;
(c) expediting, delaying, hindering or preventing the performance of an official act;
(d) aiding, assisting or favouring any particular person in the transaction of any business with a public body;
(e) aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;
(f) showing any favour or disfavour to any person in performing a function as a public officer;
(g) diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or
(h) exerting any improper influence over the decision making of any person performing functions in a public body.

13 Offences in respect of corrupt activities relating to procuring and withdrawal of tenders

(1) Any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, as –

(a) an inducement to, personally or by influencing any other person so to act –

(i) award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other acts, to a particular person; or

(ii) upon an invitation to tender for such contract, make a tender for that contract which has as its aim to cause the tenderee to accept a particular tender; or

(iii) withdraw a tender made by him or her for such contract; or

(b) a reward for acting as contemplated in paragraph (a)(i), (ii) or (iii), is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.

(2) Any person who, directly or indirectly –

(a) gives or agrees or offers any gratification to any other person, whether for the benefit of that other person or the benefit of another person, as –

(i) an inducement to, personally or by influencing any other person so to act, award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or

(ii) a reward for acting as contemplated in subparagraph (i); or

(b) with the intent to obtain a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, gives or agrees or offers to give any gratification to any person who has made a tender in relation to that contract, whether for the benefit of that tenderer or for the benefit of any other person, as -

(i) an inducement to withdraw the tender; or

(ii) a reward for withdrawing or having withdrawn the tender,

is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders."

508. The Act further provides for severe penalties in the case of any infringement of section 13 involving a maximum sentence of imprisonment for life.

509. Section 34 of POCCA[2953] requires any person who holds a position of authority and who knows, or ought reasonably to have known or suspected, that any person has committed a section 13 offence involving an amount of R100 000.00 or more, to report

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[2953] Section 34
(1) Any person who holds a position of authority and who knows or ought to reasonably to have known or suspect that any other person has committed—
a. an offence under Part 1, 2, 3 or 4 or section 20 or 21 (in so far as it relates to the aforementioned offences of Chapter 2; or
b. the offence of theft, fraud, extortion, forgery or uttering a forged document involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.
(2) Subject to the provisions of section 37(2), any person who fails to comply with subsection (1), is guilty of an offence.
(3)
a. Upon receipt of a report referred to in subsection (1), the police official concerned must take down the report in the manner directed by the National Commissioner, and forthwith provide the person who made the report with an acknowledgement of receipt of such report.
b. The National Commissioner must within three months of the commencement of this Act publish the directions contemplated in paragraph (a) in the Gazette.
c. Any direction issued under paragraph (b), must be tabled in Parliament before publication thereof in the Gazette.
(4) For purposes of subsection (1) the following persons hold a position authority, namely—
a. the Director-General or head, or equivalent officer, of a national or provincial department;
b. in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);
c. any public officer in the Senior Management Service of a public body;
d. any head, rector or principal of a tertiary institution;
e. the manager, secretary or a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);
f. the executive manager of any bank or other financial institution;
g. any partner in a partnership;
h. any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means;
i. any other person who is responsible for the overall management and control of the business of an employer; or
j. any person contemplated in paragraphs (a) to (i), who has been appointed in acting or temporary capacity.

such knowledge or suspicion or cause such knowledge or suspicion to be reported to a Police official in the Directorate for Priority Crime Investigations. Failure to do so renders the person guilty of an offence carrying a maximum sentence of imprisonment for a period not exceeding 10 years.

Construction Procurement

510. Construction procurement in the public sector is governed by the above legislation that applies to procurement in general as well as by the Construction Industry Development Board Act 38 of 2000, ("CIBD Act") the regulations to the CIDB Act and the prescripts issued in terms thereof by the Construction Industry Development Board ("**CIDB**"). Construction procurement presents particular difficulties in practice, particularly where large-scale projects are concerned. As explained by National Treasury –

> "The delivery and maintenance of infrastructure differ considerably from those for general goods and services required for consumption or operational needs, in that there cannot be the direct acquisition of infrastructure. Each contract has a supply chain which needs to be managed and programmed to ensure that the project is completed within budget, to the required quality, and in the time available. Many risks relate to the 'unforeseen' which may occur during the performance of the contract. This could, for example, include unusual weather conditions, changes in owner or end user requirements, ground conditions being different to what were expected, market failure to provide materials, or accidental damage to existing infrastructure. Unlike general goods and services, there can be significant changes in the contract price from the time that a contract is awarded to the time that a contract is completed."[2954]

Transport

511. The integration and regulation of public transport services on land is extremely complex, involving government at national, provincial and municipals levels. The National Land

[2954] Quoted by Anthony AM "Re-Categorizing Public Procurement in South Africa: Construction Works as a Special Case" *PER/PELJ* 2019 (22) DOI.

Transport Transition Act 22 of 2000, as amended by Act No. 26 of 2006, specifically provided that:

> "A transport authority, in awarding contracts for goods and services, must apply a system which is fair, equitable, transparent, competitive and cost-effective, and which is in accordance with the [PPPFA], and any relevant local government laws."

512. In the National Land Transport Act 5 of 2009 there is no similar wording, but there can be no doubt that its provisions for negotiated contracts, subsidised service contracts and commercial service contracts remain subject to the same general public procurement laws except where, by necessary implication, the contrary may pertain.

513. In terms of the National Land Transport Act contracting authorities at all three levels of government have been permitted to enter into negotiated contracts (i.e., without going to tender) with public transport operators in their areas "once only", and not for longer than 12 years.[2955] New subsidised service contracts must not exceed seven years and may be concluded only if the services to be operated in terms thereof have been put out to public tendering and awarded by the conclusion of a contract in accordance with procedures prescribed in other applicable national or provincial laws.[2956]

514. Furthermore, the Minister of Transport may, in consultation with the MECs —

> (a) "prescribe requirements for tender and contract documents to be used for subsidised service contracts which must be binding on contracting authorities, unless the Minister agrees that an authority may deviate from the requirements in a specific case; and
>
> (b) provide model tender and contract documents, and publish them in the *Gazette*, for subsidised service contracts as a requirement for contracting authorities, who may not deviate from the model tender and contract documents, unless this is agreed to in writing by the Minister, but those documents may differ for different authorities or situations."[2957]

[2955] Section 41 of the Act.

[2956] Section 42(4) of the Act.

[2957] Section 42(6) of the Act.

515. New commercial service contracts (as distinct from subsidised service contracts) with public transport operators, which may likewise not exceed seven years, are also specifically subject to a tender process and the Minister may prescribe the requirements to qualify as a tenderer in respect of both these and subsidised service contracts.

516. The Road Traffic Management Corporation Act 20 of 1999 requires procurement to be undertaken in terms of procedures prescribed in terms of that Act.

517. The Administrative Adjudication of Road Traffic Offences Act 46 of 1998 allows the Road Traffic Infringement Agency to appoint agents, or contract with any person, to perform any function vested in it, by following procurement procedures prescribed in terms of that Act.

State Information Technology Agency

518. The State Information Technology Agency Act 88 of 1998 governs procurement of information technology by the national and provincial departments and other agencies listed in the schedules to the Public Service Act, 1994 (Proclamation No. 103 of 1994). Despite any provision in any other law to the contrary, these *must* procure all information technology goods or services either from or through the State Information Technology Agency (Pty) Ltd ("**SITA**").

519. Parliament and provincial legislatures, municipalities, and constitutional institutions and public entities defined in section 1 of the PFMA *may* follow the same procurement procedure – in other words, it is not peremptory for these institutions to do so. The procurement process through SITA is governed in detail by regulations made by the Minister for the Public Service and Administration in terms of s 23 of the Act. SITA itself is listed in Schedule 3 Part A of the PFMA, and its own procurement is thus subject to the PPPFA and the regulations made thereunder by the Minister of Finance.

520. In addition to the foregoing, there are a number of statutes regulating, in greatly varying degrees of specificity, the procurement functions of particular organs of state and/or in relation to specific issues. The following list is not necessarily exhaustive:[2958]

(a) The Financial Management of Parliament and Provincial Legislatures Act 10 of 2009, as amended by Act 34 of 2014, governs procurement of goods and services by Parliament and provincial legislatures.

(b) The Armaments Corporation of South Africa, Limited Act 51 of 2003 requires Armscor to "establish a system for tender and contract management in respect of defence matériel" (meaning any material, equipment, facilities or services used principally for military purposes) and, "if required in a service level agreement or if requested in writing by the Secretary for Defence, the procurement of commercial matériel".

(c) The Nursing Act 33 of 2005 requires the Registrar of the South African Nursing Council to ensure that the Council has and maintains "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".

(d) The Public Audit Act 25 of 2004 requires the Deputy Auditor-General to take all reasonable steps to ensure that the Auditor-General has and maintains "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".

(e) The Health Professions Act 56 of 1974 requires the Registrar of the Health Professions Council to ensure that the council has and maintains "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".

(f) The Housing Act 107 of 1997, as amended by Act No. 4 of 2001, required the Minister of Housing, by not later than April 2002, to determine a procurement policy

[2958] See the evidence of Mr Mathebula, Exhibit B1 para 4.3.1, p7. In the words of Mr Mathebula: "In most cases, these statutes prescribe procedural rules in addition to the rules that would apply to procurement activities mentioned above, in terms of the more general legislation above. In some instances, however, the specific legislation operates to the exclusion of general rules such as in the case of the Financial Management of Parliament and Provincial Legislatures Act, which governs public procurement by Parliament to the exclusion of the PFMA. The level of detail found in these specific pieces of legislation varies significantly.

"which is consistent with section 217 of the Constitution in relation to housing development". This procurement policy is binding on the MECs of provinces. An extensive definition of "procurement" in s 1 goes well beyond s 217 of the Constitution. That definition reads: "the process by which organs of state procure goods, services and works from, dispose of movable property, hire or let anything, or grant rights to the private sector". The appointment of a panel to advise the Minister on housing development must itself occur "in accordance with a procurement policy that is consistent with s 217 of the Constitution" and must follow a public invitation for nominations. The same applies to advisory panels to advise the MECs of provinces.

(g) The Disaster Management Act 57 of 2002 provides, that if a national state of disaster has been declared, the designated Cabinet Minister may make regulations and authorise the issue of directions to the extent necessary concerning emergency procurement procedures. Similar powers are given to Premiers of provinces where a provincial state of disaster has been declared, and municipal councils where a local state of disaster has been declared.

The Supply Chain Management Policy

521. The criteria which govern procurement are set out in section 217 of the Constitution which has been quoted at the commencement of this Chapter. What is required, according to section 217(1), is a system which is fair, equitable, transparent and cost effective, being a system which must be brought to life through a prescribed framework created by National Legislation.

522. The survey of the legislation in this Chapter has tracked a complex legislative mosaic rather than a single comprehensive and easily accessible statement of the required over-arching framework. The legislative treatment of procurement is either piecemeal or it is dealt with as a mere component part of public financial management, subject to general and not specific prescriptions.

523. It is only in section 112 of the MFMA and in Regulation 16A that one encounters a comprehensive framework intended to convert the abstract criteria into a detailed policy being the supply chain management policy. Although section 112 operates in the sphere of local government, the scheme detail is a representative statement of the National framework. Sections 111 and 112 read as follows:

> "111 Supply chain management policy
>
> Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this Part.
>
> 112 Supply chain management policy to comply with prescribed framework
>
> (1) The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following:
>
> (a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;
> (b) when a municipality or municipal entity may or must use a particular type of process;
> (c) procedures and mechanisms for each type of process;
> (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;
> (e) open and transparent pre-qualification processes for tenders or other bids;
> (f) competitive bidding processes in which only pre-qualified persons may participate;
> (g) bid documentation, advertising of and invitations for contract;
> (h) procedures and mechanisms for –
> (i) the opening, registering and recording of bids in the presence of interested persons;
> (ii) the evaluation of bids to ensure best value for money;
> (iii) negotiating the final terms of contracts; and
> (iv) the approval of bids;
>
> (i) screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value;
> (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids;
> (k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117;
> (l) the barring of persons from participating in tendering or other bidding processes, including persons-
> (i) who were convicted for fraud or corruption during the past five years;
> (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or
> (iii) whose tax matters are not cleared by South African Revenue Service;
> (m) measures for-

(i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and
(ii) promoting ethics of officials and other role players involved in municipal supply chain management;
(n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by –
(i) councillors in contravention of item 5 or 6 of the Code of Conduct for Councillors set out in Schedule 1 to the Municipal Systems Act; or
(ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that Act;
(o) the procurement of goods and services by municipalities or municipal entities through contracts procured by other organs of state;
(p) contract management and dispute settling procedures; and
(q) the delegation of municipal supply chain management powers and duties, including to officials.

(2) The regulatory framework for municipal supply chain management must be fair, equitable, transparent, competitive and cost-effective."

524. Section 112 does not provide the local authorities with any mandatory template complete with the nuts-and-bolts content of the desired procurement system. It delegates that task to each municipality and municipal entity, contenting itself with a headline description of the topics to be covered, many of which are aspirational in nature.

525. Presumably this disinclination to set out *how* the design aspirations are to be secured 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 status accorded to municipalities and the requirement that they be allowed to govern on their own initiative in regard to the local affairs of the community.[2959]

526. The consequence of devolving the design function in this manner is assessed later in this Chapter bearing in mind that a like dispensation is also enjoyed by the other public procuring entities.

[2959] Constitution section 151.

G: Intractable Problems

527. Some of the problems which continue to affect public procurement have their origin in the legislative design. Others emanate from the ravages of state capture or the systemic weaknesses which facilitated state capture. Dealing with these problems requires a concerted effort and a fixed determination, always acknowledging that many of these matters should have been addressed years ago.

Problems in the legislative design

Difficulties in interpreting the legislative mosaic

528. The sheer number of the Acts and the Regulations which address 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 harmonise the various legislative enactments which would not be the case if the legislation was codified and unified. The gaps and the disharmonies occasioned by fragmentation present a considerable challenge to the honest procurement official whilst enabling the dishonest official to exploit obscurities and contradictions in the law. Indeed, it should be noted that, in explaining the high incidence of procurement irregularities, Mr Mathebula attributed as much as half the problem to misunderstanding or misinterpretation of the applicable Rules and half to intentional abuse.[2960]

529. One of the fundamental difficulties inherent in our procurement legislation is to reconcile the particular objectives separately addressed in sections 217(1) and 217(2) of the Constitution. Section 217(1) of the Constitution obliges an organ of state or any other institution identified in national legislation, when it seeks to contract for goods or

[2960] Transcript 21 February 2019 pp 27.

services, to do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Section 217(2) qualifies section 217(1) and provides that section 217(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 preferences in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. What must, however, be made clear is that because of the injustices emanating from our past, section 217 (2) is critically important. The potential for misunderstanding is increased by the fact that the PFMA and the MFMA collectively address the requirements of section 217(1) leaving the correction of the disparities of the past to be dealt with in separate legislation under the PPPFA. This unco-ordinated approach leaves a critical question unanswered: is it the primary intention of the Constitution to procure goods at least cost or is the procurement system to prioritise the transformative potential identified in section 217(2)? There is an inevitable tension when a single process is simultaneously to achieve different aspirational objectives.

530. There are of course many cases, one hopes the vast majority, in which the award of the tender satisfies both objectives of the Constitution but undoubtedly there are other cases some of which may well be high-value tenders in which one or other of these two objectives must be preferred, and it is in such cases that the legislation fails to give guidance.

531. In the view of the Commission the failure to identify the primary intention of the Constitution is unhelpful and it has negative repercussions when this delicate and complex choice has to be made, by default, by the procuring official.

532. Ultimately in the view of the Commission the primary national interest is best served when the government derives the maximum value-for-money in the procurement process and procurement officials should be so advised.

533. The same problem is encountered when a choice must be made between the competing virtues of localisation and lower cost. Again, the view of the Commission is that the legislation should make it clear that in such a case the critical consideration is value-for-money.

The extent to which the legislation has decentralized the procurement process

534. Excessive decentralisation creates serious problems.

535. The power to procure goods and services in the public sector has been given to the following entities:

535.1. national government departments;

535.2. provincial government departments;

535.3. all municipalities;

535.4. major public entities;

535.5. other public entities;

535.6. all constitutional entities.

536. Within the sphere of local government there are 8 metropolitan municipalities, 44 district municipalities and 226 local municipalities all exercising the right to procure goods and

services on their own initiative. The PFMA lists some 21 major public entities and approximately 154 other public entities (in both cases together with any subsidiaries or entities under their ownership control) and 22 national government business enterprises (and their subsidiaries). To this list must be added 55 provincial public entities (and their subsidiaries) and 15 provincial government business enterprises (and their subsidiaries). To this list must be added 9 constitutional institutions and every department of national and provincial government.

537. It is idle to suppose that the requirements and the skills needed for procurement are available throughout the country and are at the disposal of each procuring entity. The lack of capacity was noted as the second major cause of crisis in the PARI Paper of 2002 (before the full extent of decentralisation had taken place) and was the first challenge identified by Ambe and Badenhorst-Weiss in their assessment in 2012. The same problem featured again in the 2017 article of Mazibuko and Fourie. Mr Mathebula, in giving evidence to the Commission, pointed in particular to a generalised lack in capacity both in contract management and in procurement planning. What was required, he said, was a focus on training and development and he singled out the need for procurement practitioners at least to be able to put together a tender document. That, he said, was one of the reasons why these issues often got before the Courts, simply because of the way the tender documents are crafted. He also noted pervasive misinterpretation of the complex legislation, again an indication of a lack of necessary skill.[2961]

538. One must bear in mind that the present state of extended decentralisation is itself a reaction to the centralised procurement system which was in place in South Africa until 2008. There were good reasons to move away from an over-centralised system but it

[2961] Transcript 21 August 2018 page 57.

now appears that the design has moved to the opposite extreme. The legislation regulating public procurement is in urgent need to find a better balance between these extremes.

539. A fresh approach would take into account:

539.1. the fact that certain goods and equipment may be required on a sectoral basis at national, provincial and local levels and that in cases of that sort a centralised procurement process is probably more efficient than a decentralised one and would further offer benefits in the form of price discounts and the like. Opportunities for centralised procurement would arise, for example, in the purchase of medicines or the acquisition of specialised equipment for hospitals, or in providing educational material for schools. National Treasury should be mandated to consider how centralisation of selected procurement processes could best be introduced;

539.2. special provision should be made in the case of high-value tenders. Such tenders should not be left in the sole care of decentralised procuring entities. National Treasury should be required to allocate an independent expert to attend, participate and report upon the process and to certify the outcome;[2962]

539.3. a mechanism must be found to address the situation where a procuring entity lacks the capacity to operate efficiently. In such cases procurement operations must be taken over by another entity which can do the job. The legislation should provide for the establishment of tender boards which are able to replace malfunctioning procurement entities wherever necessary;

[2962] The qualifications of such experts and their eligibility for appointment will need to be standardised and will involve membership of a regulated procurement profession as addressed in the recommendations.

539.4. decentralisation, on the scale that exists in South Africa, defies adequate monitoring and informed oversight. The result has been a decentralised procurement system which outruns available capacity and is subjected to fragmented and largely ineffectual supervision. That state of affairs must be corrected without delay and is further addressed in the recommendations in this Chapter;

539.5. subject to these constraints and limitations, the decentralised system will begin to operate at an acceptable level of efficiency in order to provide the benefits which a decentralised system should offer.

The efficiency and the competence of procurement officers

540. 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 which 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 the standards necessary to detect and confront corruption.

541. Training, experience and competence are essential tools in the fight against corruption. Training includes instruction in ethical standards.

542. 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. This involves proper training programs and a proper system by which

knowledge and skills are constantly updated and procurement officials supported through the sharing of information and data. 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 OECD Report notes in this regard:

> "Recognising officials who work in the area of public procurement as a profession is critical to enhancing resistance to mismanagement, waste and corruption. Governments should invest in public procurement accordingly and provide adequate incentives to attract highly qualified officials. They should also update officials' knowledge and skills on a regular basis to reflect regulatory, management and technological evolutions. Public officials should be aware of integrity standards and able to identify potential conflict between their private interests and public duties that could influence public decision making."

543. The ultimate responsibility for the creation of a regulated profession for procurement officials lies with National Treasury as does the formulation of adequate training programs. In that regard it is a matter of concern to note ongoing difficulties in raising the level of competence which have been experienced in ensuring that procurement officials obtain the necessary skills and qualifications. For the most part it appears that National Treasury has been setting time limits for the achievement of necessary qualifications only to find that it has to extend those time limits on an ongoing basis. That is not a situation which can be allowed to continue.

The Consequences of State capture and Systemic Weaknesses

Corruption in Political Party Financing

544. It is a matter of extreme concern that the evidence given at the Commission establishes a link between the corrupt grant of tenders and political party financing. Such a link can represent an existential threat to our democracy. It is inconceivable that political parties should finance themselves from the proceeds of crime, and yet there is alarming evidence to that effect.

545. In its report entitled "Bribery in Public Procurement (2007)" the OECD noted that political party financing had been identified as a very serious problem area associated with corruption and bribery. It said:

> "**Political party financing** was identified as a very serious problem area associated with corruption and bribery. Examples of corruption in public procurement associated with political party financing have been identified in many countries around the world and public procurement is certainly a means by which political parties divert public funds illegally to finance themselves. Corruption can be seen to enter the political scene in several cases. Politicians may use their powers in view of establishing networks seeking control over sources of rents provided by public procurement. Once the network group obtains access to the administration, it may then put in place its own persons. Resources levied are then used to favour political parties. Bribes or kickbacks do not necessarily involve personal enrichment. Experts noted that corruption in public bidding and within public administrations may reflect a wider corruption phenomenon. Corruption in public markets may lead to a debate on the transparency of political party financing, and vice versa."

546. The examples of corruption manifesting in high value contracts which 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.

547. 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.

548. 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 of Mr Van Coller some R50 million was donated to the ANC by EOH for the 2016 local government elections.

549. Another example involves the Free State Provincial Government in its dealing with Blackhead Consulting. Blackhead Consulting received a number of 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.

550. 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 more than enough to sound the alarm. In fact, there is another example. That is BOSASA. The evidence heard by the Commission revealed that BOSASA was deeply involved in corruption for many years which involved tenders from government departments or government entities such as the Department of Correctional Services (prisons) and the Department of Home Affairs and the Airports Company. The evidence also revealed that BOSASA made donations to the ANC in cash and in kind. It cannot be that it only gave the ANC “clean” money or that it did not spend “dirty” money on the ANC.

551. It goes without saying that these cases need to be prioritised by the National Prosecuting Authority but that, alone, will not address the problem. Legislation is

required to prevent, expose and criminalise such activity. Thus far the National Assembly has been tentative in addressing this problem as noted below

552. The recent promulgation of the Political Party Funding Act No. 6 of 2018 (PPFA) is at least a first step but most likely an ineffectual step in addressing this particular abuse. Section 9 of the PPFA 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 renders any contravention of this section a criminal offence punishable by a fine or imprisonment.

553. The PPFA has sensibly opened the way to fund political parties by way of the Represented Political Party Fund and the Multi-Party Democracy Fund both of which are supervised by the Electoral Commission established under the Constitution and the Electoral Commission Act. These mechanisms are to be welcomed since they should alleviate, to some degree at least, the financial plight of political parties. The PPFA also moves in the right direction in identifying classes of donations to political parties which need to be prohibited and in requiring the disclosure of donations which are made to political parties. Enforcement is placed in the hands of the Commission and various transgressions are criminalised.

554. Nonetheless, the PPFA does not go as far as it should. Provision must be made to prohibit donations linked to the grant of tenders. The making of any such donations by a prospective tenderer or by a successful tenderer within an extended period of time must be made to constitute a criminal offence as must the receipt of any such payment whether such payment is made directly into the coffers of the political party or by some indirect means. To be effective, it will be necessary for the legislation to require external inspections both of tenderers and political parties by a designated authority with

appropriate powers of search and seizure. Significant monetary penalties need also to be imposed both on the tenderer and on the political party in the event of a breach of these provisions.

The need to encourage Whistle Blowers

555. The whistle blower is one of the most effective weapons against corruption. In most cases the whistle blower has information that provides a detailed insight into hitherto unsuspected criminality which is not readily ascertainable from routine inspection. The present system offers no inducement to the whistle blower to break cover. The *bona* fide whistle blower is actuated by a sense of duty of the highest order.

556. 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.

557. Recent events in South Africa which will be well known to every reader make it the highest priority that a *bona fide* whistle blower who reports wrongdoing should receive, as a matter of urgency, effective protection from retaliation.

558. Article 32(2) of the United Nations Convention against Corruption suggests that signatory States provide for:

(a) establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting them, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity or whereabouts of such persons;

(b) providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony

to be given through the use of communications technology such as video or other adequate means.

559. The relevant legislation in South Africa[2963] which is intended to provide over-arching protection for whistle blowers is to be found in:

559.1. the Protected Disclosures Act No. 26 of 2000; and

559.2. the Protection from Harassment Act No. 17 of 2011.

560. The Protected Disclosures Act 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, i.e. a disclosure made to certain classes of persons (a legal adviser or an employer or a member of Cabinet or of a Provincial Executive Council or to various State or constitutional entities) that a criminal offence has been committed or is likely to be committed or that there is a failure to comply with any applicable legal obligation or that a miscarriage of justice has occurred or is likely to occur. An informant who acts in good faith is not liable to any civil, criminal or disciplinary proceedings by reason of that disclosure and in the event of suffering occupational detriment, he or she may seek relief in the Labour Court or the CCMA or like body.

561. The Protection from Harassment Act allows for the issuing of protection orders against harassment, i.e. a course of identifiable conduct intended to cause harm or to inspire

[2963] Other forms of protection are found in sections 186(2)(d), 187(1)(h) and 191(3) of the Labour Relations Act and section 159 of the Companies Act.

the reasonable belief that harm may be caused to the victim (by stalking or verbal and other intrusive communications).

562. This body of legislation although well intended is deficient in important respects. It does not provide a clear-cut procedure for the whistle blower to follow; it does not sufficiently guarantee that the disclosures will be protected; it is not pro-active in providing physical protection; it offers no incentives to the whistle blower and it does not ensure that all such information finds its way to a destination with specialised skills in receiving, investigating and utilising such information effectively.

563. In the view of the Commission the whistle blowing disclosure regarding corruption, fraud and undue influence in public procurement should be received by way of, among others, an electronic reporting system which permits and protects the anonymity of the reporting individual; provides for clarificatory questions and guarantees confidentiality in respect of disclosures. That protection must extend to an indemnity from civil and criminal liability and, once the informant discloses his/her identity, it must be compulsory for adequate physical protection to be provided at the informant's reasonable request and, in the absence of such a request, on the assessment of the designated authority as to whether the informant or her family may be in danger.

564. The importance of limiting disclosure to a single authority, arises from the following:

564.1. the authority will be responsible to devise the optimal system by which disclosure can be made, confidentiality can be guaranteed and effective protections can be provided;

564.2. the format and procedures for disclosure to the authority can be widely published so that the mechanism for making disclosure is simplified for prospective informants and is readily ascertainable by them;

564.3. the authority can encourage the making of disclosure by publishing the range of concrete undertakings which it is obliged to offer in terms of article 32(2) of the United Nations Convention Against Corruption.

565. There remains a further issue of importance. Should whistle blowers be incentivised to make disclosure?

566. The Public Affairs Research Institute (PARI) published a position paper in April 2020 titled *Reforming the Public Procurement System in South Africa* which proposed the introduction by legislation of *qui tam* provisions. The thrust of the proposal which has been motivated in a related article[2964] is that South African public procurement law needs a tougher approach to enforcement and that could be achieved by empowering and incentivising whistle blowers to bring civil claims for the recovery of damages suffered by the State as a result of procurement fraud and corruption.

567. In the explanatory words of the authors:

> "To address these shortcomings, the Public Procurement Bill could adopt a form of law known as qui tam, an abbreviation of the Latin for 'he who sues on behalf of the King as well as for himself.' The essence of qui tam legislation is that it grants to some private persons the right to approach a court to enforce a public law. It simultaneously encourages such efforts with a reward, a financial incentive or bounty, for successful litigation.
>
> The basic idea is simple and elegant. It is applied in a number of legal systems around the world. Incentivising civic efforts covers for gaps in political will and investigative capacity. Inside information is difficult and costly to get to, so qui tam draws this information out, sowing distrust in corrupt combinations and encouraging whistle-blowers to break rank and come forward. In South Africa, a similar mechanism is used in the corporate leniency policy of the Competition Commission, which has proven to be highly effective in disrupting price-fixing cartels."

[2964] Published on 25 March 2020 by Ryan Brunette and Jonathan Klaaren of PARI.

568. These proposals are useful particularly in drawing attention to the need to recoup damages suffered but the Commission favours an alternative which can address these issues more effectively and without the complications that necessarily follow when private individuals are empowered to litigate for personal financial reward but in the name of the State.

569. The Commission recommends that the mandate and the responsibility to litigate on behalf of the State for the recovery of damages or the disgorgement of monies related to corruption in public procurement not be privatised. However, a fixed percentage of monies recovered should be awarded to the whistle blower provided that the information disclosed by the whistle blower has been material in the obtaining of the award.

570. The appropriate recommendations are contained in section J below.

<u>The collapse of governance in state owned enterprises</u>

571. 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 to which Ms Hogan testified. Much of the abuse is attributable to the way in which appointments have been made to the Boards of the SOEs.

572. Persons 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.

573. The government is the sole shareholder of every SOE but it holds those shares in trust for the nation. It follows that the persons responsible for appointing members of these boards owe a duty of care to the citizens of South Africa and must ensure that fit and proper persons are appointed to carry out the mandate of the SOE.

574. 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.[2965] With respect to most SOEs, there are three different legal frameworks that must be considered, namely the PFMA, the Companies Act 71 of 1998 ("**the Companies Act**") and the specific law establishing the SOE ("**founding legislation**").

575. 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.[2966]

576. In dealing with the question as to who has the authority to appoint board members, the three frameworks present a convoluted picture. The key tenets are as follows:

577. in principle, the PFMA is always applicable to an SOE. However, the PFMA does not explicitly regulate the appointment of Board members. The PFMA includes the power to appoint Board members within its definition of "ownership control". In SOEs, "ownership control" is exercised by the national government, through the relevant Minister. The PFMA, therefore, implicitly locates the power to appoint Board members

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[2965] Wandrag, R. (2018) *The legal framework for the appointment and dismissal of SOE board members,* Dullah Omar Institute, University of Western Cape.

[2966] Wandrag, R. (2018) *The legal framework for the appointment and dismissal of SOE board members,* Dullah Omar Institute, University of Western Cape.

in the relevant Minister. However, it does not provide any procedures for appointment and dismissal of such people;

578. the Companies Act applies to all SOEs that are registered as companies. Not all SOEs are registered as such. PRASA, for example, is not. When an SOE is registered as a company in terms of the Companies Act, the Act will apply and provides that its directors are elected at the company's Annual General Meeting. The company's Memorandum of Understanding may provide for another procedure, however;

579. the founding legislation sometimes regulates board appointments. For example, the Broadcasting Act 4 of 1999 deals with the appointment of non-executive SABC board members, but the Eskom Conversion Act 13 of 2001 is silent on the appointment of Board members to Eskom.

580. While the law is unclear, the practice is not. Board members are appointed by the relevant shareholder Minister, ostensibly in or after 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.[2967] Procedures for the appointment of SOE board members lack integrity and are not transparent. In addition, there is often a disjuncture between the fiduciary duties of SOE board members and the profile, skills and expertise of incumbents. There are a number of alarming examples which 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 and we need to correct what has happened in the past."[2968]

[2967] IODSA (2016) King IV – Report on Corporate Governance For South Africa, p. 116.

[2968] President Ramaphosa, Transcript 29 April 2021, p. 73.

581. 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 which should appoint the CEO who in turn leads the management team in implementing the decisions of the board.

582. It is the view of the Commission that the function of appointing directors of SOEs should no longer be left solely to Ministers. As the President remarked in his testimony before the Commission, there was a "massive system failure" on how the Boards of SOEs were appointed. This system failure needs to be remedied urgently.

583. 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 state owned enterprises operate under efficient and professional leadership which requires that the appointment procedure is transparent, not driven by party political interests but made in accordance with objective criteria.

584. Appropriate recommendations to address this weakness are made elsewhere in the report of the Commission in the wider context affecting state owned enterprises.

<u>The problem of dishonest tenderers and their accomplices outside of the public service</u>

585. On the one hand there are the corrupt officers of an organ of state. On the other hand, there are corrupt bidders or contractors who distort the procurement processes by paying bribes or kickbacks. Any reform of the present system must also deal aggressively with criminal acts committed by private sector actors.

586. It is recommended that there be four levels of response. These measures, each of which will be discussed in further detail, are (1) disqualification from participation in tenders, (2) deferred prosecution agreements, (3) criminal prosecution and (4) restitution for damages suffered and monies misappropriated.

Disqualification from participation in tenders

587. The first level involves the disqualification of offending private sector entities from participation in public procurement processes either permanently or for a set time. The jurisdiction so to disqualify private sector entities should vest in the single authority identified in the Chapter sections which follow.

Deferred prosecution agreements

588. The second level is an innovation called a deferred prosecution agreement ("**DPA**").

Introduction

589. Mr Ian Sinton, who gave evidence at the Commission, also proposed the adoption in South Africa of the DPA procedure. This topic has also been referenced – albeit more tangentially – in other evidence before the Commission, in annexures to the evidence of Mr Pravin Gordan[2969] and Lord Peter Hain.[2970]

590. A DPA, in short, entails an agreement between prosecutors and the accused corporation in which the corporation admits facts from which criminal liability could be inferred and agrees to engage in specific conduct in the near future.[2971] In exchange,

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[2969] Pravin Gordhan's evidence is contained in exhibits N1 to N3.

[2970] This appears from the annexures to Lord Peter Hain's affidavit, Exhibit QQ a-d [PH].

[2971] Daniel McCarron "Deferred Prosecution Agreements: A Practical Proposal" (2016) *Kings Inns Law Review* 54 at 54; Jake. A Nasar "In Defense of Deferred Prosecution Agreements" (2018) *New York University Journal of Law*

the prosecutor defers the criminal charges – provided that the corporation adheres to the terms and conditions of the agreement.[2972] If the corporation complies with the DPA, the charges are dropped, but if it fails to comply, the prosecution will proceed.[2973]

591. The aim of a DPA is to incentivise self-reporting by, and, secure future compliance from, the misbehaving corporation and to detect and punish serious crimes committed by the natural persons – employees, directors and officers – through which the corporation acted. As such, DPAs may provide a useful alternative to prosecution.

592. The following provides a brief overview of the role of DPAs and their implementation in the UK and the US and suggest that this mechanism may offer a ready, pragmatic and effective solution to some of the acute challenges facing our prosecution system. The suggestion is that DPAs will benefit law enforcement in South Africa by enhancing the

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& Liberty 838 at 842; Eugene Illovsky "Corporate Deferred Prosecution Agreements: The Brewing Debate" (2006) *Criminal Justice* 36 at 36; Erik Paulson "Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements" (2007) 82 *New York University Law Review* 1434 at 1436; Michael Bisgrove and Mark Weekes "Deferred Prosecution Agreements: A Practical Consideration" (2014) *Criminal Law Review* 416 at 420; Benjamin M Greenblum "What Happens To a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements" (2005) 105 *Columbia Law* 1863 at 1863; Matt Senko "Prosecutorial Overreaching in Deferred Prosecution Agreements" (2009) 19 *Southern California Interdisciplinary Law Journal* 163 at 169.

[2972] Greenblum "What Happens To a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements" at 1863 - 1864; McCarron "Deferred Prosecution Agreements: A Practical Proposal" 54-55; Elis W Martin "Deferred Prosecution Agreements: 'Too Big to Jail' and the Potential of Judicial Oversight Combined with Congressional Legislation" (2014) 18 *North Carolina Banking Institute* 457 at 463; Illovsky "Corporate Deferred Prosecution Agreements: The Brewing Debate" at 36; F. Joseph Warin and Andrew S Boutros "Deferred Prosecution Agreements: A view from the trenches and a proposal for reform" (2007) 93 *Virginia Law Review In Brief* 121 at 121; F Mazzacuva "Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US systems of Criminal Justice" (2014) 78 in *the Journal of Criminal Law* 249 at 250; Nasar "In Defense of Deferred Prosecution Agreements" at 842; Kathleen M Boozang & Simone Handler- Hutchinson (2009) 35 "'Monitoring' Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care" *American Journal of Law, Medicine & Ethics* 89 at 91; Mary Miller "More Than Just A Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power" (2016) 115 *Michigan Law Review* 135 at 135 and 137; M Koehler "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement" (2015) 49 in *University of California, Davis* 497 at 505; Sara George, Alan Ward and Richard McGarry "Deferred Prosecution Agreement – in Jeopardy of Falling Short?" (2014) 15 *Business Law International* 115 at 115; Tan Yann Xu "Evaluating Deferred Prosecution Agreements in the Context of Singapore" (2019) *Singapore Comparative Law Review* 151 at 151; Wee Toh Loo "The United Kingdom's deferred prosecution agreement regime five years on: is it an effective tool in addressing economic crime perpetuated by companies" (2019) *Singapore Comparative Law Review* at 137 at 138; Wulf A Kaal and Timothy A Lacine "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013" (2014/2015) *The Business Lawyer* 61 at 63 and 69.

[2973] Nasar, In Defense of Deferred Prosecution Agreements" at 842; M Koehler "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement" (2015) 49 in *University of California, Davis* 497 at 509.

efficacy of corporate prosecutions while preventing the negative collateral consequences of this process.

The case for introducing DPAs in South Africa

593. As the evidence discussed above has shown, South Africa suffers from pervasive corruption in both the public and private sectors. Frequently, a corporation is among the participants in a corrupt act. Although companies act through their employees, directors and officers – and those natural persons may be held liable for offences committed in that capacity – corporations may also incur liability for criminal conduct.

594. This is in terms of section 332 of the Criminal Procedure Act 51 of 1977 ("**the CPA"**), which regulates the prosecution of corporations and members of associations – although prosecution can be extended to any juristic entity. Section 332 establishes criminal liability either by:

594.1. holding a corporation or association liable for the unlawful acts or omissions of its directors, servants, or members; or

594.2. holding a director, servant or member, personally liable – either separately or jointly – for the unlawful acts or omissions of a corporation or association in certain circumstances.

595. A corporation may therefore be the subject of prosecution in our law.

596. Although our legal system clearly has the means to hold companies criminally liable for their part in endemic corruption, given the evidence presented to the Commission and public statements made by the NPA, the combatting of corrupt activities and money-laundering is being hampered by the onerous burden of proof upon prosecutors (whose tasks are frustrated by inadequate resources). Indeed, the NPA has been criticised for

the dearth of prosecutions "despite the corruption uncovered by the Zondo Commission" and cases referred by the Hawks to the NPA.[2974] The introduction of DPAs may go some way to improving the situation, particularly in the light of the recommended involvement of the Public Procurement Anti-Corruption Agency (PPACA) and its Litigation Unit and the Tribunal.

597. There is no legislation or precedent that expressly permits the use of DPAs in South Africa. Commentators such as Corruption Watch have gone as far as to point to the lack of provision for DPAs as being "a major issue, hindering law enforcement authorities' ability to detect foreign bribery and severely limiting the scope of voluntary disclosure by companies".[2975] Corruption Watch has also proposed a number of interventions, including the passing of legislation that provides for DPAs.

598. In fact, it was as far back as 2002 that the South African Law Reform Commission proposed that DPAs be introduced. Since then, academics and commentators[2976] have commented favourably on the use of DPAs in the US and have proposed that the NPA adopt the approach of the DoJ, with certain adjustments to accommodate the South African regulatory environment.[2977]

[2974] Recommendation for reform of the National Prosecuting Authority by the Africa Criminal Justice Reform ("**ACJE**") and the Dullah Omar Institute. See https://acjr.org.za/resource-centre/npaprecommendations-2-11-2020-1.pdf.

[2975]https://www.corruptionwatch.org.za/wp-content/uploads/2020/10/Exporting-Corruption-2020_Full-Report_Embargoed.pdf

[2976] Recommendations for reform of the National Prosecuting Authority by the Africa Criminal Justice Reform ("ACJR") and the Dullah Omar Institute. See https://acjr.org.za/resource-centre/npa-recommendations-2-11-2020-1.pdf.

[2977] "*During 2004, the DoJ introduced settlements by companies as part of their effort to combat corruption … The DOA and the non-prosecution agreements have almost replaced prosecution … A DPA is when the government agrees to suspend criminal charges for a specified period if the company made an admission, pays the fine and takes every step possible to rectify the corrupt practices ..*

Fourteen principles were developed over a decade in the use of settlements (Corruption Watch – UK, 2016)and can be summarised as follows: 1) it should be a tool in a broader enforcement strategy where prosecution also plays an important role, 2) the conditions should be to only use it in cases where a company as self-reported and cooperated fully, 3) judicial oversight that includes proper scrutiny of the evidence should be required, 4) settlements should only be used where the company has acknowledged misconduct, 5) these settlements should

DPAs in the United States and the United Kingdom

599. DPAs have been used for many years in the US to achieve non-prosecution outcomes for juristic persons that are potentially vicariously liable for the wrongful acts of their directors and officers. The availability of DPAs to UK juristic persons was introduced by legislation in 2014.

600. The UK's SFO lists a number of high-profile corporations that have entered into DPAs[2978] – including Rolls-Royce[2979], Tesco[2980] and Airbus SE.[2981]

601. In the UK, the lessons have been that the availability of formal leniency to employers that are potentially vicariously liable for the wrongful acts of employees incentivises self-reporting and accountability – which in turn greatly reduces the workload of prosecutors and courts.

602. To qualify for leniency a juristic person that identifies corrupt activities or other crimes by employees (and/or associates in the case of UK persons) is expected to:

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entail the strengthening and monitoring of compliance programmes as well as forcing full disclosure of these misconducts, 6) these settlements should require companies to cooperate with all parties involved. 7) companies with previous corruption related misconducts taken against them are excluded and 8) further legal actions should not be precluded in other jurisdictions not a party to the settlement subject to the double jeopardy principle.

It is suggested that the NPA can adopt the DoJ's role based on their authority to prosecute, while the Financial Intelligence Centre (FIC) can adopt the SEC's role on their responsibility for receiving and analysing financial information and distributing the findings to authorities. However, the SEC has a Division of Enforcement handling the civil and administrative proceedings, whereas the FIC forwards its findings to the relevant competent authorities. As a result, it is suggested that an additional department be established within the FIC's structures similar to the Division of Enforcement.

[2978] https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/

[2979] https://www.sfo.gov.uk/cases/rolls-royce-plc/

[2980] https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/

[2981] https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global- resolution/

602.1. self-report the knowledge or reasonable suspicion that corrupt activities may have occurred to the authorities;

602.2. appoint independent experts to conduct an unrestricted investigation to establish the facts;

602.3. make full disclosure to the authorities of the results of such investigation;

602.4. agree to disgorge all benefits derived from all corrupt activities identified and, if appropriate, compensate victims who suffered damages caused by the corrupt activities;

602.5. agree to pay a penalty or fine commensurate with the nature and scope of the corrupt activities identified and disclosed;

602.6. agree to remedial action under the supervision of an inspector appointed by the authorities that includes disciplinary action against all directors, officers and employees implicated and adoption of systems, controls and training designed, to the satisfaction of the said inspector, to prevent any recurrence of corrupt activities or other crimes;

602.7. acknowledge that after an agreed period (typically three years) the charges deferred will be withdrawn provided it can be shown to the authorities concerned (including the High Court in the UK) that all the obligations imposed upon the leniency applicant in the applicable DPA have been discharged and no other corrupt activity has occurred in the interim.

603. It should be an offence for a juristic person to fail to prevent an act of bribery by an associate:

603.1. from the evidence being presented to the Commission, it cannot be disputed that agents and supplier development partners ostensibly engaged to assist in winning or retaining business opportunities in furtherance of the government's transformation objectives are in fact being widely used to facilitate and disguise corrupt activities. Consequently, we separately suggest that the failure by a juristic person to prevent an act of bribery by an associate should constitute an offence.

603.2. In the UK, this is provided for in section 7 of the Bribery Act:

> "7 Failure of commercial organisations to prevent bribery
> (1) A relevant commercial organization ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending-
>
> (a) to obtain or retain business for C, or
>
> (b) to obtain or retain an advantage in the conduct of business for C.
>
> (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
>
> (3) For the purposes of this section, A bribes another person if, and only if, A-
> (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence),
> (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.
>
> (4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.
>
> (5) In this section – "partnership" means-
> (a) a partnership within the Partnership Act 1890, or
> (b) a limited partnership registered under the Limited Partnerships Act 1907,
>
> or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,
>
> "relevant commercial organisation" means-
> (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
>
> (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any t part of the United Kingdom,
>
> (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
>
> (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and, for the purposes of this section, a trade or profession is a business."

604. In the view of the Commission DPAs (provided they are subject to oversight) are a useful tool in that they enable investigators and prosecutors to become aware of corporate crimes from the perpetrators and hold them and their implicated employees and agents accountable while avoiding the harsh consequences of an indictment on innocent employees and other stakeholders.

605. The DPA system that would work best in South Africa would be one that incorporates judicial review by the Tribunal. This would curb the potential for prosecutorial overreach and ensure that the terms of the DPA adequately address the violations.

606. However, a DPA should – as far as possible – be accompanied by the criminal prosecution of the implicated individuals. This would ensure that individuals are also held accountable and mitigate against any suggestion that DPAs allow the corporate criminal to "get away" with crime.

Criminal prosecution and the National Prosecuting Authority

607. The third level of response is criminal prosecution and that is a response which depends upon the ability of the National Prosecuting Authority (NPA) to discharge its primary function which is to institute criminal proceedings on behalf of the State.

608. It is of course well known that for many years the NPA has failed to prosecute cases of corruption, and specifically cases of corruption in the procurement process. The extent of that failure can be measured by reference to the almost complete absence of cases brought under the legislation applicable to crimes of this sort.

609. So, for example, the Prevention and Combatting of Corrupt Activities Act came into force in 2004. It was passed for the stated purpose of the strengthening of measures to prevent and combat corruption and corrupt activities. It included a range of offences dealing with corrupt activities which related to public officers i.e. any member, officer or servant of a public body being any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government. It criminalised the offering or acceptance of bribes and it dealt directly with corrupt activities which relate to the procuring and withdrawal of tenders. That Act was in force throughout the state capture period. The evidence given to this Commission identifies multiple cases of corruption to which the Act applied, yet reference to the Law Reports shows that only one prosecution was brought under the Act – *State v Shaik and Others* 2005 (3) SA 211 (D). The same is true of the PFMA which has been on the statute books for more than 20 years. The first prosecution under that Act appears to be the one which was initiated against Mr Agrizzi (who was not a civil servant).

610. The Constitution vests the prosecutorial function in the NPA and therefore the failure of the NPA to have responded adequately, or at all, to the challenges of state capture points to a fundamental failure of a sovereign state function.

611. What will now be required is a thorough re-appraisal of the structure of the NPA in order to understand the causes and the nature of its institutional weaknesses so that these can be addressed presumably by way of legislative reform.

612. The Commission is well aware that remedial action of this sort requires an in-depth analysis of the internal structure of the NPA and the legislative and constitutional context in which it operates.

613. Such an in-depth analysis falls outside the remit of the present Commission and it must be left to the decision and the initiative of the President to order a separate detailed investigation.

Restitution for damages suffered and monies misappropriated

614. As alarming as the absence of prosecution is the absence of civil litigation aimed at the recovery of damages or monies misappropriated. The right of action to pursue such claims vests in the State and would ordinarily be processed through the State Attorney's office. Again there is no evidence that there has been any recourse to litigation other than in cases initiated very recently by the Special Investigating Unit.[2982] The work of the Special Investigating Unit has been commendable and demonstrates what can be achieved by a skilled and committed litigation unit dedicated to the recovery of the proceeds of crime. Nonetheless, the establishment of such a unit is not the ultimate solution in the recovery of looted funds for the reasons given below.

615. Both the Special Investigating Unit and the associated Special Tribunal are created under the provisions of the Special Investigating Units and Special Tribunals Act No. 74 of 1996. The Act vests in the President the power to establish the Units and the Tribunal and to define their mandate. It is intended to operate *ad hoc* and until the completion of its mandate. The entire edifice depends upon the goodwill of the President. It does not represent an appropriate defence mechanism against state capture and is therefore not an adequate solution to the problem of rooting out corruption and, in particular, corruption which may involve political actors.

[2982] Establish to investigate corruption in Eskom and Transnet.