Judicial Commission of Inquiry into State Capture Report: Part 1

Vol. 1: South African Airways and its Associated Companies

This is the report of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including organs of state, also known to the public and the media as the Zondo Commission

Chairperson: Justice RMM Zondo
Acting Chief Justice of the Republic of South Africa

Report of the Judicial Commission of Inquiry into State Capture: Part 1: Vol. 1

Judicial Commission
of
Inquiry into allegations
of
State Capture, Corruption and Fraud in the Public Sector including Organs of State

Report: Part 1
Vol. 1: Chapter 1 – South African Airways and its Associated Companies

Chairperson: Justice R.M.M. Zondo
Acting Chief Justice of the Republic of South Africa

ABOUT THE COMMISSION

Introduction

1. This Commission was established pursuant to the remedial action taken by the then Public Protector, Adv T Madonsela, in her "State of Capture" Report in October 2016. That Report arose from Phase 1 of an investigation she conducted concerning certain complaints she had received which included certain allegations of improper conduct on the part of the then President of the Republic of South Africa, Mr Jacob Zuma, and on the part of certain members of the Gupta family. The remedial action included that President Zuma should appoint a judicial Commission of Inquiry to be chaired by a Judge selected solely by the Chief Justice.

2. After President Zuma had failed in his court application to have the Public Protector's Report set aside, the High Court, Pretoria, ordered him to appoint the Commission within 30 days. In accordance with the Public Protector's remedial action, he requested Chief Justice Mogoeng Mogoeng to give him the name of a Judge who would chair the Commission. After obtaining my consent, the Chief Justice gave President Zuma my name and President Zuma announced the appointment of the Commission and my appointment as its Chair on 9 January 2018.

The issues that the Public Protector wanted the Commission to investigate

3. The Public Protector had conducted Phase 1 of the investigation but felt that Phase 2 required a judicial Commission of Inquiry. The issues that she identified as the issues that the Commission should investigate were set out in her "State of Capture" Report. They were:

“Alleged breach of the Executive Member Ethics Act, 1998

(a) Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of removal and appointment of the Minister of Finance in December 2015;

(b) Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to engage or be involved in the process of removal and appointing of various members of the Cabinet;

(c) Whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of appointing members of Boards of Directors of SOEs;

(d) Whether President Zuma has enabled or turned a blind eye, in violation of the Executive Ethics Code, to alleged corrupt practices by the Gupta family and his son in relation to allegedly linking appointments to quid pro quo conditions;

(e) Whether President Zuma and other Cabinet members improperly interfered in the relationship between banks and Gupta owned companies thus giving preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies;

(f) Whether President Zuma improperly and in violation of the Executive Ethics Code exposed himself to any situation involving the risk of conflict

between his official duties and his private interest or used his position or information entrusted to him to enrich himself and or enabled businesses owned by the Gupta family and his son to be given preferential treatment in the award of state contracts, business financing and trading licences; and

(g) Whether anyone was prejudiced by the conduct of President Zuma.

Awarding of contracts by certain organs of state to entities linked to the Gupta family

(a) Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the appointment or removal of Ministers and Boards of Directors of SOEs;

(b) Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the award of state contracts or tenders to Gupta linked companies or persons;

(c) Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the extension of state provided business financing facilities to Gupta linked companies or persons;

(d) Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with exchange of gifts in relation to Gupta linked companies or persons; and

(e) Whether any person/entity was prejudiced due to the conduct of the said state functionary or organ of state."

The establishment of the Commission

4. The formal establishment of the Commission was promulgated by way of a Proclamation that was published in the Government Gazette on 23 January 2018. The terms of reference of the Commission in terms of that proclamation were:

"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 SOE's. In particular, the Commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family;

1.2. whether the President had any role in the alleged offers of Cabinet positions to Mr Mcebisi Jonas and Ms Mentor by the Gupta family as alleged;

1.3. whether the appointment of any member of the National Executive, functionary and/or office bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and /or announced, and if so, whether the President or any member of the National Executive is responsible for such conduct;

1.4. whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's 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;

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

1.6. whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOE's;

1.7. whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies;

1.8. whether any advisers in the Ministry of Finance were appointed without proper procedures. In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures;

1.9. the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary

of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest."

5. It will be seen from a comparison of the issues identified by the Public Protector for this Commission and the terms of reference of the Commission that the terms of reference widened its scope of investigation considerably. They required the Commission to investigate allegations of corruption and fraud in every municipality, every provincial government department, every national government department and in every state owned entity or organs of state. Such an investigation would take more than ten years.

6. In February 2018, President Zuma promulgated the Regulations which were to apply to this Commission and made the Commissions Act, 8 of 1947 applicable to this Commission. Those regulations conferred on me the power to appoint the Secretary of the Commission and other staff and assemble the Commission's Legal Team as well as the Commission's Investigation Team. I appointed Dr KW de Wee as the first Secretary of the Commission. Apart from two Acting Secretaries that I appointed after Dr de Wee, towards the end of the life of the Commission I appointed Prof I Mosala as the Secretary of the Commission. I also appointed Adv Paul Pretorius SC as the Head of the Commission's Legal Team and Mr Terrence Nombembe, a former Auditor-General of South Africa, as the Head of the Commission's Investigation Team.

7. Following upon the promulgation of the Regulations, I made Rules that governed the proceedings of the Commission. The Rules were published in the Government Gazette prior to the commencement of the hearing of oral evidence which started on 20 August 2018. The Rules made provision for applications for leave to testify, call witnesses and to cross-examine. The Rules also made provision for applications for leave to make written and oral submission.

Lifespan of the Commission

8. The Commission was required to complete its work within 180 days of its establishment. By orders of the High Court and pursuant to several applications by the Commission, extensions of time have been granted to allow the Commission to complete its work. The most recent of these applications was made on 20 December 2021.

Description	Application date	Order date	Time period	Duration
Proclamation No. 3 of 2018	N/A	23 January 2018	23 January 2018 to 23 July 2018	6 months
Extension 1	19 July 2018	23 July 2018	1 March 2018 to 1 March 2020	24 months
Extension 2	20 December 2020	24 February 2020	1 March 2020 to 31 March 2021	13 months
Extension 3	2 February 2021	26 February 2021	31 March 2021 to 30 June 2020	3 months
Extension 4	17 June 2021	29 June 2021	30 June 2021 to 30 September 2021	3 months
Extension 5	16 September 2021	29 September 2021	30 September 2021 to 31 December 2021	3 months
Extension 6	20 December 2021	28 December 2021	31 December 2021 to 28 February 2022	2 months

<u>The Work of the Commission</u>

9. During the first months of 2018 the Commission set about its preparatory work. This involved the appointment of investigators, a legal team and a secretariat. It also involved administrative matters such as the provision of offices, the hiring of a hearing venue, securing the necessary equipment and planning.

10. The Commission began with the preparation of evidence in June 2018. Under my direction and in consultation with investigators and members of the legal team, the Terms of Reference, read together with the Report of the Public Protector were considered and the content of the required evidence decided upon.

11. Pursuant to this exercise, several “workstreams” were established. An evidence leader and other members of the legal team, together with a team of investigators, were appointed to manage each workstream. Issues relevant to the scope of each workstream were identified, relevant investigative material was sourced, witnesses were identified, interviewed and their evidence prepared for their testimony at hearings of the Commission. Where necessary, the statutory and regulatory powers of the Commission read together with its Rules, were invoked in order to secure evidence.

Evidence

12. The first hearing of the Commission took place on 20 August 2018.

13. Evidence was completed on 12 August 2021, when President Ramaphosa testified for the second time.

14. The evidence led before the Commission covered, amongst others, allegations of state capture, corruption, fraud, irregularities relating to tenders in, among others:

    14.1. South African Airports Company, South African Airways Technical and South African Express;

    14.2. Bosasa;

    14.3. Denel;

    14.4. Eskom;

14.5. Estina;

14.6. PRASA;

14.7. SABC;

14.8. SARS;

14.9. State Security Agency; and

14.10. Transnet.

Work Completed

15. The Commission conducted its hearings over a period of more than 400 days of evidence and procedural hearings.

16. During the more than 400 hearing days of the Commission, more than 300 witnesses gave evidence.

17. The Rules of the Commission provide for notices to be given to parties to be implicated by evidence to be led informing them of that evidence and of the opportunity to apply for leave to cross-examine the relevant witness and, in addition, to give evidence.

18. Approximately 1,438 persons and entities were implicated by evidence led before the Commission. More than 3,099 Rule 3.3 notices were issued during the period August 2018 to 1 December 2021.

19. Approximately 159 applications for leave to cross examine and/or lead evidence have been received and dealt with by the Commission.

20. A number of other applications were brought before the Commission. These included applications to prevent or delay evidence being led; applications to direct that witnesses

may testify without their identities being disclosed; applications to compel witnesses to testify (among whom was the former President).

21. In addition to providing for the issuing of summons to compel witnesses to appear or to provide evidence the regulations and Rules of the Commission conferred power on me to issue directives compelling persons to furnish affidavits and documentation to the Commission. The Commission also made use of less formal requests for information by way of written requests (so called RFI's). Relevant statistics in this regard are set out below:

Year	Summons	RFI
2018	0	0
2019	1,143	459
2020	1,614	810
2021	414	111
Total	**3,171**	**1,380**

22. The record of oral evidence led before the Commission: The official record of the public hearings of the Commission comprises 75,099 pages of transcribed oral evidence.

23. Exhibits (documentary evidence presented to the Commission): A total of 1,731,106 pages of documentary evidence was prepared and presented to the Commission at its public hearings. Several copies of these exhibits were required to be printed for use by various persons at the Commission hearings. Thus, a total of 8,655,530 pages of documentary evidence was printed for public hearing purposes.

24. The Commission will, among others, leave two major distinctive outputs during its lifespan. Firstly, the Report and secondly a legacy of data and evidence amounting to approximately a petabyte of information data on corruption, fraud and capture. The archive of investigative material comprises statements, affidavits, investigative reports

and other evidential material (real evidence, such as but not limited to telephone records, banking records and vehicle tracking records that were not all led in evidence). Data is gold and the legacy of data accumulated by the Commission will support future research and policy development. This archive will also be a valuable resource that might in the future be made available to Law Enforcement Agencies and for further research and investigation, as directed by the President after receipt of this Report.

Secretariat, Legal and Investigation Support staff employed

25. Apart from myself and my support staff, the Commission's work was carried out by three categories of personnel: the Secretariat, the Commission's Legal Team and the Commission's Investigation Team:

    25.1. The Secretariat provided secretarial support in respect of correspondence, document management, information technology support, call centre support and facilities support. The secretariat also carried out the necessary procurement and budgetary support.

    25.2. The Legal Team prepared evidence and presented evidence. It worked together with investigators to plan, research, prepare and present evidence before the Commission. It also provided legal advice to various parts of the Commission. In addition, members of the legal team were involved in the preparation and conduct of the various applications heard by the Commission.

    25.3. Investigation Support provided all the necessary support functions relating to the gathering of evidence, the securing and interviewing of witnesses, the preparation of evidence and support for the evidence leaders at the hearings of the Commission.

The Report of the Commission

26. The Commission's Report will be delivered in three parts, each consisting of a number of volumes. Part I, Part II and Part III of the Report will contain a summary and analysis of the evidence led and the recommendations made in respect of all the workstreams of the work of the Commission. Part I of the Report will be delivered to the President before the end of December 2021, Part II before the end of January 2022 and Part III before the end of February 2022. Part III will include a summary of the Report as a whole.

27. Part I of the Report consists of four Volumes, namely:

    (a) Vol I which is a summary and analysis of evidence and recommendations relating to SAA, SAAT and SA Express;

    (b) Vol II which is a summary and analysis of evidence and recommendations relating to agreements that various State entities had with the Guptas or their entities in regard to The New Age and Breakfast Shows;

    (c) Vol III which is a summary and analysis of evidence and recommendations relating to the South African Revenue Service (SARS) and Public Procurement in South Africa and makes recommendations on necessary reforms.

28. A fundamental question that this Commission is required to answer is whether the evidence led before the Commission has established state capture. A reading of Part I of the Report will show the reader that this Commission has concluded that state capture has been established. This will also be shown in Part II and Part III of the Report. However, it will be in Part III in which the Commission will give reasons for its conclusion.

Summary of the Report

29. Part I and Part II of the Report will not be accompanied by a summary of the Report. A summary of the whole Report will be provided in Part III. We appreciate that many would have liked to have the summary of the Report at the beginning but this has not been possible. The Commission appreciates that many people will not be able to read the detailed volumes of the Report and may wait for the summary. However, the Commission believes that, given the amount of money spent on its work, the volumes of evidence it collected, the many witnesses it heard as well as the importance of the issues it has dealt with, it is of great significance that that evidence be summarised and properly analysed in order to show how the Commission reached its findings and conclusions that it has reached. It is important to point out that the different parts of the Report will consist of manageable volumes that deal with different SOEs or topics investigated by the Commission that will enable anyone who wishes to read a part of the Report that relates to a specific SOE or topic to take the particular volume and read about that SOE or topic.

Conclusion

30. The past four years of the Commission have been years of hard work by all in the Commission and there have been many challenges. However, the support of the people of South Africa has kept all of us going in the Commission. This is not the occasion to exhaust acknowledgements because in the final Part of the Report I will do all the acknowledgements when the work will be completed.

31. For now, it is my honour and privilege to present this Report to the President.

RMM ZONDO

ACTING CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA

and

CHAIRPERSON OF THE COMMISSION

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PART 1: VOLUME I

CHAPTER 1 - SOUTH AFRICAN AIRWAYS AND ITS ASSOCIATED COMPANIES

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INTRODUCTION

1. This section of the report relates to the investigation that was conducted into South African Airways SOC Limited (*SAA*), its subsidiary, South African Airways Technical SOC Limited (*SAAT*) and South African Express (Pty) Ltd (*SA Express*).

2. Although the Public Protector's Report made some references to SAA, this was only in two contexts: the newspaper subscriptions with The New Age,[1] and the allegations of Ms Barbara Hogan about the pressure that had been applied to the then Chairperson of SAA, Ms Cheryl Carolus, concerning an SAA flight route referred to as "the Mumbai route".[2]

3. Notwithstanding the fact that SAA did not feature prominently in the Public Protector's State Capture Report, the Commission investigated it in some detail because the Terms of Reference of the Commission required the Commission to establish the extent to which state capture, corruption and fraud was prevalent in the public sector. In particular, the terms of reference required the Commission to investigate, make findings and report on whether public officials or functionaries had unlawfully awarded tenders to benefit any family, individual or corporate entity (paragraph 1.4 of the Terms of Reference). The Terms of Reference also required the Commission to determine whether any officials or functionaries within the various SOEs had benefitted personally from acts of corruption (paragraph 1.9 of the Terms of Reference).

4. These Terms of Reference therefore guided the investigation that was conducted into the affairs of SAA, SAAT and SA Express. The Commission also focussed its

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[1] Public Protector State Capture Report, paras 4.25 and 5.7

[2] Public Protector State Capture Report, para 5.16

investigations on Ms Hogan's allegations, as they were recorded in the Public Protector's report, and sought to uncover more about the interactions surrounding the Mumbai route.

5. In order properly to understand SAA as an accountable institution within the public sector, the Commission's investigation focused on the Board of SAA as it is the accounting authority of SAA in terms of the Public Finance Management Act 1 of 1999 (*PFMA*). Ultimate responsibility for the regularity of SAA's expenditure lies with the Board and it is the Board which bears the obligation to procure goods and services in accordance with the requirements of the Constitution.

6. The investigation focused on the procurement undertaken by SAA and its associated companies because, as the work of the Commission developed, it became clear that acts of corruption and fraud within state owned enterprises usually occurred in areas of procurement of goods and services.

7. The investigation also considered the state of general governance at SAA over a period of just less than ten years in order to explore whether deficiencies in the governance of the entity could have contributed to the acts of corruption and fraud that took place within SAA. It also explored whether the usual watchdog institutions and functionaries, such as the independent non-executive members of the Board of SAA and the entity's auditors, performed their functions adequately.

8. The investigation revealed that there was a steady decline in the quality and effectiveness of the governance of SAA from 2012 onwards. This poor quality and ineffectiveness developed over the period that Ms Duduzile Myeni was the Chairperson of SAA and her co-Board member, Ms Yakhe Kwinana, was Chairperson of SAAT.

9. During both their tenures, acts of corruption and fraud took place at SAA and SAAT. Committed managers, who tried to stand up to the increasingly unreasonable and unlawful demands of these Board members, were slowly but surely removed from their positions.

10. The auditors appointed to SAA for the 2012 to 2016 financial years failed dismally to detect any of this fraud and corruption. The internal audit function within SAA was also hopelessly ineffective in identifying or limiting these criminal acts.

11. The Commission's investigations into SAA and SAAT show that fraud and corruption took hold in these entities not only because there was a wholesale failure of governance within the companies but also because, when companies are so depleted of those who are responsible and accountable, the conditions for state capture take hold.

12. State capture thrived in these entities because they were eventually being run, not in the interests of the people of South Africa for whom they were established, but in the interests of a select few who wielded power inside and outside of the entities.

13. The evidence reveals that Ms Myeni was appointed Chairperson of the Board of SAA in circumstances where she was an underperforming Board member. She proceeded, through a mixture of negligence, incompetence and deliberate corrupt intent, to dismantle governance procedures at SAA, create a climate of fear and intimidation and make a series of operational choices at SAA that saw it decline into a shambolic state.

14. From the time of her appointment as Chair, many people within SAA and officials in government, attempted to speak out against Ms Myeni and to stop her from wreaking havoc at the SOE. However, all attempts to criticize or remove her were met with resistance at the highest level. Two successive Ministers of Finance were, despite their efforts, unable to remove her from office. In 2016, Minister Gordhan was forced to replace the entire Board of SAA to "mitigate the harm" that its Chair had caused, and would likely continue to cause, to the entity.

15. Ms Myeni and those members of the SAA Board who were closely aligned with her, including Ms Kwinana, caused sustained damage to our national airline. They bullied officials within SAA who tried to resist their unlawful conduct. They created a climate so intolerable for many personnel that they left the airline or were forced out only to be replaced by more pliant employees.

16. This section of the report will first consider the Board of SAA under Ms Cheryl Carolus from 2009. When Ms Carolus and a number of her colleagues resigned *en masse* from SAA in September 2012, there were eleven non-executive members on the Board of SAA.

17. From October 2012 Ms Myeni was appointed as the Acting Chairperson of the Board and was later appointed as Chairperson of the Board of SAA. She would hold this position until 2017. Over those five years, the Board of SAA was slowly denuded of many of its members.

18. Matters came to a head in early 2014 when the majority of the Board members complained to the Minister of Public Enterprises, Mr Malusi Gigaba about Ms Myeni's leadership of the Board. Despite the seriousness of their concerns, Ms Myeni was not called to account for her conduct by the Minister. Instead, the complaining members were required to do so. Minister Lynne Brown replaced Mr Gigaba after

the May general election in 2014. In October 2014, despite the serious allegations against Ms Myeni, the then Minister of Public Enterprises, Ms Lynne Brown, retained Ms Myeni and those who supported her, including Ms Kwinana, on the Board.

19. By the end of 2015 and into 2016, when many of the acts of fraud and corruption uncovered at SAA and SAAT took place, the Board had been whittled down to only four non-executive members.

20. The management style and approach of both Ms Myeni and Ms Kwinana enabled acts of fraud and corruption to engulf the entities. They became companies in which decision making was driven by the benefits that would accrue to those in charge as opposed to what was in the companies' best interests.

21. When this type of decision-making takes place in a few instances within an SOE, it may be possible to view them as isolated criminal acts. However, when this type of decision-making predominates and fraud and corruption become the order of the day, something else is at play. It was then that state capture had taken hold of the entity because it had now been transformed into an entity that benefitted the few rather than one that served the people.

22. This part of the report sets out in detail how the project of state capture took hold in SAA and its associated entities. It also reveals the considerable costs of state capture. Those costs do not just lie in the millions of Rands that are lost to the tax-payer. They also lie in the broken careers of people who tried to resist its stranglehold. The costs include the emotional trauma experienced when managers at SAA were subjected to unlawful and invasive state security vetting. The costs include the precarious livelihoods of those who subsequently faced joblessness

because these entities were driven into the ground. Finally, the costs lie in Cabinet decision-making that was motivated not by what was in the best interests of a state-owned entity but by the personal preferences of a President.

23. After dealing with SAA and SAAT, this chapter of the report then sets out the findings relating to an investigation conducted by the Commission into allegations that high - ranking officials in the North West provincial government had colluded with functionaries at SA Express to syphon millions of Rands out of the North West provincial government's coffers in order to benefit themselves, their families and the ruling party.

GOVERNANCE

From Function to Dysfunction

The 2009 Board

24. Ms Cheryl Ann Carolus was the Chair of the SAA Board from 28 September 2009 to September 2012.[3]

25. In her testimony before the Commission, Ms Carolus said that she served on the Board with other highly qualified people.[4] There were 11 non-executive members of the Board at this time.[5] Ms Carolus explained that the then shareholder representative, former Minister of Public Enterprises, Ms Barbara Hogan, ensured that the Board was familiar with its role in overseeing the corporate governance of SAA and that the members adhered to "the letter and the spirit of all the pieces of legislation and practices that governed the state owned companies and enterprises in general such as the PFMA[6] . . . and . . . the newly adopted Companies Act".[7]

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

    26.1. Governance failures – there were prevalent and frequent violations of the PFMA, procurement and tender processes had not been followed and the

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3 Transcript 29 November 2018, p 15

4 Transcript 29 November 2018, p16 – 18

5 Transcript 29 November 2018, p 106. See exhibit DD33, p 98 and p 100

6 Public Finance Management Act 1 of 1999 and Companies Act 71 of 2008

7 Transcript 29 November 2018, p 20

previous CEO had been suspended as a result. The Board had to lay criminal charges and institute civil actions to retrieve misappropriated money.[8]

26.2. There were very poor levels of capitalisation as a result of which SAA could not keep up with competitors.[9] SAA had not kept up with the market in terms of the aircrafts it used and services it offered and had lost market share and many opportunities as a result.[10]

26.3. SAA faced a number of criminal and civil claims for price fixing and anti-competitive behaviour.[11]

26.4. Management was fragmented and there were serious problems with how management had behaved; there was very poor staff morale as a result.[12]

26.5. SAA had a very weak balance sheet and was virtually bankrupt which drastically increased the cost of financing, making expansion even more difficult.[13]

27. In order to address these challenges, Ms Carolus explained that the first task was to appoint a competent CEO. At that time, the executives were mostly in acting positions and were not suitably qualified.[14] The Board looked for a "world class person who had international experience and respect and somebody who understood the markets" and therefore hired an international headhunting firm to

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8 Transcript 29 November 2018, p 20-21

9 Transcript 29 November 2018, p 21-22

10 Transcript 29 November 2018, p 22

11 Transcript 29 November 2018, p 22

12 Transcript 29 November 2018, p 22

13 Transcript 29 November 2018, p 23

14 Transcript 29 November 2018, p 25

conduct the search.[15] At the end of a very vigorous search, the Board selected Ms Sizakele Mzimela who was a banker by training but had spent most of her professional life at SAA and was serving as the CEO of SAA Express.[16]

The 2009 Executive

28. Ms Sizakele Petunia Mzimela was the Group Chief Executive of SAA from 1 April 2010 until 9 October 2012.[17] Ms Mzimela testified before the Commission and explained the hierarchy of SAA.[18] The structure is that the Minister of the DPE is the shareholder representative of SAA. The Board of SAA reports to the shareholder.

29. Because Ms Mzimela acted as the Group CEO, there were various subsidiary and group companies of SAA for which she was also responsible. The CEOs of South African Travel Centre (*SATC*), Mango Airlines SOC Ltd (*"Mango"*), Air Chefs SOC Ltd (*"Air Chefs"*) and SAAT reported to her.

30. The Board of SAA then had various subcommittees. These included the Remuneration and Human Resources Committee (*Remco*); the Procurement and Tender Processes Committee; the Social and Ethics Governance and Monitoring Committee; the Finance, Risk and Investment Committee and the Audit Committee. However, eventually the Finance and Audit Committees became one Committee, the Audit and Risk Committee (*ARC)*. The sub-committees would make recommendations and the Board would make the ultimate decision.

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15 Transcript 29 November 2018, p 26

16 Transcript 29 November 2018, p 26-27

17 Transcript 26 June 2019, p 22

18 Exhibit DD14, p 5

31. Below the level of CEO are the General Managers in SAA.

32. Ms Mzimela testified that there were four key governance documents[19] aside from the legislation that governed SAA. These were the Memorandum of Incorporation (*MOI*); the Significance and Materiality Framework;[20] the shareholders compact;[21] and the corporate plan.[22]

33. The MOI provides that the Board must have a minimum of three and a maximum of sixteen directors. It also provides that there has to be a minimum of two *ex officio* directors, the CEO and CFO, and that the majority of the Board must always be non- executive directors.[23] Accordingly, there would always have to be a minimum of three non-executive directors.

34. Ms Mzimela testified that under Minister Hogan, governance at SAA was very well managed and the Minister communicated with the Board through its Chair and the CEO of SAA communicated with the DG of the DPE. All communication would be formal and recorded in writing. There were monthly monitoring meetings. SAA governance enjoyed high levels of transparency and information passed through the correct channels.[24]

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[19] Transcript 26 June 2019, p 41

[20] This specifies matters that have to be referred to the shareholder, the Minister of the DPE. It is contemplated under sections 54(2) and 55(2) of the PFMA

[21] This is a documentation of the strategic intent for the organisation which performance targets that are monitored between the shareholder and the organisation. It is reviewed on an annual basis.

[22] This is a three-year plan that sets out the implementation of the shareholder strategy – this would contain focus areas in terms of the company's routes, deliverables, changes in capital and fleet, revenue generation plans. See transcript 26 June 2019, p 47. This plan is required under section 52 of the PFMA

[23] Articles of Association, clause 21.1, exhibit DD14, p 63. The MOI was introduced later and can be found in exhibit DD2, p 143. The relevant clause is clause 13.1.1 that now provides for a minimum of five and a maximum of fifteen board members in total

[24] Transcript 26 June 2019, p 53-55

Change in shareholder

35. Ms Carolus testified that during her tenure, the executive was engaged in designing a turnaround strategy. In doing so, they collaborated extensively with the Department of Public Enterprises (*DPE*) which had an aviation unit. The result was a New Growth Strategy that was presented to the Board in October 2010.[25]

36. One of the key strategies SAA was exploring in the strategy was a Mumbai route and expanding the "East-West Corridor", bringing passengers from Mumbai and Beijing as these were key South African trading markets.[26] This strategy would include the capitalisation of SAA and the acquisition of a new fleet of aircraft.[27] The strategy was presented to Minister Hogan and her advisors and specialists in the DPE signed off on the strategy.[28]

37. Immediately after the presentation and approval of the New Growth Strategy in October 2010, Minister Hogan was replaced with Minister Malusi Gigaba on 1 November 2010.[29]

38. Ms Carolus testified that, soon thereafter, a tension developed between the Minister (i.e. Mr Gigaba) and the Board of SAA. She explained that the Minister would criticise and misrepresent the Board in public, which the Board felt undermined the market confidence that SAA was trying to build up with the public and financial institutions.

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25 Transcript 29 November 2018, p 28

26 Transcript 29 November 2018, p 24

27 Transcript 29 November 2018, p 28

28 Transcript 29 November 2018, p 28-29

29 Transcript 29 November 2018, p 29

Minister Gigaba would also criticize the board for being unpatriotic in public while commending their performance in person.[30]

39. Ms Mzimela testified that, in contrast to corporate governance under Ms Hogan, under Minister Gigaba anyone in the Ministry would communicate directly with the CEO and there was not an enforced structure. This meant that issues "fell through the cracks". There was a breakdown in the division of roles in the organisation and therefore a breakdown in good governance.[31]

Treasury guarantee

40. Ms Carolus testified that in 2012 SAA was making some progress in its financial position. In the two preceding decades the airline had been consistently suffering losses and requiring bailouts. However, in the two years preceding 2012 SAA had started to see some small profits. Nevertheless, because of its past performance and its weak balance sheet, financial institutions were reluctant to give SAA funding. As a result, SAA required a guarantee from its shareholder to give the funders comfort. This would also result in a reduction of interest rates charged by the banks because the risk would be improved.[32]

41. In 2012 SAA made a presentation to Minister Gigaba about capitalisation requirements for SAA and the guarantee SAA needed in this regard. 2012 had seen an increase in SAA's expenditure by R2billion because of the hike in the oil price, and because it was still using a fuel inefficient fleet which exacerbated the problem.

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30 Transcript 29 November 2018, p 35-36

31 Transcript 26 June 2019, p 53-54

32 Transcript 29 November 2018, p 78-79

The guarantee was needed to facilitate borrowing for a new fleet. A fleet takes around four years for delivery from time of ordering but, because of the effects of the 2008 economic crisis, many airlines could not make good on existing orders. SAA was able to negotiate some very good deals on new available aircraft. It was therefore urgent that SAA obtain the requisite guarantees to exploit these opportunities.[33] The guarantee was also important for SAA to be able to ensure it was a viable going concern and was trading responsibly.[34]

42. Ms Carolus testified that, despite the R2billion increase in expenditure, SAA, through careful financial and business planning, still managed to make a small net profit (albeit an operational loss).[35] She also pointed out that during her tenure on the Board, SAA received a clean audit where there were no allegations of any wrongdoing.[36]

43. Without the guarantee, Ms Carolus explained, the audit would be qualified, because there was no certainty SAA was a going concern. However, the audit was otherwise complete and showed that governance was sound and all the right procedures had been followed. In addition, the PFMA required that the financial statements be presented to, among others, the DPE within five months of the end of the financial year (August 2012). SAA, therefore, could not wait for the guarantee and still comply with the PFMA requirements.[37]

44. Ms Carolus testified that, when the Board began to reach the end of its term, its members started to become concerned about some of the Minister's statements that

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[33] Transcript 29 November 2018, p 80-81

[34] Transcript 29 November 2018, p 82

[35] Transcript 29 November 2018, p 81-82

[36] Transcript 29 November 2018, p 82

[37] Section 55(1)(d) of the PFMA provides that the accounting authority for a public entity must submit within five months of the end of a financial year to the Treasury, to the Executive Authority and to the Auditor General

the SAA Board had no strategy or vision, were unpatriotic and that some officials were receiving inappropriate financial rewards. Ms Carolus said that this had no basis in fact. She said that SAA submitted its strategy and business plan each year with its annual financial statements, which then formed part of the corporate strategy that served as a compact with the shareholder on key deliverables.[38] Despite this, however, over time, the Minister made ever increasingly strident statements about the Board's alleged incompetence, deviousness and lack of patriotism.[39]

45. Ms Carolus explained that, as a result of these negative statements by Minister Gigaba, the Board was determined to create a very detailed handover report, documenting its journey with relevant attachments, showing that it was in compliance with legal requirements and had acted with the consent of the shareholder.[40]

46. In addition to the annual financial statement reporting requirements under the PFMA, SAA was also required, under the Companies Act, to submit the financials to the Annual General Meeting (*AGM*) within six months of the end of the financial year (September 2012). As waiting for the guarantee would make the annual financial statements late, the Board proposed that, in order to meet the deadline in the Companies Act, they would present the annual financial statements at the AGM without the guarantee and therefore with qualified audited statements.[41]

47. The Minister, however, advised the Board that he had postponed the AGM until 25 September 2012 in order to secure the guarantee letter from Treasury. Then, on the 25th of September, the Minister advised that the meeting was no longer taking place. There were just 5 days left before the deadline imposed under the Companies

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38 Transcript 29 November 2018, p 88

39 Transcript 29 November 2018, p 90

40 Transcript 29 November 2018, p 90. The report may be found in Exhibit R, p 92-139

41 Transcript 29 November 2018, p 83-84

Act. Ms Carolus explained that being a director of a company that was non-compliant with the Companies Act had serious consequences for the members of the Board, particularly where they were also directors of other major companies. She also explained that having a qualified audit would have serious consequences for SAA.[42]

48. The Board, therefore, continued to follow up with the Minister about the AGM and the letter of guarantee. On 25 September 2012, Ms Carolus met with Minister Gigaba to ask about the letter of guarantee. He claimed that he had already sent the guarantee to Ms Carolus's staff and they had really "let her down". She asked him to ensure that the letter of guarantee reached her the next day.[43]

49. At the meeting with the Minister, Ms Carolus advised him that because of the enormous risk to directors in being part of a Board that did not comply with the deadlines in the Companies Act, and because of the directors' general frustrations with Minister Gigaba's conduct, some directors had threatened to resign and she had already received one resignation letter. Ms Carolus testified that she told these directors that they had recovered SAA to the point where it had by then become a bankable proposition and they should not do it harm by resigning just a few days before their terms were due to expire.[44] Ms Carolus explained this to the Minister who undertook to get the letter to her the next day.[45]

50. However, the next morning (i.e. 26 September 2012) in the Business Day Minister Gigaba, through the Speaker of Parliament, had released a statement, without any warning to the Board, stating that the AGM was to be postponed because

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42 Transcript 29 November 2018, p 91

43 Transcript 29 November 2018, p 92

44 Transcript 29 November 2018, p 93

45 Transcript 29 November 2018, p 93

SAA had not completed the preparation of its Annual Financial Statements,[46] which Ms Carolus said was false.[47]

51. Ms Carolus said that, in fact, what had happened at Treasury was that a letter and memo had been dispatched for Minister Gordhan's attention seeking the R5billion guarantee for going concern purposes.[48] Minister Gordhan testified before the Commission that there is a process that needs to be followed when a guarantee is requested. A request will go to the Fiscal Liability Committee who convene to investigate and prepare a report on the request. The report is then sent to the DG and then to the Minister who has the authority to sign the guarantee.[49] Despite the fact that the SAA Board had met with Minister Gigaba and requested the guarantee at the beginning of the year,[50] the supporting memo that was sent to the Fiscal Liability Committee was dated 21 September 2012.[51]

52. Nevertheless, the Fiscal Liability Committee made a recommendation to support the request.[52] On 26 September 2012, the DG, Mr Lungisa Fuzile, signed his confirmation that he approved the recommendation.[53] Minister Gordhan signed his approval the same day.[54] Accordingly, it was false that Minister Gigaba had already sent the letter of guarantee to SAA because at that point, 25 September 2012, it did

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46 The report stated "Mr Gigaba said the airline had been unable to finalise its annual report due to the need to address its 'immediate financial challenges' for its auditors to complete the financial statements"

47 Transcript 29 November 2018, p 94. A copy of the article may be found in Exhibit R, p 140

48 Exhibit N2, p 93

49 Transcript 21 November 2018, p 41-42

50 Transcript 29 November 2018, p 96-97

51 Exhibit N2, p 93-102

52 Exhibit N2, p 102

53 Exhibit N2, p 103

54 Exhibit N2, p 104-105

not yet exist.[55] In fact, it was only faxed from Mr Gordhan to the DPE in the early hours of the morning on 27 September 2012.[56]

53. Although Mr Gigaba was sent a rule 3.3 notice in relation to the evidence of Ms Carolus, he did not respond to it at the time of her testimony. He explained in a later affidavit to the Commission that the notice had not been brought to his attention at the time that it was sent but he had identified it when he was provided with a bundle of documents from the Commission in advance of his scheduled attendance to give evidence. His response to the evidence of Ms Carolus is dealt with later in this section of the report.

Resignation of the Board

54. In the light of the Business Day report of 26 September 2012, on 27 September 2012, eight of the 12 directors resigned from the Board.[57] This was precipitated by Ms Carolus convening a meeting with the Board in which she explained that, in the light of Minister Gigaba's hostile and irresponsible conduct, she was going to resign as she could not trust the Minister to have fixed the situation by 30 September 2012.[58]

55. The Board did not wish to make any statements that would destroy all the progress they had achieved for SAA in the financial markets during its tenure. Accordingly, the eight members issued a carefully drafted statement. They did not want to make

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55 Transcript 29 November 2018, p 100

56 Exhibit N2, p 105

57 Transcript 29 November 2018, p 106

58 Transcript 29 November 2018, p 108

damning statements about the Minister as this would have catastrophic consequences for the airline.[59]

56. According to Ms Carolus the 2009-2012 Board of SAA was highly qualified, fully capacitated and had a very productive working relationship with Minister Hogan. There was also a respectful and productive relationship of cooperation between the Board and the CEO, Ms Mzimela. The Board was able to turn around SAA and make it a sustainable enterprise; there was a clear vision and strategy for the future. However, the Board's relationship with Minister Gigaba began as tense and became openly hostile.[60]

57. The Board was faced with costly delays caused by the inaction of the DPE and Minister Gigaba in failing to secure the treasury guarantee timeously. Minister Gigaba also publicly sabotaged and maligned the Board, which ultimately led to the mass resignation of eight members of the Board at the same time.

<u>The Mumbai route and the relationship between the board and Minister Gigaba</u>

58. Ms Carolus and Ms Mzimela both testified before the Commission about another feature of their interactions with Minister Gigaba and his special advisor, Mr Siyabonga Mahlangu. These interactions related to the issue of SAA's Mumbai route and the efforts made by SAA's competitor, Jet Airways, to get SAA to close down the route. According to Ms Carolus and Ms Mzimela, they were pressurized by Minister Gigaba and Mr Mahlangu to accommodate Jet Airway's requests despite the fact that it did not make commercial sense for SAA to close down the route.

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59 Transcript 29 November 2018, p 110-111

60 Transcript 29 November 2018, p 107

59. Both Mr Gigaba and Mr Mahlangu responded to these allegations in their evidence before the Commission.

60. In his affidavit to the Commission, Mr Mahlangu stated that he was acting in the honest discharge of his duties in all his dealings with personnel at SAA and was not motivated by any outside interest.[61]

61. Mr Gigaba similarly denied having placed any pressure on SAA to close the Mumbai route. He also emphasised that the decision to close the route was finally taken after he had already left the Department of Public Enterprises. However, he did not dispute that he remained silent in the meetings that were arranged with him and at which the Jet Airways representatives reprimanded Ms Mzimela for the lack of action on SAA's part to cancel the route. He also did not deny that he and Ms Mzimela had to wait for a full two hours before the representative of Jet Airways arrived at their first scheduled meeting.[62]

62. These two common cause facts indicate, on their own, that Mr Gigaba extended a level of preference to the Jet Airways representatives. It is quite something for a Cabinet Minister to be willing to be delayed for two hours for a third party representative to arrive at a meeting and then to say nothing when that representative behaves in a wholly inappropriate manner to the CEO of one of the state owned entities under the Minister's portfolio. It is therefore understandable that Ms Mzimela formed the view that, because Mr Gigaba had been willing to entertain Jet Airways' representatives in this way, he was communicating his support for the closure of the route.

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61 Mr Mahlangu's affidavit dated 9 September 2020, para 270

62 Mr Gigaba's affidavit dated 17 June 2021, paras 12-15

63. In so far as Ms Carolus's general evidence regarding Mr Gigaba's attitude to the Board and his delays in communicating the Treasury guarantee to the Board are concerned, Mr Gigaba stated in his affidavit to the Commission that he did not remember questioning the Board's capabilities or patriotism and denied that there was any antagonism between him and the members of the Board prior to their resignation in September 2012.[63] However, this explanation does not match up with the unprecedented conduct of the majority of the board members. The majority of the board of SAA saw fit to resign, *en masse*, a matter of days before their terms at the airline would, in any event, have come to an end. That type of conduct is a statement. It evidences a break down in the relationship between the board and its shareholder. Mr Gigaba's denials are therefore not consistent with this extraordinary step taken by well-respected national and international business people.[64] As Ms Carlous explained in her evidence, they had professional reputations to uphold and served on many other high-profile boards. They could not accept any irregularities and unlawful conduct or even the appearance of impropriety. Compliance with the PFMA and the Companies Act was a top priority to the Board and they were fully aware of their obligations in this regard.

64. This era in SAA's governance was characterised by a keen understanding of corporate governance requirements, and high levels of integrity and competence amongst Board members.

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[63] Mr Gigaba's affidavit dated 17 June 2021, paras 18-21

[64] Teddy Daka, Tukela Jantjies, Russel Loubser, Bonang Mohale, Jabulani Ndlovu, Lewis Rabbets, Zakele Sithole, Maggie Whitehouse and David Lewis (Abel Bouchon left the carrier mid-term for other reasons)

After the resignation of the Carolus Board

65. After the resignation of most of the members of the SAA Board in September 2012, Mr Vuyisile Kona was appointed as the Acting Chair of the Board on 28 September 2012.[65] Mr Kona was *also* appointed as Acting CEO of SAA on 12 October 2012.[66]

66. At the same time, seven new non-executive Board members were appointed to the Board and three members from the old Board were retained: Ms Myeni, Ms Kwinana and Ms Lindi Nkosi-Thomas.[67]

67. Because of concerns the Board had about Mr Kona acting in both positions, the Board requested the Minister to appoint another Acting-Chair. On 7 December 2012, Minister Gigaba appointed Ms Myeni as Acting Chair.[68]

68. Ms Mzimela testified that she found it surprising that Ms Myeni was appointed as chair because she had a poor attendance record. She sometimes failed to turn up for meetings at all. If she did arrive, there were very few occasions where she stayed for the full duration. She always found a way to excuse herself early.[69] Her main excuse was "she now has to rush because number one has called her to a meeting".[70] Notwithstanding this, Ms Myeni was appointed as Acting Chairperson of the SAA Board. When asked to explain this decision, Mr Gigaba distanced himself from the process and stated that the appointment of chairpersons and acting chairpersons was dealt with by the Department. The motivation for appointing a

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65 Transcript 4 February 2020, p 72. See also p 74

66 Transcript 4 February 2020, p 75

67 Exhibit DD33, p 101

68 Exhibit DD 34.13, p 1212. See also transcript 4 February 2020, p 77

69 Transcript 26 June 2019, p 203

70 Transcript 26 June 2019, p 204

particular person were contained in Decision Memorandum which was then presented to the Minister. He was unable to obtain the memoranda that related to the appointment of Ms Myeni as acting chair and so could not give a full response. Nevertheless, he stated that he had "no reason at the time to be concerned about Ms Myeni's competence, credentials or diligence in the performance of her fiduciary duties".[71]

69. Mr Kona testified before the Commission that Minister Gigaba's advisor, Mr Mahlangu, played a very direct role in the affairs at SAA. He acted as the link between Mr Kona and the Minister.[72]

70. Mr Kona testified that, soon after his appointment, he began to prepare an urgent turnaround plan for SAA.[73] While he was busy with this task, Mr Mahlangu approached him and insisted that he attend a meeting at the Gupta's house in Saxonwold. This meeting is set out in detail in the section of this report dealing with The New Age. The upshot of Mr Kona's evidence was that, prior to this meeting, he had requested the supply chain management department of SAA to issue a tender for a consultant to assist with the turnaround plan and business plan to secure the future sustainability of the airline. The supply chain team had selected Lufthansa Consulting, which was the cheapest of the bidders.[74] At the Gupta meeting, he was offered large sums of money by Mr Tony Gupta, which he refused. After this occurred, Mr Gupta asked him about the contract for the turnaround strategy and Mr Kona informed him that Lufthansa Consulting had already been awarded the contract. According to Mr Kona, Mr Gupta became "livid" upon hearing this news.[75]

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71 Exhibit BB 24.1

72 Transcript 4 February 2020, p 82

73 Transcript 4 February 2020, p 83

74 Transcript 4 February 2020, p 89-91

75 Transcript 4 February 2020, p 91-100

While Mr Mahlangu admitted that he was present at this meeting, he denied that Mr Kona was offered money by Mr Tony Gupta. Mr Mahlangu was not a good witness in many respects and in certain cases gave untruthful evidence. The probabilities favour Mr Kona's evidence. After all the evidence heard by the Commission and by other witnesses who had dealings with Mr Tony Gupta also testified that he offered them large assortments of bribes. In this regard reference can be made to Mr Jonas and Mr Dukwana.

71. Mr Kona testified that Mr Gupta even contacted the Director-General of Public Enterprises, Mr Tshediso Matona, to demand to know how this had happened. The DG promptly called Mr Kona to confront him about the award of the contract.[76] Mr Kona testified that a few days later, he received a letter from the DPE stating that it was investigating the award to Lufthansa. According to Mr Kona, the investigation revealed no irregularities and yet the DPE would not allow Mr Kona to start work with Lufthansa.[77]

72. Mr Kona explained that, after this, the DPE and his fellow Board members became hostile towards him and it was clear that the DPE no longer wanted him to retain his position. The DPE had conversations with his colleagues and made his working life as difficult as possible.[78] Soon thereafter Minister Gigaba told Mr Kona that, because the Board was delaying implementing the turnaround strategy, the Board had to just do its own turnaround plan. Mr Kona testified that this was just a "hodge podge" compilation of documents for the sake of submitting something and he could not be part of it.[79]

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76 Transcript 4 February 2020, p 101-102

77 Transcript 4 February 2020, p 103

78 Transcript 4 February 2020, p 103-104

79 Transcript 4 February 2020, p 104-105

73. Thereafter, the Board produced legal opinions claiming that the Lufthansa contract was awarded because Mr Kona had an interest in the contract – which he denied. He therefore contacted Minister Gigaba to try and resolve the issue. Mr Kona said that the Minister stated that, when he returned to Johannesburg, they could have a meeting to discuss the matter but this never happened. Mr Kona was ultimately suspended for reasons he says were "spurious". Mr Kona testified that the reason for his removal was his refusal to cooperate with the Guptas.[80]

74. Mr Kona testified that he approached Ms Myeni, who was at that stage the Acting-Chair of the Board, about the meeting with the Guptas. He stated that Ms Myeni was more interested in what he ate and drank at the Saxonwold residence rather than being concerned about what had transpired. She did not seem to take the meeting very seriously.[81] Mr Kona said that he assumed Ms Myeni made some calls thereafter[82] because he then received messages from Mr Mahlangu.[83] These were sms messages that stated that Mr Kona was "compromising the mission". Mr Kona understood this to mean that he was not supposed to tell other people about what had transpired.[84] He explained that he was given the impression that Ms Myeni had her own agenda for how to use the Guptas to align with her own plan and that by alerting her to their visit to Saxonwold, Mr Kona had let her know that Mr Mahlangu and others were also trying to use these "power brokers" to advance their plans.[85]

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80 Transcript 4 February 2020, pp105-106

81 Transcript 4 February 2020, p 115-116

82 Transcript 4 February 2020, p 116

83 Transcript 4 February 2020, p 117

84 Transcript 4 February 2020, p 117. See the screenshots of these messages in Exhibit DD17, p 16-18. The message dated 17 November 2012 stated "why did you let her know that you knew where she was going you will compromise the mission"

85 Transcript 4 February 2020, p 120

75. Mr Bongisizwe Mpondo, a former non-executive director of SAA, who was appointed on 27 September 2012, provided the Commission with an affidavit. He explained that in around December 2012, information came to the Board's attention about allegations of irregularities against Mr Kona. The "legal executive" drove the sourcing of legal opinions in this regard, which were negative towards Mr Kona.[86] In the light of these opinions, the Board, with the concurrence of the Minister, suspended Mr Kona from his position as Acting CEO on 11 February 2013,[87] and removed him as a Board member on 26 February 2013.[88] The Board and the Minister sought to appoint a new Acting CEO and selected Mr Nico Bezuidenhout, the CEO of Mango at the time.[89]

76. Mr Siyabonga Mahlangu provided an affidavit dated 9 September 2020 to the Commission in which he dealt with Mr Kona's allegations concerning his role in the meeting at the Gupta residence and thereafter. Mr Mahlangu confirmed in his affidavit that the meeting at the Gupta residence took place and that he was there with Mr Kona. However, he denied most of the other details about what transpired at the meeting. In particular, he stated that he did not witness any discussion about large sums of cash nor did he see any such wads of cash. He also said that there was no discussion about the Lufthansa contract.[90]

77. In relation to the sms that he sent Mr Kona, in which he said that he was "compromising the mission", Mr Mahlangu has a completely different explanation for

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86 Exhibit DD 34.13, p 1213 para 10

87 Transcript 4 February 2020, p 73

88 Transcript 4 February 2020, p 74 and p 76. Mr Kona's removal is recorded in a shareholder resolution dated 11 March 2013, annexure BM3 to the affidavit of Bongisizwe Mpondo, Exhibit DD 34.13, p 1245

89 Exhibit DD 34.13, p 1214, para 11

90 Mr Mahlangu's affidavit dated 9 September 2020 paras 226-239

this message. According to Mr Mahlangu, "the mission" to which he was referring related to Mr Kona's ambitions to be appointed as CEO of SAA.[91]

78. On the probabilities, Mr Kona's version about what transpired at the meeting he had with Mr Tony Gupta in the presence of Mr Mahlangu is the truth. He provided details in regard to the discussion as well as what followed after that discussion. What followed after that discussion includes that Mr Matona, the Director-General of Public Enterprises, telephoned him to ask him about the decision to award the tender to Lufthansa. His evidence was also to the effect that subsequently he received correspondence from the Department of Public Enterprises to the effect that they were investigating Mr Kona's decision in this regard or were investigating allegations against him. Mr Mahlangu's evidence in regard to various matters that he was questioned about before the Commission was untruthful in a number of respects.

The Board under Ms Myeni

79. This part of the report considers the allegations made by various parties against Ms Myeni as the Chair of the SAA Board, which ultimately resulted in the resignation of the majority of the Board members of SAA.

80. When Ms Myeni took office as Chair of the SAA Board on 7 December 2012, she signed an undertaking.[92] It provided:

> "I, Duduzile C Myeni, in my capacity as a non-executive member of the South African Airways Board, hereby accept the appointment as acting Chairperson of South African Airways Board. I undertake to observe and comply with the principles and provisions of all legislation relevant to South African Airways, the protocol on corporate governance under review and the provisions of the shareholder compact

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91 Mr Mahlangu's affidavit dated 9 September 2020 paras 244-248

92 Ms Myeni confirmed it was her signature - Transcript, 4 November 2020, p 62. The declaration is at Exhibit DD34(b), p 1240

between the Board of South African Airways and the Minister of Public Enterprises; to devote sufficient time for the execution of my responsibilities; to utilize my skills to the best of my ability; to initiate, develop and implement systems or mechanisms for the effective and efficient management of South African Airways; and to maintain and observe the highest standards of integrity and probity in the execution of my responsibilities."

81. As the discussion below illustrates, Ms Myeni did not live up to this undertaking.

Pembroke Capital

82. Mr Mpondo's affidavit to the Commission explained that, prior to the new Board appointments in 2012, SAA had concluded a deal to acquire 20 A320 narrow body aircraft from Airbus.[93] As Ms Carolus explained, this was part of the strategy to capitalize SAA to allow for more regional flights and shorter distance flights to Africa and Latin America because SAA only had planes available for short haul and very long haul flights and nothing in between.[94]

83. Mr Mpondo's evidence was that the deal had been concluded but the financing had not been finalised. The Bank of China had been recommended but it had pulled out of the deal. He said that the Board ultimately resolved on 27 May 2013 to award the contract to finance 10 of the 20 aircraft to Pembroke Capital. The next ten would require another procurement process.[95] On 2 June 2013, there was another Board meeting at which the Chairperson of the Audit and Risk Committee, Ms Kwinana, started to raise concerns about the terms of the Pembroke transaction. However, the

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93 Para 12

94 Transcript 29 November 2018, p 23-24

95 Affidavit of Bongisizwe Mpondo, Exhibit DD 34.13, p 1214, para 12. The resolution of the Board for the financing of the 10 aircraft was dated 27 May 2013, item 9.9, and can be found at annexure BM4 of this affidavit, Exhibit DD34.3, p 1257. Ms Myeni is recorded as being at the meeting.

Board considered that the matter has already been resolved at its meeting of 27 May 2013 and decided not to revisit it.[96]

84. After the resolution of 27 May 2013, an application was submitted to the Minister of Public Enterprises in terms of section 54 of the PFMA[97] for the approval of the financing that would be obtained from Pembroke for the leasing of the 10 aircraft.[98] However, on 20 June 2013, Ms Myeni wrote to the Minister and said that "we would like to update the Minister on the award of the sale and leaseback of aircraft to Pembroke Capital. While reference is made to ten (10) aircraft in the previous correspondence, *the Board has subsequently resolved* to transact on two (2) aircraft with Pembroke"[99] (emphasis added).

85. About three weeks later, on 11 July 2013, Ms Myeni wrote a third letter to the Minister in which she claimed that a third decision had been taken by the Board of SAA. This third decision was to revert to the original request for approval for the financing of ten aircraft.[100]

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96 Affidavit of Bongisizwe Mpondo, Exhibit DD 34.13, p 1214, para 14

97 S 54(2) of the PFMA provides:

"(2) Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:

(a) establishment or participation in the establishment of a company;

(b) participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;

(c) acquisition or disposal of a significant shareholding in a company;

(d) acquisition or disposal of a significant asset;

(e) commencement or cessation of a significant business activity; and

(f) a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement."

98 Transcript 4 November 2020, p 105-106

99 Exhibit DD34, p 1544

100 Exhibit DD 34.13, p 1283

86. Mr Mpondo's affidavit explains that the Board was not aware that Ms Myeni had sent the second letter to the Minister. He said that the Company Secretary had circulated a memorandum to the members of the Board to "ratify" its decision to approve the funding of two aircraft instead of 10. Mr Mpondo said that this memorandum caused a "heated debate since the board had never taken such a decision." He stated: "It appears to me that DPE had requested the acting Chairperson to provide a Board resolution to confirm the decision, which she contended for in her letter of 20 June 2013. It appears, on the face of it, that Ms Myeni unilaterally attempted to change the board resolution of 27 May 2013 without the knowledge or approval of the board. This was highly irregular in my opinion."[101]

87. Mr Mpondo's affidavit further indicated that on 22 January 2014, the Board held a meeting – which Ms Myeni did not attend – at which members of the Board raised concerns about the fact that the aircraft had not yet been delivered when the Board had already voted on the decision in May 2013. This was costing SAA R2million per month in storage fees to Airbus for not taking delivery timeously.[102] The Board noted that a large reason for the delay was the exchange between the Chairperson and the Minister regarding Ms Myeni's attempts to change the Board's decision.[103]

88. There was a further Board meeting on 3 April 2014, which Ms Myeni yet again did not attend, at which the Board resolved that the Chair needed to account to the Board for the changes she had attempted to make to the resolution regarding the Pembroke transaction. Despite this resolution, Ms Myeni failed to account to the Board.[104]

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[101] Exhibit DD 34.13, p 1215, para 16

[102] Exhibit DD 34.13, p 1216, para 21

[103] Exhibit DD 34.13, pp 1216-1217, para 22

[104] Exhibit DD 34.13, p 1217, para 23

89. The Board members concluded that Ms Myeni appeared to be trying to secure her own funding for the acquisition of the 10 Airbus A320s, without involving the executive, resulting in the attempted change in the Board's funding resolution. Ms Myeni's conduct in the Pembroke transaction resulted in delays in the delivery of the aircraft that cost SAA approximately R800m in pre-delivery payments. This led to a further cash shortfall and SAA having to increase its borrowing limits, which negatively impacted SAA for a long time.[105]

90. When Ms Myeni testified before the Commission, she was asked about this transaction and it was put to her that she had lied to the Minster when she claimed that the Board had taken a decision to change the original transaction for financing of 10 aircraft to one for financing only two aircraft.[106]

91. Her misrepresentation to the Minister was clear because in 2017 Ms Myeni had deposed to an affidavit before the Companies and Intellectual Property Commission in which she claimed that the letter she had written to the Minister on 20 June 2013 was written on her "understanding of what the Board had resolved. [Ms Myeni] subsequently ascertained that [she] was mistaken and that the Board's decision had not changed, at which point [she] wrote a further letter to the Minister of Public Enterprises to clarify the situation, which clarification was accepted by the Minister".[107]

92. But Ms Myeni had not confessed her mistake to the Minister back in 2013 when she wrote her third letter. On the contrary, her third letter claimed that there was yet a

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105 Exhibit DD 34.13, p 1335

106 Transcript, 4 November 2020, p 100-115

107 Exhibit DD34, p 1564, para 8

further decision taken by the Board in which it decided to revert to the financing for ten aircraft.

93. Therefore, Ms Myeni had falsely represented to the Minster of Public Enterprises that the Board of SAA had taken two decisions that it simply had not taken. Her representations to the Minister caused delays in the financing transaction which resulted in substantial financial losses to SAA – in the order of R800 million.

94. Fraud is the "unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another".[108]

95. It was put to Ms Myeni during her evidence that she had knowingly misrepresented to the Minister of Public Enterprises in 2013 that the Board of SAA had resolved to change the Pembroke transaction in circumstances where she knew that they had not done so and that the misrepresentation cost SAA in the order of R800 million.[109]

96. As was the case with most of Ms Myeni's testimony before the Commission, she refused to answer these questions citing her privilege against self-incrimination.[110] She was later called back to the Commission to deal with some of the questions in respect of which she had invoked the privilege against self-incrimination. Between the time of her initial testimony and her recall to give evidence, the Constitutional Court handed down a judgment in which it made findings concerning the ambit of the privilege against self-incrimination when it is invoked by witnesses in a commission of inquiry.[111] This is addressed in more detail below.

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108 Heese obo Peters v Road Accident Fund 2012 (6) SA 496 (WCC) at para 65

109 Transcript 6 November 2020, p 254

110 Transcript 4 November 2020, p 100-115

111 Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma [2021] ZACC 2; 2021 (5) SA 1 (CC); 2021 (5) BCLR 542 (CC)

The privilege against self incrimination

97. Ms Myeni's invocation of the privilege was, at times, abused during her evidence. Whenever the privilege was being abused because the question put to her was innocuous and could not reasonably result in an answer that would incriminate her, the evidence leader noted for the record that its invocation in each of those instances was an abuse.[112]

98. Ms Myeni also abused the privilege in another way. There were some instances in which she would be asked one question, to which she would provide an often lengthy answer, and then when the evidence leader would ask a follow-up question that was more difficult for Ms Myeni to answer, she would invoke the privilege. [113] On each occasion that this occurred, the evidence leader noted for the record that the privilege was being abused.

99. The Commission takes a dim view of a witness who conveniently invokes the privilege against self-incrimination. Ms Myeni's own testimony reflects the abuse of the privilege because she often described herself as "not comfortable" answering the questions; she said that they were showing her in a "bad light"; she said that she did not want to answer because there were pending civil proceedings against her or because the National Prosecuting Authority was investigating matters. [114] None of those is a valid ground for invoking the privilege. This was explained at the outset of Ms Myeni's evidence[115] and yet she continued to invoke the privilege when there was no legally justifiable basis for doing so.

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112 Transcript 5 November 2020, p 84-85

113 Transcript 6 November 2020, p 251

114 Transcript 6 November 2020, p 251

115 Transcript 4 November 2020, p 35-41

100. Where she did invoke the privilege in circumstances where it could legitimately be invoked, I explained to Ms Myeni that her failure to deal with these pertinent issues would mean that the evidence against her was uncontested and findings could then be made on the basis of the uncontested evidence against her.[116]

101. The Pembroke transaction is one such instance where the evidence against Ms Myeni is undisputed and overwhelming. Ms Myeni, the then Chairperson of the Board of SAA, on two successive occasions, lied to the Minister of Public Enterprises when she claimed that the Board had taken two decisions that it had not taken. Those misrepresentations caused financial losses to SAA.

102. After Ms Myeni testified, the Constitutional Court handed down judgment in the matter of *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 1 (CC) on 28 January 2021. The judgment dealt with the invocation of privilege against self-incrimination by witnesses who testified at the Commission.

103. In the light of this judgment, Ms Myeni was sent a copy of the submissions that the Legal Team intended to make that she had abused the privilege against self-incrimination. Ms Myeni was informed that the Legal Team would seek rulings from the Chairperson regarding the instances where she had abused the privilege. Ms Myeni was therefore summonsed to appear before the Commission again on 25 May 2021 to deal with this issue.

104. Ms Myeni failed to appear before the Commission on the date specified in the summons. Her non-attendance was in breach of the Commissions Act and so I made a ruling that a charge should be laid with the police by the Secretary of the

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[116] Transcript 6 November 2020, p 5

Commission concerning her failure to attend. Thereafter, arrangements were made with Ms Myeni to facilitate a virtual hearing so that she could be questioned. By that stage of the day, valuable time had been lost and so the evidence leader proposed that the questions in respect of which rulings had been sought should be answered on affidavit by Ms Myeni. Ms Myeni confirmed that she no longer had an objection to answering the questions and so would do so on affidavit.[117] She indicated that she would need some time to do so because she wanted to deal with the questions "comprehensively".[118]

105. The affidavit that was subsequently received from Ms Myeni was not comprehensive. It mainly consisted of one word answers and claims that Ms Myeni had no knowledge of certain matters. It was therefore of no utility to the Commission and indicated that Ms Myeni was merely continuing with her strategy of avoiding the Commission's questions and had no intention to frankly and honestly assist the Commission's work.

106. It is important to emphasise that the questions put to Ms Myeni on affidavit, were *only* in respect of the questions where the Legal Team took the view that she had abused her privilege against self incrimination – that is, where there was no discernible criminal offence associated with the possible answers to the question. Ms Myeni was not simply re-asked all of the questions put to her in her three days of evidence. Those questions remain unanswered because she invoked her privilege against self-incrimination. She did not have a change of heart in respect of those questions and never endeavoured to answer them. The evidence put to her in that questioning, remains uncontested.

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117 Transcript 25 May 2021, p 158

118 Transcript 25 May 2021, p 159

107. Ms Myeni's conduct, when she was summonsed to return on 25 May 2021 to deal with the matters involving SAA where she had previously abused her privilege, is consistent with a witness who will go to great lengths to avoid being questioned. First, in defiance of the summons issued, Ms Myeni simply failed to appear before the Commission. Then, when I ruled that a criminal charge be laid for this non-attendance, Ms Myeni made herself available for questioning. However, until she was told that she could provide answers on affidavit to the questions in respect of which she had abused her privilege in refusing to testify, she maintained that the privilege had not been abused.

108. However, once she was presented with the option of responding to those questions on affidavit because there was no time remaining in the day for her to be questioned properly about the matters, she was suddenly wiling to respond to the questions in an affidavit. The affidavit then proved to be vague and evasive.

The disclosure of Mr X's identity

109. Ms Myeni's conduct revealed a sustained disdain for the authority and processes of the Commission. During her first evidence session in November 2020, Ms Myeni disclosed the identity of a witness in respect of whom I had made a clear ruling that his identity should not be revealed because of concerns for his and his family's safety and security.

110. The witness was Mr X. Mr X gave evidence of a scheme in terms of which he received money from the bank account of Ms Myeni's son, Mr Thalente Myeni.

According to Mr X, he had no business dealings of any kind with Mr Thalente Myeni or his business, "Premier Attraction".[119]

111. Despite this, R 3.15 million was paid into Mr X's company's bank account in three tranches towards the end of 2015 and early 2016.[120] After receiving the money, Ms Myeni contacted Mr X and instructed him to pay the money out. Some of it was withdrawn in cash and then given to Ms Myeni or dropped off at her home. [121] There were also two large amounts that were paid into a bank account for which Ms Myeni provided the banking details.[122] Mr X testified that, at the time that he made the payments in accordance with Ms Myeni's instructions, he did not know who the holder of the bank account was. However, when he was initially questioned by the Commission's investigators, he was told that the payments were made to the Jacob Zuma Foundation.[123]

112. The Commission traced the money that Mr X had received from Mr Thalente Myeni's business, to a R2 million payment from VNA Consulting.[124] VNA Consulting had been involved in a housing project in the Free State Province and had used some of the monies it received on that project to pay Mr Myeni's business, Premier Attraction. So, the money appears to have originated from the Free State government's coffers, been paid to VNA Consulting, then to Mr Myeni's business "Premier Attraction", then to Mr X's company's bank account, and then, on instruction by Ms Myeni, into the bank account for the Jacob Zuma Foundation.

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119 Transcript 18 February 2020, p 59-61

120 Transcript 18 February 2020, p 52-54

121 Transcript 18 February 2020, p 63-84

122 Transcript 18 February 2020, p84-86

123 Transcript 18 February 2020, p 85-86

124 Transcript 17 February 2020, p 22

113. Mr Thalente Myeni was questioned at the Commission about his involvement in this arrangement. He claimed that the dealings with VNA Consulting and with Mr X were all legitimate business dealings,[125] despite Mr X's complete denial that there was any business relationship at all between him and Mr Thalente Myeni.

114. Mr Myeni's claims that these were all legitimate business dealings cannot be accepted as correct. He was extremely vague in his testimony about the work with VNA Consulting. He did not know how many people worked on the "project".[126] He could not recall the names of the people at VNA Consulting with whom they had worked.[127] He said that there was no method by which they would account for the work done and he was unable to provide any details of the precise work that would earn his company R2 million.[128] He could not recall the period over which the work was to be completed.[129] Despite being summonsed by the Commission to produce the document that would evidence this business relationship, Mr Myeni could not produce a single document.[130]

115. The Commission has seen a number of instances of this type of alleged "business dealings" during the course of its hearings. Witnesses would come before the Commission and claim that there were genuine business relationships between various parties but then could not ever produce a contemporaneous document to corroborate their version. The absence of contemporaneous documents is a compelling indicator that no genuine business relationship existed. This is because, in the ordinary course, genuine business relationship produce records – records of

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125 Transcript 17 February 2020, p 25

126 Transcript 17 February 2020, p 25

127 Transcript 17 February 2020, p 26

128 Transcript 17 February 2020, p 28-29

129 Transcript 17 February 2020, p 29

130 Transcript 17 February 2020, p 32-p 34 and p 42

emails between the parties, records of work done, progress records on performance, and records of interactions and conversations. The absence of records, together with an inadequate explanation for their non-existence, means that the relationships were probably not genuine ones.

116. Mr Myeni's version must also be assessed against that of Mr X. Mr X was a candid and frank witness. He made it clear at the end of his testimony that he did not want to be testifying before the Commission but that he realised he had no choice but to tell the full story when all the documents and records of the bank transactions were presented to him by the Commission's investigators.[131] He also gave evidence at the Commission in difficult circumstances and notwithstanding the threat that this posed to his own and his family's well-being.

117. Mr X's story is also one that the Commission heard often. It is the story of someone who got caught up, as a result of circumstance and long term relationships, in what appears to be a criminal scheme. Although he was a reluctant witness, he came before the Commission to explain his conduct in a forthright manner. He did not try to excuse it, or obfuscate. He explained what had happened in clear and simple terms. This was in stark contrast to Mr Myeni's evasive approach when being questioned.

118. The evidence that was presented at the Commission indicates that the dealings between VNA Consulting, Premier Attraction (Mr Thalente Myeni's business), Mr X's business, Ms Duduzile Myeni, and the Jacob Zuma Foundation were not arms-length business dealings. The flow of funds from the Free State to these various individuals and entities need to be investigated further in order to establish whether there was

[131] Transcript 18 February 2020, p 104

a corrupt relationship between any of these parties in terms of which state funds were redirected to benefit private parties, including the Jacob Zuma Foundation.

119. Mr X did a service to this country in being willing to give a frank and candid account of his involvement in these transactions. He did not deserve to have his identity revealed by Ms Myeni. When Ms Myeni did so during her testimony before the Commission, I directed that a criminal complaint should be lodged with the Police.. I understand that a criminal complaint has been lodged with the Police but, at the time of finalising this report, I am unaware of any arrest having been made.

The Board evaluation by Institute of Directors of South Africa NPC (IoDSA)

120. It is now necessary to return to the situation at SAA in 2014 because, as the report has highlighted above, during the early part of 2014 there was a material breakdown at board level at SAA. A number of the directors had expressed grave misgivings about Ms Myeni's leadership of the Board.

121. In the light of this situation, the Institute of Directors of South Africa NPC (IoDSA)[132] was tasked with undertaking an evaluation of the SAA Board. According to Mr Mpondo, Ms Myeni insisted that members of the Board be interviewed for the evaluation instead of simply completing the evaluation electronically as most had done. The rest of the Board was unhappy with this because it would delay the preparation of the AGM pack required for the AGM on 29 January 2014.[133]

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[132] The IoDSA is a non-profit company and a professional body for directors that is recognised by the South African Qualifications Authority. It promotes corporate governance in South Africa, serving as a convener and secretariat to the King Commission on Corporate Governance and has ownership of the King Codes/Reports

[133] Exhibit DD 34.13, p 1217, para 24

122. The pack was delayed unduly because the report was not forthcoming. It was eventually presented as a hardcopy at the AGM by a member of the Social, Ethics, Governance and Nominations Committee. The Board requested that the Chair account for why she held back the report.[134] Mr Mpondo stated that the report would have reflected all the governance and leadership issues facing SAA at the time.[135]

The letter of complaint and mass resignations of Board members

123. Mr Mpondo's affidavit stated that at a meeting of the SAA Board on 22 January 2014 the Board dealt with the leadership of the Board in general and resolved that there were challenges in the leadership of Ms Myeni.[136]

124. On 28 January 2014 six Board members resolved to write a letter to Ms Myeni and copied Minister Gigaba regarding concerns with her leadership.[137] The letter[138] was signed by all of the Board members except Ms Kwinana, Ms Nkosi-Thomas and Dr Naithani. The letter dealt with the following issues:

124.1. The Chair undermined the narrow body fleet financing process. This is the Pembroke transaction referred to above.

124.2. The procurement process for the wide body fleet was irregular – Ms Myeni as the Chair of the Board appeared not to have been aware that a Request for Proposals (*RFP*) had been issued by the management of SAA in this regard, despite the requirement in the MOI of SAA that Ministerial approval must be

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134 Exhibit DD 34.13, p 1218, para 2

135 Exhibit DD 34.13, p 1218, para 26

136 Exhibit DD 34.13, p 1218, para 27

137 Exhibit DD 34.13, p 1218, para 28

138 Exhibit DD 34.13, pp 153-162

sought by the Chair, on behalf of the Board, before any processes for procurement of a major asset.

124.3. Losses occasioned by the Chair's procrastination. First, Ms Myeni's conduct in the Pembroke transaction caused delays which cost SAA R800m. Second, Ms Myeni refused the Board's request to convene meetings to finalise the wide-body acquisition process, resulting in SAA losing the scheduled slots for the delivery of these aircraft, which meant SAA did not have these fuel-efficient aircraft for the 2016/2017 year leading to financial losses.

124.4. The Chair initiated forensic investigations into three fellow board members, without following the process set out in the SAA Internal Audit Charter. The Board stated: "We refuse to be managed by fear and victimization in this Board." It continued: "The conduct of the Chairperson in overtly acting against resolutions or seeking to change resolutions is becoming pervasive. It happened with the A320 financing transaction. It continues to happen with whistleblowing and investigations."

124.5. The Chairperson sowed confusion in Board Committees and interfered in their operations, to the extent that the Chair claimed to be a member of all Board Committees. This compromised the Chair's impartiality. This included using the Audit and Risk Committee to investigate Board members without proper processes in place; entering into a performance contract with the CEO, assisted by the HR & Remco Chairperson without the members of that committee or the Board seeing the contract, in contravention of the MOI; and trying to usurp the powers of the Procurement and Tender Processes Committee (*PTPC*) in the wide body procurement process.

124.6. The Chair was responsible for various inefficiencies. These included the poor administration of the Board, which resulted in many urgent agenda items not being attended to and causing the company financial loss; lack of planning for the 2014 AGM which resulted in the Chair seeking a waiver of the AGM notice period and never explaining to the Board why this was necessary; the Chair's non-attendance at key meetings or failure to provide reports for the Board to consider in advance of meetings.

124.7. The Chair disregarded Board resolutions.

125. The letter concluded:

> "This letter demonstrates repeat transgressions of corporate governance, undermining due process by the Board and a lack of diligence and care on the part of the Chairperson on extremely important matters.
>
> All the examples employed above are illustrative of a leadership style that potentially will expose all serving Board members to liability. We specifically highlight the risks associated with non-compliance with section 76 'Standards of Directors Conduct' & 77 'Liability of Directors and Prescribed Officers' of the Companies Act, 2008.
>
> In the exercise of our fiduciary obligations we recognize the need to uphold the highest standards of governance. These issues are seriously impacting on our performance individually and collectively. It is our sole intention to continue to put our shoulders behind the proverbial wheel with the aim of turning the organisation around. Increasingly it appears to us that our best efforts will be in vain given the realities we are operating under."

126. The signatories to the letter first attempted to have a meeting with Ms Myeni to deal with these challenges and requested the Company Secretary to schedule a special session. The Chair rejected the request and so the members had to resort to the

letter.[139] The Chair responded to the letter by refusing to meet to discuss the issues.[140]

127. Ms Nkosi-Thomas resigned from the Board in or around March 2014.[141]

128. On 3 April 2014 the Board requested that the Company Secretary prepare an assessment of the Board's effectiveness.[142] The Company Secretary presented this report at a meeting on 29 May 2014.[143]

129. The report concluded that:

129.1. the Board was not a coherent team;

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

129.3. the Chair attempted on two occasions to place a moratorium on board meetings;

129.4. the Board raised serious issues of leadership that remained unresolved;

129.5. one of the Board members transmitted a memorandum from the Chairperson to the Auditor General to investigate before the Board could deliberate and investigate the issues raised. This was calculated to undermine internal processes;

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139 Exhibit DD 34.13, p 1219, para 28

140 Exhibit DD34.13, p 1343

141 Transcript 5 November 2020, p 82

142 Exhibit DD34.13, p 1346

143 Exhibit DD34.13, p 1360

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

130. The Board adopted the Company Secretary's report and resolved that a letter be written to the DPE to request a session between the Minister and the Board.[144] The Board took advice that it could initiate a process, in consultation with the Minister, to invoke the provisions of section 71(3)(b) of the Companies Act to remove Ms Myeni as a director.[145] Minister Gigaba convened a meeting to mediate between all the parties but the Chair did not arrive.[146] Thereafter, Mr Gigaba was replaced by Ms Lynne Brown, as Minister of Public Enterprises.

131. In June 2014 the new Public Enterprises Minister, Ms Lynne Brown, convened a meeting with the Board. The Chair arrived during the course of the meeting. The Board members raised all the issues they had advanced in their letter.[147] Following on the meeting, the Minister requested, and was presented with, a report on SAA's leadership issues prepared by officials in the DPE.[148] This briefing report, dated 30 July 2014, concluded that the Board was completely dysfunctional and referred to Ms Myeni's decision to suspend all Board activities until the Minister intervened, which had aggravated the problems faced by the Board and SAA.

132. On 14 October 2014 the Board members received a notice convening a special general meeting of the company.[149] The notice stated that the meeting was convened to consider removing the seven Board members that signed the letter to the Minister

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144 Exhibit DD34.13, p 138

145 Exhibit DD34.13, p 1222, para 37

146 Exhibit DD34.13, p 1222-3, para 38

147 Exhibit DD34.13, p 1223, para 39

148 Exhibit DD34.13, p 1393

149 Exhibit DD34.13, p 141

about Ms Myeni, as well as the removal of Dr Naithani. Mr Mpondo stated that he was surprised at this because there was no indication that the Minister was not happy with the Board's performance.[150] Given the content of the notice it appeared that there was already a predetermined outcome and as the Board members did not consider that they had done anything wrong, there was nothing to present to the Minister. Mr Mpondo accordingly decided to resign from the Board.[151] Ms Myeni was not, however, asked to account to the Minister.

133. Ms Myeni was asked during her testimony about the Board's resignation and the contents of the letter they sent to the Minister complaining about her. She was also asked why it was that in the circumstances, the Minister would only ask the other Board members to account for why they should not be removed and never questioned Ms Myeni. Ms Myeni invoked her privilege against self-incrimination in respect of these questions.[152]

134. The affidavit of Mr Mpondo was also put to Ms Myeni.[153] Mr Mpondo was one of the directors who resigned. He set out the considerable steps that the Board had taken to report Ms Myeni's deficiencies to the Minister and Ms Myeni's failure to show up at the meeting scheduled with Minister Gigaba and the DG to try and work out the issues. The affidavit set out the report that was sent to Minister Brown about Ms Myeni including the factions in SAA, the DPE's assessment that the Board was completely dysfunctional, and Ms Myeni's decision to suspend all Board activities.

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150 Exhibit DD34.13, p 1224, para 43

151 Exhibit DD34.13, p 1224, para 44

152 Transcript 4 November 2020, p 4- 28

153 Exhibit DD34(b).13, p 1222

135. Again, Ms Myeni invoked her privilege against self-incrimination in response to being asked for her account of these events.[154] Ms Myeni's failure to give any contrary version on these events means that Mr Mpondo's affidavit is uncontested. There is no reason why the Commission should not accept Mr Mpondo's version, not only because it has not been denied by Ms Myeni but also because it is supported by two independent sources of corroboration. Both the SAA Company Secretary's report and the report prepared by the DPE confirmed that by 2014 there was a completely dysfunctional Board at SAA. They also recorded serious concerns about the manner in which Ms Myeni was discharging her functions as Chair of the Board.

136. Despite all these concerns, in October 2014 Minister Brown retained Ms Myeni on the Board, together with Ms Kwinana and Dr Naithani. They were joined on the Board by two new appointments – Mr Anthony Dixon and Dr John Tambi.[155]

137. Ms Brown provided an affidavit to the Commission dealing with the issue of the retention of Ms Myeni on the Board of SAA notwithstanding the complaints that had been received from the majority of the board members.

138. Although Ms Brown emphasised that she was concerned with issues of corporate governance when she took over the Public Enterprises portfolio in May 2014, she stated that "the issue of Ms Myeni as an individual Board Chairperson was not a priority".[156] Ms Brown further emphasised that the DPE's briefing report only reached her in September 2014 which was one month before the October AGM at which the directors would be changed.[157]

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154 Transcript 5 November 2020, p 49-55

155 Exhibit DD33, p 102

156 Affidavit of Ms Brown dated 23 January 2020 para 75

157 Affidavit of Ms Brown dated 23 January 2020 para 76

139. Ms Brown further explained that she had not been informed "about each fibre of Ms Myeni's conduct or the conduct of the other Board members for that matter". She therefore stated that she "could not take action against Ms Myeni or any other Board member in the abstract".[158] Later in her affidavit, however, she acknowledged that "there was a flurry of allegations and counter allegations making it difficult to make an objective grounded determination as to exactly who [had] failed to fulfil his/her duties".[159]

140. Ms Brown then referred to the fact that she gave the Board three months to resolve their differences and received advice from the Department that she would need to make a decision whether to remove some or all of the Board members.[160]

141. However, on the critical issue, which was why only the complaining Board members had been called on to explain why they should not be removed, Ms Brown said that she could not remember whether Ms Kwinana or Ms Myeni had also been given letters to explain their conduct. The records that the Commission obtained from the Department do not include any such letters being sent to Ms Myeni or Ms Kwinana. As a result, it is probable that they were not sent such letters. This, again, raises the key question: why would the Minster only call on the complaining Board members to explain why they should not be removed?

142. Ms Brown's answer to this key issue was unsatisfactory. In the end, she concluded her affidavit by saying that, when those Board members who had been called on to explain their conduct resigned, the only two remaining members – Ms Myeni and Ms Kwinana – were retained to ensure continuity.[161] However, that begs the question:

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158 Affidavit of Ms Brown dated 23 January 2020 para 86

159 Affidavit of Ms Brown dated 23 January 2020 para 93

160 Affidavit of Ms Brown dated 23 January 2020 paras 97-101

161 Affidavit of Ms Brown dated 23 January 2020 para 104

continuity for what purpose? The account by the majority of the Board was that Ms Myeni had chaired a hopelessly dysfunctional board and had acted improperly and in breach of her duties. That is not the type of continuity that a Minister should be looking for in an SOE. Continuity could also have been maintained by acting on the complaints of the majority of the Board, which may have encouraged them to stay on. The Minister's explanation for failing to deal with or meaningfully investigate serious, fundamental concerns about the organisation's leadership is inexcusable.

143. In his affidavit submitted to the Commission, Minister Gordhan stated that by January 2015, the SAA Board "had shrunk in size and been eroded in terms of its skills and expertise leaving only Ms Myeni, Ms Kwinana and Dr Tambi on the SAA Board. The Board was thus under-capacitated."[162] Mr Dixon was also on the Board at that time but resigned in November 2015.[163] This was as good as SAA having no board at all. That this situation was allowed to happen in regard to an SOE was, to say the least, scandalous, particularly when Minister Gigaba and Minister Lynn Brown had been told about these challenges at SAA.

144. The events that unfolded under this under-capacitated Board were devastating for SAA. Some of the particular transactions, which demonstrate the governance problems at SAA under this Board, are explored below.

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[162] Minister Gordhan's affidavit, dated 20 August 2020, para 19

[163] *Organisation Undoing Tax Abuse and Others v Myeni* [2010] ZAGPPHC 169 at para 72. See also transcript 1 July 2019, p 9

THE TRANSACTIONS

Airbus Swap and Emirates deal

145. The Airbus swap transaction and the Emirates deal have been the subject matter of OUTA's High Court application to declare Ms Myeni a delinquent director under the Companies Act. OUTA was successful in the High Court. [164]

146. The High Court's judgment makes numerous findings against Ms Myeni in justifying its order to have her declared delinquent. The judgment makes findings that Ms Myeni failed to attend meetings, that she displayed negligence in her dealings as Board Chairperson, that she often had opaque motives for obstructing patently advantageous measures for SAA, that she was in a powerful position in South Africa and was a close confidant of President Zuma and that she appeared to have a desire (at face value) to promote transformation and local development to the negation of all other principles of process and good governance, and the welfare and continued survival of SAA.

147. In respect of the transaction with Emirates, the High Court found as follows:

147.1. SAA had a code sharing relationship with Emirates that was one of the most profitable areas of SAA's business and generated profits of over R170million per year. The agreement involved SAA purchasing Emirates flights at a reduced rate and selling them to customers at a profit. Conducting international flights with the heavy Airbus 340-600 aircraft was inefficient and made it hard to run these routes profitably and Emirates had been granted a substantial number of frequencies to South Africa by the Department of Transport as part

[164] Organisation Undoing Tax Abuse and Others v Myeni [2020] ZAGPPHC 169

of a bilateral agreement. The result was that SAA could not be profitable on its international routes and needed an enhanced code sharing arrangement between SAA and a middle eastern airline. Therefore in 2013 increasing networks through code sharing[165] was a key priority for SAA.

147.2. At first, SAA had a deal with Etihad but it was causing SAA major losses. In January 2015, Emirates approached SAA with a proposal for enhanced code-sharing which proposal was forwarded to National Treasury. SAA had two bargaining chips going into negotiations – its code-sharing relationship with Etihad and the possibility of helping Emirates in litigation against the DoT.[166] The deal was very beneficial to SAA. The Board was made aware of the proposal as soon as it was received. SAA also had a Fleet plan prepared for it by an external consultancy that recommended this arrangement with Emirates. The SAA Management prepared a Memorandum of Understanding (MOU) and circulated it to the Board. Ms Myeni got involved in the operational aspect of the deal and insisted on attending meetings with Emirate, which was highly unusual. This included Ms Myeni travelling to Dubai. Management hoped to conclude the MOU at the meeting. Ms Myeni then cancelled the meeting at the last minute for unexplained reasons which was treated as highly disrespectful by Emirates and Dubai officials.

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165 Code sharing is a marketing arrangement in which an airline places its designator code on a flight operated by another airline, and sells tickets for that flight. Airlines frequently form code-share arrangements to strengthen or expand their market presence and competitive ability

166 This litigation related to the legality of the agreement that underpinned a contractual arrangement Emirates had with the DoT. DoT tried to stop the agreement during 2013. Emirates approached the Court and obtained an interdict to keep it in place, but DoT was threatening to appeal. Although Emirates sought SAA's support over the fourth frequency, Mr Bezuidenhout, Mr Bose, Ms Mpshe and Mr Meyer were all clear in the Myeni delinquency trial that SAA had no legal power to determine existing route rights or to determine the course of DoT's litigation with Emirates, but could merely approach DoT to consider the prudency of the litigation, in the light of the prospective code sharing agreement with Emirates

147.3. There was a second opportunity for a meeting in Cape Town and Ms Myeni was personally invited by the CEO of Emirates to attend. Despite being reminded to attend, Ms Myeni just failed to show up. The other non-executive Board members also did not show up. The meeting took place between the executives of SAA and Emirates and they concluded a draft non-binding MOU.

147.4. Mr Nick Linnell, an independent legal adviser whose involvement with the SAA Board and relationship with Ms Myeni is detailed later in the report, presented to the Board queries about the MOU that were contrary to the legal opinion that SAA's legal advisory panel had obtained. The Board and Ms Myeni in particular caused delays in the finalisation of the MOU and even set up a committee to assess this non-binding MOU. The committee fully supported the MOU. Ms Myeni still delayed the conclusion – she asked to meet with the review committee, but failed to attend. The rest of the Board members all indicated that they had no objection. Ms Myeni was the only hold out. She cancelled further plans to conclude the MOU. The conclusion of the MOU was scheduled to take place at a formal ceremony to which international media had been invited. Ms Myeni then called the executive to say the President had instructed them not to sign the MOU. The ceremony was called off leading to national embarrassment, ruining the deal with Emirates and hampering relations with Etihad (because SAA had made it known that it was building a relationship with Emirates, instead of Etihad, but then failed to do so) as well as other partners because SAA was now seen as entirely irrational.

147.5. At the meeting that Ms Myeni called after this had happened on 3 July 2015, she confiscated everyone's devices. During the meeting, she issued action points that made no sense. Ms Myeni prevented the circulation of a round robin resolution to approve the MOU. Thereafter, Ms Myeni continued to be an

obstacle to the conclusion of the MOU – citing undisclosed concerns. Eventually, every member of the SAA team responsible for engaging with Emirates was removed or resigned. The Court found that her reasons for frustrating and sabotaging the deal remain unclear to this day.

147.6. The High Court concluded that Ms Myeni's actions "led to irreparable harm for SAA and the country. What motivated these reckless and detrimental actions to SAA and country, we still do now know. Ms Myeni acted recklessly and broke her fiduciary duty in sabotaging this deal and the people of South Africa and SAA's employees are paying the price for her actions."[167] There can be no doubt, that what happened at SAA during Ms Myeni's tenure as the chairperson the Board of SAA contributed significantly to SAA being placed under business rescue a few years later – in 2020.

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

148.1. Ms Myeni tried to put a stop to a transaction between Airbus and SAA, in terms of which SAA sought to cancel a legacy contract for the purchase of 10 Airbus A320-200s and to replace this with a new deal for SAA to lease five airbuses directly from Airbus. This would have allowed SAA to escape onerous pre-delivery payments and inflated prices under the old contract. The matter was extremely urgent as SAA was liable to pay R1billion to Airbus in 2015, which money it did not have. Default would risk triggering its other loan obligations with the effect that billions of rand would fall due immediately, with a knock-on effect on government debts.

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[167] Organisation Undoing Tax Abuse and Others v Myeni [2010] ZAGPPHC 169 para 132

148.2. Executives had spent months negotiating the deal with Airbus. It was very beneficial to SAA and crucial for it because it allowed the replacement of the old fleet which was inefficient with more fuel efficient and lighter aircraft in line with SAA's network and fleet plan. Treasury had approved the deal and all that was missing was the SAA Board's resolution to ratify the documents. This deal was a key condition to getting any further guarantees from government.

148.3. Ms Myeni simply failed to meet the deadline and did not ratify the deal. The Board then began questioning the deal, after having previously approved of the transaction. Rather than just ratifying the agreements, Ms Myeni, Ms Kwinana and Dr Tambi started engaging directly with Airbus representatives to attempt to renegotiate the deal, which was highly irregular. The Board continued thereafter to delay finalising the deal, which delay would have catastrophic consequences for SAA. Ms Myeni even went so far as to send a letter herself directly (without consulting anyone) to the President of Airbus to try and agree on new terms. She tried to unilaterally introduce the engagement of "an African Aircraft Leasing Company".

148.4. Ms Myeni could offer no plausible explanation for her delay or her actions. Again, she cited unspecified concerns with it. Ms Myeni then took it upon herself to appoint a transaction advisor, without any processes in place, which was manifestly unlawful. The proposal from the selected advisor demonstrated a complete lack of understanding of the transaction and aptitude to advise on the matter. All the while National Treasury was in correspondence with Ms Myeni, warning her of the danger in which she was putting SAA. Thereafter, all senior executives who opposed Ms Myeni's plan to change the transaction were removed. She sent out a completely inaccurate section 54 application to the Minister of Finance (Mr Nene) in regard to her amended version of the plan with

Airbus. The Minister declined Ms Myeni's request and instructed her to approve the Swap Transaction without delay.

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

148.6. The High Court found that "faced with all these risks, Ms Myeni's attitude seemed to be one of supine indifference" and her explanations were "generally incomprehensible". "As Chairperson of the Board she did not show any concern for the catastrophic consequences of her actions not only for SAA but the country."[168]

149. Former Minister Nene testified before the Commission[169] about a meeting to which he was summoned by former President Zuma which was also attended by Ms Myeni in November 2015. Mr Nene was called to that meeting after he had shared concerns about Ms Myeni's leadership at SAA with his ANC colleagues in an ANC meeting. Minister Nene testified that during the meeting he complained about Ms Myeni and said to former President Zuma that Ms Myeni was obstructive and the Board acted recklessly under her leadership. He recommended that she be removed from office. He emphasised that, because of Ms Myeni's conduct in the airbus swap

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168 Organisation Undoing Tax Abuse and Others v Myeni [2010] ZAGPPHC 169 at para 230

169 Transcript 3 October 2018

transaction, there was a serious threat that the airline would default on its obligations and this would have a ripple effect across the economy as a whole.

150. Also during his evidence, Mr Nene said that he considered his subsequent removal as Minister of Finance a month later as having been linked to the views he expressed about Ms Myeni in the meeting he had with Mr Zuma and Ms Myeni.

151. During her evidence, Ms Myeni was asked how, after this had happened, she had managed to persuade the former President to keep her on as a member of the SAA Board and, indeed, to remain as its Chairperson. She was also asked whether her retention on the Board had anything to do with Minister Nene's removal as Finance Minister. Ms Myeni refused to answer these questions and instead invoked her privilege against self-incrimination.[170] When Ms Myeni responded to these questions after she had agreed to do so on affidavit, she said that she may have attended a meeting with former President Zuma at which Minister Nene was present. However, beyond that, she stated as follows: "I dispute all of Minister Nene's evidence".[171]

152. It was also put to Ms Myeni that Minister Gordhan had testified before the Commission[172] that Ms Myeni's efforts to reverse Minister Nene's decision on the airbus swap transaction would likely have triggered debt defaults by SAA and that Minister Gordhan had decided not to reverse Minister Nene's decision, despite Ms Myeni's application for him to do so. After he had refused to reverse Mr Nene's decision, Minister Gordhan received a call from President Zuma asking him to reconsider the decision. Ms Myeni was asked whether she had asked President

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170 Transcript 6 November 2020, p 103-110

171 Ms Myeni's affidavit dated 6 June 2021 para 29

172 On 20 November 2018

Zuma to do so. She refused to answer the questions and invoked her privilege against self-incrimination.[173]

153. It was also put to Ms Myeni that the evidence of two successive finance Ministers was that her approach to SAA was reckless. Once again, Ms Myeni refused to answer the questions and invoked her privilege against self-incrimination.[174]

154. The evidence of former Minister Nene and Minister Gordhan on their interactions with both Ms Myeni and former President Zuma therefore stand uncontested before the Commission, save for a bald and self-serving denial in Ms Myeni's affidavit about Mr Nene's account of the meeting with Mr Zuma. There is no reason why the Ministers' evidence should not be accepted. It is to the effect that by 2015 the SAA Board was being chaired by a person who had little concern or appreciation for the serious negative effect that the airbus swap transaction would have had on SAA's financial position and that of the country.

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173 Transcript 6 November 2020, p 125-126

174 Transcript 6 November 2020, p 127

General interference by the Board in operational matters

155. Ms Mathulwane Emily Mpshe was appointed as Acting CEO in July 2015,[175] replacing Mr Nico Bezuidenhout, and remained in that position until November 2015,[176] when she was replaced by Mr Musa Zwane.[177]

156. Ms Mpshe testified that she was notified in an urgent meeting during July 2015 that Mr Bezuidenhout was going back to Mango Airlines and that Ms Myeni had instructed that Ms Mpshe be appointed as Acting CEO.[178]

157. Ms Mpshe testified that there were numerous instances of Board members interfering with operational matters that ought to have been the exclusive purview of management at SAA. In particular, with reference to the appointment or discipline of employees – non-executive directors, and in particular the Chair, Ms Myeni, would be heavily involved in, and, issue instructions on, these issues.[179] Ms Mpshe explained that this was inappropriate. The Board, and the shareholder in consultation, should select the CEO but thereafter, the CEO is responsible for selecting other executive members and those employees would select other employees to populate the organisation.[180]

158. Ms Mpshe testified that these instructions on the appointment of specific individuals was contrary to the employment procedures, policies or prescripts in place at SAA.

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175 Transcript 1 July 2019, p 5

176 Transcript 1 July 2019, p 6

177 Transcript 1 July 2019, p 8

178 Transcript 1 July 2019, p 6

179 Transcript 1 July 2019, p 11

180 Transcript 1 July 2019, p 11-12

She said it was also inappropriate at the time because SAA was in the process of retrenching large numbers of employees. She explained that she raised this as a problem on two occasions with the Remunerations Committee of the Board.[181] However, they did not act to address these concerns.

159. The Board's inappropriate involvement in the affairs of management did not stop with the appointment of personnel. The Board also took decisions that were contrary to the advice of management. When these decisions were probed during the course of the Commission's hearings, it became clear that they were unjustified. In some instances, the decisions were so lacking in rationality that the only explanation for the Board's conduct appears to have been some ulterior purpose. These examples are dealt with in greater detail below.

[181] Transcript day 124, 1 July 2019, p 13.

LSG Skychefs/Air Chefs

160. Ms Mpshe testified that in 2015 an SAA subsidiary Air Chefs was servicing SAA lounges.[182] However, customers were complaining at the airport lounges about the service and food served.[183] The SAA lounges had stopped being competitive and so Investec started a partnership with SAA to revamp the lounge. Part of the revamp involved a tender for a catering company.[184]

161. The contract went out to tender and Air Chefs was among the bidders invited to bid for the contract.[185] The contract was for an amount of R85million spread out over three years.[186]

162. Ms Msphe testified that LSG Skychefs South Africa (Pty) Ltd (*LSG Skychefs*) was a subsidiary of Lufthansa Airlines, a German company. It was a South African registered company and based in South Africa. It was employing South Africans.[187] It had acquired the necessary BEE credentials.[188]

163. LSG Skychefs and Air Chefs both tendered for the catering contract.

164. Dr M Dahwa was the Head of Procurement at SAA in 2015. He testified before the Commission that there was a full formal procurement process and evaluations had been done in respect of airport lounge catering.[189]

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182 Transcript 1 July 2019, p 56

183 Transcript 1 July 2019, p 54

184 Transcript 1 July 2019, p 55-56

185 Transcript 1 July 2019, p 56

186 Transcript 1 July 2019, p 56

187 Transcript 1 July 2019, p 53

188 Transcript 1 July 2019, p 53

189 Transcript,28 June 2019, p 236

165. Given that the contract award was for R85 million, it fell within Ms Mpshe's delegation of authority as Acting CEO to approve the award. After the full procurement process had been completed and LSG SkyChefs had been selected, Ms Mpshe prepared a submission to the Board of SAA to notify it that there would be a new service provider after the renovated lounges had been opened.[190]

166. The submission was dated 20 August 2015. It informed the Board of the following:[191]

166.1. the deterioration of quality in the service and product provided by Air Chefs at OR Tambo International Airport and the complaints SAA had received about this which had resulted in reputational and commercial harm to SAA and prompted customers to move to competitor lounges;

166.2. the management of SAA had several interactions with Air Chefs about the deteriorating quality and, despite these efforts, there had been no improvement in the service and the quality of the food;

166.3. SAA, therefore, had had no other option but to go out on a confined tender[192] to find a suitable catering service;

166.4. the level and standard of service required was also part of the contractual obligation that SAA had to Investec as part of their partnership in upgrading the lounges;

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190 Transcript 1 July 2019, p 57

191 Exhibit DD15(a), p 91-93

192 This is where a tender is not advertised generally to the public for any interested party to bid for it. Instead, the tender committee would identify a limited group of suitable candidates and invited only these parties to bid for the contract

166.5. SAA had received three responses to the bid. These were from (1) LSG Skychefs; (2) Air Chefs; and (3) Dnata-Newrest;

166.6. a full, proper and lawful procurement process had been conducted;

166.7. Air Chefs had been unable to meet even the minimum qualification criteria for the tender and had therefore been excluded;

166.8. of the remaining two tenderers, LSG Skychefs had the lowest price;

166.9. there would be a revenue loss to Air Chefs of R18million per annum and a negligible negative net profit impact of R1.8million per annum; and

166.10. due consideration had been given to the implications of taking business away from Air Chefs as against retaining customers in a highly competitive market and it had been noted that this was only carving out a small portion of services rendered by Air Chefs in relation to the total SAA account.

167. Ms Mpshe testified that in the negotiations between SAA and LSG Skychefs the parties had agreed that the business of servicing the lounges was going to be transferred as a going concern as contemplated in section 197 of the Labour Relations Act 66 of 1995.[193] As a result, LSG Skychefs would take over the

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[193] S 197(2) provides:

"If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) - (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer; (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee; (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and (d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer"

employees of Air Chefs. The process had in fact already begun – employees were being transferred and trained in preparation for the opening of the lounge. There would accordingly not be any loss of employment at Air Chefs despite the fact that it had not been awarded the tender.[194]

168. On 21 August 2015 Dr Dahwa sent a letter of award to LSG Skychefs confirming that it had been awarded the catering contract.[195] On 1 September 2015 Ms Mpshe, Ms Myeni and Dr Dahwa went to attend a meeting of the relevant Portfolio Committee of Parliament. The issue of SAA awarding the tender to a "German company" was discussed for a long time in Parliament.[196] In fact, according to Ms Mpshe, this was something Ms Myeni herself raised: Ms Mpshe said Ms Myeni told Parliament that as a non-executive director she had been surprised to learn that SAA had been awarding contracts to German companies. This was what drew Parliament's attention to the issue.[197]

169. Dr Dahwa testified that Ms Myeni was asked by the Portfolio Committee why SAA had awarded a catering tender to a German company – and whether SAA meant that there were no South African women who could cook.[198] Ms Myeni had responded by claiming that she did not know about the decision and did not agree with it.

170. Ms Mpshe testified that, when the SAA delegation left the Portfolio Committee, Ms Myeni was irate and said to her that by taking away business from a local

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194 Transcript 1 July 2019, p 60-61

195 Transcript 1 July 2019, p 5. See also transcript 123, 28 June 2019, p 235

196 Transcript 1 July 2019, p 58

197 Transcript 1 July 2019, p 58

198 Transcript 28 June 2019, p 236

company and giving it to a "foreign" company, "you mean Black people can't cook".[199] She began berating Ms Mpshe in front of her colleagues waiting outside of Parliament.[200] Ms Mpshe responded by saying that they should discuss this elsewhere because Ms Mpshe's correspondence to Ms Myeni had already explained and addressed Ms Myeni's concerns.[201]

171. On 2 September 2015 Ms Myeni sent Ms Mpshe an email instructing her not to award the tender to LSG Skychefs. Ms Mpshe responded that the award had already been awarded to LSG Skychefs and that her submission to the Board had simply been a notification. She also clarified that LSG Skychefs were the legitimate successful bidders. Ms Myeni asked her about Air Chefs and why they were excluded. Ms Mpshe checked with Dr Dahwa and was advised that Air Chefs had been excluded because they had not submitted the full documentation required to be eligible for the tender. She told Ms Myeni accordingly.[202]

172. On 3 September 2015 Ms Kwinana sent an email to Ms Mpshe stating that the award had to be cancelled; that she was "disturbed by this decision which is killing SAA subsidiary"; she also stated that "this looks like treason and I request this to be investigated by the SIU".[203]

173. Thereafter, Ms Myeni sent Ms Mpshe an email stating that she had to cancel the LSG Skychefs award.[204] She stated that she had a responsibility to support a

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199 Transcript 1 July 2019, p 59

200 Transcript 1 July 2019, p 60

201 Transcript 1 July 2019, p 59

202 Transcript 1 July 2019, p 61

203 Exhibit DD15(a), p 116

204 Transcript 1 July 2019, p 61

subsidiary of the airline.[205] Ms Myeni stated that furthermore, Ms Myeni was the chairperson of the Board of Airchefs at the time.[206] Ms Mpshe testified that she believed this was a conflict of interest.[207] In the email Ms Myeni asked for a comprehensive review of the tender process.[208]

174. In response Ms Mpshe gathered all the information from Dr Dahwa about the procurement process.[209] She also asked the legal department at SAA to provide an opinion as to the legal risks of cancelling the contract. The legal department expressed the view that LSG Skychefs had been appointed pursuant to a lawful procurement process. They concluded that the cancellation or suspension of the award could result in possible legal action and financial exposure against SAA.[210] The opinion was provided to the Board.[211]

175. Ms Mpshe prepared a comprehensive response and circulated it to all the members of the Board on 8 September 2015.[212] In this response, she clarified that:

175.1. there were not going to be any job losses and this was also a condition of the tender itself;

175.2. LSG Skychefs was a South African entity which locally sourced and produced products procured by SAA;

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205 Transcript 1 July 2019, p 63. This email is at exhibit DD15(a), p 111

206 Transcript 1 July 2019, p 64

207 Transcript 1 July 2019, p 65

208 Exhibit DD15(a), p 111.

209 Transcript 1 July 2019, p 68

210 Exhibit DD15(a), p 127-135

211 Transcript 1 July 2019, p 84

212 Exhibit DD15(a), p 114-117. This includes an earlier email response from Ms Mpshe of 3 September 2015, addressing more of the Chair's questions

175.3. the lounge services only represented 4.265% of AirChef's total annual revenue and, that, therefore, the revenue loss would be negligible;

175.4. a letter of award had already been issued to LSG on 21 August 2015. LSG Skychefs had already commenced with implementing operational requirements;

175.5. the tender had been awarded pursuant to a recommendation by the Bid Adjudication Committee (*BAC*) after due process had been followed in accordance with Ms Mpshe's delegated authority;

175.6. any cancellation of the award would result in litigation and financial exposure against SAA;

175.7. Air Chefs had failed to meet the initial minimum threshold for evaluation in the tender and had lawfully been precluded from proceeding to further stages of the evaluation.

176. Ms Mpshe then had a meeting with the rest of the Board on 28 and 29 September 2015 about whether to cancel the LSG tender award.[213] Despite the warning from the legal department and the extensive explanations by Ms Mpshe of the fair tender process that had been followed, the Board simply decided to pass a resolution to cancel the award on the basis that it had a duty to its subsidiary, Air Chefs.[214] The resolution stated that the award to LSG Skychefs had to be "retracted" and the contract awarded to Air Chefs "without going through a bidding process".[215] The LSG

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213 Transcript 1 July 2019, p 85

214 Transcript 1 July 2019, p 87-88

215 Exhibit DD15(a), p 138

Skychef's contract was, thereafter, cancelled.[216] Subsequently, LSG Skychefs sued SAA over this decision.[217] Customers continued to note the substandard food in the lounges.[218] The Board never concerned itself with even attempting to improve Air Chef's services.[219]

177. Dr Dahwa explained that he signed the cancellation letter to LSG SkyChefs because the Board had resolved that this should be done.[220] He accepted, however, that this was "not the right thing" to do. He signed the letter, nonetheless, because of the sensitive political optics of the situation – i.e. that this had been the subject of tense and embarrassing public questioning in Parliament and that Ms Myeni was insistent that this embarrassment be addressed in this way.[221] He did so on 6 October 2015.[222] Dr Dahwa stated that part of the reason why he signed the letter was that he did not want to continue to be seen to be insubordinate or unwilling to implement the will of the Board.[223]

178. At this same meeting on 28 and 29 September 2015, Ms Myeni in her anger at Ms Mpshe's decision, proposed that the Board pass a resolution reducing her delegation of authority by half – as well as the authority of all the executives.[224] The

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216 Transcript 1 July 2019, p 89

217 Transcript 1 July 2019, p 94

218 Transcript 1 July 2019, p 94-95

219 Transcript 1 July 2019, p 96

220 Transcript 28 June 2019, p 238 and p 240

221 Transcript 28 June 2019, p 246

222 Transcript 28 June 2019, p 247. This was four days after his long ordeal with Ms Myeni and Ms Kwinana over the letters of award to Swissport and Engen, which is dealt with later.

223 Transcript 28 June 2019, p 248

224 Transcript 1 July 2019, p 93

result of this was that the Board would then have to be more involved in the day to day operations of the airline.[225]

179. Ms Mpshe testified that the executives were very concerned about the level of the Board's involvement in the operations of SAA but they did not issue any resolution to this effect or refuse Ms Myeni's proposal. She testified that the morale of the executives was very low because these instructions were contrary to lawful process and what the airline should have been doing in terms of implementing the company's strategic objective.[226] Ms Mpshe stated that, while non-executives were not supposed to be at SAA very frequently outside of meeting times, Ms Myeni and Ms Kwinana were frequently at SAA.[227] She stated that the executives had to spend time fighting back against unlawful instructions instead of implementing the approved strategy at the airline to deal with SAA's already precarious position.[228]

180. When Ms Kwinana testified before the Commission, she was asked for her account of the decision to withdraw the LSG SkyChefs tender in order to give it to Air Chefs. She said that it was one of the best decisions she ever made at SAA. In support of her view, she said:[229]

180.1. leaving the tender with LSG SkyChefs would have resulted in retrenchments and job losses at Air Chefs; she said that it would have resulted in the loss of 1500 jobs;

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

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225 Transcript 1 July 2019, p 93

226 Transcript 1 July 2019, p 90

227 Transcript 1 July 2019, p 102

228 Transcript 1 July 2019, p 91

229 Transcript 2 November 2020, p 170

180.3. Air Chefs is a 100% subsidiary of SAA and it should be developed and given a chance to improve;

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

180.5. whoever had made the decision to award the tender to LSG Skychef was clearly trying to sabotage SAA.

181. It was put to Ms Kwinana that all of the reasons she advanced had been dealt with comprehensively by Ms Mpshe in her submission to the Board. It was put to her that the Board had therefore either ignored these factors because they were determined to cancel the bid, or they simply did not read Ms Mpshe's submissions. In response, Ms Kwinana took the position in her testimony that the simple fact that Air Chefs was a subsidiary of SAA meant that it had to be chosen as a supplier all the time, regardless of the cost to SAA or the harm to SAA's reputation. She kept comparing Air Chefs to a child that she said had to be guided and nurtured,[230] instead of a corporate entity that SAA engaged with as an efficient business entity.

182. When Ms Mpshe's responses to all of these issues were put to Ms Kwinana, she claimed, without any basis, to "not trust" Ms Mpshe's submission, even suggesting it never reached the Board. Ms Kwinana began making wild, unsubstantiated allegations against Ms Mpshe, including that she joined forces with LSG Skychefs to sue SAA to set aside the tender.[231] She was continuously evasive, particularly when it was put to her that SAA routinely used South African subsidiaries of foreign

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230 Transcript 2 November 2020, p 175, 185 and 189

231 Transcript 2 November 2020, p 255-256

companies as service providers, and this therefore could not have been a valid basis for withdrawing the tender or contract.[232]

183. Ms Kwinana was also questioned about whether the decision to retract an existing tender and replace it with an award to another entity on instruction from the Board was a reportable irregularity. A reportable irregularity is a concept defined under section 45 of the Auditing Professions Act 26 of 2005.[233] It refers an unlawful act or omission that has been committed by someone in a management position which has caused or is likely to cause material financial loss to the entity or which is fraudulent or which involves a material breach of a fiduciary duty.

184. Ms Kwinana testified that it was not a reportable irregularity to retract an existing tender that followed correct procedure, and simply award it to another bidder without following any process. She claimed that it would have been a reportable irregularity if the award had *remained* with Air Chefs because the tender was supposed to go to the shareholder in terms of section 54 of the PFMA[234] because it was a discontinuation of a big portion of the SAA Group.[235]

185. Ms Kwinana's insistence that the Board's decision to retract the tender award from LSG SkyChefs and give it to Air Chefs was not a reportable irregularity was in stark contrast to the evidence of Mr Mothibe, the PWC auditor who was responsible for auditing SAA in the 2016 financial year. When Mr Mothibe testified before the

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232 Transcript 2 November 2020, p 223-224

233 An unlawful act or omission committed by somebody in a senior management position which (1) has caused, or it likely to cause, material financial loss to the entity, or (2) which is fraudulent or amounts to theft, or (3) which present a material breach of a fiduciary duty

234 See the fn above setting out this section. In essence, the section provides that before a public entity concludes any major stipulated transactions, the accounting authority for the public entity (the Board) must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction

235 Transcript 2 Novemeber 2020, p 171

Commission, he accepted that, had the true facts concerning the Board's decision on this matter been brought to his attention, he would have reported it to the Independent Regulatory Board for Auditors (*IRBA*) as a reportable irregularity.[236]

186. Furthermore, Ms Kwinana's reference to section 54 of the PFMA is also entirely incorrect as a matter of law. First, even if this tender did require the approval of the shareholder or National Treasury under section 54 of the PFMA, it was finally and officially awarded to a bidder. It was a final administrative act. South African law says that an administrator cannot simply withdraw a final administrative decision because there was an irregularity in the process. It must apply to court through the appropriate channels for the decision to be set aside. The decision is binding until a court sets it aside.[237]

187. In any event, section 54 did not apply in this case. Section 54(2)(e) of the PFMA provides that, before a public entity may conclude a transaction that amounts to commencement or cessation of a significant business activity, the Board must promptly and in writing inform the relevant treasury of the transaction and submit particulars to the executive authority for approval of the transaction. However, the servicing of the SAA lounge was not a "significant business activity". According to Ms Mpshe's submission to the Board, it amounted to around 4% of Air Chef's business and R18milion in revenue per year (R1.8million in profit).

188. "Significant" is not defined in the PFMA. Treasury Regulation 28.3.1 provides that the Board may develop a framework of acceptance levels of significance with the Minister. This framework is known as the Significance and Materiality Framework. The transaction thresholds are set out in annexure B thereof. For cessation of a

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236 Transcript 16 July 2020, p 201

237 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (4) SA 418 (CC)

business activity, the annexure requires notification if there is a cessation of business activity which results in retrenchment of any number of employees; or a cessation of business activity where costs exceed R100million. Neither of these applied to this transaction.

189. In any event, this was not the reason given *at the time* for why the Board set aside the award. Rather, it was Ms Kwinana's after-the-fact justification presented under questioning before the Commission which had no legal or factual basis.

190. Ms Kwinana's conduct made no commercial sense and it put SAA at risk both reputationally and legally. During her evidence, Ms Kwinana repeatedly claimed that her conduct was lawful because the letter of award had not yet been sent out when the Board took its decision to retract the award.[238] When it was put to her that this was false and she would have known that because the legal opinion presented to the Board made it clear, she would still not accept it.

191. Ms Kwinana was a very poor witness. She continually refused to make the most basic of concessions, even when the evidence presented to show that she was wrong, was overwhelming. In the end, this severely undermined her credibility as a witness. She showed herself to be willing to be dishonest under oath simply to avoid having to account for her unlawful and irresponsible conduct.

192. The evidence regarding the Board's conduct in the unlawful and unjustified cancellation of the LSG Skychefs tender was also put to Ms Myeni when she testified. She again refused to answer the questions and invoked her privilege against self incrimination. Despite invoking the privilege, she did say that outsourcing from Air Chefs to LSG Skychefs would be like "killing a child that was established by

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[238] Transcript 2 November 2020, p 230-243

SAA as a subsidiary".[239] This explanation was remarkably similar to Ms Kwinana's attempted justification. For the same reasons set out above in respect of Ms Kwinana's purported justification, Ms Myeni's explanation is also rejected.

193. Ms Myeni also testified that she was entitled to ignore the advice of the SAA legal department.[240] That sort of attitude to the advice provided by SAA's own qualified internal lawyers is deeply concerning. It evidences a level of disregard for the expertise of others that calls into question Ms Myeni's fitness to hold any position on the board of an SOE.

194. Ms Myeni and Ms Kwinana displayed a wanton disregard for the best interests of SAA in their decision-making on the lounge catering contract. They acted in gross disregard of their fiduciary duties to SAA when they took this decision.

195. Section 162 of the Companies Act empowers the shareholder of a company, amongst others, to bring an application to declare a director of a company delinquent. The shareholder of SAA is the executive authority as defined under the PFMA. At the time when these decisions were taken, that was the Minister of Finance, Minister Gordhan.

196. Section 162 is the section of the Companies Act in terms of which OUTA brought its application before the High Court for an order declaring Ms Myeni a delinquent director. No such application was, however, instituted against Ms Kwinana. There is a limitation in section 162(2)(a) of the Companies Act on these types of applications. They must be brought within 24 months of the person having been a director of the company.

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239 Transcript 6 November 2020, p 239-224

240 Transcript 6 November 2020, p 246-248

197. Therefore, under the current statutory regime, it is not possible for the executive authority of SAA any longer to bring such an application to court. Given that it often takes a number of years for the facts of delinquency, especially in SOEs to be uncovered, the Commission recommends the amendment of the Companies Act so as to permit applications of this type to be brought even after two years, on good cause shown. This will mean that in cases such as the present, where the true extent of the Board members' breaches of duty are only uncovered a number of years later, steps can still be taken by the executive authority of an SOE to ensure that they are declared delinquent and thereby prevented from serving on the boards of companies in the future.

False whistleblower reports

198. Ms Mpshe testified that Deloittes provided a whistleblower service to SAA. The results would be reported on a platform to which Ms Kwinana, as head of the Audit and Risk Committee (*ARC*), had access.[241]

199. In 2016 Ms Mpshe received a call from a member of OUTA, Mr Wayne Duvenage, explaining that Ms Kwinana had approached OUTA after she had resigned from the SAA Board and told them that she would accompany Ms Myeni to internet cafes to go and formulate whistleblower reports and use these to victimize staff members at SAA – to suspend or dismiss those that they wanted removed.[242] Ms Mpshe said she was shocked to hear this because these reports had been used to initiate disciplinary proceedings against, among others, Mr Sylvain Bosch and Mr Bezuidenhout.[243] According to Ms Mpshe, Mr Duvenage explained to her that Ms Kwinana had said that she had decided to tell OUTA everything so that she could avoid being targeted in their litigation against Ms Myeni to have her declared a delinquent director, which would have been fatal for her career as a chartered accountant with her own firm.[244]

200. During her evidence before the Commission Ms Kwinana was asked to confirm that Ms Myeni prepared false whistleblower reports. It was put to her that during her interview with OUTA, she had told them that Ms Myeni had indeed prepared false whistleblower reports in order to discipline staff that she had a problem with. When Ms Kwinana disputed that she had said this to OUTA, she was shown a transcript of her meeting with OUTA on 30 August 2016.[245] However, Ms Kwinana still persisted

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241 Transcript 1 July 2019, p 97-99

242 Transcript 1 July 2019, p 141

243 Transcript 1 July 2019, p 142-143

244 Transcript 1 July 2019, p 144

245 Exhibit 33.26

that she had never said this and claimed that it was a "language issue" – which is patently absurd as the transcript is very clear. She then claimed that the transcript had to be wrong because it referred to having been "edited" on the first page.[246] The Commission subsequently provided the audio recording of the interview to Ms Kwinana and invited her to indicate to the Commission whether she disputed the transcript which the Commission had obtained. She was warned that, if there was no alternative transcript forthcoming from her, she would be taken to have accepted the correctness of the Commission's transcript. Despite the invitation to do so, Ms Kwinana failed to provide the Commission with an alternative transcript of the interview. The Commission's transcript is therefore uncontested and reveals that just over a week after Ms Kwinana had left SAA, she confessed to OUTA that she knew that Ms Myeni used to prepare false whistleblower reports in order to remove executives and employees that she wanted out of SAA.

201. That Ms Kwinana said this at her interview with OUTA in August 2016 is beyond doubt. Whether she was lying when she did so, is less clear. It was put to Ms Kwinana during her evidence that one possibility was that she was lying about Ms Myeni when she accused her of preparing the false whistleblower reports in order to deflect attention from her own conduct [247] or, alternatively that what she said about Ms Myeni at the time was true but, for some unknown reason, Ms Kwinana was now willing to lie under oath about that fact before the Commission. It is not possible, definitely, to resolve this question. But at least the following should be noted:

201.1. Ms Nhantsi, who was the interim CFO after Mr Wolf Meyer had resigned from SAA, testified before the Commission that Ms Kwinana had also told her, while

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[246] Transcript, 7 November 2020, p 223-234

[247] Transcript 7 November 2020, p 231

she was still at SAA, that Ms Myeni would prepare false whistleblower reports.[248]

201.2. In addition, when the issue of false whistleblower reports was put to Ms Myeni in her evidence, she first used the opportunity to claim that the Commission is a refuge for tainted employees and that it just listens to false gossip. She stated that Ms Kwinana and Ms Nhantsi are friends and business partners.[249] However, ultimately, she invoked the privilege against self incrimination when asked directly whether she had falsified the reports.[250]

202. In the light of this evidence and Ms Myeni's failure to contradict it despite giving some evidence on the topic, it is probable that Ms Myeni did prepare the false whistleblower reports while she was Chairperson of the Board of SAA. This type of conduct is also consistent with other evidence that the Commission has received about how Ms Myeni treated managers and employees whom she wanted to remove from SAA. This is dealt with in more detail below.

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248 Exhibit DD2 page 22

249 Transcript 6 November 2020, p 192-193

250 Transcript 6 November 2020, p 193

General problems with procurement

203. Dr Dahwa was the Chief Procurement Officer at SAA from August 2014 until his suspension on 3 December 2015. Dr Dahwa testified that there were significant problems with the procurement process when he arrived at SAA. SAA did not keep proper records of tender documents and contracts. They were kept loose in various drawers. One of the main audit findings around that time was that documents would simply go missing and were not available for inspection.[251] Records of tender documents and records of when tender submissions were received were "in a shambles".[252] Therefore, one of Dr Dahwa's primary goals was to implement changes to these record-keeping systems.[253]

204. Dr Dahwa also stated that, when tenders were awarded, SAA would simply send out a tender award by letter without any terms and conditions or securing a signed contract.[254] SAA would try and negotiate contract terms only after awarding contracts, at which point, suppliers had no incentive to agree to terms and negotiations would go on for up to two years without contracts being secured. This was another issue that Dr Dahwa identified as needing "urgent attention".[255]

205. On 13 March 2015 Dr Dahwa presented various changes in corporate procurement governance that he believed needed to be implemented at SAA.[256] This presentation

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251 Transcript 28 June 2019, p 119

252 Transcript 28 June 2019, p 120

253 Transcript 28 June 2019, p 120

254 Transcript 28 June 2019, p 120

255 Transcript 28 June 2019, p 121

256 Exhibit DD16, p 181

noted that, ideally, there should be two primary committees responsible for procurement.

206. The first was the cross-functional or sourcing team that, at that stage, was mandated with the whole procurement process from origin of tender specification right up to the award.[257] Dr Dahwa testified that the way things had been operating at that stage did not separate out various duties nor preserve an independent body for procurement. The system therefore lacked appropriate checks and balances.[258] He also noted that the committee did not have sufficient competencies and capacities to execute their duties properly.[259]

207. The second was the bid adjudication committee (BAC). This committee would review what the first committee had done.[260]

208. In order to separate out responsibilities in the cross functional team, Dr Dahwa proposed creating a three-stage bid process. First, there would be a bid specification committee who would put together the bid and then draft terms and conditions of the tender; the second independent committee would be the bid evaluation committee who would write recommendations to the bid adjudication committee in line with the procurement processes in the supply chain management policy; and the third stage would be the BAC, who would award the tender.[261]

209. Dr Dahwa testified that, although he found SAA's procurement processes in disarray, he took steps to improve them. However, as set out below, he said that these

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257 Transcript 28 June 2019, p 123

258 Transcript 28 June 2019, p 121

259 Transcript 28 June 2019, p 123

260 Transcript 28 June 2019, p 123

261 Transcript 28 June 2019, p 124

processes he introduced were undermined entirely by the interference of the Board's non-executive members.

30% BEE set aside

The origins

211. In 2015, SAA adopted what was referred to as "a 30% set aside policy" in terms of which SAA would set aside 30% of its procurement spend for BEE enterprises. The Board claimed that the policy was based on statements made by former President Zuma during his State of the Nation Address of 2015.[262] However, the former President's actual statement was that: "Government will set aside 30 percent of appropriate categories of state procurement for purchasing from small to medium enterprises, cooperatives as well as township and rural enterprises."[263]

212. This is a very different proposition. It is far more conservative and reasonable. It certainly does not bind SoEs to set aside 30% of all their procurement spend for BEE enterprises.

213. In his evidence before the Commission, Dr Dahwa testified that the SAA Board was determined to pursue an "aggressive transformation" policy. He explained that he was happy with the goal of the policy but not the way that SAA attempted to implement it.[264]

214. Dr Dahwa explained that he experienced tremendous pressure from the Board to implement the 30% set aside policy. He told the Board that the policy could not be implemented without proper PFMA amendments or treasury guidelines. However, he said that he was, nevertheless, simply instructed by the Board to impose the policy without any proper procurement processes being followed. He said that the

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262 Transcript 28 June 2019, p 128-129

263 Exhibit DD16, p 8

264 Transcript 28 June 2019, p 147-148

Board would insist on this condition being imposed after the procurement process had already been undertaken and the condition was nowhere in the bid document. He said that this was irregular and unlawful.[265]

The Roadshows

215. Ms Mpshe testified before the Commission that, as part of the Board's decision to implement the 30% set aside policy, Ms Myeni would call meetings with potential service providers about the 30% set aside opportunity.[266] Ms Myeni and Ms Kwinana would decide whom to invite to these meetings. This culminated in supplier development roadshows.[267]

216. Dr Dahwa testified that these were information-sharing roadshows where SAA representatives would travel to different provinces sharing information with potential BEE suppliers to SAA about how to do business with SAA. They were called "supply engagement summits". They shared information about when key contracts were expiring so that the participants could prepare for the bidding process. It was simply information sharing and was non-committal.[268]

217. Dr Dahwa testified that, at the inaugural supply engagement summit, Ms Myeni announced publicly to the attendees that Dr Dahwa was the Acting CPO and, in order for him to secure a permanent position, he needed to take instructions from her about transformation initiatives and make sure that he implemented them in

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265 Transcript 28 June 2019, p 135-136

266 Transcript 1 July 2019, p 161

267 Transcript 1 July 2019, p 162

268 Transcript 28 June 2019, pp145-146

accordance with her request.[269] Dr Dahwa testified that at a further summit, Ms Myeni made further similar comments that Dr Dahwa regarded as problematic.[270]

218. Dr Dawha testified that, although these summits had begun as commitment-free information sessions, over time, the spirit changed and it became clear to him that Ms Myeni and Ms Kwinana wanted to begin making concrete undertakings about contracts to the attendees.[271] In fact, Ms Kwinana actually supplied Dr Dawha with a list of companies she wanted invited to the summit that was hosted in Durban. SAA ultimately invited over 60 companies to that summit.[272]

219. It was at one of these roadshows that Ms Nontsasa Memela, the Head of Procurement at SAAT, testified that she met Mr Vuyisile Ndzeku of JM Aviation (South Africa) (Pty) Ltd (*JM Aviation*). As set out in greater detail below, JM Aviation and Mr Ndzeku were involved in a number of questionable dealings with many decision-makers within SAA and SAAT.

220. After one of these roadshows in Durban, Ms Kwinana instructed Dr Dahwa to simply award 15% of the Swissport Services and the Engen contracts to all the companies that attended the roadshow. Dr Dawha explained to her that this was not possible because it was illegal and it was also not clear how it would be possible to award a contract to 60 different entities. Ms Kwinana told Dr Dahwa to establish a holding company that constituted all 60 companies and award it to that company. Dr Dahwa explained that as Chief Procurement Officer he could not do such a thing because it was a fundamental breach of his duties. She responded that she would then do it

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269 Transcript 28 June 2019, p 165-166

270 Transcript 28 June 2019, p 166

271 Transcript 28 June 2019, p 167

272 Transcript 28 June 2019, p 147

herself.[273] As appears later, Ms Kwinana did so and formed the company "Quintessential" in order to implement the set aside policy, that involved her own personal enrichment.

Bidvest

221. Ms Mpshe testified that, in addition to Ms Myeni and Ms Kwinana's attempts to implement the 30% set aside policy in new tenders, they were also attempting to impose the policy on existing service providers that already had a contract with SAA.[274]

222. Dr Dahwa testified that Ms Kwinana requested a list from him of all contracts that were due to expire, that she was going to use for "transformation purposes".[275] Dr Dahwa provided the list which included Swissport (to the value of R1.2billion) and Bidvest.[276]

223. Ms Mpshe testified that Mr Meyer approached her and said he was very embarrassed because he came back from a meeting with Ms Kwinana and a company in the aviation space called Bid Air,[277] at which Ms Kwinana had told them about the 30% set aside policy and instructed Bid Air to put aside 30% of its share of the tender for a BEE partner. Bid Air was already a level 1 BEE accredited firm so they were confused at this news and unclear how this was supposed to be practically

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[273] Transcript 28 June 2019, p 148

[274] Transcript 1 July 2019, p 173-174, line

[275] Transcript 28 June 2019, p 130,. The email request may be found at exhibit DD16, p 214. It pertained to Swissport and Bidvest's contracts in particular and asked for the details of security companies, insurance companies, toilet paper suppliers and so on

[276] Exhibit DD16, p 9

[277] Transcript 1 July 2019, p 172

implemented. They wrote a letter thereafter to SAA asking about these issues and requesting SAA to advise as to the firm with which they are supposed to partner. Ms Mpshe testified that Mr Meyer showed her the letter but took it with him when he left. The letter, dated 23 June 2015, worried Ms Mpshe because, legally, they were not supposed to be imposing this policy and this was documentary evidence that representatives of SAA had attempted to do so.[278]

224. The letter stated that Bid Air was already 63.42% Black owned and 24.85% Black women owned. It also asked whether this requirement would be a prerequisite for the upcoming tender. The letter pointed out that there were material difficulties in implementing this because they were a licensed entity and the new BEE partner would not be. They said that, in addition, the licence requirements provided that companies awarded contracts for the first time must use new equipment. They said that this meant that they would not be able to transfer equipment to this SAA-nominated partner, which would result in additional capital expenditure of R20million.[279]

225. Ms Mpshe explained that someone must have notified other parties about this because then Dr Anton Alberts, a member of Parliament, sent a letter to the B-BEEE Commission about the matter.[280] The Acting B-BBEE Commissioner of the Department of Trade and Industry (*DTI*), Ms Zodwa Ntuli, advised Ms Mpshe, at a subsequent meeting, that SAA had to immediately stop what it was doing with regard

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[278] Transcript 1 July 2019, p 171-172. The letter from Bid Air may be found in exhibit DD15(b), p 349, dated 23 June 2015

[279] Exhibit DD15(b), p 349

[280] Transcript 1 July 2019, p 178

to the 30% set aside policy because it was illegal.[281] Ms Mpshe communicated this discussion to the Board.[282]

226. On 13 September 2015 Ms Ntuli sent a letter to Ms Myeni.[283] In the letter, Ms Ntuli stated that the DTI had had a meeting with Ms Mpshe on 8 September 2015 at which Ms Mpshe had informed the DTI that SAA was demanding that Bidvest give 30% of its contract away to an SAA-nominated company. The letter stated in no uncertain terms that the initiative was not in line with the B-BBEE Act and Codes of Good Practice. The letter asked SAA to send written confirmation by 18 September 2015 that it would not proceed to implement the 30% set aside initiative until it had applied for and received authorisation to do so as an official deviation from the terms of the B-BBEE Act.

227. Ms Mpshe testified that Ms Myeni's response to Ms Ntuli's letter was to tell Ms Mpshe, at the next meeting after receiving the letter, that "I do not want to hear anything from that woman" because she (i.e. Ms Myeni) dealt with the Deputy Minister instead.[284] She asked Ms Kwinana to respond to the letter. Ms Kwinana prepared a response for Ms Mpshe to send but Ms Mpshe refused because she felt that the tone of the response was inappropriate. The letter effectively said that it was not for Ms Ntuli to tell SAA what to do and that transformation was a national agenda and there was nothing illegal about it.[285] Ms Mpshe changed the letter to say that, as an SOE, SAA would obey the laws of the land.[286]

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281 Transcript 1 July 2019, p 185

282 Transcript 1 July 2019, p 186

283 Exhibit DD16, p 234.1-243.3

284 Transcript 1 July 2019, p 187

285 Transcript 1 July 2019, pp 193-194

286 Transcript 1 July 2019, p 196

228. On 28 September 2015 Mr Kenneth Brown, the Chief Procurement Officer of National Treasury sent a letter to Ms Mpshe about the fact that the SAA Board resolved to set aside 30% of key procurement transactions for Black-owned businesses. He also told SAA that, while decisions taken by the Board to encourage transformation in procurement were commendable, the Board should *not* operate outside the procurement legal framework. He further recorded that the resolution to set aside 30% of contracts was not supported by any procurement legal framework and "must be stopped with immediate effect". The letter requested Ms Mpshe to "advise the Board not to take procurement decisions that would bring the name of SAA and National Treasury into disrepute." [287]

229. The DTI and Treasury were correct. The current Broad-Based Black Economic Empowerment Act 53 of 2003 and the Preferential Procurement Policy Framework Act 5 of 2000 provide for specific measures for BEE in procurement (a 90/10 split in bid evaluation, for example). If a particular industry or body seeks to deviate from that, it must get special dispensation from the Minister. They cannot simply design their own BBBEE policy. This has now been confirmed by the courts.[288]

230. Ms Mpshe responded to the letter from Treasury.[289] She stated that while there was a proposed 30% set aside policy to expedite BEE growth, SAA was an SOE and would seek to ensure compliance with applicable laws and regulations.

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[287] Exhibit DD16, p 234

[288] *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] 2 All SA 1 (SCA) and *Swissport South Africa (Pty) Ltd v Airports Company South Africa SOC Limited and Others* [2020] ZAGPJHC 70 at para 21

[289] Exhibit DD15(b), p 370

231. Ms Kwinana also responded to Treasury on behalf of the Board.[290] The letter asked for full details about precisely how the Board operated outside of procurement frameworks and how exactly the Board's procurement decisions brought SAA and National Treasury into disrepute.[291] This letter was curious given the clear terms of Mr Brown's letter to which this was a response.

The Swissport and Engen letters of award

232. Swissport was the ground handling service provider for SAA. The evolution of the award and contract with Swissport is discussed in much greater detail below. For present purposes, it is sufficient to record that Swissport had been a long-standing provider of ground handling service to SAA and had been formally awarded the tender to provide such services, and was indeed performing the services. However, due to delays in SAA, the formal contract was never signed.

233. Engen was also a long-standing service provider to SAA. It had been awarded a jet-fuel tender by SAA and the conclusion of the contract was still outstanding in 2015.

234. As set out below, Ms Kwinana saw the outstanding contracts as an opportunity to get Swissport and Engen to agree to the 30% set aside policy.

235. Dr Dahwa testified that on 2 October 2015 at 10am he received an SMS from Ms Kwinana requiring him to go to the SAA Airways Park boardroom on the 6th floor.

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290 Exhibit DD15(b), p 390

291 Exhibit DD15(b), p 394

He complied. He said that Ms Kwinana asked him how far he had gone in the implementation of the 30% set aside policy.[292] In particular, she asked him whether the 30% set aside policy had been included in the Swissport and Engen contracts. Dr Dahwa explained to her that this would be unlawful and that he could not go ahead with that decision.[293]

236. Dr Dahwa testified that Ms Myeni entered the boardroom while he was in discussion with Ms Kwinana and asked Ms Kwinana how far Dr Dahwa had gone in implementing the 30% set aside strategy. Ms Kwinana told Ms Myeni that Dr Dahwa was making excuses as to why he could not implement the strategy. Ms Myeni then told Dr Dahwa that she was advertising his job. She refused to let him talk unless he did what she asked. Ms Myeni then instructed him to go back to his office and prepare the award letters. Ms Kwinana provided him with some rough drafts of what the letters of award should say.[294] The award letters contemplated awarding a percentage[295] of the Swissport contract to an entity called "Jamicron (Pty) Ltd" and a percentage of the Engen jet fuel contract to "Quintessential" – the holding company formed by Ms Kwinana to represent the 60 companies which had attended the Durban summit.[296]

237. Dr Dahwa went back to his office and tried to draft the award letters in accordance with the instructions. He found himself unable to comply with this instruction which he regarded as unlawful. He returned to the boardroom and told Ms Myeni and Ms Kwinana that his conscience would not let him sign the letters. Ms Myeni was about

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292 Transcript 28 June 2019, p 167

293 Transcript 28 June 2019, p 170

294 Transcript 28 June 2019, p 171

295 Ms Kwinana was debating what percentage would be tolerable with Dr Dahwa, suggesting 15 or 10% if he refused to grant anything higher - Transcript 28 June 2019, p 196

296 Transcript 28 June 2019, p 196

to sign the letter but appeared to change her mind.[297] She instructed Dr Dahwa to go back to his office and change the name of the signatory to Ms Mpshe.[298]

238. Dr Dahwa went to speak to Ms Mpshe and told her what was happening, namely, that Ms Myeni and Ms Kwinana were trying to compel him to issue or sign the letters of award which would be unlawful. She told him that, if he knew that this was wrong, he should not do what they were instructing him to do because it was unlawful and it would come back to haunt him one day. Dr Dahwa testified that he then left and went back to his office to pretend he was doing something but in truth he was "being held at ransom" as Ms Myeni and Ms Kwinana were waiting for him in the boardroom. Dr Dahwa then appended Ms Mpshe's name to the bottom of the letter and took it to her to sign. She refused to do so.[299]

239. Dr Dahwa went to tell Ms Myeni that Ms Mpshe had refused to sign the letter. Ms Myeni then insisted that they all go to Ms Mpshe's office. Ms Mpshe told Ms Kwinana and Ms Myeni that she was not going to sign the letters. She also told Dr Dahwa, again in front of Ms Myeni and Ms Kwinana, not to sign the letter if his conscience would not allow him to do that and it was unlawful.[300]

240. Ms Myeni told Ms Mpshe and Dr Dahwa that she was surprised that, as Black executives, they were not in support of the idea. Eventually, Ms Mpshe excused herself and the rest were left in her office. Before she left, she told Dr Dahwa that he would be alone in Court should he sign and this matter come back and that, if he knew that it would be wrong to sign, then he should not do it. She said to Dr Dahwa

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297 Transcript 28 June 2019, p 177

298 Transcript 28 June 2019, pp 176-177

299 Transcript 28 June 2019, p 178

300 Transcript 28 June 2019, p 178

that, if he signed, with all of his qualifications, experience and credentials, he would have to answer for it one day.[301]

241. Dr Dahwa testified that he asked Ms Kwinana 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 effective service provider for SAA.[302] Ms Kwinana did not respond well to this and conveyed to Dr Dahwa that he was just anti-transformation and began to threaten him that if he continued to disobey them, he and Ms Mpshe were going to "suffer" and would face disciplinary consequences.[303]

242. Dr Dahwa testified that Ms Kwinana and Ms Myeni continued to insist that he sign the letters but he refused. They then asked him to undertake that he would sign it by the next week. He explained that he felt the two of them were playing psychological games with him – one minute praising him and then chastising him.[304]

243. The whole ordeal with Ms Kwinana and Ms Myeni lasted from 10h00 to around 18h00 on a Friday.[305] Dr Dahwa testified that, after everyone had left and it was just the three of them in Ms Mpshe's office, Ms Myeni said to him that the EFF would be coming to SAA on the Monday because they were concerned about transformation issues at SAA and they wanted to get rid of people like him.[306] He said that she went so far as to tell him that the EFF wanted to get rid of all Zimbabweans from SAA.[307]

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301 Transcript 28 June 2019, p 179-180

302 Transcript 28 June 2019, p 182

303 Transcript 28 June 2019, p 182-184

304 Transcript 28 June 2019, p 180

305 Transcript 28 June 2019, p 172

306 Transcript 28 June 2019, pp183-184

307 Exhibit DD16, p 12, para 34

He said Ms Kwinana and Ms Myeni often made comments about him being a Zimbabwean.[308]

244. Dr Dahwa testified that, after Ms Kwinana had told him that he and Ms Mpshe were "going to suffer" and would undergo disciplinary proceedings if they did not obey her, he then became emotional and asked them whether he could leave because it was around 6 or 7pm.[309] Dr Dahwa said he eventually, under duress, undertook to sign the letters by the next week but he had no intention of doing so and only said that he would in order to be allowed to leave the meeting.[310] He confirmed that he never wrote or signed the letters.[311]

245. In her testimony before the Commission Ms Mpshe confirmed Dr Dahwa's version of events as to what took place on 2 October 2015. She stated that he was visibly shaken and emotional. He presented two letters of award to her and said he could not sign them. Ms Mpshe confirmed the content of the letters to Swissport and Engen about setting aside 30% of their expenditure for companies nominated by Ms Kwinana. She advised Dr Dahwa that he had her support and she would not sign the letters. Ms Mpshe testified that Dr Dahwa was almost in tears and told her that he had never been so humiliated in his life. He had been told by Ms Myeni and Ms Kwinana that he was a Zimbabwean citizen and was holding a position he would never hold in his own country and was standing in the way of transformation.[312]

246. Ms Mpshe testified that, when she and Dr Dahwa were together with Ms Myeni and Ms Kwinana and they tried to put their perspectives across, they were simply told

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308 Exhibit DD16, p 12, para 35

309 Transcript 28 June 2019, p 184

310 Transcript 28 June 2019, p 190-191

311 Transcript 28 June 2019, p 248

312 Transcript 1 July 2019, p 202-208

that there was a board resolution supporting these awards and they had to implement them. Ms Mpshe explained that this was often what these two non-executive directors said, but that, when one asked for the resolutions, it transpired that they did not already exist. Instead, the resolutions would be taken after the fact to justify what Ms Myeni and Ms Kwinana had said.[313]

247. The following Monday morning, Dr Dahwa wrote an email to his line manager, Mr Meyer explaining what Ms Myeni had said to him about the EFF and its march on that day. He told Mr Meyer that, as a result of what he had been told about the EFF and its picket at SAA on that day, he felt scared to come to work.[314]

248. Shortly after this had taken place, on 9 October 2015, Ms Kwinana wrote a letter of complaint about Dr Dahwa to Ms Myeni.[315] The letter made various complaints including that Dr Dahwa had refused to sign the award letters because his conscience would not allow him and that he insinuated that the Board required him to do unprofessional, unethical, illegal and criminal activities. Ms Kwinana complained that she was being forced to "micromanage executives in respect of the non-implementation of our Board Resolutions in general."[316] She concluded the letter as follows:

> "From the foregoing it is clear that there is no commitment on the part of Dr Dahwa to the resolutions of the Durban Road Show. No positive outcome has eventuated since we went on the roadshow judging by numerous inquiries from would-be service providers that have gone unanswered. The situation as it presents itself amply demonstrates that Dr Dahwa is hell bent on sabotaging and derailing the transformation agenda of the present government in general and that of SAA in

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313 Transcript 1 July 2019, p 216

314 Transcript 1 July 2019, p 217-218

315 Exhibit DD16, p 240

316 Exhibit DD16, p 241

> particular. While the SAA Board is doing all in its power to translate the Government's intent of economic empowerment into concrete reality to extricate the African majority from the quagmire of poverty. Dr Dahwa is equally doing his best to keep the same people in economic bondage. He is part of a sinister, retrogressive agenda which is aimed at reversing the transformational agenda of the present government. His behaviour smacks of insubordination and conspiracy against the SAA Board. This purulent attitude may be located in the fact that he does not share the agony of the people of South Africa who have emerged from centuries of economic deprivation and whose freedom was born of struggle. It is actually ironic that he is essentially biting the hand that feeds him. This leaves me with no other option except to recommend that the strongest possible action be taken against him." [317]

249. Dr Dahwa testified in detail as to why the other allegations in the letter were unfounded and false.[318]

250. Dr Dahwa also testified that he was from the same African background and was also a product of the struggle. He also testified that he was a South African permanent resident and took his responsibility to the government and the people of South Africa very seriously. He explained that he had implemented many pro-transformation measures but just refused to break the law. Dr Dahwa testified that Ms Kwinana had written the letter out of bitterness because he had refused to do what she and Ms Myeni wanted him to do.[319]

251. Thereafter, the following correspondence was exchanged:

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317 Exhibit DD16, p 241-242

318 Transcript 28 June 2019, p 200-202

319 Exhibit DD16, p 208

251.1. On 29 October 2015, Ms Kwinana sent an email to Dr Dahwa asking him to confirm that "BEE will be able to participate" in the Swissport Ground Handling tender, "with effect from Monday, 2 November 2015".[320]

251.2. On 30 October 2015 Dr Dahwa responded to Ms Kwinana's letter and said that he was in the process of preparing a detailed report about the high risk of this award being challenged because the terms and conditions SAA was seeking to impose on Swissport were not included in the procurement process.[321]

251.3. On 2 November 2015 Ms Kwinana wrote back to Dr Dahwa in the following terms: "I did not ask for the risks, I asked for the implementation of board resolutions. Please let me know if you will not implement the resolutions of the Board."[322]

251.4. On 3 November 2015 Mr Meyer wrote to Ms Kwinana, copying (among others) Ms Myeni, Ms Mpshe, Ms Ruth Kibuuka (the company secretary) and Dr Dahwa.[323] As CPO, Dr Dahwa reported to Mr Meyer as the CFO. Mr Meyer told Ms Kwinana that the CPO had a fiduciary duty to ensure that SAA procurement policies were compliant with its own SME policies as well as the Public Procurement laws and regulations. He also pointed out that a 15% set aside to the company "Quintessential Business Consulting Limited, registration number 2014/012470/07 represented by Mr Peter Tshisevhe" was not actually

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320 Exhibit DD16, p 230

321 Exhibit DD16, p 229

322 Exhibit DD16, p 228-229

323 Exhibit DD16, p 225-227

included in the Board resolution.[324] This company was the holding company Ms Kwinana had established to represent the 60 companies that had attended the Durban summit.[325] The letter also stated that the selection of Jamicron (Pty) Ltd to work with Swissport as the BEE partner for the 30% set aside is not in line with the Board resolution and did not follow a due and proper procurement process.[326] Mr Meyer suggested that the Board take note of the detailed memo on the risks associated with this decision that Dr Dahwa's team was preparing.[327] He stated that the Board had a fiduciary responsibility to uphold and promote good corporate governance; it could not become operationally involved and give instructions that exposed the airline to non-compliance with its own policies and the law. He pointed out that SAA had received direct guidance from the Minister and the DoT (this should have read "DTI") that the 30% set aside policy should not be implemented. He concluded thus: "We all agree that transformation in South Africa is important, but this goal does not justify that proper governance and SCM policies should not be followed".[328]

251.5. On 6 November 2015 Ms Kwinana responded to Mr Meyer's letter and addressed her responses to Ms Myeni, who had been copied into Mr Meyer's letter, as follows:[329]

> "The allocation of 15% to BEE was a Board decision which has not been implemented, the Board allocated the 15% to all BEE companies in the SAA data base who've been knocking on SAA doors. The number of these companies is +/-

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324 Exhibit DD16, p 226, paras 1-3

325 Transcript 28 June 2019, p 153

326 Exhibit DD16, p 226, para 4

327 Exhibit DD16, p 227

328 Exhibit DD16, p 227-228

329 Exhibit DD16, p 224-227. Ms Kwinana was responding to an email of Wolf Meyer's dated 3 November 2015. Her email is in the form of red comments on Mr Meyer's email. Mr Meyer's original text is in black.

> 60 in the Sharks Board Supplier engagement forum, the forum that you were supposed to be at, it was agreed that SAA or Engen for that matter cannot sign an agreement with 30 companies and that they will be included as one company for ease of contracting. In subsequent meeting with [Dr Dahwa] it was agreed the one company represents all +/- companies or all 60 companies sign, it is not an issue. What must happen is that the 15% must be implemented. In fact Chairperson non-implementation of Board resolutions amounts to insubordination."

251.6. The letter continued that management is responsible for implementing the Board's decision. In addition, Ms Kwinana stated "I appreciate the guidance that you received from the Shareholder and DOT [this should have read "DTI"] in respect of the 30% set aside. I would, however, have loved that your Board's guidance on the implementation of 30% would also have been included and counted here."

251.7. On 9 November 2015 Mr Meyer responded to this email.[330] He explained that the implementation of Board resolutions should be guided by the company's supply chain management policies and that other potential BEE companies could be prejudiced by this decision. He pointed out that Ms Kwinana's position was contrary to section 217 of the Constitution and section 51(1)(a) of the PFMA; the summits were just information sharing sessions and not formal due procurement processes to award a contract; SAA did not have the power to form and appoint a holding company to represent 60 companies that expressed an interest in supplying jet fuel; and the resolution of the Board made no mention of Quintessential or Jamicron.

252. As will be set out in more detail under the Swissport section below, Mr Lester Peter, who replaced Dr Dahwa as Chief Procurement Officer after he was put through a grossly unfair disciplinary process, did take steps to comply with Ms Kwinana's

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330 Exhibit DD16, p 223-24

demands and sent out a draft contract to Swissport imposing the 30% set aside policy.

253. In her evidence before the Commission, Ms Kwinana testified that SAA tried to implement the 30% set aside policy but had received communication from the DTI and National Treasury saying that they could not do so.[331] Ms Kwinana even conceded that the set aside policy was not in line with the SCM Policy in place at SAA.[332]

254. Ms Kwinana then went on to claim that after receiving the correspondence from the DTI and National Treasury (28 September 2015), she no longer attempted to implement the 30% set aside policy.[333] She claimed that the evidence by Dr Dahwa and Ms Mpshe about the events on 2 October 2015, were false.[334] She claimed that she did not attend any such meeting; that she did not threaten Dr Dahwa thereafter; and that Dr Dahwa had not communicated to her that his conscience would not allow him to sign the letters she was demanding. When her version was tested, she maintained that could not have been any meeting because there were no minutes taken. However, that is palpably absurd because, as pointed out, if there was an unlawful and unethical meeting taking place, it is unlikely that anyone would keep a record of it in minutes.[335]

255. It was put to Ms Kwinana that the letter she wrote later to Ms Myeni on 12 October 2015,[336] where she viciously condemned Dr Dahwa, actually confirmed Dr Dahwa's

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331 Transcript 2 November 2020, p 107

332 Transcript 3 November 2020, p 16

333 Transcript 3 November 2020, p 18

334 Transcript 3 November 2020, p 64-65 and p 70

335 Transcript 3 November 2020, p 30

336 Exhibit DD16, p 239-240

version of events because she complained that he had failed to sign award letters - award letters that Ms Kwinana testified she knew nothing about.[337] The letter also repeated what Dr Dahwa said; namely that he had refused to write letters of award because "his conscience would not allow him". Ms Kwinana had initially denied in her evidence that she had ever been told this by Dr Dahwa.[338] When the letter was shown to her, Ms Kwinana just said she forgot that she had written the letter.[339]

256. Ms Kwinana was also shown the contemporaneous letter that Dr Dahwa had written to Mr Meyer where he said that he was not coming to work as he feared for his life after the threats from Ms Myeni and Ms Kwinana about the EFF. All this notwithstanding, she still denied that any of it took place.[340]

257. During her evidence before the Commission, Ms Myeni was also asked about these events. She refused to answer and invoked the privilege against self incrimination.[341]

258. Ms Kwinana's evidence on the interaction with Dr Dahwa was dishonest. She was given numerous opportunities to come clean and accept what the contemporaneous documents revealed about the events of the 2nd of October 2015. However, rather than accepting responsibility for her role in the ordeal, she doggedly persisted in lying under oath. Her evidence is rejected as patently false and I find that Ms Mpshe and Dr Dahwa's account of what transpired on 2 October 2015 is true. On that day, two senior executives at SAA were tormented by Ms Myeni and Ms Kwinana for refusing to take action that both National Treasury and the DTI had told SAA was unlawful.

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337 Transcript 3 November 2020, p 39

338 Transcript 3 November 2020, p 39-40

339 Transcript 3 November 2020, p 40

340 Transcript 3 November 2020, p 47-48

341 Transcript 6 November 2020, p 223-238

259. As set out in greater detail below, Dr Dahwa was ultimately removed from his position as Chief Procurement Officer in December 2015. Once Dr Dahwa was removed from his position and Ms Mpshe was moved out of her role as Acting-CEO, the 30% set aside policy forged ahead and Swissport was eventually awarded the ground handling contract for five years from 1 April 2016, in circumstances that were irregular and unlawful. In addition, there was a strange BEE provision included in this contract that ended up benefitting JM Aviation to the tune of R6 million. Shortly after that R 6million came into JM Aviation's bank account, it was used to benefit Ms Kwinana personally in the amount of R4.3 million. This is dealt with in more detail below.

Set aside for veterans

260. Ms Mpshe testified that Ms Myeni approached her and instructed her to do a presentation for MK veterans[342] Ms Mpshe consulted Dr Dahwa and the head of transformation, Mr Thapelo Lehasa, and created an outline of what would be presented, including the framework for procurement at SAA; all of the upstream and downstream opportunities for services there were at SAA; the requirements to be a service provider at SAA; and how SAA could assist them in getting on the service provider list so that they would be informed of tender opportunities.[343]

[342] Transcript 1 July 2019, p 165

[343] Transcript 1 July 2019, p 166-167

261. The meeting was attended by the Deputy Minister of Military Veterans and Defence, Mr Kebby Maphatsoe, together with Mr Des van Rooyen and some other representatives of the MK Veterans organisation.[344]

262. After the presentation, Ms Myeni stood up and said that "these people" had "died for us to get our freedom and all you want to do is tell them about policies and procedures. They are not interested in policies and procedures". They want to know what the budget is of the jet fuel per annum. Ms Mpshe responded that she did not believe it was appropriate to discuss budgets with potential service providers. Ms Myeni proceeded to talk about how these veterans had "died" and suffered and that perhaps they should set aside 30% of all vacancies at SAA for the children of MK veterans. Ms Mpshe said she made no further comments about Ms Myeni's pronouncements, but at the end of the meeting, Ms Mpshe stated that she would make arrangements for Mr Lehasa and Dr Dahwa to meet with Mr van Rooyen to assist them in helping them register on the database of suppliers.[345]

263. On 2 December 2015 Dr Dahwa was told by the head of transformation, Mr Lehasa, that he wanted to see him urgently together with Mr Des van Rooyen, who Mr Lehasa told him was the Treasurer-General for the Military Veterans Associations.[346] Dr Dahwa initially refused to attend as he had been given no notice of this meeting but was informed that there had been emails about it and eventually he attended.[347]

264. At the meeting Mr van Rooyen advised that he was not happy because Dr Dahwa was not responding to his emails, to which Dr Dahwa responded that he had not

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344 Transcript 1 July 2019, p 168

345 Transcript 1 July 2019, p 169

346 In fact, Mr van Rooyen was the Treasurer General of the MKVA as his card indicates – Exhibit DD16, p 264

347 Transcript 28 June 2019, p 212

received the emails. Mr van Rooyen then explained that the MKVA wanted to do business with SAA and particularly with respect to two contracts, security provision and the Amadeus contract extension,[348] that required a BEE partner. Dr Dahwa testified that he was not aware of any open tenders for security (one had recently been awarded) and the Amadeus contract extension potential for a BEE partner was in early discussion phases and had certainly not yet gone out to tender. Mr van Rooyen insisted that these two tenders be awarded to two particular companies, related to MKVA.[349]

265. Dr Dahwa testified that he was surprised that Mr van Rooyen had this information, as well as some detailed content about the amount of money SAA intended to dedicate to this development endeavour.[350] Dr Dahwa said that he tried to find out who had told them this or who had indicated that they might be BEE partners, but Mr Van Rooyen refused to give up their source.[351] This concerned Dr Dahwa. He was also concerned that MKVA was not making a request, but was giving an instruction that these contracts be awarded to these companies.[352] Dr Dahwa testified that the meeting ended with him refusing to help the MKVA representatives.[353]

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

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348 The Amadeus contract was the online booking system used by SAA - Transcript 28 June 2019, p 219

349 Transcript 28 June 2019, p 213

350 Transcript 28 June 2019, p 226

351 Transcript 28 June 2019, p 225

352 Transcript 28 June 2019, p 227-228

353 Transcript 28 June 2019, p 229

Dr Dahwa's removal

267. The day after the meeting with Mr van Rooyen, on 3 December 2015, Dr Dahwa was instructed to report to the boardroom at SAA.[354] On his way to the boardroom, he saw Mr Musa Zwane speaking to Ms Myeni – Mr Zwane had by now replaced Ms Mpshe as Acting-CEO of SAA.

268. On his way to the boardroom Dr Dahwa was intercepted by Ms Phumeza Nhantsi who introduced herself as the new Acting CFO and she moved him into another venue. She stated that she had been instructed to place Dr Dahwa on special leave because there were matters concerning him that were being investigated. Dr Dahwa was provided with a letter setting out the basis for his suspension that had been prepared by an external lawyer from BMK Attorneys, Mr Mbuleli Kolisi.[355] The letter was to the effect that Dr Dahwa was suspended with immediate effect. After reading the letter, Dr Dahwa went to his office, packed up his things and left the workplace.[356]

269. On 9 December 2015 Dr Dahwa went to consult a lawyer about his suspension. This is the day on which Minister Nhlanhla Nene was fired by President Zuma. He saw on television, the announcement that Mr Des van Rooyen had been appointed as Finance Minister. This made Dr Dahwa suddenly realise that the person to whom he had said "No" in the previous meeting was far more powerful than he thought and he started to become worried for his safety. He made plans to immediately leave for Zimbabwe with his family.[357]

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354 Transcript 28 June 2019, p 255

355 Transcript 28 June 2019, p 256

356 Transcript 28 June 2019, p 257

357 Transcript 28 June 2019, p 263

270. After this, Dr Dahwa received disciplinary charges and then a disciplinary process followed.[358] The process was an expensive external hearing, chaired by a Mr Khotso Ramolefe.[359] Mr Kolisi from BMK Attorneys acted for SAA.[360]

271. The disciplinary proceedings began on 16 March 2016. Dr Dahwa attended the first day but then handed in a sick note for the second day. BMK Attorneys, acting for SAA, insisted that the proceedings should continue even in the absence of Dr Dahwa.

272. After Dr Dahwa had testified in the Commission, I requested that an affidavit be obtained from SAA setting out what had happened during the course of Dr Dahwa's disciplinary process. In accordance with that request, the head of Employee Relations at SAA, Mr Lourens Erasmus, provided an affidavit to the Commission detailing the circumstances of Dr Dahwa's disciplinary process. In his affidavit, Mr Erasmus explained that, after Dr Dahwa had provided a sick note to the chair of the disciplinary hearing, he was very concerned that the proceedings would be continuing without Dr Dahwa present. Mr Erasmus immediately raised concerns because he said that, unless the authenticity of the medical certificate was challenged, it would be unfair to proceed with the inquiry in his absence.[361]

273. Mr Erasmus took up the issue with Ms Nhantsi who was coordinating the proceedings against Dr Dahwa but she said they would continue nonetheless.[362]

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358 Transcript 28 June 2019, p 265-266

359 There was some uncertainty at the time that Dr Dahwa testified about who had chaired his disciplinary proceeding but it was subsequently clarified that it had been Mr Ramolefe and not Cassim SC, as originally thought – see Affidavit of Erasmus, DD34 p 1729

360 Transcript 28 June 2019, p 267-268

361 Exhibit DD34 p 1728 para 42

362 Exhibit DD34 p 1729 para 43

274. Mr Erasmus remained concerned that any finding against Dr Dahwa after a hearing conducted in his absence would be liable to be challenged. This would be because he had not been given an opportunity to test the evidence against him and to put his side of the case. Mr Erasmus was concerned about the proceedings continuing and so he engaged Ms Khanyisile Khanyile, an Employee Relations Specialist, to assist and give her opinion on the appropriateness of the disciplinary proceedings proceeding in Dr Dahwa's absence. She was unequivocal in her views.[363] She said that the entire process would be procedurally and substantively unfair if it continued. She also said that if it continued, SAA could face many claims for unfair dismissal, unfair labour practices, and civil claims.

275. Despite this, the disciplinary hearing proceeded. The chairperson found against Dr Dahwa.

276. The ruling[364] explains that Dr Dahwa was "charged" with various counts of dishonesty and dereliction of duty. These were to the effect that he had implied at the roadshows that the jet fuel contract had more BEE opportunities than there were in reality and that it was *this* representation that caused the Board members present to then offer these opportunities to the attendants at the show; that he had lied about sending out the 30% set-aside letter to Engen, when he hadn't; and that he refused to carry out the "lawful" and "reasonable" instruction to implement the 30% set aside policy.

277. Dr Dahwa's testimony dealt in detail with why these allegations were baseless; his lawyers also addressed this aspect in detail.[365] The upshot of the charges was that he was insubordinate for failing to follow Ms Myeni and Ms Kwinana's irregular and

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363 Exhibit DD34 p 1732 para 49

364 Exhibit LE12, p 1796

365 Exhibit DD16, p 313-325

unlawful instructions. As set out above, the circumstances of his removal strongly lend themselves to the conclusion that these charges were trumped up in order to remove him from office. This is further supported by the treatment of Ms Mpshe (discussed later) when she was also forcibly removed. Dr Dahwa had ample reason not to carry out these instructions and it was Ms Myeni and Ms Kwinana who made promises at the roadshows when they were not in a position to do so.

278. In the light of Ms Khanyile's advice, Mr Erasmus implored Ms Nhantsi not to provide the ruling to Dr Dahwa because of all the irregularities in the process.[366] She did so nonetheless and he was dismissed.[367]

279. Mr Erasmus also provided the ruling to Ms Khanyile, who expressed serious concerns about its correctness.[368]

280. Dr Dahwa then tried conciliation, but SAA kept failing to arrive for the conciliation meetings and so he then moved to arbitration. However, at a point, it was just becoming too draining to keep fighting and so he settled with SAA on the basis that he would be paid six months remuneration just to walk away. [369]

281. Dr Dahwa explained that after this, he did not receive any formal job offers for three and a half years and ultimately his house in Pretoria, which he had purchased when he took the job at SAA, was repossessed by the bank.[370]

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366 Exhibit DD34 p 1744 para 54

367 Exhibit DD34 p 1744 para 54

368 Exhibit DD34 p 1744 para 55

369 Transcript 28 June 2019, p 273- 274

370 Transcript 28 June 2019, p 275

Ms Mpshe's removal as Acting Group CEO of SAA

282. On 13 October 2015 there was an Exco meeting with the Board. At the meeting, Ms Myeni stated that the meeting had been convened because the Board was concerned with Ms Mpshe's performance as Acting CEO. This was because she was alleged to have refused to follow and implement Board instructions and was second-guessing the Board.[371]

283. Ms Mpshe testified that at this meeting, Mr Zwane, who was the CEO of SAAT at the time, had said that he could not understand why a CEO would resist taking instructions from the Board. He emphasised that, as CEO of SAAT, he worked very well with Ms Kwinana as Chairperson of the Board of SAAT and always implemented her decisions.[372]

284. Mr Zwane's willingness to implement decisions of the SAAT Board is a matter that is addressed later herein.

285. Ms Mpshe testified that other executive members at the meeting said that they did not have any problem with her leadership and were indeed complimentary of her leadership style. They had also stated that the company was beginning to stabilise under her leadership. Ms Mpshe then insisted that she should have a right of reply. She stated that she would take instructions from the Board that were lawful and

[371] Transcript 1 July 2019, p 228

[372] Transcript 1 July 2019, p 229

would comply with approved policies and procedures within the governance framework of SAA.[373]

286. After this meeting, on 27 October 2015, the Chair summoned Ms Mpshe to a meeting alone with her in Durban at the Beverly Hills Hotel. The Chair began by showering Ms Mpshe with praise.[374] She asked Ms Mpshe why she had not applied for the permanent CEO position and now the deadline had passed. She told Ms Mpshe to just send Ms Myeni her CV anyway even though the deadline had passed. Ms Mpshe refused.[375]

287. After this, Ms Myeni stated that the unions were dissatisfied with how Ms Mpshe was handling the retrenchment process at SAA, which had almost reached the final stage by that point. Ms Mpshe testified that she was surprised to hear this because some of the unions had complimented her on how the process had been handled.[376]

288. On 13 November 2015 the company secretary contacted Ms Mpshe and told her that Ms Myeni had scheduled a meeting with trade unions in the afternoon. Ms Mpshe queried this because there was a structured forum where these discussions were meant to take place at which all relevant stakeholders would be present.[377] Nevertheless, Ms Mpshe attended the meeting. Ms Myeni and Ms Kwinana were present, along with one trade union.[378] When the meeting opened, Ms Mpshe voiced her concern at the inappropriateness of the meeting in the light of the structures that were in place for discussions with labour. Ms Myeni told her that this was Ms Myeni's

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373 Transcript 1 July 2019, p 230

374 Transcript 1 July 2019, p 234

375 Transcript 1 July 2019, p 235

376 Transcript 1 July 2019, p 237

377 Transcript 1 July 2019, p 240

378 Transcript 1 July 2019, p 241

meeting, so she "must shut up and listen and toe the line". Ms Mpshe then kept quiet.[379] The meeting was about highly operational issues concerning staff rosters.[380]

289. Ms Mpshe testified that she believed the true purpose of the meeting was to try and create some justification for terminating her employment as Acting CEO and to carry on the termination narrative of the meeting in Durban that the unions had complained about her. Ms Mpshe testified that there was really no reason for a meeting about purely operational matters that involved Ms Mpshe or any Board members.[381]

290. Later that day, namely, 13 November 2015 Ms Myeni called Ms Mpshe and told her there would be a Board meeting later that evening that she was obliged to attend.[382] At the meeting, only Ms Kwinana and Dr Tambi were in attendance. Ms Myeni was not there.[383] Ms Kwinana opened the meeting by saying that the Chair had instructed them to relieve Ms Mpshe of her position because they wanted to give other executives a chance at the position, which Ms Mpshe responded was "fair enough". Ms Mpshe asked when the decision was effective and Ms Kwinana told her it was effective immediately. Ms Mpshe explained that it was a legal requirement to have a CEO at all times. They responded that Mr Zwane would take over her position.[384] Ms Mpshe then simply left before Ms Myeni arrived. Mr Zwane acted as the CEO of SAA until there was a permanent appointment on 1 November 2017.[385]

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379 Transcript 1 July 2019, p 242

380 Transcript 1 July 2019, p 242

381 Transcript 1 July 2019, p 244

382 Transcript 1 July 2019, p 245-246

383 Transcript 1 July 2019, p 248

384 Transcript 1 July 2019, p 249

385 Transcript 1 July 2019, p 252

The appointment of Ms Nhantsi to the permanent position of CFO

291. Ms Mpshe testified that after she had been removed as Acting CEO, she went back to her position as General Manager: Human Resources. In this capacity, she was tasked with the appointment of the new SAA CFO.

292. Ms Phumeza Nhantsi had been seconded as interim CFO towards the end of November 2015. Ms Nhantsi testified that in 2015 she was employed at SNG – an accounting firm. She was a chartered accountant. She did joint audit work with Ms Kwinana's firm, Kwinana & Associates. Ms Nhantsi testified that towards the end of 2015, Ms Kwinana approached her and asked if she wanted to be seconded to SAA.[386] Ms Nhantsi said she was interested. On 27 November 2015, Ms Nhantsi became the interim CFO but was still paid by SNG because she was on secondment. There was no process followed prior to this appointment and Ms Mpshe testified that she regarded it as irregular.

293. While Ms Nhantsi was in the position of interim CFO, a process was undertaken to find a permanent CFO. Ms Mpshe explained that, although Ms Nhantsi had been part of the pool of potential candidates for the permanent CFO position, she had not made the short list.[387]

294. However, after the short list had been completed, Mr Zwane, the then acting-CEO, told the team responsible for the process that Ms Myeni had issued an instruction that Ms Nhantsi was to be placed on the shortlist. Ms Mpshe testified that this was done.[388]

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386 Transcript 18 June 2019, p 29

387 Transcript 1 July 2019, p 252-253

388 Transcript 1 July 2019, p 254

295. In the end, Ms Nhantsi was appointed to the position of permanent CFO in May 2017.[389] The role that was to be played by Ms Nhantsi later was to reveal why Ms Myeni wanted her to be CFO. It was to get to that position somebody who was to be beholden to her and who would make sure that she implemented her unlawful decisions. This is also what happened when Mr Gigaba selected Mr Brian Molefe as Group CEO of Transnet even though he had not obtained the highest points in the interview and he overlooked a candidate who had scored higher points than Mr Brian Molefe. Mr Gigaba did so either because he had been instructed to do so or because, even if he had not been instructed to do so, he knew that Mr Molefe was the candidate that the Guptas wanted to be appointed to that position. As I say elsewhere in the report, one friend of the Guptas appointed another friend of the Guptas to a strategically important position.

Suspension of Ms Mpshe as General Manager: HR

296. In the middle of December 2015 Ms Mpshe was back in her position as General Manager: HR and she went on a month's leave. When she returned to work on 19 January 2016, she was told to attend a presentation by the SSA regarding security vetting. Thereafter, she was handed an envelope from Ms Kibuuka that had a long list of allegations of misconduct against her. The document containing the allegations of misconduct was signed by Mr Zwane.[390] Ms Kibuuka advised Ms Mpshe that the letter came from Mr Lester Peter who also told Ms Kibuuka to advise Ms Mpshe that

389 Transcript 1 July 2019, p 256

390 Transcript 1 July 2019, p 258

she had to go on leave.[391] Mr Peter was the SAA contract manager responsible for procurement at the time.[392]

297. The allegations contained in the letter ranged from conduct in 2012. This included failure to discipline Mr Wolf Meyer when instructed to do so (this was when Ms Mpshe had asked for a legal opinion and investigation report before taking action, which was not provided); failure to cooperate with the State Security vetting operations (this was when Ms Mpshe refused to fire or move an innocent member of the treasury department who Ms Myeni had targeted and accused of failing her vetting because she had dual citizenship); allegedly adjusting Dr Dahwa's salary without following due process; and allegedly signing a contract with Airbus without the correct delegation of authority.[393]

298. Later that day, Ms Mpshe received a phone call from a journalist in connection with her suspension. He informed her that a reliable source at SAA had told him that she was going to be suspended. Ms Mpshe told him she did not know what he was talking about, asked him to please not call her again, and put the phone down.[394]

299. Ms Mpshe, having noted that the letter of charges and allegations against her was signed by Mr Zwane, asked to have a meeting with him to discuss the letter. Mr Zwane was only able to meet with Ms Mpshe in early February 2016. She asked Mr Zwane what the allegations were about because, as far as she was concerned, she had led an exemplary career in SAA and had never been found to have committed any misconduct.[395] Ms Mpshe testified that some of the allegations she was facing

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391 Transcript 1 July 2019, p 259

392 Transcript 1 July 2019, p 259

393 Transcript 1 July 2019, p 264-266

394 Transcript 1 July 2019, p 260

395 Transcript 1 July 2019, p 263

dated back to 2012. In her view, it simply did not make sense for these allegations to be levelled against her for the first time in 2016.[396] According to Ms Mpshe, Mr Zwane would not look her in the eye and responded that it was the Board and he was just carrying out the Board's instruction.[397]

300. Ms Mpshe's attorneys wrote a response to Mr Zwane's letter of charges.[398] The response dealt with each individual charge and allegation and explained why Ms Mpshe's actions in each case were justified. She also explained that she believed the suspension was for ulterior reasons and the charges had no real basis. She contended that the ulterior motive was that she was being punished for refusing to sign off the 30% BEE set aside letters that Ms Kwinana and Ms Myeni wished her to sign.[399]

301. Then she heard nothing further from SAA's attorneys, ENS, until mid-April 2016, when another set of attorneys, BMK Attorneys, took over the matter. Ms Mpshe's attorney advised her that the attorneys at ENS were surprised to learn someone else was taking over the matter and that it was even proceeding at all because, based on the response from Ms Mpshe, they had taken the view that there was no basis for a disciplinary process.[400]

302. On 5 May 2016, Mr Zwane summoned Ms Mpshe to a meeting with Ms Kwinana.[401] At the meeting, he handed her a letter which suspended her with immediate effect. Ms Mpshe told Mr Zwane that she would not acknowledge receipt of the letter as the matter was being dealt with by her attorney. Ms Kwinana stated: "Do you always

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396 Transcript 1 July 2019, p 264

397 Transcript 1 July 2019, p 264

398 Transcript 1 July 2019, p 268

399 Exhibit DD 15, pp 415-470

400 Transcript, 1 July 2019, p 269

401 Transcript 1 July 2019, p 270

have to be so difficult?". Ms Mpshe responded, "I'm not sure how much experience you've had with attorneys. Once you have handed your matter to your attorney, you are not going to be having dealings with other people on the same matter. It is on principle. It is not being difficult." Ms Mpshe therefore did not take the letter and left the room.[402]

303. SAA made no effort to respond to Ms Mpshe's attorney's letter setting out her response to the charges until around 6 August 2016.[403] On this date, completely new charges were levelled against Ms Mpshe, with only two of the allegations remaining the same.[404] The disciplinary process was stalled and did not progress, with SAA's attorney, BMK Attorneys, stating they did not have instructions.

304. Ms Mpshe was on suspension for 22 months.[405] The suspension was with pay. Finally, in around August or September 2017, Ms Mpshe was asked to prepare representations to the Board as to why her suspension should be lifted.[406] At this stage, a new Board was in place, but Ms Myeni remained the Chair.[407]

305. After Ms Mpshe had provided the representations on 15 September 2017,[408] she had to wait until February 2018 to hear anything further from the Board. The new CEO, Mr Jarana, proposed to Ms Mpshe a mutual separation. Ms Mpshe asked for the terms of this proposal but they were not forthcoming.[409] A few weeks later, there was a letter that misrecorded what had occurred at the meeting between Ms Mpshe

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402 Transcript 1 July 2019, p 271

403 Transcript 1 July 2019, p 272

404 Transcript 1 July 2019, p 276

405 Transcript 1 July 2019, p 290

406 Exhibit DD15(b), p 432

407 Transcript,1 July 2019, p 292

408 Exhibit DD15, p 43

409 Transcript 1 July 2019, p 295

and Mr Jarana. Ms Mpshe was advised by her attorneys that they could continue to fight the action and they would likely win, but that SAA had deep pockets and she had already incurred almost R500 000 in legal fees by that point.[410] Ms Mpshe ultimately agreed to a mutual separation on the basis of which she received a settlement of 12 months' salary.[411]

306. Ms Mpshe told the Commission that she and her family had endured "immeasurable hardship" because of SAA's conduct. Her reputation was permanently damaged and the whole saga had had extremely serious consequences for her career.[412] She said that her children had been humiliated by the accusations that their mother had been suspended for misconduct.[413] She said that it was embarrassing for her in the community and it was embarrassing for her husband that she was put through this ordeal.[414]

Conclusion on disciplinary proceedings

307. The facts set out above tell a sorry tale of gross manipulation of disciplinary processes to remove a competent and committed Chief Procurement Officer and the Head of Human Resources at SAA. Both Dr Dahwa and Ms Mpshe were subjected to abuse from Ms Myeni and Ms Kwinana when they tried to resist their attempts unlawfully to redirect 30% of SAA's procurement spend to pre-selected BEE entities.

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410 Transcript 1 July 2019, p 296

411 Transcript 1 July 2019, p 298

412 Transcript 1 July 2019, p 301

413 Transcript 1 July 2019, p 302

414 Transcript 1 July 2019, p 303-304

They were also both subjected to trumped up charges and had to endure drawn out and unfair disciplinary processes, which they eventually could no longer fund.

308. Taxpayers' money was wasted on these expensive disciplinary processes that utilised external lawyers, that ultimately required SAA to pay out Dr Dahwa and Ms Mpshe, and that necessitated the employment (and payment) of other people to fulfil these roles while Dr Dahwa and Ms Mpshe were on paid suspension for months and even years, on end. This again shows a complete disregard by Ms Myeni and Ms Kwinana for the money of the South African public that had been entrusted to the airline.

309. Elsewhere in this report there will be a discussion on what should be done about possible compensation to those individuals who have suffered or who suffer financially and otherwise as a result of their resistance to state capture and corruption. For example, they may have incurred legal costs to defend themselves against suspension and dismissal or they may have been dismissed and had no funds to fight unlawful or unfair dismissals which were used to get them out of the way so that malleable individuals would be appointed to their positions or where the suspensions or dismissals are used to penalise them for their refusal to co-operate with corrupt agendas.

310. Just how much the removal of Ms Mpshe and Dr Dahwa cost SAA will be dealt with below. Once Dr Dahwa and Ms Mpshe were out of the way, the project of state capture truly took hold in SAA and paved the way for a number of acts of gross corruption and fraud at the national carrier and its subsidiary, SAAT.

BNP Capital raising

312. Ms Cynthia Agnes Soraya Stimpel served for 10 years as the Head of Financial Risk Management at SAA and then became the Acting Group Treasurer.[415] She testified that the SAA Board of Directors under Ms Cheryl Carolus was focused towards a strategic direction and the team worked together to achieve SAA's vision. At the time, the staff morale was quite high and it appeared that SAA was slowly starting to improve.[416] In contrast, after Ms Carolus had left the airline, Ms Stimpel noted that there was increased interference by the Board in operational matters like specific SAA contracts. Ms Stimpel testified that this was a deviation from the appropriate governance and oversight role that the Board was supposed to play.[417]

313. Ms Stimpel testified that in February 2015, SAA was in a seriously precarious financial situation. It had a treasury guarantee of up to R15billion but had borrowed about R11billion. She said that it was always short term debt with the result that, when the loans came to maturity, they had to be rolled over which was not a simple process.[418] This also resulted in very high interest rates.[419] Around this time, Ms Stimpel was appointed as Acting Group Treasurer.[420] During this period, SAA was instructed to stop reporting to the DPE and instead report to National Treasury.[421]

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415 Transcript 13 June 2019, p 24

416 Transcript 13 June 2019, p 24

417 Transcript 13 June 2019, p 25

418 Transcript 13 June 2019, p 25

419 Transcript 13 June 2019, p 26

420 Transcript 13 June 2019, p 26. Ms Stimpel explained why she was qualified to take on this role in transcript 13 June 2019, p 28

421 Transcript 13 June 2019, p 18-19

314. National Treasury required SAA to draw up a borrowing plan for the next three to five years indicating how SAA intended to manage its funds.[422] Ms Stimpel's team, in collaboration with Mr Wolf Meyer, who was the CFO at this time, and National Treasury, prepared this plan and submitted it to Exco and the Audit and Risk Committee (*ARC*). The Board approved the plan in April 2015.[423]

315. The plan was based on the analysis that, if SAA converted all its short-term debts to long-term ones, over a ten-year tenure, and took full advantage of the R15billion guarantee, this could be secured at a fixed rate and would save SAA approximately R400million.[424]

Procurement in financing

316. Ms Stimpel testified that, in making funding decisions at SAA, they followed a slightly different process to ordinary procurement. They used the Financial Risk Management Policy. This required an RFP but only to the five major banks directly.[425] This was because the banks were reliable and there had been a proven historical funding relationship.[426] The process was conducted through the Financial Risk Committee and not through those responsible for the SCM Policy. It then went to Exco, then ARC, and then the Board as opposed to the SCM Policy that required the process to go through the Cross Functional Sourcing Team, the BAC and only then

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422 Transcript 13 June 2019, p 29

423 Transcript 13 June 2019, p 30

424 Transcript 13 June 2019, p 31

425 Transcript 13 June 2019, p 31

426 Transcript 13 June 2019, p 32

to the ARC and the Board.[427] However, Ms Stimpel explained that they did attempt to get the most competitive rates they could get from the banks and made a full analysis of each bank's offer before taking a decision.[428]

The first RFP

317. Ms Stimpel testified that, after the Board had approved the borrowing plan on 22 April 2015, SAA began to implement it and went out to the market with an RFP for R15billion for debt consolidation. However, despite having approved this plan, the Board then queried the issue of the RFP and its content, and asked for a paper to be prepared on debt consolidation.[429]

318. Thereafter, Ms Kwinana sent an email stating that the process had to be cancelled and that a tender process should be followed.[430] The email queried the limited pool of funders as this would not allow new entrants to the market.

319. Ms Stimpel explained that, when dealing with such an enormous sum, they did not deviate from the institutions that were in a position to fund such large amounts. She said that smaller institutions simply did not have the capacity to do so.[431] Ms Stimpel responded to the email and pointed out that the RFP had been sent out on the instruction of the Board's Chairperson.[432] She tried to dissuade the Board from cancelling the process because of the reputational risk to the company and the harm

427 Transcript 13 June 2019, p 32.

428 Transcript 13 June 2019, p 33.

429 Transcript 13 June 2019, p 34

430 Exhibit DD1, p 170

431 Transcript 13 June 2019, p 35

432 Exhibit DD1, p 178

it would cause if they later put out another RFP.[433] She also pointed out that the large banks had proven themselves to be reliable in treating SAA's sensitive financial information confidentially.[434] Finally, in addressing Ms Kwinana's concern about new entrants, Ms Stimpel explained that, despite the formal limited-scope RFP, they had received many unsolicited calls from new entrants many of whom explicitly said they could not manage R15billion. Ms Stimpel told Ms Kwinana that the ones who could were asked to prepare a term sheet in response to the RFP and they had asked what a term sheet was. In other words, they were clearly not capacitated to fulfil this role.[435] Ms Stimpel also expressed concerns about how exactly these unsolicited bidders knew about the funding opportunity in circumstances where no RFP had gone out. She and Mr Meyer suspected they got the information from the Board because the executive team in SAA treasury had been involved since 2007 in borrowing activities and knew not to disclose anything about it.[436]

320. The Board ultimately decided to cancel the RFP. Accordingly, the Treasury prepared a smaller RFP which was just for the amount of maturing debt that was rolling over at that time, which was R7billion. When it got to the Board, however, the Board changed it back to a full R15billion debt consolidation RFP.[437] Not only did the Board require Ms Stimpel to then prepare a new RFP for this full amount, but it wished the RFP to be sent out to all the unsolicited bidders that had visited SAA previously in relation to the debt and the Board wanted to approve and even add to the list of funders to whom the RFP would be sent. Ms Stimpel explained that this was the first time she had heard of an RFP first being approved from the Board and not going

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433 Transcript 13 June 2019, p 36

434 Exhibit DD1, p 178

435 Transcript 13 June 2019, p 37

436 Transcript 13 June 2019, p 38

437 Transcript 13 June 2019, p 39

through the normal financial procurement channels. She testified that this was unusual, even in SCM processes.[438]

The second RFP

321. On 10 September 2015, the new RFP went to the Board for approval with a list of counterparties to whom it would be sent.[439] The RFP was approved and sent out. The closing date for responses was 2 October 2015. This would allow time to compile a spreadsheet out of the respective bidders' term sheets so that SAA could compare who was offering the best terms and interest.[440]

322. In around October 2015, (before his resignation in November 2015), Mr Meyer called Ms Stimpel and other treasury managers into his office and explained to them that a potential bidder had called a meeting with him. He had assumed the meeting would be to discuss how to put together the term sheet or something about the lending terms. However, when he got there, and met with the bidder, a Mr Jayendra Naidoo from First Self Financial Services, someone at the meeting called him aside, and told Mr Meyer that he must ensure SAA gave his client the deal because "number 1" (President Jacob Zuma) wanted this deal to happen.[441] Mr Meyer responded that the decision making was done in a team and based on a full analysis and so he could not assist in this request.[442] Mr Meyer also explained to Ms Stimpel that he was suspicious when he got to the meeting and decided to record it from a recording

438 Transcript 13 June 2019, p 43

439 Exhibit DD1, p 207. The list of parties is at Annexure B, p 212

440 Transcript 13 June 2019, p 46

441 Transcript 13 June 2019, p 47. See also p 48. See also exhibit DD13, p 6, para 33

442 Transcript 13 June 2019, p 48

device in a pen.[443] Ms Stimpel congratulated him for putting him straight and for recording the interaction. She then left as she had a lot of work to do.[444]

323. Ms Stimpel explained that in November 2015 Mr Meyer was called into a Board meeting. When he arrived, he was searched and the security confiscated his recording pen and his laptop.[445] Ms Stimpel explained that these types of precautions were highly unusual.[446] However, she noted that a few months later, in February 2016, Ms Myeni called a meeting with National Treasury and at this meeting there was again someone waiting at the door who asked everyone to hand over their cell phones and laptops.[447]

324. Ms Stimpel testified that she found it highly unusual and very suspicious that Ms Myeni would even have known about the recording pen and thought to confiscate it from Mr Meyer. She also began to feel that something was really not right at SAA when the Board started taking these extraordinary measures. The secrecy and fear of being recorded at a meeting was very suspicious.[448] In addition, Ms Stimpel confirmed that the security men that confiscated items were not internal SAA security personnel.[449]

325. Mr Meyer told his treasury personnel that, because of negative reporting about him in the press, which he said was defamatory, regarding the management of certain SAA funds in Africa, he had been advised by his attorney to simply resign and find

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443 Transcript 13 June 2019, p 48

444 Transcript 13 June 2019, p 48

445 Transcript 13 June 2019, p 49

446 Transcript 13 June 2019, p 49-50

447 Transcript 13 June 2019, p 50,

448 Transcript 13 June 2019, p 50

449 Transcript 13 June 2019, p 51.

alternative employment. He did so [450] and was then replaced by Ms Phumeza Nhantsi on 27 November 2015 as interim CFO.[451]

326. SAA received various responses to the funding RFP.[452] The top offer came from SeaCrest Investments. They had the best interest rate and offered the full amount required.[453] There was an alternative offer from three major banks, which were together only willing to fund R4.3billion.[454] The Treasury team was preparing a recommendation for the appointment of SeaCrest but during their analysis they became worried that there was not enough information available on SeaCrest. They asked SAA's legal department to do a full due diligence on the company.[455] Accordingly, in the recommendation from Treasury to the Financial Risk Committee, Ms Stimpel recorded that, although SeaCrest was the preferred bidder, a full due diligence still needed to be conducted before any decision could be taken.[456]

327. Ms Stimpel's recommendation also provided for an alternative position. As there still had to be due diligence performed, they could put in place a contingency plan that, if Seacrest was not recommended, then SAA should take the combination from all the banks of R4.3billion.[457]

328. The due diligence was conducted because there was little known about SeaCrest and its term sheet revealed that it was not going to be the direct funder. It was using

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450 Transcript 13 June 2019, p 52

451 Transcript 13 June 2019, p 52

452 These can be found summarized in an analysis sheet in exhibit DD1, p 256

453 Transcript 13 June 2019, p 55

454 Transcript 13 June 2019, p 57

455 Transcript 13 June 2019, p 57

456 Exhibit DD1, p 234

457 Exhibit DD1, p 235

two other funders, Mars Capital and the other – main funder – was Grissag.[458] The due diligence report reflected that SeaCrest and its investors were reluctant to provide the required information and documentation until a successful bidder was announced. This information was critical in order to make an informed decision. SAA was concerned about the origin and availability of the funds.[459] However, the ultimate recommendation was that the due diligence could be finalised after the award of the tender during the contracting process and one of the conditions precedent of the agreement was going to be a due diligence.[460] The review committee drafted an agreement which proposed that a successful due diligence and the provision of various documents and safeguards – from regulators and insurance companies - would be a condition for the contract coming into being.[461]

329. These documents were then sent to Exco. The recommendation recorded that the Treasury team were not comfortable with the results of the due diligence at that time. While the Treasury team recommended SeaCrest as the first choice, this was subject to a more thorough due diligence being a condition precedent in the contract.[462] However, Ms Stimpel still raised with Exco that SAA could consider simply jettisoning SeaCrest altogether. This was because Ms Stimpel was still concerned that since 2007, SAA's practice had been to go through the big banks which were reliable and had the requisite capacity. SAA also had a close working relationship with them. The due diligence for SeaCrest had raised red flags and SAA still did not know who

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458 Transcript day 112, 13 June 2019, p 60

459 Exhibit DD1, p 274

460 Exhibit DD1, p 275

461 Exhibit DD1, p 258. The conditions precedent are on p 263

462 Transcript 13 June 2019, p 66

Grissag was and how it would be sourcing its funds. So, Ms Stimpel's view was that, if she had to make the decision alone, she would have excluded SeaCrest.[463]

330. This same recommendation was then placed before the SAA Board.[464] Ms Stimpel did not attend the Board meeting, at Ms Nhantsi's direction, even though she normally did attend meetings about funding or hedging together with the CFO.[465] Ms Stimpel testified that what she expected was that the Board would either choose one of the recommended options, or they would reject both and ask that a fresh RFP be put out but that is not what occurred.[466] When Ms Stimpel went to fetch the Board resolution from the company secretary's offices in order to implement the Board's decision, there was no resolution there. However, the Board meeting had been on 3 December 2015 and this was 7 December 2015.[467]

Funding from the FDC

331. When Ms Stimpel finally received the Board resolution, she found it perplexing. The Board had rejected both recommendations and resolved to get funding from a third option that had not appeared in the recommendation – an entity known as the Free State Development Corporation (FDC). The resolution gave authority to the Acting CEO and interim CFO to sign any contracts to make sure that the loan happened. The Acting CEO was Mr Zwane who had replaced Ms Mpshe. The Acting CFO was Ms Nhantsi who had replaced Mr Wolf Meyer. The resolution was based on a letter

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463 Transcript 13 June 2019, p 67

464 Exhibit DD1, p 244

465 Transcript 13 June 2019, p 80

466 Transcript 13 June 2019, p 69

467 Transcript 13 June 2019, p 69

that had been sent to the Board by a "Shepard Moyo" from the FDC. Ms Stimpel was concerned because that letter had not even gone through the formal RFP process, nor had it been analysed.[468] The letter stated only the following:

> "Free State Development Corporation is a schedule 3D company in terms of PFMA. The Corporation offers financial and non-financial support in terms of FDC Act. Subsequent to our discussion regarding funding that we provide, we are in the process of exploring a joint venture between FDC and foreign investor through its newly formed subsidiary in the Free State.
>
> The investor has indicated that there is appetite for government owned entities such as SAA who require funding. This is a first of its kind within FDC but we would like to explore this opportunity and provide such funding to yourselves. This is subject to investor agreements reached and also PFMA approvals sought. I will keep you informed if this materialises and we will negotiate terms at that point in time. The funder has indicated that it is low cost funding but this matter is under discussion. I envisage this to be between 3% to 6%. Please note that as we discussed, this letter is not a commitment but one of the solutions we may explore in future together."[469]

332. While Ms Stimpel did not disagree with the Board's rejection of the SeaCrest recommendation, she did disagree with the rejection of the second. Even though it was correct that the amount was not the full amount required to consolidate the debt, it would have alleviated some of SAA's immediate pressures and allowed SAA to go out on RFP again for the remainder of the debt. She testified that, if she had been at the meeting, she would have pointed this out.[470] In fact, in the Board minutes there is no reflection of any discussion around this point.[471] However, the very concerning aspect was that the resolution was for the approval of the FDC loan, from a foreign bidder that did not go through any process, on the basis of a brief letter that did not

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468 Transcript 13 June 2019

469 Exhibit DD1, p 287

470 Transcript 13 June 2019, p 81

471 Transcript 13 June 2019, p 81

even set out the terms of the loan.[472] The resolution empowered Ms Nhantsi to take all steps to conclude an agreement on a R14billion loan. That is the same Ms Nhantsi who did not make it to the shortlist for the position of CFO and only got in because Ms Dudu Myeni issued an instruction that she be included in the shortlist.

333. The letter from the FDC[473] stated that the transaction was subject to approvals under the PFMA and that terms would be negotiated at a later point in time. It stated that the interest rate may be between 3 and 6% but this was not a commitment. The letter made no mention of the amount it was willing to advance. It also made no mention of the tenure of the loan.

334. Ms Stimpel testified that she asked for this letter at the time and the Board told her that she did not need to see it.[474] Ms Stimpel was shown the letter by the Commission's investigator. She testified that this letter could never have been sufficient for the Board to reject the recommendations of the entire process the Treasury had gone through and to simply choose another bidder on these vague terms. There was no information on the FDC's mandate; this was an exploratory letter and not a firm commitment so it was not even clear what the terms were. The Board clearly wanted to work with the FDC without going through the approved governance processes.[475]

335. The mandate of the FDC is in fact governed very clearly by the terms of the statute that created it. That is the Free State Development Corporate Act 6 of 1995.[476] Section 4 defines the capacity and powers of the FDC and confines the power to the

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472 The resolution is at exhibit DD1, p 289. See transcript 13 June 2019, p 82.

473 Exhibit DD1, p 287

474 Transcript 13 June 2019, p 78

475 Transcript 13 June 2019, p 72-73

476 See the legislation in exhibit DD1(c), p 904. Section 3 and 4 is at p 905-906

FDC's objects, set out in section 3. The objects provide for the FDC to develop enterprises *within the Free State province.* It includes assisting Free State SMMEs and economic empowerment projects within the province.

336. Ms Stimpel was similarly concerned about some of the reasons given by the Board in the resolution. The resolution stated that borrowing from another SOE carried less risk and that they would give SAA better treatment in the event of default.[477] Ms Stimpel testified that, if she had been at the meeting, she would have explained that this could not be correct. She said that, in fact, the risk was worse because the two parties' risks are in one bundle – the government/public bundle. This would be concentrating all the risk within the Government.[478] She said that it was also incorrect that FDC would have treated SAA any differently in the event of default. Ms Stimpel explained that the knock-on effects of default would be crippling to the FDC, with terrible consequences for the overall funding of national and provincial government.[479]

337. Ms Stimpel testified that the Board's seemingly inexplicable decision, based on a letter that did not make any of the undertakings reflected in the resolution, could be understood if one had regard to the composition of the Board in late 2015. It was only Ms Myeni, Ms Kwinana, Dr Tambi and then executives, Ms Nhantsi and Mr Zwane. Ms Nhantsi and Mr Zwane were never going to oppose anything that Ms Myeni wanted. As already set out above, it was under this diminished Board, with its new executives, that fraud and corruption progressed unabated at SAA and SAAT.

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477 Exhibit DD1, p 289, para c

478 Transcript 13 June 2019, p 83

479 Transcript 13 June 2019, p 83-84

338. During the week of 7 December 2015 Ms Stimpel received instructions from Ms Nhantsi to "ratify" the decision to appoint the FDC (which, in the light of the context in which it was said, meant to execute or implement the decision). She refused as she was being asked to do so without even seeing the Board resolution at that stage.[480] Ms Stimpel then later received the resolution and recorded her reservations in an email dated 9 December 2015.[481] The email noted that the process was irregular and that, if the FDC was to be considered, the RFP had to go out again with the FDC included as a bidder.

339. As a result, Ms Stimpel made a recommendation to the Financial Risk Committee that they send the RFP to the FDC as they would with any bidder. Once the FDC had responded to the RFP, the Committee would be able to do a full comparison of the different options and decide – regardless of what the Board had decided.[482]

340. A member of Ms Stimpel's team did send an RFP out on 24 December 2015 to the FDC but they were concerned that even this was outside of proper processes because the period for the submission of responses to the RFP had expired on 2 October 2015.[483]

341. Ms Stimpel also testified that the Board's conduct had prejudiced SAA because a number of loans were coming to maturity in December 2015 and needed to be rolled over and there would be new debt. SAA needed urgent cash to meet these obligations. It would need bridging finance to do so, given that neither the consolidation, nor the alternative partial loans from the banks had happened. SAA

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480 Transcript 13 June 2019, p 89

481 Exhibit DD1, p 291

482 Transcript 13 June 2019, p 84-85

483 Transcript 13 June 2019, p 90

used the remaining R3biliion to which it had access under the National Treasury guarantee to meet those obligations and secured bridging finance for the period December to March 2016.[484]

342. The legal department, which was part of the cross-function sourcing team for financing, raised a concern about the FDC and whether a due diligence had been conducted. The legal department's representative sent this query in a letter to Ms Nhantsi who confirmed that it would be done.[485] This was an inversion of the process – usually a due diligence should be done *before* the Board decides to award the contract – not after.[486] Furthermore, there was no provision in the resolution for any conditions precedent, as would have been the protection with SeaCrest, to provide for a due diligence process to be conducted.[487]

343. Ms Nhantsi's response to the request for a due diligence was also curious because she then instructed Treasury to send out the RFP to the IDC and PIC as well.[488] The IDC and PIC had been part of the entities to which SAA had sent the RFP previously, which had not responded because their mandate did not include funding SOEs. For that reason, they were not considered in later years. Treasury therefore did not act on this request. It also did not appear in the Board resolution.[489]

344. The FDC responded to the RFP with a term sheet.[490] The startling thing about the term sheet was that it proposed a joint venture between the FDC and Grissag –

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484 Transcript 13 June 2019, p 92-93

485 Transcript 13 June 2019, p 94

486 Transcript 13 June 2019, p 94

487 Transcript 13 June 2019, p 95

488 Exhibit DD1, 303

489 Transcript 13 June 2019, p 96

490 The term sheet may be found in exhibit DD1, p 316

which was the main funder in the SeaCrest offer. The Board had rejected the SeaCrest offer because there had been insufficient due diligence and not enough information about the funder.[491]

345. When Treasury met and performed the analysis of the response to the RFP on 6 January 2016, they invited representatives from National Treasury to be observers. The interest rate (of 4%) seemed very beneficial but the same issue of Grissag not being subject to due diligence was worrying. When National Treasury weighed in, they explained that the FDC did not have the mandate to conclude the transaction. FDC could only fund development projects in the Free State.[492] It is quite clear that the Board simply did not do a basic "homework" about the FDC before they made their resolution in favour of FDC.

346. On 6 January 2016, Ms Stimpel set up a meeting with Ms Nhantsi and relayed this information to her that the FDC had no mandate outside of the Free State. Ms Nhantsi advised them to leave the matter with her and she would speak to Mr Moyo at the FDC about it. Ms Nhantsi failed to come back to Ms Stimpel for a long time. It was only on 20 April 2016 that she told Ms Stimpel that the FDC was off the table for this reason.[493]

Transaction advisor bid

347. At the end of the meeting between Ms Nhantsi and Ms Stimpel on 6 January 2016, Ms Nhantsi advised Ms Stimpel that she had received Board approval for a

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491 Transcript 13 June 2019, p 97

492 Transcript 13 June 2019, p 100

493 Transcript 13 June 2019, p 101

transaction advisor about the debt consolidation transaction. The transaction advisor would consider SAA's debt portfolio and how to restructure the balance sheet and related matters. Ms Stimpel responded that this was precisely what Treasury had done through the financing department and had made recommendations which had been approved. This was an internal function.[494]

348. Ms Nhantsi claimed that there was a need for this advisor because:

(1) Treasury did not have sufficient skills since Ms Stimpel had only been in her position for 8 months; Ms Stimpel said that this was unfounded as she had been performing a similar role in the Treasury department for 10 years;

(2) The large amount was only in the Board's authority and the Board needed external assurance from an independent source about the transaction; Ms Stimpel said that it was unjustified and irresponsible, to spend unwarranted sums on another party reproducing work already performed internally, particularly in the light of SAA's financial situation; and

(3) Ms Nhantsi was new and did not have sufficient institutional knowledge; Ms Stimpel testified that she could have relied on her team that worked with the National Treasury and the legal department for this institutional knowledge.[495]

349. Ms Nhantsi prepared recommendations to be submitted to the Board about why a transaction advisor was necessary.[496] Ms Stimpel went through each of the motivations and testified that each of these were things that were being considered or had already been considered internally.[497]

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494 Transcript 13 June 2019, p 102

495 Transcript, 13 June 2019, p 103-104

496 Exhibit DD1, p 330

497 Transcript 13 June 2019, p 107-111

350. Nonetheless, the Board approved the recommendation for the appointment of a transaction advisor "to advise regarding the R15billion debt consolidation restructuring exercise".[498] Thereafter, an RFP was issued. The BAC prepared a document with the proposed evaluation criteria for it.[499] When Ms Stimpel read the document, she realised that the advisor was actually going to be tasked with sourcing the R15billion funding – something her team had been tasked with doing and in respect of which the RFP process was still open. While Ms Stimpel had not seen the Board resolution, she did understand that it did not extend to actually sourcing the funding. She immediately tried to get hold of Ms Nhantsi but she was not able to reach her.[500]

351. Ms Stimpel also testified that it made no sense to get a middle person to broker this funding process in circumstances where SAA had historically managed to obtain funding straight from the banks, that they knew would be reliable. Ms Stimpel shared this view with Ms Nhantsi at various meetings.[501] Appointing a middle person would significantly drive up costs for SAA.[502] Ms Stimpel eventually wrote an email to Ms Nhantsi detailing all her concerns.[503] Ms Nhantsi told her that she already had Board approval and would send it to Ms Stimpel. However, what she sent her was Ms Nhantsi's recommendation for a transaction advisor, which did not make mention

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498 Exhibit DD1, p 333

499 Exhibit DD1, p 348

500 Transcript 13 June 2019, p 113

501 Transcript 13 June 2019, p 115

502 Transcript 13 June 2019, p 116

503 Exhibit DD1, p 356

of a broker to source the funding.[504] Ms Stimpel therefore made changes to the BAC evaluation document so that it excluded the sourcing of funds.[505]

352. The RFP that ultimately went out followed Ms Stimpel's revisions – it only related to transaction advisory services and did not include the sourcing of funds.[506] Seven entities responded: Deloitte & Touche, Regiments Capital, Basis Point Capital, Singer Holdings, Nasela Capital, Nedbank Limited, and BNP Capital.[507]

353. The RFP required[508] bidders to submit their BBBEE certificates and, if they were joint ventures, they required a consolidated certificate and had to submit the percentage income split in the joint venture agreement as well as the split in workload.[509] It also required a financial services provider licence from the Financial Services Board;[510] and the signed joint venture agreement.[511] The BNP Capital bid[512] provided that the consortium or joint venture bidding was "InLine Trading 10 (Pty) Ltd". In other words, BNP was bidding together with InLine Trading 10 (Pty) Ltd.

354. Ms Stimpel testified that neither she nor Michael Kleyn, who was the Manager of International Cash Management in the Group Treasury at SAA,[513] were invited to be involved in the evaluation of the bid submissions which would ordinarily have been

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504 Transcript 13 June 2019, p 116-117

505 Transcript day 112, 13 June 2019, p 117

506 Exhibit DD1, p 359

507 Transcript 13 June 2019, p 118

508 See Exhibit DD1, p 384-393

509 Transcript 13 June 2019, p 119

510 Transcript 13 June 2019, p 120

511 Transcript 13 June 2019, p 121

512 Exhibit DD1, p 393

513 See exhibit DD1, p 311

part of their work. The point of the Cross Functional Sourcing Team was to get expertise from different departments.[514]

355. The Bid Evaluation Committee (BEC)[515] recommended to the Bid Adjudication Committee (*BAC*), who then selected BNP Capital to provide the transaction advisory services[516] despite there being no budget for the expenditure. The budget was to come from Ms Nhantsi's funds as CFO.[517]

356. There were, however, a number of shortcomings in the BNP bid.

356.1. First, there was no information in the bid about its joint venture partner, InLine Trading;[518]

356.2. Second, there was no consolidated BEE certificate;[519]

356.3. Third, the price submission stated that because of the complexity of the project, the fee would be R1 plus a fee to SAA on the successful adoption for implementation of advice. This amount could not have been correct.[520]

357. On 20 April 2016 the Cross Functional Sourcing Team called a meeting with Ms Nhantsi to get some feedback about what was happening with the funding RFP, because the RFP was still open and they had not given any feedback to applicants. In this meeting, Ms Nhantsi told the team that FDC was "off the table" and that BNP

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514 Transcript June 2019, p 123

515 Made up of Khomotso Chadi (Compliance and Corporate Governance Expert); Silas Matsuadza (Commodity Manager); Thami Ntisane (Chief Dealer); and Themba Sikhosana (Legal Advisor) – see exhibit DD1, p 431

516 Exhibit DD1, p 424

517 Exhibit DD1, p 435

518 Transcript 13 June 2019, p 132

519 Transcript 13 June 2019, p 132

520 Transcript 13 June 2019, p 132-133

would now be sourcing the funding. The team challenged this decision. In particular, Ms Lindsay Olitzki, who was the Head of Department: Financial Accounting, in the treasury at SAA,[521] stated that the scope of the procurement transaction could not be changed in that manner. Other members, including Ms Stimpel, stated that the sourcing of funds needed to go out to tender again with a new RFP for a transaction advisor who would source funding.[522] Despite warning Ms Nhantsi at the meeting of this need, she did not appear to take any further action, and the Board passed the resolution extending the scope of the BNP transaction advisor contract to source the R15billion, as set out below.[523]

<u>The increase in the BNP scope to include sourcing funds</u>

358. The next day, on 21 April 2016, the Board decided to increase BNP's scope to include sourcing of funds.[524] There was no process behind it. Instead of management driving the process and the initiative coming from SAA business and then motivated up to the Board for final approval, all that served before the Board was a letter from Ms Nhantsi recommending that BNP's scope be extended.[525]

359. A few weeks later, on 6 May 2016, Ms Stimpel was called into Ms Nhantsi's office. Ms Nhantsi told her that, since Ms Stimpel was constantly challenging what she did, Ms Nhantsi thought that she would just show Ms Stimpel the document she wanted Ms Stimpel to sign and discuss the matter with her. Ms Nhantsi told Ms Stimpel that the Board had already approved the award to BNP of an increased scope to source funding; that she had already spoken to BNP and they were prepared to source that

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521 Exhibit DD 24, p 68

522 Transcript 13 June 2019, p 134-135

523 Exhibit DD1, p 15, para 81

524 Transcript13 June 2019, pp 136-137

525 Transcript 13 June 2019, p 137

funding; and they had given Ms Nhantsi the price. She gave Ms Stimpel a document that indicated that BNP would charge SAA 3% of R15billion as the fee for sourcing the funds. Ms Stimpel refused to sign it. She said that her job was to reduce expenses for SAA by R300million by year end and the only way to do that was to reduce interest rates on borrowing. This would wipe out the entire saving on one transaction. Ms Nhantsi agreed to go back to BNP and renegotiate.[526]

360. Ms Stimpel then went on leave. Mr Kleyn acted in her position. She instructed him not to sign anything in her absence. She also asked him to get comparative pricing from the banks for sourcing funding on the R15billion.[527]

361. On 11 May 2016 the SAA Global Supply Management Unit made a request to the BAC to support confining the award of the contract for sourcing funds to just BNP Capital.[528] It should be noted that this whole process of confinement was happening *after* the Board had already approved the extension of BNP's scope to source funding for SAA. This was another inversion of the process. Proper procurement does not permit Boards of SOEs to make decisions and then try to justify them ex post facto by running a process *thereafter*.

362. On 13 May 2016 the BAC did make such a recommendation.[529] This recommendation claimed that the sourcing was urgent and the Board had not been able to source funds from its own efforts and so needed the transaction advisor to do so. Ms Stimpel testified that the matter was not that urgent – the same problems had been facing SAA for a long time and they had been managed. Any urgency that

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526 Transcript 13 June 2019, p 139

527 Transcript 13 June 2019, p 140

528 Exhibit DD1, p 445

529 Exhibit DD1, p 453

there was, had been caused by the Board's inaction and delaying since February 2015 when SAA sent out the original RFP, which the Board had cancelled. Ms Stimpel testified that in terms of SAA's own procurement policy, lack of proper planning on SAA's part could never be regarded as a ground for urgency.[530]

363. The motivation from the BAC explained that a normal success fee in the industry is 2-3% and SAA had managed to secure a fee of 1.5%. That amounted to a total of R256million, with VAT.[531] Ms Stimpel testified that even the 1.5% was far higher than industry norms charged by banks, which would normally use basis points (less than 1%) for arranging funding. Although banks could increase interest charges on the funding, they would not charge such a large fee.[532]

364. While Ms Stimpel was away and despite her instruction to Mr Kleyn before she left, Mr Kleyn signed the BAC recommendation to appoint BNP Capital to source funding.[533] He sent her a whatsapp message saying that he had done so because he was under pressure to sign the document. Ms Stimpel testified that she was very upset. She stopped during her pilgrimage in France to send an urgent whistleblower message to National Treasury. Her message said that she had received a notification that a BAC document was signed to pay a client without her knowing anything about the client and that SAA would have to pay the client R225million (excluding VAT). She said that Mr Kleyn had signed the document because he was put under pressure to do so by the interim CFO.[534]

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530 Transcript 13 June 2019, pp 143-145. The policy is at exhibit DD1(c), p 890

531 Exhibit DD1, p 446

532 Transcript13 June 2019, p 147

533 Exhibit DD1, p 447

534 Transcript 13 June 2019, p 149. The message itself may be found at exhibit DD1, p 443.

365. Two days later, on 13 May 2016, the BAC approved the decision to confine sourcing funds to BNP.[535] The BAC checklist that accompanied the approval contained a number of requirements that had to be confirmed as having been met. However, some of the key requirements on this checklist simply had "not applicable" entered next to them.[536]

366. On 18 May 2016 Ms Stimpel returned from leave. She asked Mr Kleyn for his version of events. Mr Kleyn told her that he was called to the head of procurement's office. That was Mr Lester Peter at the time. He had replaced Dr Dahwa. Mr Kleyn said that Mr Peter literally "jumped up and down" and told him" "you don't take responsibility here, you just sign". Mr Kleyn had then just signed the recommendation.[537] Mr Lester Peter's conduct in this regard reveals beyond any doubt that Ms Myeni had made sure that Dr Dahwa was replaced as Chief Procurement Officer by someone who was going to do as Ms Myeni pleased. Mr Peter did just that.

367. Ms Stimpel's next step in trying to manage the situation was to obtain comparative prices for the sourcing of funds. She did not want the word to get out in the industry that this was happening at SAA. As a result, she sent emails to some of her colleagues at the banks and posed a "hypothetical" request for pricing. She sent the request to three banks: Standard Bank, ABSA and Rand Merchant Bank.[538] ABSA wrote back the same day to say their fees were lower than 10 basis points (that is 0.1%) and there could be further participation fees for the lenders and arrangers that usually ranged between 0.25 to 0.4% but "A deal can always be made".[539] Ms

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535 Exhibit DD1, p 453

536 Transcript 13 June 2019, pp 153-155

537 Transcript 13 June 2019, p 155

538 Transcript 13 June 2019, p 156. The email may be found at exhibit DD1, p 460

539 Transcript 13 June 2019, p 157

Stimpel also received a quote from RMB for a couple of different structuring options, including one for 0.5% and another, where the amounts were raised from different sources with rates varying from 0.2 to 0.3% but also required further engagement.[540]

368. Ms Stimpel wrote to Ms Nhantsi on 20 May 2016.[541] Ms Stimpel testified that the email was designed to stop the approval process from progressing any further up the approval chain (Exco, TIPCO, ARC and the Board) because she could show that there were much lower quotes in the market. She provided Ms Nhantsi with a table of comparative prices that allowed a savings of R85million. The email also warned about reputational risks to SAA because they had been seeking these funds from the banks since 2015 and now SAA was simply going with a transactional advisor that she could find nothing about online. She suggested that they do a full comparison break down and open the bidding to these other parties.

369. Ms Stimpel testified that Ms Nhantsi elected not to draw these concerns to the attention of the Board and instead secured the Board's approval – which was done by round robin resolution on 24 May 2016.[542]

370. At the time Ms Stimpel did not know that the Board had taken this decision and so she continued to try to communicate with Ms Nhantsi via whatsapp and email, setting out her concerns. Ms Nhantsi responded eventually to say that they needed to have a meeting to make Ms Stimpel understand that, at the end of the day, the Board and executives make the decision, not her, and SAA had a crisis and needed money.[543]

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540 Transcript 13 June 2019. The response is at exhibit DD1, p 466

541 Exhibit DD1, p 462

542 Transcript 13 June 2019, p 162. The resolution may be found at exhibit DD1, p 480

543 Transcript 13 June 2019, p 166. The sms communication may be found in exhibit DD1, pp 471-473

371. On 25 May 2016 SAA issued a letter of award to BNP Capital to source the funding.[544] It was subject to various conditions and stated that these were the essential terms of the parties' agreement and would prevail should there later be any inconsistencies. It provided that any services rendered by BNP prior to signing the agreement would be governed by SAA's general conditions of contract. This award was accepted in a letter from BNP on the same day (25 May 2016).[545]

The cancellation fee

372. In its 25 May 2016 letter BNP stated that it had already been engaged in work to source funding. As a result, BNP told SAA that, if SAA were unilaterally to cancel the award, BNP would claim a cancellation fee of 50% of the total fee to which they were entitled.[546] This cancellation fee would therefore be 50% of the R2,68 million, which was the fee they claimed as transaction advisor, and then 50% of the R225 million fee on the sourcing of funds. The total cancellation fee would therefore have been approximately R114million, excluding VAT.[547]

373. Ms Stimpel testified that cancellation fees in this type of agreement are not customary. At the time SAA was in serious financial difficulty and so every employee had been tasked with cost-saving. This type of fee could not be accommodated in such a precarious financial environment. She also testified that sending a letter

544 Exhibit DD1, p 490

545 Exhibit DD1, p 491

546 Exhibit DD1, p 494

547 Transcript 14 June 2019, p 8

demanding a cancellation fee for work already done on the very same day that the award was granted seemed very odd.[548]

Conclusion of the term sheet with BNP

374. On 3 June 2016 Ms Stimpel attended a meeting between National Treasury and SAA funders. Various representatives from SAA were present including Ms Olitzki and Ms Nhantsi. This was one of the regular meetings SAA had with Treasury as its guarantor, to present its financial results, its progress with its turnaround strategy and financial operations, and an overview of the business.[549] These presentations would also be done for each individual funder bank separately so as to avoid any disclosure of confidential information. BNP Capital did not attend this meeting despite having purportedly accepted its mandate on 25 May 2016.[550]

375. On 8 June 2016 BNP Capital sent a letter to SAA referring to a meeting of 3 June 2016 between National Treasury, SAA and SAA's funders and recorded the key points of those meeting.[551] Ms Stimpel testified that she was surprised that BNP had this information as it was confidential and should not have been conveyed to them by any members of the team.[552] The letter from BNP went on to set out in great detail the costs that Grissag, who BNP had selected as the preferred source of funds, had already incurred in sourcing the funding in order to justify the cancellation fee that BNP claimed in its 25 May 2016 letter.[553] The letter concluded by stating that BNP

548 Transcript 14 June 2019, p 10

549 Transcript 14 June 2019, p 16-17

550 Transcript 14 June 2019, p 18

551 Transcript 14 June 2019, p 18. The letter may be found at exhibit DD1, p 526

552 Transcript 14 June 2019, p 19

553 Exhibit DD1, p 527

urgently requested SAA to sign off the term sheet indicating its preferred choice.[554] This was a reference to the term sheet that Grissag had provided. The request stated that the response from SAA must not include a caveat that the approval of the term sheet was "non-binding".[555]

376. This request was apparently granted by SAA because on 6 June 2020 Ms Nhantsi signed a term sheet with Grissag.[556] The term sheet was missing a section usually included in these term sheets which provides that the term sheet is non-binding. This had evidently been removed.[557]

377. Ms Stimpel explained that she was very concerned to see that Ms Nhantsi had bound SAA to this term sheet in circumstances where none of this had gone through the proper channels. There was a departure from historical lending from the big banks, there was no proper RFP process, there was a transaction advisor brought in when this was not necessary, the advisor's scope was simply increased without process or assessment of risk and cost, and the advisor's fee was enormous and negated any savings associated with debt consolidation.[558]

378. Ms Stimpel was very concerned about the particular terms to which SAA was now bound under the term sheet. Not only did Grissag get a 3.5% fee, but it also got 1% payable to it on each draw down that SAA made on the funding. This meant that every time SAA made a drawdown, Grissag would get 1% of the amount utilized by SAA. The final cost would therefore be unclear and onerous. It did not appear to

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554 Exhibit DD1, p 528

555 Transcript 14 June 2019, p 20

556 Exhibit DD1, p 530-534

557 Transcript 14 June 2019, p 21

558 Transcript 14 June 2019, p 26

have been thought through. No risk assessments or financial impact assessments were done as would normally have been done at the BAC level.[559]

Whistleblowing

379. As a result of these serious concerns, Ms Stimpel approached her fellow treasury managers about speaking out about this but they were too afraid of losing their jobs. Ms Stimpel consulted her family about the risk to her job and decided to blow the whistle about the transaction.[560] She drafted a whistleblowing letter and asked a member of the executive, Mr Joshua du Plessis, what route she should take. He advised her not to do anything internally because it would simply go to the Board and she would be immediately suspended. He also told her about a previous example, where Mr Bosc, the head of operations at the time, had reported certain irregularities in the Airbus deal through the normal internal whistleblowing process and was immediately suspended from SAA[561].

380. Ms Stimpel reported her whistleblowing to National Treasury and then to the Organisation Undoing Tax Abuse (*OUTA)*. On 1 July 2016[562] she met with OUTA. They asked her whether she could retrieve some of the procurement documents around BNP Capital. On 4 July 2016 Ms Stimpel attempted to get the documents from Mr Silas Matsaudza who was in the procurement department. She could not find him after a number of attempts. She then went to his office. When she was there, she found the BNP documents on the floor. She took them and went to scan

559 Transcript 14 June 2019, p 23-24

560 Transcript 14 June 2019, p 26

561 Transcript 14 June 2019, p 28

562 Transcript 14 June 2019, p 34

them to herself. When she sought to return them to Mr Matsaudza's office, she found the office locked. The next day, 5 July 2016, she handed them back to him and explained that she had taken them the previous day. He was very angry and said he was going to report her to Ms Nhantsi and Mr Peter.[563] His level of anger surprised Ms Stimpel. She told Mr Matsaudza that she had to meet with National Treasury but would return after the meeting to discuss the matter.

381. While on her way to the meeting, Ms Nhantsi called Ms Stimpel on the phone and told her not to attend the meeting as she had been told by Mr Matsaudza what had happened.[564] Ms Nhantsi said that she did not want Ms Stimpel giving the documents to National Treasury. Ms Stimpel testified that it should not have been a problem to share this information with National Treasury as they were often included in the funding process since National Treasury was the provider of SAA's guarantee.[565] Ms Stimpel testified that there was no legitimate reason to want to exclude National Treasury. Ms Nhantsi also told Ms Stimpel that, if this were to be leaked to the media, she would hold her responsible.[566] Ms Stimpel did not proceed to go to the meeting with National Treasury because, as set out below, she was then suspended.

382. Ms Nhantsi testified that she denied that the reason why she instructed Ms Stimpel not to meet with National Treasury was that she did not want her to give National Treasury the BNP bid documents. She stated that the reason she wanted Ms Stimpel not to proceed to the meeting with National Treasury was that she wanted Ms Stimpel to come back and explain her conduct with the confidential documents.[567]

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563 Transcript 14 June 2019, p 36-37

564 Transcript 14 June 2019, p 43

565 Transcript 14 June 2019, p 44

566 Transcript 14 June 2019, p 46

567 Transcript 19 June 2019, p 40

However, this explanation was inconsistent with Ms Stimpel's testimony that Ms Nhantsi had refused to let her tell her side of the story after the incident. When this was put to Ms Nhantsi, she did not deny it but simply said she could not remember saying that.[568]

383. Late in the afternoon on the same day , Ms Nhantsi called Ms Stimpel to her office and gave her a letter to the effect that she had been suspended for taking confidential tender documents without permission from the procurement section.[569] After receiving her letter of suspension, Ms Stimpel received a call from a journalist at the Sunday Times about it, but she refused to comment.[570]

384. On 6 July 2016 Ms Stimpel met with OUTA's attorneys, Webber Wentzel and relayed the story. On 7 July 2016, Webber Wentzel sent a letter of demand to SAA to stop the BNP transaction.[571] SAA did not respond to the letter by the stipulated deadline. Ms Stimpel worked with Webber Wentzel to prepare an application for a court interdict.[572]

385. Unbeknown to Ms Stimpel, on 4 July 2016, Ms Nhantsi prepared a submission to the Board, which Mr Zwane approved as Acting Group CEO, recommending that a cancellation fee be approved for BNP in the event that SAA cancelled its mandate. By this stage, the cancellation fee had been reduced from 50% of the total fee, to

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568 Transcript 19 June 2019, p 40-41

569 Transcript 14 June 2019, pp 49-50. The letter may be found at exhibit DD1, p 570

570 Transcript 14 June 2019, p 53

571 Transcript 14 June 2019, p 54. The letter may be found in exhibit DD1, p 548

572 Transcript 14 June 2019, p 55

just under R50million and was sought to be justified on the basis of the amount of work that BNP claimed it had already done to source funding.[573]

386. Ms Nhantsi's recommendation was supported by Ms Myeni only. On 7 July 2016, the Deputy Company Secretary, Madu Nyoni, wrote to the Board asking for a round robin approval of the cancellation fee.[574] Ms Stimpel noted that it had become a habit of the Board to pass a number of important resolutions by round robin.[575] Ms Myeni responded the same day saying, "Does this need Board approval? If so I approve it."[576] There was no approval from the other Board members.

387. On 8 July 2016 Mr Mahlangu from BNP sent a letter to SAA regarding the licence that had been issued to BNP by the, then, Financial Services Board (*FSB*). The letter stated that BNP had received a letter from the FSB on 12 May 2016 indicating its intention to temporarily suspend BNP's licence for three months because, under section 10 of the Financial Advisory and Intermediary Services Act 37 of 2002, the "key individual" of the organisation had failed to complete the first level regulatory examinations.[577] An FSB licence was part of the critical criteria for being appointed as a transaction advisor. Despite having been advised of this issue as early as May 2016, notably even before BNP was appointed to source funds, BNP had not disclosed this problem to SAA. Instead, it had waited until July to do so.[578]

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573 Exhibit DD1, p 555-556

574 Exhibit DD1, p 559

575 Transcript 14 June 2019, p 41

576 Exhibit DD1, p 559

577 Exhibit DD1, p 573

578 Transcript 14 June 2019, p 57

388. The FSB (now the Financial Sector Conduct Authority (*FSCA*)) provided the Commission with an affidavit to the effect that the letter of 12 May 2016 was not a letter of an *intention* to suspend but was an actual suspension letter.[579]

389. On 21 July 2016 Webber Wentzel launched urgent interdict proceedings to stop the BNP transaction. SAA held a press conference and indicated that it had stopped the transaction and terminated the appointment of BNP.[580] This was before the urgent application could be heard and the order granted.

390. On 27 July 2016 Ms Stimpel received a notification of disciplinary charges against her.[581] The charges included removing company documents; "insolence"; breaching contract of employment including confidentiality undertakings; and breaching SAA's anonymous reporting policy.

391. Ms Stimpel testified that the tender documents were not confidential in the sense that she would not be authorised to see them. She was part of Treasury and responsible for sourcing funds – it was part of her main responsibility at SAA. As to the charge of "insolence", this may have related to a whatsapp she sent a colleague stating "the Board continues with its unethical behaviour". Ms Stimpel denied ever having breached her employment contract. The last charge was an accusation that she did not go through the SAA internal whistleblowing process. Ms Stimpel testified that she was never obliged to use that route. It was available *if* employees wanted to use it.[582]

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579 Exhibit DD1, p 578

580 Transcript 14 June 2019, p 59. The press statement may be found in exhibit DD1, p 833

581 Exhibit DD1, p 837

582 Transcript 14 June 2019, pp 64-68

392. Ms Stimpel testified that there were multiple postponements in the disciplinary hearing against her.[583] Eventually, she was advised to take the case directly to the Labour Court but then the Court ruled that she had to take her case to the CCMA, which she did. She said that SAA attempted to move and postpone each date arranged with the CCMA. Eventually, after months of this conduct, Ms Stimpel's lawyer advised her that she should just settle because this could continue for another year. So Ms Stimpel relented and settled the case.[584] The settlement included six months of salary with no benefits and Ms Stimpel went into early retirement. This meant that she received only her pension from her Provident Fund and not any of the travelling benefits she was entitled to as Group Treasurer at retirement. This, together with outstanding salary up to normal retirement age, was valued at around R4million.[585]

393. Ms Stimpel testified that she believes she was suspended because she stood up to SAA against conduct she regarded as irregular and potentially corrupt.[586] She also testified, with reference to, among others, Mr Bosc and Ms Mpshe, that, if anyone challenged what the Board was directing people to do, or instructions from senior executives, then you were immediately suspended. The charges were not given at the time but made up afterwards. She stated that, at the time of her suspension, at least four other people were suspended. Employees were instructed to sign documents and, if they refused, then SAA would find a way to get the employee

583 Transcript 14 June 2019, p 68-69

584 Transcript 14 June 2019, p 70

585 Exhibit DD1, p 29, paras 156-157

586 Transcript 14 June 2019, p 74-75

concerned suspended. She testified that this appeared to be a prevalent pattern around that time at SAA.[587]

394. Ms Stimpel testified that she was aware of a disciplinary hearing that took place against Ms Nhantsi and Mr Zwane in 2018 once SAA was under a new Board. She was called on behalf of SAA to testify against them regarding their conduct in respect of BNP. She agreed to do so.[588]

395. Ms Nhantsi and Mr Zwane were charged with their roles in facilitating the irregular transaction with BNP and the unlawful cancellation fee.[589] The findings of the disciplinary process, given by Mr Nazeer Cassim SC on 19 June 2018, were that these employees were both guilty of gross misconduct in that they facilitated corrupt activities and theft that enriched those in control of SAA.[590] Mr Cassim SC concluded that: "The employees have not shown any remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation. There is, in my view, no prospect on any basis for SAA or SAAT to keep these two individuals in their employment. I recommend summary dismissal."[591] He also recommended they be reported to the regulatory authorities responsible for chartered accountants for having breached their ethical duties.[592]

396. During her testimony at the Commission, Ms Nhantsi made various allegations against Ms Stimpel and impugned her character: She said that Ms Stimpel was bullying towards her, stormed into her office without an appointment, and accused

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587 Transcript 14 June 2019, p 75-76

588 Transcript 14 June 2019, p 80

589 Exhibit DD1, p 858, para 40

590 Exhibit DD1, p 859 and 864

591 Exhibit DD1, p 867

592 Exhibit DD1, p 866

her of only having her role because of affirmative action. Ms Stimpel denied all of these allegations.[593]

397. Ms Stimpel's evidence was also put to Ms Myeni. In response, Ms Myeni initially claimed not to know who Ms Stimpel was. Then she just invoked her privilege against self-incrimination in respect of each allegation.[594]

Ms Nhantsi's version

398. As set out above, in November 2015, Ms Nhantsi had been originally seconded to the position of interim CFO of SAA and had then been permanently appointed to the position by Ms Kwinana in May 2017. Ms Nhantsi did not have sufficient experience in this type of position and appeared to have been hand-picked by Ms Kwinana for the role, without a thorough and transparent appointment process.

399. Ms Nhantsi testified that, as a chartered accountant, she understood that, as CFO, she had a fiduciary duty to act in the best interests of SAA and to act in good faith and for a proper purpose.[595] She testified that she understood that competitive and transparent procurement process had to be followed unless there were exceptional circumstances, in which case departure from the processes had to follow the rules and systems required for such a departure at SAA.[596]

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593 Transcript 14 June 2019, p 82-83

594 Transcript 6 November 2020, p 195-208 and p 223-227

595 Transcript 14 June 2019, p 31

596 Transcript 14 June 2019, p 32

400. Ms Nhantsi testified that, soon after she had joined SAA, Ms Myeni gave her Mr Masotsha Mngadi's number and told her that he was an advisor and that, if she had any questions about the submissions she was working on for the swap deal, she should contact him. He was also given Ms Nhantsi's number.[597] Later on, upon making enquiries with Ms Kwinana in December 2015, she realised that Mr Mngadi was not an SAA-appointed advisor, but was a personal advisor to Ms Myeni and no process had been followed for this appointment.[598] He was not on SAA's payroll.[599] Ms Nhantsi testified that Mr Mngadi nevertheless helped her to draft a letter to National Treasury about the aircraft swap deal.[600]

401. It was put to Ms Nhantsi that it was strange that she consulted with a third party who was not employed by SAA about SAA operations because, if SAA required advisors, they should be duly procured.[601] Ms Nhantsi responded that she was just told by Ms Kwinana that this was Ms Myeni's "person" and was told by Ms Myeni, that if there were ever any questions about SAA, she should ask Mr Mngadi and so she did so.[602] Ms Nhantsi conceded that it was indeed strange that a third party, who was not an executive at SAA, would be contributing to drafting letters to National Treasury from SAA. She noted that she was only at SAA for two weeks at that point and was not entirely sure about protocol yet.[603]

402. Ms Nhansti testified that many years prior to her arrival at SAA, SAA ordered wide body aircraft, 10 or 20 of them, and wanted to swap them. The deal was at an

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597 Transcript 14 June 2019, p 33

598 Transcript 14 June 2019, p 35

599 Transcript 14 June 2019, p 36

600 Transcript 14 June 2019, p 37

601 Transcript 14 June 2019, p 39

602 Transcript 14 June 2019, pp39-40

603 Transcript 14 June 2019, p 42

advanced stage when Ms Nhantsi joined SAA. The Minister of Finance then sent an instruction to SAA to stop the transaction.[604] Mr Mngadi knew all about the transaction because he was the one giving Mr Zwane and Ms Nhantsi the background to the deal.[605]

403. On 30 October 2015 Mr Mngadi wrote a letter to the SAA Board about the Airbus swap transaction.[606] The letter set out in great detail why leasing the aircraft would be advantageous to SAA. Ms Nhantsi testified that the letter was never shown to her.[607]

404. Ms Nhantsi also testified that she engaged with Mr Mngadi about the BNP transaction. She testified that she began engaging with him after BNP had been successful in the transaction advisor bid. BNP was officially represented by Mr Pholisani Daniel Mahlangu but Ms Nhantsi said that she would often receive calls from Mr Mngadi as part of the BNP team.[608]

405. Ms Nhantsi provided the Commission with some of her whatsapp messages with Mr Mngadi.[609] They reveal that Ms Nhantsi had saved Mr Mngadi's details as "Masotsha Mngadi SAA/Nedbank". Ms Nhansti confirmed that she saved his details in that way about two days after starting work at SAA. She accordingly stated that she had always been aware that Mr Mngadi was associated with Nedbank.[610] This association was important because, as set out above, Nedbank was also one of the bidders to provide transaction advisory services to SAA. As a Nedbank employee,

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604 Transcript 14 June 2019, p 42

605 Transcript 14 June 2019, p 43

606 Exhibit DD2, p 200

607 Transcript 14 June 2019, p 44

608 Transcript 14 June 2019, p 45

609 Exhibit DD2, p 101

610 Transcript 14 June 2019, p 57-58

Mr Mngadi could not also be associated with a competitor bidder, such as BNP Capital, in the process.

406. Ms Nhantsi testified that she had supported the decision of the Board to approve the funding of the R15billion debt consolidation by the FDC because the savings on interest with that offer would have been R1.2billion per year. However, in hindsight, she did not support her original decision. She agreed that it was not in the best interests of the company.[611] She testified that, at the time, she was not aware (because she did not read the documentation properly as she was new to SAA at the time) that the FDC was using a foreign investor, Grissag, to fund the transaction. She said that she now realised that there was a bigger scheme at play. She said that there were arrangements for the FDC to form a joint venture with the same funder that was behind the SeaCrest offer. She testified that her present view was that there were "people who stood to benefit from the transaction using [her] to conclude the transaction".[612]

407. Ms Nhantsi testified that she had supported her decision to appoint BNP as transaction advisor.[613] However, she testified that this had changed and she no longer supported her initial decision to expand the scope of BNP Capital to include sourcing funds.[614] In addition, she testified that she never supported and continued not to support the decision to approve the cancellation fee to be paid to BNP pursuant to the extended scope.[615]

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611 Transcript 14 June 2019, p 61

612 Transcript 14 June 2019, pp 60- 61

613 Transcript 14 June 2019, p 62

614 Transcript 14 June 2019, p 62

615 Transcript 14 June 2019, p 62

408. Ms Nhantsi testified that on 1 December 2015, which was a few days after her secondment to SAA, she received a call from Mr Moyo of the FDC who asked her if SAA still needed funding. She testified that she knew Mr Moyo because they had served articles together and then worked extensively together at SNG.[616] She asked him whether he had a mandate for that and how it would be possible given that the FDC received government grants. Mr Moyo told her that the FDC was in talks with a foreign investor and that the FDC Act allowed the FDC to do the funding transaction. She asked him to put that offer in writing, which he did. Ms Nhantsi presented it to the Board at the meeting on 3 December 2015.[617] Ms Nhantsi testified that the Board considered the SeaCrest offer but was concerned about its responses to the due diligence requests and the recommendation from the banks for R4.3billion defeated the point of debt consolidation.[618] Ms Nhantsi conceded that the Board never called anyone from the Legal Department to address their concerns about SeaCrest and the due diligence. She said she did not recall anyone mentioning the proposed draft contract that was before the Board. This draft contract imposed conditions precedent on the FDC and the foreign investor, that would have required all necessary documentation to be forthcoming *before* a contract would come into being.[619] This would have protected SAA.

409. Ms Nhantsi explained that during the Board meeting it appeared as though the Chair, Ms Myeni, already knew about the FDC proposal. Ms Nhantsi and Mr Zwane were

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616 Transcript 14 June 2019, p 64

617 Transcript 14 June 2019, p 65. The letter may be found in exhibit DD1, p 287

618 14 June 2019, p 66 -67

619 Transcript 14 June 2019, p 91-96

mandated to urgently facilitate the transaction and do all that was necessary to process it because the company urgently needed funds.[620]

410. Ms Nhantsi admitted that the Board did not seem to be concerned with following due process with FDC. She stated that, in seeking to impose some kind of process after-the-fact, the Board was doing things in reverse.[621] She testified that during the Board meeting she was not sure whether what they were doing was lawful in terms of process because she was so new. Ms Nhantsi pointed out that she had no reason to doubt that they knew what was supposed to be done and were acting in accordance with due process.[622] She also admitted that the Board did not have sufficient information before them to make the decision – like the terms of the offer (duration, rate of interest, amount advanced, details about the foreign funder), and due diligence[623] – because all they had was the non-committal letter from the FDC.[624] Ms Nhantsi conceded that she ought to have raised all of these issues with the Board but had failed to do so. She said that she tried to remedy some of this afterwards by then following due process.[625]

411. Ms Nhantsi testified that, after the Board meeting, she called the treasury department to inform them about the Board's decision on FDC. She said that during the call, Ms Stimpel "was shouting" and saying this was not allowed. Ms Nhantsi ended the call with Ms Stimpel by stating that they had to comply with the Board's resolution.[626] They decided the best way forward was to send the template term sheet and the

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620 Transcript 14 June 2019, p 67

621 Transcript 14 June 2019, p 83

622 Transcript 14 June 2019, p 109-110

623 Transcript 14 June 2019, p 116-118

624 Transcript 14 June 2019, p 111

625 Transcript 14 June 2019, p 119-120

626 Transcript 14 June 2019, p 70

RFP to the FDC. FDC's response to the RFP was submitted by 24 December 2015. It was evaluated in early 2016.[627]

412. Ms Nhantsi conceded that Ms Stimpel told her on 6 January 2016 that she had had a meeting with National Treasury during which they told her in no uncertain terms that FDC did *not* have a mandate to advance funds to SAA. However, she said she went to Mr Moyo and he hold her that in terms of section 4A(h), the FDC did have this mandate.[628] She testified that she ran this past Ms Ursula Fikelepi, the Head of Legal at SAA, but she did not formally ask for an opinion.[629] She testified that it did not worry her at the time that she was being given advice that was directly contradictory to that of National Treasury but that looking back on it now, it should have concerned her.[630]

413. It was further put to Ms Nhantsi that one of the main reasons given by the Board for rejecting SeaCrest was that it was not satisfied there was an adequate due diligence, but that it had approved the FDC proposal without any due diligence whatsoever. Ms Nhantsi accepted this fact.[631]

414. Ms Nhantsi explained that the reason she believed, at the time of testifying, that the transaction should not have been approved, was that Mr Moyo had mentioned to her that the Chair of the FDC Board was Mr Ace Magashule's sister. Ms Nhantsi said that she had not been aware of all the politics at the time but, looking back and knowing what she later learned, particularly the evidence of Mr Van der Merwe, she then understood how she was used as a "scapegoat" or "a vehicle for people to

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627 Transcript 14 June 2019, p 71

628 Transcript 14 June 2019, p 97

629 Transcript 14 June 2019, p 98- 99

630 Transcript 14 June 2019, p 100-101

631 Transcript 14 June 2019, p 104

enrich themselves". Mr Van der Merwe was the director of Grissag who was summoned to give evidence at the Commission. His evidence will be dealt with below.

415. BNP was ultimately appointed as transaction advisor on 20 April 2016 and Ms Nhantsi testified that she started engaging with them about two or three weeks after they had received the letter of award. She did not have any interactions with Mr Mahlangu in this regard.[632]

416. Ms Nhantsi testified that, although she never met Mr Mahlangu, she did interact with Mr Mngadi about the transaction and she understood him to be part of the BNP team.[633] Ms Nhantsi was asked whether she was concerned that Mr Mngadi worked at Nedbank – a competitor bidder in the process – but seemed to be a representative of BNP, another bidder. Ms Nhantsi said she remembered asking him but could not recall his answer; she did not probe it further. She admitted that it appeared to be irregular that he was part of both companies.[634] Indeed, she even said she found it strange at the time because, when SAA had a meeting with Nedbank, Mr Mngadi was there as its representative, but she knew he was also acting for BNP.[635]

417. It should also be borne in mind that the irregularity goes much further because Mr Mngadi was also being consulted as if he were an internal advisor at SAA to Ms Myeni and then Ms Nhantsi. In fact, Ms Nhantsi testified that she was aware that Mr Mngadi was also having interactions with the Chair, as the Chair's "person", in the background throughout this time and that he would have conversations with the

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632 Transcript 14 June 2019, p 161-162

633 Transcript 14 June 2019, p 163-164

634 Transcript 14 June 2019, p 138

635 Transcript 14 June 2019, p 165

Chair and then feedback these discussions to Ms Nhantsi.[636] However, in respect of this conflict of interest, once again, she never enquired further.[637]

418. When it was put to Ms Nhantsi that there were a number of occasions during her testimony when she conceded that she should have probed things further and failed to do so, she responded that it was because she was new and she took comfort from the fact that this was endorsed by Ms Myeni and so did not feel the need to take her concerns too seriously. However, she also testified that this suspicious conflict and Mr Mngadi's dubious involvement did make her ultimately review the transaction with stricter eyes and, despite great pressure from the Chair, she ultimately pushed for its cancellation.[638]

419. I also questioned her about whether her failure to push back against the Board and Ms Myeni's say-so was because she lacked some relevant experience in the position. I highlighted that she had only been a chartered accountant for 7 or 8 years at SNG and that perhaps someone with experience in corporate governance in an SOE or in aviation might have been better placed to deal with these pressures and challenges.[639] Ms Nhantsi testified that the job itself of CFO was something she felt comfortable with doing but when she considered everything that the job at SAA ultimately entailed, including the politics, unanticipated pressures, the resistance from Ms Myeni to the cancellation of the agreement when it was discovered that BNP had misled SAA concerning the FSB licence and her insistence that they just carry on, then she agreed that "her plate was too full".[640] She also testified that perhaps

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636 Transcript 14 June 2019, p 166-167

637 Transcript 14 June 2019, p 167

638 Transcript 14 June 2019, p 168

639 Transcript 14 June 2019, p 168

640 Transcript 14 June 2019, p 169

she was a bit too naïve that she thought all the Board members would be acting in the best interest of the company.[641]

420. Ms Nhantsi testified that on 21 April 2015 there was a teleconference with the Board to provide them with an update on the FDC. They advised the Board that the FDC could not provide funding as it did not have a legal mandate to do so. During the discussion, the Chair, Ms Myeni, issued an instruction that they must approach BNP to source the funding for SAA.[642] The Board then passed a resolution on 21 April 2016, approving the extension of BNP's scope to source the funds.[643] Ms Nhantsi testified that she now deeply regrets not raising the issue of the conflict of Mr Mngadi at that meeting.[644]

421. As had become the pattern, *after* the Board resolution had been passed, Ms Nhantsi prepared a recommendation for that very same decision.[645] Also *after the final Board decision had been taken, she* went back to the legal and procurement teams to ask how they could justify implementing the Board decision while still trying to follow proper process. They then decided that there were some exceptions in the procurement process policies. One was emergencies, and another was confined bidding and they would use that to justify the processes they ultimately employed.[646]

422. Ms Nhantsi testified that SAA did not notify BNP of the decision immediately on 21 April 2015.[647] Instead, Ms Nhantsi explained that a confined bidding process was

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641 Transcript 14 June 2019, p 170

642 Transcript 14 June 2019, p 170

643 Exhibit DD1(b), p 441

644 Transcript 14 June 2019, p 171

645 Transcript 14 June 2019, p 172

646 Transcript 14 June 2019, p 173

647 Transcript 14 June 2019, p 175

first carried out and the Board approved the decision *again* on 24 May 2015 and only on 25 May 2016 did a letter go out advising BNP that it had been appointed to source funds.[648]

423. Ms Nhantsi testified that she signed the recommendation to extend the BNP scope to include sourcing funds upon Mr Lester Peter's request.[649] Ms Nhantsi testified that she was confused as to why she was being asked to sign this when the Board had already made the decision but was assured by Mr Peter that she had to do so as part of a checklist and so she "moved on" and did so.[650] Thereafter, the BAC also recommended that BNP be appointed – as opposed to merely noting that the Board had already done so.[651]

424. Throughout her testimony, Ms Nhantsi appeared not to accept that this order of events was irregular and against good governance practices.[652]

425. Ms Nhantsi did not appear to comprehend the distinction between these two very different processes:

(1) In the initial RFP, the ordinary process was followed in terms of which the Board initiated a fair and open-ended process for bids and tasked the correct bodies to formulate and then follow that process. It was only once that whole process had been completed and an independent recommendation made to the Board, that the Board was then required to make a decision; and

(2) In the subsequent processes, in which Ms Nhantsi was involved, the Board *first*, and without receiving any recommendation or following any process, reached a *final decision* on who should be appointed and only *thereafter* asked the staff

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648 Transcript 14 June 2019, p 176

649 Transcript, 14 June 2019, p 183-184. The signature appears in exhibit DD1(b), p 450

650 Transcript 14 June 2019, p 185-186

651 Exhibit DD1(b), p 453

652 Transcript 14 June 2019, p 187-188

> and management at SAA to reverse engineer the process by making an after-the-fact recommendation that supported what the Board had already done. This recommendation would then make it seem as if the proposed appointment had come from staff at SAA when, in actual fact, it came first from the Board.[653]

426. This is a worrying state of affairs and underscores that Ms Nhantsi's experience as an accountant was not sufficient for the governance knowledge required to be the CFO of a major SoE in a specialised industry. Her inexperience appears to have been exploited by the Board in order to advance their own agenda. It may well be that she went along with what the Board required in order not to oppose the Board. As the findings above makes plain, it was very difficult for the management of SAA when they did decide to take on the Board and disagree with its demands.

427. Ms Nhantsi admitted that it was not proper for the Board to expand BNP's scope without knowing a) whether it was possible from a procurement process perspective, b) if BNP had the capacity to do so and, c) on what terms it would provide the additional services.[654]

428. Ms Nhantsi testified that when she received the letter of demand from Webber Wentzel on 7 July 2016, that SAA should cancel the contract with BNP, she called the FSB to check if BNP was in good standing and was sent a letter on 8 July 2016, confirming that BNP had been suspended already in May 2016.[655]

429. When Mr Mahlangu testified at the Commission he claimed that he had alerted Ms Nhantsi to the issue of the FSB licence as far back as 13 May 2016 and pointed to a letter dated 11 July 2016, which referred to that correspondence of 12 May 2016.

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653 Transcript 14 June 2019, p 189

654 Transcript 14 June 2019, p 191-192

655 Transcript 14 June 2019, p 198

However, Ms Nhantsi testified that she had never received the May correspondence.[656] To support this claim, Ms Nhantsi referred to an email from Mr Moyo of BNP Capital dated 6 July 2016 in which he stated that they can "confirm that the funding entity has an FSB licence and is authorized under South African law to provide this financial product. See attached FSB licence".[657] She also produced correspondence that she sent to BNP on 13 July 2016 in response to Mr Mahlangu's letter of 11 July 2016 claiming that BNP had alerted SAA to the licencing issue in May.[658] Ms Nhantsi's letter of 13 July stated that having a licence was one of the critical criteria for the tender and confirmed that SAA did not receive this alleged communication of 13 May 2016.[659]

430. Ms Nhantsi stated that in the BNP acceptance letter of 25 May 2016, BNP had included a claim for a 50% cancellation fee. She said that her engagement with Mr Mngadi and Mr Mahlangu revealed that the fee had never been discussed with the SAA management. She said this demand "came as a shock" to her.[660] It is not clear why she would have been shocked by a demand that she knew had not been agreed to by SAA. If SAA had not agreed to the demand, it would not have been obliged to pay BNP anything as it did not form part of the agreement between the parties. Ms Nhantsi's shock may therefore have been a product of her inexperience and ignorance.

431. Ms Nhantsi testified that on around 2 June 2016, BNP sent a term sheet that had the cancellation clause in it and Mr Mngadi called Ms Nhantsi and sent her whatsapp

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656 Transcript 14 June 2019, p 199. The correspondence from Mr Mahlangu is in exhibit DD4, p 143

657 Transcript 14 June 2019, p 215. Exhibit DD1(b), p 575

658 Exhibit DD2, p 330-332

659 Transcript 19 June 2019, p 7-8

660 Transcript 14 June 2019, p 225

messages pressuring her to agree to it. She also stated that Ms Myeni was placing a lot of pressure on her to conclude the term sheet and told her the company would be "going down" if she did not secure the funding. Ms Nhantsi stated that she ultimately signed the term sheet but included a handwritten note that it was not binding until the Board had agreed.[661]

432. Ms Nhantsi testified that she contacted Ms Kwinana and told her that she was being pressured to sign things that were outside of her authority and were within the Board's authority.[662] Ms Kwinana advised her that, if she felt her integrity was compromised, she should not sign the term sheet agreeing to the cancellation clause. She therefore responded to Mr Mngadi and told him that the decision fell outside her authority.[663]

433. Ms Nhantsi testified that she believed that Ms Myeni herself stood to gain something from this cancellation fee. She formed this conclusion because of the pressure that Ms Myeni exerted upon her to sign the term sheet, together with Mr Mngadi's frequent references to the Chair and to them all being part of a "team", as well as the confidential SAA Board information that the Chair was feeding to Mr Mngadi.[664]

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

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661 Transcript 14 June 2019, p 226-227

662 Transcript 14 June 2019, p 228

663 Transcript 14 June 2019, p 229

664 Transcript 14 June 2019, p 243

434.1. On 31 May 2016 Mr Mngadi gave various reasons why he claimed BNP was justified in receiving a cancellation fee, including that various costs had been incurred.[665]

434.2. Mr Mngadi stated that he thought Ms Nhantsi was "part of our collective team".[666]

434.3. On 2 June 2016 Mr Mngadi said, "my sister this letter you have sent means nothing – it is of no use to the funders, to me to everyone".[667] Ms Nhantsi testified that the only other person he could be referring to was the Chair, Ms Myeni, who had been calling her frequently to place pressure on her to sign the term sheet.[668] The message went on to state that "we might as well have waited for you to get Board approval for the cancellation fee clause".[669] Ms Nhantsi said this was a reference to the caveat she had included in the term sheet that it was subject to Board agreement.[670] Mr Mngadi stated in the message he thought the Board resolution was circulated the previous day .[671] Ms Nhantsi testified that, as she did not tell Mr Mngadi about Board resolutions, he must have been told this by the Chair, Ms Myeni. Ms Nhantsi testified about earlier messages from 23 May 2016 where Mr Mngadi appeared to have known about resolutions that had been passed by the Board, which he seemed to have been told about by Ms Myeni.[672] Mr Mngadi then ramped up the pressure in

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665 Exhibit DD2, p 84-85

666 Exhibit DD2, p 85

667 Exhibit DD2, p 87. The date of 2 June 2016 was clarified in testimony, see transcript 14 June 2019, p 235

668 Transcript 14 June 2019, p 236

669 Exhibit DD2, p 87

670 Transcript 14 June 2019, p 236

671 Exhibit DD2, p 87

672 Transcript 14 June 2019, p 239

later messages, threatening to withdraw the funding.[673] He stated that Ms Nhantsi needed to call the Chair because she was awaiting her call.[674]

434.4. On 3 June 2016 he put even more pressure on Ms Nhantsi to sign the term sheet on an unconditional basis by 9am that morning, failing which, he said he would "inform the stakeholders".[675] Ms Nhantsi responded, after her discussion with Ms Kwinana, that she could not, without Board approval, sign documents that were beyond her mandate as it would compromise her career and she had to follow process.[676]

435. Ms Nhantsi testified that she told Ms Myeni that she would only sign the term sheet unconditionally if the issue of the cancellation fee was left out of it and was resolved separately. She eventually signed it on that basis. Soon thereafter, Mr Zwane received a call from Ms Myeni asking what his delegation of authority was as CEO. Mr Zwane said it was R50million. Two days later, SAA received a revised cancellation letter from BNP Capital stating that it had reduced the fee to R49.9million. Ms Nhantsi testified that this was very suspicious because BNP had failed to explain how the original cancellation fee of R128million was made up but, instead, suddenly dropped its fee to below the CEO's delegation of authority[677] which was a huge drop from R128 million to R49, 9 million. That was more than a 60% decrease. It is difficult to regard the initial fee as legitimate, if BNP, without explanation, was willing to drop it so substantially.

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673 Exhibit DD2, p 89

674 Exhibit DD2, p 89. For the translation, see Ms Nhantsi's testimony, transcript 14 June 2019, p 240-241.

675 Exhibit DD2, p 91

676 Exhibit DD2, p 93

677 Transcript 14 June 2019, p 244

436. Ms Nhantsi testified that she knew that Ms Myeni was behind the drop in the cancellation fee. She stated that this was done so that the transaction did not have to get Board approval. However, what Ms Myeni did not anticipate was that Ms Nhantsi would, nevertheless, put the cancellation fee to the Board for approval by round-robin resolution. Ms Nhantsi prepared the submission for the Board on the justifications given for the cancellation fee. Thereafter, she called Dr Tambi and Ms Kwinana and said that she was not comfortable with the cancellation fee and they should not vote to approve it. Ms Nhantsi herself abstained from the vote.[678] This was when the Board of SAA consisted of only three non-executive directors namely, Ms Myeni, Ms Kwinana and Dr Tambi.

437. Dr Tambi abstained from the vote and Ms Kwinana and Mr Zwane rejected the resolution.[679] Ms Myeni was the only Board member to approve it. Ms Myeni called Ms Nhantsi before the vote to ask why she was asking the Board to approve something that did not require its approval. Ms Nhantsi explained that this was an additional term in what was a Board transaction. Ms Nhantsi told Ms Myeni that it had to get Board approval.[680]

438. It was put to Ms Nhantsi that by signing a recommendation on 4 July 2016 to the Board to approve the cancellation fee, she was endorsing the decision. She agreed and admitted that this was because of the mounting pressure she received from Mr

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[678] Transcript 14 June 2019, p 245

[679] Transcript 14 June 2019, p 262. See Ms Kwinana's vote in exhibit DD1(b), p 560. Ms Nhantsi was under the mistaken impression that she abstained but she actually voted against the cancellation fee

[680] Transcript 14 June 2019, p 246

Mngadi and Ms Myeni[681] but she had hoped that the other Board members would reject the recommendation.[682]

439. It was further put to Ms Nhantsi that abstaining was not the same as rejecting a resolution. The MOI for SAA provided that the votes counted for a resolution were based on the number of votes actually cast and not the votes abstaining.[683] Ms Nhantsi testified that she was not aware of that. She said that she thought that, in order for the motion to pass, it needed 3 out of 5 votes and she was hoping that would not be reached.[684] However, her abstention meant that she did not vote against the resolution and she therefore put SAA at risk that it would be passed. Her explanation for this was that she was "too busy" to ensure she voted against the resolution. But this explanation does not make sense in the light of the steps she took to convince other members to vote against it. She also did not appreciate that abstaining did not have the same effect as voting against the decision.[685] This is further confirmation that she was moved into the position of CFO before she was ready.

440. It is also important to be aware that there was an instruction issued by National Treasury[686] aimed at combatting abuse in the supply chain management system. It directed all public entities to obtain prior written approval from National Treasury if any existing contract was extended above 15% of the original value.[687] Ms Nhantsi testified that she was not aware of this and the Board did not appear to be aware of

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681 Transcript 14 June 2019, p 252

682 Transcript 14 June 2019, p 249-251

683 Exhibit DD2, p 152. Clause 13.11.7 of the MOI

684 Transcript 14 June 2019, p 261

685 Transcript 14 June 2019, p 263

686 Note 3 of 2016/2017 – Exhibit DD2, p 324

687 Section 9, p 327

this requirement either. This National Treasury requirement was applicable to the BNP extension of scope to source funding. She testified that, if there were communications from Treasury, they would have been directed to Ms Myeni.[688]

441. Ms Nhantsi testified that Ms Myeni knew about Mr Mngadi's involvement in BNP and in sourcing the funds. Ms Nhantsi testified that she regarded the cancellation fee as Ms Myeni's scheme in which she was being assisted by Mr Mngadi to enrich themselves. Ms Myeni and Mr Mngadi placed great pressure on her to push through the fee and changed the amount so that it did not require Board approval. This was fortified by the evidence of Mr van der Merwe, the director of Grissag, who testified that Grissag never claimed any cancellation fee from BNP, despite communications from BNP that they were going to charge USD5million if the contract was cancelled.[689]

442. During her testimony Ms Nhantsi explained that she faced three types of pressure from Ms Myeni. First, Ms Myeni told Ms Nhantsi when she joined SAA and on different occasions that no one ever had anything on her (i.e. Ms Myeni) because she never wrote anything down. Second, Ms Nhantsi said that she would then receive a minimum of three calls a day from Ms Myeni. Ms Myeni's consistent message to Ms Nhantsi was that Ms Nhantsi was not moving fast enough and was delaying things and taking unnecessary documents to the Board – she should just go ahead and approve the transaction – in particular the cancellation fee.[690] Third, Ms Nhantsi stated that Ms Myeni required her to, for example, breach leases relating to aircraft by trying to change the insurers to move to Black and locally owned or

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688 Transcript 19 June 2019, p 19-20

689 Transcript 19 June 2019, p 11-12

690 Transcript 19 June 2019, p 12

rural parties and when Ms Nhantsi raised concerns or resisted, Ms Myeni would say that she could see it in Ms Nhantsi's eyes that she would not obey instructions.[691]

443. Ms Nhantsi also testified that she was frequently asked to do unlawful things and there was enormous pressure from the Board and Ms Myeni to do things without following proper process. She gave an example that Ms Myeni would give her a CV and say she had appointed a particular person in the procurement department, because they were struggling to get work and that she had a "vision from God" that the person would assist in SAA's problems. Then, when she asked Mr Lester Peter about this, he seemed to know about it already and did not ask any questions. Ms Nhantsi testified that this appeared to indicate that Ms Myeni had instructed him about it already. When the person would then arrive for an interview, he would fail dismally.[692] When Ms Nhantsi told this to Ms Myeni, she was ordered to fly to Durban to meet with her and was berated and told that she did not follow instructions from the Board. When Ms Nhantsi asked Ms Myeni for the Board resolution, Ms Myeni disapproved of the enquiry.[693]

444. It was put to Ms Nhantsi that she was obliged under section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004, to have reported any knowledge or suspicion that acts of corruption, fraud or theft were taking place at SAA. Ms Nhantsi testified that she was aware of this.[694] She accepted that she had breached her obligations in that regard.[695] She said she would perhaps have taken those steps but it was "overtaken by events" because the Webber Wentzel letter had arrived and the BNP agreement had to be cancelled. She also testified that Ms Myeni continued to

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691 Transcript 19 June 2019, p 12-14

692 Transcript 19 June 2019, p 24-25

693 Transcript 19 June 2019, p 26

694 Transcript 19 June 2019, p 20

695 Transcript 19 June 2019, p 22

exert pressure on her thereafter with constant calls not to cancel BNP. She claimed that BNP would sue SAA. This was despite the fact that BNP did not have a valid licence. Ms Myeni was not able to tell Ms Nhantsi on what ground BNP could sue in those circumstances. Therefore, her first priority was ensuring that the cancellation took place and safeguarding SAA's assets.[696]

445. Ms Nhantsi testified that she did not speak out against Ms Myeni or report her because she was scared. She clarified that she was actually scared for her life, particularly when she was in Durban.[697] She said she knew that she would ultimately lose her job because of the cancellation of BNP and the number of times she resisted instructions from Ms Myeni. She said that she had also been told by Ms Kwinana that employees had "a shelf life" with Ms Myeni. She said that Ms Kwinana had this to say about Ms Myeni and an employee who did not carry out her instructions: if an employee did not follow Ms Myeni's instructions, Ms Myeni would go to Sunnyside Café in disguise, and write whistleblower emails about the employee and then approach the Chief Internal Auditor and put pressure on him to suspend or dismiss the employee, or to appoint an external firm to do the work.[698]

446. Ms Nhantsi also testified that, at some stage, employees at SAA were subjected to a certain vetting process. Ms Nhantsi testified that Ms Myeni informed her that one of the people in her department (Treasury) had "failed" the vetting process. According to Ms Nhantsi, Ms Myeni expressed the view that she could not have someone in that sensitive department who had failed the vetting process. This person was Ms Lindsey Olitzki. Ms Myeni then asked Ms Nhantsi to have a meeting with Ms Olitzki and give her two options: either to be moved to another place in the

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696 Transcript 19 June 2019, p 21

697 Transcript 19 June 2019, p 33 and p 35

698 Transcript 19 June 2019, p 34

organisation or be fired. Ms Nhantsi stated that she resisted this because vetting was not part of Ms Olitzki's employment contract and there could be labour disputes. Ms Olitzki was given these options and she refused both. Ms Nhantsi decided with Mr Zwane that they should wait and take a uniform approach to all the results of the vetting. The next day Ms Myeni called Ms Nhantsi and asked if she had spoken to Ms Olitzki. Ms Nhantsi told Ms Myeni what she and Mr Zwane had decided. Ms Myeni was furious with her for not carrying out her instruction.[699]

447. Ms Olitzki was said to have "failed" the vetting because she had dual citizenship. Ms Nhantsi testified that she believed that this was just a pretext given by Ms Myeni to get rid of Ms Olitzki and that she had some other motive for wanting to get rid of her. It seemed that Ms Myeni was attempting to place people who would serve as her "eyes and ears" in all the different departments. She had first attempted this with the procurement department. Ms Nhantsi said that Ms Myeni wanted to replace Ms Olitzki with someone who would play that same role (i.e. Ms Myeni's "eyes and ears") in the Treasury department as well. Ms Nhantsi also testified that she was surprised at the vetting process because the executives were all at different levels and were not generally exposed to confidential information of the nature requiring security vetting.[700]

448. Ms Nhantsi appears to have been somewhat out of her depth in the position of CFO at SAA. She admitted to having succumbed to the pressure that Ms Myeni placed on her during the BNP transactions. To Ms Nhantsi's credit, she was willing to make concessions when she was questioned about her conduct and accepted that the way

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699 Transcript 19 June 2019, p 28-29

700 Transcript 19 June 2019, p 30-32

in which she had behaved was not consistent with either good governance or procurement requirements.

449. In the end, however, it was Ms Nhantsi who recommended that a cancellation fee be paid to BNP Capital for just short of R50 million. As the report details below, had this gone through, it would have amounted to an extraordinary windfall because BNP had not, in fact, incurred any costs in sourcing funding for SAA. The level of pressure exerted on Ms Nhantsi to advance the funding arrangements from both Mr Mngadi and Ms Myeni reveals an inappropriate level of interest on their part in securing that windfall for BNP Capital. Ms Nhantsi was also the person who acted with great determination in pursuing disciplinary proceedings against Dr Dahwa which resulted in Dr Dahwa's dismissal.

BNP Capital's evidence

450. Mr Pholisani Daniel Mahlangu is the CEO of BNP Capital, a company formed in 2010. In 2016, he was responsible for the day to day running of the business[701] and was the sole director of the company.[702] Mr Mahlangu testified before the Commission that on 9 February 2016 he was approached by Mr Mngadi who said that he had been referred to him by a mutual friend. He said that he would like to work together with BNP to submit to SAA a response to a Request for Information (*RFI*) for transaction advisory services.[703] The two men then met and Mr Mngadi explained that he was aware of the financial situation at SAA and that he had come

701 Transcript 27 June 2019, p 8

702 Transcript 27 June 2019, p 9

703 Transcript 27 June 2019, p 45

up with a solution to "help it breathe".[704] He told Mr Mahlangu that he was a longstanding consultant for SAA[705] and suggested that BNP should partner with his entity, InLine Trading.[706] Mr Mahlangu agreed to this suggestion and the two entities began to work together to present the response to SAA.

451. On 13 February 2016, Mr Mngadi sent an email to Mr Mahlangu with amendments to the response to the RFI in which he told Mr Mahlangu to delete any reference to his name and to use the company name: InLine Trading.[707] Mr Mahlangu testified that he understood the bid was for transaction advisory services on how to consolidate SAA's debt and to analyse the financials. He accepted that this was an entirely different mandate to one for sourcing funding.[708]

452. During his testimony Mr Mahlangu admitted that BNP bid as part of a joint venture with InLine Trading for the transaction advisory services. He stated that he did not provide InLine Trading's financials in the bid, because they had not been prepared. He stated that, for that reason, he wrote in his statement to the Commission that this was because they had not been a trading entity. He eventually admitted during questioning, however, that this was just an assumption he had made and that this assumption was in fact inconsistent with what he had written in the bid submission. In the bid submission he had written that InLine Trading had 10 years of experience in the aviation sector.[709] Mr Mahlangu admitted that BNP did not, in fact, do any due diligence on InLine Trading before it decided to enter into this partnership and did not probe them for information. At first, he claimed that this was because of the short

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704 Transcript 27 June 2019, p 48-49

705 Transcript 27 June 2019, p 49 and p 52

706 Transcript 27 June 2019, p 57

707 Exhibit DD4, p 22. See transcript 27 June 2019, p 58

708 Transcript 27 June 2019, p 60-61

709 Transcript 27 June 2019, p 79-81

deadline for the RFI but later admitted that the RFP was only due a full month later on 18 March 2016 and, that, therefore, there would have been time to do a check on the entity, but they had elected not to do so.[710] Mr Mahlangu could generally not give any satisfactory answer for why InLine Trading actually needed BNP as a partner in this bid as it had the necessary experience and BEE credentials itself.

453. Mr Mahlangu testified that Mr Mngadi assumed a dominant role in relation to the bidding with SAA. He said that Mr Mngadi prepared the sourcing of funds proposal and drafted the relevant correspondence which would be sent off under the BNP Capital logo and letterhead.[711] He stated that Mr Mngadi was also responsible for liaising directly with SAA.[712] However, while Mr Mahlangu confirmed that the partnership with InLine Trading was pitched to him by Mr Mngadi on the basis that InLine Trading would do all the communication with SAA, what transpired was that none of the correspondence with SAA ever came from InLine Trading. It always came from BNP and then informally through Mr Mngadi.[713]

454. On 18 March 2016 Nedbank submitted its bid as a transaction advisor. Mr Mngadi featured as part of the Nedbank transaction team in the bid.[714] Mr Mahlangu testified that he was not aware at the time that Mr Mngadi was employed by Nedbank. He also stated that he was not aware that Nedbank was also bidding for the same award[715] or that Mr Mngadi was on that very bidding team.[716]

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710 Transcript 27 June 2019, p 99-100

711 Transcript 27 June 2019, p 109-110

712 Transcript 27 June 2019, p 112

713 Transcript 27 June 2019, p 115-116

714 Exhibit DD2, p 198-199

715 Transcript 27 June 2019, p 116

716 Transcript 27 June 2019, p 139

455. Mr Mahlangu was not able to deny any of the following shortfalls in the BNP bid submission.[717] For example, it was put to Mr Mahlangu that InLine Trading was actually a car dealership. Mr Mahlangu testified that he was not aware of that and did not actually know what its business was.[718] In addition, it was put to Mr Mahlangu that the person who Mr Mngadi insisted be the representative of Inline Trading and whose name appeared in the bid documents instead of his own, Mr Brendan King, had actually resigned as a director of InLine Trading[719] prior to the submission of the bid.[720] Mr Mahlangu testified that he did not know any of that and that Mr Mngadi had told him at a later stage that the CEO of InLine Trading had actually passed away.[721]

456. Mr King provided an affidavit to the Commission in which he said that he knew Mr Mngadi as a customer of InLine Trading who purchased some cars from them and occasionally sent business their way.[722] He also stated that a Mr Eric Mbezi had taken over InLine Trading around the time when he (i.e. Mr King) retired. Later, on 9 February 2016, Mr Mbezi passed away.[723] Mr Mahlangu confirmed that, had he known all of this information, he would never have partnered with InLine Trading in a bid for SAA business.[724]

457. Mr Mahlangu certified in the bid documentation that BNP submitted that all of its contents were correct. He also certified that no one involved in the bid had any personal relationship with anyone who would be evaluating the bid. However, he

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717 Transcript 27 June 2019, p 128-134. See also p 142-151

718 Transcript 27 June 2019, p 156

719 See Mr King's affidavit confirming this in exhibit DD2, p 317

720 Transcript 28 June 2019, p 4

721 Transcript 28 June 2019, p 5

722 Exhibit DD2, p 317

723 Exhibit DD2, p 317-318

724 Transcript 28 June 2019, p 10

admitted in his evidence that he had never checked whether Mr Mngadi had any such relationship, despite knowing that Mr Mngadi had long ties to SAA.[725]

458. Mr Mahlangu sent a letter to Grissag, BNP's funder, on 22 April 2016.[726] Attached to the letter was a "mandate from SAA to raise and arrange funding for and on behalf of SAA for purposes of consolidation of SAA's debt of R15 billion".[727] However, the letter of award from SAA for the sourcing of funds was only received by BNP from SAA on 26 May 2016. He explained that Mr Mngadi had drafted the letter. He confessed that had not checked it carefully. He accepted, however, that the letter was false because in April 2016, BNP's mandate was only for transaction advisory services and not for sourcing of funds.[728]

459. Mr Mahlangu also testified that, with respect to the correspondence that was sent to SAA regarding the justification for the cancellation fee, Mr Mngadi was responsible for sourcing these facts from Grissag.[729] He testified that it was Mr Mngadi's role to communicate with the client and that he introduced Grissag as the funder. Mr Mahlangu said that he never had interactions with and had never heard of Grissag. BNP had, therefore, assumed that the information they were receiving from Mr Mngadi about the funding was correct and coming from Grissag itself.[730] According to Mr Mahlangu, all facts in the letter to SAA about the cancellation fee had come

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725 Transcript 27 June 2019, p 171-172

726 Exhibit DD3, p 18

727 Transcript 27 June 2019, p 176

728 Transcript 27 June 2019, p 183

729 Transcript 27 June 2019, p 184

730 Transcript 27 June 2019, p 186-187

from Mr Mngadi and Mr Mngadi had claimed that those facts had been communicated to him by Grissag.[731]

460. Mr Mahlangu, therefore, conceded that he had no basis to dispute what Grissag's director, Mr van der Merwe, had said when he testified before the Commission. According to Mr van der Merwe's testimony, the representations made in those letters to SAA concerning the basis for the cancellation fee were all false.[732] Mr Mahlangu conceded that in the letter he sent to SAA stating that the cancellation fee had to do with the substantial penalty cost Grissag would impose, he had relied on Mr Mngadi's say so for this.[733] He therefore could not deny Mr van der Merwe's testimony that there was no such penalty.[734]

461. In addition, he clarified that, on his understanding, the cancellation fee would not have been payable immediately on 25 May 2015 when the mandate was given – it was only payable if actual work had been done to justify the payment. His intention behind the letter was that, if they carried forward the mandate from that date and performed work, they wanted to be covered by a cancellation fee in case they raised the funds and SAA decided not to use them.[735] He confirmed that the fee could only be payable if they actually met their mandate and raised the money – but not before.[736] This would mean that funds would have been raised; SAA would have actually signed a term sheet on those funds; draft agreements on those funds would have been prepared and finalized and then, at the end of the day, it was only if SAA had not actually used the funds, that the cancellation fee would have bene payable.

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731 Transcript, 28 June 2019, p 49

732 Transcript 28 June 2019, p 79

733 Transcript 28 June 2019, p 80

734 Transcript 28 June 2019, p 81

735 Transcript 28 June 2019, p 61-62

736 Transcript 28 June 2019, p 62-63

According to Mr Mahlangu, those were the only circumstances in which the cancellation fee would apply.[737]

462. Mr Mahlangu admitted that having a valid FSB licence was a requirement for the tender for transaction advisory services. He confirmed that BNP did have this licence when the bid was submitted. However, on 23 March 2016[738] the FSB sent correspondence to BNP to the effect that the FSB intended to suspend the licence. Then on 12 May 2016[739] the FSB actually suspended the licence.[740] The notice of suspension stipulated that the BNP had to inform all affected clients and product suppliers about the suspension.[741] Mr Mahlangu claimed that he fulfilled that requirement by sending a letter on 13 May 2016 to SAA. However, he could not provide any documentation to demonstrate that it was actually sent to and/or received by SAA or, indeed, who actually sent it and to whom. The letter itself is undated.[742] Mr Mahlangu could also not deny Ms Nhantsi's evidence that she never received the notification.[743] Mr Mahlangu said that he was "surprised" that one of his staff, Mr Moyo, wrote to SAA to say that they had a valid licence on 6 July 2016 when that was not the case.[744] He testified that, even though the email was copied to him, he was very busy and he did not notice it.[745]

463. It was put to Mr Mahlangu that, even in the later letter of 8 July 2016, in which he explained that he had already notified SAA of the 12 May 2016 suspension, he still

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737 Transcript 28 June 2019, p 69

738 Exhibit DD1(c), p 597

739 Exhibit DD1(c), p 603

740 Transcript 27 June 2019, p 189-190. The notice of suspension is in exhibit DD1(c), p 614

741 Transcript 27 June 2019, p 193-194

742 Exhibit DD14, p 143

743 Transcript 27 June 2019, pp 194-196

744 Transcript 27 June 2019, p 199

745 Transcript 27 June 2019, p 200-201

misrepresented the notification as a letter of "intention to temporarily suspend" whereas it was an actual suspension notice. Mr Mahlangu admitted that he had not correctly described the notice. He claimed that he did not mean to mislead anyone with his choice of words.[746]

464. Mr Mahlangu testified that the additional fee of 1% from any drawdowns, which the term sheet signed on 8 June 2016 provided, would go to Grissag and would not be shared with BNP because only the fundraising entity would be entitled to that share. That was his understanding but he never spoke to Mr van der Merwe about it. He said that he was under the impression that BNP was entitled only to a success fee but not this additional "commitment fee". When it was put to him that Mr van der Merwe testified that Grissag and Mr Mngadi had agreed that the fee would be shared between the two parties, he conceded that it was possible that that could have happened but said that he did not know about it.[747]

465. Mr Mahlangu testified that, as far as he was concerned, he had no agreement with SAA about the success fee. He believed they were running the process through proposals and that BNP had proposed a fee of 1.25% but that, as far as he knew, SAA never came back to him about that. He was never aware of an agreement to pay a success fee of 1.5%.[748]

466. Mr Mahlangu testified that in 2017, Mr Mngadi called him and wanted him to confirm in an affidavit that Mr Mngadi was not an employee of BNP and that he did not compile the bid himself. Mr Mahlangu said that he agreed because both of those points were technically true, even though Mr Mngadi provided the inputs to the bid

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[746] Transcript 27 June 2019, p 204

[747] Transcript 27 June 2019, p 217-218

[748] Transcript 28 June 2019, p 48

that was compiled by BNP. He testified that he later realised that Mr Mngadi was trying to distance himself from the transaction and pretend not to have been involved in it.[749] He also stated that he did not read the whole affidavit properly before signing it.[750] Mr Mahlangu testified that Mr Mngadi asked him to sign the affidavit because there had been press reporting on the issue and he was an employee of Nedbank, which had been a competing bidder.[751]

Grissag

467. Mr Pieter Johannes Van der Merwe testified that he started Grissag in 2014/2105, with another man, Mr Sergey Pokusaev, with the intention of funding South African public entities.[752] Both men had worked for the Russian Federation and, before that, the Soviet Union. At the stage that they formed Grissag, Mr Pokusaev was retired. They registered Grissag SA (Pty) Ltd in South Africa with the two of them as directors.[753]

468. Mr Van der Merwe testified that, as Grissag, they approached various governments and also the FDC. They proposed to the FDC that Grissag could get involved with the FDC's funding and wrote them a proposal for funding for housing projects.[754] The proposal did not come to fruition because Grissag insisted on a guarantee for any capital advanced and the FDC said that they could not get a Treasury guarantee and they had no other large enough assets to guarantee the financing.[755]

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749 Transcript 28 June 2019, p 91

750 Transcript 28 June 2019, p 94

751 Transcript 28 June 2019, p 95

752 Transcript 14 June 2019, p 88

753 Transcript 14 June 2019, p 89

754 Transcript 14 June 2019, p 93

755 Transcript 14 June 2019, p 94

469. In or around August 2015 a representative for SeaCrest a Mr "Rambal" represented by an attorney, Mr Leon Etzbeth asked Mr Van der Merwe whether Grissag would be interested in funding SAA for R14billion. That representative made it clear to Mr Van der Merwe that as Grissag had neither an FSB licence nor BEE credentials, it could not go on tender alone. He said that its bid would have to be through a joint venture arrangement.[756] On 27 August 2015 the parties signed a memorandum of agreement.[757] The agreement provided for a fixed interest rate of 4.5% per annum.[758] Then SeaCrest would get whatever margin above that (markup) that it could manage to negotiate with SAA.[759]

470. Mr Van der Merwe testified that he never checked with SeaCrest what its ultimate markup was. When it was put to him that it was 1.3% bringing the total to 5.8%, he said that was much higher than international standards. He said that it would normally be somewhere in the region of 0.5% on an amount that large.[760] This accorded with Ms Stimpel's quotes from the banks at the time.

471. Mr Van der Merwe explained that, when SeaCrest asked Grissag for proof of funds, it was not possible to provide such proof because the international banks it worked with would only make a decision based on a final signed agreement as they had to get permission from their central banks.[761] Mr Van der Merwe testified that it would have been in order to have conditions precedent in the agreement that the information be provided and a due diligence performed before the agreement came

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756 Transcript 14 June 2019, p 95

757 Transcript 14 June 2019, p 96. The agreement is in exhibit DD3, p 12

758 Transcript 14 June 2019, p 97

759 Transcript 14 June 2019, p 98

760 Transcript 14 June 2019, p 107

761 Transcript 14 June 2019, p 108

into effect, but he needed a finalized signed agreement for purposes of sourcing the funding.[762]

472. Mr Van der Merwe testified that in or around November or December 2015 he was concerned that the SeaCrest transaction was not going anywhere. He said that he asked FDC whether Grissag could instead fund SAA through the FDC.[763] He testified that the FDC told him that it had an FSP (financial services provider) licence.[764] He was not aware that there might be any other legal limitation on FDC's ability to finance SAA.[765] Mr Van der Merwe sent the FDC a standard term sheet for the amount of R15billion.[766] The terms were 4% interest fixed per annum to be calculated on each draw down and then lower rates depending on different factors, down to 3%.[767] The lower rate was achieved through negotiations with their international funders who were quite keen for the transaction to go through.[768] The actual term sheet sent to SAA by Mr Moyo of FDC did not include the changes in the interest rate. It just said 4% and was not actually a term sheet prepared by Grissag – though the FDC appears to have used Grissag's logo.[769]

473. A few weeks later, the FDC came back to Mr Van der Merwe and advised that it was not possible for one state entity to finance another. Mr Van der Merwe accepted this.[770] He placed the date at around January 2016 when he was told this. He confirmed that it was never as late as March or April 2016.[771] This is significant

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762 Transcript 14 June 2019, p 109-110

763 Transcript 14 June 2019, p 110-111

764 Transcript 14 June 2019, p 111

765 Transcript 14 June 2019, p 111-112

766 Exhibit DD3, p 16. See transcript 14 June 2019, p 112

767 Transcript 14 June 2019, p 113-114

768 Transcript 14 June 2019, p 114.

769 Transcript 14 June 2019, p 115. Exhibit DD1, p 313- 316

770 Transcript 14 June 2019, p 112

771 Transcript 14 June 2019, p 117-118

because SAA was only advised about this problem by the FDC in April 2016. This date issue is important as it was that delay in the process until April 2016 and the "sudden" revelation from FDC that it could not fund SAA that was used to justify the urgency of the situation and the confinement to BNP of the tender for the sourcing of funding.

474. In around February or latest March 2016 Mr Van der Merwe was approached by someone who told him that BNP had been appointed to source the R15billion for SAA.[772] He testified that his main reason for entering into a partnership with BNP was its BBBEE status and the fact that it had an FSP licence.[773]

475. On 22 April 2016 Mr Mahlangu from BNP sent Mr Van der Merwe an email confirming that they had been awarded the contract by SAA to source the funds. Mr Mahlangu confirmed in his evidence that this had been incorrect because they were only awarded that tender in May 2016.[774] However, it should be noted that there had, by that stage, on 21 April 2016 (the day before), been an internal decision by the Board to extend the scope of BNP's mandate to include sourcing funds. However, no process had yet been followed to approve that appointment.[775] This means that someone on the Board or privy to the Board's resolution must have advised BNP about the decision.

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[772] Transcript 14 June 2019, p 118

[773] Transcript 14 June 2019, p 122

[774] Transcript 14 June 2019, p 128

[775] Transcript 14 June 2019, p 128

476. Mr Van der Merwe did not appreciate the difference between a transaction advisor and a funding source and so did not realise that the letter attached to the email from BNP was not a fund-sourcing award.[776]

477. The email from BNP asked Grissag to provide proof of funds of between R3 billion and R7 billion. Mr Van der Merwe testified that he responded that this was not possible up front. He required at least a signed term sheet that committed SAA to the terms and conditions and then a formal funding agreement would need to be signed.[777]

478. On 2 June 2016 Mr Van der Merwe noted that Ms Nhantsi had provided him with a term sheet that stated that it was non-binding. He testified that a non-binding term sheet was meaningless and so he could not accept it.[778]

479. Mr Van der Merwe testified that on 8 June 2016 he travelled to SAA's offices and attended a meeting with Ms Nhantsi that was set up by BNP. She signed the term sheet before him and he then left.[779] By that stage, Mr Van der Merwe had managed to secure an even lower rate from his funder and so the term sheet reflected 3.5% interest. However, another fee was added on top of that.[780] This was the 1% payable to Grissag for every draw down. Mr Van der Merwe testified that this 1% was a once off fee so it did not amount to a 1% increase in interest. It would be around 0.1% overall. So the additional 1% figure would lead to an effective interest rate of 3.6%.[781]

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776 Transcript 14 June 2019, p 130

777 Transcript 14 June 2019, p 131

778 Transcript 14 June 2019, p 133-134

779 Transcript 14 June 2019, p 132

780 Transcript 14 June 2019, p 142

781 Transcript 14 June 2019, p 143

480. Mr Van der Merwe testified that this 1% fee, which would amount to R150million, would be split between BNP and Grissag. Each party would receive R75million. This was, as far as Mr van der Merwe was concerned, the entire remuneration BNP would get for being Grissag's intermediary and providing the FSP licence and BEE credentials.[782]

481. Mr Van der Merwe testified that he was totally unaware that BNP would be receiving an additional 1.5% on the transaction for finding the Grissag funding. He said that he was shocked at learning about that because BNP did not find Grissag. On the contrary, Grissaghad been attempting to fund SAA and was also well known as a funder in the market. It therefore could not have been a finder's fee.[783]

482. Mr Van der Merwe testified that he had various interactions with BNP but he did not know the names of the people to whom he had spoken. It could have been Mr Mngadi but he could not say for certain.[784] He also confirmed that he never saw nor was he aware of the letters exchanged between SAA and BNP about the cancellation fee.[785] He also confirmed that none of the statements made in those letters about costs already incurred or to be incurred by Grissag was true. Mr Van der Merwe stated that Grissag had not incurred any costs at that time and the funding partners listed in the letters were all fabricated because Grissag did not disclose its funders to anyone. He said that it was also false that Grissag was imposing a penalty or cancellation fee in dollars on BNP. He denied that Grissag had been flying around the world sourcing funding. Every single fact in those letters about Grissag was

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782 Transcript 14 June 2019, p 144

783 Transcript 14 June 2019, p 145

784 Transcript 14 June 2019, p 153

785 Transcript 14 June 2019, p 154

inaccurate and made up.[786] Mr Van der Merwe confirmed that, in order to have imposed a cancellation fee, a contract would have had to be concluded and there was no such contract at that point – only a signed term sheet that referred to a future contract.[787]

Connection between BNP and the Myenis

483. Ms Myeni's conduct in respect of BNP becomes more explicable when the following evidence is considered.

484. In August 2016 at an interview with OUTA, Ms Kwinana said that Ms Myeni's son, Thalente Myeni, had a close relationship with Mr Mngadi of BNP Capital. The Commission did not procure a formal transcript of this aspect of the interview, but the audio recording of the interview reveals the following.

484.1. during her interview, Ms Kwinana confirmed that Mr Thalente Myeni was "involved" in BNP because where Mr Mngadi was, "Thalente" would be. They were either close friends or perhaps more likely associates/business partners given the age gap between them.

484.2. Ms Kwinana also testified about a number of occasions on which Mr Myeni had been seen with Mr Mngadi. First, there was a time when Ms Nontsasa Memela, who was the Head of Supply Chain Management at SAAT, told Ms Kwinana that she had had a meeting with Ms Myeni in respect of Air France and Mr Thalente Myeni was at the meeting. When they had a second meeting with

786 Transcript 14 June 2019, p 156. See also p 158-161

787 Transcript 14 June 2019, p 163

Airbus, Mr Mngadi was at SAA with Mr Thalente Myeni but Mr Thalente Myeni did not form part of the meeting. However, they arrived and left together and, when Ms Kwinana and other attendees arrived at the meeting venue, Mr Mngadi and Mr Thalente Myeni were sitting together. Ms Kwinana said that she did "not trust" Mr Mngadi. When asked where else she had seen Mr Mngadi and Mr Thalente Myeni together, she said that they could be seen in Sandton together. When Ms Kwinana was pushed for further locations where she had seen Mr Mngadi, she just said she knew they used to hang out together.

485. During her testimony, Ms Kwinana denied ever having said this.[788] However, as the report sets out above in relation to her denials regarding the false whistleblower reports that used to be prepared by Ms Myeni, her version can be rejected. The audio recordings clearly reveal that she did say these things to OUTA. Her efforts to contend that there was a language barrier to her being properly understood are so far-fetched that they can safely be rejected.

486. The evidence therefore appears to establish a relationship between Ms Myeni and Mr Myeni, on the one hand, and Mr Mngadi, on the other. The relationship between Ms Myeni and Mr Mngadi was a key feature of Ms Nhantsi's evidence before the Commission. Mr Mngadi was provided with an opportunity to respond to the evidence of both Ms Nhantsi and Mr Mahlangu. His response is dealt with in the next section. Notably, he does not ever deal with his relationship with Ms Myeni. Given how important that relationship was, on the evidence of Ms Nhantsi, Mr Mngadi's failure to deal with it indicates that he did not have an adequate answer to the allegation that he had a close relationship with Ms Myeni.

[788] Transcript 7 November 2020, p 236-237

Mr Mngadi

487. Mr Mngadi did not testify before the Commission but he did provide an affidavit to the Commission after Ms Nhantsi and Mr Mahlangu had given evidence.[789]

488. Mr Mngadi explained in his statement that he had had a number of interactions over the years with officials at SAA as a result of the position he held at Nedbank.[790] He said that he was introduced to Ms Nhantsi by Ms Kwinana of SAA and he had agreed to assist her "informally" to deal with the challenges facing SAA regarding its debt position.[791]

489. Mr Mngadi contended that providing this informal advice to SAA was not in conflict with his position at Nedbank because Nedbank had not submitted any proposal to SAA in response to an RFI.[792] However, this misses the point. Nedbank had certainly tendered for the transaction advisory services at SAA. Its bid submission formed part of the documents presented during Mr Mahlangu's evidence before the Commission.[793]

490. Despite this, and despite the fact that Mr Mahlangu provided his affidavit to the Commission after Mr Mahlangu had given evidence, Mr Mngadi claimed that Nedbank did not participate in this tender.[794] He provided a copy of a BAC document

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789 The Commission's efforts to obtain a signed affidavit from Mr Mngadi have been unsuccessful

790 Mr Mngadi affidavit para 26

791 Mr Mngadi affidavit paras 28 and 34

792 Mr Mngadi affidavit para 35

793 Exhibit DD2, p 198-199

794 Mr Mngadi affidavit para 76.1.2

from February 2016, which did not list Nedbank as a bidder.[795] The origins of that specific document is not disclosed in Mr Mngadi's statement. It is contradicted by the evidence already before the Commission regarding the tender for transaction advisory services, which clearly shows that Nedbank submitted a bid.[796]

491. Mr Mngadi's affidavit also fails to engage properly with the text and tenor of his whatsapp messages to Ms Nhantsi. Ms Nhantsi provided the Commission with the whatsapp messages she was receiving from Mr Mngadi while the sourcing of funds was underway at SAA. Those messages reveal a level of familiarity between Mr Mngadi and Ms Myeni. They also evidence an increasing amount of pressure being placed on Ms Nhantsi to ensure that the funding transaction went through.

492. Despite this, Mr Mngadi never dealt with his relationship with Ms Myeni in his affidavit. He also failed to deal with the clear import of his whatsapp communications with Ms Nhantsi.

493. Mr Mngadi denied the role that Mr Mahlangu said he played in the BNP bid and subsequent interactions with SAA,[797] but the contemporaneous communications to Ms Nhantsi at the time, which are not addressed in Mr Mngadi's affidavit at all, show clearly that he was involved.

Conclusion

494. There can be little doubt that, but for the actions of Ms Stimpel, the BNP transaction would have gone ahead in one form or another. It was her unwavering commitment

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795 Mr Mngadi affidavit – annexure MM18 referred to in para 76.1.3

796 Exhibit DD1, p 429

797 Mr Mngadi affidavit para 76.3.2

to proper procurement processes that made her stand up to what was going on around her, at great personal cost to herself.

495. Whistleblowers like Ms Stimpel are the final defence against corruption and state capture taking hold in SOEs. Without people like her, who are willing to resist the pressures being applied on them to bend the rules, the chances that these illegal activities at SOEs will be exposed reduces considerably.

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

Swissport

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

498. In February 2020 Mr Schalk Human was the Head of Department for Technical Materials at SAAT. In his position, he was responsible for procurement, logistics and

inventory management. He gave evidence before the Commission and was able to testify to a chronology of events relating to tenders at SAAT through the written documentation available to him, including forensic reports, minutes of meetings and other documents.[798]

499. Mr Human testified that ground handling services involve positioning power units, towing services, tugs, loading aircraft, baggage transportation, steps and ramps.[799]

500. The ground handling contract was awarded by SAA itself. It was published in May 2011. Then on 31 July 2012, the Board awarded the contract to Swissport for five years from 2012 onwards.[800] The contract with Swissport was never actually signed or concluded but it nevertheless provided the services to SAA. An amount of R1.139 billion was paid to Swissport without any contract being in place during this period.[801]

501. In 2016, SAAT eventually took the decision to conclude a contract with Swissport for a further five years notwithstanding that the original tender awarded in 2012 was for five years, expiring in 2017, and notwithstanding that no further procurement process was carried out before this occurred.[802] The contract value would therefore end up being double the original tender value.[803]

502. When the ground handling contract was concluded with Swissport in 2016, it was a condition of the contract that Swissport had to contract with a BEE company that had representation of Black women, youth, military veterans and disabled persons, from

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798 Transcript 6 February 2020, p 14

799 Transcript 6 February 2020, p 129

800 Transcript 6 February 2020, p 131

801 Transcript 6 February 2020, p 132

802 Transcript 6 February 2020, p 135

803 Transcript 6 February 2020, p 136

which Swissport would purchase all the equipment required for the SAA contract.[804] It was also a condition of the contract that Swissport was to acquire all SAAT's ground power units.

503. Mr Peter Kohl, a former CEO of Swissport, provided the Commission with a number of affidavits. In his first affidavit, he stated that:

503.1. Swissport was successful in the 2012 tender for offering ground handling services to SAA but there was an inordinate delay in preparing the agreement because of SAA's frequent changes in management; he said that by 2014 it appeared that SAA was not going to honour its tender award and conclude a contract with Swissport.[805]

503.2. Nevertheless, Swissport continued to provide services to SAA on a month-to-month basis. This eventually became untenable for Swissport and it attempted to get SAA to sign a contract. SAA not only resisted signing an agreement, but it also changed the requirements for the tender by introducing new conditions for Swissport about BEE supplier requirements, as set out below;[806]

503.3. Swissport was already 49% BEE-owned and had the required BBBEE contributor rating for the tender;[807]

503.4. SAA accounted for 70% of Swissport SA's business at the time;[808]

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804 Transcript 6 February 2020, p 137

805 Exhibit DD25, p 230, paras 5.3 and 5.4

806 Exhibit DD25, p 231-232

807 Exhibit DD25, p 234

808 Exhibit DD25, p 234

503.5. If Swissport lost SAA's business, it would have been liquidated;[809]

503.6. It eventually came to Swissport's attention that SAA would award it a ground handling contract with a 30% share for BEE SMMEs set aside;[810] SAA suggested to Swissport that it partner with an entity called "Jamicron" as a BEE partner but Swissport ultimately never partnered with Jamicron.[811] A 30% BEE SMME set aside meant that Swissport had to give 30% of the value of the contract to a BEE partner. The 30% set aside policy was said to be aimed at promoting transformation and to give business to Black-owned companies.

503.7. In December 2015 Mr Lester Peter from Global Supply Management at SAA sent Swissport SA a draft contract including the 30% set aside. Swissport responded that this was likely an illegal agreement and would not genuinely help with transformation;[812]

503.8. On 10 February 2016 Mr Kohl, Mr Vuyisile Ndzeku, who was a shareholder of Swissport and a shareholder and director of JM Aviation, and a number of other Swissport representatives met with Ms Kwinana and other officials from SAA. At the meeting, Ms Kwinana insisted that Swissport sign the agreement with the 30% set aside, which would be allocated to a BEE partner as selected by SAA.[813] Swissport refused to sign that agreement;

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809 Exhibit DD25, p 235

810 Exhibit DD25, p 236

811 Exhibit DD25, p 239

812 Exhibit DD25, p 281

813 Exhibit DD25, p 245

503.9. When Swissport refused to sign the agreement, SAA sent Swissport a letter which would have put an end to the entire business that Swissport was getting from SAA. Nevertheless, the parties did not get to that point;[814]

503.10. They ended up concluding a contract in March 2016. It was a condition of the contract, set out in clause 8.1, that Swissport would subcontract some of its services to BEE companies. Clause 8.2 required Swissport to purchase the SAAT ground power units (GPUs) at market value or book value;[815]

503.11. In terms of the agreement, SAA would select a BEE partner that Swissport had to work with. It chose JM Aviation South Africa (Pty) Ltd (*JM Aviation*);[816] JM Aviation would purchase the GPUs and sell them on to Swissport;[817] Mr Kohl said that he was not aware that Mr Ndzeku was also involved in JM Aviation.[818]

<u>The ground handling agreement and Jamicron</u>

504. In 2015 and 2016 Mr Vuyisile Ndzeku was a shareholder[819] and director of Swissport.[820] Mr Ndzeku testified that he ceased being a director of Swissport in early 2020, which was around the time he was originally scheduled to give evidence at the Commission.[821]

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814 Exhibit DD25, p 245

815 Exhibit DD25, p 250-254

816 Exhibit DD25, p 256

817 Exhibit DD25, p 257 and p 265

818 Exhibit DD25, p 268

819 Transcript 26 August 2020, p 39. He estimated between 9 and 15%

820 Transcript 26 August 2020, p 43

821 Transcript 26 August 2020, p 43-44

505. Mr Vuyisile Ndzeku was also a shareholder[822] and director of JM Aviation and had held these positions since around 2015.[823] Prior to this, Mr Ndzeku testified that he worked with JM Aviation International.[824] Mr Jules Aires was the founder of JM Aviation and was also a shareholder of the company in 2015/2016.[825] The other two shareholders of JM Aviation are Mr Ndzeku's daughters, Ms Khosi Sokhulu and Ms Natasha van Louw.[826] Since October 2015, these four shareholders have also been directors of JM Aviation.[827] Mr Ndzeku's wife, Ms Hendricks, was also an employee of JM Aviation.[828]

506. Mr Ndzeku conceded that he did not disclose to Swissport that he was a director and shareholder of JM Aviation.[829] He confirmed that he did not recuse himself from any meetings where transactions between the two entities were discussed or voted on.[830] Mr Ndzeku admitted that he spoke regularly to Ms Yakhe Kwinana on the phone during 2016.[831] He admitted that he and Ms Kwinana discussed how to facilitate the 30% set aside for the Swissport contract to Jamicron. Mr Daluxolo Peter was a director of Jamicron at the time and his evidence will be referred to below.[832]

507. Mr Ndzeku confirmed that he and Ms Kwinana had discussed Swissport's empowerment partner "many times".[833] He testified that during their first interactions

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822 Transcript 26 August 2020, p 45. He is a 20% shareholder

823 Transcript, 26 August 2020, p 44

824 Transcript 26 August 2020, p 45

825 Transcript 26 August 2020, p 48. He was a 15% shareholder

826 Transcript 26 August 2020, p 49. Ms Sokhulu held 35% and Ms van Louw held 30%

827 Transcript 26 August 2020, p 52

828 Transcript 26 August 2020, p 54

829 Transcript 26 August 2020, p 51

830 Transcript 26 August 2020, p 75

831 Transcript 26 August 2020, p 118

832 Transcript 26 August 2020, p 132

833 Transcript 26 August 2020, p 133

about an empowerment partner, Ms Kwinana had Mr Daluxolo Peter with her and stated that she and Ms Myeni insisted that Swissport use him as an empowerment partner. Mr Ndzeku said that he had resisted this because Swissport already had empowerment credentials.[834]

508. Mr Ndzeku testified that on 10 February 2016, he attended the meeting referred to above at SAA with Mr Peter Kohl on behalf of Swissport. Ms Kwinana and Mr Lester Peter were present for SAA. Mr Daluxolo Peter was also there. Mr Ndzeku and Mr Dulaxolo Peter knew each other and had interacted in the past. For example, they had attended a soccer world cup match together in 2010.[835] At this meeting on 10 February 2016, SAA told Swissport that it wanted Swissport to set aside 30% of its revenues to an empowerment firm, and in particular, to Mr Daluxolo Peter.[836]

509. Mr Ndzeku testified that at some point in 2016, he was told by Mr Kohl that Swissport was going to pay JM Aviation R28.5million.[837] Despite being a director of JM Aviation, he professed to know nothing about any contract in terms of which this payment from Swissport was to be made to JM Aviation.[838]

510. The Commission's investigations revealed that this payment of R28.5 million was made to JM Aviation in March 2016, the month before the ground handling contract between SAA and Swissport was finally concluded.

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834 Transcript 26 August 2020, p 134

835 Transcript 26 August 2020, p 111-113

836 Transcript 26 August 2020, p 129-131

837 Transcript 26 August 2020, p 159

838 Transcript 26 August 2020, p 144. The contract may be found in exhibit DD26, p 235. It was signed by Ms Sokhulu on behalf of JM Aviation. It provided at clause 7.1 that JM Aviation was going to restructure the company's workshops throughout South Africa with the aim to improve maintenance processes and procedures to optimize the company's GSC support services

511. Mr Ndzeku also testified that Mr Kohl had instructed him to pay R20million of the R28.5 million to Jamicron.[839] Mr Ndzeku testified that Mr Kohl said that this was because Jamicron was going to be the empowerment partner in the Swissport ground handling contract.[840]

512. Mr Daluxolo Peter provided the Commission with an affidavit about the payment to Jamicron. He stated that it was not Mr Kohl who had instructed JM Aviation to pay Jamicron. Instead, he said that it was an arrangement that had been devised entirely by Mr Ndzeku. Mr Peter's version was that it was Mr Ndzeku who had established Jamicron, installed his daughter as a director of Jamicron, together with Mr Peter, and then facilitated the R20million payment to Jamicron.[841] Mr Ndzeku then told Mr Peter what to do with that R20million and who to pay with it.[842] This involved withdrawing cash over three days, totalling R5million and handing it over to Mr Kolisi of BMK Attorneys.[843] This was the same Mr Kolisi who was, at the time, running a disciplinary hearing against Dr Dahwa. As this report detailed above, Dr Dahwa had refused Ms Kwinana and Ms Myeni's unlawful instruction regarding awarding the ground handling contract to Swissport. This was also the same Mr Kolisi who had drafted the letter that was used to suspend Ms Mpshe. Mr Peter also stated that he took R5million of the R20 million for himself,[844] as payment for the work he had done

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839 Transcript 26 August 2020, p 159-160. See also p 182

840 Transcript 26 August 2020, p 141

841 Transcript 26 August 2020, p 187

842 Transcript 26 August 2020, p 192

843 Transcript 26 August 2020, p 193

844 Transcript 26 August 2020, p 194

in facilitating the ground handling transaction.[845] He was then also instructed by Mr Ndzeku to pay R10milion over to BMK Attorneys directly.[846]

513. In response to these allegations, Mr Ndzeku denied being the mastermind behind the creation of Jamicron. He said that he could not have been the mastermind because he did not receive any payments himself for facilitating the transaction.[847] This was, however, false. During his evidence, Mr Ndzeku was shown bank statements evidencing that he had received R2.5 million out of the R28.5million paid by Swissport to JM Aviation.[848] In response he said, "Okay that's good, I'm happy, it's good if I did get some money, Swissport gave me some money".[849] Mr Ndzeku could not explain the reason why he received that money. He said "maybe it was an agreement between myself and Jules".[850] The reference to Jules is reference to Mr Jules Aires of JM Aviation.

514. The bank records also showed that a further R2.5million of the Swissport payment to JM Aviation was paid out to BMK Attorneys, with the reference "Pete".[851] This money was used by BMK Attorneys[852] to pay for Mr Lester Peter, the Head of Procurement of SAA, to buy two luxury sports cars the following day.[853]

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845 Affidavit of Dulaxolo Peter, dated 25 August 2020, para 12

846 Transcript 26 August 2020, p 194

847 Transcript 26 August 2020, p 187

848 Transcript 26 August 2020, pp 87-88. See exhibit DD26, p 44. These are the bank records of JM Aviation SA. This shows a balance of only R1000; then payment on 23 March 2016 from Swissport of R28.5million; then R20million is paid out to Jamicron; then R2.5million is paid to Mr Ndzeku. Mr Ndzeku's bank statement evidencing this payment are at exhibit DD26, p 198. It was paid on 23 March 2016

849 Transcript 26 August 2020, p 199

850 Transcript 26 August 2020, p 204

851 Exhibit DD25, p 45

852 Transcript 26 August 2020, p 230

853 Transcript 26 August 2020, p 227-228

515. In preparation for Mr Ndzeku's evidence before the Commissions, its investigators again engaged Swissport and asked it to explain the R28.5 million it had paid to JMAviation. According to a second affidavit furnished to the Commission by Mr Kohl, Swissport claimed that it had entered into a service level agreement with JM Aviation to upgrade its ground support equipment (GSE) workshops.[854] As set out above, Mr Ndzeku professed to know nothing about this arrangement nor about the services allegedly rendered by JM Aviation to Swissport entitling it to be paid R28.5 million.[855]

516. The bank account of JM Aviation had only R1000 in it when this R28.5million payment from Swissport was made.[856] Despite this, Mr Ndzeku testified that that JM Aviation South Africa had engaged in various transactions during its business dealings before the payment from Swissport. But then it was put to Mr Ndzeku that this could not be correct because the JM Aviation bank account had been inactive prior to the R28.5million payment from Swissport, save for the initial deposit of R1000. Mr Ndzeku was then forced to admit that the previous transactions had actually been conducted through JM Aviation International.[857] He confirmed that JM Aviation South African had engaged in no transactions at all until it received Swissport's payment in March 2016.[858]

517. After Mr Ndzeku's evidence, Swissport provided a further affidavit dated 19 November 2020 to the Commission in which Mr Kohl disputed Mr Ndzeku's version. He denied having any knowledge of Mr Ndzeku's dealings with Jamicron and denied

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854 Transcript 26 August 2020, p 143

855 Transcript 26 August 2020, p 144. The contract may be found in exhibit DD26, p 235. It was signed by Ms Sokhulu on behalf of JM Aviation. It provided at clause 7.1 that JM Aviation was going to restructure the company's workshops throughout South Africa with the aim to improve maintenance processes and procedures to optimize the company's GSC support services

856 Transcript 26 August 2020, p 149

857 Transcript 26 August 2020, p 164-165

858 Transcript 26 August 2020, p 170

that he had instructed Mr Ndzeku to make the payments that he did from the R28.5 million received from Swissport.

518. In order to try to get to the bottom of whether there was, in fact, a genuine agreement concluded between Swissport and JM Aviation for the upgrade of Swissport's GSE or whether the payment of R28.5 was nothing more than a "facilitation" fee for securing the ground handling contract, the Commission's investigators asked Swissport to produce any and all documents evidencing the services that were provided by JM Aviation pursuant to the GSE workshop upgrade. Swissport, however, advised the Commission that it did not have a single scrap of paper that evidenced any aspect of the alleged contract having been entered into between the parties. There was not a single email. There were no meeting notices, no invoices, no slideshows, no logs, no design documents – absolutely nothing. Although Mr Kohl stated that he had taken some handwritten notes in his interactions with Mr Jules Aires when JM Aviation provided its services, his office had apparently been "cleaned out" after he had left his CEO position in South Africa and any such records were destroyed in the process.[859]

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

[859] Kohl affidavit provided to the Commission on 11 May 2020 unsigned because of COVID-19 lockdown circumstances, para 23

procure the services of JM Aviation and Jamicron (Mr Ndzeku and Mr Peter) to facilitate the conclusion of the contract with SAA. These parties then paid certain crucial decision-makers at SAAT (Ms Yakhe Kwinana, Ms Nontsasa Memela and Mr Lseter Peter) and the contract was indeed awarded to them. JM Aviation and Jamicron then took a share of that payment. If Swissport paid this amount in order to secure the ground handling contract with SAA and knew that it would be used to pay bribes to SAA and SAAT officials, then it committed an act of corruption.

520. It has, unfortunately, not been possible to get to the bottom of Swissport's knowledge on these matters. This is because Swissport declined the invitations extended to it to meet with the Commission's investigators and legal team. It preferred, instead, to answer the Commission's on-going enquiries as the investigation developed with affidavits produced by Mr Kohl. When the Commission enquired about Mr Kohl's availability to give oral evidence, it was told that he was located in the United States of America and was not in a position to testify in the Commission. This has meant that the Commission has not been in a position to test his version through questioning.

521. Notwithstanding this limitation, the evidence to the effect that corruption took place in this deal is supported by two undisputed facts:

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

521.2. What JM Aviation actually did with the money. If services were genuinely to be rendered under the contract with Swissport, JM Aviation would likely have had to pay salaries and made at least some purchases to equip itself to provide the

services. However, the bank statements of JM Aviation show that no such payments were made. Instead, the money came into the account and, within a matter of days, it was paid out to those connected with SAA. It was paid to Mr Daluxolo Peter, whose own affidavit before the Commission confirms that he was paid this money for facilitating the ground handling agreement with SAA. It was paid to Mr Ndzeku who, on his own version, knew nothing about the GSE workshop upgrade with Swissport. It was also paid to Mr Kolisi, who, in turn, bought two luxury cars for Mr Lester Peter, the head of procurement at SAA.

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

523. In her evidence before the Commission, Ms Kwinana admitted that she had attended the meeting with Swissport on 10 February 2016 that Mr Ndzeku also attended. She claimed that it was a short engagement because she simply informed Swissport that SAA was going to go out on tender because the existing contract was irregular.[860] However, this version of the events that transpired at the meeting is in conflict with contemporaneous notes prepared immediately after the meeting.

524. On 12 February 2016 Mr Kohl wrote an email to his fellow directors at Swissport recording what was said at the meeting of the 10th February 2016.[861] He said that Ms Kwinana had chaired the meeting and declared that its purpose was to conclude the contract and no one would leave the room until it was concluded. Thereafter, Mr Lester Peter and Ms Kwinana had insisted that Swissport sign the supplementary

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860 Transcript 2 November 2020, p 45

861 Exhibit DD25, p 300

agreements that Mr Peter had emailed to Swissport in December 2015. These were the draft agreements that stipulated the 30% set aside for an as-yet-unidentified BEE partner.

525. Mr Kohl's email further recorded that they were told that, if Swissport did not sign the agreements, SAA would terminate its business with Swissport. The email said that, apart from being illegal and outside of the provision of South Africa's B-BBEE Act, these demands would bankrupt Swissport.

526. Ms Kwinana testified that she had no memory of this being discussed at the meeting and demanded to see minutes of the meeting.[862] However, Mr Kohl's affidavit explained that Swissport had sought minutes recording these demands from SAA but they were never forthcoming.

527. There was also another of Swissport's representatives at the meeting, who took independent notes of what transpired at the meeting. They accord with Mr Kohl's emailed account of the meeting.[863] When this further corroboration of Mr Kohl's notes was shown to Mr Kwinana, she again claimed that they were false.[864] Ms Kwinana testified that she also had no knowledge of the draft agreement that was circulated to Swissport in December 2015 by Mr Lester Peter.[865]

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862 Transcript 2 November 2020, p 63

863 Exhibit DD25, p 309

864 Transcript 2 November 2020, p 76

865 Exhibit DD25, p 291. Transcript 2 November 2020, p 80 and p 82

528. Ms Kwinana did admit that she knew Mr Daluxolo Peter from the supplier development roadshows, but she could not recall if he was at the meeting of 10 February with Swissport.[866]

529. It was put to Ms Kwinana that it was not appropriate for a non-executive Board member to attend these types of operational meetings.[867] She simply answered that she went "to give support".[868] Later on, when challenged about getting herself involved in operational matters as a non-executive Board member Ms Kwinana claimed that she attended such meetings in order to offer strategic direction because this was a BEE issue.[869] This later version contradicted her earlier version to have only attended such meetings to offer "support". It also tends to corroborate the version of Mr Kohl that Ms Kwinana played a leading role in the meeting by putting pressure on Swissport to accept a 30% set aside BEE partner.

530. In fact, it was put to Ms Kwinana that there was evidence from her own emails that confirmed Swissport's claim. On 20 January 2016 she sent an email to Mr Lester Peter,[870] which said: "yesterday I had a meeting with one of the shareholders of Swissport, Mr Vuyo Ndzeku, Mr Peter Kohl (CEO/CFO Swissport), Mr Daluxolo Peter, a BEE partner of Swissport. The purpose of the meeting was that the BEE partner was concerned about the status of the contract." Ms Kwinana's response to this clear written confirmation that she was intimately involved in trying to secure a set aside for a BEE partner under the Swissport deal was that she had never seen

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866 Transcript 2 November 2020, p 52

867 Transcript 2 November 2020, p 86

868 Transcript 2 November 2020, p 87

869 Transcript 2 November 2020, p 93

870 Exhibit DD33.23, referred to in evidence on transcript 3 November 2020, p 168-170

this email. Given that she had written the email herself, this claim is simply preposterous and should be rejected.[871]

531. In an effort to probe Ms Kwinana's version of what transpired at the meeting on 10 February 2016, she was asked why, if she went to the meeting to advise Swissport that its contract was irregular and would be put out to tender, SAA did not ultimately go out to tender thereafter.[872] Ms Kwinana provided no satisfactory answer to this question. She said that "maybe it was because of the processes."[873] She then claimed that, while the Board may have thought that the contract was irregular, perhaps the processes required to "regularise it" were not implementable.[874] None of this was convincing.

532. Ms Kwinana's testimony about the Swissport transaction was evasive and, at times, nonsensical. The evidence is overwhelming that she insisted that Swissport sign a contract to give away 30% of its revenue to an entity that SAA would select. When Swissport refused, Ms Kwinana changed tack and, after many calls in early 2016 between her and Mr Ndzeku, an arrangement was concluded in terms of which millions of Rands were paid by Swissport to JM Aviation for services it did not receive so that JM Aviation would be able to pay kick-backs to various important decision-makers within SAA.

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871 Transcript 3 November 2020, p 169

872 Transcript 2 November 2020, p 88

873 Transcript 2 November 2020, p 88

874 Transcript 2 November 2020, p 90

GPUs

533. Mr Human testified that GPUs are ground power units, or generators, that aircraft need to maintain their power supply when grounded.[875] In 2015, SAAT purchased eight GPUs for use during SAAT's maintenance operations.[876] The GPUs were purchased for a total of R9 193 981.20 including VAT.[877]

534. It was a condition of the ground handling contract concluded between Swissport and SAA in March 2016 that Swissport would be required to purchase those GPUS from SAAT at market value or book value.[878] SAAT sold the GPUs to Mr Ndzeku's company, JM Aviation, for an amount of R248 000 per unit, totaling R3 392 640. The book value of the units at the time was R7 968 117. In terms of the ground handling agreement, Swissport was then required to purchase the units from JM Aviation.[879] The day after SAAT had agreed to sell the GPUs to JM Aviation for just more than R3 million, JM Aviation sold the very same GPUs to Swissport for more than R9 million.

535. Since the sale of the units, SAAT has, to date, spent R8.4 million in fees for leasing the very same units back from Swissport.[880] This means that SAAT lost, in total, around R14.5million on the transaction.[881]

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875 Transcript 6 February 2020, p 129

876 Transcript 6 February 2020, p 133

877 Exhibit DD22(b), p 684

878 Transcript 6 February 2020, p 134

879 Transcript 6 February 2020, p 138

880 Transcript 6 February 2020, p 141

881 Transcript 6 February 2020, p 141

536. Mr Arson Malola Phiri, the Acting CEO of SAAT at the time of the transaction, provided the Commission with an affidavit. He explained that SAAT acquired the 12 GPUs so that they could eventually insource SAA's ground handling services to SAAT.[882] This required licencing from ACSA. It was awarded the licence in 2012 for two years. The plan was to take over the ground handling services from Swissport.[883]

537. Despite SAAT's decision to purchase the GPUs and commence a process of in-sourcing, SAA's Board then authorised its management to conclude a ground handling contract with Swissport on 15 March 2016, signed by Ms Nhantsi and Mr Zwane. It was a term of this agreement, as set out above, that Swissport would buy the GPUs from SAAT at their book value or market value.[884] According to Mr Malola Phiri, this reversal of the decision to insource these services to SAAT had significant commercial and financial implications for SAAT.[885]

538. At the time Ms Memela was the Head of Procurement at SAAT. The SAAT Board met on 15 June 2016 to discuss the sale of the GPUs. The minutes of the meeting[886] recorded that the Board had been asked to consider and approve the disposal of 12 GPUs "as the services they were purchased to offer had been outsourced to an external service provider, Swissport, by SAA." The minutes record that the "GPUs would be sold to Swissport at their current asset value. The Board was informed that SAA's contract with Swissport provided for Swissport to purchase the GPUs from SAAT". The Board ultimately resolved that "the disposal of SAAT's 12 . . . GPSs, as

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882 Exhibit DD26, p 776

883 Exhibit DD26, p 777

884 Exhibit DD26, p 777

885 Exhibit DD26, p 778

886 Exhibit DD25(b), p 609

a result of SAA awarding the ground handling services to an external service provider be and is hereby approved".

539. The Board resolved to sell the GPUs at the best possible price in the light of the book value.[887]

540. Ms Memela testified that she was tasked by the Acting CEO of SAAT, Mr Zwane, to negotiate the sale of the GPUs. She attended a meeting on 21 June 2016 with a Mr Makaleng, whose department at SAAT owned the GPUs, and Mr Stan Vosloo, who was responsible for materials management at SAAT. She testified that, although she invited Mr Leon Roberts, the logistics and inventory manager at SAAT, to attend the meeting, he did not do so. They were joined in the meeting by Mr Jules Aires and Ms Sokhulu of JM Aviation. They discussed the proposal that Mr Malola Phiri had made to the Board of SAAT for the sale of the GPUs. Ms Memela explained that her role began with negotiating the price that JM Aviation would pay to purchase the GPUs at this meeting and ended with her and the CEO signing an invoice for the sale.[888]

541. Mr Makaleng and Mr Vosloo[889] provided affidavits to the Commission in which they both denied having attended this meeting with Ms Memela.[890] Mr Makaleng provided a copy of the meeting invite which reflected that he had not accepted the invitation.[891] Mr Vosloo sent an email to Ms Memela after the meeting on 21 June 2016 asking her to confirm the sale price for the GPUs.[892] In her response, Ms Memela did not

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887 Exhibit DD26, p 783

888 Transcript 7 February 2020, p 38

889 DD25(b), p 742

890 DD25(b), p 612

891 DD25(b), p 647

892 DD25(b) p 747

question why Mr Vosloo was asking this question given that, according to her, Mr Vosloo had been at the meeting where the price was discussed.[893] Instead, she just confirmed the sale price.[894]

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

542.1. She confirmed that she had not established how much they had been purchased for the year before.[895]

542.2. Ms Memela testified that she did consider the book value of the GPUs,[896] which Mr Phiri had also considered relevant because he had included it in his submission to the Board of SAAT on whether to sell the GPUs.[897] The book value was contained in the asset register of SAAT, as it was in June 2016, which was provided to the Commission by Mr Human from SAAT.[898] However, Ms Memela testified that she did not have regard to that particular document before negotiating with JM Aviation and spent a very long time, together with her lawyer, detaining the proceedings of the Commission by challenging the authenticity and validity of the document instead of addressing the questions put to her.[899]

542.3. Because Ms Memela testified that she had not seen the asset register extract, she was asked about the submission that Mr Malola Phiri had made to the

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893 Transcript 10 February 2020, p 81

894 Transcript 10 February 2020, p 81

895 Transcript 10 February 2020, p 35-36

896 Transcript 10 February 2020, p 37

897 Transcript 10 February 2020, p 41

898 Exhibit DD22(b), p 694

899 Transcript 10 February 2020, p 48-54

Board on 15 June 2016 about the book value of the GPUs to which she had previously referred in her evidence.[900] The submission stated that each unit was purchased for R766 165.10 with a total of over R9million; the current value of the 12 units, was R682 890.62 per unit, as per the SAAT asset register. The total in June 2016 was R4.7million. Ms Memela then claimed that she had never seen this document either and was not aware of these amounts. This, despite the fact that Mr Makeleng, who she claimed had attended the negotiations with her, confirmed on affidavit that these values were correct, and that they came from the SAAT asset register.[901]

542.4. Ms Memela's attorney again detained the Commission with objections that they demanded to see the authenticated asset register before Ms Memela would answer any questions.[902]

542.5. Ms Memela then testified that all she had been given was the proposal from Mr Aires and the Board resolution.[903]

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

543. Ms Memela conceded that the Board resolution required the GPUs to be sold at their asset value as at that time.[904] It was put to her that R248 000 per unit did not accord

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900 Transcript 10 February 2020, p 56. The submission is in exhibit DD22(b), p 811

901 Exhibit DD25(b), p 632

902 Transcript 10 February 2020, pp 61-62

903 Transcript 10 February 2020, p 62

904 Transcript 10 February 2020, p 107

with the current asset value.[905] Ms Memela then pointed to a part of the minutes of the meeting of the SAAT Board of 15 June 2016, where the Board discussed the discrepancy between the purchase price of the GPUs in 2015 (R782 000) versus the depreciated asset value that Mr Phiri presented to the Board as at June 2016 (R648 000) which the Board assumed was the price at which the GPUs would be sold. The Board then debated whether to claim that shortfall from SAA because it was in terms of the SAA agreement with Swissport that SAAT was being forced to sell the GPUs.[906]

544. Ms Memela attempted to claim that this is why she was not worried about the shortfall in the offer from JM Aviation for R248 000 because SAA would pay it.[907] However, it is clear that Ms Memela based her claim on a portion of the minutes that had nothing to do with the price that was eventually agreed upon with JM Aviation. That portion of the minutes related to *internal accounting matters* between SAA and SAAT. When this was put to Ms Memela, she again went on a tangent about the fact that there was no proof that the amount given by Mr Malola Phiri was the correct asset register amount for the GPUs. Once again, Ms Memela disputed the authenticity of the asset register of SAAT.[908] But this misses the point and is entirely evasive. Ms Memela was required to negotiate a price with JM Aviation and did not appear to have had any regard to any information about the value of the goods in respect of which she was asked to negotiate the price. Ultimately, Ms Memela admitted that she did not

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905 Transcript 10 February 2020, p 107

906 Exhibit DD25(b), p 193

907 Transcript 10 February 2020, p 110

908 Transcript 10 February 2020, p 110-118

do anything to establish the current asset value or book value or any value of the GPUs. She simply took the word of JM Aviation.[909]

545. It was put to Ms Memela that clause 8.2 of the agreement with Swissport required that the sale would be at either book value or fair market value and yet she had done nothing to establish either one before agreeing to a price.[910] She was evasive and gave an answer that did not make sense.[911]

546. Ms Memela, in any event, confirmed that the final price was not agreed at the meeting with JM Aviation on 21 June 2016, which Mr Vosloo and Mr Makaleng denied attending. She said that it was only approved thereafter.[912] When she was asked who from SAAT did determine or approve the final price, Ms Memela would just not answer this straightforward question. She kept asking for clarification and

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909 Transcript 10 February 2020, p 119-121

910 Transcript 10 February 2020, p 121

911 Transcript 10 February 2020, p 121-122:

"Chairperson, the provision that Ms Hofmeyr is referring to of the Swissport and SAA Contract was concluded between – it went to the Board of SAAT. You see if maybe the owner of the GPU's – at that time when he actually was showing discomfort or maybe he was uncomfortable with selling all 12, but he wanted to sell seven. Maybe he came to SCM. Give the instruction or requisition request to go out on the market and test the market in terms of what could be found here before it went to the Board. I would have understood, because like then I will have some thing that says there is a requisition form where I mean the owner of these GPU's had requested a procurement to say okay. Let us test the market. Even if so Chair that he had – if he had maybe asked us. Maybe he was going to be told again that okay, but this thing has already been decided on the Swissport/SAA Contract. Remember I said earlier Chair yes Mr Makaleng raised the fact that he was not happy with selling all GPU's and I said Mr Malola-Phiri, Acting CEO, said our hands are tied. The Acting CEO said that our hands are tied, because this thing has been agreed upon to do this by the high powers. There is absolutely nothing that he could have done and for me to run or test the market to get the fair price would have been before the Board . . . And after the instruction Chair, because we do not just go out on a tender as we please.These letters Chair we usually write after we have spoken to the person who has given you instruction. Hence I said I am sure after – as much as we do not have evidence. You do not have evidence as well, but after receiving the email from Ms Sohkulu confirmating that okay this now is the price . . . "

912 Transcript 10 February 2020, p 82

then failed to get to the point.[913] She eventually stated that acceptance of the revised offer would have been through the invoice that she and Mr Phiri signed.[914] When asked directly whether she discussed the amount with Mr Phiri *before* she told Mr Vosloo that this was the approved "reviewed" price and to generate an invoice, or *before* signing the invoice, her answer was again evasive. She said "I do not remember I understand [Mr Phiri] as a person who would not sign anything until he understands or until he knows that, okay here is the feedback."[915]

547. It was put to Ms Memela that she was the only person who was sent the revised price on 21 June 2016. She accepted this. It was further put to her that her testimony was that she did not have the authority to agree to that price. She also accepted this. But then she added "But when it was signed by the CEO it means that I had a discussion with him".[916] She could not recall when it was that she spoke to Mr Phiri but confirmed it would have had to have been after Ms Sokhulu had sent the revised price on 21 June 2016 (at 2:49pm).[917]

548. On 22 June 2016 Ms Memela sent a notification to Ms Sokhulu at JM Aviation that their revised offer to purchase the GPUs had been accepted.[918] This letter stated, "your proposal for the purchase of the GPU's on behalf of Swissport was approved by the Board." It was put to Ms Memela that this was contrary to her previous testimony that she did not believe JM Aviation was acting on behalf of Swissport or would on-sell the GPUs to Swissport.[919] After speaking in circles for a long time, Ms

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913 Transcript 10 February 2020, p 82-86

914 Transcript 10 February 2020, p 86

915 Transcript 10 February 2020, p 87

916 Transcript 10 February 2020, p 89

917 Transcript 10 February 2020, p 95

918 Exhibit DD25(b), p 615

919 Transcript 10 February 2020, p 98

Memela eventually conceded that, in fact, she was aware, at the time, that JM Aviation was purchasing the GPUs on behalf of Swissport.[920]

549. Ms Memela conceded that she did not ask JM Aviation what price Swissport was willing to pay for the GPUs.[921]

550. The letter of 22 June 2016 stated further, "Kindly note that the approval is based on the latest price review by yourselves." Ms Memela testified therefore that she had received Mr Phiri's approval on the price between receiving Ms Sokhulu's email on 21June 2016 and responding with this acceptance on 22 June 2016.[922]

551. Mr Phiri provided the Commission with an affidavit in which he denied having spoken to Ms Memela between 21 and 22 June 2016 or ever having approved the final revised price.[923] He explained that he could not have had that discussion with her because he was in an EXCO meeting the entire day on 21 June 2016 and the email of 22 June 2016 was sent off at 5:43am and therefore the discussion could not have taken place on 22 June 2016 either.[924] He stated that, when Ms Memela gave him the invoice to sign, he was assured that this was the best price she could negotiate and that this had been done together with Mr Vosloo and Mr Makaleng.[925] However, as set out above, both Mr Vosloo and Mr Makaleng deny having been at that meeting. When this version was put to Ms Memela during her testimony, she

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920 Transcript 10 February 2020, p 98-101

921 Transcript 10 February 2020, p 101

922 Transcript 10 February 2020, p 103

923 Exhibit DD26, p 785, paras 72-74

924 Exhibit DD26, p 786, para 82. He also attached minutes of the meeting

925 Exhibit DD26, p 786, paras 75-76

persisted in her version and claimed that she had consulted Mr Phiri about the price during a break in the EXCO meeting.[926] Mr Phiri says they had no such discussion.

552. The day after JM Aviation had purchased the GPUs from SAAT, it sold them to Swissport for approximately R9.8million.[927]

553. As set out below, Ms Memela's willingness to sell the GPUs to JM Aviation at an amount well below their book value and without making any effort to assess their true market value benefitted JM Aviation to the tune of R 6 million.

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926 Transcript 1 October 2020, p 298

927 Transcript 7 November 2020, p 61

JM Aviation and AAR

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

556. Mr Schalk Human testified about SAAT's components tender. He explained that holding excessive stock is very expensive so companies will conclude a component contract where inventory is centralised by a service provider and the company uses the service and pays a premium on a monthly basis – usually at an hourly rate – for the use of those components. He said that this allowed the quick provision of replacement component parts.[928] He explained there are normally three components. The first is a base kit with core components that are placed on site so that there is quick access; then advance exchange services where the company can request a specific part to be shipped; and the third is the repair services in respect of those components.[929] The pricing is known as "power by the hour" or "PBH" – where the payment rate is charged only when the airplane is in flight and the component is being used, otherwise there is no charge on the component.[930]

557. Mr Human explained that, as an SOE, SAAT had to follow the procurement requirements of section 217 of the Constitution, and those in the SCM Policy of the Group. The SCM Policy provides that tenders should be advertised on the website and tender bulletin. The Policy allows for a fair chance for receipt of a responsive bid in response to a published request for proposals (RFP) that sets out the critical criteria. The Policy also distinguishes between those who compile the specifications of the bid and those who are responsible for its evaluation. The evaluation is

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928 Transcript 6 February 2020, p 14

929 Transcript 6 February 2020, p 15

930 Transcript 6 February 2020, p 16

conducted by the Bid Adjudication Committee (BAC).[931] During 2016, SAA and SAAT also had a Cross Functional Sourcing Team (*CFST*) that both compiled the specifications and conducted the evaluation but, pursuant to National Treasury Instruction 3 of 2016, this had to be a strict segregation of duties so that the same people that designed the bid would be different to those who evaluated it and those who made the ultimate decision. This led to a practice where the team was divided into three different committees.[932] The three Committees were the Bid Specification Committee; Bid Evaluation Committee; and Bid Adjudication Committee.[933]

558. Prior to February 2013 Air France provided component support services to SAAT. This contract was then advertised five times, each time with a separate bid number.[934]

First tender

559. The first tender was advertised on 16 February 2013, with a deadline of 30 March 2013.[935] The CFST recommended that the first tender be awarded to Israel Aerospace for the Boeing Fleet and Air France for the Airbus Fleet.[936] However, the tender was then retracted.[937] This was to allow an integrated approach where both the logistics (transport of components) and components would be combined in one award.[938]

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931 Transcript 6 February 2020, p 17-18

932 Transcript 6 February 2020, p 18-19

933 Exhibit DD22, p 8, paras 27-28

934 Transcript, 6 February 2020, p 20

935 Exhibit DD22, p 8, para 29

936 Transcript 6 February 2020, p 21-22

937 Transcript 6 February 2020, p 22

938 Transcript 6 February 2020, p 23

Second tender

560. The second tender was advertised on 29 October 2014 with of 2 December 2014 as the closing date. Bids were received. On 29 April 2015, the Board asked the CFST to stop the evaluation of the bids, and to put this process on hold for three months while they engaged with an American company, AAR Inc, on the possibility of concluding a memorandum of understanding (MOU) with that company. The Board then formally withdrew the tender on 18 June 2015.[939] The Board passed this resolution to allow the finalisation of a strategic partnership with AAR and to allow SAAT to test the market by requesting quotations from other parties for 6 months.[940] The purpose of this was to allow a confined bid to one party but to ensure that there was economic value by testing it against the market.[941]

561. The relationship between SAAT and AAR began in February 2015 when Ms Cheryl Jackson, who was the Vice-President: Government Affairs and Corporate Development of AAR, approached Mr Nico Bezuidenhout, the then Acting-CEO of SAA, and submitted a proposal for a partnership between AAR and SAAT. Despite there being an open tender process at the time, SAAT decided to put it on hold to explore this partnership.[942] Mr Human testified that it was generally prohibited for suppliers to have any interaction with bidders when a tender was open. This is explicitly prohibited in the SCM Policy of SAA and SAAT.[943] Nevertheless, the proposal – which offered the same services that were subject to the open tender[944]

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939 Transcript 6 February 2020, pp 26-27 and p 30

940 Transcript 6 February 2020, p 32

941 Transcript 6 February 2020, p 32

942 Transcript 6 February 2020, p 34

943 Transcript 6 February 2020, p 35

944 Transcript 6 February 2020, p 37

– was sent to Mr Zwane regarding the provisioning of components.[945] The Board resolved thereafter to approve the strategic partnership between SAAT and ARR. The Board also resolved to visit the headquarters of AAR in the USA in May 2015. The Board's idea was that a collaboration agreement would be signed between SAAT and AAR which would be the basis for a later memorandum of understanding.[946] It was resolved that Mr Zwane would be authorised to sign all necessary documents to effect the collaboration agreement and that, in the meantime, the tender process would be suspended for three months to allow this process to take place.[947] Mr Human testified that this was an unsolicited bid that was accepted without a competitive procurement process.[948]

562. SAAT's travel records reflect that Dr Tambi, Ms Kwinana, Mr Zwane and Ms Memela visited AAR in the US from 2-8 May 2015.[949] At this time, the second tender process was still open and AAR was one of the bidders. Mr Human testified that the SCM only allowed engagement with bidders in very circumscribed circumstances where the suppliers would all be protected. One example is where, during the evaluation stage, samples may be provided. However, there is nothing in the policy allowing the Board and head of procurement to engage with bidders.[950] Ms Kwinana claimed in response to a rule 3(3) notice relating to Mr Human's evidence that supplier visits were not unusual and SAAT needed to know who they were dealing with before signing an MOU. Mr Human responded that, if this was for the evaluation of a service, then members of the CFST might be justified in undertaking such a visit. The type

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945 The proposal is in DD22(c), p 1128

946 Exhibit DD22(c), p 1056. See also transcript 6 February 2020, p 40

947 Exhibit DD22(c), p 1058. See also p 1079

948 Transcript 6 February 2020, p 41

949 Transcript 6 February 2020, p 46

950 Transcript 6 February 2020, p 46

of visit would be confined only to the evaluation part of the tender. The evaluation would not be performed by the Board or executives of SAA.[951]

563. The Commission's investigations also revealed that a representative of AAR had met with Ms Memela to get an understanding of SAAT support requirements and needs apart from what was contained in the RFP. Mr Human testified that this type of interaction would have been totally inappropriate given that this was a bidder in an open tender process.[952] This inappropriateness was in fact confirmed by Mr Mike Kenny who was the General Manager for Marketing at SAAT at the time. He sent an email to Ms Memela in response to an invitation from her that he should attend a meeting with AAR. In the email, he said that he was concerned about discussing component support issues with a bidder when the tender process was still ongoing.[953]

564. There was also correspondence between Ms Jackson and representatives of SAA during the time that the second tender was still open that revealed that she was already aware, before any Board decision had been taken on the matter, that the tender was going to be cancelled. Mr Human testified that it was irregular for a bidder to be aware of an intended cancellation of a bid before it actually occurred. He said that it suggested that information had been made available to a supplier outside of the normal procurement process.[954]

565. After the tender had been cancelled, a memorandum of understanding for the same services as sought in the tender was concluded between SAAT and AAR at the Paris

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951 Transcript 6 February 2020, p 47

952 Transcript 6 February 2020, p 49

953 Transcript 6 February 2020, p 51-52

954 Transcript 6 February 2020, p 55-56

Air show in June 2015. The memorandum provided for collaboration between AAR and SAAT in connection with the provisioning of components as part of a joint venture.[955] The MOU was in breach of section 54 of the PFMA which required the Board to seek permission from National Treasury if it intended to conclude an unincorporated joint venture.[956] The MOU contemplated such a joint venture. One of the SAAT Board members at the time, Mr Barry Parsons, raised concerns about this with the Board but his concerns were not addressed[957]. He then submitted his resignation on 24 July 2015.[958].[959] In the letter, he said that there appeared to be some "hidden agenda" in the AAR strategic partnership with SAA that required urgent independent investigation.[960]

Third tender

566. On 14 July 2015[961] SAAT issued a closed bid for a short-term tender to obtain services pertaining to components for five months – it was issued to Air France, Israel Aerospace, Pegasus, and Lufthansa. The reasons for the short-term nature of the tender was to give SAAT time to conclude a final agreement with AAR. The MOU had to be converted to a final collaboration agreement.[962]

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955 Transcript 6 February 2020, p 57

956 Transcript 6 February 2020, p 59

957 Transcript 6 February 2020, p 60

958 Transcript 6 February 2020, p 66

959 Transcript 6 February 2020, p 60

960 Exhibit DD22(d), p 1676

961 Exhibit DD22, p 28, para 98

962 Transcript 6 February 2020, p 68

567. This tender had not, however, been provided to AAR and SAA received legal advice at the time that AAR's exclusion from the process could be challenged. The tender was then withdrawn.[963]

Fourth tender

568. The same tender was then reissued with the only difference being that it also included AAR.[964]

569. AAR submitted a bid for this tender, with Nziza Aviation as its BEE partner.[965]

570. SAAT awarded the tender for five months to Air France to ensure continuity of the service while it tried to finalise an agreement with AAR arising from the MOU in the meantime.[966]

Fifth tender

571. The fifth tender was issued on 8 December 2015, with 19 January 2016 as the closing date. It was for a five-year period.[967] Part of the critical criteria for its award included that the bidder must have sufficient experience and equipment; be financially sound; be certified by various aviation authorities; provide access to pool or exchange bases; agree to a No Fault Rate of 20% and a Beyond Economic Repair Rate of 70%.[968] Another critical criteria was supplier development. The bid document stated that a bidder had to indicate what value they would place on each area of

963 Transcript 6 February 2020, p 68

964 Transcript 6 February 2020, p 68

965 Transcript 6 February 2020, p 69

966 Transcript 6 February 2020, p 69

967 Transcript 6 February 2020, p 70-71

968 Transcript 6 February 2020, p 72

development outlined above which they would be imparting to the local vendor. The document also provided for the National Industrial Participation (*NIP*) obligations, which requires foreign entities, in contracts over USD10million, to conclude an agreement with the DTI, where 30% of the contract value had to go back to South African development.[969]

572. AAR submitted its bid for this tender together with its new joint-venture partner, JM Aviation.

573. The CFST was responsible for evaluating the tender. The team recommended that Lufthansa be appointed for both the Boeing and Airbus fleets. Lufthansa had offered the lowest price. The next lowest was AAR together with JM Aviation and then Air France.[970] On 25 April 2016, the CFST met again and decided to ask the bidders to confirm that they understood the scope correctly and to list their current customers because the prices that were provided appeared to be too low. This is known in the industry as "low balling". It occurs when a bidder underquotes and then the service is compromised due to financial constraints.[971]

574. Ms Memela, who at the time was the Chair of the BAC, joined the CFST meeting on 25 April 2016 and emphasised the need to urgently finalise the project. Thereafter, the team decided that even though Lufthansa was the lowest price, because of the risk of low balling and the outstanding NIP obligations from Lufthansa, they changed their recommendation to be for Air France. There was similarly a concern about low-balling from AAR/JM Aviation which is why Air France was ultimately chosen.[972]

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969 Transcript 6 February 2020, p 76-77

970 Transcript 6 February 2020, p 80-81 and p 83

971 Transcript 6 February 2020, p 84-85

972 Transcript 6 February 2020, p 91

575. Mr Human testified that it is not common practice for the chair of the BAC to attend the evaluation committee meeting as the adjudication and evaluation are supposed to be performed as separate functions, so that they serve as checks and balances on the process.[973] On 6 May 2016, the BAC also resolved by round robin resolution that their recommendation was for Air France to be awarded the tender.[974]

576. On 9 May 2016 the Board of SAAT held a special meeting to deal with the award of the components tender.[975] At the meeting, the Board noted that management (Exco) had recommended that the tender be awarded to Air France. The Board did not accept this recommendation. Its reason was that Air France was resistant to "align itself with SAAT's development agenda". This was said to be a reference to "supply development". It also stated that "the benefits as outlined by the submission as a result of selecting Air France were not compelling enough to position the latter as the preferred bidder". The Board concluded that the concerns regarding JM/AAR "low balling" could be mitigated by reducing each party's obligations to writing. The Board resolved, therefore, not to follow management's recommendation and rather to award the components support services tender for both Boeing and Airbus fleets to the joint venture of AAR and JM Aviation for five years "subject to the mitigation of risk".[976]

577. In his evidence Mr Human accepted that it was the Board's role to interrogate recommendations received from BAC or the CFST, but he testified that, generally, when it did so in a procurement context, the appropriate SCM policy-stipulated action would be to then refer the matter back to the BAC and to tell them how they had erred so they could reconsider. The BAC is then also in a position to refer the matter

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973 Transcript 6 February 2020, p 86

974 Transcript 6 February 2020, p 92

975 The minutes may be found in exhibit DD22(e), p 2302

976 Exhibit DD22(e), p 2305

back to the CFST to reconsider if there are grounds for doing so. After the recommendation has been referred back to these bodies, a new recommendation can then be made to the Board. He stated that it was unusual for the Board simply to make a decision that was entirely different to the recommended one without reverting to these bodies.[977]

578. On 13 May 2016 a letter of award was sent out to AAR/JM Aviation.[978] On 7 July 2016[979] the contract was concluded between the parties. Mr Kenny provided the Commission with an affidavit explaining that the negotiation process had been quite contentious. He said that, once the contract had been signed, he asked Ms Memela for a copy of the contract. However, she refused to give him the whole contract, which he noted was extremely unusual, and she told him that she only gave him part of the contract in order "to protect [him]".[980]

579. The contract[981] provided that, prior to the commencement date, JM/AAR would invoice SAAT for the deposit. It also provided that SAAT would pay the deposit by way of an irrevocable letter of credit from a bank and that JM/AAR would have the right to set off any SAAT invoices not paid by the due date against the deposit. If this occurred, SAAT would have to continue to replenish the deposit. Mr Human testified that this was a normal clause for such an agreement.[982]

580. However, the Commission's investigations revealed that the manner in which the clause was actually implemented was unusual. JM/AAR in fact invoiced SAAT for

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977 Transcript 6 February 2020, p 104-105

978 Transcript 6 February 2020, p 110

979 Transcript 6 February 2020, p 112

980 Exhibit DD22(g), p 3150

981 Exhibit DD22(f), p 2325. See clause 4.26

982 Transcript 6 February 2020, p 114-115

the value of the deposit, amounting to USD4.382million (around R60million), and this invoice was paid in cash and not by credit letter.[983] Mr Human testified that he was unable to find any justification for this payment in cash, which would have put a great deal of strain on SAAT's cash flow and would put SAAT at risk if AAR did not deliver. He also explained that, to his knowledge, there had never been any drawdowns from that deposit for outstanding invoices.[984]

581. In 2018 SAAT conducted a review of the contract. SAAT was dissatisfied with various aspects of the performance, including the long turnaround times for the repair of components. Some components were out for repairs for more than 600 days; there was incorrect invoicing; the contract provided that SAAT would only be responsible for 35% of the beyond economic repair costs but was being invoiced up to 100% with an additional mark up and handling fee; AAR was charging excessive penalties against SAAT for slow returns of components but did not itself suffer any penalty for late repair; there had been no NIP obligation benefits;[985] the contract provided for reciprocal work to be given to SAAT to be done at its workshops but no such work had materialised.[986] The review revealed that the total contract expenditure paid by SAAT was R1.8billion.[987]

582. In terms of JM Aviation's JV agreement with AAR, 5% of all revenue was to go to JM Aviation. This amounted to approximately R53million.[988]

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983 Transcript 6 February 2020, p 115

984 Transcript 6 February 2020, p 116

985 Transcript 6 February 2020, p 117

986 Transcript 6 February 2020, p 118

987 Transcript d6 February 2020, p 121

988 Transcript 6 February 2020, p 123

583. In so far as the NIP obligations under the components' tender was concerned, a representative of the Department of Trade and Industry furnished the Commission with an affidavit which stated that SAAT and JM Aviation both had an obligation to inform it about the conclusion of the contract within 5 days but had failed to do so at all.[989]

584. Mr Human testified that Air France instituted litigation proceedings to challenge the award of the tender. However, the Court had refused to grant an urgent interim interdict and Air France did not pursue final review relief.[990]

Ms Sambo and AAR

585. Ms Sibongile Rejoyce Sambo testified before the Commission that she was a young entrepreneur who was attempting to break into the aviation industry. In 2004, she registered a company, SRS Aviation, and tendered for various businesses in the industry. SRS was the first 100% Black female owned aviation company in South Africa that provided private jets and helicopters licenced by the Civil Aviation Authority (CAA).[991] In 2009, after the 2008 economic crisis, SRS decided to diversify into providing airplane parts and jet fuel for airlines. SRS was introduced to the SAAT database and it would receive quotations and requests to supply parts and components.[992]

586. Ms Sambo testified that she was invited by the DTI to be part of a business delegation to Chicago where she was introduced to AAR. She had already identified AAR as a possible business partner and thought she could use the opportunity to try

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989 Exhibit DD22(g), p 2972. See in particular p 2976, para 16

990 Transcript 6 February 2020, p 127-128

991 Transcript 4 February 2020, p 194

992 Transcript 4 February 2020, p 195

and forge a business relationship.[993] She proposed that she become AAR's African partner to explore business opportunities on the continent.[994] In particular, she met with Ms Cheryl Jackson and suggested business opportunities with SAA's subsidiary SAAT, which provides technical services to airlines.[995]

587. Ms Sambo proposed that they conclude an agency agreement so that AAR would be SRS's official partner. Ms Jackson indicated that AAR did not conclude agency agreements with foreign companies unless there was a concrete deal on the table. Ms Jackson wanted more information about exactly what the opportunities were at SAAT. She did state verbally to Ms Sambo that AAR would pay SRS 8% of the value of a contract if SRS facilitated a contract between SAAT and AAR, and SRS could act as the BEE partner in the transaction.[996]

588. Between 2013 and 2015 Ms Sambo engaged with AAR and became its bid-partner in SAAT's first and second components tenders. During this period, she introduced AAR to Mr Zwane, in his capacity as Acting-CEO at SAA. It was during a meeting with Mr Zwane that Ms Sambo was first introduced to Ms Memela as the head of procurement at SAAT.[997]

589. Ms Sambo testified that, over time, she and Ms Memela became friends. They were friends on Facebook. In April 2015, Ms Memela told Ms Sambo that various members of SAAT would be visiting AAR in Chicago.[998] Ms Sambo asked Ms

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993 Transcript 4 February 2020, p 197

994 Transcript 4 February 2020, p 198

995 Transcript 4 February 2020, p 198-199

996 Transcript 4 February 2020, p 201-202. See also p 203

997 Transcript 5 February 2020, p 13

998 Transcript 5 February 2020, p 50

Jackson if she could also attend the trip – even financing herself – but Ms Jackson refused.[999]

590. Ms Sambo arranged for Ms Memela's visa for the US trip to be processed on an expedited basis.[1000] Ms Sambo noted from Facebook that the trip to the US went ahead in May 2015.[1001]

591. Some time in 2015 before the trip, Ms Memela called Ms Sambo and told her that Ms Kwinana would like to speak to her. Ms Kwinana then came for a meeting at Ms Sambo's residence. She told Ms Sambo at the meeting that she intended to resign from SAAT. She wanted to know the nature of Ms Sambo's relationship with AAR. She indicated that, when she left as Chair, she "wanted to get her hands on other contracts at SAA such as . . . a contract for aircraft tyres, a contract for logistics" and components. She asked Ms Sambo to introduce her to Ms Jackson directly. Ms Sambo did so and Ms Kwinana began talking to Ms Jackson directly.[1002] Ms Sambo testified that the meeting made her uncomfortable because it seemed as if something untoward was happening. She therefore did not want to know the details of what Ms Kwinana meant about "getting her hands on" certain contracts. Ms Sambo said she "did not want to really entertain it".[1003]

592. Within a few weeks of this meeting, Ms Kwinana called Ms Sambo again and asked to meet with her. They met at the Protea Hotel with Dr Tambi. Ms Kwinana explained to Ms Sambo that, once she had left SAAT, Dr Tambi would "look after her interests at SAAT", which were the contracts she wanted to "get her hands on".[1004] Ms

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999 Transcript 5 February 2020, p 51

1000 Transcript 5 February 2020, p 54-55

1001 Transcript 5 February 2020, p 55-56

1002 Transcript 5 February 2020, p 57

1003 Transcript 5 February 2020, p 59

1004 Transcript 5 February 2020, p 62

Kwinana then also introduced Ms Sambo to Ms Koekie Mdlulwa and introduced her as "ihashi" (which is a horse in isiZulu). Ms Kwinana said that what she meant by that was that Ms Mdlulwa was a runner, a person that is a go-between for making deals for her. Ms Kwinana explained that as part of her interest in the components tender, she wanted Ms Mdlulwa to go and negotiate on her behalf with AAR, and that she would make sure that AAR got the contract. Ms Kwinana explained that in order to secure the contract, AAR would have to pay her and other parties R100million. The idea was that Ms Mdlulwa would go and negotiate and collect this money.[1005]

593. Ms Sambo testified that it then became clear to her that things had moved into "corruption mode". Ms Kwinana said to her that Ms Sambo would not be part of the group receiving the R100million that would be negotiated for herself and "my people inside SAAT".[1006] She explained that "her people" inside SAAT were Mr Zwane, the CEO of SAAT, and Ms Memela, the Head of Procurement at SAAT.[1007]

594. In her response to the rule 3(3) notice relating to Ms Sambo's evidence, Ms Kwinana confirmed that she had this meeting at the Protea Hotel with Ms Sambo and Dr Tambi. However, she said that she did not understand why she would tell Ms Sambo that she wanted to get her hands on certain contracts because she had an audit firm and a property development company and was, therefore, not going to be "destitute" after leaving SAAT. In fact, Ms Kwinana claimed that it was Ms Sambo who told her that she (i.e. Ms Sambo) had been the "ihashi" for AAR since 2011 without any

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[1005] Transcript 5 February 2020, p 63-64

[1006] Transcript 5 February 2020, p 64-66

[1007] Transcript 5 February 2020, p 68

remuneration and that "*they"* owed Ms Sambo R100 million. Ms Kwinana said that she told Ms Sambo that SAAT could not intervene in such a matter.[1008]

595. Ms Sambo testified that she never said any of those things. She said that she did not even know what an "ihashi" was until Ms Kwinana explained it to her. Ms Sambo stated that she also did not mention to Ms Kwinana her problems with AAR at the time.[1009] It must be noted that Ms Kwinana's response to the Commission did not deal at all with Ms Sambo's evidence regarding the first meeting at Ms Sambo's residence.[1010] Ms Sambo testified that after this meeting with Ms Kwinana, she told her team at SRS about the discussion.[1011]

596. After Ms Sambo's meeting with Ms Kwinana, Ms Jackson contacted her and gave her feedback on the SAAT trip to AAR's premises and told her that AAR was planning a trip to SAAT's premises.[1012] The CEO of AAR, Mr David Storch, invited Ms Sambo to a party at the Paris Air Show on 16 June 2015. Ms Sambo testified that she declined the invitation because she felt that AAR had been excluding her from activities surrounding the contract with SAAT despite the expense and time she had taken to introduce AAR to the South African market. When the SAAT delegation returned from the Paris Air Show, AAR had concluded the MOU referred to above with SAAT.[1013]

597. In August 2015 Ms Sambo had a meeting with Ms Jackson at a restaurant. Ms Sambo testified that Ms Jackson was very frustrated about not managing to secure

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1008 Exhibit DD18, p 502.

1009 Transcript 5 February 2020, p 74-75

1010 Transcript 5 February 2020, p 77

1011 Transcript 5 February 2020, p 78

1012 Transcript 5 February 2020, p 79

1013 Transcript 5 February 2020, p 80

a contract with SAAT and said that AAR was putting so much pressure on her to get the contract. According to Ms Sambo, Ms Jackson insisted on getting information from Ms Sambo to help them win the bid.[1014] Ms Sambo then contacted Ms Memela explaining that AAR was frustrated and wanted information on the bid. Ms Memela asked her to meet her at a Shell garage in Alberton, Johannesburg, that evening to get information.[1015]

598. That evening, Ms Sambo went to meet Ms Memela at the Shell Garage near the SARS offices in Alberton. Ms Sambo testified that she got into Ms Memela's vehicle and Ms Memela gave her information on a flash disk. It was an excel spreadsheet of previous pricing for the components bid. She then drove back to the restaurant where Ms Jackson was. She told Ms Jackson that she had this information but AAR kept refusing to pay her and put her on a retainer. She wanted to use this information as leverage[1016] to secure a retainer.[1017]

599. In her response to the rule 3(3) notice relating to Ms Sambo's evidence, Ms Memela denied having met Ms Sambo in Alberton. She denied having given her any information suggested by Ms Sambo. She stated that she never met with Ms Sambo anywhere outside of SAAT and never gave her a memory stick with bidder identities and prices and claimed that she did not even have access to that information as she was not on the CFST.[1018] However, Ms Memela's version was shown to be false because Ms Sambo then produced the actual memory stick and gave it to the

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[1014] Transcript 5 February 2020, p 95-96

[1015] Transcript 5 February 2020, p 96

[1016] Transcript 5 February 2020, p 111

[1017] Transcript 5 February 2020, p 97

[1018] Exhibit DD18, p 512

Commission. The memory stick contained an excel spreadsheet with pricing information on it.[1019]

600. The data forensic team at the Commission imaged the memory stick that Ms Sambo produced and advised that the spreadsheet was indeed created and last saved on 3 August 2015 and that the user who saved it was Ms Memela. 3 August 2015 was 16 days before AAR submitted its tender on the five month components contract. [1020]

601. This was put to Ms Memela when she testified before the Commission.[1021]

602. Ms Memela denied that she had given the memory stick to Ms Sambo and then her lawyer, Ms Mbanjwa, objected to the line of questioning and indicated that they wanted to have their own expert consider the metadata on memory stick.[1022] However, despite being given numerous opportunities by the Commission to collect the memory stick and have it analysed, Ms Memela never did so. The evidence therefore remains unchallenged. It must be considered together with the affidavit from the author of the excel pricing document, Mr Leon Robbertse, who explained exactly how and when he created the document, and confirmed that it was a document with confidential bidder information on it, created in 2015.[1023] In the light of this evidence, the reasonable conclusion to draw is that that Ms Memela provided Ms Sambo, a bidder, with confidential bid pricing information.

603. According to Ms Sambo, after her meeting with Ms Memela at the Shell Garage in Alberton, she drove back to the restaurant where Ms Jackson was waiting for her.

[1019] Transcript 5 February 2020, p 102

[1020] Transcript 5 February 2020, p 105. The actual spreadsheet is in exhibit DD18, p 553-557

[1021] Transcript 10 February 2020, p 139-141. The affidavit of the forensic expert is in exhibit DD25(b), p 653

[1022] Transcript 10 February 2020, p 144-146

[1023] Transcript 11 February 2020, p 14 -15

When Ms Sambo returned with the memory stick and asked for AAR to review their decision not to put her on retainer, Ms Jackson told her that she could not pay her in return for the information because that would be regarded as bribery and corruption. Ms Sambo said at the time that she had not thought about it like that but realised that it would actually be inappropriate. Ms Sambo testified that she decided not to give the information to AAR. Ms Sambo conceded that asking SAAT for information while there was an open bid was improper. She stated that she felt under pressure to deliver something to AAR as she felt that she was being sidelined. Ms Sambo stated that, when she realised that it was wrong, she asked her employees to take the memory stick and keep it far away from her. It therefore proved difficult to find it when the Commission began engaging Ms Sambo but in the end, she managed to secure it from one of her former employees and it was handed over to the Commission. Ms Sambo testified that she ultimately never actually gave Ms Jackson the information.[1024]

604. In September 2015 Ms Jackson invited Ms Sambo to a discussion about the five-year components' services bid. Ms Sambo was surprised to receive this invitation given their previous interaction.[1025] However, when Ms Sambo went to meet Ms Jackson, she found her sitting with Mr Ndzeku.[1026] Mr Ndzeku explained that he was introduced to Ms Jackson through a mutual friend and then left indicating that he and Ms Jackson were going to meet later.[1027] Ms Sambo had previously been introduced to Mr Ndzeku as being part of Swissport.[1028]

[1024] Transcript 5 February 2020, p 112

[1025] Transcript 5 February 2020, p 119

[1026] Transcript 5 February 2020, p 120

[1027] Transcript 5 February 2020, p 121

[1028] Transcript 5 February 2020, p 121

605. Ms Jackson and Ms Sambo then proceeded to a meeting that had been arranged with Ms Mdlulwa.[1029] Ms Mdlulwa stated that she was representing Ms Kwinana and her people at SAAT and that they wanted R100million from AAR to make sure it got the contract. Ms Sambo agreed that she would continue to be the direct liaison with AAR.[1030] Ms Jackson told Ms Mdlulwa that she did not have the authority to agree to this arrangement and payment but that she would go back and speak with her principals.[1031]

606. After the final five-year components tender had been issued in December 2015, Ms Memela told Ms Sambo that Ms Kwinana wanted to meet with her again. Ms Sambo also testified that, around this time, Ms Memela had told her that AAR was at that time partnering with JM Aviation, which was Mr Ndzeku's company.[1032]

607. The purpose of the meeting was to find out what Ms Sambo knew about Mr Ndzeku, whether he had interactions with Ms Jackson before the tender was advertised and also to discuss another BBBEE structure.[1033] At the meeting with Ms Kwinana, Ms Kwinana asked whether Ms Sambo had resolved her issues with AAR. Ms Sambo explained that this was because she had complained regularly to Ms Memela over this period about feeling excluded by AAR and she assumed Ms Kwinana had heard about it through Ms Memela.[1034] Ms Sambo explained that it seemed from the meeting that Ms Kwinana was driving the process and was in control of who would ultimately partner with AAR. She even called Ms Jackson during the meeting to ask if they could drop Mr Ndzeku and revive the partnership with SRS. There was no

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[1029] Transcript 5 February 2020, p 121-122

[1030] Transcript 5 February 2020, p 122

[1031] Transcript 5 February 2020, p 125

[1032] Transcript 5 February 2020, p 128-129

[1033] Exhibit DD18, p 33, para 114

[1034] Transcript 5 February 2020, p 128-129

conclusion to that suggestion during the telephone call in the meeting. Ms Sambo said she could not remember any further details about the meeting, save that Ms Kwinana wanted to know if Ms Sambo knew Mr Ndzeku and appeared to want to know more about him. Ms Sambo told her to google him.[1035]

608. At some stage, Ms Memela called Ms Sambo to a meeting in Alberton where she told her that the five-year tender had been awarded to AAR (with JM Aviation). Ms Sambo testified that she broke down because she had been so betrayed and had put so much effort and financial resources into introducing AAR and then some other party, JM Aviation, got involved at the last minute in a R1.3billion contract.[1036]

609. Ms Memela told Ms Sambo in the meeting that Ms Kwinana had introduced Mr Ndzeku to her and asked her to assist Mr Ndzeku in preparing the bid.[1037] She even forwarded emails to Ms Sambo showing that Ms Memela had helped JM Aviation to finalise the draft joint venture agreement and had been requested to help JM Aviation and AAR to finalise their bid documentation.[1038] These emails were presented to the Commission.

610. During her testimony, Ms Memela denied that it was inappropriate for her to have had such communication with JM Aviation while the bid was still open. She said that there was no problem with such communication because she was not on the bid evaluation committee and it was part of her job to educate BEE companies about tender requirements. She denied that she said Ms Kwinana had asked her to help JM Aviation, and also said Ms Sambo was making this story up because Ms Memela

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[1035] Transcript 5 February 2020, p 131

[1036] Transcript 5 February 2020, p 132-133

[1037] Transcript 5 February 2020, p 133

[1038] Transcript 5 February 2020, p 135. The emails may be found in exhibit DD18, p 367-442 and p 339

had refused to give her pricing and other information when she had asked previously.[1039] As the report sets out below, Ms Memela's version on this issue was not credible.

611. After the meeting and having received these documents, Ms Sambo told Ms Memela that she intended to sue her and AAR about the whole process of the award of the bid. Ms Memela told her that there were others who had helped JM Aviation to compile the bid, including Ms Princess Tshabalala, senior manager of SCM at SAAT,[1040] and Mr Zwane, the CEO of SAAT.[1041] Ms Sambo testified that Ms Tshabalala approached her at SAAT later and asked her not to sue because she would lose her job. She told Ms Sambo that Ms Memela had promised her that they would get paid once AAR and JM Aviation had been awarded the tender.[1042]

612. Ms Sambo provided the Commission with whatsapp messages sent to her by Ms Memela.[1043] One of the messages from Ms Memela stated, among other things: "All I ever did was help you. Even the info that you are using now was sent to you in good faith to help you. Even before that when you wanted price info for Cheryl. I gave that to you as I never thought you would one day plan to use it against me". The whatsapp message also said: "I had to tell the CEO, Yakhe and Princess, because as much as you would think you are destroying me they will also get affected."

1039 Exhibit DD18, p 512

1040 Transcript 5 February 2020, p 157-159

1041 Transcript 5 February 2020, p 164

1042 Transcript 5 February 2020, p 160

1043 Exhibit DD18, p 517-532

613. The whatsapp communications between Ms Sambo and Ms Memela were also put to Ms Memela.[1044] Her lawyer, Ms Mbanjwa, objected to Ms Memela being asked any questions on the whatsapp messages because they wished to challenge their authenticity, given that the evidence was of an electronic nature.[1045] I, nonetheless, permitted the questioning and indicated to Ms Memela that she could challenge the authenticity of the messages in due course with expert evidence if she wished to do so.[1046] However, she never did so. When questions were put to Ms Memela about the content of the whatsapp messages, Ms Memela never actually denied that she had sent them. Instead, she simply argued about what their content meant.

614. For example, it was put to Ms Memela that the whatsapp messages confirmed that she had given pricing information to Ms Sambo, despite the fact that Ms Memela had denied doing so in her response to the rule 3.3 notice arising from Ms Sambo's evidence. As set out above, In the whatsapp messages, Ms Memela had said that, when she gave Ms Sambo pricing information for Ms Jackson, she did not expect that it would later be used against her.

615. In response to this, Ms Memela made the remarkable claim that any pricing information that she was referring to in the messages was in the public domain. However, it was then put to her that pricing information in the public domain could never be used against her later. Ms Memela had no adequate answer to this obvious point.[1047]

[1044] Exhibit DD18, p 532

[1045] Transcript 11 February 2020, p 4-5

[1046] Transcript 11 February 2020, p 4-5

[1047] Transcript 11 February 2020, p 25-29

Ms Memela's response

616. Ms Memela testified that, in her role as head of procurement at SAAT, she would receive a recommendation from the bid evaluation committee (part of the CFST). She would make sure that she was satisfied with it from a legal perspective and would then sign off to indicate that she supported the recommendation as head of department of supply chain management.[1048] This would then go to Exco, which was made up of the general managers of SAAT. Once Exco had confirmed that it supported the recommendation, it would then go to the BAC. The BAC would then check whether the evaluation had been done regularly and transparently in terms of section 217 of the Constitution and the PPFA and all other legal requirements.[1049] After the BAC process had been completed, the CEO,[1050] on behalf of management,[1051] would place the final recommendation before the Board for consideration.[1052] Ms Memela confirmed that in May 2015 she was the Chair of the BAC,[1053] but that she recused herself from the components tender.[1054]

617. As set out above, before AAR and JM Aviation submitted their bid in early 2016 for the final components' tender, there were emails exchanged between Ms Sokhulu, of JM Aviation, and Ms Memela on 14 January 2016. During her testimony before the Commission, Ms Memela was asked to comment on the appropriateness of her communication with Ms Sokhulu about AAR/JM Aviation's tender documents in circumstances where the tender was still open. These emails asked for approval of

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1048 Transcript 7 February 2020, p 52

1049 Transcript 7 February 2020, pp 47-48

1050 Transcript 7 February 2020, p 54

1051 Transcript 7 February 2020, p 55

1052 Transcript 7 February 2020, p 49

1053 Transcript 7 February 2020, p 57

1054 Transcript 7 February 2020, p 58

the joint venture agreement between AAR and JM and for approval of the actual bid submission.[1055] Ms Memela did not deny having communicated with Ms Sokhulu as set out in the emails. Instead, she claimed that the communication was not in breach of the tender requirements or was not untoward in any way. She testified that it was only if someone was sitting in the evaluation committee, the CFST, that there would be a conflict of interest.[1056] She also said that, because there was no email in response with track changes on the document in the Commission's possession, then there was nothing wrong with her interactions with Ms Sokhulu.[1057] However, she later testified that she probably did respond to the email later by telephone to say that the supplier development aspect of the bid was in order.[1058] It is noteworthy that the emails were not sent to Ms Memela's official SAAT email address but to a personal one.[1059] Ms Memela claimed that this was just because, when she was at home, she would only use her private email account.[1060] However, the email in question was sent at 4pm on a week day which is a time when she ought to have been at work.[1061]

618. It was put to Ms Memela that the bid document provided that it was prohibited under the bid for there to be any communication between a bidder and somebody other than the project manager at SAAT and that any such communication would mean the bidder would be eliminated.[1062] Ms Memela testified that she was aware of this

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[1055] Transcript 10 February 2020, p 149

[1056] Transcript 10 February 2020, p 150

[1057] Transcript 10 February 2020, p 151

[1058] Transcript 10 February 2020, p 152-153

[1059] Transcript 10 February 2020, p 161

[1060] Transcript 10 February 2020, p 162

[1061] Transcript 10 February 2020, p 163

[1062] Transcript 10 February 2020, p 165. The relevant extract is in DD22(e), p 2052, clause 1.6. It read: "All queries or information relating to this document or surrounding the bid must be addressed to the Project Manager as stipulated on page 1 of this RFP in writing". The Project Manager is stipulated on p 2043 as Leon Roberts and

prohibition.[1063] However, Ms Memela claimed that this communication did not eliminate JM Aviation from the bidding process because the clause was meant to refer only to those who are sitting on the bid evaluation committee, the CFST. When asked to identify where in the clause or in the bid document as a whole this was set out, Ms Memela conceded it was not there.[1064] Eventually, Ms Memela changed her version and claimed that she was actually not aware of this prohibition at the time. She said that she did not know that there was anything wrong in what she was doing.[1065] She ultimately conceded, that had she known about the bid condition, she would have raised it with the Project Manager.[1066]

619. JM Aviation/AAR also breached the tender requirements in other ways. They failed to uphold the *NIP* obligations in the tender. When asked about this, Ms Memela testified that even though the tender amount fell within the threshold for the imposition of NIP obligations, SAAT was permitted not to apply NIP obligations to the contract provided that they imposed their own supplier development requirements instead and that this was set out in the tender document.[1067] However, she conceded that in fact, in the tender itself, NIP obligations were imposed.[1068] However, she claimed that that was an error and that, because the supplier development requirements applied, NIP was not obligatory.[1069] She later claimed that

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Evelyn Fallot. Clause 1.6.2 provides: "Any queries addressed to individuals other than as stipulated whether verbal, telephonic, handwritten or in any other form, will eliminate the bidder from this process"

[1063] Transcript 10 February 2020, p 166

[1064] Transcript 10 February 2020, p 167

[1065] Transcript 10 February 2020, p 172-173

[1066] Transcript 10 February 2020, p 178

[1067] Transcript 10 February 2020, p 180

[1068] Exhibit DD22(e), p 2083. At page 2085, clause 4.1 it provided that the successful bidder must make contact with the DI and then it states that the bidder must satisfy NIP obligations and set out how it will do so. Then further on p 2047 are the conditions of the bid, and in clause 1.2 it says "This bid is subject to an offset obligation under the National Industrial Participation requirements mandated by the South African Department of Trade and Industry."

[1069] Transcript 10 February 2020, p 182-183

it was because one could have either direct or indirect NIP obligations and indirect obligations could actually encompass supplier development.[1070]

620. It was put to Ms Memela that the DTI had reviewed the tender and the AAR/JM Aviation bid in March 2019 and concluded that SAAT or JM Aviation ought to have immediately alerted DTI to the fact that the agreement had been concluded.[1071] Ms Memela's answer was evasive.[1072] It is clear from the terms of the RFP that the NIP obligation applied and either JM Aviation or SAAT was required to notify the DTI of the contract but both failed to do so.

621. In addition, the RFP provided that, if any person employed by the bidder directly or indirectly offered or gave anyone in the employ of SAAT any consideration or gift, they would be disqualified and excluded from any future bid with SAA.[1073] It was put to Ms Memela that JM Aviation had in fact made a payment to Ms Memela of R2.5million, and that this was in breach of the tender requirement which should have excluded JM Aviation/ AAR from the tender process.[1074] Ms Memela denied this on the basis that she was not on the bid evaluation committee and so there was no possible reciprocation for the payment.[1075] She claimed that, because the R2.5million payment to her was in respect of her mother's property, it was not a gift or gratuity.[1076]

[1070] Transcript 10 February 2020, p 192-194

[1071] Transcript 10 February 2020, p 194. The affidavit from Mr October of the DTI is in exhibit 22(g), p 2972 and the relevant paragraph is 2975, para 15

[1072] Transcript 10 February 2020, p 199-201

[1073] Exhibit DD22(e), p 2054, clause 1.13, headed "Corruption". "If a bidder or any person employed by the bidder is found to have either directly or indirectly offered, promised or given to any person in the employ of SAAT any commission, gratuity, gift or other consideration, SAAT shall have the right and without prejudice to any other legal remedy which it may have in regard to any loss or additional cost or expenses to disqualify the RFP bidder from further participation in this process and any other subsequent process in this regard.. . . SAAT reserves the right to exclude such bidder from future transactions within SAA

[1074] Transcript 10 February 2020, p 203

[1075] Transcript 10 February 2020, p 204

[1076] Transcript 10 February 2020, p 207

However, the policy also says “any consideration”. The report deals with this R2.5 million payment to Ms Memela in more detail below.

622. Ms Memela was also questioned about the trip she had made to the US to visit AAR. Her attention was drawn to the fact that the components tender that was issued on 29 October 2014 and was only retracted on 22 June 2015. This meant that the tender was still open in May 2015[1077] when Ms Memela, together with members of the Board including Ms Kwinana, Mr Zwane and Dr Tambi, had travelled to the US. AAR was one of the bidders in that very tender.[1078] Ms Memela was asked, in the light of her evidence that people who are involved in evaluating the bid and making decisions on it should not communicate with bidders when a bid was still open, whether she warned the Board members that they should not be communicating with AAR, let alone going on the trip.[1079] Ms Memela testified that she did not.[1080]

623. It was put to Ms Memela that it is problematic that Board members of SAAT went to visit one of the bidders while a bid was open and then subsequently retracted the bid, to the prejudice of other competing bidders, so that they could embark on a partnership with one of the bidders.[1081] Ms Memela’s answer was that it was not problematic but her reasons did not justify her answer. She kept insisting that there needed to be section 54 shareholder approval before any partnership was embarked upon. But at the time of the retraction there was no such approval and, in any event, this should not have any impact on section 217 of the Constitution and a free and

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1077 Transcript 11 February 2020, p 58

1078 Transcript 11 February 2020, p 59

1079 Transcript 11 February 2020, p 60

1080 Transcript 11 February 2020, p 60-61

1081 Transcript 11 February 2020, p 63

fair tender process. Shareholder approval does not negate the need for proper procurement processes to be followed.[1082]

624. It was also put to Ms Memela that the meeting she had with AAR on 27 May 2016 was also at a time when the tender was still open and that Mr Kenny had objected to attending the meeting for that very reason. Ms Memela claimed that Mr Kenny never objected to the meeting. She also claimed there was nothing wrong with the meeting because she was not the decision maker in respect of the tender.[1083] But then Ms Memela was shown the email from Mr Kenny setting out his reservations about the corporate governance problems associated with meeting with a bidder whilst the bid was open.[1084] Ms Memela's answer was again evasive, circuitous and made no sense. Her ultimate answer was to reiterate that she had no concerns about the meeting.[1085]

625. Ms Memela also confirmed attending yet another meeting on 29 May 2016, when the tender was open, with Ms Jackson.[1086]

626. It was put to Ms Memela that Ms Jackson appeared to know in advance that the RFP was going to be cancelled, as she had referred to it in an email.[1087] Ms Memela was asked how Ms Jackson would have known that in advance, and she answered that she did not remember and "cannot answer for that".[1088]

[1082] Transcript 11 February 2020, p 64-65

[1083] Transcript 11 February 2020, p 80

[1084] Transcript 11 February 2020, p 90

[1085] Transcript 11 February 2020, p 92

[1086] Transcript 11 February 2020, p 94

[1087] Exhibit DD25, p 1280

[1088] Transcript 11 February 2020, p 99

627. Ms Memela confirmed that she attended the CFST meeting where the committee decided that even though Lufthansa was the cheapest bidder, it would not be selected because, among other things, it had outstanding NIP obligations from a previous tender.[1089] Ms Memela was asked whether anyone actually found out whether Lufthansa had complied with its NIP obligations.[1090] This was asked because the DTI provided the Commission with an affidavit that confirmed that Lufthansa had no instances of non-compliance with its NIP obligations in respect of the other contract it had with SAAT at the time.[1091] Ms Memela's response to this was that they had probably been referring to Lufthansa's non-compliance with NIP obligations prior to 2008 when it used to be the components provider before Air France. She then said that, if this was not the case, then they could have been referring to Lufthansa's reluctance to agree to NIP obligations in other tenders that were not awarded to it despite the fact that it clearly undertook to comply with any supplier development obligations under those tenders.[1092] This, again, was an unsatisfactory answer because it failed to deal with the real issue. The evidence from the DTI showed that Lufthansa had not been selected for the bid, despite being the cheapest, based on alleged outstanding NIP obligations that simply did not exist. Furthermore, given Ms Memela's previous evidence that NIP obligations could simply be ignored by SAAT, the failure to comply with NIP obligations could never have been a valid basis on which to reject Lufthansa's bid.

628. The Board meeting of 9 May 2016 in which the tender was awarded to AAR/JM Aviation[1093] reflected that the Board rejected CFST's recommendation that the tender be awarded to Air France because it was resistant to align itself with

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[1089] Transcript 11 February 2020, p 103. This is recorded in exhibit DD22(f), p 2294

[1090] Transcript 11 February 2020, p 107

[1091] Exhibit DD22(g), p 2977

[1092] Transcript 11 February 2020, p 123

[1093] Exhibit DD22(f), p 2304

SAAT's development agenda, i.e. supplier development and the benefits were not compelling enough to position it as the preferred bidder. The Board further resolved that the concerns about JM/AAR "lowballing" could be mitigated by reducing the terms in writing.

629. Ms Memela testified that she was "shocked" at this decision because normally, if the Board disagreed with CFST or the committees, the matter would get referred back for reconsideration and not simply a different and unrecommended decision taken by the Board instead.[1094] However, despite Ms Memela confirming earlier that she was not at this meeting, the minutes reflect that she was.[1095] Ms Memela stated that perhaps she was there for a specific matter but not the whole meeting. She said that she did not recall being in attendance.[1096]

630. Despite Ms Memela's evidence that she was "shocked" at the Board's decision, she attended a Board meeting on 15 June 2016, a month later, where the AAR tender was discussed. At the meeting, Ms Memela was recorded as having stated that management supported the decision to award the tender to AAR and that it was justifiable.[1097] Ms Memela tried to explain this contradiction in her attitude to the award by saying that she only supported the contract because of litigation that had been instituted by Air France and because of pressure from the Chair of SAA, Ms Myeni, to cancel the contract. But, as the report sets out below, all of Ms Memela's protestations about the legitimacy of her actions has to be evaluated against the fact

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1094 Transcript 11 February 2020, p 131

1095 Exhibit DD22(f), p 2304

1096 Transcript 11 February 2020, p 134

1097 Exhibit DD25(b), p 621

that she received R2.5 million from JM Aviation that she then used to buy herself a new house.

631. Ms Memela's answers about her support for the contract and her involvement in it were generally evasive and sometimes made no sense.[1098] Her evidence on this score needs to be viewed in the light of Mr Kenny's evidence that Ms Memela and Ms Koekie Constance Mbeki were responsible for the legal aspects of the contract negotiation and drafting.[1099]

632. Ms Mbeki from SAAT provided the Commission with an affidavit explaining that Ms Memela was the leader of the contract negotiations with AAR/JM Aviation.[1100] Ms Memela was once again evasive and could not give a clear answer about whether or not this was true and what the extent of her role had been. She tried to avoid questions about the contract altogether and appeared to want to distance herself from those negotiations.[1101] In her affidavit, Ms Mbeki stated that Ms Memela called her and reprimanded her for raising concerns during the negotiation process that "had already been resolved" and delaying the process.[1102] When Ms Memela was confronted with this during her testimony, she claimed that she did not remember this.[1103] It is significant that Ms Memela did not dispute Ms Mbeki's version in this regard.

633. Ms Mbeki stated that one of the things she wanted included in the contract was a clause on penalties in favour of SAAT but that this was not included in the ultimate

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[1098] Transcript 11 February 2020, p 139-151

[1099] Exhibit DD22(g), p 3154-3155, para 21

[1100] Exhibit DD25(b), p 464

[1101] Transcript 11 February 2020, p 152-160

[1102] Transcript 11 February 2020, p 473

[1103] Transcript 11 February 2020, p 162

contract.[1104] The very absence of a clause on penalties was something that was highlighted in the 2019 review of the contract undertaken by SAAT. As already stated above, Mr Human testified that the absence of such a clause was a serious disadvantage in practice for SAAT and resulted in AAR keeping components for repairs for inordinately long periods. Ms Memela was asked why this clause was not included and what steps she took to ensure SAAT's interests were protected in the contract. She replied that it was not her job to check the contract and this was purely Ms Mbeki's responsibility.[1105] She confirmed that she did not even check the final contract before it was signed.[1106] Ms Memela's assertion that it was not her responsibility to check the final contract but that of Ms Mbeki evidences Ms Memela's unacceptable failure to accept responsibility for her actions. Ms Mbeki was Ms Memela's junior and, therefore, Ms Memela should have checked the final contract. If she did not check it and her subordinate also failed to do so, Ms Memela must be held accountable.

634. Indeed, Ms Mbeki's evidence is that even she was not afforded the opportunity to check the contract before it was signed. She had scheduled a meeting on 7 July 2016 with the SAAT team members to go through the contract clause by clause as they usually did but she was informed that the agreement had already been signed.[1107] Ms Memela testified that she knew nothing about the signing of the contract or who arranged for that to happen.[1108] There is support for Ms Mbeki's testimony that the signing of the contract was rushed and was done without a proper review because there are numerous errors in the contract including in the numbering

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[1104] Exhibit DD25(b), p 472

[1105] Transcript 11 February 2020, p 170

[1106] Transcript 11 February 2020, p 172

[1107] Exhibit DD22(b), p 475

[1108] Transcript 11 February 2020, p 174

of the contract.[1109] Mr Malola Phiri's affidavit to the Commission also confirms that the contract was rushed to be signed because Ms Kwinana was insistent that it be concluded.[1110]

635. Mr Kenny's evidence about Ms Memela refusing to give him the full contract "to protect [him]", was put to Ms Memela. Ms Memela testified that she did not remember this.[1111] Ms Memela was also asked about the implementation of clause 4.26 of the contract which required a deposit from SAAT in the form of a credit letter, but which was instead paid in cash. She was directed to correspondence where Mr Kleyn asked about the deposit that AAR was demanding and enquired whether the agreement provided instead for a bank letter as that was a standard SAA contract clause. Ms Memela responded to his enquiry by writing an email stating that they fought hard in the negotiations for a deposit clause with respect to cash to be excluded from the contract but, unfortunately, it was part of AAR's policy and SAAT could not refuse because the deposit being a bank letter had not been stipulated in the tender.[1112]

636. However, Ms Memela was wrong. There was no requirement in the contract for a deposit to be paid in cash. She was therefore either deliberately misleading Mr Kleyn about the provisions of the contract or grossly negligent for not in fact checking what the contract said. Ms Memela claimed that this correspondence was only in respect of what happened at the negotiations and that she still needed to check what the contract stated. However, this is not a plausible explanation given what she said in the actual correspondence. In addition, she eventually admitted that she actually

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[1109] Transcript 11 February 2020, p 176

[1110] DD25(c) p 790

[1111] Transcript 11 February 2020, p 178

[1112] Exhibit DD22(b), p 649.1-649.2

could not recall ever having checked the contract and later claimed it was actually not her role to check it.[1113] Furthermore, the explanation in her email about what had transpired during the negotiation of the contract with AAR is inconsistent with her claim that she was not involved in the negotiation process and that this was done by Ms Mbeki alone. Ms Memela's answer was again evasive and did not make sense in the light of the written correspondence.

637. Her answer is also belied by later correspondence in which AAR again queried why it had not been paid in respect of deposit invoices it had issued. In response, Ms Memela again said that SAAT was obliged in terms of the contract to make payment in respect of a security deposit upfront and that this was part of the conditions precedent. She again referred to the negotiation process that resulted in SAAT agreeing to pay this deposit.[1114] Ms Memela's contemporaneous correspondence therefore confirms that she was heavily involved in the contractual negotiations. Despite this, and despite the clear terms of the contract that was actually concluded, Ms Memela failed dismally in protecting SAAT's interests when AAR starting demanding a cash payment to which it had no contractual entitlement. Instead of refusing the payment on the basis that the contract made no provision for it, Ms Memela actively supported that the payment be made. This is a further example of the ways in which she was able to influence events to the benefit of AAR and JM Aviation.

[1113] Transcript 11 February 2020, p 188-193

[1114] Exhibit DD25(b), p 650

638. Ms Memela's insistence to her colleagues that the contract required a cash deposit to be paid had a serious prejudicial effect on SAAT because SAAT was in a precarious cashflow position at the time. [1115]

639. The deposit payment amounted to approximately R60million in cash. JM Aviation stood to benefit from this because it was entitled, under the joint venture, to receive 5% of that revenue.[1116] This is the same JM Aviation that paid Ms Memela R2.5million in May 2016.

640. The inescapable conclusion from all this evidence is that Ms Memela did favour AAR/JM Aviation during the tender relating to components in at least six ways. These are that:

640.1. she met with AAR in South Africa while the tender, in which AAR was a bidder, was still open;

640.2. she travelled to the US to meet with AAR while the tender, in which AAR was a bidder, was still open;

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

640.4. she shared confidential pricing information with AAR while the tender was open;

[1115] Transcript 12 February 2020, p 7-11

[1116] Transcript 12 February 2020, p 19

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

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

641. Had there been no payment that JM Aviation made to Ms Memela, it might have been possible to view her conduct as a manifestation of incompetence or gross negligence but JM Aviation's payment of R2.5 million to Ms Memela gives a different complexion to these facts. When the Head of Procurement of a state-owned company extends these types of favours to a supplier and receives R2.5 million from that same supplier, there is corruption at play.

642. When Ms Memela concluded her oral evidence, she requested an opportunity to make written re-examination submissions. She was afforded this opportunity and submitted these on 21 April 2021. Ms Memela's re-examination submissions do not advance her evidence before the Commission. They consist primarily of allegations against the evidence leader,[1117] complaints that the Commission's fact-finding endeavours have destroyed her relationships[1118] and criticisms about which witnesses the Commission chose to call.[1119]

643. Ms Memela's submissions display a complete lack of candour and a singular failure to accept any responsibility for her actions. She complains that she was asked to

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[1117] Ms Memela's re-examination submissions submitted on 21 April 2021, paras 3 and 4

[1118] Ms Memela's re-examination submissions submitted on 21 April 2021, para 1.4.3

[1119] Ms Memela's re-examination submissions submitted on 21 April 2021, para 1.4.7

account for her conduct at all. Her core contention is that other people should have been asked the questions posed to her.[1120] However, this misses the point that it was Ms Memela who, through an admittedly fabricated sale agreement, ended up being paid R2.5 million by a SAAT supplier.

644. Ms Memela also included in her submissions that Mr Leon Robertse, who had provided an affidavit to the Commission regarding the pricing information that Ms Memela provided to Ms Sambo, left SAAT and bought a game farm. She criticised the Commission for not investigating this further, suggesting that it did not do so because he had supplied the Commission with the evidence that it wanted. However, this is not fair criticism because Ms Memela did not previously bring this allegation of an illicit game farm purchase, let alone any evidence to support it, to the Commission's attention.[1121] Self-evidently, the purchase of a property on retirement is not by itself suspicious or worthy of investigation. It was not Ms Memela's purchases or attempted purchase of property that warranted the Commission's interest, but the payment from a supplier of the state-owned entity that she worked for as head of procurement.

645. Ms Memela's re-examination submissions refer to numerous documents that were said to corroborate her version of events but then the documents were not attached to the submissions. Instead, the submissions indicated that they "can be provided to the Commission" if a request is made.[1122] The re-examination submissions were Ms Memela's opportunity to place any remaining clarificatory evidence before the Commission. It was up to her to include whatever supporting documents she deemed

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[1120] Ms Memela's re-examination submissions submitted on 21 April 2021, para 2.1.1

[1121] Ms Memela's re-examination submissions submitted on 21 April 2021, para 2.3

[1122] Ms Memela's re-examination submissions submitted on 21 April 2021, para 2.7

relevant to her re-examination. Her failure to do so attracts the inference that these documents did not, in fact, advance her case.

646. Ms Memela's submissions conclude on the basis of a "plea for leniency" from the Commission. She justifies this plea on the basis, amongst other things, that she was not afforded an opportunity to be re-examined or to cross-examine witnesses whom, she contends, lied about her.[1123] However, this is not correct. Ms Memela agreed to provide written re-examination submissions in lieu of being questioned in re-examination and she decided not to pursue the cross-examination applications she had brought. She informed the Commission that she was content to rely on her re-examination submissions.

647. Ms Memela's pleas for leniency are not justified. In the light of the considerable evidence against Ms Memela which indicates that she received a kick-back payment from JM Aviation for advancing JM Aviation's and AAR's interests in their dealings with SAAT, the Commission will recommend that the NPA consider prosecuting Ms Memela for corruption.

Ms Kwinana's version

648. Ms Kwinana testified that she did not think it was inappropriate or irregular for a Board member, who would vote on a tender, to meet with a bidder whilst the tender was still open, if:

[1123] Ms Memela's re-examination submissions submitted on 21 April 2021, para 7

648.1. that Board member was not aware that there was a bid going on and this person was a bidder; or

648.2. if the member was aware, it would depend on their level of involvement in the decision-making;[1124] and,

648.3. even if such a board member was a key decision-maker, he or she should still be able to meet and talk about issues other than the tender.[1125]

649. Ms Kwinana went so far as to say that a decision-maker would only need to disclose a conflict of interest, or avoid talking to a bidder, if they personally felt that their judgment would be impaired because of their relationship.[1126]

650. At first, Ms Kwinana claimed that there was nothing wrong with the SAAT Board members' trip to the AAR Headquarters in the US because there were no tenders open at the time. However, when it was pointed out to her that the tender that had opened on 29 October 2014 was still open in May 2015 when the trip occurred, she accepted that it was open at the time.[1127] She also accepted that AAR was one of the bidders.[1128] She confirmed that the SAAT delegation was flown on private jets and driven in limousines and was taken to restaurants by AAR.[1129]

651. Ms Kwinana nevertheless testified that she did not regard this as irregular because the Board could only give its final approval if it went to Chicago to see AAR's facilities. She also claimed that she did not know that there was a tender open at that stage.

[1124] Transcript day 296, 2 November 2020, p 144

[1125] Transcript 2 November 2020, p 147 and p 154

[1126] Transcript 2 November 2020, p 150

[1127] Transcript 3 November 2020, p 91

[1128] Transcript 3 November 2020, p 92

[1129] Transcript 3 November 2020, p 90-91

But the minutes of Board meetings show that this was false because the Board had already voted to suspend the process so that they could explore a relationship with AAR.[1130] However, later she admitted that she would have known when the contract was going out on tender and, therefore, she would have known that it was still open.[1131] She nonetheless tried to downplay the effect of this knowledge during her testimony by claiming that that there were so many tenders at SAAT that she would not have remembered this particular one. But this was a tender for over R1billion.[1132] It is therefore highly unlikely and implausible that Ms Kwinana did not know that the tender was still open when she visited the AAR headquarters in the US.

652. Ms Kwinana then denied that the restaurants, limousine rides and private jet flights were "benefits" that the Board ought not to have accepted from a bidder. Instead, she said that it was just part of their "due diligence".[1133] This explanation can be rejected on its face. There is no need to be transported around in limousines while one is conducting a "due diligence". But even if Ms Kwinana were correct, and these sorts of lavish perks were just part and parcel of the work, the due diligence was still not conducted on any other bidders. It was performed on AAR precisely to investigate the possibility of an MOU with AAR[1134] in respect of work that was the subject of an active tender. Indeed, the problem with this approach was highlighted by another feature of Ms Kwinana's testimony. When she was asked about the information on which she based her decision when she voted as Chair of the Board of SAAT to award the five year components tender to AAR, she testified that she

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[1130] Transcript 3 November 2020, p 93

[1131] Transcript 3 November 2020, p 96

[1132] Transcript 3 November 2020, p 97

[1133] Transcript 3 November 2020, p 98

[1134] Transcript 3 November 2020, p 98

relied on what she had learnt about AAR's operations on this very trip.[1135] This was information that no other bidder was able to provide and which no other bidder could dispute because it was not disclosed to them. The trip to the United States flew in the face of a fair, transparent and competitive procurement process.[1136] Ultimately, the trip resulted in the Board retracting the open tender to pursue a private arrangement with AAR.[1137]

653. Ms Kwinana again claimed that, as long as in her opinion, the trip and benefits did not "impair [her] independence and thinking", then there was no problem. Of course, her casual reference to relying on information not actually in the tender documents that she gleaned from the trip, shows that she is not an appropriate judge of her own impartiality and that is why the procurement processes and SCM policies are in place at SAAT.

654. Ms Kwinana also claimed that such a trip would not influence an outcome because procurement processes are so rigorous that it would not matter.[1138] However, the Board's decision thereafter to withdraw the tender, as well as the Board's decision to disregard the CFST, BAC and management recommendation that the tender be awarded to Air France, demonstrate that this is clearly false. There can be various safeguards in place but if the Board makes the ultimate decision, and it has allowed itself to be influenced in this way, the whole process is undermined.

655. It was put to Ms Kwinana that there are safeguards in place to ensure the independence of the non-executive Board members who ultimately vote on a tender.

[1135] Transcript 7 November 2020, p 29-30. This was the fact that AAR was a components manufacturer and supplier itself and did not go through a middle man like Air France

[1136] Transcript 3 November 2020, p 100

[1137] Transcript 3 November 2020, p 105

[1138] Transcript 3 November 2020, p 109-110

One of these safeguards is that it is management who should conduct any due diligence, and then make recommendations to the Board – the Board should not be enjoying a trip to the US and performing the due diligence itself. Ms Kwinana's response was that "this has been the practice" at SAAT.[1139]

656. It was evident from Ms Kwinana's testimony that nothing about her prior interactions with AAR were of any concern to her. When Mr Parsons resigned, he raised the concern that there was something untoward going on behind the scenes in the conclusion of the MOU between SAAT and AAR. He also said: "My other specific concern is the identification and selection of the BBBEE partners, if any, for the proposed joint venture, a process that needs to be highly transparent in a business that already has an uncompetitive cost base. The MOU received includes an implementation timetable that suggests this process may already be significantly advanced and there is no visibility of this to either the SAAT or SAA Boards or National Treasury."[1140] Ms Kwinana's response to this was that, if Mr Parsons had concerns, he should have raised them at a Board meeting instead of just resigning and she said that she did not understand his concerns.[1141] This says a lot about Ms Kwinana.

657. The clauses in the RFP prohibiting any communication between anyone at SAAT and bidders in the tender, save for the Project Manager, were also put to Ms Kwinana. She was then taken to Ms Memela's emails with Ms Sokhulu of JM Aviation on the eve of the awarding of the tender to AAR/JM Aviation. Despite the clear and unequivocal wording of these clauses, Ms Kwinana continued to claim that there could still be communication between SAAT officials, including head of procurement,

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[1139] Transcript 3 November 2020, p 114

[1140] Exhibit DD33, p 22.

[1141] Transcript 3 November 2020, p 124-125

depending on the "circumstances" and where it would be "impractical" to observe the proper procedure.[1142] This feature of Ms Kwinana's testimony was particularly concerning because it revealed an approach to legal compliance directly at odds with the governing legislation. The bottom line of Ms Kwinana's approach was that it was permissible not to follow the legal requirements of a tender if it was impractical to do so. I am satisfied, having listened to Ms Kwinana's evidence, that many of the situations she would regard as impractical are situations which most people would find practical.

658. Finally, it was put to Ms Kwinana that clause 1.6.3 of the RFP made it clear that no exceptions or "circumstances" would justify a departure from the prohibition on communications. The clause said that "No discussions will be entered into surrounding elimination through non-compliance in clause 1.6.1".[1143] Eventually, she admitted that "on the face of it, I would be of the view that the bidder should be eliminated".[1144] She confirmed that AAR/JM Aviation should therefore have been eliminated from the five-year bid because of this communication but was not.[1145]

659. Ms Kwinana testified that she had a professional relationship with Mr Ndzeku. She met him during the SAA roadshows for supplier development in 2015.[1146] She admitted having had many telephone calls with Mr Ndzeku where she gave him guidance about how BEE requirements at SAA were implemented.[1147] She even admitted to having various telephonic discussions with him when the AAR/JM Aviation tender was open. However, she claimed that there was nothing

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[1142] Transcript 3 November 2020, p 133-135

[1143] Transcript 3 November 2020, p 137

[1144] Transcript 3 November 2020, p 140

[1145] Transcript 3 November 2020, p 147-148

[1146] Transcript 2 November 2020, p 42

[1147] Transcript 2 November 2020, p 44-45

inappropriate about this.[1148] It was put to Ms Kwinana that she even spoke to Mr Ndzeku the day before the Board took its decision to award the components tender to AAR and JM Aviation, at 7:12pm.[1149] Ms Kwinana claimed again that this was not irregular because they did not discuss the tender.[1150] However, based on her own concessions about Ms Memela's emails disqualifying AAR and JM Aviation as a bidder, these telephone calls would also have resulted, on Ms Kwinana's version, in JM Aviation/AAR's elimination from the bid.

660. It was put to Ms Kwinana that she was present at the meeting at which the component services contract with AAR/JM Aviation was signed. Mr Malola Phiri's affidavit to the Commission sets out in detail that Ms Kwinana and Ms Memela were present at the meeting where the contract was signed. According to Mr Phiri, Ms Memela indicated at the meeting that the agreement was on its way with a courier. Ms Kwinana's driver was requested to collect the parcel while everyone waited in the boardroom. When the contract was delivered, it was already signed by AAR. Ms Kwinana insisted that Mr Phiri sign it on behalf of SAAT. He asked Ms Memela and Ms Kwinana to check the document and, on their approval, he signed it. Mr Malola Phiri added that Ms Kwinana wanted the contract signed as a matter of urgency. Mr Phiri said that Ms Kwinana's behaviour at the meeting was "over the top, bordering on being aggressive".[1151]

661. As Ms Memela had done in her testimony, Ms Kwinana also denied being present when the contract was signed. Ms Kwinana claimed that the contract had already been signed when she convened a meeting with SAAT's management and that she

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[1148] Transcript 3 November 2020, p 150

[1149] Transcript 3 November 2020, p 154

[1150] Transcript 3 November 2020, p 154

[1151] Exhibit DD25(c), p 790-791

wanted to obtain the signed version urgently because National Treasury wanted it.[1152]

662. There are no independent facts in relation to the meeting at which the component services agreement was signed to indicate which of the two versions is true. Ms Kwinana played a key-decision making role in deciding to award the tender to the joint venture of AAR and JM Aviation. This decision was both unjustified and unfair. It therefore does not matter whether she also pushed for the contract to be signed. The contract should, in fact, never have been awarded to AAR/JM.

663. On 9 May 2016 the Board of SAAT decided to award the component services contract to AAR/JM, and not to follow the management's recommendation that it should be awarded to Air France. The Board's reasons for its decision were given as:

663.1. Air France's unwillingness to align itself with supplier development;[1153]

663.2. The benefits given for selecting Air France were not compelling;[1154]

663.3. Concerns about AAR/JM Aviation low balling could be mitigated through contract.[1155]

664. When Ms Kwinana was asked what the Board meant when it said that Air France did not align itself with "supplier development", she first stated that she would need to "google" the term. Thereafter, she went on to explain that it meant that Air France

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[1152] Transcript 3 November 2020, p 163

[1153] Transcript 7 November 2020, p 10-11

[1154] Transcript 7 November 2020, p 11

[1155] Transcript 7 November 2020, p 11

did not comply with BEE. Ms Kwinana said that Air France "was not even supposed to be there" because that was part of the critical criteria.[1156]

665. However, SAAT's CEO's recommendation[1157] included an observation that none of the tenderers was BEE compliant and that, for that reason, they had all been ranked the same with regard to BEE.[1158] This recommendation had served before the Board when the Board made its decision. When this was pointed out to Ms Kwinana during her testimony, she then had to shift ground and started to rely on other reasons.[1159] She said that she had meant something else by supplier development – namely, that Air France did not indicate it could develop other local suppliers.[1160] When it was put to Ms Kwinana that all of the bidders had committed to supplier development, and none of them had submitted a full proposal yet,[1161] she said "There were many things that we talked about that resulted in us rejecting Air France."[1162] This was an evasive answer and one that Ms Kwinana was driven to give because none of her other prior answers withstood scrutiny.

666. Ms Kwinana then testified about the second reason given by the Board for rejecting Air France and this related to cost savings.[1163] However, management had raised a concern that it appeared that AAR was deliberately "low balling" with its projected costs and it would inflate those costs over time and then claim various things were not included in the tender.[1164] Management set out their concerns as follows in the

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1156 Transcript 7 November 2020, p 12

1157 Exhibit DD22(f), p 2274-2280

1158 Exhibit DD22(f), p 2280

1159 Transcript 7 November 2020, p 16

1160 Transcript 7 November 2020, p 23

1161 Transcript 7 November 2020, p 23-24

1162 Transcript 7 November 2020, p 24-25

1163 Transcript 7 November 2020, p 28

1164 Transcript 7 November 2020, p 33

recommendation to the Board: "Sudden drastic cuts to the tender prices with a reduction of more than USD40million raised the fear of low balling to get the contract and doubts on sustainability".[1165] In the end, the price difference between Air France and AAR was fairly close, but in order to get there, AAR had to drop its prices in a dramatic fashion that raised concern.[1166] Ms Kwinana testified that, despite this serious concern being raised by management, the Board did not take any steps to check whether the contract eventually concluded in fact protected SAAT against this low-balling concern.[1167]

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

668. Ms Kwinana was also questioned about Ms Sambo's allegations that she has disclosed to her that she wanted to "get her hands" on some of the contracts before she left SAA and SAAT. Ms Kwinana denied Ms Sambo's testimony on these aspects.[1168] In fact, she claimed Ms Sambo was a "pathological liar".[1169] Ms Kwinana denied that she asked to be introduced to Ms Jackson.[1170] She testified that a reasonable person would doubt that if Ms Kwinana wished to ask these things, she would have said it in the presence of Dr Tambi or even Ms Sambo herself.[1171] Ms Kwinana stated that Ms Sambo approached SAAT and complained about her

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[1165] Transcript 7 November 2020, p 34

[1166] Transcript 7 November 2020, p 35-36

[1167] Transcript 7 November 2020, p 37 and p 42

[1168] Transcript 3 November 2020, p 80-81

[1169] Transcript 3 November 2020, p 81-82

[1170] Transcript 3 November 2020, p 82

[1171] Transcript 3 November 2020, p83

relationship with AAR and that is why Ms Kwinana called a meeting with Dr Tambi, to see if there was anything SAAT could do.[1172] Ms Kwinana said that she had called Ms Sambo an "ihashi" during the meeting, because Ms Sambo explained how she had been running around trying to introduce AAR to various officials in South Africa since 2011.[1173]

669. Ms Kwinana testified:

> "Ms Memela tried to assist her but because she is such a spoilt brat, maybe she is used to getting things her way but now, if you don't even put your tender how was she expected to win the tender. So, basically, that's the reason why, basically, I did not even put an effort to answer her affidavit because it is clear that she is a blatant liar".[1174]

670. It was put to Ms Kwinana that Ms Memela's whatsapp communications with Ms Sambo provide independent contemporaneous support for Ms Sambo's version.[1175] In 2017, Ms Memela had sent a whatsapp message to Ms Sambo in which she had said the following: "And in 2015 you came to me as a friend and asked for information for the short tender which you wanted to give to you partner, but looks like you ended up not giving it to them, since you wanted money upfront, they tendered anyway with your company name . . You guys (yourself, Koekie Mdluli and Chair) were negotiating with Cheryl where there was an agreement of what amount was going to

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1172 Transcript 3 November 2020, p 83

1173 Transcript 3 November 2020, p 85

1174 Transcript 3 November 2020, p 84

1175 Exhibit DD18, p 539-540

be paid out to you guys if there was success. Unfortunately, Cheryl changed her mind, claiming it was illegal in her country to pay out bribes. . .”[1176]

671. Ms Kwinana testified that this was “nonsense”.[1177]

672. While it may be that Ms Sambo’s version is not correct in all its respects, no explanation was proffered by Ms Kwinana for why Ms Memela, her trusted head of procurement, would have made up a story in an unguarded moment in 2017 to implicate Ms Kwinana in soliciting a bribe if it were not true.

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

673.1. had been wined and dined by AAR in Chicago;

673.2. had been speaking to Mr Ndzeku regularly on the phone while decisions on tenders affecting AAR and JM Aviation were being made;

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

674. In the circumstances the evidence is overwhelming that Ms Kwinana engaged in corrupt activities in order to benefit the joint venture of AAR/JM.

675. Both Ms Kwinana and Ms Memela denied that their conduct constituted corruption. They offered, in support of these denials, elaborate explanations about why the

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[1176] Transcript 3 November 2020, p 88

[1177] Transcript 3 November 2020, p 89

money they received from JM Aviation was not intended for their own benefit. Ms Memela's version involved Mr Ndzeku buying land in the Eastern Cape from her mother which her mother then donated to Ms Memela for the purchase of her house in Bedfordview. Ms Kwinana's version involved Mr Ndzeku investing millions of Rands in forex trading that Ms Kwinana's business, Zanospark (Pty) Ltd, just happened to be engaged in while JM Aviation was a candidate supplier to SAAT.

676. Both of these versions were, however, shown to be false because of small errors that the perpetrators had made when they were trying to cover their tracks. This is dealt with in the next section. It is important to note, for present purposes, that Ms Memela and Ms Kwinana were not working alone when they perpetrated their deceitful scheme. They were aided by the attorney, who represented them throughout their dealings with the Commission – Ms Mbanjwa.

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

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

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

Ms Memela and the sale of her mother's land

679. JM Aviation paid an amount of R2.5million towards the purchase of a house for Ms Memela in 2016.[1178] Ms Memela testified that it was not JM Aviation that had paid the R2.5 million but, rather, Mr Ndzeku himself, although the funds may have come through JM Aviation.[1179] She explained the payment from Mr Ndzeku on the basis that her mother had sold him a plot of land in the Eastern Cape at Mpindweni, next to Umzimvubu, that she (i.e. Ms Memela's mother) had inherited from her parents.[1180] Ms Memela stated that she put Mr Ndzeku in touch with her mother because he was looking for property in the Eastern Cape for one of his projects.[1181] She testified that the contract of sale of the property was concluded between 2015 and 2016 and the purchase price was R2.5million.[1182] Later she claimed that she was sure that the agreement was concluded in November 2015 – long before the tender had been awarded to AAR/JM Aviation. This was despite the fact that the payment was only made in May 2016.[1183]

680. Ms Memela testified that her desire to purchase property had begun in 2015 when she had been interested in a property in the Eastern Cape in Cove Ridge, for business purposes, for the total cost of R2.8million. She said that her mother had

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[1178] Transcript 7 February 2020, p 72

[1179] Transcript 7 February 2020, p 73

[1180] Transcript 7 February 2020, p 75

[1181] Transcript 7 February 2020, p 75

[1182] Transcript 7 February 2020, p 78

[1183] Transcript 7 February 2020, p 207

told her that she would assist with the deposit for the property by selling some of her property in the Eastern Cape.[1184] Ms Memela said that in or around February 2016, she and her mother agreed that the money should be used to purchase a property in Bedfordview.[1185] Ms Memela testified that the Bedfordview property was purchased for R3.8million. She stated, that once she had found the Bedfordview property, she cancelled the Cove Ridge purchase.[1186]

681. The Cove Ridge purchase agreement[1187] was concluded on 21 April 2015 between an entity called Slipknot Investment and Ms Memela. It is a three-page document that does not provide when the purchase price had to be paid; whether the transaction was subject to bond approval; whether a deposit had to be paid or indeed many other critical details. Ms Kwinana, the Chair of SAAT, represented Slip Knot in this transaction.[1188] Ms Memela testified that it was Mbanjwa Attorneys who handled the transfer of the property.[1189] Ms Memela stated that Ms Kwinana provided her with "sisterly advice" in terms of investment and that she had provided her with this property as an investment opportunity.[1190]

682. Ms Memela testified that Mr Ndzeku paid the purchase price for her mother's property directly to Ms Mbanjwa who was going to pay it to the transferring attorneys

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1184 Transcript 7 February 2020, p 98-99

1185 Transcript 7 February 2020, p 101

1186 Transcript 7 February 2020, p 3

1187 Exhibit DD25(b), p 370-374

1188 Transcript 7 February 2020, p 113

1189 Transcript 7 February 2020, p 116

1190 Transcript 7 February 2020, p 119

for the Bedfordview property.[1191] Ms Memela testified that this payment from her mother was not a loan but rather a donation.[1192]

683. Ms Memela testified that, when she decided to purchase the Bedfordview property instead, she cancelled the Cove Ridge agreement. However, there was no cancellation clause entitling the purchaser to cancel the agreement.[1193] Once this was pointed out to Ms Memela, she testified that she had secured Ms Kwinana's agreement to cancel.[1194] The cancellation letter,[1195] dated 7 May 2016, stated that Ms Memela intended to cancel the contract and "the deposit of which will be used in the sale of the aforementioned house in Bedfordview. The monies that were paid to L Mbanjwa Incorporated in respect of this transaction should now be paid over to the seller's attorneys …"

684. Ms Memela testified that she had already committed to the Bedfordview property and made an offer to purchase back in February 2016.[1196] It was put to her that this meant that in February 2016, she was on the line for R3.8 million on the Bedfordview property and, at the same time, was liable to pay Slipknot, Ms Kwinana's company, R 2.8 million for the Cove Ridge Property. Ms Memela conceded that she did not, at that stage, have R 6.6 million available to her for both property acquisitions.[1197] Nonetheless, she only cancelled the Cove Ridge agreement many months later on 7 May 2016. It was put to her that this did not make sense. Ms Memela was evasive in response and could not answer the question. She eventually suggested that

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1191 Transcript 7 February 2020, p 122

1192 Transcript 7 February 2020, p 123

1193 Transcript 7 February 2020, p 135

1194 Transcript 7 February 2020, p 136

1195 Exhibit DD25(a), p 397

1196 Transcript 7 February 2020, p 188

1197 Transcript 7 February 2020, p 143

maybe she and Ms Kwinana agreed verbally to cancel the agreement and then only cancelled formally three months later.[1198]

685. The other suspicious aspect of the cancellation date was that it was two days after the deposit was received from JM Aviation into Ms Mbanjwa's account.[1199] The payment is actually reflected in the bank statements as "consulting Kwinana". Ms Memela could not give an answer for why a payment that Mr Ndzeku had made, which had nothing to do with Ms Kwinana, would have had the payment reference "consulting Kwinana".

686. It was put to Ms Memela that, in Ms Sambo's affidavit to the Commission, she stated that Ms Memela had told her she had put in an offer on a house in Bedfordview but it was declined as her salary was insufficient and Ms Memela informed Ms Sambo that Ms Kwinana and Mr Zwane told her that they would make a plan for her.[1200] Ms Memela's response was so convoluted that it is not clear what her ultimate response was but it appeared to imply that she denied the statement.[1201]

687. Ms Memela confirmed that, when JM Aviation made this payment of R2.5million on 5 May 2016, she was the Head of Procurement at SAAT.[1202] Furthermore, as at this date, the components tender that AAR/JM Aviation was ultimately awarded, was still open. The Board decided to award the tender to JM/AAR on 9 May 2016.[1203] The BAC meeting only took place on 6 May 2016, the day after this payment had been

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[1198] Transcript 7 February 2020, p 144-146

[1199] See the bank account records of Mbanjwa Attorneys in exhibit DD25, p 395 that shows JM Aviation paid the money on 5 May 2016

[1200] Transcript 7 February 2020, p 155

[1201] Transcript 7 February 2020, p 157-160

[1202] Transcript 7 February 2020, p 161

[1203] Transcript 7 February 2020, p 162

made.[1204] In addition, on the date on which this payment was made, JM Aviation and SAAT, represented by Ms Memela, were still negotiating the price of the purchase of the GPUs.[1205]

688. Ms Memela claimed that there was no conflict of interest in having received this payment from JM Aviation and she stated that she was not sitting on the evaluation team and so there was no conflict.[1206] When asked whether she was familiar with the conflict of interest policy of SAAT and when she would be required to declare a conflict, she admitted that she was not familiar with it.[1207] The policy[1208] provides at clause 7.1[1209] that SAA employees must not seek to use their positions to gain direct or indirect benefits for themselves or their family members.

689. It was put to Ms Memela that the fact that she had used her position and her meeting with Mr Ndzeku to find a purchaser for her mother's property, that ended up benefiting her, was in conflict with clause 7.1. Her answer was again evasive and hard to understand. She began questioning whether the policy had indeed been adopted by SAAT.[1210]

690. Ms Memela was then asked whether she had not breached clause 7.3.1 of the same policy which provided that SAA employees shall refuse gifts, hospitality or other benefits that could influence their judgement or performance of obligations. Ms Memela testified that she was not the decision maker in either the sale of the GPUs

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1204 Transcript 7 February 2020, p 162

1205 Transcript 7 February 2020, p 162-163

1206 Transcript 7 February 2020, p 164-165

1207 Transcript 7 February 2020, pp 166-167.

1208 Exhibit DD25(a), p 436

1209 Exhibit DD25(a), p442

1210 Transcript 7 February 2020, p 169-172.

to JM Aviation nor the award of the tender to AAR/JM Aviation. She said that these were Board decisions.[1211]

691. After Ms Memela had testified, Mr Ndzeku testified about the contract with Ms Memela's mother, Ms Hlohlela. Mr Ndzeku stated that he had met Ms Memela in around mid 2015 at one of the supplier development workshops.[1212] He testified that during that introduction, Ms Memela had told him about her mother's land in the Eastern Cape and he was interested in buying it.[1213] He explained that, at that time, he was involved in commercial cannabis farming in Lesotho and Swaziland and he wanted to use Ms Hlohlela's property for that type of business.[1214]

692. As evidence of Mr Ndzeku's involvement in the growing of cannabis, he provided the Commission with an investment document from a company called Medigrow that is involved in commercial cannabis farming. He testified that this was the company that he was dealing with at the time.[1215] He also stated that he had shown Ms Hlohlela this document in 2015 when discussing the sale of the land.[1216]

693. Mr Ndzeku testified that he met with Ms Hlohlela about the purchase at the land in Mpindweni in the Eastern Cape, in a village called Mbizana.[1217] He said that the meeting was somewhere between mid-2015 and the signing of the sale agreement in November 2015.[1218] Mr Ndzeku testified that at the meeting, Ms Hlohlela called

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1211 Transcript 7 February 2020, p 172-173

1212 Transcript 26 August 2020, p 82

1213 Transcript 26 August 2020, p 83-84

1214 Transcript 26 August 2020, p 87

1215 Transcript 26 August 2020, p 88

1216 Transcript 26 August 2020, p 240

1217 Transcript 26 August 2020, p 90

1218 Transcript 26 August 2020, p 92-9

the tribal chief to join them and introduced Mr Ndzeku to the chief.[1219] When asked whether Mr Ndzeku was referring to Chief Sigcau, Mr Ndzeku said he thought so.[1220] He stated that Chief Sicgau was the "inkosi"[1221] of the area[1222] and that Chief Sigcau was introduced to him at this meeting.[1223] He also testified that Chief Sigcau told him that any acquisition of land had to go through him as the chief of the area.[1224] Mr Ndzeku claimed that his uncle also joined him at this meeting. He stated that at the time of his testimony before the Commission, his uncle was sick in hospital and was, therefore, not available to testify.[1225] He stated that the Chief brought two or three other people with him to the meeting.[1226]

694. Mr Ndzeku testified that he was taken to the land, which was opposite the Umzimvubu River, on the Ntabankulu side of the River, and he was happy with it.[1227] Mr Ndzeku testified that Ms Hlohlela then instructed him to go and speak to Ms Mbanjwa about getting paperwork to confirm the sale of the land.[1228] Mr Ndzeku relied on an affidavit that was allegedly deposed to by Ms Hlohlela stating that Mr Ndzeku purchased her family land in Mpindweni that had been passed down to her by the Cholani family. Mr Ndzeku provided the Commission with this affidavit.[1229] He

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1219 Transcript 26 August 2020, p 94

1220 Transcript 26 August 2020, p 95-96

1221 "Inkosi", otherwise appearing as "Nkosi", is the isiZulu and isiXhosa word for a Chief – a traditional leader

1222 Transcript 26 August 2020, p 96

1223 Transcript 26 August 2020, p 259-260

1224 Transcript 26 August 2020, p 264

1225 Transcript 26 August 2020, p 97

1226 Transcript 26 August 2020, p 101

1227 Transcript 26 August 2020, p 102

1228 Transcript 26 August 2020, p 270-271

1229 Exhibit DD26, p 24

testified that in 2015/2016[1230] the affidavit had been given to him by Ms Memela in front of Ms Mbanjwa, and he was told that it would be proof of ownership of land.[1231]

695. Mr Ndzeku testified that Ms Mbanjwa prepared the sale of land agreement.[1232] He said that he and Ms Hlohlela signed the sale agreement in respect of her property in November 2015.[1233] He said that, when he made the payment for the land to Ms Mbanjwa, he was asked to use Ms Kwinana's name as a reference.[1234] He claimed that he did not know that Ms Memela was going to use the money to purchase property.[1235] Mr Ndzeku's claim that he did not know that Ms Memela was going to purchase property with the money is false, because this fact is actually recorded in the sale agreement between him and Ms Hlohlela.[1236]

696. After Mr Ndzeku had given this version of the events surrounding the property purchase, the evidence leader began to probe some of its main features. First, when it was put to Mr Ndzeku that he could not have given Ms Memela or Ms Hlohlela the Medigrow document in 2015 because that document was only created in November 2018,[1237] he realised that he had been caught out and conceded that he did not give them the document in 2015.[1238] Mr Ndzeku had, therefore, lied about this document in his earlier testimony.

1230 Transcript 26 August 2020, p 303

1231 Transcript 26 August 2020, p 297-298

1232 Transcript 26 August 2020, p 270-271

1233 Transcript 26 August 2020, p 237

1234 Transcript 26 August 2020, p 107

1235 Transcript 26 August 2020, p 252

1236 Exhibit DD26, p 14-23

1237 Transcript 26 August 2020, p 240

1238 Transcript 26 August 2020, p 242

697. It was also put to Mr Ndzeku that the Commission had received an affidavit from Medigrow's CEO[1239] who confirmed that the document could only have been given to Mr Ndzeku during a presentation to potential investors in November 2018. Therefore, he could not have been looking to purchase the land for this purpose in 2015. Mr Ndzeku then said he did not remember when he got the document from Medigrow.[1240] He then conceded that he had no interactions with Medigrow at all in 2015 and in fact had no plans with the company at all. However, he still persisted in his version that he had plans to grow cannabis in Swaziland at the time.[1241] This explanation must be rejected because, when Mr Ndzeku was served with a summons requiring him to provide any documents evidencing what he had planned to do with the property when he purchased it in 2015, he had provided the Medigrow document.[1242] On Mr Ndzeku's own version, therefore, it was Medigrow that he was interested in when he bought the property in 2015. However, when the date discrepancy was pointed out to Mr Ndzeku, he tried to escape the obvious conclusion that he had no such plans in 2015 with a vague reference to other cannabis growing that he planned to undertake.

698. It was also put to Mr Ndzeku that he could not have met with Chief Sigcau because the Chief had, himself, provided the Commission with an affidavit[1243] explaining that he had never met Mr Ndzeku, that Ms Hlohlela had no authority to sell the land she claimed to have inherited from the Cholanis in Mpindweni and that no such land was ever sold to Mr Ndzeku according to the traditional authorities responsible for the land. The affidavit also explained the process that would be followed if there was a change in the use of traditional land. Chief Sigcau said that process required the

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1239 Exhibit DD26, p 278-282

1240 Transcript 26 August 2020, p 246

1241 Transcript 26 August 2020, p 247

1242 Transcript 26 August 2020, p 248

1243 Exhibit DD26, p 283-291

involvement of the traditional authorities and various procedures had to be followed – none of which had been followed in respect of the Mpindweni land. He also observed that no such use rights had ever been sold in respect of land within his area of jurisdiction for anywhere close to the value of R2.5million, but rather for hundreds of rands.[1244]

699. Mr Ndzeku's response to this was to claim that he was told by one of the Chief's associates that, once the Commission's investigators had started asking the Chief and others questions about the land transaction, the Chief had said that he did not want to be involved in the Commission's activities. Mr Ndzeku said that that was why the Chief was denying the meeting.[1245] However, the detailed affidavit provided by the Chief is not the sort of affidavit produced by someone who does not want to be involved in the Commission's work. This explanation by Mr Ndzeku therefore made no sense. In addition, it was put to Mr Ndzeku that his story of meeting with the Chief was highly implausible because he claimed that the Chief came to Ms Hlohlela's house whereas it would have been required of them to go to visit the Chief at his house and not the other way.[1246] Mr Ndzeku said in response that he understood this – and did not attempt to provide any further defence of the story.[1247] He eventually conceded: "So I am a little bit confused exactly what happened that day. Maybe I am wrong or maybe it was not the Chief, I do not know what to say."[1248]

700. It was further put to Mr Ndzeku that the affidavit he provided to the Commission, which purported to evidence Ms Hlohlela's rights over the land and her transfer of

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[1244] Transcript 26 August 2020, p 287

[1245] Transcript 26 August 2020, p 288-289

[1246] Transcript 26 August 2020, p 290-291

[1247] Transcript 26 August 2020, p 291

[1248] Transcript 26 August 2020, p 294-295

those rights to Mr Ndzeku, could not have been provided to him in 2015/2016 because it was on an affidavit template used by the Mount Frere Police Station from 2019. The Mount Frere Police Station provided the Commission with affidavits by some of its officers explaining that it would be impossible to have had that template in 2015 or 2016.[1249] They also explained that the policeman who was allegedly the Commissioner of oaths of the affidavit, could not have deposed to it on that date because he was out on patrol, according to his incident book.[1250] The Commission investigators met with the police officer who allegedly commissioned the affidavit and sought to obtain an affidavit from him. While at first he cooperated, he eventually stopped cooperating with the Commission. The South African Police has commenced an investigation into his conduct in this regard.

701. It was further put to Mr Ndzeku that the affidavit and the contract of sale could not have been signed by Ms Hlohlela because the Commission had received a report from a handwriting expert who had compared various documents that Ms Hlohlela had signed when she was still alive – from many years back until up to a year before the affidavit was allegedly signed – and had concluded that the affidavit was signed by the same person who signed the sale of land agreement, purporting to be Ms Hohlela, but that neither of these signatures matched the other verified signatures of Ms Hohlela. The expert concluded that the signatures on the affidavit and the sale agreement had been forged.[1251]

702. Finally, it was put to Mr Ndzeku that the sale agreement could not possibly have existed in 2015 because it made provision for certain disputes under it to be referred to the President of the Legal Practice Council and yet the Legal Practice Council did

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[1249] Exhibit DD26, p 304-335

[1250] Exhibit DD26, p 304-335

[1251] Exhibit DD26, p 292-303. Transcript 2020, p 312

not exist in 2015. It was only established in 2018. The sale agreement was, therefore, likely to have been based on an agreement template designed after 2018 and not 2015.

703. Faced with all this evidence, Mr Ndzeku eventually conceded that the affidavit was a forgery.[1252] He also admitted that he did not sign the purchase agreement in 2015, but rather in 2019.[1253] He confirmed that it was prepared by Ms Mbanjwa[1254] and that it was a fraud.[1255]

704. It was put to Mr Ndzeku that there was no agreement about land in 2015 or 2016. JM Aviation paid Ms Memela as head of procurement at SAAT an amount of R2.5million out of the R28.5million that was paid by Swissport to JM Aviation, in exchange for her helping JM Aviation in the GPU sale and in the AAR/JM Aviation bid.[1256] By this time, Mr Ndzeku had no answer.

705. After Mr Ndzeku had testified, Ms Memela gave evidence again. She was questioned about what had been revealed in the evidence of Mr Ndzeku regarding the veracity and authenticity of the sale agreement which, on Ms Memela's version, had been the reason for the payment of R2.5 million to her.

706. Despite all the concessions made by Mr Ndzeku about the sale agreement being a fraud, Ms Memela denied this and said that the agreement was valid. She said that Chief Sigcau's evidence that he had never authorized the sale of the land to Mr Ndzeku should be rejected because the land that was being referred to was not land

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[1252] Transcript 26 August 2020, p 331-332

[1253] Transcript 26 August 2020, p 336

[1254] Transcript 26 August 2020, p 339

[1255] Transcript 26 August 2020, p 340

[1256] Transcript 26 August 2020, p 343-344

owned by her mother's family, the Cholanis.[1257] However, that cannot be correct, because in the alleged affidavit from Ms Hlohlela, the land is described as being from the Cholanis. In fact, Ms Memela[1258] failed to give a proper responses to this. Instead, her response was convoluted. It mostly involved accusing the Commission's evidence leader of not understanding how land was treated in rural areas, criticising the investigators of the Commission, and criticising the way that the evidence leader questioned Mr Ndzeku..[1259] All these criticisms must be viewed against the fact that Mr Ndzeku positively identified the land as being next to the Umzimvubu River on the Ntabankulu side of the River – which accords with the description of the land by Chief Sigcau as being the Cholani family land.[1260]

707. Ms Memela then claimed that Chief Sigcau's affidavit was problematic because the Paramount Chief would not have been involved in the administration of the land himself and his permission would not have been required. She claimed, contrary to Chief Sicgau's evidence, that one did not in fact need permission from anyone, be it headman or any traditional authority, to transfer land.[1261] She also challenged whether Chief Sigcau had spoken to the correct officials in the area that serve under him.[1262]

708. Ms Memela did not offer any contrary evidence by anyone in the area or any traditional leader.[1263] Land under the jurisdiction of an inkosi or a chief does not get transferred from the ownership of one person to that of another as is done in the case of land or property that is the subject of a title deed. That is because land under

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[1257] Transcript 1 October 2020, p 166-167

[1258] Transcript 1 October 2020, p 169

[1259] Transcript 1 October 2020, p 170-172

[1260] Transcript 26 August 2020, p 103-105

[1261] Transcript 1 October 2020, p 173-174

[1262] Transcript 1 October 2020, p 176

[1263] Transcript 1 October 2020, p 180

a chief or inkosi is not owned by any individual. It is communal land administered by the local chief on behalf of his community. It is the right of use that may be passed from one family to another where the Chief approves the arrangement. There can be no doubt Chief Sigcau's version is to be preferred to that of Ms Memela.

709. Ms Memela also maintained that the affidavit allegedly deposed to by her mother was authentic. She claimed that the handwriting expert's opinion to the contrary should be rejected because she had only considered handwriting samples from 20 years before her mother's alleged affidavit.[1264] But this was not true. The handwriting expert had considered sample signatures *spanning* 20 years, not samples that were 20 years' older than the affidavit. Further, despite being given an opportunity to do so, Ms Memela did not engage another handwriting expert to refute the Commission's expert. When the sample signatures from just a year before the alleged affidavit was signed were shown to Ms Memela, she accepted that her criticism was unjustified but then she changed tack. She explained that, because of the standard disclaimer[1265] attached to the expert report, which said that the expert had worked from copies and not originals, the report should not be believed.[1266]

710. The disclaimer in fact explained that there were certain comparisons that could not be made on a copy, such as considering differences in pen pressure. However, beyond that, comparisons based on copies could be undertaken. Having considered the copies, the expert concluded that the dissimilarities or similarities in individual characteristics were "profound". It was therefore her professional opinion that the signatures she examined that were known to be Ms Hlohlela's were not made by the same writer as the signatures found in either the purported affidavit or the alleged

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[1264] Transcript 1 October 2020, p 167

[1265] Exhibit DD26, p 295

[1266] Transcript 1 October 2020, p 189 and p 194

sale agreement. The handwriting expert said that the sale agreement and affidavit were signed by the same hand but that was different to Ms Hlohlela's signature on official comparison documents.[1267] Ms Memela stated that she disputed this conclusion but offered no evidence to the contrary or indeed any plausible criticism of the expert report.[1268] She finally deflected the issue by saying that "we will request that we also take this through our expert". She never did so. Indeed, she had already had the report for two weeks before the hearing and had made no attempt to secure an expert in that time.[1269] It is fair to assume that the reason why Ms Memela did not call any handwriting expert to support her version is either that she knew that the conclusion reached by the Commission's handwriting expert was correct and, therefore, did not bother to consult another expert or she consulted another expert, who told her that the conclusion reached by the Commission's expert was correct.

711. Ms Memela disputed Mr Ndzeku's admission that the sale agreement was actually signed only in 2019. She testified that, as there would be no title deed, Mr Ndzeku had insisted upon a sale agreement and the affidavit.[1270] She testified that she had, therefore, given him the affidavit some time in 2015 or 2016 and the sale agreement followed suit.[1271]

711.1. When it was put to Ms Memela that the template of the affidavit was dated 2019, she said that that was "an error".[1272] However, as the evidence from the Mount Frere police station demonstrated, it is literally impossible for a document deposed to in 2015 to be completed on a 2019 template because that template

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1267 Exhibit DD26, p 298

1268 Transcript 1 October 2020, p 198

1269 Transcript 1 October 2020, p 201

1270 Transcript 1 October 2020, p 206

1271 Transcript 1 October 2020, p 207

1272 Transcript 1 October 2020, p 213

would not have been in existence yet at that time. Quite clearly, Ms Memela was sticking to the version that had been fabricated.

711.2. When Ms Memela's attention was drawn to the fact that the sale agreement that Mr Ndzeku admitted was actually signed in 2019 had a dispute resolution clause that appointed the President of the Legal Practice Council to select an arbitrator and yet, in 2015, the Legal Practice Council did not exist as it was only established in 2018, she could not offer any sensible answer. She must have realised that she and Mr Ndzeku had been caught out.

711.3. Ms Memela maintained that she did not help Mr Ndzeku get any tender.[1273] However, it was amply demonstrated, throughout Ms Memela's evidence that she played an important role in the whole procurement process. The highlights of her role include the following:

711.3.1. she communicated with JM Aviation about its bid submission and its JV agreement with AAR while the tender process was still open and bids had not yet been submitted;

711.3.2. she attended a CFST meeting while the tenders were being evaluated;

711.3.3. after the tender had been awarded to AAR/JM and the contract was under threat of being cancelled by Ms Myeni, Ms Memela supported it;

711.3.4. she negotiated the terms of the contract that were prejudicial to SAAT;

[1273] Transcript 1 October 2020, p 168

711.3.5. she misled the treasury of SAA into paying a R60 million cash deposit to AAR in circumstances where the contract did not require it and this had severely prejudicial consequences for SAAT's cash flow; and

711.3.6. she agreed to sell twelve GPUs to JM Aviation at a price far that was far lower than the market value, at a significant cost to SAAT.

712. In short, there were multiple ways in which Ms Mememla influenced the tender decision and unduly assisted JM Aviation/AAR to secure the components tender and a low price for the sale of the GPUs. In the face of this, her continued insistence that, as head of procurement, she did nothing for JM Aviation, is most regrettable. Quite clearly, she engaged in acts of corruption in order to assist AAR/JM Aviation.

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

713.1. the agreement was purportedly concluded in April 2015,[1274] but while this agreement was still in existence and the full R2,8million obligation owing on it, Ms Memela also concluded a binding sale agreement to pay R3.8million for the Bedfordview house in February 2016, and allegedly kept both in operation until May 2016.

713.2. the agreement had been signed only by Ms Memela and her husband did not sign the agreement, in circumstances where Ms Memela was married in community of property, with her husband which was in breach of section 15 of

[1274] Exhibit DD25(a), p 370. The signature and date are at p 373

the Matrimonial Property Act 88 of 1984.[1275] Section 15 provides that any transaction under the Alienation of Land Act must be signed by both spouses to be valid. In response, Ms Memela claimed that she had signed various other property purchase agreements without her husband. She offered to provide those offers to purchase or sale agreements to the Commission. When the Commission followed up with her after her evidence to request such documents, none was produced.[1276] Quite clearly, Ms Memela was continuing with her dishonest version.

713.3. Ms Memela had attempted to purchase a house two months before this for R1.4million. Her application for a mortgage bond for the purchase was declined by the bank. [1277] Despite this, two months later, she committed herself to paying R2.8 million for a property from Slipknot Investments. Ms Memela claimed that this was because she knew her mother was selling her property in the Eastern Cape.[1278] However, that does not make sense because the alleged sale agreement with Mr Ndzeku was only ostensibly signed in November 2015, some seven months later. Furthermore, the Slipknot sale agreement did not contain any condition that it was subject to her first securing the "sale" of her mother's property.

713.4. Ms Memela did not sign a client form under the Financial Intelligence Centre Act 38 of 2001 (*FICA*) for Ms Mbanjwa when the Slipknot sale agreement was concluded.[1279] Instead, such a form was only completed a full year later in

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[1275] Section 15(2) provides that a spouse married in community of property may not without the written consent of the other spouse (g) as a purchaser enter into a contract as defined in the Alienation of Land Act 68 of 1981, and to which the provisions of that Act apply

[1276] Transcript 1 October 2020, p 241 and p 271

[1277] Transcript 1 October 2020, p 233-234

[1278] Transcript 1 October 2020, p 235-236

[1279] Transcript 1 October 2020, p 247

2016.[1280] However, in terms of section 21 of FICA, client information forms are required to be provided and signed when the transaction occurs or when the business relationship begins.[1281] The date of the client take on sheet (6 May 2016) that was ultimately signed is suspicious because it was only signed the day *after* JM Aviation had paid R2.5million to Ms Mbanjwa (5 May 2016) which money was ultimately used by Ms Memela to purchase her property in Bedfordview. This tends to indicate that the first time Ms Memela became a client of Ms Mbanjwa's was when JM Aviation had made the payment of R2.5 million into Ms Mbanjwa's account.

714. The final suspicious feature of the Slipknot agreement was eventually put to Ms Kwinana during her evidence. When Ms Kwinana appeared before the Commission, she was asked about the *domicilium* address that she had provided for Slipknot Investments under the agreement.[1282] The address given was 92 President Park, Midrand. However, in 2015, Ms Kwinana had not been working out of that address for a number of years already. The agreement was signed in April 2015, and the new owner of the President Park property, Mr Mark Bates, provided the Commission with an affidavit that explained that his company had been in that property since 2013.[1283]

715. It was put to Ms Kwinana that this mistaken address is precisely the kind of mistake that is made when agreements are created many years after the alleged event and

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[1280] Exhibit DD25(c), p 1129 and p 1135

[1281] Section 21(1) of the FICA Act requires that when an accountable institution engages with a prospective client to enter into a single transaction or to establish a business relationship, the institution must, in the course of concluding that single transaction or establishing that business relationship establish and verify the identity of the client

[1282] Exhibit DD25(a), p 374

[1283] Exhibit DD33, p 201

are made to look like they were concluded earlier.[1284] Her response was that she had continued to write the wrong address on various documents for many years after leaving her premises. This explanation makes no sense and Ms Kwinana should be ashamed to have given these answers.[1285]

716. In the end, the evidence presented to the Commission shows clearly that Ms Memela received payment of R2.5million from JM Aviation to facilitate the JM Aviation/AAR components tender and the sale of the GPUs. It also shows that Ms Memela, Ms Kwinana and Ms Mbanjwa conspired to try to hide their corrupt activities by fabricating agreements after the commission of their corrupt activities.

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

Ms Kwinana's Zanospark investment company

718. As set out above in the report, JM Aviation bought the GPUs from SAAT for approximately R3million and then immediately sold them to Swissport for R9million, thus making a profit of R6million in a day. This same calculation was put to Ms Kwinana and she was invited to accept that, as a result of SAAT's sale of the GPUs to JM Aviation, JM Aviation made R6million.

[1284] Transcript 7 November 2020, p 163-165 and p 239-239

[1285] Transcript 7 November 2020, p 167-168

719. Ms Kwinana would not accept this. She resisted the conclusion that JM Aviation made an immediate profit of R6 million. She denied this on the basis that, when you buy a motor car for R200,000 and it depreciates in value, then, when you sell it, you can only get R150,000 for it. When it was pointed out to her that that may be so for motor cars but, in this case, there was no depreciation (the sale taking place the very next day and in respect of already used equipment), she still would not concede that JM Aviation made R6 million on the sale.

720. After her evidence, Ms Kwinana's lawyer, Ms Mbanjwa provided "submissions" to the Commission in lieu of re-examining Ms Kwinana. In those submissions, Ms Mbanjwa makes the point that, in the affidavit that Mr Aires (of JM Aviation) provided to the Commission, he claimed that seven of the GPUs were taken in for repairs. She then asserted that "the cost of repairs would clearly be an add-on on the selling price that JM Aviation would charge Swissport".[1286] Ms Mbanjwa also criticized the evidence leader for allegedly ignoring this evidence and claimed that the evidence leader had thereby "misled the public".[1287]

721. However, a proper consideration of Mr Aires's affidavit reveals that it does not provide support for this submission. In support of the conclusion that Mr Aires' affidavit did not support Ms Mbanjwa's submission, the following can be said:

721.1. First, although Mr Aires contends in paragraph 27 of his affidavit to the Commission that seven of the GPUs were sent for repairs "at JM Aviation's cost", he provides no documents that support this claim and the claim is

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[1286] Submissions for Ms Kwinana dated 1 December 2020 at page 16, para (a)

[1287] Submissions for Ms Kwinana dated 1 December 2020 at page 5, para 2.3(a)

inconsistent with his contemporaneous emails with Swissport at the time and his emails in 2017 to Ms Memela.

721.2. Mr Kohl's affidavit makes it clear that on Thursday, 14 July 2016, Mr Aires sent an email to Swissport in which he confirmed that he had inspected the GPUs and ten of them were ready for collection.[1288] This was followed with an email on 28 July 2016 in which Mr Aires informed Swissport that the remaining three GPUs were ready for collection.[1289] By 28 July 2016, therefore, all twelve GPUs had been collected from SAAT. In an email on 2 August 2016, Mr Aires confirmed to Swissport that all the GPUs had been delivered to Swissport.[1290] In his contemporaneous correspondence, Mr Aires makes no reference to the need for these GPUs to be repaired at JM Aviation's cost after they had been collected from SAAT.

721.3. Furthermore, in 2017, Mr Aires provided an email to Ms Memela in which he set out the chronology related to the GPUs. This email is an annexure to one of the Open Waters reports that Ms Kwinana kept emphasising during her testimony and which she said ought to have been considered by the Commission.[1291]

721.4. Until receipt of Ms Kwinana's submissions on 1 December 2020, it had not been necessary to refer to these emails but because the issue was pertinently raised in her submissions, it is necessary to refer to them.

[1288] Exhibit DD25, p 361

[1289] Exhibit DD25, p 362

[1290] Exhibit DD25, p 364

[1291] Transcript 2 November 2020, p 10-11

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

721.6. It appears that Mr Aires was, therefore, not being truthful in his affidavit. Unfortunately, Mr Aires is located in the United States of America and therefore was not available to be questioned at the Commission. Had he given evidence, this aspect would certainly have been probed further.

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

721.8. Second, Mr Aires's entire affidavit suffers from a fatal flaw. In it, Mr Aires tried to justify both the price at which JM Aviation bought the GPUs from SAAT and the price at which it sold them, a day later, to Swissport as reflecting fair market value. However, the problem with that is that despite being sold only a day apart, the sale prices were R 6 million apart. This means that Mr Aires has to justify a sale price of R3 million as being market-related on day 1 but then simultaneously justify a sale price of R9 million as being market-related on day 2. Without some explanation for a change in the market over a day, of which there is none in Mr Aires affidavit, that type of reasoning is simply untenable.

His was an attempt to defend the indefensible or to explain that which is inexplicable.

722. Of the approximately R9 million that JM Aviation received from Swissport for the GPUs, R4.3million was paid to Ms Kwinana. This was done through paying an entity called Zanospark (Pty) Ltd that Ms Kwinana controlled.[1292]

723. The relevant bank statements illustrate that on 24 June 2016, Swissport paid JM Aviation R9 849 600 from the proceeds of the sale of the GPUs; on 29 June 2016, R2.5million was paid out of the account to Ms Hendricks, who is Mr Ndzeku's wife; Ms Hendricks then paid the money to Zanospark, as well as a later payment of R600 000.

724. Zanospark was only created in February 2016 and had an opening balance of R502 at the time.[1293] Thereafter, once Ms Kwinana had left SAA, further amounts were paid to her directly from JM Aviation. Through-out this period, there was no other activity in the Zanospark bank account. This money was then paid out to Ms Kwinana's personal account.[1294] Ms Kwinana ultimately received a total of R4.3million from JM Aviation over the period from July 2016 to September 2016.

725. Mr Ndzeku claimed that the money that had been paid from JM Aviation to Ms Kwinana's company, Zanospark, was actually his money that JM Aviation owed him, and he wanted to invest it with Zanospark as a forex investment company.[1295] He also stated that, although the payments were also reflected as being paid by Ms

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[1292] Transcript 26 August 2020, p 344-345

[1293] Exhibit DD26, p 49. See also pp 392-403

[1294] Exhibit DD26, p 397

[1295] Transcript 26 August 2020, p 346-351 and p 370

Hendricks, his wife, she was investing his money on his behalf.[1296] He claimed to have received updates on his investment, in the form of annual statements, which he would receive from Zanospark on email.[1297] However, after Mr Ndzeku was served with a summons requiring him to produce any documents he had in this regard, he stated in an affidavit that there were no such statements.[1298] During his evidence, however, he claimed that the documents did, in fact, exist and said that he could produce them.[1299] However, after the Commission had followed up with him on a number of occasions after his evidence, Mr Ndzeku failed to produce any documents. Obviously, that was because he never had any such documents and he had been dishonest in telling the Commission that they existed.

726. It should also be noted that Mr Ndzeku was also asked to report to the Commission about JM Aviation's accounting to SARS for the payment it had received from Swissport. The Swissport payment of R28.5 million had included an amount of R3.5 million for VAT, for which JM Aviation was accountable to SARS.[1300] Mr Ndzeku has also failed to report to the Commission on this matter. SARS should investigate this issue further and take such steps as it may deem appropriate in terms of the law.

727. It was also put to Mr Ndzeku that if Zanospark was trading in forex, then it would have needed to be licenced either by the SARB or as a financial services provider under the Financial Advisory and Intermediary Services Act 37 of 2002 (*FAIS*), but that both those institutions had advised the Commission that Zanospark had no such licences.[1301]

[1296] Transcript 26 August 2020, p 366

[1297] Transcript 26 August 2020, p 354

[1298] Exhibit DD26, p 0.144, para 3.3

[1299] Transcript 26 August 2020, p 381

[1300] Transcript 26 August 2020, p 380 to 382

[1301] Exhibit DD 26, p 336-391. Transcript 26 August 2020, p 360-361

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

729. Ms Kwinana confirmed that she established Zanospark in February 2016 with her daughter, Ms Lumka Goniwe.[1302]

730. She explained that the payments she received first from Ms Hendricks (prior to Ms Kwinana leaving SAA) and, thereafter, from JM Aviation, were investments that she was placing for Mr Ndzeku and Ms Hendricks, and that they were two of around eight investment clients that Zanospark had.[1303]

731. It was clear from Ms Kwinana's evidence that she engaged in extensive forex trading on online platforms, placed investments in various vehicles and also traded in cryptocurrency. This was not surprising as she is a chartered accountant and should have financial experience and investment acumen.[1304]

732. However, if she was legitimately trading on behalf of third parties as her clients, then she would (and Zanospark would), according to an affidavit from the Financial Sector Conduct Authority provided to the Commission, be required to have a licence as a financial services provider.[1305] This is because in terms of FAIS, a financial service

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[1302] Transcript 3 November 2020, p 181

[1303] Transcript 3 November 2020, p 183 and 187

[1304] Transcript 3 November 2020, p 184- 187, p 192, p 211, p 215-216, p 224, and p 240-241

[1305] Exhibit DD33.21, p 323-384

provider is defined as anyone who, as a regular feature of the business of such person, furnishes advice; or renders an intermediary service or both. Advice is defined as any recommendation or guidance of a financial nature by means of any medium to a client in respect of the purchase of a financial product or an investment in any financial product, or on the conclusion of any other transaction aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product. An intermediary service is defined as any act performed by a person on behalf of a client the result of which is that the client enters into any transaction in respect of a financial product or with a view to buying, selling, administering or managing a financial product purchased by a client or in which the client had invested. A financial product includes securities and instruments such as shares, debentures, money market instruments, a participatory interest in a collective investment scheme, a foreign currency denominated investment instrument, including a foreign currency deposit, and any other product similar in nature declared to be a financial product by the Minister.

733. Ms Kwinana persistently denied in her evidence that she needed a licence to do forex trading[1306] and in the submissions made by her legal representative to the Commission on her behalf, this point is raised again.[1307]

734. Of course, if Ms Kwinana were conducting the forex trading for herself, then she would need no licence because FAIS only regulates financial *services* that are provided *to clients*. The fact that Ms Kwinana, a chartered accountant who operated an accounting firm for many years, would not get a licence from the FSCA, if she were legitimately investing on behalf of third parties, seems highly unlikely. The

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[1306] Transcript 3 November 2020, p 188

[1307] Submissions for Ms Kwinana dated 1 December 2020, page 20 para 6.3.5

absence of a licence therefore tends to indicate that Ms Kwinana was not conducting forex trading activities for others, but for herself.

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

735.1. the Zanospark bank account had no activity in it until the payments from JM Aviation.[1308]

735.2. the money was always transferred into her personal account and disappeared from there. This is not the conduct of a financial advisor who should be keeping her clients' funds separate from her own.[1309]

735.3. Zanospark was unable to provide the Commission with any records of the investments. By way of a summons, it was required to produce any and all documents evidencing the investments and trading done on behalf of Ms Hendricks and Mr Ndzeku but was unable to do so. It could produce no client ledger where the clients' investments and their progress was noted. It could produce no investment statements provided to clients, nor a single email to demonstrate the existence of a client-relationship. Despite this, Ms Kwinana claimed that she had sent out annual statements in January of each year[1310] and concluded FICA documents[1311] but just could not give them to the Commission.

[1308] Exhibit DD26, p 104-111

[1309] Exhibit DD26, p 104-111 and transcript 3 November 2020, p 227 and p 229

[1310] Transcript, p 3 November 2020, p 198

[1311] Transcript 3 November 2020, p 235-236

735.4. Ms Kwinana's attempts to justify why she could not produce the documents was not credible. She claimed that Zanospark has a strict confidentiality policy that prevented her from ever emailing her clients. According to her, she would print the statements out and then deliver them by hand to her clients in January of a year, wherever they happened to be – at the office, at the airport.[1312] This was flatly contradicted by Mr Ndzeku who testified that he had received the statements via email. In the end, both Mr Ndzeku and Ms Kwinana were simply giving dishonest versions of what the position was.

735.5. Ms Kwinana also claimed that her server had been seized in February 2020[1313] with the result that she had none of the electronic copies of the annual statements.[1314] However, if this were a legitimate business, then it strains belief that she would not have retrieved these records from the host or at least keep back-ups somewhere.

735.6. In any event, the company that confiscated the server, Onero, told the Commission that the server was, in fact, confiscated in April 2019[1315] – which means that the last statements from December 2019[1316]/January 2020[1317], which Ms Kwinana claimed she had prepared for her clients, would still have been in her possession. Yet, she had failed to produce these in response to the summons. When I pressed her on this during her evidence, she then changed her story and said that she did not provide them because there were so many documents referred to in the summons and she did not have all of them. That

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1312 Transcript 3 November 2020, p 205

1313 Transcript 3 November 2020, p 199

1314 Transcript 3 November 2020, p 198

1315 Transcript 7 November 2020, p 55. Ms Kwinana did not dispute this date

1316 Transcript 3 November 2020, p 199

1317 Transcript 3 November 2020, p 205

explanation, as I pointed out, just did not bear scrutiny – you don't fail to produce documents in response to a summons because you only have some of the number that are summonsed; you produce those you have.[1318]

736. All these factors point clearly to the conclusion that Ms Kwinana was not investing Mr Ndzeku's money for him. The money she received from JM Aviation and Ms Hendricks was meant *for her*.

737. Indeed, the evidence showed that Ms Kwinana invested the R4.3 million in a property that she purchased through a family trust. On Mr Ndzeku's own version, he was investing in forex trading in order to hedge against the falling Rand.[1319] It was therefore put to Ms Kwinana that, if she was in fact investing Mr Ndzeku's money, she would not have been permitted to buy property located in South Africa with the money because this would provide no "hedge against the Rand".[1320] She had no adequate answer to this proposition.

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

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

[1318] Transcript 7 November 2020, p 99

[1319] Transcript 26 August 2020, p 347 - 351

[1320] Transcript 3 November 2020, p 251-253

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

739. As the report highlighted above, Ms Kwinana presented the Commission with re-examination submissions at the conclusion of her oral evidence. She filed the submissions on 1 December 2020.

740. Ms Kwinana complained in her submissions that the Commission had adopted an "inquisitorial" approach to her evidence and contended that she had suffered prejudice as a result.[1321] Ms Kwinana also said that the questioning by the evidence leader had been "random, haphazard and incoherent".[1322]

741. However, as the detailed account of Ms Kwinana's testimony above shows, Ms Kwinana was provided with a fair opportunity to respond to the questions put to her. She gave evidence for three days at the Commission and any consideration of the transcript of the evidence will show that her questioning was structured in a logical and coherent manner.

742. Ms Kwinana emphasised repeatedly in her submissions that the pertinent decisions on which she was called to account were taken by the Boards of SAA or SAAT.[1323] This explanation appears to have been provided to shift, or at least dilute, the blame attributable to Ms Kwinana. However, the efforts do not avail her because as a member of those Boards, she was still accountable for her own conduct. With regard

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[1321] Ms Kwinana's re-examination submissions dated 1 December 2020, paras 1.2.2.5 and 8.1 to 8.2

[1322] Ms Kwinana's re-examination submissions dated 1 December 2020, para 1.2.2.8

[1323] See, for example, Ms Kwinana's re-examination submissions dated 1 December 2020, para 2.1.1 a) and 2.2 b)

to SAAT, she was the Chairperson of SAAT'S Board and, therefore, that Board's leader.

743. The bulk of the submissions are directed to a reformulation of the evidence that Ms Kwinana already gave under oath.[1324] That is not the purpose of re-examination. Under the Commission's Rules, re-examination is permitted in order to clarify the evidence of a witness, not to repeat or reformulate it.

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

Use of external service providers

745. One of the themes that has emerged in the evidence presented to the Commission is the use of external service providers when there were already ably qualified and skilled staff working within the various SOEs. This use of duplicate external service

[1324] See, for example, Ms Kwinana's re-examination submissions dated 1 December 2020, paras 3.1 to 3.6

providers was often a means by which corruption was allowed to flourish within the SOEs. Attention was therefore given to this issue in the investigation into SAA.

746. The SAA Working Capital Tender Awarded to the McKinsey Regiments Consortium

Background

747. Mr Phetolo Ramosebudi was the South African Airways (SAA) Treasurer from January 2012 to February 2015 when he left SAA to become the Transnet Treasurer. Prior to joining SAA, Mr Ramosebudi had been the Treasurer at Airports Company South Africa (ACSA) from 2007 to 2011.[1325]

748. While Mr Ramosebudi was Treasurer of ACSA, he developed a corrupt relationship with Regiments Capital. This is based on the following transactions:

748.1. between 2010 and 2013 Mr Ramosebudi issued invoices in the names of entities controlled by him or his brother to Regiments Capital in amounts that aggregated to R9 132 490,39. [1326]

748.2. the invoices were emailed to Niven Pillay or Eric Wood, both of whom were partners of Regiments Capital at the time. [1327]

[1325] Transcript 26 November 2020, p 20

[1326] Transcript 26 November 2020, p 94-138

[1327] Transcript 26 November 2020, p 94-138. Ramosebudi Bundle FOF-04-085- 092 and FOF-04-712 -726

748.3. Regiments Capital did not pay all of these invoices, but did pay to Mr Ramosebudi or the entities linked to him, an aggregate amount of R5 173 013.66 over the same period.[1328]

748.4. Mr Ramosebudi was unable to provide any explanation for these invoices and payments and repeatedly raised his right against self-incrimination when questioned in relation to them.[1329]

749. It seems clear that these payments to Mr Ramosebudi were a corrupt quid pro quo for Mr Ramosebudi's role in allowing Regiments Capital to extract more than R50 million in gratuitous payments that were funded by ACSA.

750. In 2008 Regiments Capital were engaged by ACSA to advise it on a number of funding structures.[1330] Although Regiments had been appointed on terms that provided for a specific fee,[1331] with the collusion of Mr Ramosebudi, Regiments Capital arranged to extract more than an additional R50 million at the expense of ACSA. The additional Regiments Capital "fees" were the following:

750.1. R13 165 348 (R11 548 000 plus VAT) which was invoiced by Regiments Capital to Nedbank in relation to a R2 billion interest swap between Nedbank Capital and ACSA and then recovered by Nedbank from ACSA over the life of the interest swap transaction.[1332]

1328 Transcript 26 November 2020, p 94 and p 98-107

1329 Transcript 26 November 2020, p 94-138

1330 Transcript 26 November 2020, p 30

1331 Transcript 26 November 2020, p 29. Ramosebudi Bundle FOF-04-020

1332 Transcript 26 November 2020, p 37-41. Ramosebudi Bundle FOF-04-023

750.2. R10 784 561.88 (R9 460 142 plus VAT) which was invoiced by Regiments Capital to Nedbank in relation to a R1.5 billion interest swap between Nedbank Capital and ACSA and then recovered by Nedbank from ACSA over the life of the interest swap transaction.[1333] This transaction was entered into by ACSA on the recommendation of Regiments Capital to avoid the interest rate exposure on a loan from the Development Bank of South Africa that Regiments Capital had apparently been paid by ACSA for arranging in the first place.[1334]

750.3. Additional amounts aggregating to R 11 420 477.82 (R10 017 963 plus VAT) invoiced by Regiments Capital annually to Nedbank from March 2011 to March 2019 in respect of the same R1.5 billion interest swap between Nedbank Capital and ACSA, which amounts were recovered by Nedbank from ACSA over the life of the interest swap transaction.[1335]

750.4. R22 260 782.28 (R19 527 002 plus VAT) which was invoiced by Regiments Capital to Standard Bank in relation to a R1.75 billion interest swap between Standard Bank and ACSA and then recovered by Standard Bank from ACSA over the life of the interest swap transaction.[1336]

751. Mr Ramosebudi provided comfort to Standard Bank that ACSA was willing to enter into these arrangements in terms of which Standard Bank[1337] would pay Regiments Capital "fees" which would then be repaid by ACSA over the life of the transactions.[1338] There is no evidence to suggest that anyone at ACSA other than

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[1333] Transcript 26 November 2020, p 37 -41. Ramosebudi Bundle FOF-04-062

[1334] Transcript 26 November 2020, p 59-60

[1335] Transcript, 26 November 2020, p 146 -147. Ramosebudi Bundle FOF-04-111

[1336] Transcript 26 November 2020, p 65-78. Ramosebudi Bundle FOF-04-084

[1337] It appears that Nedbank were happy to rely on the say so of Eric Wood of Regiments Capital and did not seek confirmation from anyone at ACSA

[1338] Transcript 26 November 2020, p 65-69. Ramosebudi Bundle FOF-04-082

Mr Ramosebudi was aware of these arrangements. On his own version, Mr Ramosebudi was not authorised to enter into arrangements like these for the payment of additional "fees" to Regiments Capital.[1339]

752. Before leaving this background topic, it is necessary to note a disturbing feature of Nedbank's involvement in these transactions.

752.1. The Nedbank dealers who engaged with Regiments Capital in relation to the ACSA transactions were Mario Visnenza and Moss Brickman.

752.2. Mr Visnenza and Mr Brickman appear to have had an arrangement with Eric Wood of Regiments Capital in terms of which the Regiments Capital "fee" which was to be repaid by ACSA over the life of the transaction would be matched by an equivalent amount to be paid to Nedbank by ACSA. This arrangement was reflected in Mr Visnenza's repeated statement to Mr Wood in emails relating to Nedbank ACSA Regiments transactions. Mr Visnenza's statement was:

> "We leave it to you to include a margin for us to share on the usual 50/50 agreement".[1340]

752.3. Nedbank's arrangement with Regiments Capital was, accordingly, one in terms of which Regiments Capital, which was ACSA's agent, was incentivised to act contrary to its principal's interests by increasing the margin payable by ACSA to Nedbank and, thus, increasing its 50% share of this margin.

752.4. There is no evidence that Nedbank ever sought proof from ACSA that ACSA had authorised the arrangement in terms of which Nedbank, as ACSA's

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[1339] Transcript 26 November 2020, p 69-70

[1340] See for example Ramosebudi Bundle FOF-04-021 email from Mario Visnenza to Eric Wood, 1 October 2009 (copied to Moss Brickman and Elize Britz of Nedbank) and Ramosebudi Bundle FOF-04-032 email from Mario Visnenza to Eric Wood, 16 February 2010 (copied to Moss Brickman of Nedbank)

counterparty, would pay the "fees" of ACSA's agent, Regiments Capital, up front and recover these "fees" from ACSA over the life of the transaction with ACSA. Still less is there evidence that Nedbank informed ACSA that Regiments Capital, as ACSA's agent, was being incentivised to increase the margin payable by ACSA to Nedbank.

752.5. On its face, the arrangement between Mr Visnenza and Mr Brickman on the one hand, and Mr Wood, on the other, would appear to contravene section 6(b)(ii) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004. That provision reads:

> "6 Offences in respect of corrupt activities relating to agents
>
> Any-
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> …
>
> (b) person who, directly or indirectly-
>
> …
>
> (ii) gives or agrees or offers to give any gratification to an agent, whether for the benefit of that agent or for the benefit of another person,
>
> in order to act, personally or by influencing another person so to act, in a manner-
>
> (aa) that amounts to the-
>
> (aaa) illegal, dishonest, unauthorised, incomplete, or biased;
>
> …
>
> exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
>
> (bb) that amounts to-
>
> (aaa) the abuse of a position of authority;
>
> (bbb) a breach of trust; or

(ccc) the violation of a legal duty or a set of rules;

(cc) designed to achieve an unjustified result; or

(dd) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to agents."

752.6. The Commission had intended to canvass these issues with Nedbank in evidence at the hearings, but the time for hearings ran out before this could take place. So Nedbank's version in relation to these transactions has not been heard. This is a matter which requires further investigation by the appropriate authorities and recommendations in this regard are made in the concluding section of this Chapter, together with recommendations in relation to the roles of Regiments Capital and Messrs Ramosebudi, Wood and Pillay in these transactions.

The Corrupt Manipulation of the SAA Working Capital Tender

753. SAA Bid No RFP 085/13 was an invitation issued on 19 November 2013 for proposals "for the appointment of a consultant to assist the South African Airways Group with the unlocking of working capital." [1341] The framing of this bid and its adjudication were corruptly manipulated by Mr Ramosebudi and Regiments Capital so as to ensure that the tender was awarded to the McKinsey Regiments consortium.

754. It is important to note that there is no evidence that McKinsey was aware of the corruption linked to its joint bid with Regiments Capital. After the corruption had been

[1341] Ramosebudi Bundle FOF-04-133 - 201

pointed out to McKinsey by the Commission, McKinsey repaid to SAA the full amount that it had received from SAA pursuant to its appointment flowing from the joint bid with Regiments Capital.[1342] The amount paid by McKinsey to SAA was R12 484 710. That payment was made by McKinsey pursuant to an approach by the Commission's Investigation Team and Legal Team where they shared with McKinsey the evidence uncovered by the Commission showing wrongdoing in relation to SAA Bid No RFP 085/13.

755. The corrupt rigging of the Working Capital tender started more than a month before the bid invitation was issued.

755.1. On 14 October 2013, Mr Ramosebudi sent Mr Wood at Regiments Capital an email of a draft of the scope of work to be included in the Working Capital tender.[1343]

755.2. On 24 October 2013 Mr Ramosebudi emailed Mr Wood a draft of the evaluation criteria to be included in the Working Capital tender. His covering email invited Mr Wood to "review and comment".[1344]

755.3. On 28 October 2013 Mr Wood emailed Mr Ramosebudi a revised draft of the evaluation criteria. The revised draft of the evaluation criteria had been sent to Mr Wood earlier that day by Mr Indheran Pillay of Regiments Capital. The revised draft had been copied to Mr Tewedros Gebreselasie of Regiments Capital. It, therefore, appears that Mr Indheran Pillay and Mr Gebreselasie were

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[1342] Transcript26 May 2021, p 63-65

[1343] Ramosebudi Bundle FOF-04-115 – 118 email from Phetolo Ramosebudi to Eric Wood 14 October 2013

[1344] Ramosebudi Bundle FOF-04-119 – 122 email from Phetolo Ramosebudi to Eric Wood 24 October 2013

also aware of Regiments Capital's revision of the evaluation criteria for the SAA Working Capital tender.[1345]

755.4. The changes made by Regiments Capital to the draft evaluation criteria were material. Most of these changes were incorporated in the final bid invitation document that was issued on 19 November 2013. [1346]

755.5. On 29 October 2013 Mr Ramosebudi emailed Mr Wood an invoice in the amount of R375 606 issued to Regiments Capital in the name of Mr Ramosebudi's entity, Rams Capital CC. [1347] On 7 November 2013 Regiments Capital paid the invoiced amount of R375 606 to Riskmaths Solutions (Pty) Ltd, another of Mr Ramosebudi's entities. The payment was made from the Regiments Capital Standard Bank business current account into the FNB business account of Riskmaths Solutions (Pty) Ltd. [1348]

756. Twelve days after Regiments Capital had paid its bribe to Mr Ramosebudi, the SAA Working Capital Bid Invitation document was issued on 19 November 2013 with a closing date of 4 December. [1349] So, while all other bidders were given only 15 days between receiving notice of the bid and submitting their bid, Regiments Capital had an additional month to consider the scope of work section of the bid and had reformulated the evaluation criteria of the bid three weeks before the bid invitation was issued.

[1345] Ramosebudi Bundle FOF-04-123 – 126 email from Eric Wood to Phetolo Ramosebudi 28 October 2013

[1346] See Ramosebudi Bundle FOF-04-127 – 129. Compare Ramosebudi Bundle FOF-04-153 - 154

[1347] Ramosebudi Bundle FOF-04-130 - 131 email from Phetolo Ramosebudi to Eric Wood 29 October 2013

[1348] Ramosebudi Bundle FOF-04-654 (Regiments Capital Standard Bank account statement, 30 November 2013 and FOF-04-691 – 692 (Riskmaths Solutions FNB account statement, 9 November 2013)

[1349] Ramosebudi Bundle FOF-04-133 – 201 at 137.

757. Regiments Capital submitted a bid in partnership with McKinsey.[1350] As pointed out above, there is no evidence that McKinsey was aware of the corrupt dealings between Regiments Capital and Mr Ramosebudi linked to this bid.

758. The Regiments Capital McKinsey bid was structured so that the remuneration payable to the consortium was not fixed but would be 8% of the benchmarked savings achieved for SAA. This created a potential problem in that the Bid Adjudication Committee considering the tender only had authority to award tenders less than R100 million and the 8% of savings might exceed R100 million. Mr Ramosebudi flagged this issue in an email to the Bid Adjudication Committee on 24 January 2013. He suggested that McKinsey be approached to place a R100 million cap on their fees. Later, on 24 January 2013 he forwarded to Mr Wood his confidential email to the Bid Adjudication Committee. In that way he alerted Mr Wood to the fact that, unless the Regiments Capital McKinsey bid price was capped at R100 million, the tender award would have to be approved by the SAA Board and Mr Ramosebudi would lose his control over the process.[1351]

759. On 24 January 2013 Mr Ramosebudi also forwarded to Mr Wood confidential exchanges between the Bid Adjudication Committee and the Regiments McKinsey consortium's two remaining competitors, Boston Consulting[1352] and the IQ Group. [1353] These exchanges included details of the pricing structure of the Boston

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[1350] Ramosebudi Bundle FOF-04-202 - 227

[1351] Ramosebudi Bundle FOF-04-228 email from Mr Ramosebudi to Mr Wood, 24 January 2014 forwarding email from Mr Ramosebudi to Reinette Slabbert and others, 24 January 2014

[1352] Ramosebudi Bundle FOF-04-235 – 247 email from Mr Ramosebudi to Mr Wood, 24 January 2014 forwarding exchanges between the Bid Adjudication Committee and Boston Consulting

[1353] Ramosebudi Bundle FOF-04-248– 251 email from Mr Ramosebudi to Mr Wood, 24 January 2014 forwarding exchanges between the Bid Adjudication Committee and IQ Group

Consulting and IQ Group bids. So, the Regiments Capital McKinsey bidders would have knowledge of this information when they were approached to cap their price.

760. On 28 January 2013 Mr Ramosebudi forwarded to Mr Wood an internal Bid Adjudication Committee email reporting that McKinsey had still not confirmed that they would cap their fees below R100 million. [1354]

761. Later, on 28 January 2013 McKinsey emailed Reinette Slabbert of the Bid Adjudication Committee to confirm a cap on their fees of R80.5 million for a saving of R1.2 billion. [1355]

762. Upon receipt of this communication from McKinsey, Ms Slabbert emailed the Bid Adjudication Committee later on 28 January 2013 recommending that the Committee establish from Boston Consulting and the IQ Group what their fees would be for a saving of R1.2 billion. [1356] Mr Ramosebudi immediately intervened to quash Ms Slabbert's proposal. He wrote an email to the Bid Adjudication Committee stating:

> "I am seriously very unhappy the way this tender is run, Reinette seems to be biased and we can't BAFO after BAFO because someone didn't price the way Reinette expected." [1357]

[1354] Ramosebudi Bundle FOF-04-252 - 254 email from Mr Ramosebudi to Mr Wood, 28 January 2014 forwarding an exchange between the Bid Adjudication Committee and McKinsey

[1355] Ramosebudi Bundle FOF-04-255 email from Christina Planert to Reinette Slabbert, 28 January 2014

[1356] Ramosebudi Bundle FOF-04-255 email from Reinette Slabbert to Bid Adjudication Committee, 28 January 2014

[1357] Ramosebudi Bundle FOF-04-260 email from Phetolo Ramosebudi to Bid Adjudication Committee, 29 January 2014

In the face of Mr Ramosebudi's accusation, Ms Slabbert backed down,[1358] and the tender was awarded to the Regiments McKinsey consortium.[1359]

The Payments

763. SAA ultimately paid McKinsey an amount of R12 484 710 in March 2015 in respect of the Working Capital Tender. [1360]

764. The amount of R12 484 710 included Regiments Capital share of the consortium fees. On 31 March 2015, Regiments Capital invoiced McKinsey in the amount of R6 241 500 for its share of the fees (just under 50% of R12 484 710). Regiments Capital, in turn, paid R2 496 600 (40% of the amount it had invoiced McKinsey) to Homix, and R312 075 (5% of the amount it had invoiced McKinsey) to Albatime, who had introduced Regiments Capital to Salim Essa.[1361]

765. Mr Ramosebudi invoked his right against self-incrimination and declined to answer a question whether he knew that Regiments Capital had paid to a shell company designated by Salim Essa or Ashok Narayan any amounts it received on the SAA Working Capital contract.[1362]

[1358] Ramosebudi Bundle FOF-04-260 email from Reinette Slabbert to Bid Adjudication Committee, 29 January 2014

[1359] Ramosebudi Bundle FOF-04-275 email from Christina Planert to Reinette Slabbert and others, 6 February 2014

[1360] McKinsey Bundle FOF-08-475

[1361] Ramosebudi Bundle FOF-04-596 Extract from Regiments Capital spreadsheet "Advisory Invoices Tracking"

[1362] Transcript 26 May 2021, p 63-65

766. As pointed out above, McKinsey has now repaid to SAA the full amount of the R12 484 710 it received from SAA on the Working Capital contract, including the R6 241 500 it paid to Regiments Capital on the contract.

External "legal" services

767. Ms Kwinana testified that the staff of SAA were of a very high calibre; were well-qualified and competent. With particular reference to their legal personnel, she said that they were very highly qualified and the Board would rely on them regularly.[1363]

768. Ms Kwinana testified that she knew Mr Nick Linnell[1364] and that he used to attend Board meetings and committee meetings at SAA. Although she never asked why an outsider was present at such meetings,[1365] she said that she did not know why he was at those meetings. She testified that she assumed that Ms Myeni would know as she had invited him.[1366] Ms Kwinana testified that sometimes, Mr Linnell would offer a legal opinion on a matter or he would even make presentations.[1367] If the Board needed a quick legal opinion or some legal research, they would ask Mr Linnell to provide the legal opinion or to conduct the required research[1368]

[1363] Transcript 2 November 2020, p 94

[1364] Transcript 2 November 2020, p 117

[1365] Transcript 2 November 2020, p 118

[1366] Transcript 2 November 2020, p 122

[1367] Transcript 2 November 2020, p 122

[1368] Transcript 2 November 2020, p 124

769. When asked why, when SAA had such well qualified lawyers, they needed an outsider to be there to give legal advice, Ms Kwinana could not give a meaningful answer.[1369] However, she confirmed that Mr Linnell did not actually attend those meetings in his capacity as a lawyer.[1370] However, the evidence shows that Mr Linnell was heavily involved in legal matters involving Ms Myeni as the Chair of the Board of SAA. He briefed Werksmans on her behalf[1371] when she sought an opinion about the CEO, Mr Kalawe, and about the conduct of the Board.

770. Mr Linnell was paid by SAA for this work[1372] in circumstances where Ms Kwinana indicated she did not understand his purpose and that SAA had its own highly qualified in-house legal team. Mr Linnell was engaged in circumstances where no proper procurement processes were followed as they should have been under the PFMA.[1373]

771. Given that SAA already had briefed attorneys, had in-house legal counsel, and that Mr Linnell was not actually a practising attorney in South Africa, Ms Myeni was asked what role Mr Linnell was playing and why he billed SAA for his services. She was also asked why his invoices[1374] (amounting to just under R2million) were paid by SAA in circumstances where it appears no procurement processes had been followed. Ms Myeni was also asked why Mr Linnell was permitted to attend confidential board meetings when he was not fulfilling the role of an attorney (who would have then been subject to legal privilege) and whether she accepted that

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[1369] Transcript 2 November 2020, p 124

[1370] Transcript 2 November 2020, p 127

[1371] DD34 p 1979 para 7.3, p 1980 para 10

[1372] Exhibit DD34.27, p 1585-1692.

[1373] Transcript 2 November 2020, p 134

[1374] Exhibit DD34(b), p 1590-1589. Many of these invoices were addressed to Ms Kwinana – despite her testimony that she did not know what Mr Linnell did at SAA

spending just under R2million in these circumstances would amount to irregular and wasteful expenditure in breach of the PFMA.

772. Ms Myeni refused to answer these questions and invoked her privilege against self incrimination.[1375] When she responded on affidavit to the question of Mr Linnell's attendance at Board meetings, Ms Myeni confirmed that he had attended the meetings on occasion when he was invited by the Board to do so. Had Ms Myeni in fact given this answer during her testimony, the answer would have been followed up with a series of further questions about why his attendance was required when there was a fully functional staff compliment at SAA; who, precisely, had called for him to attend; what value he had added to those Board meetings; and whether having an outsider at the meetings was not in conflict with the confidentiality that Ms Myeni was often keen to emphasise for the work of SAA's Board. Evidently, Ms Myeni elected only to answer the Commission's questions on affidavit, to avoid these obvious follow-up questions, and to only give answers that did not expose any wrongdoing. Despite repeatedly stating that she wished to be helpful to the Commission, her conduct revealed something else. Ms Myeni's entire approach to the Commission was consistent with a witness eager not to be exposed to probing questioning. Her answers on affidavit were brusque and provided no legitimate reason for involving Mr Linnell in confidential board work, other than to advance her own personal interests.

773. Ms Myeni was also afforded an opportunity after her oral evidence to respond to the evidence of Werksmans about the work they did for Ms Myeni in April 2014 and in terms of which they were briefed by Mr Linnell before he was even appointed at SAA in any capacity. Ms Myeni provided an affidavit to the Commission in which she

[1375] Transcript 6 November 2020, p 170-192

declined to deal with Werksmans' evidence on the basis that she could incriminate herself.

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

775. The evidence presented in the Eskom workstream also reveals the role that Mr Linnell played, through Ms Myeni's invitation, in the efforts to remove three executives at Eskom in March 2015. Four executives were suspended, three of whom never returned to Eskom.

BEYOND SAA

State security resources

776. The evidence presented at the Commission showed that the project of state capture was often facilitated through the use of state resources to advance the personal interests of officials. The Commission therefore investigated instances where state resources were used to further the project of state capture, corruption and fraud at SOEs.

777. In the case of SAA, there were two instances of irregular and unlawful employment of state security resources.

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

and harassing members of staff. SAA lost staff as a result of the vetting and Ms Myeni attempted to use the results of the vetting to have one member of the finance team removed from her position.

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

Illegal vetting of staff at SAA

778. Ms Nokunqoba Gloria Dlamini was employed by the State Security Agency (*SSA*) and based in the Pretoria Head Office as an analyst and evaluator. This means that she interpreted and analysed reports from information obtained from vetting field work.[1376] Ms Dlamini testified before the Commission that she was assigned the role of a project manager when SAA was vetting its executives.[1377]

779. Ms Mpshe testified that she received a call from the SSA to the effect that they needed a report about SAA's decision to close the route through Dakar, Senegal – a decision made by Mr Bosc because it was not commercially viable. Ms Mpshe consulted one of the legal advisors in SAA and the two of them decided that Ms Mpshe could not simply divulge all of this information because it involved confidential information about particular employees of SAA, in circumstances where the request did not come from the normal protocol – i.e. from one government department to another. They communicated this to the SSA official. Thereafter, they received a letter from the Director–General of the SSA, Mr Dlodlo, who instructed them to reply to the request.[1378] Then a further letter arrived from the Minister of State Security,

[1376] Transcript 19 February 2020, p 11

[1377] Transcript 19 February 2020, p 12

[1378] Transcript 1 July 2019, p 147

Minister Mahlobo and then one from the National Treasury indicating that staff would be vetted by the SSA.[1379]

780. Ms Dlamini testified that the vetting of executives and support staff at SAA had its origins in a letter sent by the Minister of State Security, Mr David Mahlobo, to the Minister of Finance, Mr Nhlanhla Nene, on 13 October 2015.[1380] The letter stated, inter alia: "It has come to the attention of the State Security Agency that there is an urgent need for vetting and re-vetting of state owned enterprises given sensitive information received on an ongoing basis."[1381] The letter went on to state: "As per section 1 of the National Strategic Intelligence Act 39 of 1994 as amended by Act 67 of 2002 states that the National Intelligence Agency has the mandate to vet all other National, Provincial and Local Government Departments, Parastatals and their service providers." The letter ultimately stated that the Chairperson of SAA would be required to provide a list of all executive management support staff.[1382]

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

> "The relevant members of the National Intelligence Structures may conduct a vetting investigation in the prescribed manner to determine the security competence of a person if such a person (a) is employed by or is an applicant to an organ of state; or (b) is rendering a service or has given notice of intention to render a service to an

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1379 Transcript 1 July 2019, p 148

1380 Exhibit DD24, pp 17-18

1381 Exhibit DD24, p 18, para 2

1382 Exhibit DD24, p 18, para 6

organ of state, which service may (i) give him or her access to classified information and intelligence in the possession of the organ of state; or (ii) give him or her access to areas designated national key points in terms of the National Key Points Act, 1980. "

782. Ms Dlamini testified that her superior, General Dlodlo, explained to her that SSA would be vetting SAA because it was an SOE and vetting SOEs was part of SSA's mandate.[1383] Ms Dlamini confirmed that, in her view, just being an employee of an SOE meant that one had to be vetted.[1384] She also confirmed that at no point in the vetting exercise did the team assess whether the employees they vetted (executive managers and support staff) had access to classified information.[1385]

783. On 26 November 2015, Minister Nene responded to Minister Mahlobo's letter.[1386] In his letter, Minister Nene repeated the purported (but wrong) quote from the National Strategic Intelligence Act. The letter also described two letters from Ms Myeni setting out all executive management and support staff who were to be vetted. The one letter from Ms Myeni was dated 2 November 2015 and the other, 5 November 2015.

784. The letter from Ms Myeni dated 2 November 2015[1387] had 13 names of executives of SAA that were to be vetted. The one dated 5 November 2015[1388] had a further list of around 118 people consisting of executive managers and support staff. Ms Dlamini testified that, in her view, the Board members of SAA should also have been

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1383 Transcript 19 February 2020, p 28

1384 Transcript 19 February 2020, p 30

1385 Transcript 19 February 2020, p 46

1386 Exhibit DD24, p 19

1387 Exhibit DD24, p 20.

1388 Exhibit DD24, p 21-22

vetted as people who performed services for an organ of state if they were privy to classified information.[1389]

785. This is also provided for in clause 1.5 of Chapter 5 of the Minimum Information Security Standard (*MISS*) document. That clause provides that political appointees, directors, generals, ambassadors will not be vetted unless the President so requests or the relevant contract so provides, but that from the lowest level up to Deputy DG, all staff members and any other individuals who should have access to classified information must be subject to security vetting.[1390]

786. In summary:

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

786.2. The MISS provides that all staff members or any other individuals who have access to classified information <u>must</u> be vetted.

786.3. Directors of the Board of SAA will be service providers and thus, in order for SAA to be empowered to vet them, they must have access to classified information and if they have access to that information, the MISS makes it mandatory to vet them.

[1389] Transcript 19 February 2020, p 42- 43

[1390] Aviation legislation bundle p 465

787. Given that the vetting was not conducted in respect of Board members, Ms Dlamini admitted that the vetting would not have been compliant with the provisions of MISS if those Board members had had access to classified information.[1391]

788. Further, it is important to note that there is a qualification in section 2A of the NSIA. The vetting must be conducted "in the prescribed manner to determine the security competence of a person". The definition of security competence is: "a person's ability to act in such a manner that he or she does not cause classified information or material to fall into unauthorised hands thereby harming or endangering the security or interests of the State." This is measured against three things: the person's susceptibility to extortion and blackmail; amenability to bribes, susceptibility to being compromised due to the person's behaviour; and the person's loyalty to the state.

789. SSA's mandate to vet employees of organs of state is limited to these employees who would have access to classified information. Ms Dlamini, nevertheless, insisted that the meaning of the provision was that any employees of organs of state may be vetted, without any recourse to whether they would even be exposed to classified information.[1392]

790. Ms Olitzki, who, as seen above, was in the finance department at SAA, provided an affidavit to the Commission in which she confirmed that in the eight years that she had served as the Head of Department for Financial Accounting at SAA, she had never once seen a document that could be deemed classified or top secret.[1393]

[1391] Transcript 19 February 2020, p 48

[1392] Transcript 19 February 2020, p 147-148

[1393] Exhibit DD24, p 68 and p 72

791. In Ms Dlamini's project plan, she stated as an objective of the vetting that it was to ensure that "all classified and sensitive documents within SSA are assessed by personnel with valid security clearances."[1394] When it was put to Ms Dlamini that this goal could not be achieved if there was never an assessment of whether the vetted employees actually had access to any classified or sensitive documents, she answered that their only role was to identify the risk posed by executives.[1395] Of course, this makes no sense in a context in which risk is a function of access to classified documents.

792. The project plan also stated one of its objectives as being "executive management support and buy-in".[1396] However, it was put to Ms Dlamini that she did not receive this support because she had to fly to Cape Town to meet with Ms Myeni about this issue and that seven members of executive management resigned because of the vetting process and that many others were unhappy given the level of personal information they had to provide to the SSA.[1397] Ms Dlamini responded that this did not indicate a lack of buy-in and support because she never received indication from the Acting CEO of SAA that there was a lack of support and those management employees who resigned could have resigned for any reason.[1398] She also stated that she had regular feedback meetings and so she would be in a position to know if there was a lack of support.[1399] However, she later admitted that she had only met with the members of the Board (who was not being vetted) and the Acting CEO, Mr

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1394 Exhibit DD24, p 34, para 1.3

1395 Transcript 19 February 2020, p 51

1396 Exhibit DD24, p 35, item 1.5

1397 Transcript 19 February 2020, p 60-61

1398 Transcript 19 February 2020, p 61

1399 Transcript 19 February 2020, p 62

Musa Zwane. She therefore failed to meet with the actual people who were subjected to the vetting process and so could not have obtained feedback from them.[1400]

793. Ms Mpshe testified that many employees were suspicious and unhappy about the vetting process. Many were not willing to cooperate as vetting was not a condition of their employment and it had never been asked of them before.[1401] Ms Mpshe herself refused to comply because she was very suspicious of the reasons for the vetting, and noted that the questions were very personal and intrusive. Her husband viewed the process and questions as abusive and they decided that she would not comply. She shared this position openly with Mr Zwane who was, at that stage, the Acting CEO.[1402]

794. A curious feature of Ms Dlamini's reporting of the project plan for the vetting process is that she first met with the Chairperson, Ms Myeni, alone on 13 January 2016, and later met with the Board the next day to present the plan in Midrand. Ms Dlamini claimed that the purpose of this first meeting was just to "observe protocol" – but she had to fly to Durban to do so and then fly back for the meeting with the Board in Midrand the next day.[1403] She explained that the purpose of the meeting was to get access to the resources she needed to conduct the vetting like parking access but she then admitted that it was, in fact, the Board and not Ms Myeni that could help her with obtaining that access. She therefore could not give a good reason why she had to meet with Ms Myeni alone before meeting with the Board, to run the project plan past her.[1404]

[1400] Transcript 19 February 2020, p 62

[1401] Transcript 1 July 2019, p 149

[1402] Transcript 1 July 2019, p 149

[1403] Transcript 19 February 2020, p 63-64

[1404] Transcript 19 February 2020, p 68-69

795. Ms Dlamini testified that the vetting process had four stages. First, participants had to fill in administrative forms; second, there was fieldwork where vetting officers conducted interviews with references and any additional ones that could be necessary; third, the participant would have to undergo a polygraph test; and, finally, analysis where the data was consolidated and interpreted to reach final conclusions.[1405]

796. Ms Olitzki's affidavit confirmed the extensive and invasive nature of the vetting process.[1406] The questions asked in the administrative phase included health, psychiatric treatment, education, substance abuse, romantic relationships and cohabitation arrangements; the forms required the employee to identify referees who had known the employee for 5 to 20 years; details about any travel out of the country and those of the person's spouse; bank statements; loans; income and expenditure and sources of income.[1407]

797. During the interview phase, participants were asked wide-ranging questions, some of which were very personal and private and some of which appeared to be completely irrelevant to their work.[1408] The participants also knew that the interview would be followed with a polygraph test and so they are not in a position to withhold

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[1405] Transcript 19 February 2020, p 70-71

[1406] Exhibit DD24, p 68

[1407] Exhibit DD24, p 70

[1408] Exhibit DD24, p 43-49. These included questions about family background; whether children in the house were treated fairly when they were growing up; whether family had substance abuse issues and what they were; psychological treatment that family members had received; they had to describe their spouse's personality; whether if they could live their life over again they would marry their spouse; the nature of the relationship with their parents; what influence their relationships with their parents and parents in law had on their marriage; whether they believed in having more than one partner at a time; how your children would cope with the death of your spouse; how they deal with stress and pressure; whether they go out to bars and clubs or attend parties; what they talk about there; whether they hang out with men or women; what they see as luxuries; whether they make impulsive shopping decisions; if they borrow money; if they gamble; if they belong to a church; what principles they lived by; their political affiliations; whether it is wrong to regularly change beliefs; whether they are happy with the current government; the role of the participant in any political organisation; questions about personality and moods; whether they are susceptible to manipulation or bribery; whether they confide in their friends; whether they could be blackmailed.

information.[1409] Ms Dlamini confirmed that all the questions are of an extremely personal and invasive nature.[1410]

798. Ms Dlamini testified that the polygraph machine is only used when vetting is being conducted at a Top-Secret level or when there is a specific need to verify the reliability of the information gathered. Ms Dlamini stated that they were vetting the management of SAA on a Top-Secret level.[1411] However, she admitted that while it was "standard practice" for senior management to be vetted at this level, she did not know that any of them would ever actually be in receipt of Top-Secret Information.[1412] These managers were also not advised that they were entitled to refuse the polygraph test, which Ms Dlamini stated they should have been told.[1413]

799. Ms Dlamini stated that during the analysis stage, the evaluator would make recommendations on whether clearance ought to be granted or declined.[1414] She acknowledged that the vetting regulations provided that an applicant had to be notified in writing of the outcome of the vetting. She stated that she complied with this regulation by giving the outcomes to the Acting CEO, Mr Zwane, but not the individuals concerned.[1415] She testified that she told Mr Zwane verbally to give the outcomes to the individuals concerned and that he undertook to do so.[1416] Ms Dlamini

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[1409] Transcript 19 February 2020, p 78

[1410] Transcript 19 February 2020, p 80

[1411] Transcript 19 February 2020, p 81

[1412] Transcript 19 February 2020, p 81- 82

[1413] Transcript 19 February 2020, p 88-89

[1414] Transcript 19 February 2020, p 90

[1415] Transcript 19 February 2020, p 90-91

[1416] Transcript 19 February 2020, p 92

stated that she was surprised to learn that at least two SAA managers were not told their outcomes.[1417]

800. Ms Dlamini prepared a report on the outcome of the vetting process.[1418] She concluded that the project was successful; that 70% of executive management and support staff had been vetted and 85% of cases received clearance; and "no strikes or serious disturbances reported since the project started."[1419] Despite this statement, Ms Dlamini still persisted in her claim that she knew nothing about any unhappiness or resistance to the vetting process.[1420]

801. The report also claimed that "SAA reported an improvement on their revenue (about two billion turnover) as a result of the vetting project".[1421] She testified that she had obtained that information from the Acting CEO, Mr Zwane.[1422] However she admitted that he never told her the increase was "as a result" of the vetting process. When asked what possible causal relationship there could have been between vetting and revenue, she could not answer the question.[1423]

802. Ms Dlamini could also not explain in what way the vetting project had been "successful" as indicated in her report.[1424] After being given the opportunity to explain these so-called "successes" many times, she finally suggested that it may have contributed to a reduction in corruption but could not provide any concrete reason

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[1417] Transcript 19 February 2020, p 92

[1418] Exhibit DD24, p 50

[1419] Exhibit DD24, p 60-61

[1420] Transcript 19 February 2020, p 120

[1421] Exhibit DD24, p 60

[1422] Exhibit DD24, p 122

[1423] Transcript 19 February 2020, p 123

[1424] Transcript 19 February 2020, p 125-129

for why that would be or how that occurred, and also confirmed that they could not even terminate the employment of people who failed to obtain clearance.[1425]

803. The evidence presented to the Commission demonstrates that:

803.1. 118 employees at SAA were subjected to an invasive, intrusive, and extremely personal vetting process;

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

803.3. The objective of the vetting process was also to ensure that employees did not disclose classified information;

803.4. It was never determined whether any of these employees were ever in receipt of classified information during the course of their employment, and some evidence suggests that these employees in fact were never exposed to that type of information;

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

804. It is, therefore, reasonable and fair to conclude that the vetting was pointless, harmful and unlawful. Importantly, the two Ministers involved in the process and the project manager in the SSA were wrong about the mandate of the SAA for these types of operations. These findings are of importance to the future operations of the SAA

[1425] Transcript 19 February 2020, p 139-141

because they evidence a worrying and misguided internal understanding of the legal framework within which vetting is required to be conducted.

Illegal use of SSA VIP protection detail

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

806. The Commission heard extensive evidence about the irregular redeployment of state security resources for the benefit of former President Zuma. This process of redeploying state resources from their proper and legitimate scope was at the expense of the public they were required to serve. When state resources are diverted in this manner, there is less personnel available to discharge the proper mandate of institutions. There is also the risk that those resources will be used for unlawful and ulterior purposes such as intimidating detractors and creating a cloud of secrecy and lack of transparency over these officials' dealings.

807. Mr Y, who was employed within the State Security Agency (*SSA*), submitted an affidavit to the Commission without his identity being revealed. This was pursuant to an order I had made as Chairperson of the Commission allowing that his identity should not be disclosed.[1426]

[1426] Transcript 19 February 2020, p 113-114

808. Mr Y testified about the Special Operations Unit within the SSA. This unit dealt with strategic projects that were very sensitive and involved using undercover operatives from the SSA.[1427] Mr Y stated that this unit was used where the links between the SSA or government would need to remain hidden and to allow for plausible deniability of the state's involvement. This could be counter-terrorism or transnational organized crime – matters that required the covert gathering of intelligence. That was, at least, the function of the unit before 2012.[1428]

809. Mr Y explained that after 2012, undercover operatives were redeployed to act as protection detail for former President Zuma. These members would act as a parallel protection to the Presidential Protection Unit. This meant they were exposed as members of the SSA and therefore could no longer perform covert undercover operations.[1429]

810. To carry out this parallel protection mandate, Mr Thulani Dlomo was appointed as General Manager of the new Special Operations Unit, and all the members of the covert structure were advised that they were no longer going to be working on identified focus areas like transnational organized crime or counter-terrorism, but instead would be doing risk assessment and security directly related to President Zuma. This redeployment took place despite the fact that some of these operatives had been trained and resources had been invested in them to be placed in very long term undercover positions.[1430] The Unit was shifted from operating under the Deputy DG responsible for domestic operations, to the DG responsible for counter

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[1427] Transcript 19 February 2020, p 172

[1428] Transcript 19 February 2020, p 173

[1429] Transcript 19 February 2020, p 175

[1430] Transcript 19 February 2020, p 175-176

intelligence operations.[1431] The unit had an estimated 30 permanent members and a further 70-170[1432] members who were agents acting for the Unit but working in other law enforcement agencies.[1433]

811. Mr Y testified that he described the unit as a "parallel" structure because most of their functions were already performed by other units in the SSA or other stakeholder departments, but they were dedicated to performing this function specifically for the former President.[1434] For example, protection of VIPs (Ministers, members of Parliament) would normally be performed by the SAPS but there was now a dedicated unit in the SSA that would also specifically protect the President.[1435]

812. Mr Y testified that while some in the unit were existing operatives, most were new recruits – and most of them were recruited from KwaZulu-Natal. Mr Y did not know the reason for this but said that he could "make certain assumptions and deductions given the support base of the people involved".[1436]

813. These new recruits were given training normally reserved for full SSA members. This included training in foreign countries in counter intelligence and VIP protection and the gathering of intelligence.[1437]

1431 Transcript 19 February 2020, p 176

1432 Mr Y's affidavit says 200 in total while in oral testimony he said 100.

1433 Transcript 19 February 2020, p 176

1434 Transcript 19 February 2020, p 177

1435 Transcript 19 February 2020, p 179

1436 Transcript 19 February 2020, p 181

1437 Transcript 19 February 2020, p 181

814. Mr Y testified that, in the course of interviewing agents of this Unit, it appeared the Special Operations Unit was conducting unlawful operations. This investigation was still ongoing when Mr Y testified in February 2020.[1438]

815. Mr Y explained that the group of approximately 200 agents and members were allocated to specific people who were supporters of President Zuma and who "may have been facing certain difficulties" – and who would not be eligible for protection from SAPS. One of those people was Ms Myeni – though Mr Y confirmed that the SSA could not find any formal paperwork containing a request for protection from within SSA. Mr Y discovered that Ms Myeni had enjoyed these security benefits as a result of the work of the High-Level Review Panel investigation into SSA matters.[1439]

816. The High-Level Review Panel was established by President Cyril Ramaphosa in June 2018 to enable the reconstruction of a Professional National Intelligence Capability for South Africa that would respect and uphold the Constitution and the law. It was chaired by Dr Sydney Mufamadi.[1440] The Report generated by this panel explained that the Special Operations Unit had a legitimate function prior to 2012 working on particularly serious or sensitive operations of national importance but thereafter the report stated that there was "naked politicization of intelligence".[1441]

817. The Report concluded that Mr Thulani Dlomo had been deployed by President Zuma via the Minister of State Security, to head up the Special Operations Chief

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[1438] Transcript 19 February 2020, p 186

[1439] Transcript 19 February 2020, p 182. The High-Level Review Panel Report on the State Security Agency, dated December 2018, may be found in Exhibit DD23(c), p 168-273

[1440] Exhibit DD23(c), p 173

[1441] Exhibit DD23(c), p 236

Directorate and effect the politicization of the Unit and the SSA in general.[1442] It found that the Unit was "a law unto itself and directly served the political interest of the Executive It also undertook intelligence operations which were clearly unconstitutional and illegal." This included deploying undercover operatives for VIP protection of various persons not entitled to this protection, including Ms Myeni.[1443]

818. In fact, the Report found that the Special Operation Unit had become a parallel intelligence structure serving a faction of the ruling party and in particular the personal, political interests of the sitting President.[1444] The Report concluded that this was in direct breach of the Constitution, relevant legislation and good government intelligence functioning.[1445] Mr Y agreed with and confirmed all of these findings.[1446]

819. Mr Y testified that the normal process an official would follow if they believed their life was under threat, would be to put a request through the security advisor in the SSA allocated to a particular SOE or government department, which request would be channelled to the SAPS.[1447] Mr Y confirmed that no such process was followed with respect to Ms Myeni.[1448]

820. Even though Ms Myeni did not lawfully qualify for protective VIP services, she nevertheless received such services from the SSA.

[1442] Exhibit DD23(c), p 237, together with transcript 19 February 2020, p 186

[1443] Exhibit DD23(c), p 237

[1444] Exhibit DD23(c), p 238

[1445] Exhibit DD23(c), p 238

[1446] Transcript 19 February 2020, p 187-188

[1447] Transcript 19 February 2020, p 188

[1448] Transcript 19 February 2020, p 189

821. Mr Lingaraj Gary Moonsamy, the Head of Department: Group Security Services at SAA, provided an affidavit to the Commission that set out the nature of the security services the SSA provided to Ms Myeni.[1449] Mr Moonsamy stated that he provided Ms Myeni with the services of a close protection officer, together with three other members of the SAA security services for a period of four months. Thereafter, Ms Myeni obtained a new security detail. Mr Moonsamy did not know who had appointed them or where they came from. Mr Moonsamy explained that in doing so Ms Myeni breached SAA policy by not making prior arrangements before arriving at SAA with her own security detail. Her security personnel refused to sign in when they arrived at SAA. This was also a violation of the SAA policy.[1450]

822. Mr Y testified that, if these security personnel had been legitimately deployed by SSA, they would have had no problem signing in. He said that they are supposed to follow existing security policies and procedures.[1451]

823. Mr Moonsamy provided the Commission with CCTV footage[1452] of some of the personnel accompanying Ms Myeni to SAA and Mr Y positively identified one of them as Zama Ntolo, a member of the Special Operations Unit of the SSA.[1453]

824. Mr Moonsamy also included in his affidavit an incident report regarding the former CFO of SAA, Mr Wolf Meyer. The report provided that Ms Myeni had instructed security personnel accompanying her to SAA to confiscate a recording device (concealed in a pen) from him.[1454] In addition, Mr Moonsamy stated that his

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[1449] Exhibit DD23(b), p 15-167

[1450] Exhibit DD23(b), p 16-18

[1451] Transcript 20 February 2020, p 7

[1452] Exhibit DD23(b), p 160

[1453] Transcript 20 February 2020, p 8.

[1454] Exhibit DD23(b), p 19, para 15. See the incident report is at p 161

predecessor, Mr Jona de Waal was advised by former CEO Nico Bezuidenhout and Mr Meyer, that Ms Myeni's security personnel from SSA would confiscate laptops and phones from people before they went into meetings, on Ms Myeni's instruction.[1455] This is confirmed in an incident report compiled by an SSA member explaining that, before the meeting started, they had to gather up all electronic equipment.[1456] Mr Y testified that it was not in the mandate of SSA members to confiscate electronic equipment.[1457]

825. Mr Eric Zamokwakhe Mtolo of the Special Operations Unit of the SSA provided the Commission with an affidavit confirming that he did accompany Ms Myeni to SAA on one occasion, as was captured in the CCTV footage that Mr Moonsamy gave the Commission.[1458]

826. Mr Mtolo stated that he was summoned by Mr Dlomo, together with another member of the SSA by the name of "Gerald" (he did not know his last name) and upon entering the meeting venue, found that Ms Myeni was also there. Mr Mtolo stated that he had encountered Ms Myeni previously because he was asked to assist her in tracing a cell phone number of a person she claimed was harassing her.[1459]

827. Mr Dlomo instructed Mr Mtolo to speed up the investigation into Ms Myeni's harassment claim and also asked him to accompany Ms Myeni to SAA's offices at Airways Park and to wait outside a meeting room where Ms Myeni would be attending a meeting.[1460] Mr Mtolo and "Gerald" did as instructed and waited for Ms Myeni outside a meeting room. A few minutes into the meeting, Ms Myeni walked

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[1455] Exhibit DD23(b), p 19, para 15

[1456] Exhibit DD23(b), p 160-161

[1457] Transcript 20 February 2020, p 9. See also, p 13

[1458] Exhibit DD34.14, p 1426-1432

[1459] Exhibit DD34.14, p 1427, paras 6-8

[1460] Exhibit DD34.14, p 1428, paras 10-11

out with a recording device pen, which she placed together with a number of cell phones that were on the desk. Ms Myeni told Mr Mtolo that she had taken the pen from someone in the meeting and Mr Mtolo assumed the phones were similarly from members attending the meeting. Mr Mtolo was concerned that he was supposed to look after the devices which was not his job and told "Gerald" that he should brief Mr Dlomo about what had happened. Mr Mtolo also briefed Mr Dlomo in person about the incident. At the end of the meeting, Ms Myeni attempted to give Mr Mtolo the recording pen but he refused to take it. After Mr Mtolo had briefed Mr Dlomo about what had happened, Mr Dlomo never involved Mr Mtolo again in any of Ms Myeni's matters.[1461]

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

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

830. During her evidence before the Commission, Ms Myeni was asked about the security services she used, whether it was a lawful deployment of SSA resources and

[1461] Exhibit DD34.14, pp 1429, para 15 – 1430, para 20

whether she ordered the confiscation of Board members' electronic devices with the assistance of SSA officers. She refused to answer these questions and invoked the privilege against self incrimination.[1462]

831. She was also asked about the vetting process at SAA, the lawfulness of the process, why it was necessary in circumstances where employees were not exposed to classified information and why the Board members were excluded from the process if they, more than anyone, would be likely to be exposed to confidential or sensitive information. It was put to Ms Myeni that Board members were likely excluded because of the highly personal and invasive nature of the questions. She was also asked about Ms Nhantsi's evidence regarding Ms Olitzki and the use of vetting results to remove employees Ms Myeni wanted removed. Ms Myeni, once again, refused to answer these questions and invoked the privilege against self incrimination.[1463]

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

[1462] Transcript 6 November 2020, p 81-83

[1463] Transcript 6 November 2020, p 83-102

The new board – but retention of Ms Myeni

833. Ms Kwinana resigned from the Board on 23 August 2016. She said that her reason for resigning was that Minister Gordhan had an issue with funding and wanted new Board members.[1464] The reasons stated in her letter of resignation[1465] were that National Treasury was not issuing the guarantee to SAA which resulted in a failure to finalise the audited financial statements, and the Minister wanted to appoint a new Board so that the guarantee could be issued.[1466] Ms Kwinana also testified that she could sense that the Minister wanted the whole Board to resign because he did not have a good relationship with the Chair, Ms Myeni, and the Board.[1467] Despite this, however, Ms Myeni was retained on the new Board.

834. According to minutes of a Cabinet meeting on 24 August 2016, Mr Gordhan motivated for the appointment of Ms Myeni as a non-executive director and Chairperson of SAA for a further two years.

835. Minister Gordhan was asked to provide an affidavit to the Commission explaining why he made this recommendation. He explained that the decision was driven primarily by former President Zuma and his insistence that Ms Myeni be retained as the Chair of SAA.[1468] He said that, as a member of the executive, he was constrained by the explicit wishes of President Zuma and sought to mitigate the harm that would be caused by her retention with the appointment of other directors to the Board whom he considered to be people who were fit, independent, qualified, and with integrity "who would be able to constrain the adverse impact of Ms Myeni's leadership going

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1464 Transcript 2 November 2020, p 136

1465 Exhibit DD33.10, p 84

1466 Transcript 2 November 2020, p 137

1467 Transcript day 296, 2 November 2020, p 140

1468 Affidavit of Minister Gordhan, dated 28 August 2020, para 5

forward". He stated: "It was clear to me that the then Head of State would not permit her removal, so I worked to surround her with competent and qualified Directors".[1469]

836. Minister Gordhan also asked that the Commission call upon the President to explain "why there was unyielding insistence that Ms Myeni be retained as the SAA Chair for three terms, despite what is known about various decisions she took that harmed the airline's interests. Examples include the notorious Airbus transaction and her direct interference in the management of SAA to scuttle a very lucrative transaction with Emirates Airlines."[1470] The Commission was not able to question Mr Zuma about this because, as explained more fully elsewhere, he walked out of the Commission hearing on 19 November 2021 in contravention of a summons and, thereafter, refused to appear before the Commission. Mr Zuma fled the Commission completely without any valid reason. He did so in order to avoid having to answer questions in the Commission about matters such as this. He did not want to account to the nation. He knew he was not going to have answers to many of the questions that were bound to be put to him.

837. Minister Gordhan explained that, as further mitigation to the harm Ms Myeni could do on the Board, he proposed to Cabinet that there be an annual review of Ms Myeni's performance.[1471]

838. Mr Gordhan's affidavit has one unexplained feature. He claims that the reason he recommended Ms Myeni for two years was that the President insisted it was not up for discussion that Ms Myeni be replaced and that, as an executive member, he was bound by that decision. However, Ms Myeni was not, in the end, retained for two

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[1469] Para 8

[1470] Para 9

[1471] Affidavit of Minister Gordhan, dated 28 August 2020, para 22.

years, as recommended by Minister Gordhan. Cabinet in fact voted for her to remain at SAA for only one year[1472] – less than that proposed by Minister Gordhan. It therefore appears that Minister Gordhan was prepared to recommend that Ms Myeni remain as the Chairperson of the SAA Board for one more additional year than the majority of the members of Cabinet.

839. Minister Gordhan stated that on 12 December 2014 the DPE relinquished the role of oversight of SAA and National Treasury took over that role. At that time National Treasury was led by then Finance Minister, Mr Nhlanhla Nene.[1473]

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

841. This is particularly problematic because under SAA's memorandum of incorporation a director may only serve three terms on the Board. Clause 13.4.1 of the MOI provides that "A non-executive Director shall hold office for a term of three (3) years and shall not hold office for more than three (3) consecutive terms".[1474]

842. If Ms Myeni, had, indeed been properly appointed for a year in 2015 until 2016, that would have been her third term in office and Cabinet could not have reappointed her

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[1472] Affidavit of Minister Gordhan, dated 28 August 2020, para 23

[1473] Para 14

[1474] Exhibit DD2, p 14

in 2016. According to his affidavit, Minister Gordhan took the view that because the MOI allows for three terms of a maximum period of three years each, as long as the total period for which Mr Myeni served on the Board of SAA was less than nine years, this was compliant with the MOI.[1475] This does not, however, appear to be the correct interpretation of the term limit. A term has a maximum of three years but if the term was not three years long, the MOI did not qualify the term limit. It remained three consecutive terms.

843. As we set out above, Ms Myeni was able to remain as Chairperson of the Board of SAA despite:

843.1. the majority of the SAA Board in early 2014 raising serious concerns about her leadership;

843.2. one former Finance Minister's (Minister Nene's) concerns about her lack of appreciation of the impact that the airbus swap transaction would have on the finances of SAA; and

843.3. another former Finance Minister's (Minister Gordhan's) concerns that she should not be retained on the Board after 2016.

844. Both former Minister Nene and Minister Gordhan attribute Ms Myeni's retention on the Board to the personal preference of former President Zuma. This preference appears to have been more important to the former President than the proper governance or management of SAA.

845. By 2016, there appears to have been a consensus at Treasury that Ms Myeni was a liability to the organisation and had already caused it severe harm and financial loss.

[1475] Affidavit of Minister Gordhan, dated 28 August 2020, para 30

Notwithstanding these concerns, the former President insisted that Ms Myeni be retained in her position at any cost, and with complete disregard for the welfare of SAA. His Cabinet followed suit and voted to retain her beyond 2016.

AUDITORS

847. The Commission heard evidence from two primary witnesses on the activities of the auditors of SAA over the period set out above in which Ms Myeni was the Chair of the Board and Ms Kwinana was the Chair of the Audit and Risk Committee (ARC). ARC was the Board committee primarily responsible for the audit of SAA.

848. The Commission also received an affidavit from Mr Simon Mantell, a chartered accountant, in which he detailed the engagements he had had with SAA when his company, Mantelli's, bid for a dry snack tender in 2013. Mr Mantell's affidavit raised serious concerns about the auditing work that had been done at SAA by both its internal and external auditors. This issue merited further investigation by the Commission in order to establish whether the role that auditors played at SAA contributed in any way to what unfolded at the airline. However, the Commission could not investigate it further due to time and other constraints.

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

850. The second witness was Mr Pule Joseph Mothibe, the audit partner at PWC responsible for the SAA audit for the 2013/2014 to 2015/2016 financial years.[1476] His evidence clearly demonstrated that PWC's primary interest was in the financial aspect of the audit and ascertaining whether SAA was a going concern – as one would expect would be the focus for a private audit client. However, it was evident that PWC was either not equipped to assess, or was just not particularly concerned about, the peculiar requirements and obligations attendant on a public entity and ensuring that irregularities that contravened the PFMA and other procurement legislation were carefully investigated and reported on.

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

851.1. first, that the audit appointment itself was irregular from the second year onwards;

851.2. second, that Ms Kwinana's possible conflict of interest with PWC was not discovered;

851.3. third, that PWC failed to devise audit procedures that were appropriate to detect corruption or irregular tenders in some major transactions including the Air Chefs tender and the Swissport Ground Handling transaction.

[1476] Transcript 16 July 2020, p 28

Irregular award of audit

852. Mr Sokombela testified that under the Public Audit Act 25 of 2004, if the Auditor General elects not to audit a public entity like SAA, the Board and the shareholder of SAA would be responsible for appointing a private auditor in accordance with ordinary supply chain management policies for procurement of services. However, the concurrence of the AG is required to finalise the appointment.[1477] The concurrence will depend on the firm's capacity to do the work and whether the firm is sufficiently independent (i.e. whether there are any conflicts of interest), guided by the Code of Ethics of Professional Accountants issued by the International Ethics Standard Board for Accountants.[1478] Mr Sokombela also testified that, regardless of the length of the tender award, the audit firm's appointment must still be subject to the AG's concurrence each year and, under section 90 of the Companies Act, the entity's audit committee must satisfy itself each year that the auditors remain independent and that they are performing in terms of the required quality standards.[1479] If they do not meet these standards each year, their appointment should be terminated.[1480]

853. Mr Sokombela explained that in 2011/2012, SAA consulted the AG with regard to the appointment of PWC and Nkonki as joint auditors for the 2011/2012 financial year. The AG provided its concurrence. The request for concurrence was for a one-year appointment, but in fact PWC and Nkonki remained on as joint auditors for a

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[1477] Transcript 20 February 2020, p 51-52. See section 25 of the Public Audit Act

[1478] Transcript 20 February 2020, p 60-61

[1479] Section 90(1) of the Companies Act 71 of 2008 provides: "Upon its incorporation, and each year at its annual general meeting, a public company or state-owned company must appoint an auditor." Section 90(2)(c) provides: "To be appointed as an auditor of a company, whether as required by subsection (1) or as contemplated in section 34(2), a person or firm must be acceptable to the company's audit committee as being independent of the company…"

[1480] Transcript 20 February 2020, p 64-65

period of five years, until the AG took over the audit in the 2016/2017 audit year.[1481] Despite the irregularity of the subsequent four years, SAA did consult the AG and sought a concurrence each year thereafter until 2015/2016.[1482] The AG nevertheless still granted its concurrence. Mr Sokombela explained that this was because, at the time, the AG's processes for granting concurrence were not particularly well-developed and the AG did not look into the regularity of the process of appointment when it granted concurrence – as it does now. So even though the appointment of PWC and Nkonki was only for a year, and the subsequent years were therefore irregular, the AG did not detect this irregularity and so still granted its concurrence.[1483]

854. Mr Mothibe confirmed in his evidence that the award letter[1484] that PWC and Nkonki had received in respect of the SAA audit was only for the 2011/2012 financial year. However, his impression at the time was that they had been awarded the tender for five years. Though it must be noted that he only joined the team for the 2013/2014 financial year.[1485]

855. Not only was the award for just one year but also, the request for proposals to which PWC responded was only for the 2011/2012 financial year.[1486] Nevertheless, Mr Mothibe insisted that it would be economically unviable for a firm to audit SAA for one year only, given the size and complexity of the audit.[1487] This may very well be correct because it will take time for a new audit firm to come to grips with the business

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1481 Transcript 20 February 2020, p 68-69

1482 Transcript 20 February 2020, p 70-71

1483 Transcript 20 February 2020, p 72

1484 Exhibit DD19(c), p 115

1485 Transcript 16 July 2020, p 70

1486 Exhibit DD19(c), p 59 – the particular year is at p 77 under "scope of work"

1487 Transcript 16 July 2020, p 7

of a new client. Indeed, that was Ms Kwinana's evidence as well[1488] and the sentiment was echoed by Mr Sokombela.

856. Ms Kwinana was shown the report and recommendations from the ARC where the committee recommended the tender only go out for one year.[1489] Despite serving on that committee, she testified that this was a "very big mistake".[1490] She actually claimed that ARC never made that recommendation. However, her evidence on this cannot be correct in the face of the documents presented to her which recorded this as the decision. These included the ARC minutes themselves and the recommendation report from ARC to the Board.[1491]

857. Whatever the merits of a decision to appoint auditors for only one year may be, the fact of the matter is that PWC responded to an RFP for a one-year audit. It did not decline to do so because it was not financially viable. This was put to Mr Mothibe and he responded that the firm would have understood the tender to be for five years.[1492] However, Mr Mothibe could not adequately explain how PWC could have thought that from a clearly defined scope of work in the RFP.[1493] He went so far as to say "the procurement process is run by South African Airways and not by PWC. . . so I am not too sure I can speculate in that regard."[1494] But this displays a concerning attitude from the very team that was supposed to detect irregularities in the procurement processes at SAA.

1488 Transcript 7 November 2020, p 169-171

1489 Exhibit DD19(a), p 54

1490 Transcript 7 November 2020, p 174

1491 Transcript 7 November 2020, p 181-182

1492 Transcript 16 July 2020, p 76

1493 Transcript 16 July 2020, p 76-77

1494 Transcript 16 July 2020, p 78

858. Ultimately, Mr Mothibe's explanation was that PWC's impression was based on an industry practice where auditors are appointed for five years, subject to reappointment at the company's AGM, as per the Companies Act. He said that even if an appointment may start as being for one year, in practice, the auditor would continue thereafter for five years. However, when he was pertinently asked whether that was a practice in the private sector *and* the public sector – where appointments must be proceeded by proper procurement processes – he confirmed that he knows the practice exists in the private sector and he was not entirely sure that it exists in the public sector.[1495]

859. Given that Mr Mothibe confirmed that it was part of the audit procedure to review BAC minutes, he was asked why PWC did not pick up the BAC minutes in 2012[1496] that raised concerns about the PWC appointment when there had been no procurement process.[1497] Mr Mothibe said that he could not speak to that as he was not in the team in 2012/2013.[1498]

860. Mr Mothibe conceded that, if he had seen that minute, he would have been concerned but he refused to accept that, based on the fact that the award was only for one year, then PWC's fees over the next four years would constitute irregular expenditure under the PFMA.[1499] Mr Mothibe refused to make this concession despite the fact that he had accepted in his evidence that the PFMA required the audit service to go through proper process; that no such proper process had

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[1495] Transcript 16 July 2020, p 85

[1496] Exhibit DD19(c), p117

[1497] Transcript 16 July 2020, p 87

[1498] Transcript 16 July 2020, p 88

[1499] Transcript 16 July 2020, p 95

occurred after year one of the PWC/Nkonki audits; and that irregular expenditure is expenditure that is incurred without proper legal processes being followed.[1500]

861. PWC and Nkonki were paid a total of R69 760 888 for the years 2013-2016.[1501] This constituted irregular expenditure, none of which was disclosed in the financial statements of those years.

Conflict of interest

862. Mr Mothibe confirmed that Ms Kwinana, the Chair of the ARC and a non-executive member of the SAA Board, was a director of the auditing firm Kwinana & Associates. PWC had bid together with Ms Kwinana in respect of three tenders in late 2014 and early 2015. One bid was successful and resulted in PWC paying Kwinana & Associates R6 187 799.90 in 2016. Mr Mothibe testified that was the policy of PWC to guard against possible conflicts of interests in these types of joint business relationships.[1502]

863. In order to assess whether a joint business relationship with a client or a person from a client is material and significant for purposes of conflict of interest in the auditing work PWC does for the client, PWC considers the business relationship material if it exceeds 5% of the business partners' revenue. Mr Mothibe testified that this was in line with the International Ethics Standards Board for Accounts (IESBA) Code which is an international code. In accordance with its own policy, therefore, PWC had made enquiries with Ms Kwinana about the value of their joint business contracts,

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[1500] Transcript 16 July 2020, p 96

[1501] Transcript 16 July 2020, p 97, see exhibit DD19(c), p 49

[1502] Transcript 16 July 2020, p 107-108

and whether it met the threshold.[1503] Ms Kwinana had indicated that her firm regarded 10% as significant.[1504] Therefore, PWC asked Kwinana & Associates whether their joint business contract was in excess of 10% of Kwinana & Associates' total revenue. Mr Mothibe was unable to point to where in the policy PWC was permitted to simply depart from its own materiality standard and apply that of its partner.[1505] However, he later explained that this figure was justifiable based on figures quoted in the IRBA and ISBA guidelines.[1506]

864. Be that as it may, the email communications from Kwinana & Associates, per Ms Lumka Goniwe (Ms Kwinana's daughter) in 2015 stated that the they expected to earn about R4.1million in fees on the joint bid (it later transpired the fees were in fact R6.1million in 2016) and that this was not significant because the firm's turnover in 2015 was more than R50million.[1507]

865. The investigations of the Commission with SARS revealed that Kwinana & Associates' tax returns showed an annual turnover in that period of only R10 567 581.[1508] Mr Mothibe testified that, if he had known this, he would have been concerned.[1509] The fees PWC paid to Kwinana & Associates in 2016 were R6.1million and the turnover that year was approximately R21million according to the tax returns. Mr Mothibe was asked whether if PWC known that, it would have entered into that relationship with Kwinana & Associates since it would have

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[1503] Transcript 16 July 2020, p 108-109

[1504] Transcript 16 July 2020, p 111-112

[1505] Transcript 16 July 2020, p 114

[1506] Transcript 16 July 2020, p 125

[1507] Exhibit DD19(a), p 131-132

[1508] Exhibit DD19(c), p 472-486

[1509] Transcript16 July 2020, p 118

compromised PWC's independence. He confirmed that PWC would not have entered into that relationship.[1510]

866. During her evidence, it was put to Ms Kwinana that, as the Chair of ARC and a member of the Board that voted year after year to reappoint PWC, it was problematic that she was in a business relationship with PWC and did not recuse herself from the decision-making or disclose her personal interest. Ms Kwinana refused to accept that there was any problem with this at all.[1511] She claimed that there was no need to disclose her interest because, while she was in business with PWC, the benefit ultimately came from their client and so was not a personal interest under the Companies Act.[1512] It was put to Ms Kwinana that her firm derived a benefit from the proceeds that flowed from the joint business relationship with PWC. The revenue received from the successful tender was therefore as a result[1513] of her relationship with PWC in bidding for the tender.[1514]

867. Ms Kwinana still refused to accept that this was a form of personal interest that needed to be disclosed or that would compromise independence. She claimed that, if that were true, then all chartered accountants could never appoint audit firms because they would have likely done their articles with one of the firms. It was put to Ms Kwinana that this is not an analogous example.[1515] She then claimed that this would mean that she could never vote on any bid because at some point or another she had worked with all the audit firms. Again, it was put to her that what was relevant was her *current* business relationship with the audit firm and that *at the time* she

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[1510] Transcript 16 July 2020, p 123

[1511] Transcript 7 November 2020, p 191

[1512] Transcript 7 November 2020, p 192

[1513] Transcript 7 November 2020, p 197-198

[1514] Transcript 7 November 2020, p 193

[1515] Transcript 7 November 2020, p 194

voted to appoint PWC, she had an ongoing business relationship with it, from which her firm derived benefits.[1516]

868. It was put to Ms Kwinana that Mr Mothibe considered the joint business relationship to be a conflict of interest but she still refused to concede the inappropriateness of her decision-making while benefitting from work with PWC. She simply testified that that "is his opinion."[1517] In this regard, Ms Kwinana was referring to Mr Mothibe's opinion.

869. Ms Kwinana confirmed that Kwinana & Associates were paid R6.1million in fees from the joint business relationship it enjoyed with PWC in respect of a tender with PRASA.[1518] She was also aware of the 10% threshold above which PWC would not enter a transaction with Kwinana & Associates as a business partner, given that Ms Kwinana was also part of an audit client, SAA.[1519]

870. It was put to Ms Kwinana that her daughter, on behalf of Kwinana & Associates, had advised PWC that its revenue was R50million in a year where potential fees with PWC were R4.1million, when in fact the tax returns of Kwinana & Associates in 2015 showed revenue of approximately R10.5million.[1520] Ms Kwinana was asked whether her daughter misstated the turnover to PWC. Ms Kwinana responded that she could not confirm this. When she was pressed about whether the firm had misstated its revenue in its tax returns, Ms Kwinana said that she would have to conduct her own audit of the tax returns. However, these were tax returns submitted by her own firm of which she was a director. Her unwillingness to accept that either the tax returns

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[1516] Transcript 7 November 2020, p 196-197

[1517] Transcript 7 November 2020, p 199

[1518] Transcript 7 November 2020, p 200

[1519] Transcript 7 November 2020, p 203

[1520] Transcript 7 November 2020, p 208-209

were incorrect or her daughter's communication to PWC was incorrect was shocking.[1521] It reflected her lack of candour and dishonesty.

871. The Commission cannot definitively conclude from this evidence alone that there was bias or intentional wrongdoing in the initial appointment of PWC, or their reappointment each year thereafter albeit that the Commission can conclude the reappointments were irregular. However, this is further evidence that SAA, and in particular Ms Kwinana, did not pay regard to due processes or conflicts of interest. This is consistent with her evidence regarding the AAR tender. As the chair of the SAAT, the Chair of the SAA ARC and a non-executive member of the SAA Board, Ms Kwinana displayed a fundamental lack of appreciation of conflict of interest policies and processes. Instead of knowing and applying these policies and processes, she testified that she preferred her own subjective opinion of her own independence. Independence and avoiding conflicts of interest is one of the cornerstones of corporate governance and public accountability. It is, therefore, of great concern that a professional chartered accountant would not accept this principle and instead conduct herself while on the Boards of SAA and SAAT without proper knowledge of, or adherence to, its requirements. Unfortunately, the Commission has to conclude that a number of answers that Ms Kwinana gave to questions aimed at establishing what her understanding was about what could or could not be done by a non-executive director or a director, revealed that either Ms Kwinana had no clue at all or she knew but dishonestly pretended not to know. The Commission takes the view that Ms Kwinana should never again be appointed to as a director of a state-owned entity.

[1521] Transcript 7 November 2020, p 211-212

Inadequate audit procedures

Auditor's role and duties

872. The Auditor General is a Chapter 9 constitutional institution. It is therefore independent and accountable only to Parliament. Section 4(3) of the Public Audit Act 25 of 2004 empowers the AG to audit SAA but it is not obliged to do so. The AG will decide to do so if there is sufficient capacity.[1522]

873. Mr Sokombela explained the legislative and policy obligations under which SAA operated in respect of internal audit controls and procedures. He testified that under the PFMA, a state-owned entity is required to be equipped with a fully capacitated and skilled internal audit body; it is also required to ensure that it has comprehensive internal controls, or policies and procedures, to guarantee the proper functioning of the entity's financial administration. These are known as Standard Operating Procedures and they are designed to prevent irregularity, fraud and wastage. The procedures require checks and balances such as the segregation of duties between those procuring goods and services, and those evaluating the services.[1523]

874. As to the role of the external auditors of a public entity like an SOE, Mr Sokombela testified that their role is to provide the independent assurance to the users of the annual report or the financial statements of the SOE. They are also required to provide assurance on applicable laws and regulations to ensure that there has been compliance with those laws. This would be the responsibility of any auditor of a public entity, whether that auditor was a private firm, like PWC, or a public entity like the AG.[1524] In respect of private audit clients, the focus is on whether the financial

[1522] Transcript 20 February 2020, p 28

[1523] Transcript 20 February 2020, p 30

[1524] Transcript 20 February 2020, p 31

statements have been prepared in accordance with the financial reporting framework whereas in respect of public entities there must also be a focus on compliance. In Mr Sokombela's opinion, the AG will be more experienced with the latter type of auditing than private audit firms that predominantly service private audit clients.[1525]

875. Any auditor of a public entity must fulfil the requirements set out in the Public Audit Act which provides for various duties.[1526] Mr Sokombela emphasised the importance of the format and content of the auditor's report,[1527] which must accord with the required template.[1528]

876. Mr Sokombela testified that there are limits to the auditor's ability to scrutinize the state of affairs at an SOE. The auditors rely on audit evidence and they rely on the client for that evidence, being the management of the client. In addition, auditors are not required to test every transaction. They select a sample of the total transactions and investigate those.[1529] The sample selection is based on a scientifically tested method about selecting the sample from a population and requires an understanding of the nature of the population itself. In other words, it requires understanding the entity that is being audited and the population set and from that, determining what would be an appropriate and effective sample size.[1530] The sample size depends on the number of total transactions investigated. The main aim is to get sufficient appropriate audit evidence to reach a sound conclusion about the total population size.[1531]

1525 Transcript 20 February 2020, p 48

1526 See sections 25-27

1527 Section 28, read with the Auditor General's Reporting Guide.

1528 Transcript 20 February 2020, p 50

1529 Transcript 20 February 2020, p 32

1530 Transcript 20 February 2020, p 33

1531 Transcript 20 February 2020, p 34

877. Mr Sokombela said that a vital part of determining the audit methodology to be used and the way the sample size or content would be determined, is the risk assessment process that auditors are required to conduct in order to understand the audit environment so as to identify which potential transactions might pose a particular risk to the audit process. A risk assessment may indicate that particular transactions, not otherwise included in the sample size, pose a risk and so those transactions would be verified separately.[1532] This risk assessment would include considering press articles about the particular transaction in the public domain.[1533]

878. Mr Sokombela also testified that external auditors are not tasked with identifying and reporting on fraud and corruption. The aim of the audit process is to express a fair presentation of the financial statements and to identify any material findings on legislative compliance and key performance indicators in the annual report. However, the audit process could identify possible fraud which should be reported to management.[1534]

879. In assessing compliance of an entity, Mr Sokombela testified that it is vital to ensure that the Supply Chain Management body in the SOE complies with section 51 of the PFMA and section 217 of the Constitution. The auditor must consider the processes followed in procurement processes, assess the entity's controls and the capacity of the SCM division and consider the quality of their policies and procedures. All of these things are relevant not only to compliance findings but also to assessing particular risk areas of the entity and, therefore, what sample and what special risk sample ought to be assessed. Once a particular transaction has been identified as requiring an audit, the auditors will completely re-perform the tender process from

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[1532] Transcript 20 February 2020, p 36

[1533] Transcript 20 February 2020, p 37

[1534] Transcript 20 February 2020, p 35

start to finish, with reference to the tender files, to ensure that there was compliance with the correct processes.[1535] Mr Mothibe agreed that this was required of auditors when auditing tenders.[1536]

880. Mr Sokombela explained some important concepts.

880.1. Irregular expenditure under the PFMA is expenditure incurred in non-compliance with legislation or legal requirements. This speaks to the process through which the goods were procured.[1537]

880.2. The PFMA also refers to fruitless and wasteful expenditure, which Mr Sokombela explained was where the expenditure was not used for the benefit of the entity or did not add any value to the entity.[1538]

880.3. Mr Sokombela also explained that a reportable irregularity is a concept defined under section 45 of the Auditing Professions Act 26 of 2005.[1539] It refers an unlawful act or omission that has been committed by someone in a management position which has caused or is likely to cause material financial loss to the entity or which is fraudulent or which involves a material breach of a fiduciary duty. In such a case, the auditor has a legal obligation to immediately notify the Independent Regulatory Board for Auditors (*IRBA*) with details of the reportable irregularity and then, three days thereafter, to report to management

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[1535] Transcript 20 February 2020, p 44-45

[1536] Transcript 16 July 2020, p 60 and p 63

[1537] Transcript 20 February 2020, p 38

[1538] Transcript 20 February 2020, p 40. The definition under the PFMA is "expenditure other than authorized expenditure incurred in contravention of or that is not in accordance with the requirement of any applicable legislation including this Act or the State Act 86 of 1968 or any regulations made in terms of that Act or any provincial legislation providing for the procurement procedures in that provincial government."

[1539] An unlawful act or omission committed by somebody in a senior management position which (1) has caused, or it likely to cause, material financial loss to the entity, or (2) which is fraudulent or amounts to theft, or (3) which present a material breach of a fiduciary duty

and give them an opportunity to explain what happened. The auditor is then required to report back to IRBA and specify their opinion on whether there was such an irregularity.[1540]

881. Section 55(2)(b) of the PFMA provides that the annual report and financial statements of a public entity must include any material losses through criminal conduct and any irregular expenditure, and fruitless and wasteful expenditure, that occurred during the financial year.

882. Mr Mothibe confirmed that it is part of the role of the auditor in a public entity to identify irregular, fruitless and wasteful expenditure.[1541]

883. Mr Mothibe also testified that auditing procedures for any particular audit are designed by the audit team.[1542]

884. He confirmed that part of the audit procedures designed for the SAA audit was to review Board meeting minutes and other relevant Board committees and the BAC, for example.[1543] Mr Mothibe testified that, while it is not a requirement under the formal auditing standards to review media reports as part of this process, the PWC/Nkonki team did consider media reporting "to the extent we could find" them.[1544] Indeed, in PWC's audit report in respect of the 2015 SAA Group audit, it states under "EGA" (engagement evidence gathering) that "in accordance with the risk-based audit approach, we stay up to date on media reports pertaining to SAA

[1540] Transcript 20 February 2020, p 42-43

[1541] Transcript 16 July 2020, p 54-55

[1542] Transcript 16 July 2020, p 28

[1543] Transcript 16 July 2020, p 29

[1544] Transcript 16 July 2020, p 31. See also exhibit DD19(d), p 443

and to evaluate the effect thereof in the financial statements, identify risks and therefore update our audit approach on a continual basis when necessary."[1545]

885. The IRBA Guide on Reportable Irregularities provides that auditors ought to keep abreast of press reporting about the entity they are auditing to assist in identifying reportable irregularities. Mr Mothibe confirmed that "we act according to the guide at all times when we audit our clients".[1546]

Inadequate internal controls and procedures

886. The AG took over the audit of SAA for the 2016/2017 year, after the five years of PWC and Nkonki's joint audit. During the five years of the joint audit, every year the audit opinion was unqualified. It was a clean audit opinion.[1547] An unqualified audit is where the financial statements are free from material misstatements whether caused by fraud or error.[1548] This is subject to a level of materiality, however. It is not a guarantee there are no errors but it reflects that the statements are materially accurate.[1549]

887. A qualified audit opinion is where there are concerns arising from the financial statements. The auditors are required to opine on (1) the financial statements, (2) the predetermined objectives or performance information, and (3) on compliance with legislation. The opinion on the financial statements is escalated to the audit report; the performance information opinion is expressed in the management reports

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[1545] Exhibit DD19(d), p 442-443

[1546] Transcript 16 July 2020, p 43

[1547] Transcript 20 February 2020, p 106

[1548] Transcript 20 February 2020, p 107

[1549] Transcript 20 February 2020, p 110

(internal document) and select significant findings are escalated to the audit report; there is no formal opinion on compliance with legislation, instead the auditors make "material findings" and those are all escalated to the auditor's report. These three areas are prescribed under the Public Audit Act – they do not apply to private firms. Private firms only have their financial statements audited.[1550]

888. Mr Sokombela explained that a clean audit report means that there were no material findings on performance information or compliance with laws, regulations and processes. PWC and Nkonki had issued such a clean report for SAA for five years in a row[1551].

889. In the 2015/2016 year, the Minister of Finance, Mr Nene, requested the AG to take over the audit.[1552] However, given the capacity required for this large audit and its complexity, the AG advised that it could not take over for that year but it might reconsider in the subsequent financial year when it had some time to prepare and build capacity.[1553] In the following year, the Board of SAA recommended to the shareholder to appoint the AG as the SAA external auditors.[1554]

890. When the AG took over the SAA audit, it engaged in extensive preparatory work, including comprehensive risk assessment sessions to fully understand the aviation industry and SAA in particular, and to identify high risk areas for the airline. The AG also invested heavily in capacitating itself for the audit.[1555]

[1550] Transcript 20 February 2020, p 115

[1551] Transcript 20 February 2020, p 112

[1552] Transcript 20 February 2020, p 119-120

[1553] Transcript 20 February 2020, p 122

[1554] Transcript 20 February 2020, p 122

[1555] Transcript 20 February 2020, p 127-131

891. The AG's audit in the 2016/2017 financial year differed markedly from the previous years' audit reports. The audit opinion regressed from an unqualified audit opinion (which refers to the financial statements) with no material findings (which refers to compliance and performance information) to a qualified audit opinion with findings on compliance with legislation as well as findings on performance information or predetermined objectives. In other words, it regressed from being a clean audit to a qualified audit with significant findings.[1556]

892. This significant deviation from past opinions and findings was not simply a shift in SAA in that new financial year. As part of the audit process, the AG was responsible for confirming or reviewing the "opening balances". In other words, the AG needed to ascertain whether they were starting at the right starting point, by going through the previous auditors' files and working papers with the objective of seeing whether they could rely on that work.[1557] In the course of that review, the AG determined that it could not rely on the previous audit of PWC and Nkonki because there was a lack of supporting documentation and they could not test how the opening balances had been determined. The AG, therefore, had to perform additional procedures where they had to ask management to prove the validity of the contents of the balance sheets because the audit files did not contain the support. Vital documents that are required under international standards for aircraft, for example, were missing and other critical source documents were not in the audit files.[1558]

893. Section 51 of the PFMA provides that the accounting authority:

[1556] Transcript 21 February 2020, p 2

[1557] Transcript 21 February 2020, p 3

[1558] Transcript 21 February 2020, p 5

893.1. must have an effective, efficient and transparent system of financial and risk management and internal controls;

893.2. must also have an appropriate procurement and provisioning system which is fair, equitable, transparent, competent and cost effective; and

893.3. must take appropriate steps to prevent irregular expenditure.

894. Generally, the AG observed very poor internal controls at SAA, including severe problems with record keeping (as Dr Dahwa also confirmed).[1559] SAA was also very unstable in that more than 40% of the positions were filled in an acting capacity. The Board was under capacitated; it did not have any aviation experts.[1560] The key executive management positions of CEO, CFO, Chief Commercial Officer and Chief Strategy Officer were all vacant at the time, and the Chief Procurement Officer was on suspension. Accordingly, Mr Sokombela explained that there was an incredibly weak control environment at the time, particularly in SCM. SAA officials also lacked appropriate competencies, particularly in the preparation of financial statements and SCM.[1561]

895. Mr Sokombela testified that compliance with legislation was a critically weak area at SAA, and there were many instances of irregular, as well as fruitless and wasteful expenditure. There was also no "consequence management", i.e. no consequences were imposed for the multiple transgressions of proper processes.[1562]

[1559] Transcript 21 February 2020, p 6

[1560] Transcript 21 February 2020, p 11-12

[1561] Transcript 21 February 2020, p 12-13

[1562] Transcript 21 February 2020, p 13

896. Mr Sokombela also reported that the legal division and the office of the company secretary were severely under capacitated. The legal department was incapable of ensuring that tenders were awarded in accordance with process and that the contract was ultimately signed with the successful service provider. It was operating off simple tender award letters.[1563] This represented an enormous risk to SAA because there was no way to hold suppliers accountable. Nevertheless, these suppliers were simply paid by SAA.[1564] Mr Sokombela testified that this practice must have been going on for years because of the magnitude of the problem. SAA had a very large contract register but the *majority* of those contracts could not be located. The scale of the problem indicated that it should have been picked up by previous auditors.[1565]

897. The problems with the company secretary also presented a risk to SAA. The company secretary advises the board on corporate governance issues and the AG found many instances of transgressions of proper procedures for passing resolutions, and decisions taken contrary to the Companies Act (including unlawful advances of funding to subsidiaries.) CIPC had in fact issued a non-compliance notice to SAA in that regard.[1566]

898. Mr Sokombela testified that the AG noted that, despite the DTI and National Treasury notifying the Board not to take decisions in conformity with the 30% set aside policy, the Board had continued to implement that policy and the AG could not understand why the company secretary had not warned the Board against this course of action.[1567]

[1563] Transcript 21 February 2020, p 14

[1564] Transcript 21 February 2020, p 15.

[1565] Transcript 21 February 2020, p 16-18

[1566] Transcript 21 February 2020, p 21

[1567] Transcript 21 February 2020, p 22

899. The record keeping problem at SAA was so bad that it would sometimes take three-months for SAA to comply with a request and this resulted in a significant limitation in the scope of the audit that could be performed – without critical source documents. This was particularly so with respect to SCM and assets.[1568] A limitation of scope is a qualification the auditors will make in their report. It means that management did not provide them with the requisite documents with the result that they could not make a finding or reach an opinion on the state of affairs in the company.[1569]

900. The AG concluded that SAA needed intervention in various areas, including financial and performance management and governance. A lack of governance led to a lack of properly documented policies and procedures which represented a risk to SAA. There was no central repository of policies and the policies that were available, were outdated. This meant that no one could be held accountable for anything because their roles and responsibilities were not clearly defined.[1570] These critical, systemic problems, should also have been apparent to any auditor in previous years.[1571]

901. Mr Sokombela explained that it was also difficult to make any findings on SAA's performance because there was no head of strategy at the business. He said that there were no reliable key performance indicators or ways of measuring whether the company had met its objectives.[1572] Another feature of SAA's internal controls that was concerning was the ineffectiveness of the Information Technology Environment and infrastructure at SAA. There was no coherent Technology Governance Framework that would allow for effective alignment of processes, projects and

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[1568] Transcript 21 February 2020, p 22

[1569] Transcript 21 February 2020, p 26

[1570] Transcript 21 February 2020, p 22-23

[1571] Transcript 21 February 2020, p 25

[1572] Transcript 21 February 2020, p 27

structures to support its business. Importantly, the risk management processes lacked maturity and effective oversight – this included the ARC.[1573]

Inadequate external audit procedures

902. Mr Sokombela testified that it was cause for concern that a subsequent audit opinion came to such a different conclusion. This is because, while different audit firms may employ different methodologies, they should all conform to uniform audit standards.[1574]

903. Indeed, in this case, the AG even prepared restatements. Restatements are statements that correct errors made in the previous years' financial statements. The accounting standards provide guidance about how those errors need to be corrected in the following financial statements.[1575]

904. In the 2017 annual report, SAA disclosed approximately R125million in irregular expenditure – whereas in the 2016 financial year, only R5million had been disclosed as irregular.[1576] Even the R125million disclosed in 2017 was found to be an incomplete assessment which resulted in a qualified audit.[1577]

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

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[1573] Transcript 21 February 2020, p 26-29

[1574] Transcript 21 February 2020, p 8

[1575] Transcript 21 February 2020, p 9

[1576] Transcript 21 February 2020, p 13

[1577] Transcript 21 February 2020, p 14

expressly on the previous auditors of SAA. He claimed that he had professional ethical responsibilities not to do so. However, he did say that "if the situation at SAA before we took back the audit was the same as the situation that we found SAA to be at, then [we] would have expected then that the previous auditors have identified those findings and maybe perhaps the audit opinion should not have been clean."[1578]

906. It was evident from Mr Sokombela's evidence that the problems at SAA were "systemic" and "the way things have been done at SAA for quite some time". He stated that "when I looked at the challenges that those guys had there, they were not challenges of that year. They were challenges that are coming from prior years." He said that the "culture" at SAA was "the wrong way of doing things".[1579]

907. Mr Sokombela also emphasised that, while private audit firms had the same duties as the AG when auditing a public entity, the AG's "specialty" is ensuring compliance with legislation, regulation and SCM processes and policies.[1580]

908. In fact, Mr Mothibe's evidence indicated that he saw PWC's "primary role" to be to assess whether the financial statements fairly represented the entity's financial position and whether the information therein conformed with general accepted accounting practices.[1581] Mr Mothibe testified that one of the biggest things on their mind was whether SAA was a going concern and they were preoccupied with this issue.[1582] So, while Mr Mothibe conceded that, when PWC audits an SOE, it is obliged to consider matters of compliance, he appeared to consider this a secondary or less critical feature of the auditor's role.[1583] He also did not regard his role in

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[1578] Transcript 21 February 2020, p 33

[1579] Transcript 21 February 2020, p 67-68

[1580] Transcript 21 February 2020, p 56

[1581] Transcript 16 July 2020, p 44

[1582] Transcript 17 July 2020, p 83-84

[1583] Transcript 16 July 2020, p 44-45

auditing a public entity as materially different to auditing a private entity. He said that in both cases, one has to consider the relevant legislation because the International Standards of Auditing (*ISA*) provide that relevant legislation in an industry will have a material effect on the financial statements as a whole. Just like when they audit a bank, they must consider the impact of the relevant banking legislation. He said that "there are no additional requirements in terms of state-owned enterprises because all the standards that require you to look at applicable law and regulations cover that". He accepted that in the case of a public enterprise then the PFMA was the relevant legislation.[1584]

909. Furthermore, Mr Mothibe testified that the AG performed work pertaining to procurement on a more regular basis and they were experts in that area. He stated that compliance, procurement and contract management are complicated and the AG "would like to do a bit more work".[1585]

910. This difference in the AG's approach compared to that of PWC/Nkonki is evident from the vastly differing assessments of irregular and fruitless and wasteful expenditure in their respective audits of SAA. In the AG's final management report in the 2016/2017 year (a message to management drawing their attention to the auditor's concerns)[1586] the AG spent some time on issues surrounding procurement and the SCM of SAA. He produced a table of sample transactions and identified which of these were irregular. They tested the award of the contracts against compliance with legislation, SCM policy and relevant regulations. They found that 121 of the 140 contracts were irregular. That is a total of R6.6billion out of

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[1584] Transcript 16 July 2020, p 46

[1585] Transcript 17 July 2020, p 43

[1586] Exhibit DD20(b), p 572

R7.6billion.[1587] Mr Sokombela explained that these irregularities included non-compliance with competitive tender processes, non-compliance with the PFMA and non-compliance with the PPPFA, including awarding contracts that were inconsistent with the terms of the tender.[1588] Mr Sokombela stated that only R2.4billion thereof (103 contracts) was categorized as "irregular expenditure" and not simply non-compliance, because that expenditure had already been incurred in that financial year. This constituted 86% of the tenders.[1589] Mr Sokombela testified that he believed that this was representative of the overall population of tenders at SAA.[1590]

911. In the same report, the AG identified steps to prevent irregular and fruitless and wasteful expenditure.[1591] The report noted that Management disclosed R40.4million of fruitless and wasteful expenditure, and irregular expenditure of R125.9million. Whereas, in contrast, the AG identified the total irregular expenditure as R4.5billion and fruitless and wasteful expenditure was R300.6million, based on the sample.[1592] Mr Sokombela testified that the process generally is that the auditors determine a figure from the sample; management goes back and attempts to compile an estimate of the whole population size and reverts to the auditors; the auditors run various additional procedures to test or assess whether that figure is accurate. However, in this case, management could not practically go back and consider the whole population size because it was impossible, given SAA's shambolic record keeping.[1593] He explained that management could not simply fix the problem

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1587 Exhibit DD20(b), p 618, item 4.2.3. See transcript, 21 February 2020, p 47-48

1588 Transcript 21 February 2020, p 49

1589 Transcript 21 February 2020, p 51

1590 Transcript 21 February 2020, p 52

1591 Exhibit DD20(b), p 1104

1592 Exhibit DD20(b), p 1105

1593 Transcript 21 February 2020, p 64-65

because it was "a systemic issue that could not just be corrected within a few weeks or so."[1594]

912. This must be compared to the figure of R5.4million for irregular expenditure[1595] and R7.3 million for fruitless and wasteful expenditure that PWC and Nkonki had reached in the 2015/2016 financial year.[1596] It was put to Mr Sokombela that if the AG's audit was correct, then it is difficult to think that the 2015/2016 financial year would have had such low figures and that the previous auditors would not have picked up any significant irregular or wasteful expenditure. Mr Sokombela agreed. He also agreed that, in such a case, they could not have issued a clean audit.[1597]

913. Mr Sokombela testified that he engaged repeatedly with PWC and Nkonki regarding the previous audits. He noted that his team realised while reviewing the audits that there was not much work done on the compliance and SCM area.[1598] In fact, Mr Sokombela recounted a meeting that his team had had with the PWC/Nkonki team at which the previous auditors conceded that the work they had done on SCM was inadequate.[1599] This was recorded as follows in an email dated 13 September 2017 from Mr Sokombela, to Mr Mothibe and Ms Masasa, who was the lead audit partner from Nkonki:[1600]

> "We have since visited PWC and Nkonki on the 11 September 2017 to relook at the audit file in an attempt to resolve significant matters that were not evident on file

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1594 Transcript 21 February 2020, p 65

1595 Transcript 21 February 2020, p 72

1596 Transcript 21 February 2020, p 78

1597 Transcript 21 February 2020, p 77

1598 Transcript 21 February 2020, p 113

1599 Transcript 21 February 2020, p 112-114

1600 Exhibit DD20(d), p 1804

> regarding the SAA opening balances. Below is the detailed feedback of our review.[1601]
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> . . .
>
> Regarding SCM we agreed that there was not much work that was performed in your file and <u>we will not rely on this work</u>."[1602] (emphasis in text)

914. When Mr Mothibe was asked about this during his evidence, he attempted to explain it by stating that, since the AG was an expert in SCM, procurement and contract management, "they would be doing a bit more work in that area".[1603]

915. This echoes Mr Mothibe's earlier evidence about the AG effectively being better equipped and better qualified than a private audit firm, to assess matters of non-compliance.

916. However, this explanation does not avail PWC, or Mr Mothibe. If private audit firms, like PWC, are not equipped or experienced enough to do a proper job of this nature, then they should not be tendering for such work. Mr Mothibe was asked whether he accepted that, when an external auditor like PWC audited an SOE, it did this effectively on behalf of the AG and, therefore, had the same obligations as the AG. The evidence that the AG has special expertise does not serve to limit or reduce PWC's obligations of an SOE.[1604]

917. Mr Mothibe's answer was that PWC was able to perform at the same standard as the AG and that it would not have accepted an appointment if it could not deliver on it.[1605] However, in that case, he had no adequate explanation for the email sent by

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[1601] Exhibit DD20(d), p 1804

[1602] Exhibit DD20(d), p 1806

[1603] Transcript 17 July 2020, p 48

[1604] Transcript 17 July 2020, p 52

[1605] Transcript 17 July 2020, p 54

Mr Sokombela and the concession reflected therein that PWC's work in the compliance area was inadequate. The fact of the matter is not that the AG had higher standards than PWC; it is that PWC failed to perform to the standard required of it.

918. On 18 January 2018, after the AG had completed the SAA audit, it convened a meeting with SAA's previous auditors.[1606] The purpose of the meeting was to discuss the audit outcomes and their regression since the previous year. At this meeting, the AG warned PWC that the stakeholders would have a lot of questions for PWC/Nkonki about the previous audits based on the dramatic difference in findings and the qualifications in the 2016/2017 audit report. They would want to ask about the stark discrepancy between five years of clean audits and the limited and qualified audit for 2016/2017.[1607] The meeting summary records:[1608]

> "What was discussed was key matters to note that may be asked by the stakeholders. They include, among others:
>
> Irregular expenditure has significantly increased;
>
> Why the audit outcome has regressed from a clean audit to a qualified opinion;
>
> Why the significant matters reported by the AGSA in 2016 and 2017 audit were not reported in prior years.
>
> The previous auditors were notified that there is a huge risk on SCM, that stands for Supply Chain Management and SCOPA might need answers from the previous auditors on why this matter was not reported in prior years. The previous auditors need to prepare themselves, especially on SCM if they're called to do a presentation by SCOPA or Parliament."

[1606] Exhibit DD20(d), p 1825. See transcript 17 July 2020, p 55

[1607] Transcript 17 July 2020, p 57

[1608] Exhibit DD20(d), p 1826

919. When this was put to Mr Mothibe, he claimed that a lot of this could be explained by the peculiar circumstances attendant upon the 2016/2017 year.[1609] PWC was ultimately comfortable that the qualifications were peculiar to that year and that the financial statements were free of material misstatements in the preceding years.[1610]

920. Mr Mothibe was asked whether PWC and Nkonki were satisfied that the SAA internal controls were adequate from 2014-2016. In response, Mr Mothibe claimed that his team did identify "diversions" from regular practice and they notified management of these "deviations" but they had not "elevate[d] that part to the audit report as required".[1611] Mr Mothibe accepted that they should have elevated the issue to the audit report but had failed to do so. He also admitted that "they did not identify all the issues".[1612]

921. Mr Mothibe's original statement to the Commission did not make this concession. However, he testified that after reviewing the work again and considering the records, "it became clear that we had erred and we should have elevated some of those items of non-compliance . . . to the . . . report". [1613]

922. As set out above, Mr Mothibe agreed that it was necessary to completely reperform the processes that would have been followed in the relevant tender award in order to audit SCM compliance at an SOE. He also said that the PWC/Nkonki team did that work.[1614] However, when he was asked how he managed to do that when he could not find the relevant tender files, Mr Mothibe responded "for the simple stuff

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[1609] Transcript 17 July 2020, p 59

[1610] Transcript 17 July 2020, p 60

[1611] Transcript 16 July 2020, p 57

[1612] Transcript 16 July 2020, p 57

[1613] Transcript 16 July 2020, p 58

[1614] Transcript 16 July 2020, p 59

we had selected we followed that through and where there were challenges and there were deviations, we found them and we raised them with management and with the audit committee".[1615] During his evidence, he accepted that PWC/Nkonki had failed to elevate this issue to the audit report.

923. However, it is not only the failure to elevate these concerns to the audit report that was the issue. It is baffling how PWC could have reached any conclusion about compliance – and not note a scope limitation on their findings – in circumstances where there were no supporting documents. Mr Mothibe was asked how it could have been that, after his team had discovered that the tender files were missing, and notified management about the issue, the matter was then not taken any further. He was asked whether he considered this a dereliction of duty. He testified that it was not. He claimed that there were "reporting steps that we were able to carry out" but it was just that the "last step" should also have been carried out.[1616] When he was pressed about the fact that this last step was the critical one – the one that would alert the public to the issue because it would then appear in the audit report – he eventually conceded that it was an "omission" of duty.[1617] This is a difference of semantics. Whether one calls it a "dereliction" of duty or an "omission" of duty, the fact remains that PWC was not in any position to make a determination about SAA's compliance with legislation if it did not even have at its disposal the records that it would have needed to make this assessment.

924. It is not adequate for auditors of SOEs to alert management and Board committees to the problems that they themselves have created and are incentivized to conceal. Indeed, it was put to Mr Mothibe that the problem with skipping this "last step" is that

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[1615] Transcript 16 July 2020, p 63

[1616] Transcript 16 July 2020, p 65

[1617] Transcript 16 July 2020, p 67

the audit opinion, insofar as it talks about compliance and laws and regulations, would be incorrect. Mr Mothibe agreed with this.[1618]

925. Mr Mothibe testified that ultimately when the audit report was finalised, his team considered whether, in the light of the overall evidence, there was material non-compliance with legal requirements and concluded that there was not.[1619]He attributed this to "an error in judgment" and conceded that they "should have identified those matters as material areas of non-compliance."[1620]

926. When Mr Mothibe testified at the Commission, there was a pending case of alleged professional misconduct against him and Ms Thuto Masasa before the IRBA concerning their audits of SAA. By the time Mr Mothibe testified in July 2020, he had consented to the IRBA making an order against him of non-compliance for failing to identify non-compliance with legislation and internal control deficiencies for the SAA audits from 2014-2016.[1621] He testified that he had made the concession that there was inadequate reporting relating to compliance and irregular expenditure.[1622] He also acknowledged that, as a result of there being no tender files available at SAA to review, there were limitations placed on the scope of the audit[1623] and that the amount stipulated for irregular expenditure must therefore have been inaccurate in the audit report.[1624]

927. While it is correct that PWC did eventually make these concessions, it only did so after Mr Sokombela had testified in February 2020. Prior to that, both in relation to

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[1618] Transcript 16 July 2020, p 66

[1619] Transcript 16 July 2020, p 68

[1620] Transcript 16 July 2020, p 68-69

[1621] Transcript 17 July 2020, p 37-38

[1622] Transcript 17 July 2020, p 60

[1623] Transcript 17 July 2020, p 69

[1624] Transcript 17 July 2020, p 60

IRBA and in relation to the Commission, PWC stood by its audit reports for the 2014-2016 audits of SAA. The deficiencies in PWC's audits ought to have been apparent from the meetings with the AG in late 2016 and early 2017 as well as from the review of the results of the 2016/2017 audit report. It was, therefore, put to Mr Mothibe that "the passage of events suggests. . . that for two years, until the shoe started to pinch, until the public exposure of the deficient auditing work by PWC, PWC was content not to come clean about the errors it had made". It was also put to him that it was only when there was public disclosure through the evidence led in this Commission that "you then had another think and have made the concessions you have made."[1625]

928. In response, Mr Mothibe said that the matter of whether PWC had done to its job properly when auditing SAA during the relevant years was pending before the regulator and PWC did not want to anticipate the outcome.[1626] That is not an adequate answer to the question. The question probes why it took PWC so long to accept the inadequacies in its audit work. A responsible auditor would have made these concessions far earlier and certainly after the deficiencies had been brought to their attention by the AG. It should not have taken two more years, and a Commission of Inquiry to achieve this level of accountability from an entity like PWC.

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

[1625] Transcript 17 July 2020, p 80

[1626] Transcript 17 July 2020, p 81

Air Chefs

930. Mr Mothibe testified that he was aware of the lounge catering tender during the audit period and had had sight of the Board minutes of the meeting at which the decision to cancel the LSG Skychefs award and to give it to Air Chefs was taken.[1627] He testified that after reviewing the transaction, he did not think that there were any reportable irregularities.[1628]

931. Mr Mothibe testified that he was aware that SAA had awarded a tender to LSG Skychefs but that it had taken "a business decision" "to rather insource the provision of that catering to SAA". It was a decision to insource rather than to award to an outside party.[1629] When Mr Mothibe was asked whether such conduct was lawful under the PFMA, he stated that a decision to insource does not require a tender process.[1630] It was put to Mr Mothibe that under PAJA and administrative law, a state entity cannot run a tender process and make the administrative decision to award that contract, communicate the decision to the successful party, and then unilaterally withdraw the decision. This would be unlawful. Mr Mothibe responded that PAJA was not one the Acts that the auditors considered.[1631]

932. It was further put to him that the legal department of SAA had warned its Board of this consequence. It was also pointed out to Mr Mothibe that the opinion and its cautions to the Board were reflected in the Board minutes. Mr Mothibe stated that he

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[1627] Transcript 16 July 2020, p 158

[1628] Transcript 16 July 2020, p 158

[1629] Transcript 16 July 2020, p 160

[1630] Transcript 16 July 2020, p 160

[1631] Transcript 16 July 2020, p 162

did not recall considering those minutes, or those particular portions of them, and, if he did, it would not have been at that level of detail.[1632] He said that he did not call for any of the documents that served before the Board in making its decision and so he did not consider the memorandum that the Acting-CEO, Ms Mpshe, had prepared.[1633]

933. Mr Mothibe conceded that reading the resolution of the Board which stated that the tender award would be "retracted" and the "catering contract be awarded to Air Chefs without going through the bidding process", should have "sounded an alarm" to the auditors. It was put to him that more should then have been done and required of management to explain why they had retracted a tender that had been awarded pursuant to a lawful tender process.[1634] Mr Mothibe responded that this would still have looked like a valid decision to insource but he admitted that, when reading the record of the decision in its entirety, it did give rise to questions of possible financial loss and exposure to SAA from retracting a tender and the other obligations the Board had.[1635]

934. In his statement to the Commission, Mr Mothibe assumed that the Board was not permitted to award the contract to Air Chefs and retract it from LSG Skychefs without any process. He said even if that assumption were correct, PWC would *still* not have found any reportable irregularity. This is because PWC "would have required evidence that the SAA Board took this decision with the intention of breaching a law or regulation or that it acted negligently which evidence I did not have at the time."[1636]

[1632] Transcript 16 July 2020, p 162-163

[1633] Transcript 16 July 2020, p 163

[1634] Transcript 16 July 2020, p 179

[1635] Transcript 16 July 2020, p 182

[1636] Exhibit DD19(a), p 9

Section 45 of the Audit Professions Act defines a reportable irregularity as an unlawful act that amounts to fraud, or that results in a material loss to the company, or that amounts to a material breach of fiduciary duties. There is no necessary requirement that the unlawful act be committed with the intent to break the law.[1637]

935. After some debate, Mr Mothibe eventually accepted that an unlawful act resulting in financial loss; or a breach of a fiduciary duty, does not require intention, in order to amount to a reportable irregularity.[1638] Mr Mothibe maintained that insourcing did not require any processes and so insourcing in this manner was lawful. However, he conceded that *assuming* that the decision was an unlawful act, the requirements of material financial loss were met. This is because there was litigation instituted for the loss of the contract by LSG Skychefs, as well as the use of an inefficient service provider that SAA had received complaints about and was undermining its reputation – though he questioned whether this amount would actually fall under the materiality threshold they had set of R250million.[1639] He also conceded that the Board's decision constituted a breach of a fiduciary duty because the Board acted against SAA's internal legal advice and its decision was not based on what was in the best interests of the company.[1640] In the light of this concession, the Board's decision ought to have been reported to IRBA as a reportable irregularity. Had this taken place, management would have been required to account to its auditors for the decision.

936. The value of that type of accountability cannot be underestimated given all that we now know about what was going on at SAA towards the end of 2015. As stated above, a few days after the SAA Board had taken the decision to cancel the LSG Skychefs award, Dr Dahwa was subjected to eight hours of abuse from Ms Kwinana

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[1637] Transcript 16 July 2020, p 187-188

[1638] Transcript 16 July 2020, p 192

[1639] Transcript 16 July 2020, p 201

[1640] Transcript 16 July 2020, p 197-198

and Ms Myeni for refusing to sign letters of award to facilitate the unlawful 30% set aside policy.

937. In addition, Ms Mpshe, who had stood up to the Board over this very decision to cancel the LSG Skychefs award, was eventually charged with insubordination for her conduct. Had SAA's auditors just done their job and the correct attention been drawn to this unlawful decision, some of the devastating events of the next many months at SAA may well have been different. One of those next events was the conclusion of the Swissport ground handling contract in March 2016.

Swissport ground handling

938. Part of the AG's findings was that the Swissport ground handling contract concluded on 14 March 2016, constituted irregular expenditure.[1641] The contract was identified as part of the AG's "specific selection" of transactions during the risk assessment phase of the audit. This was because the transaction had been in the media.[1642] The AG determined that the risks associated with not testing that transaction were very high. Thus, in order to mitigate the audit risk to an acceptable level, the tender had to be selected for testing.[1643] One of the AG's great concerns was that the tender took four years between the closing date of the award and the date the contract was

[1641] Exhibit DD20(c), p 1077

[1642] Transcript 21 February 2020, p 79

[1643] Transcript 21 February 2020, p 88

actually awarded by the Board.[1644] Then, when a further contract for five years was concluded in 2016, there was no new tender process.[1645]

939. Related to the Swissport transaction was the 30% BEE set aside policy that SAA sought to impose on Swissport. The Auditor General found as follows regarding SAA's attempts to implement the 30% set aside policy:[1646]

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

940. Mr Sokombela noted that the correspondence from the BEE Commissioner and the National Treasury regarding the unlawfulness of the policy was dispatched in September 2015. He also noted that a set aside policy was not a requirement or condition of the tender that Swissport was awarded.[1647] Nevertheless, the AG found a memorandum prepared by the CFO of SAA in 2016 about the selection of the BBBEE firm for the Swissport contract, in circumstances where there did not appear to be any selection process. As a result of SAA and Swissport being unable to agree on this issue, SAA terminated Swissport's service on 16 February 2016. Then, pursuant to "off record discussions", an agreement was reached for a five-year contract. The AG was particularly concerned about why these discussions were conducted off record.[1648]

[1644] Transcript 21 February 2020, p 80

[1645] Transcript 21 February 2020, p 86

[1646] Exhibit DD20(c), p 1081-1082

[1647] Transcript 21 February 2020, p 93-94

[1648] Transcript 21 February 2020, p 94-95

941. The AG also raised concerns about JM Aviation, Swissport's ultimate BEE partner, having been appointed without any selection process. The AG investigated the entity further and found that there was a common director between Swissport and JM Aviation which concerned the AG further.[1649] That was Mr Ndzeku. This was a red flag and a conflict of interest in circumstances where this information was not disclosed anywhere in the records of SAA.[1650]

942. Part of the recommendations flowing from this investigation was to investigate the selection process of JM Aviation and to disclose irregular expenditure of R362million arising from the AG's findings.[1651] The AG also concluded "with regards to the off the record meeting held with Swissport and management, that will not be accepted as the auditors cannot validate the discussions held because they were not recorded. This is an indicator of fraud and further investigation must be done."[1652]

943. Mr Mothibe testified that the Swissport contract did not come to the audit team's attention because it did not fall within the sample of transactions that PWC reviewed.[1653] He said that is why PWC did not report it as a reportable irregularity despite the fact that it represented a substantial contract of significant value (R1.8billion) in respect of which there was no procurement process.[1654]

944. Asked why the contract was not part of the transactions reviewed, Mr Mothibe testified that they were not provided with minutes of the relevant Board meeting, and that Swissport was a longstanding ground handling service provider with the result

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[1649] Transcript 21 February 2020, p 95

[1650] Transcript 21 February 2020, p 96

[1651] Transcript 21 February 2020, p 97

[1652] Exhibit DD20(c), p 1085. See also 21 February 2020, p 99

[1653] Transcript 16 July 2020, p 20

[1654] Transcript 16 July 2020, p 206

that the contract did not stand out. He said that the amount was high so it probably went through Board approvals and "obviously the expectation is that it would have gone to the Board after it had gone through the necessary approval processes within South African Airways."[1655]

945. This answer gives rise to many concerns. It is no answer to a question whether an auditor should have reported a reportable irregularity for that auditor to claim that he expected that the decision would have been approved by the Board after processes had been followed. The whole point of a reportable irregularity is to identify instances where the management of a company are not acting in accordance with their legal obligations and are approving things that they should not be approving. Furthermore, the size of the transaction was not a reason not to report it; it was a reason to look very closely at the transaction and ensure that it complied with the law. That the contract was of such a significant monetary value was a further reason why the auditors should have included it in the sample of transactions to be considered.

946. Mr Mothibe's role in performing the audit was to determine if there was any irregular expenditure. The fact that the value of the contract was so high that it would have required Board approval could not answer the question whether it amounted to irregular expenditure. This is because it could have been irregular for having failed to follow any proper procurement process before the Board approved it.[1656] When this was pointed out, Mr Mothibe again emphasized that he and his team had not considered the Swissport contract because it was not in their sample.[1657]

[1655] Transcript 16 July 2020, p 208-209

[1656] Transcript 16 July 2020, p 209-210

[1657] Transcript 16 July 2020, p 210

947. It was therefore necessary to probe further with Mr Mothibe why this contract did not fall into the sample that PWC chose. Mr Mothibe testified that he agreed with Mr Sokombela's evidence that in the audit risk assessment process, the auditor identifies contracts that raise red flags. He also accepted that these red flags could be caused by indicators such as controversy in the media, or through research, there could be something about the contract that concerns them.[1658] Mr Mothibe was informed that the AG had identified this contract as one such transaction because there was litigation around it and the contract had taken four years to conclude after the award of the tender. Asked why none of these factors raised a red flag for PWC,[1659] Mr Mothibe responded again that Swissport was a long standing service provider and it was being paid amounts consistent with previous years and so there were no red flags.[1660]

948. Once again this type of answer seems to indicate a frame of mind or approach to auditing that may be appropriate in detecting irregular activity in a private audit client, but would not be appropriate in a public entity that is obliged to regularly put out to tender their contracts in a transparent competitive process. In those circumstances, the fact that a particular service provider may have been providing a service to the client for a long time may itself be a reason for an auditor to include a transaction in a sample.

949. Mr Mothibe testified that he was not aware that Swissport had been providing a service for a long time without a contract. He conceded that it would have been of concern to him to learn that and it would have been something he would have wanted

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[1658] Transcript 16 July 2020, p 210

[1659] Transcript 16 July 2020, p 214

[1660] Transcript 16 July 2020, p 215

to interrogate further.[1661] Swissport had been providing a service to SAA without a contract for three of the years that PWC was auditing SAA and yet it had never been picked up. Mr Mothibe said again that in none of the three years had the contract fallen into the sample of transactions.[1662]

950. Ernst & Young performed a review of SAA contracts in the second half of 2015 for the purpose of evaluating procurement and contract management at SAA, and had flagged this contract as a concern.[1663] When this was drawn to Mr Mothibe's attention, he testified that he was aware that Ernst & Young were doing work for SAA but that the final report by Ernst & Young had not been finalised by the time they signed off on their audit report.[1664] Mr Mothibe's attention was then drawn to the fact that a draft version of the report, addressed to a Mr Nick Linnell,[1665] had been provided to the SAA Board on 10 December 2015.[1666] The report considered the Swissport contract and concluded that "Swissport's contract is a month to month basis. SAA is failing to realise the costs savings as a result of delays in entering into a contract with Swissport. The delays will result in SAA overpaying for the ground handling services … SAA has failed to realise cost savings of R92 936 578."[1667]

951. Mr Mothibe claimed that PWC had enquired about a copy of any findings of Ernst & Young and had been led to believe that there was no report to consider at that stage.[1668] It was then pointed out to Mr Mothibe's attention that the media was

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[1661] Transcript 16 July 2020, p 216

[1662] Transcript 16 July 2020, p 216

[1663] Transcript 16 July 2020, p 218

[1664] Transcript, 16 July 2020, p 219

[1665] Transcript 16 July 2020, p 222

[1666] Exhibit DD19(d), p 551. The Swissport contract was considered pertinently in the report at p 597

[1667] Transcript 16 July 2020, p 223.

[1668] Transcript 16 July 2020, p 226

actually already reporting on Ernst & Young's review findings at that stage.[1669] The Business Day reported on 9 December 2015 that the Ernst & Young Report found that as much as 60% of procurement could be subject to weak business controls and it appeared from the article that Business Day were in possession of the report. Mr Mothibe stated that they did not consider this article as part of their media research.[1670]

952. Unlike for the year 2015, the audit files for 2016 did not contain *any* media articles at all. He was asked whether he could confirm if any media review was performed in that year. At this point, Mr Mothibe turned back to saying it was not a requirement that the auditors perform a media review.[1671] He said this despite the fact that he had previously admitted that it was part of the designed evidence gathering process for the audit to review media and that it was part of IRBA's guide[1672] on reportable irregularities which he professed to follow in every audit.

953. Mr Mothibe was asked to go back and review the audit file for 2016 to ascertain whether any media articles were reviewed by the audit team. Mr Mothibe did so and could not find any indication that media articles had been considered.[1673]

954. Mr Mothibe was also directed to another media article about Swissport that his team failed to collect and consider on 17 November 2015. This was a Moneyweb article that spanned four pages and was entitled "SAA Defies National Treasury and DTI Instructions".[1674] The article stated: "The SAA Board is persisting with efforts to have 30% of its procurement contracts set aside for transformation partners in defiance of

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[1669] Exhibit DD19(d), p 324

[1670] Transcript 16 July 2020, p 227-228

[1671] Transcript 16 July 2020, p 230

[1672] Exhibit DD19(c), p 129, para 7.1.3

[1673] Transcript day 234, 17 July 2020, p 3

[1674] Exhibit DD19(c), p 132.21.1

express instructions by National Treasury and the Department of Trade and Industry to stop this practice. Against this background tensions between board and top officials who continued to war against unlawful practices is reaching a breaking point. This has become clear from a Moneyweb investigation into efforts to amend the SAA ground handling contract with Swissport International." The article set out the ways in which SAA's conduct in respect of this contract was unlawful.

955. Mr Mothibe testified that even though the guidance from IRBA provides for considering matters that come to the auditor's attention, including from the media, this article did not come to their attention and, for that reason, they would not have been able to consider it.[1675]

956. However, if the auditing team had implemented the media review procedure that was set out in PWC's own evidence gathering processes, and which appears in the IRBA Guide, it is likely that these articles would have come to the team's attention. Mr Mothibe was evasive in his answer to this proposition and he reiterated that it was not part of the official standards that they review media articles.[1676] He then admitted that "if they had searched . . . it may have come up as part of the search."[1677]

957. It was put to Mr Mothibe that if the minutes of the Board meeting and its resolution approving the contract had been studied by the audit team, they would have revealed that no procurement process had been followed because usually minutes considering a tender process would discuss, for example, the recommendation of the BAC. However, the Board resolution of 14 March 2016 read quite differently and

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[1675] Transcript 17 July 2020, p 15-16

[1676] Transcript 17 July 2020, p 17

[1677] Transcript 17 July 2020, p 18

mentioned none of these processes.[1678] If PWC had looked carefully at the resolution this should have raised concerns. Mr Mothibe said that he could not comment on this question.[1679]

958. In addition, in one of the Internal Audit Reports, which Mr Mothibe testified he did generally consider, the internal control committee found that the Swissport contract had been concluded irregularly as no competitive process had been followed. This report was dated 15 September 2016.[1680] Mr Mothibe confirmed that the audit report was prepared *before* the PWC audit was finalised on 30 September 2016. His response to this obvious "red flag" was to state that the auditors were more concerned with SAA's cashflow problems and its status as a going concern at that stage,[1681] and that he could not recall having read that particular report.[1682]

959. Despite all this evidence – a Board resolution that committed SAA to more than a R 1 billion expenditure that made no reference to a procurement process having been followed; a report by Ernst & Young that flagged this contract as irregular; media reporting at the time that exposed the illegality of the contract – PWC and Nkonki did not have this contract in their testing sample. The failure to have considered this contract was, to say the least, a significant oversight by SAA's auditors, that is, if it was oversight at all.

960. As stated above, the very "off the record" discussions that the AG was concerned about in his 2017 audit have been investigated extensively by the Commission. In the month before the ground handling contract was concluded with SAA, Swissport

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[1678] Exhibit DD19(c), p 132.43

[1679] Transcript 17 July 2020, p 24

[1680] Transcript 17 July 2020, p 27. Exhibit DD19(c), p 132.53.1

[1681] Transcript 17 July 2020, p 31

[1682] Transcript 17 July 2020, p 28

paid R28.5 million to JM Aviation. JM Aviation then paid those funds to various officials within SAA and others who "facilitated" the agreement between Swissport and SAA. A recommendation has been made elsewhere in this report that prosecutions should be considered by the NPA arising from these dealings.

961. Had SAA auditors done their work properly, had they been doing adequate media reviews in 2015 and 2016, they would have come across these red flags. Had they read Board minutes and resolutions with an enquiring mind and a concern to identify irregular expenditure, then this contract would not, and could not, have escaped scrutiny.

The New Age

962. Mr Sokombela also testified that he selected the spending on The New Age newspaper at SAA as a transaction to test because, despite its relatively small value (R1.3million), during the risk assessment process this was identified as a risky transaction given the media attention around it. When investigating it, SAA was unable to produce any documents evidencing that proper processes were followed in respect of this expenditure.[1683]

963. This TNA is dealt with in great detail later in this report. However, the point for present purposes is that, if SAA auditors had flagged TNA spending in previous audit years, this may have had an important effect on SAA's (and even other SOEs) ability to justify further spending on the TNA and its associated business breakfasts.

[1683] Transcript 21 February 2020, p 102. See also exhibit DD20(c), p 1091

Conclusion

964. PWC and Nkonki gave clean audits to SAA for five consecutive years between 2012 and 2016. During this period, the Board was in a state of precipitous governance decline. It was also engaging in acts of corruption and fraud. None of this was, however, detected by its auditors. Instead, their audit reports each year conveyed to the public that SAA was complying with the law and that irregular expenditure was under control.

965. PWC and Nkonki failed in their duties as a watchdog institution.[1684] Had they performed their functions properly, the shambolic state of financial and risk management in SAA would have been picked up earlier, and could have been addressed. It took the intervention of the Auditor General to finally expose these deep deficiencies.

966. The findings of the AG on the parlous state of both internal control and financial and risk management at SAA alone indicates that the Board of SAA had failed to comply with section 51 of the PFMA. Section 51(1)(a) of the PFMA requires the accounting authority of an SOE to ensure that it has and maintains "an effective, efficient and transparent system of financial and risk management and internal controls". In terms of section 86(2) of the PFMA, an accounting authority that wilfully or grossly negligently fails to comply with this obligation is guilty of an offence.

967. Auditors who correctly discharge their responsibilities and who call management to account for breaching their obligations under the PFMA will contribute significantly

[1684] Thoroughbred Breeders v Pricewaterhouse 1999 (4) SA 968 (W)

to curbing the tide of corruption and irregular conduct that engulfed some of South Africa's SOEs over a number of years.

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

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

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

SA EXPRESS

Introduction

972. In May 2018, the Financial Mail published an article entitled "A case study in looting state-owned companies". It was written by Ms Karyn Maughan and gave rise to serious questions about a number of transactions between South African Express Airways SOC Limited (SA Express) and the Department of Community Safety and Transport in the North West Province (the Transport Department). The by-line of the article read as follows:

> "State-owned companies Eskom, PRASA, SAA and Transnet have made headlines in SA's state capture story. But evidence of corruption at SA Express – the airline set up at the dawn of democracy to connect smaller cities – has remained almost entirely under wraps."

973. SA Express is a major public entity listed under Schedule 2 to the Public Finance Management Act 1 of 1999 (PFMA).

974. Although the Public Protector's Report did not, itself, refer to the activities of SA Express, the Terms of Reference of the Commission expanded the reach of the Commission's mandate beyond the Public Protector's investigation.

975. The Terms of Reference promulgated on 25 January 2018 required the Commission to investigate, amongst other things, "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 to the PFMA" (paragraph 1.5 of the Terms of Reference).

976. Paragraph 1.9 of the Terms of Reference also required the Commission to determine "whether any member of the National Executive, public official or functionary of an

organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest".

977. Ms Maughan's article alleged that high-ranking officials in the North West government had colluded with functionaries at SA Express to syphon millions of Rands out of the North West government's coffers. The article also alleged that those same officials and functionaries had benefitted personally from the scheme. The allegations therefore fell squarely within the ambit of paragraphs 1.5 and 1.9 of the Terms of Reference and so the aviation workstream of the Commission investigated the allegations.

978. One of the extraordinary features of the investigation was that, at the time that the Commission began investigating the allegations, a criminal complaint had already been lodged with the authorities in 2016 – three years before the Commission began investigating the matter.[1685] By 2019, a criminal investigation was underway and High Court litigation had been instituted. However, despite all of these steps, by the time that the Commission heard evidence emanating from this investigation in June 2019, the criminal process had not gained any substantial momentum and the litigation had not advanced matters.

979. This slow-pace of the criminal investigation is a matter of serious concern because of two key features of the case.

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

[1685] Transcript 13 June 2019, p 7

structure of the agreement entered into between SA Express and the Transport Department proved to be an unprecedented act orchestrated by officials of SA Express to loot funds from the North West government.

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

980. These allegations were serious and were substantially supported by documentary and other evidence. Despite this, the Commission investigators' interactions with SAPS revealed that it had taken approximately two years for SAPS to obtain the relevant bank statements and there had been very little progress in the matter.[1686]

981. The Commission heard oral evidence from number of witnesses connected with this scheme. There were seven in total. These were:

981.1. Ms Babadi Tlatsana,[1687] who was a director of an entity called, Koreneka Trading and Projects CC t/a Koreneka Facilities Management (Koreneka).

981.2. Mr Arson Malola Phiri,[1688] who was employed as the General Manager for Regional Expansion at SA Express.

[1686] Transcript 13 June 2019, p 8

[1687] Ms Tlatsana's evidence bundle is DD8

[1688] Mr Phiri's evidence bundle is DD6

981.3. Mr Timothy Ngwenya,[1689] who was the Divisional Manager: Security Management at SA Express responsible for the security and investigations function within the entity.[1690]

981.4. Ms Kutlwano Phatudi,[1691] who was the Chief Financial Officer of the Transport Department in the North West Provincial Government.

981.5. Ms Kalandra Viljoen,[1692] who was the owner of an entity called Asset Movement Financial Services CC that ran a "cash in transit" business.

981.6. Mr Vivien Natasen,[1693] who was the sole director and shareholder of Neo Solutions (Pty) Ltd (Neo Solutions).[1694]

981.7. Prof Tebogo Job Mokgoro,[1695] who was the Premier of the North West Province when he testified at the Commission but who had held the position of Acting Director-General in the Office of the Premier during the period under investigation.[1696]

982. A number of these witnesses were themselves implicated in wrong-doing and were questioned about their role in the scheme. There were also others who were implicated but did not give evidence.

[1689] Mr Ngwenya's evidence bundle is DD5.

[1690] Transcript 19 June 2019, p 57

[1691] Ms Phatudi's evidence bundle is DD7

[1692] Ms Viljoen's evidence bundle is DD9

[1693] Mr Natasen's evidence bundle is DD10

[1694] Transcript day 132, 12 July 2019, p 34

[1695] Prof Mokgoro's evidence bundle is DD32

[1696] Transcript 1 October 2020, p 8

982.1. The former Minister of Transport, Ms Dipuo Peters, did not testify at the Commission in relation to this scheme but did provide the Commission with two affidavits denying the allegations made against her by various witnesses and seeking leave to cross examine those witnesses in the event that they persisted in their allegations against her. The allegations and the response will be dealt with below.

982.2. Mr Brian van Wyk, who was the former Commercial Manager at SA Express, was heavily implicated by the evidence of Ms Tlatsana and endeavoured to have her evidence delayed on the basis that he had not received adequate notice of the evidence.[1697] The evidence was not, however, postponed. Instead, I invited Mr van Wyk to bring an application for leave to cross examine any of the witnesses whom he thought had implicated him and whose version he wished to challenge.[1698] Despite being invited to do so, however, Mr van Wyk did not bring an application to cross examine any of the witnesses who gave evidence against him nor did he apply to the Commission in terms of Rule 3.3 of its rules for leave to give evidence and dispute their evidence.

982.3. The former Premier of the North West, Mr Supra Mahumapelo, was also implicated in the evidence but despite receiving a rule 3.3 notice from the Commission about the evidence of Mr Ngwenya, Mr Mahumapelo did not respond to the notice. He also did not apply for leave to cross-examine the witnesses who implicated him nor did he apply for leave to give his own evidence and to dispute their evidence.

[1697] Transcript 21 June 2019, p 2 – 8

[1698] Transcript 21 June 2019, p 21

982.4. What follows is the summary and analysis of the evidence that was given as well as the findings of the Commission in regard to that evidence.

The airports and SA Express

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

984. The North West Department of Tourism (the Tourism Department) accordingly created an initiative to revitalise and activate these airports and sent invitations to the North West government to attend a meeting about it on 26 August 2014. Ms Kuthlwano Phatudi, the CFO in the Transport Department was invited to this meeting. According to Ms Phatudi, the meeting related to the presentation of proposals by invited airlines. The Tourism Department coordinated the meeting and invited the airlines.[1699]

985. As a consequence of this initiative, six airlines were invited to submit proposals and make presentations for the provision of airline services on two routes — the Mahikeng route (Mahikeng to Johannesburg) and the Pilanesberg route (both Pilanesberg to Johannesburg and Pilanesberg to Cape Town).

[1699] Transcript 21 June 2019, p 31-32

986. Out of the six airlines invited, only four airlines submitted proposals. According to Ms Phatudi, the Transport Department was not involved in extending the invitation to the airlines to make proposals.[1700]

987. The following airlines were invited and responded by making submissions and presentations:

987.1. SA Express;

987.2. Continental Aviation Solution;

987.3. Challenger Air; and

987.4. SA Air-link.

988. The meeting on 26 of August 2014 took place at Sun City and involved the four airlines making presentations about their proposals.[1701] Representatives from the Office of the Premier, the Tourism Department, the Transport Department, and Treasury attended the meeting. These departments were represented by their Executive Council Members (MECs) and Heads of Department (HODs).[1702]

989. At the time of this meeting, the Tourism Department was represented by its acting HOD, Mr Charles Ndabeni; the Transport Department was represented by its HOD, Mr Bailey Mahlakoleng; and Treasury was represented by its HOD, Mr Israel Guneni.[1703]

[1700] Transcript 21 June 2019, p 32

[1701] Transcript 21 June 2019, p 31

[1702] Transcript 21 June 2019, p 33 and 38

[1703] Transcript 21 June 2019, p 38-39

990. Subsequent to the presentations, a memorandum was prepared and signed by the HOD of the Transport Department, Mr Mahlakoleng, and the MEC of the Transport Department, Mr Molapisi, on 11 and 15 November 2014 respectively.[1704]

991. Mr Molapisi addressed the memorandum to the Chairperson of the Executive Council (EXCO). EXCO comprised the Executive Council of the Province, consisting of the Premier, Mr Supra Mahumapelo, as its chairperson, and the MECs.

992. The memorandum concerned the proposed introduction of scheduled flights for the Mahikeng and Pilanesberg Airports. It presented a business case for establishing the airline service and provided a summary of the proposals that had been made by the four airlines that responded to the invitation.

993. Ms Phathudi was asked during her evidence if it was ordinary procedure for the Transport Department to seek approval from EXCO. She testified that the correct process was that the department would go out on tender, advertise and follow the procurement process, including going through the relevant bid committees (bid specification; bid evaluation; and bid adjudication), until approval was granted by the HOD.[1705] The award of tenders was the responsibility of the HOD as the Accounting Officer for the Transport Department.

994. This process was not followed in the case of the airlines. There were no supply chain management processes followed and it was not advertised.[1706] Ms Phatudi testified that she had advised the then HOD that the tender should be advertised. However, her advice was not followed. The HOD told her at the time that "the collective" at the

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[1704] Exhibit DD7, p 12-21 read with Transcript 21 June 2019, p 35

[1705] Transcript 21 June 2019, p 36

[1706] Transcript 21 June 2019, p 36-37

meeting at Sun City had recommended that the process go through EXCO instead and so he had prepared the memorandum in line with that decision for EXCO to approve.[1707] However, EXCO did not, ordinarily, play any role in the appointment of service providers in the Transport Department. The procurement process explained by Ms Phatudi in her evidence did not include any role played by EXCO in deciding the award of tenders.[1708] Despite this, the memorandum was prepared for EXCO's approval.

995. The memorandum concluded that SA Express met the provincial airlift strategy because it was "a state owned entity and not profit driven, while SA Air-link, Continental and Challenger Airlines will be highly dependent on government for profit making".[1709] Therefore, SA Express was recommended to be contracted for a period of five years, renewable annually.[1710]

996. However, the memorandum also showed that the SA Express proposal was substantially more expensive than the other proposals. In fact, it was R110 million as compared to R4.5 million.[1711]

997. In the face of this substantial price difference, the justification for selecting SA Express over the other airlines would have had to have been compelling. However, no other compelling justification was provided in the memorandum.

998. When Prof Mokgoro, who had been the Acting Director-General in the Office of the Premier at the time, was questioned about this during his testimony before the

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[1707] Transcript 21 June 2019, p 37

[1708] Transcript 21 June 2019, p 44

[1709] Transcript 1 October 2020, p 104

[1710] Exhibit DD7, p 18.

[1711] Transcript 1 October 2020, p 103

Commission, he conceded that the selection of SA Express "did not make sense;"[1712] that it was, in fact, "absolutely nonsensical".[1713]

999. Ms Phatudi testified that, after Exco had been presented with the memorandum, EXCO approved the appointment of SA Express.[1714] She referred to an extract of the EXCO minutes for this decision.[1715] However, those very minutes recorded various problems with the memorandum. For example, the EXCO minutes recorded that "The HOD should have done a thorough analysis of all presentations received to outline what it means financially for the Province to subsidise the Mahikeng-OR Tambo route 100%, consider all options and propose the best option for consideration by EXCO".

1000. Despite this, however, on 3 December 2014, EXCO resolved as follows:[1716]

> "(a) Exco agreed that the Department should proceed with the chosen service provider and sign the contract (SA Express).
>
> (b) The submission should serve again on December 2014 with a proper analysis of presentations and options for consideration by Exco."

1001. EXCO therefore first agreed to sign the contract and then wanted to consider a proper analysis of the presentations later. This sequencing issue was taken up in Prof Mokgoro's evidence. I questioned Prof Mokgoro as to how it could be that EXCO would first decide to approve a contract, but at the same time say that they wanted

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[1712] Transcript 1 October 2020, p 105

[1713] Transcript 1 October 2020, p 82

[1714] Transcript 21 June 2019, p 44

[1715] Exhibit DD7, p 381.

[1716] Transcript 21 June 2019, p 44-45

to consider it further.[1717] In the end, Prof Mokgoro conceded that this amounted to a contradiction in EXCO's reasoning.[1718]

1002. Ms Phatudi testified that the appointment of SA Express was not in line with the provisions of section 217 of the Constitution[1719]. It did not follow the recognised process for procurement in the Transport Department.[1720] She also confirmed that she was not aware of any exceptional circumstances that would have justified not following a proper procurement process.[1721]

1003. Despite these serious issues with the appointment process, a contract was concluded with SA Express.

The contract

1004. On 31 March 2015 the Transport Department entered into an agreement with SA Express. In terms of the agreement, SA Express would provide airline services for the designated routes between OR Tambo International Airport (OR Tambo Airport), Cape Town International Airport (Cape Town Airport), Pilanesberg Airport and Mahikeng Airport (Main Agreement).[1722]

[1717] Transcript 1 October 2020, p 91

[1718] Transcript 1 October 2020, p 92-93

[1719]Section 217(1) provides: "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."

[1720] Transcript 21 June 2019, p 48

[1721] Transcript, 21 June 2019, p 49

[1722] Exhibit DD7, p 23-62

1005. The Main Agreement was effective from 27 March 2015 for the OR Tambo Airport, Cape Town Airport and Pilanesberg Airport route, and from 1 May 2015 for the OR Tambo Airport and Mahikeng Airport route.

1006. The agreement between the Transport Department and SA Express was drafted by the legal division of the department under the instruction of the HOD. The HOD, Mr Mahlakoleng, signed the agreement for the department. Mr Inati Ntshanga, the then Chief Executive Officer of SA Express, signed on its behalf.[1723]

1007. The Main Agreement contained the following pertinent clauses:[1724]

1007.1. Effective Date: 27 March 2015 for OR Tambo, Cape Town and Pilanesberg routes and 1 May 2015 for OR Tambo and Mahikeng routes;

1007.2. Clause 4.1: SA Express and the Transport Department agreed that SA Express shall, with effect from Effective Date, commence the Airline Service on the Designated Route for a period of 5 (five) years calculated from the Effective Date;

1007.3. Clause 6.1: The Transport Department shall pay to SA Express annually, in advance, the amount stipulated in Annexure A, which amount is subject to review at the end of each year, by agreement between the Parties;

1007.4. Clause 7.1.4: SA Express shall, on quarterly basis, submit a written return to the Transport Department which includes – details of marketing and promotion

[1723] Transcript 21 June 2019, p 51

[1724] Exhibit DD7, p 23-62

of the Airline Service done during that quarter and that contemplated for the next quarter, together with the costs and/or anticipated costs thereof;

1007.5. Clause 10.1: SA Express shall, with effect from the Effective Date, provide the Airline Service with CRJ 200 aircraft, including suitable replacement aircraft should the aircraft employed in providing the Airline Service be unserviceable; alternatively with an aircraft of similar size, specification and capabilities;

1007.6. Clause 15.1: SA Express shall, in consultation with the Transport Department, appoint a management company responsible for managing certain facilities at Pilanesberg and Mahikeng airports; and

1007.7. Clause 15.3: SA Express shall enter into a Service Level Agreement with the management company, in terms of which performance of the management company will be monitored and evaluated.

1008. The Main Agreement envisaged certain subsidies being paid to SA Express for operating the routes and then certain payments being due to a management company that would take care of the ground handling at the airports but which was not yet appointed at the time that the Main Agreement was concluded.

1009. The subsidies payable in terms of the Main Agreement to SA Express for operating the routes were as follows:[1725]

1009.1. Approximately R58 million payable in 2015;

1009.2. Approximately R51 million payable in 2016;

[1725] Exhibit DD7, p 60

1009.3. Approximately R43 million payable in 2017;

1009.4. Approximately R40 million payable in 2018; and

1009.5. Approximately R36 million payable in 2019.

1010. The amounts payable to the management company were as follows:[1726]

1010.1. Approximately R51 million payable in 2015;

1010.2. Approximately R31 million payable in 2016;

1010.3. Approximately R31 million payable in 2017;

1010.4. Approximately R31 million payable in 2018;and

1010.5. Approximately R31 million payable in 2019.

1011. These two sets of amounts aggregated to R407 221 142. This meant that SA Express was to be paid just more than R200 million as a subsidy and then it would procure the services of a management company that would run the airports for just short of another R200 million.

1012. Ms Phatudi testified that she became aware of the agreement after it had been signed, when there was a claim for payment made under the contract to the Transport Department at some point in 2015.[1727]

[1726] Exhibit DD7, p 60

[1727] Transcript 21 June 2019, p 52

The first invoice

1013. On 16 March 2015 Mr Mahlakoleng prepared and issued a letter to Prof Mokgoro, who, it will be recalled, was the Acting Director-General in the Office of the Premier at the time.[1728] The letter requested the Office of the Premier to process payment to SA Express. Attached to the letter was an invoice from SA Express for an amount of R53 143 564.

1014. During her evidence, Ms Phatudi's explanation for the approach to the Office of the Premier for payment was that during March 2015, when the invoice was received, the Transport Department did not have a budget for the project. It was for this reason that the HOD had written the letter to the Office of the Premier requesting it to pay on behalf of the Department.[1729]

1015. This is a particularly concerning feature of the case. Not only was SA Express appointed in circumstances that flouted procurement principles and without any credible justification, it was also clear that the procurement itself had not been budgeted because the very department responsible for the services did not have funds for it. It had to approach the Office of the Premier to pay the first invoice.

1016. The payment was made on 26 March 2015[1730] from the Office of the Premier's budget and approved by Prof Mokgoro.[1731]

1017. Prof Mokgoro was questioned about his authorisation of this payment during his evidence. Although he initially sought to justify the payment as having come from the

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[1728] Exhibit DD7, p 65

[1729] Transcript 21 June 2019, p 68

[1730] Transcript 21 June 2019, p 69, read with Exhibit DD7, p 66A

[1731] Transcript 21 June 2019, p 70

R132 million budget that had been set aside for the MRRRP (Mahikeng Recovery Renewal and Repositioning Program),[1732] he eventually conceded during the questioning that the MRRRP funds had been earmarked for projects other than the Mahikeng airport.[1733]

1018. Prof Mokgoro was also asked about a curious handwritten note on the invoice that had been received from SA Express. The invoice itself was for an amount of R53 143 564. However, there was a handwritten note on the invoice that read: "Please process this payment for R50million, the payment agreed to with Treasury and at Exco".[1734]

1019. Prof Mokgoro was questioned about why this handwritten note did not raise alarm bells and require further probing because he was, in effect, being presented with an invoice for a specific amount but being asked to approve a rounded off figure, pursuant to a handwritten note on the invoice. Prof Mokgoro accepted, in his testimony, that he had no idea whose handwriting was on the invoice. He also accepted that it would be unreasonable to process a payment for less than an invoiced amount unless there was some history behind the payment but he then confessed that he could not recall why he had approved the payment of R50 million based on the handwritten note.[1735]

1020. Prof Mokgoro was also taken to task during his testimony about the fact that he authorised this payment on 26 March 2015, before the contract between the parties had even been concluded. He accepted that this was irregular but then was at pains

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[1732] Exhibit DD32.1, p 8

[1733] Transcript 1 October 2020, p 73 – 75

[1734] Exhibit DD32.1, p 95

[1735] Transcript 1 October 2020, p 124 – 12

to emphasise that this was a "government-to-government" contract and that he recalled that there was pressure to make the payment because the airline had begun operating but he could not give any details about when this had occurred.[1736]

1021. Prof Mokgoro's evidence on this score was entirely unsatisfactory. As Acting Director General in the Office of the Premier, he was the accounting officer for the Premier's Office. He testified that he accepted that he had a number of obligations under the Public Finance Management Act 1 of 1999 (PFMA) as a result of his position.[1737] However, he was then unable to provide any credible explanation for the fact that he authorised a payment of R50 million in respect of a contractual obligation that did not yet exist, for an airline subsidy to a state-owned enterprise for which there was no budget in the relevant department. Prof Mokgoro's conduct in this regard was completely unacceptable and he should not have authorised that payment.

1022. This first payment was then followed by a series of others which, as the next section sets out, found their way into the pockets of state officials.

[1736] Transcript 1 October 2020, p 127 – 133

[1737] Transcript 1 October 2020, p 10 – 12. These obligations included the following:

The Accounting Officer must take into account all relevant financial considerations, including issues of propriety, regularity and value for money, when policy proposals affecting the accounting officer's responsibilities are considered, and when necessary, bring those considerations to the attention of the responsible executive authority (section 38(1)(c)(i)).

The Accounting Officer must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct (section 38(1)(c)(ii)).

The Accounting Officer for the Department is responsible for ensuring that effective and appropriate steps are taken to prevent unauthorised expenditure (section 39(1)(b))

The money

A comparator?

1023. The amounts to be paid to SA Express and the management company under the Main Agreement were substantial – in excess of R400 million. One of the problems with this type of liability for the North West Province was that, because no proper procurement process had been followed, it was not possible for the Province to know whether the amounts it had agreed to pay SA Express or the management company were market-related.

1024. The Commission therefore investigated what the comparable terms had been on route subsidy agreements that SA Express had concluded in the past. It presented the evidence of Mr Phiri on this issue. He had been the General Manager for Regional Expansion at SA Express in 2010 to 2012. In that role, he had been involved in the conclusion of a series of agreements between SA Express and Dube TradePort for the development of new airplane routes between Kinshasa – King Shaka International Airport and Lusaka, on the one hand, and Harare, on the other.

1025. The nub of Mr Phiri's evidence was that the amounts that the Transport Department had agreed to pay to SA Express under the Main Agreement were overstated and excessive.[1738] He provided a number of examples of these excessive fees but only one is highlighted here.

1025.1. Mr Phiri presented the marketing costs incurred by SA Express over a period of five years. He testified that in the 2014/15 financial year, SA Express spent R1.9 million; in 2015/16, it spent an amount of R1.03 million; in 2016/17, it spent

[1738] Transcript 20 June 2019, p 74

an amount of R7.4 million; and in the 2017/18 financial year, it spent and R7.8 million.[1739]

1025.2. In the 2014/15 financial year, where an amount of nearly R2 million was spent, SA Express had introduced three additional routes, namely, Johannesburg/Pietermaritzburg, Johannesburg/Kruger National Park, Mpumalanga and Cape Town/Kimberly. The R1.9 million therefore included marketing and route development costs for all three routes.[1740]

1025.3. By contrast, in the Main Agreement concluded between the Transport Department and SA Express, the North West government committed to paying R28 million on marketing costs for two routes in year 1 and approximately R9 million from year two to five.[1741] This was far out of proportion to any of SA Express's other routes.

The management company

1026. Ms Babadi Tlatsana testified before the Commission about the appointment of her company, Koreneka, to do ground handling services at the Mahikeng and Pilanesberg airports.

1027. Her evidence was that she was very keen to be involved in the upliftment of the two airports in the North West. She said that she then began making enquiries at SAA in 2014 and was eventually directed to Mr Brian van Wyk, the Commercial Manager at

[1739] Transcript day 20 June 2019, p 79

[1740] Transcript 20 June 2019, p 81

[1741] Exhibit DD6, p 145

SA Express, because SA Express, and not SAA, dealt with domestic flights within South Africa.[1742]

1028. According to Ms Tlatsana, Mr van Wyk was very keen about the idea of having a company that would process passengers from the moment that they left the airport building until they boarded the plane.[1743] He asked her to submit a proposal to his gmail email address. According to Ms Tlatsana, she was told to use the gmail address, rather than an official 'saexpress' one, because Mr van Wyk said that he was often not at the office.[1744]

1029. After she had submitted the proposal, Ms Tlatsana received a call from Mr van Wyk, who indicated that her company had been selected as the "preferred bidder", albeit that no open tender process had been followed. However, he indicated to her that she would need to ensure that two further individuals were added to her company in order to secure the contract with SA Express.[1745] She agreed.[1746] The two people who joined Koreneka were Ms Joyce Phiri and Mr Victor Thabeng.[1747]

1030. Ms Tlatsana subsequently established that Ms Phiri is the mother of Mr van Wyk's life partner, Mr Sipho Levy Phiri.[1748] Mr van Wyk also wanted Ms Tlatsana to appoint Mr David Kasilira as the accountant for the business.[1749] She also agreed to this appointment.[1750]

[1742] Transcript 21 June 2019, p 111 – 112

[1743] Transcript 21 June 2019, p 114

[1744] Transcript 21 June 2019, p 120 – 121

[1745] Transcript 21 June 2019, p 131

[1746] Transcript 21 June 2019, p 148

[1747] Transcript 21 June 2019, p 140

[1748] Transcript 21 June 2019, p 147

[1749] Transcript 21 June 2019, p 142

[1750] Transcript 21 June 2019, p 149

1031. At that stage, Koreneka had an account with ABSA but Mr van Wyk advised Ms Tlatsana that an account should be opened with FNB. He did not give her a reason for this. When Ms Tlatsana was asked in evidence about why she had agreed to open this new bank account, she said that Mr van Wyk was assisting Koreneka to run smoothly and had taken her through the process. In the circumstances, she felt that those were the requirements of SA Express and had trusted Mr van Wyk "with her life". As a result, she would not ask questions because she thought that whatever he was saying or doing was to help Koreneka.[1751]

1032. Ms Tlatsana then opened an FNB account in January 2015.[1752] In April 2015, Mr van Wyk arranged to meet with Ms Tlatsana to sign a contract between SA Express and Koreneka. The meeting took place at Ms Tlatsana's office. Ms Tlatsana testified that Mr van Wyk brought with him a pile of documents, which Ms Tlatsana did not read before she signed, but Mr van Wyk guided her on how to sign the documents including pointing her to the signature page and where to initial.[1753]

1033. Ms Tlatsana testified that she did not retain a copy of the contract but broadly understood that her company would be providing ground handling services at the airports.[1754] Work commenced at Pilanesberg Airport on 1 May 2015 and Mahikeng Airport on 1 September 2015.[1755]

[1751] Transcript 21 June 2019, p 149 – 150

[1752] Transcript 21 June 2019, p 150

[1753] Transcript 21 June 2019, p 151

[1754] Transcript, 21 June 2019, p 171

[1755] Transcript 21 June 2019, p 176

Flow of Funds and the bribe

1034. The payments that were made to Koreneka were set out in the evidence of Mr Timothy Ngwenya, who was the Divisional Manager of Security Management at SA Express. Mr Ngwenya, in fact, conducted a detailed investigation of these payments and the contracting between SA Express and the Department of Transport, on the one hand, and SA Express and Koreneka, on the other. During the course of his investigation, he was offered a bribe of R3 million to drop his enquiries. He refused.[1756]

1035. The circumstances around this bribe are concerning. While Mr Ngwenya was doing his investigation, he received a call from the SAA Head of Security, Mr Jason Tshabalala who advised him that someone wanted to speak to him but did not share any specific details. Mr Ngwenya agreed and asked Mr Tshabalala to give his number to that person.

1036. In about 20 to 30 minutes after having spoken to Mr Tshabalala, Mr Ngwenya received a call from an unknown person who asked to meet with him based on a mandate he said he had received from "Luthuli House". Mr Ngwenya told the person he was not a politician and could not talk about mandates from Luthuli House. But he eventually agreed to the meeting and they met at the Intercontinental Hotel at OR Tambo International Airport.

1037. During the meeting, the person who had called Mr Ngwenya introduced himself as "Sipho". This person told Mr Ngwenya that he was from Luthuli House and was

[1756] Transcript 22 June 2019, p 173 – 190

mandated to speak to him about the investigation he was doing in the North West and the money involved.

1038. The person told Mr Ngwenya that the money in question was meant to finance political activities of the ANC. During the course of their discussion, the person asked Mr Ngwenya to drop his investigation for R3 million but Mr Ngwenya refused.

1039. The person then moved to speak about an amount of R20 million that was in the account of Koreneka and to which Mr van Wyk had been denied access. He tried to convince Mr Ngwenya to persuade Ms Tlatsana to release those funds since he had a better relationship with her. Mr Ngwenya refused to do so. The person asked him to give it some further thought but Mr Ngwenya said that the answer would remain "No".[1757]

1040. Mr Ngwenya's conduct in this matter is to be commended. Not only did he conduct a detailed investigation but he also resisted the offer of a considerable bribe to stop his investigations. His investigation established the following about the pertinent money flows.

1040.1. On 4 May 2015, Koreneka issued an invoice[1758] for R8.5 million to SA Express with a description "airport refurbishment and compliance maintenance and operational setup costs".[1759] No such services were, however, even referred to in the agreement between Koreneka and SA Express, and yet a payment of R8.5 million was made to Koreneka on 6 May 2015.[1760]

[1757] Transcript 22 June 2019, p 173 – 190

[1758] Exhibit DD5, p 115

[1759] Transcript 19 June 2019, p 151

[1760] Transcript 19 June 2019, p 154

1040.2. A second invoice dated 17 August 2015, to the value of R8.5 million with a description "airport refurbishment and compliance maintenance and facility upgrade" was submitted next.[1761] Despite there being no provision for these services in the agreement with SA Express, the payment of R8.5 million was made on 27 August 2017 following an authorisation process in which Mr van Wyk was involved.[1762]

1040.3. The next two invoices[1763], dated 28 August 2015, totalled R14 million. The first invoice was for an amount of R5.84 million and had a description of "facility security management and facility management"; the second invoice was for an amount of R8.16 million and had a description "airport fire truck lease".[1764] These invoices were authorised for payment by Mr van Wyk and were co-signed by the then CEO of SA Express, Mr Ntshanga.[1765] Once again, none of these services was referred to in the agreement between Koreneka and SA Express.[1766]

1041. During Mr Ngwenya's investigation of these payments, he questioned Ms Tlatsana about the origin of these invoices. Ms Tlatsana indicated to him that the invoices had been prepared by the accountant that Mr van Wyk required her to appoint for the business, Mr Kasilira.[1767]

[1761] Transcript 19 June 2019, p 154

[1762] Transcript 19 June 2019, p 154 – 155

[1763] Exhibit DD5, p 127 – 129

[1764] Transcript 19 June 2019, p 155

[1765] Transcript 19 June 2019, p 157

[1766] Transcript 19 June 2019, p 159

[1767] Transcript 19 June 2019, p 159 – 160

1042. After these payments had been made by SA Express to Koreneka, the invoicing and payments changed. From December 2015, Koreneka submitted invoices directly to the Transport Department and was paid by the Transport Department. This part of the money flow evidence was therefore addressed in Ms Phatudi's evidence.

1042.1. On 7 December 2015, Koreneka submitted an invoice[1768] to the value of R20.6 million to the Transport Department. This invoice was approved following the authorisation processes of the Transport Department. At the time (2015/16 financial year), the Transport Department had a budget to meet these costs and the Main Agreement had, by that stage, been amended to allow payment from the Transport Department directly to the management company.[1769]

1042.2. In 2016, the Transport Department received a second invoice from Koreneka to the value of R15.8 million. This invoice was not paid because the Transport Department was served with a letter from the attorneys representing Ms Phiri.[1770] According to the letter, Ms Phiri was a partner in Koreneka. The Transport Department was instructed to withhold payment until the matter had been resolved between the parties.[1771]

<u>The allegations of corruption</u>

1043. In around June 2016, Ms Tlatsana contacted Mr Ngwenya and reported to him that there were people at SA Express interfering with her company and threatened to go

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[1768] Exhibit DD7, p 113.

[1769] Transcript 21 June 2019, p 80 – 81

[1770] Exhibit DD7p 115 – 121

[1771] Transcript 21 June 2019, p 83 – 84

to the media with her allegations. Mr Ngwenya agreed to meet with her.[1772] At their first meeting, Ms Tlatsana told him how her engagements with SA Express had unfolded along the lines set out above[1773] and consistent with her testimony before the Commission.

1044. Ms Tlatsana also explained that conflicts had started to arise between her and the individuals whom Mr van Wyk had required her to bring into the Koreneka business. As a result, Mr van Wyk had threatened to take the contract away from Koreneka.[1774] Ms Tlatsana then explained that this is precisely what he did. He cancelled the contract with Koreneka and replaced it with an entity called Valotech Facilities Management CC (Valotech).[1775]

1045. During his investigation, Mr Ngwenya established that Valotech had been paid an amount of R15 million by the Transport Department without rendering any services.[1776] Valotech also did not provide any services to SA Express. After Valotech received this payment from the Transport Department, it was subsequently liquidated.[1777]

1046. When Ms Tlatsana met with Mr Ngwenya, she provided him with a number of documents evidencing the invoices and payments that had been received, as well as recordings of some of the conversations that she had had with Mr van Wyk.[1778]

[1772] Transcript 19 June 2019, p 59 – 60

[1773] Transcript 19 June 2019, p 64 – 65

[1774] Transcript 19 June 2019, p 71 – 72

[1775] Transcript 19 June 2019, p 75

[1776] Transcript 19 June 2019, p 76

[1777] Transcript 19 June 2019, p 77

[1778] Transcript 19 June 2019, p 85 – 86

1047. The Commission obtained copies of the recordings and played pertinent parts from them during the evidence of Ms Tlatsana. The recordings tell a remarkable story about the grand plan behind this scheme. It is dealt with in more detail below.

1048. Ms Tlatsana also produced a handwritten note,[1779] which she claimed had been drawn up by Mr van Wyk during one of the meetings at which she had recorded their conversation.

1049. After receiving this information from Ms Tlatsana, Mr Ngwenya conducted a thorough investigation. He was determined to get to the bottom of how these millions of Rands had been paid to entities for work that was never done. His efforts were tireless.[1780] In the end, he concluded that Mr van Wyk had been at the centre of this elaborate scheme of corruption. Mr Ngweyna then took steps to report him to his superiors and to advocate for his dismissal. However, on the day that Mr Ngwenya had planned to confront Mr van Wyk with what he had uncovered in his investigation, Mr van Wyk asked to be excused from the meeting that had been scheduled between them and never returned. According to Mr Ngwenya, Mr van Wyk literally ran from the building and did not come back.[1781]

1050. After Valotech's liquidation, two further entities were appointed as the management company under the Main Agreement. These entities were Pilanesberg Airport Management Company (PAMCO) and Mahikeng Airport Management Company (MAMCO). The contracts appointing these two entities were signed by the then CEO, Mr Ntshanga, a few days before he left SA Express.[1782]

[1779] Exhibit DD5, p 32

[1780] Transcript 19 June 2019, p 108-120

[1781] Transcript 19 June 2019, p 111 – 115

[1782] Transcript 19 June 2019, p 166

1051. These two entities were subsequently paid amounts of R15.8[1783] and R15.5[1784] million respectively. The Commission was unable to establish what, if any, work was done to justify these payments. This is a matter that will need to be probed further in the investigation that SAPS needs to complete as swiftly as possible so that those involved in this scheme can be brought to justice.

1052. The money laundering aspects of the Koreneka-leg of the scheme were extensively investigated by the Commission. The outcome of those investigations is set out in the next section.

The money laundering

1053. Ms Tlatsana testified before the Commission about the money that Koreneka had received from SA Express and the Department of Transport. Her story is a staggering one of numerous government officials being paid kick-backs for their role in approving the Main Agreement between the Transport Department and SA Express, as well as the agreement appointing her company as the management company under that agreement.

1054. The salient features of her evidence are as follows.

1054.1. Koreneka would receive payments from time to time into its bank account. Generally, Ms Tlatsana would not know when payments were made into the bank account because this was being managed by the accountant, Mr Kasilira, who had been appointed on Mr van Wyk's suggestion.[1785]

[1783] Transcript 21 June 2019, p 94, read with Exhibit DD, p 137-147

[1784] Transcript 21 June 2019, p 95

[1785] Transcript 21 June 2019, p 18 –181

1054.2. Mr Kasilira would manage the bank account of Koreneka and make payments out of it from time to time. When Ms Tlatsana received a bank sms notifying her of these payments, she would sometimes follow-up with Mr van Wyk about them and be told that they had something to do with the airports.[1786] The amounts would sometimes be as large as R2 million or R5 million but, when she made enquiries, Ms Tltasana was always told that it related to the airports.[1787]

1054.3. Between May and September 2015, three payments were made from the bank account of Koreneka to the AMFS business of Ms Kalandra Viljoen. These payments totalled R9 million. [1788]

1054.4. In November 2015, two payments of R4.9 million and R5 million were made to the bank account of Neo Solutions. Mr van Wyk told Ms Tlatsana that these payments related to security cameras for the airports. [1789]

1054.5. At some point in 2015, Ms Tlatsana realised that her company had been "hijacked"[1790] by Mr van Wyk and so she commenced a process of trying to uncover the basis for these payments and the eventual destination of the funds.

1054.6. Ms Tlatsana's investigations revealed that the R9.9 million that had been paid to Neo Solutions was then paid out of that company's bank account as follows:

[1786] Transcript 21 June 2019, p 203 – 204, p 208 – 209 and p 213-215

[1787] Transcript 22 June 2019, p 5– 6

[1788] Transcript 22 June 2019, p 25 – 26

[1789] Transcript 22 June 2019, p 2 –31 and p34

[1790] Transcript 22 June 2019, p 23 – 24

1054.6.1. R4 million paid to Batsamai Investment Holdings (Batsamai) on 11 December 2015;

1054.6.2. R3 million paid to Batsamai on 22 December 2015;

1054.6.3. R300 000 paid to Mr van Wyk in cash on 4 January 2016;

1054.6.4. R1.4 million paid to Batsamai on 10 March 2016; and

1054.6.5. R1.2 million paid to Batsamai on 26 March 2016.

1054.6.6. Ms Tlatsana's investigators established that Batsamai had been registered on 11 November 2014 and Mr Sipho Levy Phiri, who was Mr van Wyk's life partner, owned the company.[1791]

1054.7. By the end of 2015, Ms Tlatsana had decided that she needed to get to the bottom of what was going on with her company. Koreneka had also received a payment directly from the Transport Department of R20 million at the end of December and Mr van Wyk had been pressuring her to gain access to those funds.[1792] So in early 2016, she set up a meeting with Mr van Wyk at which she planned to record the conversation and get him to level with her about what was going on.[1793] Ms Tlatsana testified that she had bought a recording device specifically for this purpose.[1794]

[1791] Transcript 22 June 2019, p 43

[1792] Transcript 22 June 2019, p 60

[1793] Transcript 22 June 2019, p 59

[1794] Transcript 22 June 2019, p 59 – 60

1054.8. During the recorded conversation, Mr van Wyk gave various explanations for the use to which the funds from Koreneka had been put. He said, for example, that the monies that had been paid to Neo Solutions were used to "take care of people".[1795] According to Ms Tlatsana, Mr van Wyk also provided an explanation of the individuals to whom monies from Koreneka had been paid by drawing these out on a note that he had with him. Ms Tlatsana retained this note after their meeting.[1796]

1054.9. The note reflected that payments had been made to Minister Lynne Brown and Minister Dipuo Peters;[1797] to the Transport MEC, Mr Molapisi, and to the Transport HOD, Mr Mahlakoleng;[1798] and to "number 1" in the province, which was a reference to the Premier. Mr van Wyk said that the Premier had only received R5 million so far and so needed a further R 5million as he was due to get R10 million in total.[1799]

1054.10. The note also indicated that the Transport CFO had received some monies.[1800] This was a reference to Ms Phatudi, who herself gave evidence before the Commission and denied that she had ever received any payment. The Commission was unable to find any other independent verification of the fact that Ms Phatudi received any payments from the Koreneka funds.

1054.11. However, as set out in more detail below, a substantial amount of the funds from Koreneka were converted into cash by Ms Kalandra Viljoen's business,

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[1795] Transcript 22 June 2019, p 71

[1796] Exhibit DD8, p 588

[1797] Transcript 22 June 2019, p 79 – 81

[1798] Transcript 22 June 2019, p 84

[1799] Transcript 22 June 2019, p 97

[1800] Transcript 22 June 2019, p 104 – 105

AMFS and, once government funds are converted into cash, there is no way to trace where they ended up without eye witness evidence.

1054.12. Ms Tlatsana also confirmed that she had made a payment of R1 million to the ANC regional office in the North West in early 2016. When she was asked about the reason for this payment during her evidence, she said that Mr van Wyk had asked her to make the donation to the ANC and she had agreed to do so.[1801] Precisely why a donation of this magnitude needed to be made to a political party by Ms Tlatsana is unclear. She did, however, refer to the fact that she felt that she was being pressurised by Mr van Wyk and so decided to make the payment to avoid any further pressure.[1802]

1055. It is important to highlight at this juncture that Mr van Wyk was present at the Commission's hearings on the day that Ms Tlatsana testified. Indeed, he sought to delay the commencement of her testimony. When this request was refused, Mr van Wyk was invited to bring any application for leave to cross examine Ms Tlatsana. It was therefore open to Mr van Wyk to bring such an application or to seek leave to present his own evidence to the Commission, for example, to challenge the authenticity of the tape recording of his meeting with Ms Tlatsana in January 2016. Mr van Wyk did not take up any of these opportunities to contest the evidence against him. That failure will weigh heavily in what the Commission makes of Ms Tlatsana's evidence.

1056. In the main, where there is independent corroborative evidence of Ms Tlatsana's testimony, there is every reason for the Commission to accept it. Her testimony about the flow of funds is corroborated by the detailed analysis that the Commission's

[1801] Transcript 22 June 2019, p 144 – 145

[1802] Transcript 22 June 2019, p 140 – 141

investigators did of the relevant bank statements. These documents show that Mr van Wyk, and persons close to him, such as his life partner, received monies that were drawn out of the North West government's coffers. This documentary evidence is dealt with in greater detail below. They present a compelling case that Mr van Wyk and Mr Sipho Levy Phiri perpetrated acts of corruption.

1057. Ms Tlatsana's conversation with Mr van Wyk in January 2016 was recorded and so that recording, without any challenge to its authenticity, should also be accepted as evidencing what was said between them. That should not, however, be confused with a finding that what Mr van Wyk said in that conversation was true. The Commission is not in a position to make such a finding. This applies, in particular, to the allegation in the conversation that the former Minister of Transport, Ms Dipuo Peters, received a payment from the Koreneka monies. Former Minister Peters provided two affidavits to the Commission in which she denied having received these payments. The Commission was unable to find any further evidence corroborating receipt of these monies. The allegations against her were therefore based on the recorded conversation between Ms Tlatsana and Mr van Wyk and the handwritten note he produced during that conversation. There was no direct evidence from any witness attesting to the fact that Ms Peters had received such a payment. The Commission is therefore not in a position to make a finding on this issue. The issue can only be resolved with further investigation and further interrogation of both Mr van Wyk and Ms Peters' versions. It is therefore imperative that SAPS proceed with their investigations of these matters as swiftly as possible.

1058. One of the other areas that requires further investigation is a full accounting of the use to which all the monies received by Koreneka was put. During her testimony, Ms Tlatsana was not able to provide a satisfactory accounting of all the monies that her company had received out of the arrangement with Mr van Wyk and SA Express.

She was requested to provide such an account after her testimony concluded[1803] but, despite many follow-up by the Commission after her evidence, no such account was produced.

1059. Ms Tlatsana also gave evidence that she had received threats and intimidation after she had revealed the details of this scheme in the High Court litigation that had been brought against her by SA Express. She testified, however, that nothing had happened in relation to her complaint despite the fact that she had made a tape recording of the threats she had received on the phone and had handed these recordings to the police.[1804] I, therefore, directed the Commission's Legal Team and the Investigation Team to make enquires about the complaint and the attention it had received from the North West SAPS office in Mahikeng.

1060. Pursuant to the Commission's enquires, the following was revealed: Ms Tlatsana had lodged a case of intimidation with a Warrant Officer at the Mahikeng Detective Service on 4 January 2018. When the Commission started to make enquiries about the progress of the matter, the Deputy Provincial Commissioner for Crime Detection in North West directed that investigations be undertaken to determine what progress had been made on the case and was "dismayed" to learn that there was nothing positive that the investigator assigned to the case had done. The Provincial Office therefore took steps to remove the investigator from the investigation and the matter was handed over to the Provincial Office under the Provincial Organised Crime unit. The members involved were subjected to a disciplinary process.[1805]

[1803] Transcript 21 June 2019, p 220-221

[1804] Transcript 22 June 2019, p 155–159

[1805] Transcript 29 August 2019, p 6 – 7

1061. This is a concerning feature of the investigation and one that has been repeatedly revealed in the evidence before the Commission. When people have spoken out about the acts of state capture, corruption or fraud in which they have been involved and which implicates high-ranking officials, they have often been threatened and intimidated. When those same people have sought the protection of the police services, their cases have not been treated with the seriousness or attention that they deserve. Ms Tlatsana had lodged her complaint, together with evidence of the taped conversations in which she was threatened, and yet nothing was done about it for more than eighteen months until the Commission intervened.

The role of Neo Solutions

1062. Money laundering is defined in section 4 of the Prevention of Organised Crime Act 121 of 1998 (POCA) as follows:

> "Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and—
>
> a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not: or
>
> b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect—
>
> i. of concealing or disguising the nature, source, location, disposition or movement of the said property or its ownership or any interest which anyone may have in respect thereof
>
> ii. (of enabling or assisting any person who has committed or commits an offence whether in the Republic or elsewhere—
>
> aa) to avoid prosecution; or

bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence."

1063. There are a number of important features of this crime. The "property" with which it is concerned includes money.[1806] It is committed not only when a person knows that they are dealing with the proceeds of unlawful activities but also when they ought to have known. It is the act of concealing or disguising the nature, source, location, disposition or movement of the money that makes the perpetrator guilty of the offence.

1064. Mr Vivien Natasen, who was the sole shareholder and director of Neo Solutions, was involved in laundering R9.9 million of the money that Koreneka received from SA Express pursuant to its unlawful dealings with the North West government.

1065. Mr Natasen was also a chartered accountant.[1807] He served his articles at Deloitte and left in 2003, having held the position of a partner. Mr Natasen had been a registered member of the South African Institute of Chartered Accountants (SAICA) for 22 years, since 2007. Mr Natasen was aware of the Code of Professional Conduct for Chartered Accountants and confirmed that the code applied to him.[1808]

1066. Mr Natasen testified as follows about the relationship between Neo Solutions, on the one hand, and Koreneka and Batsami, on the other:[1809]

1066.1. Neo Solutions did not ever render invoices to Koreneka for security cameras;

[1806] See the definition of "property" in section 1 of POCA

[1807] Transcript 12 July 2019, p 32

[1808] Transcript 12 July 2019, p 32 – 33

[1809] Transcript 12 July 2019, p 38

1066.2. It did not ever render invoices to Koreneka for any services;

1066.3. No services were ever rendered by Batsamai to Neo Solutions; and

1066.4. Neo Solutions did not ever receive any invoices from Batsamai.

1067. Despite these facts, Mr Natasen explained that he had come to know Mr van Wyk in 2014, and had learnt, through his relationship with him, that he was employed at SA Express and that he was planning to leave SA Express in 2016.[1810]

1068. Mr Natasen confirmed that he received the monies from Koreneka and paid them out on the instructions of Mr van Wyk. His explanation for how this arose was as follows.[1811]

1069. According to Mr Natasen, in October 2015 Mr van Wyk approached him and asked if he could transfer R10 million into the bank account of Neo Solutions. Mr van Wyk said that he needed to transfer this money because he was an official of the state, employed by SA Express, and was leaving. He said to Mr Natasen that the money was "clean" and had nothing to do with SA Express or the state. Mr van Wyk also told Mr Natasen that he did not want his employer to know that he had implemented a successful business on the side "as they would be jealous" given that he was in the process of leaving SA Express.[1812] He also confirmed that he "did not want the money to hit his bank account" because SA Express did lifestyle audits from time to time.[1813]

[1810] Transcript 12 July 2019, p 90 – 93

[1811] Transcript 12 July 2019, p 108 – 109

[1812] Transcript 12 July 2019, p 94 – 96

[1813] Transcript 12 July 2019, p 99 – 100

1070. Mr Natasen was taken to task during his testimony about this explanation and why it did not raise any red-flags for him. He first endeavoured to justify receiving the funds on the basis that they related to a planned farming venture that they were going to be embarking upon[1814] but then struggled to explain why it was that Mr van Wyk then required R7 million of the money to be released to him. Mr Natasen's only explanation for this was that he understood that the money related to a property that Mr van Wyk suddenly needed to acquire urgently and the funds for the farming venture would then be replenished when that project got off the ground.[1815] Later in his questioning, however, Mr Natasen conceded that there was no reason why his company needed to hold the funds at all in respect of the proposed farming venture because it was just as easy for Mr van Wyk to hold onto the funds until the venture materialised. [1816]

1071. The implausibility of this version, as well as the suspicions that ought obviously to have arisen when Mr van Wyk spoke to Mr Natasen about "life-style audits" and wanting to keep the money "away" from his SA Express colleagues, were raised with Mr Natasen. He conceded, under questioning, that he had never before asked a proposed business partner whether their money was "clean".[1817]

1072. This concession alone makes it clear that, despite Mr Natasen's best efforts to seek to give a normal explanation for his company's receipt of these monies, there were alarm bells going off even for Mr Natasen. Why else would he have been talking to Mr van Wyk about whether the money was "clean"? There is no need to ask about "clean" money, unless you have concerns about "dirty" money. Everything about how Mr van Wyk approached Mr Natasen implied that he needed to hide the money. A

[1814] Transcript 12 July 2019, p 100 – 106

[1815] Transcript 12 July 2019, p 109 – 111

[1816] Transcript 12 July 2019, p 124 – 125

[1817] Transcript 12 July 2019, p 116 – 117

reasonable person in Mr Natasen's position ought to have known that he was being asked to conceal or disguise "dirty" money. It is evident that Mr Natasen was put on notice that there was suspicious activity afoot; a reasonable accountant in his position would have enquired further as to the source of the funds and would not have been justified in relying on a simple assurance that it was "clean".

1073. Mr Natasen was also questioned about the fact that his company had used the proceeds that it had received from Mr van Wyk. This was relevant because section 6 of POCA makes it a crime for a person to use money which he knows or ought reasonably to have known forms part of the proceeds of unlawful activities. Despite being evasive in response to this line of questioning, Mr Natasen eventually conceded that the discrepancies between his companies' financial statements and bank balances reflected that the money Neo Solutions received from Koreneka had been used in his company.[1818] When he returned to give evidence in August 2019, Mr Natasen was forced to concede that Mr van Wyk's money had been "mixed-up" with that of Neo Solutions and that the money was used in the operations of Neo Solutions.[1819]

1074. When Mr Natasen was probed about why he had signed off on financial statements for his company that were clearly incorrect, he deflected and sought to blame it on his accounting team.[1820] Later in his evidence before the Commission, Mr Natasen sought to involve another accountant[1821] to review his company's financial statements and to provide a veneer of respectability to them, despite the numerous discrepancies that had been exposed about their content during his evidence. He

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[1818] Transcript 12 July 2019, p 170

[1819] Transcript, 29 August 2019, p 49 – 53

[1820] Transcript 12 July 2019, p 177 – 178

[1821] Exhibit DD10A, p 238-274

even tendered to pay back the R217 494 that this accountant had found probably constituted the benefit derived by Neo Solutions as a result of being able to use the money he received from Mr van Wyk in its operations.[1822]

1075. But this tender is not adequate recompense for the role that Mr Natasen played in this looting scheme. Mr Natasen allowed his company to be used to conceal proceeds that the Commercial Manager of SA Express had syphoned out of the North West government's coffers.

The cash in transit leg

1076. One of the most effective ways in which to launder money and to pay bribes is to convert it to cash because then it is not traceable in the official banking system.

1077. Mr van Wyk appears to have been very skilled in his ability to hide portions of the monies that were extracted from the North West government. One of his concealment methods was to engage the services of a business that styled itself as a "cash in transit" operation in order to convert R9 million of the money from Koreneka into cash.

1078. Ms Kalandra Viljoen was the owner of that business. During her evidence before the Commission, she conceded that she did not apply adequate measures within her business to establish and verify the identity of her clients as required under the Financial Intelligence Centre Act 38 of 2001 (FICA). [1823] Her failure to have adequate measures in place allowed her business to be used by Koreneka, an entity with which she had no prior dealings and whose source of funds she had made no effort to

[1822] Transcript 29 August 2019, p 139 – 141

[1823] Transcript day 119, 24 June 2019, p 46 – 48; Transcript day 119, 24 June 2019, p 51

establish, [1824] to convert R9 million of the money it had received from SA Express into cash.

1079. The evidence indicates that this cash was then delivered to Mr van Wyk. This was established from the cash delivery slips[1825] that Ms Viljoen retained from these deliveries. The slips were presented to Ms Tlatsana during her evidence and she confirmed that all three delivery slips bore the signature that she knew to be that of Mr van Wyk.[1826] She was able to identify the signature because she had seen Mr van Wyk's signature on the Koreneka contract they had both signed and also on certain letters that he had signed.[1827]

1080. A portion of Ms Viljoen's questioning before the Commission focussed on whether her "cash in transit" business was operating as a genuine cash in transit business under the FICA legislation. The point that was made to Ms Viljoen was that, ordinarily, cash in transit businesses do not receive deposits of cash into their bank accounts. They are rather delivery businesses which collect cash from banks and deliver them to the appointed premises. The sheer value and volume of the deposits that Ms Viljoen's business was conducting on a daily basis tended to indicate that she was not operating a cash in transit business but was rather receiving deposits from the public as an ordinary feature of the business's operations. As such, it was operating the business of a bank and required a licence from the Reserve Bank to do so.[1828]

[1824] Transcript day 119, 24 June 2019, p 144 – 145.

[1825] Exhibit DD9, Ms Viljoen's Affidavit, p 64; Exhibit DD9, Ms Viljoen's Affidavit, p 65-66

[1826] Transcript 22 June 2019, p 163 – 164

[1827] Transcript 22 June 2019, p 162 – 163

[1828] Transcript 24 June 2019, p 136 – 137; Transcript 24 June 2019, p 144

1081. Greater vigilance will be required from the financial sector regulatory authorities if this type of operation is to be stopped. Ms Viljoen was clearly running a business that received millions of Rands on a daily basis and converted it into cash. Cash is extremely useful in the hands of those who wish to launder unlawful proceeds because once those proceeds are reduced to cash, they are untraceable. They can then end up in the hands of people of influence.

CONCLUSION AND RECOMMENDATIONS

1082. The Commission's Terms of Reference required it to establish the extent to which state capture, corruption and fraud was prevalent in the public sector. In particular, the Terms of Reference required the Commission to investigate, make findings and report on whether public officials or functionaries had unlawfully awarded tenders to benefit any family, individual or corporate entity (paragraph 1.4 of the Terms of Reference). The Terms of Reference also required the Commission to determine whether any officials or functionaries within the various SOEs had benefitted personally from acts of corruption (paragraph 1.9 of the Terms of Reference).

1083. These key aspects of the mandate of the Commission guided the investigation undertaken into the affairs of SAA, its subsidiary SAAT, as well as SA Express.

1084. The investigation endeavoured to uncover not only what had happened within these entities but also why and how it happened. The investigation therefore had a broad compass because it was motivated by a desire to understand the weakness within the public sector that makes it vulnerable to state capture, corruption and fraud.

1085. As the findings set out above show, SAA declined during the tenure of Ms Myeni to an entity racked by corruption and fraud. Despite this, she was retained as its Chairperson well beyond the point at which she should have been removed. Two successive Finance Ministers have explained to the Commission that this was because of the personal preferences of former President Zuma. This is the antithesis of accountability. President Zuma fled the Commission because he knew there were questions that would be put to him which he would not have been able to answer. He could not have justified his insistence that Ms Myeni be retained at SAA nor could he have credibly denied Mr Gordhan's and Mr Nene's evidence that he wanted Ms Myeni retained at SAA.

1086. The appointment of individuals to boards of SOEs must be justifiable based on their skills expertise, experience and knowledge.

1087. Functionaries within SOEs must be held to the highest standards of accountability because they use public funds to manage the businesses they oversee.

1088. Those responsible for governance at SAA, SAAT and SA Express displayed a wanton disregard for these standards. Rather than acting in the entities' best interests, they were motivated by their own personal interest. This should never be allowed to occur again. In particular, the Commission makes the following recommendations for action following this report.

Mr X's evidence

1089. The Secretary of the Commission has already laid a criminal complaint against Ms Myeni for her disclosure of Mr X's identity during her testimony. This matter needs to be brought to finality by the law enforcement agencies and the National Prosecuting Authority.

1090. The evidence of Mr X also merits further detailed investigation and possible charges of corruption being laid against all the individuals involved in the scheme to securing millions of Rands for the personal benefit of Ms Myeni and the Jacob Zuma Foundation.

Pembroke Transaction

1091. Ms Myeni knowingly misrepresented to the Minister of Public Enterprises that the Board of SAA had taken two decisions when it had not. Those misrepresentations caused financial losses to SAA. It is likely that her conduct constitutes the crime of fraud. The Commission recommends that the National Prosecuting Authority

considers, subject to such further investigation as may be considered necessary, whether Ms Myeni should be prosecuted for fraud.

LSG SkyChefs

1092. Ms Myeni and Ms Kwinana displayed a wanton disregard for the best interests of SAA in their decision-making on the lounge catering contract. They acted in gross disregard of their fiduciary duties to SAA when they took this decision. However, they both ceased being directors of SAA more than 24 months ago. Accordingly, the shareholder is not now in a position to bring proceedings to have them declared delinquent directors under section 162 of the Companies Act.

1093. This time bar may be amended by Parliament in order to permit applications to be brought even after two years, on good cause shown. This will mean that in cases such as this one, where the true extent of the Board members' breaches of duty are only uncovered a number of years later, steps can still be taken by the executive to ensure that such directors are declared delinquent and are thereby prevented from serving on the boards of companies in the future.

Swissport

1094. SAA's conclusion of a five-year ground handling contract took place a month after Swissport had concluded a service level agreement with JM Aviation in terms of which JM Aviation was paid R28.5 million. That money, according to Mr Dulaxolo Peter, was then used to pay millions of Rands to those who had assisted in "facilitating" the finalisation of the SAA / Swissport contract.

1095. The people who received payments from that amount of R28.5 million were:

1095.1. Mr Daluxolo Peter;

1095.2. Mr Vuyisile Ndzeku;

1095.3. Mr Lester Peter; and

1095.4. Adv Nontsasa Memela.

1096. These payments were therefore likely to have been kick-back payments to those who had secured the conclusion of the Swissport ground handling contract with SAA or were to be involved in its implementation. The Commission recommends that the law enforcement agencies should further investigate the role of Swissport and the above individuals in these dealings and where warranted, the National Prosecuting Authority should consider the prosecution of all those involved in criminal acts.

1097. JM Aviation appears not to have paid VAT to SARS on the R28.5 million it received from Swissport prior to the ground handling contract being concluded with SAA. It is recommended that SARS should consider this matter further and take such steps as it may be advised to take.

AAR / JM Aviation components tender

1098. The award of the components tender for five years to the Joint Venture of AAR and JM Aviation was unlawful, irregular and unfair.

1099. AAR and JM Aviation were favoured during the process by the SAAT Head of Procurement, Adv Nontsasa Memela and its Board.

1100. The then Head of Procurement, Adv Nontsasa Memela, and the Chairperson of the Board of SAAT, Ms Yakhe Kwinana, received payments from JM Aviation around the time that these decisions were taken.

1101. The payments were likely kick-back payments to these officials. It is recommended that the National Prosecuting Authority should seriously consider prosecuting the JM Aviation directors, the members of the Board of SAAT at the time, including Ms Y Kwinana, and Adv Nontsasa Memela for corruption or related crimes. It should also consider engaging with the United States Department of Justice regarding the role played by AAR in this scheme.

The concealment

1102. The Commission's investigations revealed that Mr Ndzeku, Ms Memela, and Ms Mbanjwa, conspired to try to hide the true nature of the payments made by JM Aviation to Adv Nontsasa Memela through Ms Mbanjwa and that Mr Ndzeku and Ms Kwinana tried to hide the payments made by or on behalf of JM Aviation or Mr Ndzeku to Ms Kwinana's company.

1103. They did so by fabricating agreements in order to ensure that they appeared as though they were arms-length transactions unrelated to the decision-making that took place in SAAT at the time. This conduct probably constitutes fraud. The Commission recommends that the National Prosecuting Authority seriously considers to prosecute them after such investigation as the National Prosecuting Authority may decide should be conducted.

1104. In addition, both Ms Memela and Ms Mbanjwa are officers of the court. Ms Memela is an advocate and Ms Mbanjwa, an attorney. Despite this, they have participated in a fraudulent scheme to try to hide money that was paid as a kick-back to Ms Memela. It is recommended that the Legal Practice Council should investigate whether the two should not be removed from the roll of attorneys, in the case Ms Mbanjwa, and, from the roll of advocates, in the case of Ms Memela.

1105. Furthermore, Ms Mbanjwa continued to act on behalf of Ms Memela and Ms Kwinana in circumstances where she was personally implicated in their impugned conduct. At times, Ms Memela and Ms Kwinana implicated each other. There is a clear apparent conflict of interest in Ms Mbanjwa's representation of either of them in these proceedings, and a conflict in representing both of them. Ms Mbanjwa's independence and objectivity would have been compromised by her personal involvement. The personal involvement of a lawyer in a case in which she acts as a legal representative has been found by the courts to be an undesirable practice.[1829] Her conduct in this regard should also receive the attention of the Legal Practice Council.

State Security matters

1106. It is recommended that the President must take note of the involvement of the State Security Agency in security vetting and take such steps as may be necessary to ensure that services of the State Security Agency are not abused in the future to serve the interests or agenda of certain individuals.

External Service Providers

1107. The ACSA interest swap contracts with Nedbank and Standard Bank were procured through the corrupt involvement of Regiments Capital, Mr Ramosebudi, Mr Wood and Mr Niven Pillay.

1108. It is recommended that:

[1829] *Carolus and Another v Saambou Bank Ltd; Simth v Saambou Bank Ltd 2002 (6) SA 346* (SE) at 348 and *Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA), in particular para 38

1108.1. ACSA take steps to recover from Regiments Capital, Mr Ramosebudi, Mr Wood and Mr Niven Pillay and failing them, Nedbank and Standard Bank, the amounts paid to Regiments Capital under the interest swap contracts and any additional losses suffered by ACSA on those contracts;

1108.2. The law enforcement agencies investigate these contracts with a view to:

1108.2.1. the National Prosecuting Authority prosecuting Mr Ramosebudi, Mr Wood, Mr Niven Pillay and Regiments Capital on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;

1108.2.2. the Asset Forfeiture Unit of the National Prosecuting Authority recovering the amounts paid to Mr Ramosebudi by Regiments Capital under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998; and

1108.2.3. the Asset Forfeiture Unit of the National Prosecuting Authority recovering the amounts paid to Regiments Capital by Nedbank and Standard Bank Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998.

1108.3. The law enforcement agencies investigate the role of Mr Brickman, Mr Visnenza and Nedbank in relation to these contracts with a view to

1108.3.1. the National Prosecuting Authority prosecuting Mr Brickman, Mr Visnenza and / or Nedbank on charges under section 6(b)(ii) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;

1108.3.2. the Asset Forfeiture Unit of the National Prosecuting Authority recovering Nedbank's profits under the interest swap contracts under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 unless Nedbank has a valid defence to such recovery claims.

1109. The SAA Working Capital tender awarded to the McKinsey and Regiments Capital Consortium under Bid No RFP 085/13 was procured through the corrupt involvement of Regiments Capital, Mr Ramosebudi, Mr Wood and possibly also Mr Indheran Pillay and Mr Tewedros Gebreselasie. There is no evidence that McKinsey was aware of any of the corrupt conduct linked to the award of Bid No RFP 085/13 and McKinsey has already repaid in full, the amount that it received from SAA in connection with its appointment under this tender.

1110. It is recommended that:

1110.1. The law enforcement agencies investigate the award of Bid No RFP 085/13 with a view to.

1110.1.1. the National Prosecuting Authority prosecuting Mr Ramosebudi, Mr Wood and Regiments Capital on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;

1110.1.2. the National Prosecuting Authority prosecuting Mr Indheran Pillay and Mr Tewedros Gebreselasie on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;

1110.1.3. the Asset Forfeiture Unit of the National Prosecuting Authority recovering from Mr Ramosebudi under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 the amount of R375 606 paid to Riskmaths Solutions (Pty) Ltd by Regiments Capital on 7 November 2013; and

1110.2. the Asset Forfeiture Unit of the National Prosecuting Authority recovering under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 the amount of R6 241 500 paid to Regiments Capital by McKinsey in relation to the SAA Working Capital contract.

Proceeds of unlawful activities

1111. Where the evidence before the Commission has revealed possible acts of corruption and fraud and has recommended that prosecutions take place, steps should be taken by the relevant authorities urgently to seek to recover the proceeds of these unlawful activities.

PRECCA reporting obligations

1112. In order for the Prevention and Combating of Corrupt Activities Act 12 of 2004 (*PRECCA*) to have any prospect of assisting in the fight against corruption, those who were duty-bound to report corruption but failed to do so, must also be held accountable.

1113. Section 34(2) of PRECCA makes it an offence for anyone who holds a position of authority within an entity and who knows or ought reasonably to have known that an act of corruption has been perpetrated, to fail to report the conduct.

1114. In her position as interim CFO, Ms Nhantsi held a position of authority within SAA. She ought, therefore, to have reported the BNP transaction and her suspicions concerning the true motives of Ms Duduzile Cynthia Myeni and Mr Masotsha Mngadi in pushing the transaction forward. Her failure to do so may constitute a crime. The Commission therefore recommends that the law enforcement agencies including the NPA should give the matter further consideration with a view to her possible prosecution.

Auditors

1115. The Auditor General's office should be further capacitated so that it can audit all public entities. To the extent that that is not practicable, serious consideration should be given to private firms being appointed to audit SOEs only if they can demonstrate that they have the requisite skills and also the requisite understanding of their obligations to the public at large when they audit an SOE. There must be a sufficient appreciation that, not only are the financial statements of cardinal importance, but also the entity's PFMA obligations are of great significance,

1116. The South African Institute of Charted Accountants should investigate whether Ms Kwinana has the requisite knowledge and appreciation of her obligations as a Chartered Accountant and whether she is suitable to continue to practise the profession of a Chartered Accountant. The Commission believes that the answers she gave to certain questions during her evidence revealed either that she has no clue about some of the basic obligations that she should know as a Charted Accountant or she knew those obligations but dishonestly pretended that she did not know them because it was convenient for her to do so. In either case SAICA should be interested in investigating the matter because either explanation may mean she is not fit and proper to practise the profession of a Chartered Accountant. Her

auditing firm's tax returns should also be investigated by SARS because there may have been a significant understatement of revenue (to the value of approximately R40 million) in the 2016 financial year. It is recommended that SARS should conduct its investigation in this regard.

SA Express

1117. The Commission's investigations into SA Express's dealings with the North West Department of Transport has revealed an elaborate scheme of corruption, designed to take money out of the state's coffers for the benefit of those with power and influence who orchestrated the scheme.

1118. The Commission recommends that all of the government and state officials, as well as private individuals who were involved in this looting scheme, should be brought to justice. There are investigations currently underway in this matter; the case has been open since 2016. They should be brought to a swift conclusion.

1119. Mr Natasen's conduct should form an important part of the authorities' further investigations of this matter. The Commission recommends that serious consideration be given by the National Prosecuting Authority to charging Mr Natasen with money laundering and the use of the proceeds of crime after such further investigation as the law enforcement agencies may conduct and if the further investigations reveals possible contravention of the relevant law ; that his conduct be reported to the SAICA and that the South African Revenue Services should investigate the numerous respects in which Neo Solutions appears not to have accurately and fairly reported its income to the authorities.

1120. The Reserve Bank should also investigate whether Ms Viljoen's AMFS operation was, in fact, a cash in transit business that merely failed to comply with its FICA

obligations, or rather operating as a bank without any lawful licence to do so. The current SAPS investigation should also be extended to interrogate the role of AMFS in more detail. The question that needs to be answered is whether AFMS was providing general money laundering facilities to those who wished to have their proceeds converted to cash without the necessary checks required from the formal banking system.

1121. Where prosecutions have been recommended in this section, it is also recommended that the Asset Forfeiture Unit of the National Prosecuting Authority takes steps to recover under Chapter 5 or Chapter 6 of POCA any amounts that constitute the proceeds of unlawful activities or the instrumentality of an offence.

Judicial Commission of Inquiry into State Capture Report: Part 1

Vol. 2: The New Age

This is the report of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including organs of state, also known to the public and the media as the Zondo Commission

Chairperson: Justice RMM Zondo

Acting Chief Justice of the Republic of South Africa

Report of the Judicial Commission of Inquiry into State Capture: Part 1: Vol. 2

Judicial Commission
of
Inquiry into allegations
of
State Capture, Corruption and Fraud in the Public Sector including Organs of State

Report: Part 1
Vol. 2: Chapter 2 – The New Age and its dealings with Government Departments and State Owned Entities

Chairperson: Justice R.M.M. Zondo
Acting Chief Justice of the Republic of South Africa

PART 1: VOLUME II

CHAPTER 2 - THE NEW AGE AND ITS DEALINGS WITH GOVERNMENT DEPARTMENTS AND STATE OWNED ENTITIES

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INTRODUCTION

1. The extent to which state funds were spent on the TNA Media (Pty) Ltd (*TNA*) formed an important part of the Public Protector's "State of Capture" Report. In particular, the Public Protector referred to both Eskom and SAA's contracts with the TNA and required, in particular, that the TNA contracts with SAA be investigated in the second phase of the investigation.[1830]

2. This section of the report therefore focusses on the unjustified public spending that took place between the state owned entities of Eskom, Transnet and SAA, and the Gupta-owned media enterprise, TNA Media (Pty) Ltd (*TNA*), between 2011 and 2017.

3. The Public Protector also focused on the relationship between the South African Broadcasting Commission (SABC) and TNA in her State of Capture Report[1831] as well as the allegations made by Mr Themba Maseko regarding TNA and the Government Communication and Information System (GCIS).[1832] Mr Themba Maseko is a former Chief Executive Officer of GCIS. This chapter includes a discussion of the transfer of Mr Maseko out of GCIS whereas the SABC aspects of the TNA story are dealt with in other sections of this report.

4. The Commission's Terms of Reference also required it to investigate, make findings and report on whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of government advertising in the New Age newspaper and other dealings with the Gupta family (paragraph 1.6 of the Terms of Reference).

[1830] Public Protector's State Capture Report para 4.25.

[1831] Public Protector's State Capture Report paras 4.26 to 4.30.

[1832] Public Protector's State Capture Report para 5.20.

5. Over the period 2011 to 2017 TNA produced The New Age newspaper, and a television show in partnership with the SABC known as The New Age Business Briefings or Breakfasts. Government departments and state-owned enterprises used scarce public resources to secure advertising in or sponsorships with TNA that defied logic and legal requirements.

6. TNA serves as an example of the way in which state capture took hold in South Africa. It shows the extent of the Guptas' influence in the public sector in South Africa as well as the Guptas' strategy to replace officials that were not compliant with their looting scheme.

7. It is undeniable that numerous public entities were used to siphon public funds to the Gupta media company and its owners. What is less clear to the public is how this was achieved and, perhaps more importantly, how it can be avoided in the future.

8. The Commission's investigations revealed how key role players enabled the project of state capture to take hold in these entities and thrive for a number of years, despite the existence of certain institutions designed to protect our democracy, including Parliament.

9. In particular, the evidence shows that there emerged at least two categories of people within the affected entities which allowed the Guptas to secure millions of Rands of public funds for themselves over a number of years.

9.1. First, a category identified as the "**facilitators**". These were compliant officials who followed the orders from the Guptas seemingly without question or hesitation. They were not concerned about what the Guptas' influence would do to the welfare of their institutions. They ordered their subordinates to be complicit in the facilitation, using them to create some veneer or pretence of

processes being followed. The facilitators used threats and intimidation to ensure that the will of the Guptas was carried out and they relied on a culture of silence and compliance from employees within the entities.

9.2. Second, a category identified as the "**followers**". These were the subordinates to the facilitators who did not stand up to their superiors or speak out when there was evidence of corruption in their organisations. These followers varied in the degree to which they resisted or complained about the orders they were given, but it is evident that the project of state capture would not have thrived as it did, if these key employees had not participated in the scheme by taking irrational decisions that were not in the best interests of their organisations. While some of these followers attempted to raise red flags, they ultimately compromised themselves and helped to cover up or legitimise public spending on TNA.

10. Importantly, one of the defining features that has emerged in the evidence before the Commission is that in order to divert public funds for private benefit, it was necessary to populate key institutions with people who were going to comply with orders. This might be because they were happy to receive some benefit – like being promoted to a high-status position – or because they received some overt pecuniary benefit.[1833] Sometimes, however, key public figures were unwilling to comply. These were the "resistors". In those instances, the "resistors" were removed from their positions and replaced, or were sought to be replaced, with "facilitators". The primary example of a resistor is Mr Themba Maseko who was unwilling to accede to the Guptas' demand to divert the whole advertising budget of Government from GCIS to the New Age Newspaper. After he had resisted, he was replaced by Mr Mzwanele Manyi. The

[1833] It is important to record that the Commission's investigations did not find evidence of any direct pecuniary benefits being paid to the facilitators.

Commission investigated Mr Maseko's removal from GCIS and his replacement with Mr Manyi in some detail.

11. This part of the report will show that the following individuals were "facilitators" of the Gupta TNA scheme:

12. at Eskom, Mr Colin Matjila, the CEO, as well as the Board of Eskom that took over in December 2014; except for Mr Baloyi,[1834] and Mr Chose Choeu, the Divisional Executive of Corporate Affairs, and

12.1. at Transnet, Mr Brian Molefe, the GCEO, and Mr Mboniso Sigonyela, the General Manager of Transnet Group Corporate and Public Affairs, responsible for advertising and sponsorships.

12.2. at GCIS, Mr Mzwanele Manyi, who replaced Mr Maseko as the CEO and DG of GCIS.

13. The following individuals were "followers":

13.1. at Eskom, Mr Pieter Pretorius, head of strategic marketing; and.

13.2. at Transnet, Mr Joseph Jackson, Brand and Publicity Coordinator and Mr Daniel Phatlane, Senior Coordinator Stakeholder Relations.

14. This section of the report will be structured in four parts:

14.1. the removal of Mr Maseko;

[1834] Mr Norman Baloyi was an Eskom Board member.

14.2. the transactions between Eskom and TNA;

14.3. the transactions between Transnet and TNA; and

14.4. SAA's dealings with TNA.

15. After dealing with the removal of Mr Maseko and his replacement by Mr Manyi, the report identifies the "facilitators" and "followers" within each of the remaining three state-owned entities. Consideration is also given to whether there were any structural differences in each of the entities that equipped them better to resist attempts at state capture and private interest influence.

16. Before dealing with these aspects, however, it is necessary to provide some background to the establishment of the TNA.

TNA MEDIA

17. TNA was established by the Gupta family in June 2010. TNA launched *The New Age* newspaper on or about 6 December 2010.[1835]

18. Former President Jacob Zuma testified before the Commission that the newspaper was his idea. He said there was a need for a different perspective in the news that would not be so "negative" and critical of the government and one that would not only cover big national news, but also province-specific coverage. He said that he suggested this to the Guptas who said they were interested in going into this business. Mr Zuma said he even came up with the name *The New Age*.[1836] Mr Zuma testified that he told Mr Gwede Mantashe about his discussion with the Guptas concerning this newspaper

[1835] Exhibit M1, p 88-89.

[1836] Transcript 15 July 2019, pp 37-40.

because he wanted to make sure that there was at least one official among the ANC officials who knew of his role in the establishment of the newspaper.

19. TNA conducted its business as a subsidiary of Oakbay Investments (Pty) Ltd, a company owned by the Gupta family and represented by Atul Gupta.[1837] TNA was responsible for the print media (*The New Age* newspaper), while Infinity Media (Pty) Ltd focused on the 24-hour television news channel, ANN7.[1838]

20. In an affidavit filed on behalf of TNA in its liquidation proceedings, it explained that, since its launch, its:

> "revenue streams were primarily derived from a combination of commercial and public sector advertising, bulk subscriptions from national and provincial government departments and its unique property brand known as the 'TNA business briefings'. The aforementioned briefings were embarked upon in partnership with the SABC and sponsored, inter alia, by various state-owned enterprises including but not limited to Eskom and Transnet."[1839]

21. In fact, TNA's primary client base consisted of government departments and parastatal companies.[1840]

22. One of the Guptas' earliest efforts to divert government advertising spend to their media business involved an approach to Mr Themba Maseko, the then DG of GCIS.

[1837] Exhibit M1, p 89-90, para 4.5.

[1838] Exhibit M1, p 90-91, para 5.1.

[1839] Exhibit M1, p 89-90, para 4.4.

[1840] Exhibit M1, p 93, para 6.6.

MR MASEKO AND GCIS

Mr Ajay Gupta's first approach to Mr Maseko and the call from President Zuma

23. Towards the end of 2010, Mr Ajay Gupta met with Mr Themba Maseko who was the Director-General and Chief Executive Officer of the Government Communication and Information System at the time and demanded that Mr Maseko should spend the whole budget of R600 million allocated for government advertisement in The New Age, a newspaper that the Guptas were about to launch. Mr Maseko's refusal to agree to this demand led to Mr Ajay Gupta telling him on 3 December 2010 that he would report Mr Maseko to his seniors and they would "sort" him "out" and replace him with someone who would co-operate with them. On 2 February 2011 Mr Maseko was removed from his position and was replaced by Mr Mzwanele Manyi under very strange circumstances. What follows is how those events unfolded.

24. During September or October 2010 Mr Maseko received a call on his mobile number from Mr Ajay Gupta requesting a meeting to discuss what he said was a new project which he and his company were launching and which he indicated required Government support.[1841] He knew Mr Ajay Gupta whom he had met at meetings of the International Marketing Council (IMC), subsequently renamed BrandSA. As CEO of GCIS, Mr Maseko had responsibility for the IMC and Mr Gupta was a board member of that agency.[1842] He was also aware at the time that there was talk of the Gupta family's plans to enter the media sector by establishing a newspaper and a television station, but he did not know any details at the time.[1843]

[1841] Exhibit E1, p 10, para 10; Transcript 29 August 2018, p 124 - 125 Later (see Transcript 29 August 2018, p 127-128) Mr Maseko became uncertain as to dates and thought it might have been in May, June or July 2010. But that would have been a departure from all his earlier statements on the matter and is in any event unlikely because GCIS media-buying was first brought in-house in August-September 2010.

[1842] Transcript 29 August 2018, p 122-123.

[1843] Exhibit E1, p 11, para 11.

25. Mr Maseko testified that, although reluctant at first, he acceded to the request for a meeting because he thought he should give Mr Gupta a hearing in order to understand more about the "project". This was in keeping with his general attitude towards all stakeholders in the media industry. A meeting at the Guptas' Saxonwold residence was arranged. He could not recall the date. He said that he often met with people either at his office or at venues suggested by them and he did not expect the meeting to be anything out of the ordinary.[1844]

The call from President Zuma

26. What happened next is best presented here in Mr Maseko's own words. He said:[1845]

> "On the date of the meeting, as I was driving out of the [GCIS][1846] office parking lot, I received a call from Mahlambandlopfu, the President's official residence. I identified the incoming number as I had had dealings with the residence previously. A female caller said the President wanted to speak to me.
>
> The call was then transferred to the President. After the pleasantries, the President then said the following: '*mfokababa. Kuna lamadoda akwa Gupta. Ngifuna ukuthi uhlangane nabo futhi ubancede.*' The English translation is "My brother, there are these Gupta guys who need to meet with you and who need your help. Please help them."
>
> I advised the President that the Guptas had already contacted me with a request for a meeting, Further, I advised the President that in fact I was on my way to the meeting with Mr Ajay Gupta at that very moment. The President thanked me for my cooperation and terminated the call.
>
> I was taken aback at the call and wondered whether the Guptas had requested the President to call me to demonstrate their power and influence in the upper echelons of government. However, I avoided jumping to that conclusion and I decided to proceed to the meeting with an open mind. I was clear in mind that I would approach the discussions as I would with any other stakeholder in the media industry, namely, by considering the discussions as objectively as possible."

[1844] Exhibit E1, p 11, paras 12-14; See also Transcript 29 August 2018, p 127.

[1845] Exhibit E1, pp 11-12, paras 15-18.

[1846] Transcript 29 August 2018, p 130, lines 1-4.

The meeting with Mr Ajay Gupta

27. Mr Maseko proceeded to the Gupta residence to meet Mr Gupta. On arrival, he was led by a staff member to a room which appeared to be a formal lounge. Mr Maseko said: "Mr Ajay Gupta entered the room and was followed by his brother Atul a few minutes later."[1847] The latter did not stay for more than a few minutes.[1848]

28. After introducing the subject of the meeting, Mr Ajay Gupta told Mr Maseko that he was aware that government was spending around R600m (per annum) on media platforms "and he wanted all that expenditure to be transferred to his company, the would-be media company."[1849] In his evidence Mr Maseko testified thus:

> "I then proceeded to explain how the budget and procurement process worked and why it would not be possible to transfer the whole budget to his company. I told him that in any case, the budget didn't sit with us at GCIS and that we merely acted as an agency for the respective government departments.
>
> He dismissed my explanation and proceeded to tell me that my job is to go and identify, collect and allocate all the communication budget amounts in the various departments to his company.
>
> He then told me that I should let him know if any department or Minister gives me any problems and he would deal with them directly. I asked him to elaborate and he told me that he will personally summon and deal with any Minister who doesn't cooperate in this regard. I then objected to the way he was talking about Ministers in such derogatory terms. He seemed oblivious to the point I was making and emphasised that he could deal with any Minister who didn't cooperate.

[1847] Exhibit E1, p 12, para 21.

[1848] Exhibit E1, p 26. In the Public Protector's summary of Mr Maseko's evidence she says: "Mr Maseko met with Mr Ajay Gupta and one of his brothers, whose name he could not recall." (See Exhibit A1 p 98 para (d)). This is not correct. In the transcript of the interview with the Public Protector's staff, at the reference cited, Mr Maseko specifically said (and repeated) that the other brother was Atul Gupta. That was consistent with all the statements made in this connection by Mr Maseko, and with his oral evidence: Transcript 30 August 2018, p 13; Exhibit E1 p 6 para 2; Exhibit E1 p 12 para 20; Exhibit E1 p 68 para 20; Exhibit E1, p 85 para 20.

[1849] Exhibit E1, p 13, para 25.

> Matters such as the inappropriateness of what he was saying and the impropriety of trying to obtain government business in this manner did not seem to matter to Mr Ajay Gupta."[1850]

29. In his testimony to the Public Protector, Mr Maseko elaborated on his exchange with Mr Ajay Gupta at the meeting. He said that he had asked Mr Gupta how he was able to do what he threatened to do. Mr Maseko said:

> "[Mr Gupta said that he] has regular meetings with the President, so he will talk to the President and the Ministers will be summoned to (indistinct) and they will be instructed to transfer the budget to him".[1851]

The reference to the President is a reference to the then President Zuma.

30. By the time that he was first approached by Mr Ajay Gupta, Mr Maseko knew that the budgeted ad-spend available to GCIS was about R600 million for the year.[1852] This figure did not form part of the operational budget of GCIS itself. The figure of R600m per annum was the quantum of the ad-spend handled by GCIS on behalf of the various government departments which was drawn from their respective budget allocations.[1853] The departments would not have known the aggregate figure of R600 million, yet Mr Gupta evidently knew it. The question is: who had given Mr Ajay Gupta this accurate information?

31. Mr Maseko then ended the meeting and left, Mr Maseko testified that, while Mr Gupta expected his instructions to be implemented with a clear action plan,

> "I on the other hand, was convinced that I would not be party to what I considered to be improper and potentially corrupt [arrangement] on his part to secure

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[1850] Exhibit E1, p 13, paras 26-29.

[1851] Exhibit E1, p28.

[1852] Exhibit E1, p 6, para 3; Exhibit E1, p 66, para 7; Transcript 29 August 2018, p 117, lines 17-20.

[1853] Transcript 29 August 2018, p 118-120.

government business. In this regard, Mr Ajay Gupta did not offer me any personal benefit, he was clearly attempting to force my hand in a threatening manner."[1854]

Mr Maseko reports the incident

32. Mr Maseko left the meeting with Mr Ajay Gupta feeling "extremely angry".[1855] He immediately called the then Minister in the Presidency, the late Mr Collins Chabane, to report the incident. Minister Chabane said he would "take care of it".[1856] He said he also had a brief meeting about it with the then Deputy President, Mr Kgalema Motlanthe, at which he raised the issue of the pressure he was getting from the Gupta family.[1857] Mr Maseko testified that Mr Motlhanthe was shocked by what Mr Maseko told him had happened. Mr Maseko testified that Mr Motlhanthe told him that there were already some concerns about the influence of the Guptas on the President and the National Executive Committee of the ANC was also concerned about the matter. Mr Maseko also had a conversation with Mr Joel Netshitenzhe, who was the Head of Policy in government at the time. He also approached the former Minister in the Presidency, Mr Essop Pahad, "because I had a good relationship with him, and I knew he was close to the Guptas." He had not gone back to President Zuma to tell him what had occurred. Mr Maseko said: "[T]he more I spoke to people, [the more] I knew that nothing was going to happen."[1858] Mr Maseko was here referring to the question of addressing the problem of the influence of the Guptas on President Zuma.

[1854] Exhibit E1, p 14, para 30.

[1855] Exhibit E1, p 28.

[1856] Transcript 30 August 2018, p 27. See also Exhibit E1, p 28: "he said I mustn't worry about it. He will make sure that the matter is attended to."

[1857] Transcript 30 August 2018, p 27-28.

[1858] Exhibit E1, p 47.

33. Mr Maseko also reported the incident to Rev Frank Chikane, who was a former DG in the Presidency.[1859] Rev Chikane has confirmed this fact on affidavit[1860] and again in his oral evidence before the Commission.[1861] However, there was some inconsistency or discrepancy between Mr Maseko's version and that of Rev Chikane in terms of when Mr Maseko discussed the matter with Rev Chikane but nothing turns on this. It is not necessary to go into details about that discrepancy because it does not detract from the essence of the evidence of what transpired in the meeting between Mr Maseko and Mr Ajay Gupta and what followed thereafter.

Mr Ajay Gupta's further approach to Mr Maseko

34. One Friday towards the end of 2010 when Mr Maseko and his wife were driving to the North West Province for a weekend getaway where they were going to attend a golf tournament – the Nedbank Golf Challenge – in Sun City, Mr Maseko received a call from an employee of the Guptas' media company.[1862] This is how Mr Maseko explained what followed:

> "Initially the approach was made by way of a call from an unknown employee of the Guptas' media company.
>
> The gentleman requested to meet me the following Monday at 08h00 in the morning to discuss government advertising in the soon to be launched New Age Newspaper.
>
> I told him I would meet with him but that he should call me on Monday morning to set up an appointment as my diary was already packed. In this regard, I wished to ensure that whilst I would listen to any proposal, this had to follow proper procedures and had to be done on a proper basis.

[1859] Exhibit E1, p 14, para 31.

[1860] Affidavit to the Commission deposed to on 28 May 2019, p 17, para 45.

[1861] Transcript 19 November 2019, p 9.

[1862] Transcript 30 August 2018, p 30-31; Exhibit E1, p 34.

He insisted that the meeting had to take place that following Monday as the launch of their newspaper was imminent. I proceeded to tell him that a Monday morning meeting was out of the question. The call ended unceremoniously.

About an hour later, my phone rang again. This time it was Mr Ajay Gupta. He sounded very agitated and he started the conversation with an aggressive tone.

He said his people told him that I was being difficult. I told him what happened in the conversation with his staff member.

He then responded by saying something to the effect that he will not tolerate any nonsense and that I didn't understand what was going on. He said the meeting must happen on Monday morning.

I was extremely offended by what was going on and the manner in which he spoke to me. I told him that he had no right to give me instructions as he was not my employer. His response was that the meeting must no longer take place on the Monday morning, as they had initially demanded, but should happen the following morning, which was a Saturday. I told him how ridiculous his demand was and that I was out of town for the weekend. He insisted that the meeting will take place on the Saturday morning.

I told him in no uncertain terms that I will not be spoken to in that manner nor dictated to as he was attempting to do. In the process and reflective of my annoyance at an attempt to improperly bully me as a government official, I also used an expletive.

At this point he told me that I was being uncooperative and that he was going to speak to my seniors in government who would sort me out and replace me with people who would cooperate with him. I can't recall whether he or I dropped the call. The call ended abruptly."[1863]

35. Mr Maseko says that he attempted that evening without success to reach Minister Chabane by telephone. On his return to Johannesburg the following week, he briefed Minister Chabane about the developments.[1864]

36. When interviewed by the Public Protector's staff, Mr Maseko said he could not recall the exact date when he received the call from Mr Ajay Gupta while he and his wife were

[1863] Exhibit E1, p 14-15, paras 32.

[1864] Exhibit E1, p 15, paras 41-42.

on their way to a golf tournament in Sun City.[1865] It was on the Friday evening while he was driving there. In fact it must have been Friday 3 December that this occurred, because, in 2010, the Nedbank Golf Challenge took place from Thursday 2 December to Sunday 5 December.[1866] This would also fit with his recollection that Mr Gupta told him that "The newspaper is launching in a few days". In fact, The New Age was launched the following Monday, 6 December 2010.[1867] It would also explain why Mr Ajay Gupta was so impatient in his demand for a meeting with Mr Maseko, initially at 8 o'clock on the Monday morning, and then on the Saturday.

President Zuma moves to replace Mr Maseko

37. It was in early December 2010, as we have seen, that Mr Maseko rebuffed the second attempt of Mr Ajay Gupta to bully him into providing government financial support to TNA in obvious contravention of the law.

38. Mr Maseko testified about a call he received from Minister Chabane towards the end of January 2011. He said:

> "I received a call from Minister Chabane asking me to meet him at his office urgently. I met him at his office the following morning. At the meeting, he advised me that he had been instructed by the President to redeploy me or terminate my contract henceforth.
>
> He told me that, although he [had] no choice but to implement the instruction from the President, he made a commitment not to throw me in the street because he knew that I was a committed civil servant who had not done anything wrong. He told me he would make a plan to find another post for me in the public service."[1868]

[1865] Exhibit E1, p 28-29.

[1866] https://www.golfchannel.com/tours/sunshine-tour/2010/nedbank-golf-challenge

[1867] Exhibit M1, p 88-89; see also Exhibit NN6, p 316: "the first publication of The New Age was on 6 December 2010."

[1868] Exhibit E1, p 16, paras 47-48.

39. During his oral evidence, Mr Maseko provided further important details about this. The call from Minister Chabane was on Sunday, 30 January 2011. The Minister requested a meeting with him that afternoon, but he was unfortunately unavailable and they met on the morning of Monday, 31 January. The Minister informed him that President Zuma, who was out of the country at the time,[1869] had called him with the instruction. According to Minister Chabane, said Mr Maseko, the President had said that by the time he returned to the country, Mr Maseko should no longer be at GCIS. The Minister said he had "no choice" but to implement this decision because the President was his boss. Mr Maseko said that Minister Chabane "put it in very clear words to say that he did not agree with the decision."[1870] Mr Maseko testified that Minister Chabane said that there were quite a few vacancies in the public service to which Mr Maseko could be moved. He would talk to his colleagues in Cabinet to see who needed a Director-General.[1871] It is common cause that Mr Zuma was out of the country from about 26 January 2011 and returned to the country on or about 2 February 2011.

40. Events moved very rapidly after that. The transfer of Mr Maseko out of GCIS and his replacement as CEO by Mr Mzwanele Manyi was announced at the Cabinet meeting two days later, Wednesday, 2 February, under curious circumstances. According to Mr Maseko, he did not learn until that announcement was made that his destination was to be the Department of Public Service and Administration.

41. Giving evidence before the Commission in July 2019 former President Zuma flatly denied that he ever instructed Minister Chabane to transfer Mr Maseko or terminate his

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[1869] President Zuma was evidently attending an African Union summit. Exhibit E1, p 35; Transcript 6 November 2019, p 41. This is supported by the fact that the 16th Ordinary Session of the African Union (AU) Summit, held in Addis Ababa, ended on Monday 31 January 2011. See https://europafrica.net/2011/02/03/decisions-and-declarations-of-the-january-2011-au-summit/

[1870] Transcript 30 August 2018, p 52.

[1871] Transcript 30 August 2018, p 40-41.

contract. He said that it was the Minister who may have discussed with him the fact that he would like to transfer Mr Maseko. Mr Zuma testified before the Commission and said: "I think there was an issue between them. I cannot remember the details."[1872] He said that ultimately, the decision to transfer was his as President, but it was not at his instance. He said "at times people use the name of the President".[1873]

42. Mr Chabane is unfortunately deceased and, therefore, cannot be asked for his version or defend himself against the former President's insinuation of dishonesty and cowardice on his part over the transfer of Mr Maseko.

43. The relationship between Mr Maseko and Minister Chabane was a close personal one as well as a political one. Mr Maseko said that they had "a very solid relationship".[1874] They played golf together.[1875] No-one – apart from former President Zuma – has suggested that there was any friction or "issue" between them which might have given rise to a motivation on Mr Chabane's part to have Mr Maseko moved. During his time at GCIS, said Mr Maseko, there was never even once any complaint about his performance and nobody had raised any issue in that regard.[1876] In December 2010, Minister Chabane, responding to a panel's assessment of Mr Maseko's performance in GCIS, had recommended "a pay progression for Mr Maseko's overall performance".[1877]

[1872] Transcript 16 July 2019, p 25.

[1873] Transcript 16 July 2019, p 29.

[1874] Transcript 6 November 2019, p 10.

[1875] Exhibit NN1. p 59.

[1876] Transcript 30 August 2019, p 56; Transcript 6 November 2019, p 46-47.

[1877] Exhibit NN5-DB-156. Mr Maseko had not seen this document before testifying. He said he was "happy" with the performance assessment of 114%. (Transcript 6 November 2019, p 14.) Performance according to standard would be 100%. (Transcript Day 6 November 2019, p 18.) "I think the message we could get out of that number is that performance was exceptional." (Transcript 6 November 2019, p 20.) There "has never been a year where I got a negative allocation of marks – points" i.e. less than 100% (Transcript 6 November 2019, p 18, 20.)

Mr Zuma himself has not suggested that Mr Maseko was anything less than a good and committed public servant.

44. Mr Maseko's version is corroborated in important respects by other witnesses whose evidence refutes Mr Zuma's testimony in regard to Minister Chabane and the move to replace Mr Maseko as CEO of GCIS.

45. Mr Abednigo Hlungwani gave evidence to the effect set out below.[1878]

46. His employment in the public service had spanned some 22 years. At the time of the transfer of Mr Maseko, he was the private secretary to Minister Chabane in the Office of the President. He was later made chief of staff to Minister Chabane in the Presidency, moving with him to be his chief of staff at the DPSA. At the time of his testimony to the Commission, Mr Hlungwani was Chief Director in the Office of the DG in the Department of Mineral Resources and Energy.[1879]

47. He had wished not to have to come and give evidence. His reluctance to appear at the Commission was for two reasons. First, he had been close to Minister Chabane for years and his passing away had pained him emotionally for months and he did not want to come to the Commission and open an emotional wound.[1880] Second, on 16 July 2019 (the second day of Mr Zuma's evidence at the Commission during which questioning on the removal of Mr Maseko was continuing), he had received an anonymous phone call from a male who warned him not to say anything about Mr Maseko's removal from office. He did not recognise the voice. The same evening, he received an abusive and

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[1878] Transcript 26 August 2019, p 28; Exhibit JJ2. Mr Hlungwani's first name was spelled incorrectly in his affidavit (deposed to on 22 August 2019); apart from that he confirmed its contents as correct: see Transcript 26 August 2019, p 29.

[1879] Transcript 26 August 2019, p 29-31; Exhibit JJ2, p 1-3, para 3.

[1880] Transcript 26 August 2019, p 76.

threatening SMS from a number which he did not recognise.[1881] The purpose, to say the least, was to discourage him from testifying.[1882] Nevertheless, when requested to do so by the Commission, he had obliged.[1883]

48. Mr Hlungwani said that, although he had great respect for former President Zuma, he was taken aback to hear him testify before the Commission that he did not call Minister Chabane about the removal of Mr Maseko.[1884]

49. Mr Hlungwani testified that in late January or early February 2011 when he was at the Union Buildings, he had received a call on his cellular phone from one of the President's private secretaries using her cellular phone. He said: "I think she indicated that they were abroad at the time" – saying that the President would like to talk to Minister Chabane. He confirmed that Minister Chabane was in the office and she said he should ask the Minister to expect a call from the President shortly. Mr Hlungwani said that he relayed the message to Minister Chabane. His desk was in a room adjacent to the Minister's office. Mr Hlungwani testified that, within a few minutes, Mr Zuma's private secretary called him again and indicated that the President wished to speak to Minister Chabane. He then handed his cellular phone to Minister Chabane in his office and walked back to his desk, closing the door behind him. Mr Hlungwani testified that, after a few minutes, the Minister "came through from his office and handed the phone back to me and the day continued".[1885]

[1881] Exhibit JJ2, p 5 – 6, paras 23 and 24. (Mr Maseko is mistakenly referred to in para 23 as "Minister Maseko". This was clearly just a drafting error. Mr Hlungwani correctly referred to Mr Maseko in para 12 of his affidavit as the CEO of GCIS at the time.) See also Transcript 26 August 2019, p 51-53.

[1882] Transcript 26 August 2019, p 54.

[1883] Transcript 26 August 2019, p 32-33 and 51-52.

[1884] Transcript 26 August 2019, p 32.

[1885] Exhibit JJ2, p 3, paras 10 and 11; Transcript 26 August 2019, p 34-35.

50. At the stage when he had handed the phone to Minister Chabane, it was the private secretary and not the President himself who was on the line.[1886] He was not privy to the conversation that took place with Minister Chabane. It is very probable, however, that the call concerned the removal of Mr Maseko from GCIS and his replacement by Mr Manyi. Although receiving a call from the President's private secretary in order to convey a message from the President to the Minister, or, because the President wanted to speak to the Minister, was not unusual,[1887] Mr Hlungwani concluded from what happened subsequently that day and shortly afterwards that the replacement of Mr Maseko was indeed the subject-matter of the President's call to Minister Chabane.

51. Mr Hlungwani said that, when Minister Chabane left the office on the day of the call – which "could have been less than an hour" after the call[1888] – he indicated to Mr Hlungwani that he would like to talk to "Themba" (i.e. Themba Maseko). Mr Hlungwani immediately telephoned the head of Mr Maseko's office to inform her that Minister Chabane would like to speak to Mr Maseko "at some stage".[1889]

52. Mr Hlungwani confirmed in his evidence:

> "A few days after Mr Zuma had spoken to Minister Chabane, I was walking [with] Minister Chabane out of the office to his official vehicle when he informed me that we "would have to move" Mr Maseko to another department. I asked the Minister who the replacement would be at GCIS and he stated, "Jimmy Manyi" ("Mr Manyi")."[1890]

[1886] Transcript 26 August 2019, p 35-36.

[1887] Transcript 26 August 2019, p 48-49, 62.

[1888] Transcript 26 August 2019, p 56.

[1889] Exhibit JJ2, p 3 paras 12-13; Transcript 26 August 2019, p 36-37, 56-57. Mr Maseko thinks, from what Mr Chabane had said to him, that the call from the President to Minister Chabane would have been on the Friday, the Saturday or the Sunday, i.e. Transcript 6 November 2019, p 40.

[1890] Exhibit JJ2, p 4, para 14.

53. Mr Hlungwani assumed that this was as a result of the telephonic discussion between Mr Zuma and Minister Chabane that had taken place a few days earlier.[1891] The impression was then reinforced by the events of 2 February 2011 – the week after the call – when there was an unexpected news media report followed by an announcement to Cabinet that Mr Maseko was to be moved to the DPSA and replaced by Mr Manyi at GCIS – although Minister Chabane had not explicitly told him that he had been instructed to remove Mr Maseko.[1892]

54. The combination of events is a reason the President's call to Minister Chabane had remained in his memory. There are certain calls which he remembers specifically (he gave examples) even after many years have passed.[1893] Another reason is that, when Minister Chabane told him that they would have to move Themba, "he just said ai".

55. Mr Brent Adrian Simons also testified. His evidence leaves little room for doubt.[1894] Although Mr Simons had become a vocal critic of Mr Zuma and his association with corruption scandals while he was still the President,[1895] there are no grounds for concluding that he invented or exaggerated his version of these events. Mr Simons said that he was a member of the ANC.

56. Mr Simons said that he had worked in the public service for some 18 years. At the time of Mr Maseko's removal, he was working at GCIS.[1896] He had applied for a Chief Director's post at GCIS but had not yet been appointed. His appointment took place towards the end of 2011, after Mr Manyi had replaced Mr Maseko as CEO. During

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[1891] Exhibit JJ2, p 4 p 15.

[1892] Transcript 26 August 2019, p 59-60.

[1893] Transcript 26 August 2019, p 63-71.

[1894] Transcript 26 August 2019, p 8; Exhibit JJ1.

[1895] Exhibit JJ1, p 12-13; Transcript 14 January 2020, p 149-154.

[1896] Transcript 26 August 2019, p 21.

January 2014 he was seconded to the Office of the Minister in the Presidency and worked directly under Minister Chabane as a Chief Director.[1897] He said that he respected Minister Chabane, they became close friends, and "he would often confide in me".[1898]

57. He was with Minister Chabane in Australia in March 2014 when news came that the Public Protector's report on her Nkandla investigation was about to be released.[1899] Mr Simons testified that, when President Zuma did not heed Minister Chabane's advice on how to respond to the report, Minister Chabane –

> "was visibly upset and told me that the country and the ANC were moving in the wrong direction. He then told me that when Themba Maseko was the DG in GCIS, the department was being well managed. However, he had been personally phoned by the former president, Mr Zuma, and instructed to remove Mr Maseko from his position and replace him with Mr Jimmy Manyi ("Mr Manyi").
>
> The Minister told me that he did not want Mr Manyi as the DG at GCIS because of the problems caused by him at the Department of Labour after it had been publicised that Mr Manyi had attempted to secure contracts for his private company.
>
> Minister Chabane told me that he tried to persuade the President to reconsider, but he refused and he was forced to remove Mr Maseko."[1900]

58. Mr Simons believed that Minister Chabane was not lying – i.e. not inventing this version belatedly as an excuse. It was clear to him that the Minister was still upset about what

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[1897] When in May or June of that year, Minister Chabane was transferred to the DPSA, he accompanied him there. After Minister Chabane's death in March 2015, he continued at the DPSA until 2018 when he resigned and took up a position as a unit manager in Parliament. Exhibit JJ1, p 1, para 3. He had been spokesperson to Minister Chabane, both when he was Minister in the Presidency and when he became Minister for Public Service and Administration. Transcript 14 January 2020, p 86.

[1898] Exhibit JJ1, p 9, para 37. "The Minister would often open up and have deep discussions [with me] not only about what was happening within the Ministry or the Department but also politically within the organisation because he knew that I was an active member of the African National Congress at that stage so we would have political discussions as well." Transcript 26 August 2019, p 14.

[1899] 'Secure in Comfort', Report No: 25 of 2013/24, 19 March 2014.

[1900] Exhibit JJ1, p 11, paras 44-46. See also Transcript 26 August 2019, p 20.

had transpired.[1901] The same story was heard among the rank and file at the time of Mr Maseko's removal.[1902] Mr Simons testified that his experience as a senior manager in GCIS was that "there was a very good relationship between the late Minister and Mr Themba Maseko".[1903]

59. Mr Simons said that the former President was being untruthful when he suggested that Minister Chabane had simply used his (the President's) name when informing Mr Maseko that he was to be removed from GCIS. Mr Simons said that such "name dropping" was "totally, totally contradictory to the character of the Minister."[1904]

60. Mr Ronald Shingange provided further strong evidence corroborating Mr Maseko's version and refuting that of former President Zuma.[1905] Mr Shingange testified that he was an advisor to Minister Chabane during the period 2009 to 2013,[1906] which includes the time when Mr Maseko was removed as CEO of GCIS and replaced by Mr Manyi. Mr Shingange testified that roughly a week after Mr Maseko had been removed, he was walking into a meeting with Minister Chabane when he asked the Minister what had happened. He said he asked the Minister why Mr Maseko had been removed and the Minister told him that he had been instructed.

61. He did not follow up with the Minister as to why as only the President could give the Minister such an instruction. His assumption was that it must have been the President who had instructed him. A lot of changes were still happening following the new

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[1901] Transcript 26 August 2019, p 21.

[1902] Transcript 26 August 2019, p 22.

[1903] Transcript 14 January 2020, p 133.

[1904] Transcript 26 August 2019, p 17.

[1905] Mr Shingange testified on 14 January 2020 (Transcript 14 January 2020, p 73). His witness statement on affidavit is Exhibit E5. The evidence leader was Adv Susan Wentzel.

[1906] He had previously served *inter alia* as Chief Executive of the parastatal Corridor Mining Resources Company, a subsidiary of the Limpopo Economic Development Agency, and had also been the acting head of the Department of Public Works. (Transcript 14 January 2020, p 77).

administration and "there was a lot of movement of Director-Generals from one department to another".[1907] Mr Shingange said that, since Mr Maseko was being moved from one department to another, he did not ask further questions at the time.[1908]

62. Mr Shingange testified that, when President Zuma testified that he did not instruct Minister Chabane to move Mr Maseko, a lot of people – knowing he had been the Minister's advisor – phoned him to ask if that was possible. His answer was that it was improbable. Because he "spoke too much", he had ended up now having to give evidence.[1909]

63. Mr Shingange testified that the relationship between Mr Maseko and Minister Chabane was good. He said: "I never saw any tension between the two of them during the period that they were working together." This was true right up to the time that Mr Maseko was removed.[1910]

64. He said that the people had also asked him about the evidence of the former President that Minister Chabane had merely used his (the President's name). Mr Shingange said people asked him: "Is it in the character of Minister Chabane to do something like that? So I said no, it is not possible".[1911]

[1907] Mr Zuma also told the Commission: "I know that there was a bit of shifting of the DGs around that time": Transcript 16 July 2019, p 26. Mr Maseko was not aware of a general situation at that time where people were moved from one department to another, but could not give "a definitive answer to say there were no movements around at that time". Transcript 6 November 2019, p 36; also p 44-47.

[1908] Transcript 14 January 2020, p 79-80.

[1909] Transcript 14 January 2020, p 80-82.

[1910] Transcript 14 January 2020, p 83.

[1911] Transcript 14 January 202, p 83.

Cabinet meeting on 2 February 2011

65. A mere two days later, on Wednesday 2 February 2011, after President Zuma had returned to the country,[1912] a Cabinet meeting was held. It was attended by Mr Maseko, still in his capacity as CEO of GCIS and government spokesperson. The transfers of Mr Maseko and Mr Manyi were clearly not on the agenda, because Mr Maseko and Minister Chabane at least would have known about that. During the tea break, Mr Maseko learned that eTV was broadcasting "the news about my axing from GCIS". He informed Mr Chabane accordingly. Mr Maseko testified: "There was no time for him to inform me that DPSA was going to be my next assignment in government."[1913] Minister Chabane consulted with the President during the break.[1914] Mr Maseko then checked with his office whether there was a letter from either the Minister or the President. "No letter, all they [his staff] told me was that there is a fellow called Jimmy Manyi who wants to come to the office, because he is the new CEO".[1915]

66. Mr Hlungwani confirmed that Minister Chabane (whom he served as private secretary at that time[1916]) was in Cabinet on that day, 2 February 2011. The Cabinet meeting was in the Union Buildings. The director in Mr Maseko's office was there to support him, sitting in a cabinet lounge next to his office and she had alerted him to the television report to the effect that Mr Maseko had been removed and would be replaced by Mr Manyi. She asked him if it was true that Mr Maseko was being removed.[1917] Although Minister Chabane had said to him that "we would have to move Themba",[1918] and also

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[1912] Transcript 6 November 2019, p 41-43.

[1913] Exhibit NN1, p 18, para 6.9.2.

[1914] Exhibit E1, p 17 para 51.

[1915] Exhibit E1 p 36 (transcript of interview with Public Protector's staff).

[1916] Exhibit JJ2, p1, para 3.2.

[1917] Transcript 26 August 2019, p 39.

[1918] Transcript 26 August 2019, p 38.

that Mr Manyi would be replacing him,[1919] he did not know whether or not that had been finalised until "the news started filtering through that day".[1920]

67. Mr Maseko vividly remembered the events that followed at the Cabinet meeting. There was no discussion or decision on the matter: instead an impromptu announcement was made by Minister Chabane "right at the end of the meeting".[1921] That was when he learned that he was to be transferred to the DPSA. He had not been consulted specifically about being moved to the DPSA.[1922]

The changeover at GCIS

68. It is clear from the evidence of Ms Phumla Williams, then the Deputy CEO of GCIS, that the exit of Mr Maseko and his replacement by Mr Manyi as CEO of GCIS was sudden and unexplained and came as a shock to the staff of GCIS.[1923]

69. Mr Manyi's effective takeover of responsibilities from Mr Maseko occurred on 2 February 2011, the day of the Cabinet meeting, and the date on which Mr Maseko issued his last statement to the media in his capacity as CEO of GCIS.[1924] It is headed "Statement on the Cabinet meeting of 2 February 2011", and its concluding paragraph read as follows:

> "Cabinet noted that Mr Themba Maseko was to be redeployed to the Department of Public Service and Administration (DPSA) with immediate effect. Mr Maseko will be replaced by Mr Jimmy Manyi as the new Government Spokesperson and Chief

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[1919] Transcript 26 August 2019, p 43.

[1920] Transcript 26 August 2019, p 41.

[1921] Transcript 6 November 2019, p 35.

[1922] Transcript 23 May 2019, p 45.

[1923] Transcript 31 August 2018, p 26.

[1924] Exhibit M, p 4, para 5.2 and p 23 annexure (Exhibit) RA1; Transcript 14 November 2018, p 88-89.

> Executive Officer of the Government Communication and Information System (GCIS)."

The statement bears Mr Maseko's name and he confirmed having issued it but he told the Public Protector's staff that he himself "didn't even do the statement".[1925]

70. Ms Williams recalled the arrival of Mr Manyi at GCIS on the same day that Mr Maseko left his office and was not aware of any process of "handover" between the two within the department.[1926] This is also what happened when Mr Des van Rooyen replaced Mr Nene as Minister of Finance. Mr van Rooyen did not want a handover from Mr Nene. Ms Williams testified: "The moment he [Mr Maseko] left, we then got to be told that Mr Manyi was at the basement in our building. He had clearly been waiting in the wings".[1927]

The documentary evidence

71. Transfers of heads of department are governed by s 12(3) of the Public Service Act (PSA).[1928] That provision reads:

> "(3)(a) The President may transfer the head of a national department or national government component before or at the expiry of his or her term, or extended term, to perform functions in a similar or any other capacity in a national department or national government component in a post of equal, higher or lower grading, or additional to the establishment, as the President considers appropriate.
>
> . . .
>
> (d) A transfer in terms of this subsection may only occur if–
>
> (i) the relevant head of department consents to the transfer; or
>
> (ii) after due consideration of any representations by the head, the transfer is in the public interest."

[1925] Exhibit E1, p 36.

[1926] Transcript 31 August 2018, p 27-28.

[1927] Transcript 31 August 2018, p 20.

[1928] Enacted by Proclamation No. 103 of 1994.

72. The evidence has raised no suggestion of a transfer "in the public interest" or of any representations by Mr Maseko in that regard. There is no doubt that Mr Maseko ultimately consented to his transfer from GCIS to the Department of Public Service and Administration but that was simply because he had no choice in the matter. He had been told by Minister Chabane that Minister Chabane had been instructed by the President to fire him or move him somewhere else. President Zuma did not want to find Mr Maseko at GCIS when he arrived back in the country. Mr Maseko had to choose between consenting to a transfer to the DPSA and still have a job or refuse to consent to the transfer and be thrown into the street. It was no choice at all.

73. However, the question is not whether Mr Maseko consented to the transfer but who initiated the idea of Mr Maseko's removal from his position or whose was it that Mr Maseko be removed from his position and why. Mr Maseko testified that Minister Chabane told him that Mr Zuma gave him an instruction to remove him. Mr Zuma denied this when he testified before the Commission and said that it must have been Minister Chabane who had wanted Mr Maseko removed and used his name (President Zuma's name) when speaking to Mr Maseko effectively to falsely implicate Mr Zuma in Mr Maseko's removal. Of course, Minister Chabane is deceased and can no longer speak for himself but Mr Maseko made it clear that Minister Chabane could not have had any reason to want him removed from his position.

74. Among the exhibits is a letter apparently signed by Mr Chabane as Minister in the Presidency on 2 February 2011 (the same day as the Cabinet meeting), addressed to Minister Baloyi of the DPSA, saying:[1929]

> "TRANSFER OF MR T J MASEKO TO THE DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION

[1929] Exhibit NN5, p 43.

> I concur, subject to the President's approval, with the transfer of Mr T J Maseko, the Director-General of the Government Communication and Information System (GCIS), in terms of section 12(3)(a) to the Department of Public Service and Administration (DPSA). The proposed effective date of the transfer, namely the date following the date that the President signs the President's Minute, is also supported."

75. An undated explanatory memorandum (not a Cabinet memorandum) which appears to have accompanied the unsigned President's Minute to which Mr Chabane referred, includes this paragraph:[1930]

> "The President's Minute proposes the transfer of Mr TJ Maseko, the Director-General of the Government Communication and Information System (GCIS), to the post of Director-General of the Department of Public Service and Administration (DPSA). The post of Director-General of the DPSA is vacant. The transfer of Mr Maseko is proposed to coincide with the transfer of Mr Manyi, the Director-General of the Department of Labour, to the post of Director-General of the GCIS."

Next to this paragraph, in the left-hand margin, there is a signature which Mr Baloyi has confirmed to be his.[1931] Another paragraph of the same document states that "the proposed transfer was discussed with Mr Maseko and he is in agreement."[1932]

76. The President's Minute No. 32 signed by President Zuma on 3 February 2011[1933] and which Mr Baloyi confirms as having been co-signed by him as "Minister of the Cabinet", stated:

> "I hereby, in terms of section 12(3)(a), read with section 12(3)(d), of the Public Service Act (promulgated under Proclamation No. 103 of 1994), transfer Mr T J Maseko from the post of Director-General of the Government Communication and Information System to the post of Director-General of the Department of Public

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[1930] Exhibit NN5, p 42, para 2.

[1931] Transcript 3 December 2019, p 184.

[1932] Transcript 3 December 2019, p 184, para 4.

[1933] Mr Maseko (Transcript 6 November 2019, p 84) said that he does not think the signature appearing as that of the President is in fact President Zuma's signature, but it appears very similar to the signature of President Zuma on Proclamation No. 3 of 2018 appointing this Commission. It should be accepted that it was indeed signed by the President.

Service and Administration, with effect from the date following the date on which this President's Minute is signed by the President until 30 June 2012."

77. Thus the effective date of the transfer was to be 4 February 2011. Mr Maseko's contract was due to expire in June 2012. However, Mr Maseko testified that he left GCIS on the same day on which the Cabinet had held its meeting. That was on 2 February 2011.

78. An essentially identical President's Minute No. 33 was signed by President Zuma and co-signed by Minister Baloyi on the same date in order to effect the transfer of Mr Manyi from the Department of Labour to the post of Director-General of GCIS.[1934]

79. Valid approval of the transfer of a DG, after the necessary consents and concurrences have been obtained, would mean an exercise of executive authority by the President in terms of s 12(3) of the PSA. That authority has to be exercised "together with the other members of the Cabinet" as contemplated by s 85(2) of the Constitution.[1935]

80. Dr Cassius Reginald Lubisi, Director-General in the Presidency and Secretary of Cabinet in 2011 and who still held that position in 2019,[1936] deposed to an affidavit on 18 November 2019 in response to a request from the Commission. In paragraph 5 of

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[1934] Exhibit NN5, p 51.

[1935] Section 85 of the Constitution provides:

Executive authority of the Republic

(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by—

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation.

[1936] http://www.thepresidency.gov.za/profiles/director-general-dr-cassius-reginald-lubisi%3A-profile; https://www.po liticsweb.co.za/documents/cassius-lubisi-new-dg-of-presidency

the affidavit he recorded that the Commission had requested those parts of the Cabinet minutes of 2 February 2011 that reflected:

> "5.1 any and all noting by Cabinet of the decision to transfer Mr Themba Maseko from the Government Communication and Information System (GCIS") to the Department of Public Service and Administration;
>
> 5.2 any and all noting by Cabinet of the decision to transfer Mr Mzwanele Manyi to GCIS;
>
> 5.3 any and all decisions of Cabinet relating to the transfers of Mr Manyi (to GCIS) and Mr Maseko (from GCIS); and
>
> 5.4 any recordal of any memoranda that were placed before Cabinet at its meeting of 2 February 2011 in relation to the transfer of Mr Manyi and Mr Maseko."

81. Dr Lubisi stated that officials within the Presidency had obtained a copy of the relevant minutes and discovered that "no part of the minutes reflected any of the requested items listed in paragraph 5 above."[1937] He went on to say in paragraph 9 of his affidavit:

> "I have personally studied the minutes of the Cabinet meeting of 2 February 2011 and can confirm that the minutes do not record any cabinet memorandum dealing with the transfers of Mr Maseko and Mr Manyi (or indeed any transfers of the Directors-General of GCIS, DPSA or Labour) having served before Cabinet at the meeting of 2 February 2011. I can also confirm that the minutes do not reflect any discussion of, or decision taken in relation to, these transfers."

Evidence of Mr Baloyi on the transfer of Mr Maseko

82. Mr Baloyi gave evidence[1938] on the transfers of both Mr Maseko and Mr Manyi. After he had testified, he wrote to the Commission asking that he be allowed to testify further,

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[1937] Exhibit NN5, p 320.

[1938] Transcript 3 December 2019. Statement of Makaringe Richard Baloyi, Exhibit NN4.

after having considered additional documentation and conducted his own investigation. He was invited to submit an affidavit which he did.

83. At the relevant times Mr Baloyi was the Minister of Public Service and Administration, having been appointed in 2008. He served in that position until October 2011.[1939] He had then moved on to other responsibilities. He said that, because of this and the number of years that had elapsed, a lot of things were now "in the cracks of oblivion", and he needed to refresh his memory from documents to which he no longer had access. Some had recently been given to him by the Commission.[1940] He was invited to specify, in the course of his testimony, any particular document he might need which had not been received, and an attempt would be made to get it.[1941]

84. From memory, he could not be sure whether he was at the Cabinet meeting on 2 February 2011 or not, but that could be verified through Cabinet minutes. The evidence before the Commission had been that he was not at the meeting.[1942] It was later confirmed by the President's Office that the minutes showed that Mr Baloyi was not present, whereas Ms Oliphant, the Minister of Labour, was present.[1943]

85. Mr Baloyi stated that the formal process of transferring a DG requires an initiator and involves "consent, concur, concur, approve". Mr Baloyi explained what he meant by this "song".[1944] If the receiving or the releasing Minister is the initiator, then the DG himself has to consent and the other Minister has to concur. The initiator could however be the

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[1939] Transcript 3 December 2019, p 93.

[1940] Transcript 3 December 2019, p 94-95.

[1941] Transcript 3 December 2019, p 96.

[1942] Transcript 3 December 2019, p 97.

[1943] Transcript 3 December 2019, p 156.

[1944] Mr Baloyi confirmed that he counter-signed the President's Minute as Minister of the Cabinet. Transcript 3 December 2019, p 157.

DG himself/herself, in which case his or her Minister needs to concur and the Minister to whose department the DG is being transferred also needs to concur.[1945]

86. Cabinet also has to "concur" and "then the President signs a Presidential minute which is co-signed by the Minister of Public Service and Administration to effect the transfer". It is the concurrence of the Cabinet "that then gives the President the authority to sign the President's Minute".[1946] The "concurrence" of the Cabinet would be its participation in the approval of a transfer by the President for purposes of s 85(2) of the Constitution.

87. There are also circumstances, said Mr Baloyi, in which the Minister of Public Service and Administration may initiate the transfer of the DG of another Department. He said whatever the case, "the various consents, concurrences and approvals that [he] talked about" would be needed.[1947]

88. Mr Baloyi testified that he, as Minister of Public Service and Administration had moved for the transfer of Mr Maseko to the DPSA when he was informed that Mr Maseko's exit from GCIS "had to happen". There were only two alternatives in that situation: the redetermination of his contract on a severance package or transfer.[1948] He testified:

> "(f) I preferred the option of transfer and began to negotiate for such to happen and do so in a manner that he be transferred to the Department of Public Service and Administration, as, at the time, there was a need for such a resource and, considering his experience, he would be suitable for the job, hence I moved for his transfer, after I took a decision his services would be of value to the DPSA.
>
> (g) I discussed with his Principal and obtained concurrence.
>
> (h) I discussed with Mr Maseko and got his consent." [1949]

[1945] Transcript 3 December 2019, p 99-100.

[1946] Transcript 3 December 2019, p 122.

[1947] Transcript 3 December 2019, p 100-101.

[1948] Exhibit NN4, p 6-7.

[1949] Exhibit NN4, p 7.

89. This, said Mr Baloyi, was not out of any special consideration for Mr Maseko, but because he preferred generally that capable DGs should be transferred rather than be lost to the public service every time it was alleged that, in one position, there has been "an irretrievable breakdown of trust".[1950]

90. As to Mr Maseko's transfer, Mr Baloyi testified that the following was required: "The written consent of the releasing Executive Authority, a Cabinet Memorandum requesting the Cabinet to approve the transfer, [a] co-signed [Presidential][1951] Minute of the Minister of DPSA and the President,[1952] as well as the appointment letter on transfer."[1953] He said that all these were very important documents.[1954]

91. Mr Baloyi testified that the Cabinet memorandum "will indicate that Minister so and so has given consent", but the consent itself will not be attached to the memorandum.[1955] He was shown a pro forma Cabinet memorandum used for the filling of posts of heads of department and confirmed that the same type of pro forma memorandum would have been used also in the case of Mr Maseko's and Mr Manyi's transfers.[1956]

92. Mr Baloyi testified that, while the necessary consents and the Cabinet memorandum should ordinarily be submitted to the DPSA at least four weeks before the relevant Cabinet meeting, the timing would in reality depend on the circumstances. He said that it could be far less than four weeks.[1957] However, he said that there "must be a Cabinet

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[1950] Exhibit NN4, p 7-12.

[1951] In his statement, Mr Baloyi wrote "Cabinet Minute" at this point, but corrected this during his oral evidence: Transcript 3 December 2019, p 105.

[1952] The counter-signing of the Presidential Minute was required by s 101 (2) of the Constitution. Transcript 3 December 2019, p 109-110.

[1953] Exhibit NN4, p 12-13.

[1954] Transcript 3 December 2019, p 102.

[1955] Transcript 3 December 2019, p 104.

[1956] Transcript 3 December 2019, p 106.

[1957] Transcript 3 December 2019, p 110-113.

Memorandum", the consent of the releasing authority must be obtained, and Cabinet must make a decision about the transfer.[1958]

93. The late Mr Chabane was the executive authority (Minister) in the Presidency responsible for Performance Monitoring and Evaluation. He was in charge of matters relating to GCIS and was Mr Maseko's principal.[1959] Mr Baloyi testified that Mr Chabane approached Mr Baloyi as Minister of Public Service and Administration to ask for assistance in managing the exit of Mr Maseko from GCIS.[1960] Mr Baloyi stated that the two of them met to discuss the matter. He said that their discussion was not over the phone.[1961]

94. Mr Baloyi could not recall when exactly this occurred and could not say whether it was while President Zuma was out of the country.[1962] He said that it could have been that week before the Cabinet meeting on 2 February 2011. Mr Baloyi became "fairly confident" of this, having regard to the letter from Minister Chabane dated 2 February 2011[1963] in which he concurred, subject to the President's approval, with the transfer of Mr Maseko to the DPSA.[1964] He said that it was certainly before Mr Maseko was transferred because he (Mr Baloyi) had initiated the transfer. This was after being asked by Minister Chabane for advice in dealing with exit management. Mr Baloyi said: "I did not become aware [of the transfer] . . . I initiated it."[1965]

[1958] Transcript 3 December 2019, p 112, 114, 122.

[1959] Exhibit NN4,p 14; Transcript 3 December 2019, p 116.

[1960] Transcript 3 December 2019, p 129.

[1961] Transcript 3 December 2019, p 129-130.

[1962] Transcript 3 December 2019, p 118.

[1963] Exhibit NN5, p 43.

[1964] Transcript 3 December 2019, p 127.

[1965] Transcript 3 December 2019, p 119-120, 191.

95. Mr Baloyi testified that Mr Chabane had communicated to him during the discussion that there was an executive authority "position"[1966] that Mr Maseko had to leave GCIS. Mr Baloyi testified that Mr Chabane said a decision had been taken that Mr Maseko should leave.[1967] Mr Baloyi testified: "There was a decision for his exit."[1968] Mr Baloyi stated that Mr Chabane did not say that it was his decision, but it is the responsibility of the executive authority (i.e. the President in respect of DGs) to transfer. Mr Baloyi did not ask him whether he had approached the President in this regard, but any decision in this regard would have needed the support of the President. Mr Baloyi testified that it was not Mr Maseko who had initiated the move.[1969]

96. Mr Baloyi said that he and Mr Chabane had "agreed that both of us should consult [Mr Maseko] individually" about the preferred course to be taken." He said "[I]f the decision of Cabinet was [on] the 2nd [February 2011], it is a decision that should have [been] preceded by these interactions."[1970]

97. Mr Maseko's evidence that he had no discussion with Mr Baloyi before the announcement of the transfer in Cabinet on 2 February 2011 was put to Mr Baloyi.[1971] Mr Baloyi was adamant that he had discussed the matter with Mr Maseko before the transfer, and that "our discussion went very far".[1972] He said that he was not, as had been suggested by Mr Maseko, confusing this with a later discussion or discussions about Mr Maseko's future before the latter left the DPSA and government service in

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[1966] Transcript 3 December 2019, p 129.

[1967] Transcript 3 December 2019, p 132.

[1968] Exhibit NN4, p 15.

[1969] Transcript 3 December 2019, p 131, 132, 194-197. Exhibit NN4, p 7.

[1970] Transcript 3 December 2019, p 122-123; Exhibit NN4, p 15.

[1971] Transcript 3 December 2019, p 133.

[1972] Transcript 3 December 2019, p 135.

July 2011.[1973] According to Mr Baloyi, it had occurred "the day before I gave feedback to Minister Chabane".[1974] Mr Baloyi testified that Mr Maseko had questioned what the use was of transferring him to his department so near the end of his contract, especially as in no time he (Mr Baloyi) could decide that Mr Maseko should leave.[1975] However, this does not accord with the fact that there were, in fact, still about 18 months left in Mr Maseko's contract. According to Mr Baloyi, Mr Maseko had not discussed with him why he was required to leave GCIS and Mr Baloyi had not asked.[1976]

98. Mr Baloyi testified that he had no recollection of receiving a call from Mr Maseko after the Cabinet meeting, either on the same day or the next day. Mr Baloyi said that Mr Maseko's evidence that Mr Maseko informed him in that call that he was his new DG is not in line with his own recollection of how the transfer happened.[1977]

99. Mr Baloyi did not say that Mr Maseko's evidence was "false" – i.e., "saying something deliberately knowing that it is not the truth".[1978] He testified that the Commission would have to decide which of the two conflicting versions to accept.[1979] He said that what "the cracks of oblivion" might be affecting both of them. He said that there was no malicious intent.[1980] Once it is accepted, as Mr Baloyi himself accepted, that Mr Maseko had not initiated his transfer, the other discrepancies in Mr Maseko's and Mr Baloyi's versions are not material for purposes of deciding who initiated Mr Maseko's transfer and why he initiated it.

[1973] Transcript 3 December 2019, p 135-136, 143.

[1974] Transcript 3 December 2019, p 137.

[1975] Transcript 3 December 2019, p 141.

[1976] Transcript 3 December 2019, p 145.

[1977] Transcript 3 December 2019,p 208-209.

[1978] Transcript 3 December 2019, p 147.

[1979] Transcript 3 December 2019, p 148.

[1980] Transcript 3 December 2019, p 150.

100. Mr Baloyi retreated further from certainty when it was disclosed to him during his testimony that an affidavit from the Presidency regarding the minutes of the Cabinet meeting of 2 February 2011 showed that no Cabinet memorandum on the matter of the transfers of Mr Maseko and Mr Manyi was placed before Cabinet and that there was no Cabinet decision on the matter.[1981] He now acknowledged that he had no independent recollection of a Cabinet memorandum on the matter, but assumed that it existed and had been put before Cabinet because he had co-signed the Presidential Minute the following day. He said that he was basing his evidence on there having been due process and on what normally occurred. The Cabinet memorandum would have been prepared by his department for him. There would have been concurrence by Cabinet. He said that during his term, Cabinet had never given concurrence to a verbal announcement. [1982]

101. If, indeed, there had simply been an announcement to Cabinet that Mr Maseko was being transferred from GCIS to DPSA and that Mr Manyi would replace him, said Mr Baloyi, then it was understandable that there was no Cabinet memorandum – but how then could a President's Minute be addressed? He said that it would be very surprising to him if such a situation happened.[1983] He was not convinced that there was no Cabinet memorandum, and wanted to be convinced.[1984] He said that it would shock him to know that there was no Cabinet memorandum, no discussion of the matter in Cabinet, and no decision in Cabinet on the two transfers.[1985] That was in fact the case. There was no cabinet memorandum, there was no discussion of the matter at Cabinet and there was no Cabinet decision on the matter.

[1981] Transcript 3 December 2019, p 151-154, 162-163.

[1982] Transcript 3 December 2019, p 157-159.

[1983] Transcript 3 December 2019, p 160-161.

[1984] Transcript 3 December 2019, p 163.

[1985] Transcript 3 December 2019, p 164.

102. Was it possible (he was asked) that he could have co-signed the President's Minute even though there was no Cabinet memorandum by reason of his role in the transfer? He said that he knew that a decision had been taken that Mr Maseko should leave GCIS, and he was asked to advise on managing the exit; on his version, he had a discussion with Mr Maseko who had verbally consented to a transfer; the President had no problem with the transfer, to say the least; the media were already running the story. On his version, too, he was told by Minister Chabane that Mr Maseko had not initiated his transfer.

103. Mr Baloyi said that, if there was a move to sign the President's Minute and fix the rest of the paperwork later, they would be tracing that indeed the paperwork was done, but for him "it is just unthinkable that such a thing can happen."[1986] If the urgency was to avoid the impression being created that Mr Maseko was being fired, "what I would have done was to expedite [the formalities] but make sure that the due process is followed." He agreed that due process would have included Cabinet discussing the issue and making a decision. Cabinet concurrence had to be in place before the Presidential Minute – the last step in the process – was signed. He said that he was not the type of person to do something incorrect just because somebody decided that it had to be done.[1987]

104. Mr Baloyi stated that even his department (the receiving department) would have said: "but where is the due process?" If the DPSA has no record about the matter his position would be one of serious disappointment. He cannot imagine how there could have been

[1986] Transcript 3 December 2019, p 166-167.

[1987] Transcript 3 December 2019, p 167-169.

a transfer without a Cabinet memorandum.[1988] If it existed, one would expect DPSA to have it.[1989]

105. The fact that eNCA had learned of the transfer on 2 February, the day of the Cabinet meeting, would not have necessitated a departure from the normal practice. Mr Baloyi said that a statement could easily be issued to clarify the matter "and then we deal with the issues accordingly".[1990]

106. Mr Baloyi was next referred to the single-page document headed "EXPLANATORY MEMORANDUM".[1991] He confirmed that it bore his signature. It "rang a bell" in his memory, but he was uneasy about being asked to deal with it as a loose piece of paper, out of the context of whatever submission or file would have contained it.[1992] His signature was on the side of the document, next to paragraph 2 which indicated that the post of DG at DPSA, to which Mr Maseko was being transferred, was vacant. According to Mr Baloyi, the document could be an explanatory memorandum, drafted at the Presidency and attached to the President's Minute, to which it refers. What was clear was that it was not a Cabinet memorandum.[1993]

107. The document also referred to the concurrence of Minister Chabane and said: "see herewith a copy of his letter to the Minister for the Public Service and Administration in this regard". It must therefore have been drafted, or its draft finalised, after Mr Chabane

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[1988] Transcript 3 December 2019, p 171, 175-176.

[1989] Transcript 3 December 2019, p 180.

[1990] Transcript 3 December 2019, p 179. In fact it was "eNews" at that stage: the eNCA brand was introduced later: see https://en.wikipedia.org/wiki/ENCA#History

[1991] Exhibit NN5, p 42, para 75.

[1992] Transcript 3 December 2019, p 185, 187.

[1993] Transcript 3 December 2019, p 186-187. Adv Hofmeyr said: "I should be fair and say the documents we have received from both DPSA and Department of Labour are in a state of disarray." Transcript 3 December 2019, p 188.

had signed his letter on 2 February 2011.[1994] The President's Minute was signed on 3 February 2011.[1995]

108. In his subsequent affidavit to the Commission,[1996] Mr Baloyi sought to deal with the fact that the evidence so far left "a space for insinuating that my signature on the document was a reflection of negligence or purposive deviation from established norms in my handling of the transfer of the two officials".[1997] He had now read the affidavit of Dr Cassius Lubisi, the DG in the Presidency.[1998] According to Mr Baloyi, the content of Dr Lubisi's affidavit, if confirmed,

> "would raise questions of ulterior motives in the process, thus feeding on the perception that the whole project of the transfer was fraught with a desire to facilitate some questionable deals, and ... if not [confirmed], such a simple-minded conclusion would unfairly put the then Government in a bad light, even if done inadvertently."

109. Unfortunately, Mr Baloyi's affidavit only makes his position worse. In desperation, he tried to build a raft from twigs.

110. In the first place, he claims that "the post-Cabinet statement by Mr Maseko", which indicated that the Cabinet had "noted" the transfers,[1999] shows that DG Lubisi's version of the content of the minutes could well be wrong. Actually, Mr Maseko had said that, while the statement was the last such statement bearing his name, and that he issued

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[1994] Transcript 3 December 2019, p 188-189; Exhibit NN5, p 43.

[1995] Exhibit NN5, p 50.

[1996] Affidavit deposed to on 12 February 2020.

[1997] Affidavit of 12 February 2020 para 2.1.4.

[1998] Exhibit NN5-DB-319 – 321. For ease of reference here, Dr Lubisi sates in para 9: "I have personally studied the minutes of the Cabinet meeting of 2 February 2011 and can confirm that the minutes do not record any cabinet memorandum dealing with the transfers of Mr Maseko and Mr Manyi (or indeed any transfers of the Directors-General of GCIS, DPSA or Labour) having served before Cabinet at the meeting of 2 February 2011. I can also confirm that the minutes do not reflect any discussion of, or decision taken in relation to, these transfers."

[1999] Exhibit M, p 24.

it,[2000] he did not write it himself.[2001] Mr Maseko's direct and first-hand evidence is that there was merely a hurried announcement to Cabinet at the end of the Cabinet meeting, necessitated by the fact that the transfers – which the Cabinet had never considered – had already been leaked to the news media. There was, therefore, in truth no formal "noting" by Cabinet and the absence of any such reference in the minutes makes perfect sense. Mr Baloyi himself was not at the Cabinet meeting. Mr Hlungwani, then Private Secretary to Minister Chabane, has confirmed the sense of surprise on 2 February 2011 that the transfers (which he believed to be still in preparation) were already being reported. The Commission has already gathered all the documentary evidence made available to it, and none of it supports Mr Baloyi's speculative line of defence. He himself has been able to produce nothing further.[2002]

Did President Zuma instruct Minister Chabane to remove Mr Maseko and, if so, why?

111. Mr Zuma testified that, if he had wanted Mr Maseko out, it would have been strange for him to call from abroad to give such an instruction:

> "I will wait until I leave the country and when I am very far away then call[!] It is quite funny. I am not running a department. Why would I have not talked to Minister Chabane when I was here? Why should I wait until I go? It is a little bit fishy.
>
> [I]f the Minister is finding it difficult to say to the DG, I am now saying go, and use the name of the President because I do not see why I should leave the country. Only when I am abroad then I must attend to this issue. It definitely – it is a little bit strange and funny and I – I never phoned Chabane about the – this DG when I was abroad. Not at all."[2003]

112. The problem with this reason given by Mr Zuma as to why it must be accepted that he did not instruct Minister Chabane to remove Mr Maseko is that the evidence that the

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[2000] Transcript 6 November 2019, p 57.

[2001] para 69.

[2002] Affidavit of 12 February 2020 para 3.2.10.

[2003] Transcript 16 July 2019, p 29-13.

Commission heard in regard to quite a few instances suggests that he could do terrible things to give effect to the wishes of the Guptas. A few examples will suffice to make the point. He fired Minister Nhlanhla Nene because Minister Nene was not co-operating with the Guptas and they wanted Mr Nene fired. President Zuma got himself involved in the suspension of executives in Eskom which led to the removal of three of them and they were replaced by Gupta associates. Furthermore, he refused to fill the position of Group Chief Executive Officer of Transnet for over two years because he wanted Mr Siyabonga Gama for that position and there is evidence heard by the Commission of a connection between Mr Gama and the Guptas.

113. On the evidence heard by the Commission there is absolutely no doubt that President Zuma did, indeed, instruct Minister Chabane to fire Mr Themba Maseko or move him from his position as DG and CEO of GCIS. There is also no doubt that in giving this instruction, President Zuma was giving effect to the wishes of the Guptas or was complying with their request or instruction to him to remove Mr Maseko because he had refused to co-operate with them. The factors set out in the next 17 paragraphs support this.

114. Mr Maseko did not ask to be removed from GCIS; in this regard it must be stated that Mr Maseko's evidence that he did not initiate his transfer was not challenged. Instead, it was corroborated by Mr Baloyi who said that Minister Chabane told him that Mr Maseko had not initiated the transfer.

115. It was not in the public interest to remove Mr Maseko from his position.

116. Mr Maseko's transfer was not related to any misconduct or allegation of misconduct or breach of contract of employment on his part.

117. Mr Maseko's transfer was not related to any poor or unsatisfactory performance of his duties.

118. Mr Maseko's transfer was not based on any legitimate operational requirements of GCIS or government.

119. Mr Maseko's transfer was not based on any agreement between himself and Mr Manyi.

120. In the meeting between Mr Ajay Gupta and Mr Maseko in October 2010 Mr Ajay Gupta had demanded that Mr Maseko should agree to use the whole of the government's R600 million advertising budget of the year to advertise in the Gupta-linked newspaper, The New Age, and Mr Maseko had rejected this demand.

121. Mr Ajay Gupta adopted a hostile or aggressive attitude towards Mr Maseko at their meeting when Mr Maseko rejected his demand.

122. Mr Ajay Gupta told Mr Maseko at their meeting that he should tell him if any Minister did not co-operate.

123. Mr Ajay Gupta made it clear to Mr Maseko that they (the Guptas) could summon any Minister who did not co-operate.

124. In a telephone conversation early in December 2010 Mr Ajay Gupta had threatened to report Mr Maseko to his seniors who, he said, would "sort Mr Maseko out" and replace him with someone who would co-operate with them.

125. As far as President's Zuma's call to Mr Maseko on the day that Mr Maseko was on his way to meet with Mr Ajay Gupta is concerned, the idea of that call must have been to convey the message to Mr Maseko that the Guptas enjoyed the support of the highest office in the land so that this could work as pressure on Mr Maseko to co-operate with

the Guptas; this has to be so because, Mr Maseko had not refused to meet with the Guptas, but, on the contrary he had agreed to meet with them. The Guptas would not have had a reason to ask Mr Zuma to intervene on their behalf. So the idea must have been to put some subtle pressure on Mr Maseko to co-operate with the Guptas.

126. By President Zuma's own admission, he and the Guptas were good friends.

127. Mr Hlungwane, Mr Simons and Mr Shingange, all of whom worked in the Presidency at certain times, all testified that they were told by Minister Chabane on different occasions that he had been instructed to remove Mr Maseko; the only person who could have instructed Minister Chabane to remove Mr Maseko was President Zuma.

128. President Zuma had an interest in the success of the media business of the Guptas.

129. Although President Zuma was the one who had the final power in law to remove or transfer Mr Maseko, he failed, when he testified before the Commission, to give a definitive answer to the question as to why Mr Maseko was removed from his position.

130. Mr Maseko was replaced by Mr Mzwanele Manyi who co-operated with the Guptas which was in line with the statement by Mr Ajay Gupta to Mr Maseko on 3 December 2010 that he (i.e. Mr Ajay Gupta) would report Mr Maseko to his seniors who would replace him with someone who would co-operate with them.

131. Mr Zuma's version that he did not instruct Minister Chabane to fire Mr Maseko or move him out of GCIS and that Minister Chabane may have requested President Zuma to approve Mr Maseko's transfer because there may have been an issue between Mr Maseko and Minister Chabane is a dishonest version. It is a fabrication by Mr Zuma to avoid accountability for a decision that he took. Mr Zuma falsely implicated Minister Chabane because he knew that Minister Chabane has passed on and will not be there

to refute his evidence. Mr Maseko said that he and Minister Chabane had never had any issues. Another witness also testified that Mr Maseko and Minister Chabane had a good relationship.

132. The finding that President Zuma gave Minister Chabane an instruction to fire Mr Maseko or move him out of GCIS is of great significance in understanding Mr Zuma's role in state capture and advancing the interests of the Guptas and his family at the expense of the interests of the people of South Africa. It shows how far he was prepared to go in order to advance the agenda of the Guptas. It will also become important later for other reasons including the question whether President Zuma gave instructions to Mr Bruce Koloane that he should facilitate the landing of the Gupta commercial aircraft at Waterkloof Air Force Base in 2013. President Zuma was prepared to throw his own comrade in the ANC, Mr Maseko, a well performing civil servant into the street just because he had refused to be party to a corrupt arrangement sought by the Guptas.

133. The fact that President Zuma was prepared to replace Mr Maseko with Mr Mzwanele Manyi as the DG or CEO of GCIS also shows how Mr Zuma operated. Mr Maseko was an excellent civil servant. His most recent performance assessment had been done about six weeks or at least the outcome of that assessment had been released six weeks before his removal. It had revealed that the panel that conducted his performance assessment had given him 114%.

134. The removal of Mr Maseko from GCIS came at great cost to the country. Mr Maseko, was one of the few government officials who was willing to stand up to the pressure exerted by the Gupta family. As the evidence presented before the Commission over three years showed time and again, there were far too few public servants with the integrity and courage of Mr Maseko.

The transfer of Mr Manyi to become CEO of GCIS

135. This was on 2 or 3 February 2011.

How the transfer of Mr Manyi to GCIS was effected

136. At the time of Mr Manyi's transfer into GCIS, Ms Neliswe Mildred Oliphant was the Minister of Labour. She had been appointed to this position with effect from November 2010, replacing Minister Mdladlana. She gave evidence at the Commission. Ms Oliphant does not appear to have had any engagement with Minister Chabane over the transfer of Mr Manyi to GCIS. Moreover, she testified that she had not formally signed any consent to such a transfer.[2004] If true (and we do not have any documentary evidence to the contrary or any good reason to doubt her truthfulness in this regard),[2005] this omission would have been irregular.

137. The transfer of Mr Manyi was handled by Minister Baloyi in consultation with Minister Chabane as Minister in the Presidency responsible for GCIS. He was at the same time dealing with Minister Chabane over the question of transferring Mr Maseko from GCIS to the DPSA. He seems to have no independent recollection of the documentation, other than what he recalled when shown the documents in the possession of the Commission. Other than what is reflected in those documents, the extent, if any, of his direct engagement with the President in the actual process of transfer remains unclear.

138. Mr Baloyi acknowledged that, if the facts regarding the transfer of Mr Manyi were as stated in Dr Lubisi's affidavit,[2006] discussed above in relation to the transfer of Mr

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[2004] Transcript 3 December 2019, p 82.

[2005] Compare Exhibit NN5-DB-043. Mr Baloyi was not asked whether (contrary to the testimony of Ms Oliphant) there was a formal release of Mr Manyi, or consent to his transfer by the Minister of Labour. There would have been little point in asking him, however, given his lack of specific recall in the absence of documentary reminders.

[2006] Exhibit NN5, p 319-321.

Maseko, then the transfer of Mr Manyi also did not follow due process: there was no Cabinet memorandum, no discussion by Cabinet and no decision taken by Cabinet on 2 February 2011 in relation to either transfer. There is no reason to doubt the correctness of Dr Lubisi's affidavit. Mr Baloyi said that, in that case, the "serious shock" that he had indicated previously when asked about the transfer of Mr Maseko would apply to both cases.[2007]

139. In the absence of "proof" of irregular removals or transfers, he declined to comment on the suggestion that irregular removals and transfers may be a way of facilitating state capture.[2008] He was not prepared, on the basis of the documents so far made available to him, to conclude on a balance of probabilities that the transfers of Mr Maseko and Mr Manyi were irregular. He said that in his involvement with the transfers of Mr Maseko and Mr Manyi the issue of the Guptas was never raised.[2009] He said he could not second-guess the decision of executive authorities. He said that no one had ever mentioned his name as being suspected of involvement in, or, benefitting from, state capture, corruption or fraud. He said that he was simply asked to deal with the process of transferring officials at the instance of Ministers to whom he provided support.[2010]

140. This narrow defence, however, does not address the question of his considerable involvement in handling the issue of Mr Manyi's status at the Department of Labour at the request of the Office of the President and in close consultation with Mr Manyi himself. The absence of proper documentation, in particular, of any reference whatsoever to the transfers in the Cabinet minutes of 2 February 2011, cannot be explained away – as has been fully discussed above. Minister Baloyi was engaged

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[2007] Transcript 3 December 2019, p 204-205.

[2008] Transcript 3 December 2019, p 206-207.

[2009] In the context of the question to which he was responding, "any other thing" is probably a reference to GCIS spending on TNA. Transcript 3 December 2019, p 205-206.

[2010] Transcript 3 December 2019, p 206.

directly in the final implementation of the transfers (for example co-signing the Presidential Minutes Nos. 32 and 33 dated 3 February 2011)[2011] either knowing that there had not yet been a Cabinet decision on the matter or not ascertaining whether or not there had been one.

141. Again in this context the question arises: If Mr Baloyi acted in ignorance, why was it so urgent that he act without checking? The probabilities are that he was responding to a Presidential demand for immediate implementation, whether communicated to him directly by President Zuma or by Minister Chabane. The evidence of the Cabinet minutes – the absence of any reference to the transfers – is very important. While some of the formal transfer documentation which exists could have been assembled later and back-dated (although that is not likely and they should rather be taken at face value), it would have been impossible to insert in the Cabinet minutes a decision that had not been taken, because a falsification in that regard would have been readily detectable by all participants.

142. Thus, as in relation to the transfer of Mr Maseko, it may be concluded on a balance of probabilities that Minister Baloyi acted in haste in effecting the transfer of Mr Manyi, without due attention to lawful and proper procedures, in order to assist in securing forthwith the practical outcome that the President required.

143. When Mr Manyi first testified at the Commission, he was asked about the circumstances under which he was told that he was being moved to GCIS.[2012] Mr Manyi said it was a few days before 3 February 2011. He and Minister Chabane had met at the Protea Hotel in Midrand. Mr Chabane had put to him two options, one being the position of CEO of GCIS and the other being the position of COO (Chief Operating Officer) in the

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[2011] Exhibit NN5, p 50-51.

[2012] Transcript 14 November 2018, p 90.

Presidency. He opted for the GCIS position because it was a horizontal move, whereas choosing the other position would have meant moving down a grade in public service rankings.[2013] Since Minister Chabane is deceased, it is not possible to verify this account, nor to reject it. Mr Manyi testified that he had not asked to be moved from his existing position as Director-General of Labour, although he had had a fallout with the (previous) Minister of Labour. That was Mr Mdladlana. Mr Manyi said that he was on special leave, awaiting disciplinary charges which were never brought; months had passed, and he saw the approach from Minister Chabane as trying to deal with the situation. The meeting had been very brief, and Minister Chabane was "telegraphic" in his communication of the two options.[2014] President Zuma never came into the account given by Mr Manyi in this regard.

144. Presenting it in this way was far from the whole truth, as the questioning on Mr Manyi's second appearance at the Commission and the subsequent evidence revealed. Mr Manyi had earlier proposed, through his attorneys, a transfer out of the Department of Labour. He had, in fact, been charged with various infractions while he was DG of Labour.[2015] There had been meetings, with Minister Baloyi at least, in which his transfer had been discussed and in which he had indicated his willingness to be transferred. He had asked President Zuma to intervene in his case, and it is highly likely that he was well aware of the desire of the latter to have him transferred to GCIS.

145. When asked whether Mr Chabane had understood that he was "on some suspension or special leave", or that a decision had been made to fire him, Mr Manyi said:[2016]

[2013]Transcript 14 November 2018, p 90-91. See also Transcript 7 November 2019, p 4.

[2014] Transcript 14 November 2018, p 91-92.

[2015] Transcript 6 November 2019, p 149-152.

[2016] Transcript 7 November 2019, p 95-96.

> "He spoke to me as somebody who is in the system, so if I was dismissed in the true sense of the word that discussion would not have happened, so in my view he spoke to me with the understanding that it is one of those fallouts and somebody is in suspension but still employed."

Mr Manyi said he was sure that Mr Chabane must have known that he and Mr Mdladlana had had a fallout, as it was public, but it was not an issue.

146. Mr Manyi said that, although he knew that Mr Maseko was the CEO of GCIS, he had no knowledge that Mr Maseko was to be transferred to another department.[2017] He said that his own consent to be transferred was conveyed verbally to Minister Chabane.[2018]

147. It is important to point out that the documentary evidence revealed that Minister Oliphant withdrew Mr Manyi's dismissal that had been effected by her predecessor, Minister Mdladlana, in order to make it possible for Mr Manyi to be transferred to GCIS. Ms Oliphant withdrew the dismissal but did not allow Mr Manyi to resume work as Director-General of the Department of Labour. She said that she was not prepared to have him in the Department of Labour because of what she had heard about him in the Department after her appointment as Minister of Labour. Without Ms Oliphant withdrawing that dismissal, a transfer could not have occurred.

Mr Manyi as DG of GCIS

148. After Mr Manyi was transferred to GCIS in February 2011, he held the position of DG in GCIS until August 2012.

149. During that period, GCIS made its largest ever monthly payment to the TNA. This occurred in March of 2012 and was just short of R6 million. The next largest spend ever

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[2017] Transcript 27 November 2018, p 33-34.

[2018] Transcript 27 November 2018, p 33-35.

made during a month to TNA was in December 2015 and it was for less than half the amount spent in March 2012.

150. This information was presented to the Commission by Mr Jan Gilliland on 10 September 2018.[2019] Mr Gilliland was the Director of Operations and Implementation at National Treasury when he gave evidence.

151. Mr Gilliland's evidence bundle included a slide presentation summarising the total spend of various government departments, including GCIS, with the TNA. The slides showed the total spend on the TNA during the period that Mr Manyi was DG of GCIS. This was reflected on page 26 of the slides presented during Mr Gilliland's evidence. The slide does not, however, enable one to add up the total amount spent during Mr Manyi's time at GCIS because the slide is presented as a bar graph and one cannot discern the precise amounts paid during each month for the purposes of calculating the total.

152. Ms Phumla Williams, who was the Acting DG in GCIS, provided the Commission with an affidavit after she had testified in 2018.

153. Ms Williams' evidence shows the following:

153.1. The TNA was launched at the end of 2010.

153.2. Its first year of business was, therefore, the year of 2011.

[2019] Transcript 11 September 2018, p 6, line 6.

153.3. During the year 2011 – 2012 (i.e. for the financial year from 1 March 2011 to 28 Feb 2012), and while Mr Manyi was DG of GCIS, GCIS spent R 6,329,082.18 on TNA.[2020]

153.4. That was the second highest amount paid to any media house during the period. GCIS spent the most on the Sunday Times during that year (R 8,479,450.54).[2021] The second highest spend was with TNA, at a time when TNA had no established readership nor certified circulation figures.

153.5. During the second year that Mr Manyi was DG of GCIS, GCIS spent a total of R8,230,218.31 with TNA.[2022] Mr Manyi was DG for half of this period because he left in August 2012, which is halfway through the financial year 2012/2013.

153.6. These two amounts paid to TNA by GCIS were not the highest annual amounts. R9,548,567.72 was paid to TNA in the financial year 2013/2014 and R 9,952,469.00 in the financial year 2014/2015.

154. When Mr Manyi testified before the Commission, he was asked about this media spend. In particular, he was asked about how GCIS had justified spending millions of Rands on a media business that had no established readership or certified circulation figures.

155. Mr Manyi never provided an adequate answer to this critical question. First, he endeavoured to contend that the comparison between the Sunday Times (which had the highest spend in 2011/2012) and TNA (which had the second highest spend in 2011/2012) was not a valid comparison because the Sunday Times was a "once in

[2020] Exhibit NN6, p 353.

[2021] Exhibit NN6, p 353.

[2022] Exhibit NN6, p 355.

seven day newspaper", whereas TNA was a five day newspaper.[2023] Second, when the evidence leader then asked for an acceptable comparison newspaper, such as the Daily Sun, and repeated her question about how it could ever be justified to spend these sums of money on a newspaper when there was no credible information about the target market of TNA, Mr Manyi deflected again.[2024] Finally, when pressed on this for a third time, Mr Manyi denied any accountability for the GCIS spend. He claimed that GCIS was required to act in accordance with the requesting department's wishes. He said that GCIS was merely "the enabler department".[2025]

156. Mr Manyi was correct that GCIS was an "enabler department" under his watch, but not in the sense that he meant it. GCIS was *an enabler of state capture* during Mr Manyi's tenure. Had it not been for the fact that Mr Manyi was moved in to replace Mr Maseko, the GCIS would likely have resisted the Guptas' incessant pressure on government departments to divert their media spend to their business.

157. Mr Maseko proved himself to be one of the foremost resistors of state capture. He stood up to the efforts of the Guptas, backed by the then President Zuma, to extract unjustified amounts from the public purse. He was summarily removed from his important position for his act of opposition. Had he remained in his position, it is unthinkable that he would have approved the payment of millions of Rands of public money on a media business with no verified readership and no credible circulation figures simply because a family with close ties to the then President demanded that he do so.

[2023] Transcript 7 November 2019, p 122.

[2024] Transcript 7 November 2019, p 122-126.

[2025] Transcript 7 November 2019, p 130.

158. In the sections that follow, the report sets out how three SOEs – Eskom, Transnet and SAA – fell victim to the Guptas' influence and diverted hundreds of millions of Rands to the TNA. Regrettably, they did not have resistors of the calibre of Mr Maseko.

ESKOM

159. The Commission heard oral evidence from five witnesses regarding the TNA contracts with Eskom.

159.1. Three were at Board level, namely Mr Zola Tsotsi (chair of the Eskom Board in 2011 until the end of March 2015);[2026] Mr Mark Pamenky (member of the Board from December 2014) and Mr Mafika Mkwanazi (non-executive director from June 2011 to December 2014).[2027]

159.2. Two were below Board level, namely Mr Pieter Pretorius (responsible for strategic marketing at Eskom) and Mr Chose Choeu (divisional executive responsible for marketing).

160. Mr Choeu was the Divisional Executive of Corporate Affairs from June 2010 until December 2018.[2028] Strategic marketing fell under his portfolio. In 2011 and 2012, Mr Choeu reported directly to the then CEO, Mr Brian Dames.[2029] Mr Tshepo Moreme (General Manager) reported to Mr Choeu. Mr Pretorius reported to Mr Moreme. Sponsorship was the responsibility of Strategic Marketing.[2030]

[2026] Transcript 23 January 2020, p 8, lines 8-13.

[2027] Transcript17 July 2020, p 157, lines 15-19.

[2028] Exhibit MM2, CAKC-001, para 1.2.

[2029] Transcript 29 October 2019, p 134, lines 11-20.

[2030] Transcript 29 October 2019, p 135, lines 6-8 and p 136, lines 8-12.

TNA contracts with Eskom

161. TNA concluded three contracts with Eskom:

161.1. On 13 April 2012 TNA concluded its first contract with Eskom[2031] for the provision of both advertising in the newspaper, in the amount of R4million, and sponsorship of six business breakfasts, in the amount of R7 185 628.74.[2032] The contract was concluded between TNA (represented by Mr Jacques Roux) and The Media Shop (as Eskom's agent).

161.2. On 5 November 2012 TNA concluded its second contract with Eskom.[2033] This time the contract was between TNA (represented by Mr Nazeem Howa), the Media Shop and Eskom itself (represented by Mr Choeu). The contract was for an additional four business breakfasts/briefings in the same 2012 financial year as the previous contract, for an amount of R4million.

161.3. On 30 April 2014 TNA concluded its third and final contract with Eskom.[2034] This contract was between only Eskom (represented by Mr Colin Matjila, the acting CEO) and TNA (represented by Mr Howa). This contract was for 36 business breakfasts/briefings, for an amount of R43 200 000. How the relationship between TNA and Eskom began is dealt with below.

[2031] Exhibit MM1, pp 144-149.

[2032] Exhibit MM1, p 142.

[2033] Exhibit MM1, p 189-191.

[2034] Exhibit MM1, p 193-202.

How the relationship began

162. On 22 March 2011 Mr Jacques Roux, from TNA, sent an email to Mr Choeu proposing a meeting to discuss Eskom advertising with TNA newspaper and setting out an "overview of the product".[2035] The email referred to a prior telephonic conversation between Mr Roux and Mr Choeu. In his response, Mr Choeu asked that a meeting be set up. He copied Mr Pretorius, head of strategic marketing at Eskom. Mr Pretorius says that this was the first time he had heard of TNA.[2036]

163. Mr Pretorius explained that the staff member responsible for communications at Eskom met with Mr Roux, but realised that the matter pertained to Mr Pretorius's role, and referred Mr Roux to him.[2037] Mr Pretorius explained that his role in "strategic marketing" involved marketing aimed at a specific problem or issue, such as energy saving at Eskom.[2038]

164. This seems to have caused a delay in anything further taking place with TNA for a number of months.

165. In addition, in a briefing note prepared by the Media Desk for Mr Dames, the CEO, on 10 June 2011, it was stated that the newspaper was marred in controversy. It had a mass resignation of staff because of its editorial policy and had close links to the Zuma family and the ANC.[2039] Mr Choeu admitted to knowing this information at the time.[2040] It also appears that Mr Dames would have been aware of this.

[2035] Exhibit MM1, p 117.

[2036] Exhibit MM1, p 117.

[2037] Transcript 29 October 2019, p 39, lines 11-14.

[2038] Transcript 29 October 2019, p 21, lines 6-20.

[2039] Exhibit MM2, p 15.

[2040] Transcript 30 October 2019, p 7 (line 1) – 8 (line 2).

166. Mr Choeu testified that on 1 August 2011, he had a meeting with Mr Atul Gupta, Mr Dames and Mr Roux.[2041] This was a pitch about the TNA to Eskom. Mr Choeu stated that Mr Dames agreed at the meeting that he would support TNA and made a commitment to do so.[2042] Without following the usual process, Mr Dames simply committed himself to contracting with TNA on behalf of Eskom.[2043]

167. Then, in September 2011 a TNA representative, whose name Mr Pretorius could not recall, contacted the corporate marketing manager of Eskom, Mr John McArdle, who reported to Mr Pretorius. He asked Eskom to support the TNA and the Business Breakfasts (also interchangeably referred to as "Business Briefings") on Morning Live on SABC 2.[2044]

168. Mr McArdle arranged a meeting with the representative, together with Mr Pretorius and his general manager, Mr Moreme, in order to discuss the TNA proposal for advertising and Eskom's participation in the Business Breakfasts.[2045] At the meeting, the TNA representative presented a proposal about Eskom sponsoring the Business Breakfasts. This was described as a breakfast to be held at a hotel in the city. SABC 2's Morning Live program would be broadcast from the venue. TNA sold tickets to the event and TNA would promote the business breakfasts through their newspaper, *The New Age*. The SABC also promised to promote the breakfasts with whichever celebrity or Minister

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[2041] Transcript 30 October 2019, p 8, lines 9-10.

[2042] Transcript 30 October 2019, p 10, lines 2-15.

[2043] Transcript 30 October 2019, p 13, lines 15-25.

[2044] Exhibit MM1, p 9-10, para 33.

[2045] Transcript 29 October 2019, p 41, lines 5-6 and p 43-44, lines 24-2.

would be attending.[2046] The proposal was that Eskom would sponsor this breakfast for R1million per breakfast.[2047]

169. Mr Pretorius testified that he declined the proposal immediately because one of the requirements for a sponsorship was that the event had to have a proven track record of success. This event had no history, no indication of circulation and no recognised brand association. He testified that he reported his views to Mr Choeu and thought the matter had been settled on that basis.[2048]

170. After this meeting, Mr Nazeem Howa, the CEO of TNA, met with Mr Choeu in Mr Cheou's office.[2049] Mr Pretorius was invited to the meeting where the breakfast briefings were discussed again and Mr Pretorius testified that he shared his concerns. Mr Howa then asked Mr Pretorius to leave the meeting, because they had other business to discuss, which he did.[2050]

171. During his testimony, Mr Pretorius said that, when he discussed his reservations with Mr Chowe, Mr Chowe said the following to him "Pieter it is an instruction. It comes from the Minister. Brian Dames had told us that you will do this."[2051] Mr Pretorius testified that he asked Mr Choeu to put this instruction in writing, but this was never done.[2052]

172. Mr Choeu denied that Mr Pretorius raised his concerns about the sponsorship deal with him.[2053] He testified that, while he did communicate to Mr Moremi and Mr Pretorius the

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[2046] Transcript 29 October 2019, p 44, lines 6-17.

[2047] Transcript 29 October 2019, p 44, lines 20-21.

[2048] Transcript 29 October 2019, p 45, line 8-46 (line 4).

[2049] Transcript 29 October 2019, p 50, lines 20-24.

[2050] Transcript 29 October 2019, p 51, lines 13-14 and p 52, lines 7-11.

[2051] Transcript 29 October 2019, p 51, lines 8-10. See also p 52, lines 18-22.

[2052] Transcript 29 October 2019, p 65, lines 5-20.

[2053] Transcript 30 October 2019, p 20, lines 1-11.

outcome of the meeting with Mr Dames, that Eskom must contract with TNA, Mr Pretorius never communicated any disquiet about this.[2054] Mr Choeu also testified that he never told Mr Pretorius that Mr Dames instructed him to conclude the contract with TNA because this had been an instruction from Minister Gigaba.[2055]

173. Mr Choeu's evidence appears inconsistent on this score because he conceded that he had a meeting with Mr Dames on 1 August 2011 where he made a commitment to contract with TNA and that he had then communicated to Mr Pretorius that there would be a contract with TNA.[2056] He conceded that he told Mr Pretorius that Mr Dames had told him Eskom must contract with TNA but he denied that he had said that this was in response to concerns from Mr Pretorius about the TNA contract.[2057]

173.1. Mr Pretorius was a frank and candid witness. He accepted responsibility for his role in the process and, as will be set out later, his role in misleading Parliament and the Public Protector about the justification for using TNA. He seemed genuinely anxious about TNA. He also did a presentation for, among others, Mr Choeu about why the TNA proposal should go through proper channels including the Sponsorship Committee in which he expressed grave doubts about TNA. His version is given further credence by the fact that he was excluded from the negotiations of the third contract after he gave this presentation.

173.2. On the other hand, Mr Choeu had, on at least two occasions, denied involvement in certain decisions (such as subscriptions to TNA and witnessing Mr Pretorius's presentation) and was then forced to admit that he was involved

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[2054] Transcript 30 October 2019, p 20, lines 11-25.

[2055] Transcript 30 October 2019, p 21, lines 11-25.

[2056] Transcript 30 October 2019, p 25 (line 21) – 26 (line 4).

[2057] Transcript 30 October 2019, p 29 (line 1) – 20 (line 3).

based on documentary evidence to the contrary. He was evasive at times and did not accept responsibility for his role in the continuing contracts with TNA. This included his role in removing the early termination clause from the TNA contract for R43 million.[2058] The forensic auditors and the lawyers who had evaluated the facts had found that he was the one who had removed the termination clause.

173.3. Mr Pretorius's version in this regard is more plausible and credible than Mr Choeu's version. It is very unlikely Mr Pretorius did not relay his concerns about TNA to Mr Choeu.

174. Former Minister Malusi Gigaba filed an affidavit with the Commission in response to this claim. He stated that he never gave such an instruction. He stated that such an instruction would have amounted to interference with operations and that was not something that he did.[2059] However, it must be pointed out that, even on Mr Kona's evidence in relation to SAA Mr Gigaba's advisor, Mr Siyabonga Mahlangu, regularly interfered in SAA operations. Mr Kona was the SAA Board member who was appointed as Acting GCEO of SAA after Ms Mzimela had resigned from that position in 2011 or 2012. Mr Mahlangu testified that all he did in relation to SOES including SAA when he was Mr Gigaba's advisor, he did in the course of his work as Mr Gigaba's advisor. Ms Mzimela also testified to a lot of interference in operational matters by Mr Mahlangu. So, Mr Gigaba's evidence that he would not have been involved in operational matters must be rejected. Mr Gigaba was prepared to do wrong for the Guptas or Mr Zuma. A number of incidents can be pointed out in support of this. His role in the process that led to the indefensible reinstatement of Mr Siyabonga Gama as CEO of TFR at Transnet, his role in the appointment of Mr Brian Molefe as Group CEO of Transnet in

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[2058] This is discussed in detail below.

[2059] Exhibit MM1, p 778, para 7.

circumstances where, by his own admission, he was a friend of the Guptas and, by Mr Brian Molefe's own admission, too, he (i.e Mr Brian Molefe) was a friend of the Guptas and he (that is Mr Gigaba) overlooked a better candidate, Dr Mandla Gantsho, who had scored higher points in the interview than Mr Molefe and decided to appoint another friend of the Guptas. That was a position that the Gupta-owned newspaper had stated (long before the position was advertised) would be occupied by Mr Brian Molefe. The role he played with regard to the Mumbai route that Jet Airways wanted to take away from SAA can also be referred to. How he was prepared to wait and make everybody wait for about two hours for representatives of Jet Airways to arrive at a meeting and keep quiet as the Chairperson of the meeting while a representative of Jet Airways unfairly attacked the SAA management as if he was in charge of the meeting until Mr Gigaba's deputy (Deputy Minister) intervened also supports this. Mr Gigaba was doing all this to send a subtle message of his support for the Jet Airways' position. In regard to evidence heard with regard to Denel, Mr Riaz Saloojee testified to his being introduced to Mr Gigaba at the Gupta residence where it is clear that the Guptas were using Mr Gigaba to send a subtle message to Mr Saloojee that they had his support and Mr Gigaba was allowing himself to be used by the Guptas in that way. Mr Gigaba's denial of that encounter between himself and Mr Saloojee at the Gupta residence is not credible. There should have been no reason for Mr Saloojee to make that story up.

175. Mr Pretorius testified that this response from Mr Gigaba was false. He explained that Mr Gigaba had interfered in Eskom's operations on many occasions. He stated that there would be no reason why Mr Dames or Mr Choeu would instruct him to enter into these contracts without an instruction from "somebody higher up".[2060] Mr Pretorius'

[2060] Transcript29 October 2019, p 53, lines 17-25.

evidence is in line with other evidence about Mr Gigaba's interference in operational matters.

176. On 20 March 2012 Mr Choeu emailed Mr Pretorius asking him to meet with Mr Roux "so you can close the deal on the TNA 49M Breakfasts as part of the Minister's National Campaign".[2061] Mr Pretorius explained that the 49M campaign was a campaign about energy saving (the population of South Africa being around 49million at the time) which was aimed at higher income groups (LSM 8-10), encouraging them not to waste energy.[2062]

177. Mr Pretorius asked for a proposal to consider in advance of the meeting which would deal with both the sponsorship of business breakfasts and advertising in the newspaper.[2063] Mr Pretorius explained that, while he still retained concerns about doing business with TNA, he was just carrying out the instruction that he had been given by Mr Choeu.[2064]

178. On 21 March 2012 Mr Mzwandile Radebe began being copied on emails between TNA and Eskom at Mr Radebe's Gmail address. Mr Radebe was the liaison between the Minister, the Department of Public Enterprises, on the one hand and Eskom, on the other. Mr Pretorius testified that he found this very unusual and that it was an indication to him that the instruction to work with TNA came from the top.[2065] Mr Radebe at that

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[2061] Exhibit MM1, p 133.

[2062] Transcript 29 October 2019, p 57, lines 1-20.

[2063] Transcript day, 29 October 2019, p 62, lines 1-21.

[2064] Transcript 29 October 2019, p 63, lines 2-4.

[2065] Exhibit MM1, p 131; transcript day 29 October 2019, p 64, lines 10-25 read with p 52, lines 15-20.

time was giving verbal orders to many of the SOEs and they were, according to Mr Pretorius, expected to do as he said or he would report them to the Minister.[2066]

179. Mr Roux and Mr Pretorius then met and Mr Roux presented a proposal for both advertising and sponsorship.[2067] Mr Pretorius asked Eskom's appointed media buying agency, Media Shop, to come up with a more palatable proposal as Mr Roux's proposal required far too large a spend. Media Shop also expressed concerns over the proposed contract but Mr Pretorius told them Eskom had to do this; it was an instruction.[2068]

180. On 27 March 2012 Mr Donald Liphoko of Media Shop sent an email to Mr Pretorius stating that Mr Moreme (referred to as "Kheepe") had impressed upon him the importance of the proposal with TNA and that Eskom had committed R10 million to the TNA, including business breakfasts and the newspaper advertising.[2069] This would involve R7 million for 6 business breakfasts over the period of a year as well as advertising spend.[2070]

181. Not long thereafter, on 13 April 2012, Eskom signed its first contract with TNA for over R10 million.

[2066] Transcript 29 October 2019, p 66, lines 1-10.

[2067] Transcript 29 October 2019, p 67, lines 20-24.

[2068] Transcript 29 October 2019, p 68 (line 1) – 69 (line 6).

[2069] Exhibit MM1, p 138 and transcript 29 October 2019, p 71, lines 2-11.

[2070] Transcript 29 October 2019, p 72 (line 1) – 73 (line 20).

The contracts were irregular

Proper procedure

182. In order to understand whether these contracts were unlawful and/or irregular, it is necessary to understand the legislative framework governing public spending at Eskom (and indeed Transnet and SAA) and the policy processes in place at the entity.

183. As to the legislative scheme, the following provisions are relevant:

183.1. Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

183.2. Eskom, Transnet and SAA are schedule 2 "Major Public Entities" under the PFMA.

183.3. Section 51(1)(a)(iii) of the PFMA[2071] provides that an accounting authority, in this case the Board of Eskom, must ensure that the public entity has and

[2071] Section 51(1)(a) of the PFMA provides:

"General responsibilities of accounting authorities

(1) An accounting authority for a public entity—

(a) must ensure that that public entity has and maintains—

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective; (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;"

maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

183.4. Section 51(1)(b)(ii) provides that the accounting authority must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.

183.5. The PFMA defines "fruitless and wasteful expenditure" as expenditure made in vain and which would have been avoided had reasonable care been exercised. It defines "irregular expenditure" as expenditure incurred in contravention of applicable legislation or as expenditure that is not in accordance with a requirement of any applicable legislation.

183.6. Section 56(1)(a) and (b) empowers the accounting authority to assign powers and duties for a public entity, in writing, to an official in that public entity or instruct an official to perform any of its duties.

183.7. Section 56(2)(a) provides that a delegation or instruction to an official is subject to any limitations and conditions the accounting authority may impose.

183.8. Section 57[2072] sets out the legal obligations of an official of a public entity. It provides that an official must:

[2072] Section 57 of the PFMA provides:

"Responsibilities of other officials

An official in a public entity—

(a) must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;

(b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;

183.8.1. ensure that the system of financial management and internal control established for that entity is carried out within the area of responsibility of that official;[2073]

183.8.2. be responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;[2074]

183.8.3. take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure;[2075] and

183.8.4. comply with the provisions of the PFMA including any delegations and instructions under section 56.[2076]

184. These responsibilities of the Board, as accounting authority under the PFMA, will become vital in understanding and evaluating the actions of the Board as set out below, particularly in respect of the third TNA contract. The Board must ensure there are internal financial controls in Eskom, that Eskom and its officials follow any policies set out to enhance transparency and competitive processes, and importantly, to ensure that it does not permit officials to make irregular expenditure and fruitless and wasteful

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(c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(d) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and

(e) is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility."

[2073] Section 57(a).

[2074] Section 57(b).

[2075] Section 57(c).

[2076] Section 57(d).

expenditure. Further – if any officials do so – the Board is required to ensure that disciplinary action is taken against such officials.

185. In addition to these responsibilities, the following provisions of the PFMA are also relevant:

185.1. Section 83(1) of the PFMA provides that an accounting authority for a public entity commits an act of financial misconduct if that authority wilfully or negligently fails to comply with sections 50, 51, 52, 53, 54 or 55 of the PFMA or makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

185.2. Section 83(2) provides that, if the authority is a board, then the members of the Board are individually and severally liable for any financial misconduct of the authority.

185.3. Section 83(3) provides that an official of a public entity to whom a power or duty is assigned in terms of section 56, commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.

185.4. Section 83(4) provides that financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member or person mentioned in (2) or (3).

185.5. Section 86(2) provides that an accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with sections 50, 51 or 55.

185.6. Regulation 33.1.1 of the Treasury Regulations provides that, if an employee is alleged to have committed financial misconduct, the accounting authority of the public entity must ensure that an investigation is conducted into the matter and, if confirmed, must ensure that a disciplinary hearing is held in accordance with the relevant prescripts.

186. As to the relevant processes and policies applicable at Eskom in regard to these matters, Mr Pretorius testified that, in so far as advertising was concerned, the process was as follows:

186.1. Eskom would prepare a briefing document with the particular issue that Eskom was seeking to advertise about. Eskom would then appoint a media buying agency through a transparent commercial process. The agency was responsible for designing a media buying strategy to meet Eskom's specific advertising needs as set out in the briefing document. The agency would conduct research and indicate which media tools were best designed to meet the target audience. They would prepare a media plan on which Eskom would sign off.[2077]

186.2. Mr Pretorius explained that the most important thing for Eskom to consider was "frequency" and "reach". The frequency is the number of times an advertisement would appear in a particular medium. The reach was the number and type of people that would be exposed to the advert in a particular medium. If one was looking to target particular "LSMs" (living lifestyle measurement),[2078] then the type of media selected had to reach this particular demographic.[2079]

[2077] Transcript 29 October 2019, p 24, lines 5-25.

[2078] Transcript 29 October 2019, p 58, line 5. Lower LSMs are poorer categories of people, LSMs 5-7 are "middle class" and LSMs 8-10 are higher income earners (transcript29 October 2019, p 57, lines 7-15).

[2079] Transcript 29 October 2019, p 25, lines 10-19.

The media buying agency was tasked with researching the reach of the medium. This would involve assessing the circulation of the newspaper.

186.3. Eskom had a policy that it would only deal with accredited publications whose viewership had been audited. This meant publications whose circulation figures the Audited Bureau of Circulation (*ABC*) had verified.[2080] The agency would assess the circulation and the price to assess the most cost-effective options and present a strategy document for Eskom to consider and approve.[2081] Mr Pretorius explained that it would be highly unusual for Eskom to spend on a medium where no market research had been conducted or verified.[2082]

186.4. While Eskom would try to support new entrants into the media market, it would do so with a small amount of support and then, once there had been some audit of the publication's circulation figures, Eskom would begin to give the publication more support.[2083]

187. Mr Pretorius testified that for sponsorship approval the process was different. He explained it in this way:

187.1. Sponsorship is a commercial transaction between the sponsor and the sponsorship property owner to secure some benefit for the sponsor. The sponsor would determine whether to enter the agreement based on an understanding that they would get more business through the sponsorship exposure. The sponsorship deal would also need to include advertising the fact

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[2080] Transcript 29 October 2019, p 27, lines 2-5.

[2081] Transcript 29 October 2019, p 25 (line 23) – 26 (line 15).

[2082] Transcript 29 October 2019, p 27, lines 6-10.

[2083] Transcript 29 October 2019, p 27, lines 16-21.

of the sponsorship – to "leverage" the sponsorship. Every R1 used for sponsorship, ordinarily requires R3 for the publicity surrounding it.[2084]

187.2. The process was different from advertising in that, instead of using an agency, Eskom had a sponsorship desk. Policy documents created by Eskom set out the criteria for sponsorship approval and the sponsorship desk would apply this policy to any proposal. If, on the criteria, the applicant scored more than 75%, then the request for sponsorship would go to the Sponsorship Committee for approval – provided there was a budget for it.[2085]

187.3. Once the sponsorship committee had approved the sponsorship, Eskom's marketing team would negotiate the responsibilities and the terms of the contract with the sponsorship property owner.[2086]

187.4. According to Eskom's sponsorship policy document applicable at the time,[2087] if any proposed sponsorship was over R50 000, it had to go to the Sponsorship Committee for approval. That was the Corporate Affairs Division Management Committee sitting as the Sponsorship Committee. Anything less than this amount could be approved by the relevant executive responsible for the sponsorship.[2088] The Sponsorship Committee had the power to approve sponsorship of up to R10 million but anything more had to be approved by the

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[2084] Transcript 29 October 2019, p 29, lines 13-25.

[2085] Transcript 29 October 2019, p 30, lines 14-23.

[2086] Transcript 29 October 2019, p 31, lines 7-15.

[2087] Exhibit MM1, pp 65-115.

[2088] Transcript 29 October 2019, p 33, lines 11-14.

Electricity Council. That is equivalent to the Board under the new dispensation.[2089]

187.5. The Policy Document also required a return on investment. This meant that the contract of sponsorship needed various safeguards to ensure impact and results – such as maintaining a particular audience reach. [2090]

187.6. Mr Choeu confirmed that the sponsorship policy at Eskom included various objectives that had to be met. These included increasing "brand equity" and a "tangible return on investment".[2091]

187.7. Mr Pretorius confirmed that it would be "very wrong" for a sponsorship to be approved without going through this process and meeting the criteria set out in the policy document.[2092] He could not recall any instances of any deviation from these processes prior to the TNA's proposals to Eskom.[2093]

Deviation from procedure

188. The first TNA contract, which was from 1 April 2012 to 31 March 2013 and covered six business breakfasts as well as advertising in *The New Age* newspaper, was irregular.[2094]

[2089] Transcript 29 October 2019, p 33 (line 20) – 34 (line 10).

[2090] Transcript 29 October 2019, p 35 (line 20) – 36 (line 10).

[2091] Transcript 29 October 2019, p 137, lines 10-15 and p 140, lines 18-25.

[2092] Transcript 29 October 2019, p 36, lines 13-20.

[2093] Transcript 29 October 2019, p 37, line 1-19.

[2094] Transcript 30 October 2019, p 99, lines 17-25.

188.1. Mr Pretorius confirmed that, while the proposal for the first contract from TNA claimed it had circulation of 100 000 people,[2095] this figure could not be verified because TNA was not registered with the ABC.[2096] TNA was never registered with ABC during its existence.[2097]

188.2. In deciding the cost of advertising, it was important to assess both circulation (the number of copies sold) and the actual readership (how many people actually read the paper).[2098] The ABC provided circulation figures, other measures, such as AMPS (All Media and Products Study), provided the results of behavioural studies that determine readership.[2099] TNA had neither.

188.3. Mr Pretorius testified that there was no available budget for this expenditure at the time the contract was concluded.[2100] Mr Choeu conceded there was no budget for the TNA contract when it was concluded.[2101] Therefore, he explained, this additional budget had to be sourced from the Investment and Capital Assurance Committee (ICAC)[2102] in June 2012. R6million was approved for such a purpose.[2103]

[2095] Exhibit MM1, p 124.

[2096] Transcript 29 October 2019, p 39, lines 18-25.

[2097] Exhibit MM1, p 752.

[2098] Transcript 29 October 2019, p 89, lines 18-25.

[2099] Transcript 29 October 2019, p 90, lines 1-5.

[2100] Transcript 29 October 2019, p 87, lines 15-20.

[2101] Transcript 30 October 2019, p 40, lines 15-20.

[2102] Transcript 30 October 2019, p 100, lines 20-25.

[2103] Transcript 30 October 2019, p 101, lines 1-5 and p 102, lines 1-25.

188.4. The sponsorship never went to the sponsorship committee, and it was not assessed under the sponsorship criteria in the policy. In other words, the policy requirements for sponsorship were not met.[2104]

188.5. Mr Choeu corroborated Mr Pretorius's statement that the Sponsorship Committee was supposed to approve all sponsorships but that this had not occurred with TNA and the sponsorship was never evaluated against the sponsorship criteria.[2105] He conceded that the contracts were, therefore, irregular and in breach of the sponsorship policy.[2106]

188.6. Mr Choeu also conceded that, as far as strategic marketing was concerned, the usual process would be that a problem was identified in the business – like load shedding – and they would approach a media agent to determine the best way of addressing that problem (the platforms and media to use to target the relevant audience). He agreed that it was not customary to go to Media Shop and stipulate that they must spend R6million on Business Breakfasts.[2107]

188.7. He also agreed that it was very unusual for Eskom to sponsor an enterprise in order for that enterprise to make profits. It was unusual to sponsor commercial companies or corporations for this purpose.[2108]

188.8. He conceded that this long-standing relationship ceased to be a sponsorship and became a commercial relationship which gave Eskom no value.[2109] Mr

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[2104] Transcript 29 October 2019, p 87 (line 23) – 88 (line 15).

[2105] Transcript 29 October 2019, p 148 (line 22) – 149 (line 18).

[2106] Transcript 29 October 2019, p 154 (line 10) – 155 (line 3).

[2107] Transcript 30 October 2019, p 52, lines 8-21.

[2108] Transcript 30 October 2019, p 56, lines 15-21.

[2109] Transcript 30 October 2019, p 59, lines 2-11.

Choeu testified that he began to form this negative view of TNA around the time of the Parliamentary questions about TNA and the negative media reporting. These two events meant that contracting with TNA could have reputational risks for Eskom. According to Mr Choeu, that was why Eskom did not contract with TNA for a year after the second contract (from April 2013 to May 2014).[2110]

188.9. Mr Choeu corroborated Mr Pretorius's evidence that there was a link in the timing between Minister Gigaba appearing on the business breakfasts on 12 April 2012 and the conclusion of the first contract.[2111] Mr Gigaba's response to this was that it was an internal matter for Eskom if it decided to sponsor a breakfast because he was speaking at the event.[2112] In addition, Mr Gigaba testified that there was value in the business breakfasts because they had "a large viewership" and were attended by "business people from different angles". However, as is set out below, the viewership of the SABC's Morning Live show presented limited value to the SOEs because the briefings themselves were not focused on the SOEs. Also, there were many opportunities for the SOEs to engage with "business people "without having to pay R1million a time to do so.

188.10. Mr Pretorius testified that he raised his concerns about the first contract with Mr Choeu on a number of occasions. He said that he was concerned not only about the fact that Eskom was receiving no value from the contract but also because internal governance procedures had been flouted.[2113] Mr Choeu's response was that he should not fight it because it was happening and must

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[2110] Transcript 30 October 2019, p 57 (line 20) – 59 (line 15).

[2111] Transcript 30 October 2019, p 63, lines 10-18.

[2112] Transcript 21 June 2021, p 202, lines 13-20

[2113] Transcript 29 October 2019, p 88 (line 20) – 89 (line 1).

just be done.[2114] Mr Pretorius testified that Mr Choeu would tell him not to make himself sick with worry about this issue because they were being forced or instructed to do this.[2115] As set out above, Mr Choeu denied this happened, but Mr Pretorius's version is more likely to be true for the reasons set out above.

189. The second contract, which was for four business breakfasts and no advertising,[2116] was for the same financial year as the first one and added four breakfasts to the existing six in the 2012 period.[2117]

189.1. Mr Choeu testified that, even though there was no budget for the first contract, in the same financial year TNA approached Eskom again and asked for four more business breakfasts to be sponsored for a further R4million.[2118]

189.2. Mr Pretorius testified that he had even greater concerns regarding the conclusion of this contract because, since the conclusion of the first contract, Parliament had started to raise queries about TNA.[2119]

189.3. Mr Pretorius explained that under the sponsorship policy, there had to be monitoring and evaluation of the success and effectiveness of a sponsorship before it could be entered into again, but there was no such evaluation done before the second TNA contract was concluded.[2120]

[2114] Transcript 29 October 2019, p 89, lines 1-4.

[2115] Transcript 29 October 2019, p 79, lines 6-25.

[2116] Transcript 29 October 2019, p 98, lines 20-25.

[2117] Transcript 29 October 2019, p 99, lines 1-8.

[2118] Transcript 30 October 2019, p 106 (line 21) – 107 (line 8).

[2119] Transcript 29 October 2019, p 89, lines 8-14.

[2120] Transcript 29 October 2019, p 94, lines 1-5.

189.4. The second contract was not concluded just between the Media Shop as Eskom's agent, and TNA (as was usual). This time, Eskom itself became a party. This was to ensure that TNA was paid on preferential and faster terms than usually paid by Media Shop to vendors.[2121]

189.5. Unlike the first agreement, this second agreement was tabled before the sponsorship committee. On 20 July 2012 Mr Choeu and one other member approved the proposal, while the eight other members all rejected it.[2122]

189.6. Mr Pretorius testified that he assumed the contract should, nevertheless, go ahead despite the resolution because of Mr Choeu's instructions in respect of TNA, generally, and in respect of the previous contract.[2123] This assumption was confirmed for Mr Pretorius, by the fact that it was Mr Choeu who signed the second contract.[2124] Mr Pretorius testified that he was asked to sign the second contract but refused to do so because, by that stage, there had been Parliamentary questions about the TNA, and the country generally (the media) was talking about TNA and its links to the Guptas, and Mr Pretorius did not want to be associated with it.[2125]

189.7. Mr Choeu accepted that the second contract was rejected by the Sponsorship Committee and that this gave him pause for thought. This was also the time when Parliament began raising questions about TNA.[2126] Mr Choeu testified, however, that even though the committee tasked with approving sponsorship

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[2121] Transcript 29 October 2019, p 94, lines 8-22.

[2122] Transcript 29 October 2019, p 94 (line 23) – 95 (line 18).

[2123] Transcript 29 October 2019, p 96, lines 11-24.

[2124] Transcript 29 October 2019, p 97, lines 4-9.

[2125] Transcript 29 October 2019, p 97, lines 11-21.

[2126] Transcript 30 October 2019, p 108, lines 9-15.

had rejected the proposal for a second contract, there was pressure from the CEO (Mr Dames) and the Minister, Mr Gigaba, to continue with the business breakfasts for the 49M campaign.[2127] Mr Choeu accepted that the second contract was, therefore, irregular.[2128] He admitted that he signed it anyway, even though it was irregular, because of pressure from the CEO associated with the Ministerial 49M campaign.[2129]

190. In between the second and third contracts, there was also an *ad hoc* TNA sponsorship that Eskom approved.

190.1. Mr Choeu testified that, even though, after the conclusion of the period of the second contract (April 2013), he had resolved not to do more business or enter into another contract with TNA because of the reputational problems it caused Eskom, the barrage of Parliamentary and media questions they were forced to answer, and the lack of value, he nevertheless approved an *ad hoc* business breakfast at which Minister Gigaba would be speaking. He says he did this, despite disagreeing with the decision, because it came from the chief executive's office and one does not disagree generally with such instructions.[2130]

190.2. Mr Choeu testified that he met regularly with Mr Dames, the CEO, who instructed him to agree to this additional ad hoc arrangement. He said he

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[2127] Transcript 30 October 2019, p 109 (line 19) – 110 (line 10).

[2128] Transcript 30 October 2019, p 111, lines 21-25.

[2129] Transcript 30 October 2019, p 111 (line 24) – 112 (line 10).

[2130] Transcript 30 October 2019, p 133 (line 22) – 134 (line 25).

thought it would be insubordination not to do what the CEO told him to do or even indeed to take issue with the instruction at all.[2131]

191. The third contract, to sponsor 36 TNA business breakfasts/briefings for R43.2million, was also irregular:

191.1. In April 2014 a new acting CEO was appointed, Mr Matjila.[2132] There was a restructuring in the governance of Eskom and Mr Choeu was no longer a member of Exco. Instead, he was a divisional head reporting to Ms Erica Johnson, who, in turn, reported to Mr Matjila.

191.2. Mr Choeu testified that Mr Matjila told Ms Johnson that he wanted Eskom to sponsor the business breakfasts in a long-term contract for three years.[2133] Ms Johnson told Mr Choeu that she had warned Mr Matjila that the business breakfasts were not a good idea and were not good for Eskom's reputation. Mr Matjila responded that he would deal with all of those problems – he had the authority to conclude the contract and Mr Choeu and Ms Johnson should just worry about creating the correct source document for auditing purposes.[2134]

191.3. Despite Mr Choeu testifying that he was uncomfortable with the sponsorship agreement, he nevertheless proceeded to prepare a proposal endorsing it.[2135]

191.4. In this third contract, the cost per breakfast event was going to be R1.2million (up from R1million). This increase had already been approved by the CEO

[2131] Transcript 30 October 2019, p 135 (line 18) – 137 (line 2).

[2132] Transcript 30 October 2019, p 142, lines 17-20.

[2133] Transcript 30 October 2019, p 143, lines 15-17.

[2134] Transcript 30 October 2019, p 144 (line 18) – 145 (line 2).

[2135] Transcript 30 October 2019, p 150 (line 22) – 151 (line 8).

when Mr Choeu put the proposal together.[2136] This was ultimately negotiated down to R1million per event, provided that Eskom agreed to more events – up to 36 business breakfasts.[2137]

191.5. Mr Choeu explained that it was as though Eskom was required to comply with whatever TNA wanted it to do and that it was the CEO that created this situation.[2138] He also confirmed that a lot of the pressure that the Eskom staff felt to endorse the contract was because they could see that the Gupta family were very powerful and had connections to the President – they could exert a strong influence.[2139]

191.6. Mr Choeu's proposal for the third TNA contract for R43million contained certain "key assumptions", including that the sponsorship of the business briefings contributed to an 87% awareness of the 49M campaign."[2140] However, during his questioning before the Commission, Mr Choeu admitted that the "study" that was conducted about consumer awareness pertained to the entire 49M campaign and not the business breakfasts.[2141] He conceded that the business breakfasts could have contributed anything between 1% or 20% - he did not know.[2142] He ultimately agreed that he should have removed this section from the proposal because it was not, in fact, possible to establish a causal link between the business briefings and awareness of the campaign.[2143]

[2136] Transcript 30 October 2019, p 153, lines 16-24

[2137] Transcript 30 October 2019, p 154 (line 5) – 155 (line 1).

[2138] Transcript 30 October 2019, p 156, lines 5-14.

[2139] Transcript 30 October 2019, p 156 (line 21) – 157 (line 4) and p 158, lines 3-19.

[2140] Transcript 30 October 2019, p 163, lines 18-25. See also exhibit MM42, p 41.

[2141] Transcript 30 October 2019, p 165, lines 1-10.

[2142] Transcript 30 October 2019, p 165, lines 12-20.

[2143] Transcript 30 October 2019, p 171 (line 20) – 172 (line 8).

191.7. The proposal concluded that the use of this sponsorship tool had produced tangible results that ought to be supported.[2144] Mr Choeu agreed that the 87% figure – which he admitted should not have been included – was there to support this conclusion of "tangible results".[2145] He confirmed this conclusion was what the CEO wanted him to advance in the proposal.[2146]

191.8. Mr Choeu acknowledged that at the time of writing this proposal he was against the TNA and the sponsorship.[2147] He also accepted that he should not have signed a document that did not reflect his views. He justified his conduct on the basis that "in Corporate that's how we do it".[2148] He added that his position was clear that his division did not want to attend the breakfasts; they did not have the money to do it and that the CEO should take charge of it.[2149]

191.9. After the second contract had been concluded, Mr Pretorius prepared a presentation that motivated for the sponsorship contract to serve before the Sponsorship Committee before the contract was approved.[2150]

191.10. The presentation stated clearly that the sponsorship was not recommended because it did not meet the minimum requirements for sponsorship; there was reputational risk; and circulation could not be verified.[2151]

[2144] Exhibit MM2, p 42.

[2145] Transcript 30 October 2019, p 174, lines 18-25.

[2146] Transcript 30 October 2019, p 175, lines 1-4.

[2147] Transcript 30 October 2019, p 175, lines 6-12.

[2148] Transcript 30 October 2019, p 177, lines 1-24.

[2149] Transcript 30 October 2019, p 178, lines 21-23.

[2150] Transcript 29 October 2019, p 100, lines 13-16. The presentation is at Exhibit MM1, p 754.

[2151] Exhibit MM1, pp 766-767.

191.11. However, Mr Pretorius said in the presentation that if, despite these problems, Mr Choeu was of the view that the sponsorship should proceed anyway for "strategic reasons", then it should at least follow the process of being passed by resolution before the correct body. In this case, this was the "CAD Manco" [2152] (the Corporate Affairs Division Management Committee) which played the role of the Sponsorship Committee.[2153]

191.12. Mr Choeu did not present this to the Sponsorship Committee (CAD Manco).[2154] The matter was then dealt with directly by Mr Choeu and the acting CEO, Mr Matjila. It was never submitted to, nor approved by, the Sponsorship Committee (CAD Manco).[2155] This contract therefore also failed to comply with the policy requirements for sponsorships devised by Eskom.

191.13. The negotiations for the contract were concluded between Mr Howa (and his sales people) and Mr Choeu. Mr Pretorius was no longer involved in the discussions around TNA.[2156]

191.14. The third contract was between Eskom and TNA directly – Media Shop was no longer involved. Mr Pretorius said that he was excluded from discussions about the contract, presumably because he had been vocal about his opposition to it.[2157]

[2152] Transcript 29 October 2019, p 103, lines 9-23.

[2153] Transcript 29 October 2019, p 31, lines 19-25.

[2154] Transcript 29 October 2019, p 104, lines 1-10.

[2155] Transcript 29 October 2019, p 106, lines 1-3.

[2156] Transcript 29 October 2019, p 100, lines 8-12.

[2157] Transcript 29 October 2019, p 105, lines 1-23.

191.15. Mr Pretorius explained that the contract was for R43 million, which was more than *the entire marketing budget of Eskom*.[2158] There was simply no accommodation made for it in the Eskom budget.[2159]

Mr Matjila was not authorised to sign the third contract

191.16. The contract was ultimately signed by Mr Matjila.[2160] Mr Choeu testified that he was aware that a sponsorship over R3 million had to be approved by Eskom's board.[2161]

191.17. There was a report compiled by Sizwe Ntsaluba Gobodo (SNG), an auditing and forensics firm, which concluded that Mr Matjila, as acting CEO, exceeded his authority in concluding the contract.[2162]

191.18. A law firm, Ledwaba Mazwai, confirmed these findings and concluded that the contract was unlawful and irregular insofar as there was no budget approved for it and Mr Matjila's delegation of authority did not cover contracts of R43 million.[2163]

191.19. Ledwaba Mazwai's report also concluded that Mr Matjila had breached various legal obligations in signing the contract, including his fiduciary duties to Eskom,

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[2158] Transcript 29 October 2019, p 105, lines 1-23.

[2159] Transcript 29 October 2019, p 105, lines 23-25.

[2160] Transcript 29 October 2019, p 106, lines 4-5.

[2161] Transcript 30 October 2019, p 181, lines 15-21.

[2162] Transcript 29 October 2019, p 231, para 4.61. The report was dated 6 November 2014 (Exhibit MM1, pp 208-659).

[2163] Exhibit MM1, p 190, para 1.4.3.1.

delegated duties of the accounting authority under the PFMA, and the duties of an official of a public entity under the PFMA.[2164]

No termination clause

191.20. The report also found that the agreement had been concluded without a termination clause, which was very unusual. Mr Pretorius explained that, because of the volatility of the Eskom business and budget, they had to have an "enabling" contract, which allowed Eskom to exit the contract and not be bound to use advertising if it did not wish to.[2165] The report found that it was Mr Choeu who was responsible for removing that clause, to the detriment of Eskom, and that disciplinary action should be taken against him.[2166]

191.21. The Commission's investigations established the following:

191.21.1. On 24 April 2014 Mr Choeu sent a copy of the third sponsorship contract to Mr Matjila.[2167] Prior to this, the contract had been reviewed by the Eskom lawyers and certain changes had been made,[2168] one of which was in clause 2.2 where an exit clause had been inserted. It stated "Eskom reserves the right to withdraw its sponsorship at any time in the event of a breach by TNA Media of any of the terms of this agreement . . . or for any other reason on 30 days written notice to TNA."[2169]

[2164] Exhibit MM3, pp 185-187.

[2165] Transcript 29 October 2019, p 107, lines 14-23.

[2166] Exhibit MM1, pp 187-189.

[2167] Exhibit MM2, p 51.

[2168] Transcript 30 October 2019, p 185, lines 11-18.

[2169] Exhibit MM2, p 54. See also clause 11.2 on p 59.

191.21.2. Mr Choeu testified that he advised Mr Matjila that, because the contract was in excess of R3 million, there was a process that had to be followed. That was that it could not just be approved by Mr Matjila, but had to be approved by the Chief Executive in consultation with Exco. Also, it had to be subject to the approved budget.[2170]

191.21.3. On 29 April 2014 Mr Howa wrote to Mr Choeu and said that the draft contract was different to "the one agreed between us previously".[2171] He had a problem with the exit clause that allowed Eskom to exit the contract on notice (i.e. without breach) and stated "I am sure this is an oversight in drafting and is easily correctible. After which I would be happy to receive a corrected version."[2172]

191.21.4. Mr Choeu acknowledged in evidence that this was a key protection for Eskom and certainly not an "oversight" in drafting.[2173] Mr Choeu forwarded the email to the legal team, including Mr Mohamed Adam, the Senior General Manager for Legal and Compliance in Eskom, and asked them to respond.[2174] Mr Adam responded, "Chose, you need to make a call based on commercial need. It was not an oversight. It was deliberately drafted to allow for cancellation on 30 days' notice. I would recommend retaining our wording."[2175]

[2170] Transcript 30 October 2019, p 190 (line 19) – 191 (line 25).

[2171] Exhibit MM2, p 67.

[2172] Transcript 30 October 2019, p 201, lines 10-20.

[2173] Transcript 30 October 2019, p 201 (line 23) – 202 (line 2).

[2174] Exhibit MM2, p 67.

[2175] Exhibit MM2, p 80.

191.21.5. Mr Choeu testified that, after this he *would have* informed the CEO about this and would have responded to Mr Howa to inform him that this clause was what Eskom wanted.[2176] However, this is not supported by the correspondence. Instead, Mr Choeu responded a couple of days later, on 2 May 2014. In this email to Mr Matjila, he said that the parties had reached agreement on most clauses but TNA did not want Eskom to include the exit clauses on 30 days' notice – he quoted the clauses. He then said, "You will notice that they have removed the clause from both signed versions of the contracts."[2177]

191.21.6. The contract itself said that it was signed by Mr Matjila for Eskom on 30 April 2014. It was witnessed by Mr Choeu on that same date.[2178] When confronted with this during his evidence, Mr Choeu then claimed that he must have told Mr Matjila about the termination clause verbally sometime before 30 April 2014.[2179]

191.22. It is not clear precisely what went on between Mr Adam's response, the signing of the contract, and the email from Mr Choeu to Mr Matjila two days thereafter. However, it is clear that Mr Choeu knew about the removal of the termination clause because of Mr Adam's email to him indicating that it should be retained to protect Eskom. On Mr Choeu's version, he communicated this to Mr Matjila at some point before Mr Matjila signed the contract (albeit that the written record of this notification occurred after the contract had in fact been signed). It is, therefore, fair to conclude that at least Mr Choeu knew that the critical clause had been omitted. In so far as Mr Matjila is concerned, if he signed the contract

[2176] Transcript 30 October 2019, p 205, lines 4-7.

[2177] Exhibit MM2, p 83.

[2178] Exhibit MM2, p 114.

[2179] Transcript 30 October 2019, p 213, lines 1-9.

without knowing that the clause had been removed, then he committed Eskom to a contract without properly vetting it and ensuring that it adequately protected Eskom. If Mr Matjila did know that the provision had been removed, then he knowingly acted against Eskom's best interests. In any event, both he and Mr Choeu concluded this contract with TNA for R43 million at a time when TNA was mired in controversy, questioned by Parliament and the Public Protector, and the contract offered Eskom no verifiable value.

191.23. Mr Choeu testified that he had no idea the SNG report made findings against him in this regard or that they made recommendations about the taking of disciplinary action against him. He confirmed that no such disciplinary action was ever taken against him for this.[2180]

The contracts constituted fruitless and wasteful expenditure

192. The business briefings/breakfasts would involve a Minister or official appearing at the breakfast. The most exposure that Eskom gained from these breakfasts was some opportunity to display its branding at the breakfast.[2181] This included hanging some banners. While Eskom would be given an opportunity to speak, this would not be on air. The Minister appearing on the show would not discuss Eskom, energy efficiency or the 49M campaign at all. Mr Pretorius testified that there would not be value to Eskom in spending money on such an event and it "did not make sense" to him.[2182]

193. Mr Pretorius explained that it was not even the Eskom logo or colours that were displayed, but, rather, the 49M logo, with different colours.[2183] Because the banners and

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[2180] Transcript 30 October 2019, p 215, lines 4- 25.

[2181] Transcript 29 October 2019, p 73, lines 15-25.

[2182] Transcript 29 October 2019, p 74 (line 3) – 75 (line 12).

[2183] Transcript 29 October 2019, p 75, lines 20-25.

the show provided no context for the logo, market research showed that many people thought 49M was a radio station and had no association with Eskom or energy saving.[2184]

194. In addition, the Morning Live show was not even aimed at or watched by the target audience for the 49M campaign because those people would have already been at work at that time.[2185] Mr Pretorius therefore testified that he would not have paid R1million for a breakfast briefing would have negotiated a totally different package but was "forced" to agree to this one.[2186]

195. Mr Pretorius compared this event to the "POP17" that the Mail and Guardian had hosted and for which Eskom had paid only R300 000 as a sponsor. That event had at least discussed sustainability and topics relevant to Eskom's interests. When this was compared to the TNA business breakfasts, it made no financial sense for Eskom to spend over R1million on the breakfasts.[2187]

196. Mr Pretorius explained that all Eskom would get for this R1million was two tables of 10 people at the event. He said the reputation of the breakfasts and TNA was so bad that they eventually struggled to fill those seats. Eskom would pay for the costs of the event – the venue hire, décor and food (a simple breakfast). Mr Pretorius explained that the rest of the tables were sold by TNA to make further money. Accordingly, the costing charged to Eskom made no sense. If the money was not going to paying the costs of the event and TNA was selling further seats to make profits, where was Eskom's

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[2184] Transcript 29 October 2019, p 76, lines 1-7.

[2185] Transcript 29 October 2019, p 76, lines 9-22.

[2186] Transcript 29 October 2019, p 76 (line 24) – 77 (line 4).

[2187] Transcript 29 October 2019, p 77, lines 10-25.

sponsorship money going? Eskom was, after all, spending public money.[2188] In fact, TNA was not even required to pay SABC 2 for using its time on Morning Live.[2189]

197. Mr Pretorius also explained that, if they wanted to get a message out to the public on load shedding, it would have been a matter of public interest and they could have just called a press conference for free.[2190]

198. Mr Choeu confirmed in his evidence that, on a previous occasion, the SABC had aired a segment where they had followed the Minister around to people's houses and watched him change a lightbulb to a more energy efficient option. This was directly related to the 49M campaign and it was aired for free by SABC.[2191]

199. In so far as the reach of the TNA's newspaper circulation was concerned, when TNA claimed to have a distribution of 100 000, this was simply how many copies of the newspaper it printed. TNA claimed to sell 39 000 of these and the rest were dropped off for free at various SOEs.[2192] Media Shop determined that TNA was only reaching 0.5% of the target LSMs of the 49M campaign (LSMs 6-10).[2193]

200. The Media Shop also researched, using estimates of readership (circulation figures not being available), that the cost to reach one person under TNA was R317 whereas the cost per person with Business Day, for example, was R276, 47.[2194] Accordingly, the publication also did not provide value for money as compared to other publications.

[2188] Transcript 29 October 2019, p 78 (line 2) – 79 (line 6).

[2189] Transcript 29 October 2019, p 89, lines 3-6.

[2190] Transcript 29 October 2019, p 80, lines 9-23.

[2191] Transcript 29 October 2019, p 68, lines 15-21.

[2192] Transcript 29 October 2019, p 90, lines 7-20.

[2193] Transcript 29 October 2019, p 92, lines 13-18. See also Exhibit MM1, p 18, para 59.3.

[2194] Exhibit MM1, p 18 and transcript 29 October 2019, p 93, lines 1-10.

201. Mr Pretorius said that, as a marketer, he did not believe that Eskom derived any benefit from these events or the advertising and there were no verified circulation figures from which to assess such value.[2195]

202. Mr Choeu stated in his affidavit to the Commission that the business breakfasts by TNA yielded a tangible return on investment because it allowed Eskom to obtain 2.5 hours broadcasting on SABC 2 which it otherwise would not have.[2196] However, in his oral testimony, he conceded that it was only 57 minutes and that Eskom did not actually get this time allocated to broadcasting Eskom-related matters. He ultimately conceded that there was no basis to say that Eskom obtained substantial airtime.[2197] He also conceded there was no basis to say there was any tangible return on investment because such an analysis was never done – he simply made an "assumption".[2198]

203. Mr Choeu confirmed during his evidence that the contracts were concluded without making any assessment as to the value that could be extracted from the commitment.[2199] Despite having no evidence for this, Mr Choeu claimed he did believe that TNA would have some potential value in the future, but that it became apparent that it could not deliver on this potential and it had a bad reputation – this was in 2012, when the first Parliamentary questions began.[2200]

204. Mr Choeu did not consider it his responsibility to worry about wasteful expenditure of public funds. He conceded that this was his concern under the first two contracts, but not the third as the CEO took over this responsibility; it was not the responsibility of his

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[2195] Transcript 29 October 2019, p 86, lines 10-25 and p 87, lines 1-15.

[2196] Exhibit MM2, p 3, para 3.2, bullet 3.

[2197] Transcript 29 October 2019, p 141 (line 10) – 143 (line 19).

[2198] Transcript 29 October 2019, p 144, lines 1-10.

[2199] Transcript 30 October 2019, p 71 (line 25) – 72 (line 3).

[2200] Transcript 30 October 2019, p 77, lines 2-4 and p 78, lines 1-25.

division. In respect of the third contract, he believed this was only Exco's role and not his.[2201]

205. This evidence clearly shows that there was no or negligible value for Eskom in sponsoring the TNA business breakfasts. It also shows that the advertising spend for *The New Age* newspaper was unjustified and its effectiveness could simply not be measured – save that its cost of reach per person was far higher than its competitors.

206. As will be set out in greater detail below, the Board of Eskom, when called to ratify the third TNA contract (which was worth R43 million) did not at any point evaluate the commercial value of the contract. The only thing that the Board of Eskom did do was to stipulate that Eskom must "extract maximum value" from the contract. However, Mr Pretorius explained that the Strategic Marketing Department, which would have been charged with this responsibility, did nothing to extract value from the contract.[2202] Mr Pamensky, a member of the incoming Eskom Board that passed this resolution also admitted that the Board never followed up to make sure this ever happened.[2203]

Ratification of the third contract

<u>"Compliant" facilitator CEOs</u>

207. Mr Zola Tsotsi testified that he had no knowledge of the first and second TNA contracts; nor the correspondence between Parliament and Eskom or with the Public Protector. In fact, he said that Mr Dames gave him the impression, when he joined Eskom in August 2011, that Eskom was already involved in a contractual relationship with TNA

[2201] Transcript 30 October 2019, p 179, lines 12-15. Then p 179 (line 25) – 180 (line 25).

[2202] Transcript 29 October 2019, p 108, lines 23-25.

[2203] Transcript 31 October 2019, p 82 (line 19) – 83 (line 5).

and that the subsequent contracts were "renewals", including the third contract for R43 million – even though this occurred after a gap of a year.[2204]

208. Mr Tsotsi testified that, when Mr Dames left as CEO, the Board wanted to appoint Dr Steve Lennon as the interim or acting CEO and to restructure the business of Eskom. Mr Tsotsi got approval from Minister Gigaba for this appointment and Dr Lennon had agreed. Then Minister Gigaba called Mr Tsotsi and shouted at him for trying to appoint a white person when there was a pending general election. Mr Tsotsi said that Mr Gigaba said in effect that appointing a white person would have resulted in the ANC losing support. Mr Tsotsi testified that Minister Gigaba was "irate" and he suspected that someone had put him up to saying this. He said that he had known Mr Gigaba for a long time and the two of them had had a good relationship. Mr Tsotsi said that it was uncharacteristic of Mr Gigaba to speak to him the way he did on that occasion. Thereafter, the Minister instructed Mr Tsotsi to stop the restructuring efforts until a CEO was appointed and he requested that Mr Matjila be appointed as the acting CEO.[2205] In his testimony before the Commission, Mr Gigaba denied that he had been angry during his discissions with Mr Tsotsi or that he had changed his mind. However, he did confirm that he was against the appointment of Dr Lennon because he wanted to promote the transformation agenda and therefore proposed Mr Matjila.[2206] In this connection I believe Mr Tsotsi's evidence and prefer it to that of Mr Gigaba. There appears to be no reason why Mr Tsotsi would have fabricated this story about Mr Gigaba. Mr Tsotsi seemed to remember the occasion very well.

209. Shortly after Mr Matjila had joined Eskom as the acting CEO, he approved the third TNA contract which did not have the termination protection clause that Eskom would usually

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[2204] Transcript 23 January 2020, p 10 (line 1) – p 22 (line 3).

[2205] Transcript 23 January 2020, p 27 (line 20) – 30 (line 24).

[2206] Transcript 21 June 2021, p 215, lines 11-25

include in such a contract. A complaint about the third contract was lodged with the Audit and Risk Committee of Eskom. As a result, an investigation was launched. [2207]

210. During the investigation it appeared that Mr Matjila had been improperly attempting to influence and communicate with the team at Sizwe Ntsaluba Gobodo (*SNG*) that was investigating the matter. For example, he sent an email to one of the investigators asking for details about the investigation. Mr Tsotsi testified that he had no knowledge of this but it was surprising, given that Mr Matjila was the subject of the investigation.[2208] According to Mr Tsotsi, it would not have been appropriate for Mr Matjila to involve himself in an investigation in this way when he was the subject of the investigation.[2209]

211. Mr Tsotsi explained that the third contract came to the Board's attention through a whistle blower who approached the Audit and Risk Committee (ARC) and claimed that Mr Matjila had not followed proper procedure in concluding the R43 million contract.[2210]

212. Before approaching the Board, the ARC reached the conclusion that the contract was irregular and that they required a forensic audit to establish whether this was the case.[2211] SNG was appointed as the audit firm.[2212]

213. Mr Tsotsi testified that, while the investigation was going on,[2213] Mr Tony Gupta called him and asked to see him at the Sahara offices in Midrand. Mr Tsotsi went to the meeting. He said that at the meeting, Mr Gupta expressed a concern about the investigation into Mr Matjila's signing of the TNA contract and wanted Mr Tsotsi to "make

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[2207] Transcript 23 January 2020, p 25, line 11-20.

[2208] Exhibit MM6, p 218. Transcript 23 January 2020, p 36 (line 3) – 37 (line 15).

[2209] Transcript 23 January 2020, p 38, lines 4-10.

[2210] Transcript 23 January 2020, p 25, line 11-20.

[2211] Transcript 23 January 2020, p 35, lines 17-25.

[2212] Transcript 23 January 2020, p 36, lines 1-2.

[2213] Transcript 23 January 2020, p 44, lines 13-14.

it go away". Mr Tsotsi said that Mr Tony Gupta said that the investigation was impeding the conclusion of the contract.[2214] Mr Tsotsi testified that he told Mr Gupta that he did not have the authority to stop the investigation. He testified that Mr Gupta was visibly upset and remarked that Mr Tsotsi was not interested in helping him.[2215]

214. Despite Mr Tsotsi's claim that he refused to help Mr Gupta, on 16 October 2014, Mr Tsotsi instructed the company secretary of Eskom to write to SNG instructing it not to release its report on the TNA contract until he had first spoken to SNG's chairman and CEO.[2216] Mr Tsotsi claimed that this was because Mr Matjila felt he was not getting a fair treatment by Eskom in this investigation and Mr Tsotsi wanted to speak to SNG and prevent litigation against Eskom in this regard.[2217] However, in the light of the request from Mr Gupta, this conduct on Mr Tsotsi's part seems suspicious, particularly because later in the year, Mr Tsotsi was one of only two members of the Board who were allowed to be part of the next Board of Eskom. If the Guptas were too unhappy with him, they would not have allowed him to go to the next Board and be its Chairperson.

215. On 29 October 2014 the Public Protector wrote to Mr Tsotsi. The letter stated that the Public Protector had read in the media that Mr Matjila had signed a R43 million contract with TNA. The letter stated that the Public Protector was dismayed to see the contract was concluded despite the fact that she was investigating the legality of the other two TNA contracts. This was particularly so in circumstances where the contract was concluded against internal legal advice and was in excess of the sponsorship budget. She implored Mr Tsotsi, in the interests of corporate governance, transparency and

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[2214] Transcript 23 January 2020, p 41 (line 20) – 42 (line 25).

[2215] Transcript 23 January 2020, p 43, lines 5-17.

[2216] Exhibit MM6, p 221.

[2217] Transcript23 January 2020, p 40, lines 1-19.

accountability, to hold the new contract in abeyance pending the release of her provisional report in respect of the first two TNA contracts at Eskom.[2218]

216. On 31 October 2014 a new CEO, Mr Tshediso Matona, was appointed.[2219] Mr Matjila was then removed as acting CEO and reverted to serving Eskom only in the capacity of a member of the Board.[2220] Mr Matjila resigned from the Board in December 2014.[2221]

217. In his evidence, Mr Tsotsi denied that Mr Matjila's removal had anything to do with the TNA contract or the letter from the Public Protector.[2222]

218. On 7 November 2014 the ARC sent the SNG report to the Board.[2223]

219. The key conclusions of the SNG investigation report were that the contract was irregular because it did not fall under Mr Matjila's delegation of authority and that it was a sponsorship and not an investment. The guidelines set out for sponsorship agreements had not been followed. In addition, the report found that the early termination clause had been removed against the advice of the legal department at Eskom.[2224] The report found that Mr Choeu and Mr Matjila had been responsible for the removal of the clause.[2225]

220. On 24 November 2014 there was a Board meeting.[2226] At the meeting the Board discussed the findings of the investigation that the R43 million contract was irregular

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[2218] Exhibit MM6, pp 364-365.

[2219] Transcript 23 January 2020, p 49, lines 8-24.

[2220] Transcript 23 January 2020, p 50, lines 7-10.

[2221] Transcript 23 January 2020, p 50 (line 16) – 51 (line 3).

[2222] Transcript 23 January 2020, p 50, lines 1-8.

[2223] Transcript 23 January 2020, p 51, lines 12-15. The SNG report appears in exhibit MM6, p 233.

[2224] Transcript 23 January 2020, p 56, lines 4-22.

[2225] Transcript 23 January 2020, p 57, lines 1-12.

[2226] Exhibit MM3, p 336.

and, therefore, needed to be reported in the Eskom financial statements. The auditors addressed the Board on what steps had to be taken to address the irregularity in those statements.[2227] This meeting was held to determine how to deal with the irregularity in the interim financial statements.[2228]

221. During the meeting Mr Tsotsi raised the fact that he had received a letter from Mr Matjila complaining about the SNG investigation and making allegations against the financial director of Eskom, Ms Tsholofelo Molefe.[2229] Ms Molefe had queried the contract around the time of its conclusion. In an email of 7 May 2014, she had raised the issue that she had understood that the contract was going to be for a shorter duration with fewer breakfast briefings in order to be aligned with Eskom's sponsorship strategy. She noted in the email that the budget had not been approved for the contract.[2230]

222. Mr Tsotsi testified that one of the recommendations from the SNG report was that Eskom should obtain a legal opinion on the disciplinary action Eskom should take against Mr Matjila and Mr Choeu, as well as the company's position in respect of the contract.[2231] The Board therefore instructed a law firm, Ledwaba Mazwai, to provide an opinion on the legal effects of Mr Matjila's conduct in regard to the third TNA contract.

223. The next Board meeting occurred on 3 December 2014.[2232] At this meeting, the Board considered Ledwaba Mazwai's advice on the legal effects of Mr Matjila's actions with respect to the third TNA contract.

[2227] Transcript 23 January 2020, p 52, lines 17-22.

[2228] Transcript 23 January 2020, p 53, lines 1-6.

[2229] Transcript 23 January 2020, p 54, lines 2-19.

[2230] Transcript 23 January 2020, p 55, lines 10-21.

[2231] Transcript 23 January 2020, p 58, lines 14-25.

[2232] Exhibit MM3, p 343.

224. The minutes of the meeting record that Mr Mazwai's report back was that, if the contract was ratified, there would be no irregularity; that Mr Matjila had exceeded his authority in concluding the contract; and that Mr Choeu had removed the termination clause against legal advice, but that Mr Matjila appeared not to have known about this. It is not clear whether Mr Mazwai was aware of the email from Mr Choeu to Mr Matjila of 2 May 2014 in which he alerted Mr Matjila to the termination clause's removal.

225. Mr Tsotsi agreed during his testimony that, given Eskom's precarious financial position, it was essential that there was an exit clause in a contract for R43 million with TNA in case the spend was no longer viable for Eskom.[2233]

226. Mr Mazwai also indicated in his advice to the Board that disciplinary action should be taken against Mr Choeu. The minutes of the 3 December 2014 meeting reflect that the Board took the view that it was not their responsibility to take disciplinary action against Mr Choeu because he did not report to the Board and was an employee of Eskom.[2234]

227. However, as set out above, the PFMA provides that the Board was the accounting authority of Eskom and was responsible for ensuring that appropriate disciplinary action be taken where someone was engaging in irregular expenditure.

228. Mr Tsotsi accepted that this was the correct legal position even though this was not recorded in the minutes.[2235] Mr Tsotsi stated that every Board member is required to acquaint themselves with their legal responsibilities from their first day in office and should continue to ensure that legal advice is sought when difficult legal issues arise.[2236] Mr Tsotsi confirmed that he understood that it was the Board's responsibility to take

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[2233] Transcript 23 January 2020, p 62, lines 17-25.

[2234] Exhibit MM3, p 345.

[2235] Transcript 23 January 2020, p 64 (line 15) – 65 (line 5).

[2236] Transcript 23 January 2020, p 67, lines 13-23.

effective disciplinary action against Eskom employees who committed irregular or wasteful expenditure and that the Board was expected to do so when it discussed and deliberated upon the R43 million contract.[2237]

229. Mr Tsotsi testified that the minutes did not reflect this understanding but that it was indeed what was discussed and agreed at the meeting. He said that the Board had intended for management to execute the required disciplinary process.[2238]

230. This position was confirmed by Mr Mkwanazi's testimony. Mr Mkwanazi, another outgoing member of the Eskom Board, also testified about the SNG forensic report and the conclusions it reached about Mr Matjila and Mr Choeu and their misconduct under the PFMA. He agreed that the Board had an obligation under the PFMA to take action in this regard. He testified that he understood that Mr Matjila had reverted to being a non-executive director and that "corrective" or disciplinary action could not be taken against him in this regard; and that Mr Choeu was still an employee of Eskom and that disciplinary action had to be taken against Mr Choeu. It was his understanding that the new Board was going to take that action.[2239]

231. The minutes of the meeting of 3 December 2014 reflected that "from the standpoint of the financial status of Eskom, the contract could not be regarded as a good contract".[2240] It was resolved that a special Board meeting should be convened on 8 December 2014 to "finalise this issue".[2241]

[2237] Transcript 23 January 2020, p 68 (line 23) – 69 (line 1).

[2238] Transcript 23 January 2020, p 65, lines 3-22. See also p 66 (line 23) – 67 (line 7).

[2239] Transcript 17 July 2020, p 228 (line 10) – 229 (line 18).

[2240] Exhibit MM3, p 347.

[2241] Exhibit MM3, p 348.

232. On 4 December 2014 the Board received Ledwaba Mazwai's final report.[2242] The report was to the effect that the Board could ratify the contract if it represented good value for money when compared to the costs of sponsorship.[2243] Ledwaba Mazwai confirmed that they could not offer any input on whether the contract was good value for money.[2244] They said that the Board would have to make this judgement call itself.

233. On 8 December 2014 the Board had another meeting.[2245] Mr Tsotsi testified that the major purpose of the meeting was to discuss the legal opinion.[2246] The Board made a note that under the National Treasury regulations, it was required to notify the Minister, National Treasury and the Auditor General of Mr Matjila's conduct. It was found that he was in wilful breach of the PFMA requirements and this conduct had to be reported. However, Mr Tsotsi testified that he did not recall this ever having happened and there were no records that this was done.[2247] He conceded that it ought to have been done.[2248]

234. The minutes also stated that the Board had to determine whether the contract was wasteful and fruitless expenditure based on whether it had commercial value.[2249] The minutes recorded that Mr Tsotsi noted that the discussions up to that point had been about irregularity and that this should be separated from the issue of fruitless and wasteful expenditure – i.e. the commercial value of the contract. He stated that "the Board had to be convinced that the contract was not a bad one." Thereafter, Ms Luthuli, who was the Chair of ACR at the time, recorded that "the handover report had to reflect

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[2242] Transcript 23 January 2020, p 75, lines 17-20. See exhibit MM3, p 180.

[2243] Exhibit MM3, p 190, para 4.1.3.2

[2244] Exhibit MM3, p 190, para 4.1.4.

[2245] Exhibit MM3, p 349.

[2246] Transcript 23 January 2020, p 77, lines 10-19.

[2247] Transcript 23 January 2020, p 74, lines 4-17.

[2248] Transcript 23 January 2020, p 77 (line 20) – 78 (line 14); p 79, lines 19-21. See also exhibit MM3, p 351.

[2249] Exhibit MM3, pp 351-352.

that the Board had considered whether or not the contract was a bad one and had concluded that the contract was not good at this time."[2250]

235. Mr Tsotsi confirmed that the Board was of the view that the contract was not a good one and that that finding needed to be reflected in the handover report to the new Board.[2251] He confirmed that the Board considered the contract and concluded that it "was not a good contract for Eskom at this time".[2252]

236. Mr Mkwanazi clarified that it was clear already to the Board that the conclusion of the contract by Mr Matjila was irregular because he had exceeded his authority, the termination clause had been removed, and there was no budget.[2253] However, as to whether it was fruitless and wasteful expenditure, he testified that one needed to have a specialist to determine what value Eskom was getting for the R43million. He explained that the outgoing Board had not yet engaged in that analysis.[2254]

237. Mr Mkwanazi stated that the reference to the contract being a "bad contract" in the minutes of the meeting 8 December 2014 of the Board was both that it did not have an exit clause and that Eskom was experiencing financial difficulties at the time and did not have a budget for this expense. He said that to spend R43 million on this contract would make it a "bad contract."[2255] Mr Mkwanazi also confirmed that this conclusion about it being a bad contract had to be conveyed to the new Board through the handover report.[2256]

[2250] Exhibit MM3, p 352.

[2251] Transcript 23 January 2020, p 82 (line 22) – 83 (line 2).

[2252] Transcript 23 January 2020, p 83, lines 12-16.

[2253] Transcript 17 July 2020, p 230, lines 13-15; p 231, lines 1-15.

[2254] Transcript 17 July 2020, p 229 (line 19) – 230 (line 6).

[2255] Transcript 17 July 2020, p 234, lines 5-15.

[2256] Transcript 17 July 2020, p 235 (line 24) – 236 (line 4).

238. The Board also resolved at this meeting that Ledwaba Mazwai and the company secretary should prepare a summary and final resolution on the discussions and decisions around the TNA Sponsorship contract for signing by the chairman of the Board and the ARC for inclusion in the handover report to the new Board.[2257]

239. The outgoing Board did not vote on the ratification of the contract, even though it had received the reports of SNG and Ledwaba Mazwai and had already received Mr Matjila's representations on the value of the contract and its regularity (dated 27 November 2014), prior to their final meeting on 8 December 2014.[2258] This suggests that it was not yet in a position to vote on the ratification and wanted further information in order to do so. However, when the new Board came in, they were given no additional information and yet saw fit to ratify the contract. This decision is considered in greater detail below.

240. On 11 December 2014 the outgoing Board was replaced by the new Board.[2259]

<u>The timeline of the ratification – the incoming Board</u>

241. There had been advertisements for new Eskom Board members in September 2014. Mr Gigaba had been Minister of Public Enterprises from 1 November 2010. He was Minister of Public Enterprises until May 2014. Ms Lynne Brown succeeded him after the general election of May 2014.[2260]

242. There was evidence presented to the Commission that Mr Tony Gupta and his associate, Mr Salim Essa, were close to Minister Brown and that they were involved

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[2257] Exhibit MM3, p 353.

[2258] Transcript 31 October 2019, p 36 (line 1) – 38 (line 23). The response is exhibit MM6, pp 238- 243.

[2259] Transcript 23 January 2020, p 83, lines 19-22.

[2260] Transcript 23 January 2020, p 86, lines 8-15.

with Minister Brown's selections of the new Board and the allocation of Board members to different Board committees. Mr Tsotsi testified that Mr Essa sent him a document stating which Board committees he had been allocated to; and then Minister Brown sent him a document setting out an identical allocation. In addition, Mr Tsotsi testified that he was summoned to Minister Brown's house briefly and instructed to make allocations as set out in the document that Ms Brown had given him which was the same as the one Mr Tsotsi had recieved from Mr Essa. Mr Tsotsi testified that, when he came to Ms Brown's residence, Mr Gupta and Mr Essa were both present at Minister Brown's house.[2261]

243. Mr Pamensky was a member of the new Board of Eskom that took office after 11 December 2014.[2262] Mr Pamensky is a chartered accountant and he had sat on 25 boards before taking this position.[2263]

244. Mr Pamensky testified that he discovered the Board position being advertised around 28 September 2014 and felt he had the appropriate skills to apply for the position.[2264] However, it transpired that he was also, at the time of applying for the position, a director of Oakbay Resources and Energy Limited – a Gupta-affiliated company.[2265] He became a director on 25 September 2014, a matter of days before the advert came out for the Eskom board position and his application for that role. Mr Pamensky testified that he became a director of Oakbay after being approached by Mr Atul Gupta.[2266] He also

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[2261] Transcript 23 January 2020, p 90 (line 17) – 96 (line 16).

[2262] Transcript 31 October 2019, p 5, line 3.

[2263] Transcript 31 October 2019, p 5, lines 16-20.

[2264] Transcript 31 October 2019, p 6, lines 5-10.

[2265] Transcript 31 October 2019, p 8, lines 20-25.

[2266] Transcript 31 October 2019, p 9, lines 15-20.

explained that he met Mr Tony Gupta in June 2014 at the Gupta home in Saxonwold.[2267] Then he had a follow up meeting with Mr Atul Gupta in August 2014.[2268]

245. This information, together with Minister Brown's close association with the Guptas during the selection of the new Board, raises serious questions about the Board's independence. This was the very Board that went on to approve and ratify the R43 million contract with TNA without determining whether the contract was good value for money. In fact elsewhere in this report the Commission finds that that Board was not independent and, in many ways, made decisions that advanced the interests of the Guptas about those of Eskom.

246. The new Board had its first meeting on 16 January 2015. At no point during this meeting was the ratification of the R43 million contract discussed, despite the fact that it had been held over from the previous year and required attention.[2269] The next Board meeting was scheduled for 16 February 2016. [2270] However, between these two dates, a round robin resolution was circulated for the Board to ratify the R43 million TNA contract.[2271]

247. Furthermore, contrary to the intentions of the previous Board, the handover report to the new Board made no mention of the findings of the previous Board regarding the financial value of the contract and it being a bad one for Eskom at the time.[2272] Under "outstanding issues", it recorded only "Reportable irregularity identified by the external auditors during the review of the 30 September 2015 interim results. This matter was

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[2267] Transcript 31 October 2019, p 10, lines 1-5.

[2268] Transcript 31 October 2019, p 11, lines 13-18.

[2269] Transcript 23 January 2020, p 96 (line 20) – 97 (line 21). See also the minutes, exhibit MM3, p 366.

[2270] Transcript 23 January 2020, p 108, lines 10-15.

[2271] Transcript 23 January 2020, p 106, lines 11-13.

[2272] Exhibit MM6, p 361 (the ARC report).

reported to and dealt with by the Board."[2273] Mr Pamensky, an incoming Board member, testified that the "outstanding issues" portion of the ARC report in the Board's handover reports, indicated to him that the irregular expenditure issue of the TNA contract had been dealt with by the previous Board and was therefore not an issue coming across for the new Board to deal with.[2274]

248. Mr Tsotsi confirmed that the minutes of the Board meetings of 24 November, 3 December and 8 December 2014 should also have formed part of the handover report but were inadvertently excluded.[2275] Mr Tsotsi conceded that, when the new Board voted on the round robin resolution regarding the TNA contract, there was important communication that the new Board should have seen about the old Board's view on the TNA contract.[2276] Mr Pamensky testified that, now having read the minutes of 3 December 2014, it was relevant that the old Board had determined it was necessary to assess whether there was value in the TNA contract.[2277] He also confirmed that, as a new member of the Board, he believed it was necessary for him to know about the minutes of the 3 and 8 December 2014 meetings and the conclusion that the contract with TNA was a "bad contract". In fact, he said the remaining directors were "duty bound" to inform the new Board of this.[2278]

249. Mr Tsotsi testified that it would have been the job of the secretariat to convey the correct handover information to the new Board.[2279] However, he accepted that he and Ms Mabude were the only two non-executive directors who were retained from the old

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[2273] Exhibit MM6, p 361.

[2274] Transcript 31 October 2019, p 29, lines 20-25.

[2275] Transcript 23 January 2020, p 99 (line 24) – 101 (line 21).

[2276] Transcript 23 January 2020, p 102 (line 16) – 103 (line 15).

[2277] Transcript 31 October 2019, p 36 (line 22) – 37 (line 1).

[2278] Transcript 31 October 2019, p 41, lines 1-13.

[2279] Transcript 23 January 2020, p 103, lines 5-24.

Board and therefore the only ones who would have known about the need to ensure that the correct information was given to the new Board. Mr Tsotsi, therefore, accepted that, as Chair of the Board and a member of the old Board, he was responsible for ensuring the handover information was correct and that the Board's views at the 8 December 2014 meeting were accurately reflected.[2280]

250. Mr Tsotsi admitted that the incoming Board did not have all the information it needed to make a properly informed decision on the TNA contract in the round robin resolution.[2281]

251. The round robin resolution was circulated on 3 February 2015.[2282] The document contained a "summary of facts".[2283] Despite Mr Tsotsi having signed the document to confirm that its contents were correct, he admitted during his testimony that he did not in fact read the document and he now accepted that there were errors in it.[2284] He explained that he realised later that the document erroneously stated that Mr Choeu was no longer an employee of Eskom.[2285]

252. The round robin statement was also incorrect in a number of ways.

252.1. It stated that the SNG report was only presented to the Board on 8 December 2014, when it was already with them on 24 November 2014.[2286]

[2280] Transcript 23 January 2020, p 104, lines 1-6.

[2281] Transcript 23 January 2020, p 107, lines 10-25.

[2282] Exhibit MM6, p 234.

[2283] Exhibit MM6, pp 236-237.

[2284] Transcript23 January 2020, p 111, lines 10-20.

[2285] Transcript 23 January 2020, p 112, lines 20-25.

[2286] Transcript 23 January 2020, p 117, lines 5-13.

252.2. It stated that the parties involved in the TNA contract were "no longer within the sphere of Eskom's operations". This was not true as Mr Choeu was still an employee.[2287]

252.3. There was also a statement that Mr Tsotsi admitted did not make any sense.[2288] This is that statement: "The parties involved [it is not clear which parties] had divergent views on the specific aspects of the matter as such scarce resources would have to be deployed to bring these contentious matters to finality."[2289]

252.4. It also stated: "Considering the representations made by the then Interim CE, there exists a difference of interpretation regarding the provisions of the Company's Delegations of Authority ("DoA") that needs to be reviewed and clarified further in order to close any gaps which may be present."[2290] However, Ledwaba Mazwai had rejected Mr Matjila's interpretation of his delegation of authority. They had no difficulty in doing so.[2291] Mr Matjila's version was that the TNA contract was an investment and the delegation allowed him to conclude investment agreements to the value of the TNA contract. Ledwaba Mazwai, however, considered there to be no merit in this interpretation. Mr Matjila's interpretation was simply untenable. Therefore, for the round robin statement to have framed this as a legitimate "difference of interpretation" was misleading. Mr Tsotsi testified that he did not write this statement and he did not vet the document well enough. Had he done so, he would have phrased this point differently.[2292]

[2287] Transcript 23 January 2020, p 117, lines 15-25.

[2288] Transcript 23 January 2020, p 118, line 20.

[2289] Exhibit MM6, p 236.

[2290] Exhibit MM6, pp 236-237.

[2291] Transcript 23 January 2020, p 119, lines 8-16.

[2292] Transcript 23 January 2020, p 122, lines 14-18 and p 119, lines 20-22.

252.5. The most egregious misrepresentation in the document is the statement that "The Board recognises that there is value in platforms that enable Eskom to interact with the public to communicate and garner support for the work that it is doing to ensure that South Africa has sufficient energy. In this regard, the Contract provides an opportunity for Eskom to achieve the aforesaid objectives."[2293] This directly contradicts the finding of the previous Board that this was not a good contract for Eskom and that no investigation *at all* had been done into the commercial value of the contract.

253. Mr Tsotsi's testimony was in accordance with that of Mr Mkwanazi. He and Mr Mkwanazi accepted that the old Board had never actually determined whether the contract had commercial value.[2294] Mr Tsotsi therefore admitted that this round robin was circulated and voted on without the Board ever determining whether the contract had commercial value for Eskom.[2295]

254. Mr Tsotsi testified that the Board had to determine whether to cancel or ratify the contract and they ultimately decided it was better to ratify it because otherwise there would be considerable financial implications for Eskom.[2296]

255. However, he conceded that there could not have been consensus on this point, because then the outgoing Board would simply have ratified the contract then, instead of leaving it to the new Board.[2297] Leaving the issue to be resolved by the incoming

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[2293] Exhibit MM6, p 237.

[2294] Transcript 23 January 2020, p 124 (line 10) – 125 (line 18).

[2295] Transcript 23 January 2020, p 125, lines 19-25.

[2296] Transcript 23 January 2020, p 128 (line 10) – 129 (line 6).

[2297] Transcript 23 January 2020, p 129 (line 9) – 130 (line 5).

Board, implied that the outgoing board considered it necessary to determine the commercial value of the contract before ratifying it – which was never done.

256. Mr Tsotsi also conceded that the way the draft round robin resolution was phrased was such as to give the impression that it had been determined that there was commercial value, which was not the case.[2298]

257. The round robin resolution also did not even include the actual contract that the Board was being asked to ratify. Mr Tsotsi said it was "meant to be included".[2299] The minutes were also meant to be included, according to Mr Tsotsi, but were not.[2300]

258. Mr Tsotsi admitted that, even though he realised there were errors in the document, he did not go back to the Board members after they had cast their votes to alert them to these errors.[2301] He said he was going to explain the errors at the next Board meeting of 19 March 2015 but the minutes of that meeting do not reflect that this was discussed.

259. Mr Tsotsi admitted that Mr Choeu was supposed to be disciplined and this was part of the fiduciary duties of the Board. However, he testified that he left the Board of Eskom at the end of March 2015 and so did not know what the Board did in this regard.[2302] This was not a proper discharge of his duties as Board member. Mr Tsotsi accepted that the new Board was misled about Mr Choeu's continued employment at Eskom. He was one of only two continuing Board members who would have been aware of the outgoing Board's intention to discipline Mr Choeu. His failure to ensure that this took place was

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[2298] Transcript 23 January 2020, p 130 (line 24) – 130 (line 2).

[2299] Transcript 23 January 2020, p 133, lines 15-20.

[2300] Transcript 23 January 2020, p 134, lines 1-6.

[2301] Transcript 23 January 2020, p 114, lines 19-23.

[2302] Transcript 23 January 2020, p 139 (line 11) – 140 (line 5).

a dereliction of duty. Leaving the organisation is no excuse. It ought to have been part of the round robin resolution or resolved shortly thereafter.

260. Mr Tsotsi also confirmed that Eskom never even attempted to renegotiate the contract with TNA.[2303]

The breached obligations of the Board

261. The number of inaccuracies in the round robin resolution; the fact that the round robin resolution was used instead of a proper Board meeting, when there was a new Board and the outgoing Board had seen fit to meet several times regarding the TNA issue; the fact that Mr Tsotsi – upon realising how many mistakes and omissions were in the round robin resolution – does not appear to have ever corrected them with the incoming Board; together with his interactions with the Guptas and his actions in respect of the Public Protector (set out below), seems to indicate that there is a very real possibility that Mr Tsotsi actively sought to "sweep the contract under the rug" and try to have it ratified.

262. This could have been, as Mr Mkwanazi's evidence seemed to indicate, from the desire to just fix an "irregularity" that would have been a headache for the Board from an auditing perspective (and legally under the PFMA). However, this could have also been more sinister, and stemming from direct or indirect/general pressure from the Guptas or their sympathisers. Regardless, even if Mr Tsotsi did not wilfully attempt to influence the ratification of the contract, at best for him, he acted negligently and in contravention of his fiduciary duties and his legal duties as a member of an accounting authority of a public entity. This negligence facilitated wasteful expenditure and the siphoning of public funds from an already overburdened public body.

[2303] Transcript 23 January 2020, p 151 (line 21) – 152 (line 7).

263. As for the other members of the Board, Mr Pamensky testified that, had he known various information that was not apparent from the round robin draft resolution, he would have been more sceptical about ratifying the contract. This included the following:

263.1. Mr Pamensky testified that he was "surprised" to learn that there was no Eskom branding at the breakfast briefings, and that the address by the sponsor was not even aired. He concluded that this was not helpful in promoting the Eskom 49M campaign.[2304] Mr Pamensky noted that, if he had been aware of what Mr Pretorius said in his evidence about the lack of branding and the utility of the campaign, then he would have been very sceptical about it.[2305] He added that he would have also been very concerned if he had been aware that because of TNA's reputation, Eskom was finding it difficult even to fill its tables at the breakfast briefings.[2306]

263.2. Mr Pamensky testified that he was not aware at the time that the round robin resolution was incorrect about Mr Choeu no longer being with Eskom.[2307]

263.3. Mr Pamensky testified he was unaware of the fact that Eskom had been asked to answer Parliamentary questions about TNA and he did not know that the Public Protector had expressed concern about the contract and the business briefings, nor of what was in the media and thus he did not realise that there was any reputational or other risk to Eskom in continuing with the contract.[2308]

[2304] Transcript 31 October 2019, p 46 (line 18) – 47 (line 10).

[2305] Transcript 31 October 2019, p 47 (line 23) – 48 (line 6).

[2306] Transcript 31 October 2019, p 48, lines 7-16.

[2307] Transcript 31 October 2019, p 55, lines 15-20.

[2308] Transcript 31 October 2019, p 71 (line 10) – 72 (line 4).

He testified that, if he had realised that, it would have given him pause for thought about the contract.[2309]

263.4. Mr Pamensky stated that he reached the conclusion that the TNA contract had some value because of what Mr Matjila said in his representations. In his representations, Mr Matjila had said:

263.4.1. there had been two prior contracts with similar subject matter but what he neglected to mention was that those two contracts were also irregular – which Mr Pamensky accepted would have made him more sceptical.[2310]

263.4.2. the platform had been a success in promoting awareness of the 49M campaign. However, he did not state that the Media Shop, in response to questions from Parliament about the contract, had told Eskom that there was no way to establish if the business briefings had anything to do with that success. He also accepted that, if he had known this, he would have been more sceptical.[2311]

263.4.3. the contract was a renewal and that it allowed savings of 17%.[2312] Mr Pamensky accepted that he did not use the word "renewal" but that that is the impression created because he said that there were two previous contracts of the same subject matter that had expired.[2313] Mr Matjila's representations did not reveal that there had been a gap of a year between the second and third contracts which meant that it could not

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[2309] Transcript 31 October 2019, p 72, lines 5-7.

[2310] Transcript 31 October 2019, p 95 (line 5) – 96 (line 5).

[2311] Transcript 31 October 2019, p 96 (line 20) – 97 (line 11).

[2312] Transcript 31 October 2019, p 102 (line 23) – 103 (line 20).

[2313] Transcript 31 October 2019, p 104, lines 1-17.

have been an extension of an existing service or contract. Mr Pamensky accepted that, if he had known this and that the gap was caused by the reputational problems with TNA, he would have approached what Mr Matjila said differently.[2314]

263.4.4. Mr Pamensky testified that he also took comfort in the fact that the Chair had submitted this round robin resolution – he believed the Board viewed the contract to have value.[2315]

263.5. Mr Pamensky accepted that under the PFMA it is an act of financial misconduct to knowingly or negligently permit fruitless and wasteful expenditure; and that the Board was therefore required, in ratifying the contract, to ensure that there was value in the contract so that it was not fruitless and wasteful.[2316] He accepted that, if the Board knew everything that Mr Pamensky knew now, the ratification of the contract with TNA would have constituted wasteful expenditure.[2317] He agreed he would have called for further investigation and would not have ratified the contract.[2318]

263.6. Mr Pamensky testified that he was not aware that the Public Protector had written to Mr Tsotsi on 29 October 2014, and again thereafter, requesting that the contract be put on hold pending her report. He stated that, if he had known this, he would have taken the request very seriously.[2319]

[2314] Transcript 31 October 2019, p 104 (line 18) – 105 (line 5).

[2315] Transcript 31 October 2019, p 98, lines 1-10.

[2316] Transcript 31 October 2019, p 109 (line 19) – 110 (line 16).

[2317] Transcript 31 October 2019, p 111, lines 6-9.

[2318] Transcript 31 October 2019, p 129, lines 7-10.

[2319] Transcript (31 October 2019, p 124 (line 20) – p 125 (line 9).

263.7. It was put to Mr Pamensky that one of his fellow board members, Ms Klein, had stated before the Parliamentary Portfolio Committee that she had raised the issue that Mr Choeu had not been disciplined at a subsequent board meeting. Mr Pamensky testified that he was not in that meeting but if he had been, he would have asked for an investigation.[2320]

264. Mr Pamensky therefore made a number of fair concessions about the inadequacy of the information that was placed before the Board. He was also clear that, had this information been known to him at the time, he would have demanded that the necessary investigations take place. Mr Pamensky certainly cannot be accountable for what he did not know unless his ignorance was as a result of him not taking reasonable steps to inform himself about matters. However, he and his fellow Board members were accountable for what they did know and the decisions they took based on what was placed before them.

265. From a proper consideration of the round robin pack alone, it should have been apparent to any reasonable person who considered it that the summary of facts made very little sense and was ambiguous. It would also have been glaringly clear that the draft resolution pack did not even contain the very contract that the Board was being asked to ratify. Nobody who sits on a Board of a company and knows what they are doing can ratify a contract that he or she has not seen or read unless he or she does not care about the interests of the company or seeks to achieve someone else's agenda. It would also have been obvious that there was no proper assessment of the value of the contract. Despite this, the Board was being asked to ratify a R43 million

[2320] Transcript 31 October 2019, p 127, lines 4-12.

contract at a time when the government had just given Eskom a R23 *billion* support subsidy a few months earlier.[2321]

266. The Board members ought to have been aware of the provisions of the PFMA, particularly section 51 (as set out above) which requires the Board to prevent irregular and wasteful expenditure, but, the evidence of Mr Pamensky and Mr Tsotsi confirms that they had no sense of the value of the contract before ratifying it. The Board was also obliged to *identify* wasteful expenditure under the PFMA, and take action against those who caused it, but could not do so if it never evaluated the commercial value of the contract. Mr Tsotsi's conduct in ratifying this contract and in failing to ensure that the new Board was made fully aware of all the facts about this contract and what the previous Board – of which he was the Chairperson – had said about this contract can only lead to the conclusion that he was either advancing the agenda of the Guptas or was so incompetent that he should never have been a director of a company, not to speak of being Chairperson of Eskom. It is incomprehensible how he could have acted in the manner he did unless the situation was one of the two.

267. Mr Pamensky testified that at the stage when he was asked to ratify the TNA contract, he did not familiarise himself with the PFMA, even though he had never served on a public board before.[2322] Mr Pamensky agreed that it was important for board members of state owned enterprises to be familiar with the PFMA and that there were heightened obligations for board members of state owned entities compared to those in private companies because they are spending public funds.[2323] Mr Pamensky said he accepted

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[2321] Transcript 31 October 2019, p 15, lines 5-11.

[2322] Transcript 31 October 2019, p 15, lines 12-18.

[2323] Transcript 31 October 2019, p 16, lines 2-15.

at the level of principle that each member of the accounting authority should know what is required of them so as not to engage in financial misconduct.[2324]

268. Strangely, however, Mr Pamensky testified that he only became familiar with the PFMA about six months after he had been appointed as a member of the Eskom Board.[2325] In this regard he particularly referred to the obligation under section 51(1)(e) that the Board was responsible for taking disciplinary action against employees that were guilty of causing irregular or wasteful expenditure.[2326] He later claimed that a Board member could only be expected to understand their full obligations under the PFMA after about 3 to 4 years of serving on the Board.[2327]

269. Quite clearly, this is a self-serving and preposterous claim. Board members are individually liable under the PFMA for performing their functions and keeping other officials and delegates accountable for the performance of their duties. They are given no grace period for doing so. Failure to do so would necessarily amount to negligence or even gross negligence.

270. There was one reason that could serve as justification for ratifying the contract. It was that it would be in the best interests of Eskom for the Board to ratify the contract because otherwise Eskom would have been bound by the contract in any event; failure to ratify the contract would amount to a repudiation; and TNA could have claimed damages for the full value of the contract (R43 million) while Eskom would get no value out of it. However, the new Board could not justifiably argue that ratifying this contract was in the

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[2324] Transcript 31 October 2019, p 22 (line 25) – 23 (line 3).

[2325] Transcript 31 October 2019, p 16, lines 20-25.

[2326] Transcript 31 October 2019, p 19, lines 1-15.

[2327] Transcript 31 October 2019, p 34, lines 1-22.

best interests of Eskom. How could they argue that when they did not even know the terms of the contract when they ratified it?

271. There was an option open to the Board which does not appear to have been considered.

271.1. Mr Tsotsi testified that he had no idea that the Board could have gone to court to have the contract set aside as invalid and was therefore not obliged to ratify it.[2328]

271.2. Mr Pamensky claimed that he was under the impression that, if the Board did not ratify the contract, this was tantamount to repudiation and they would have had to pay damages to TNA.[2329] He claimed that Eskom would then have suffered R43 million in damages but received no value.[2330] He said that this belief came from the Ledwaba Mazwai opinion furnished to the new Board.[2331]

272. This perception unfortunately stems from some hasty legal advice sought by the outgoing Board from Ledwaba Mazwai. It must be borne in mind that the instructions to Ledwaba Mazwai were given on a very urgent basis and also asked only about two options in respect of the contract – the prospects of ratification or cancellation. The brief was to answer two questions, namely:

272.1. whether the ratification of the TNA contract was an option available to Eskom, and, if it was, what the implications of ratification were; and

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[2328] Transcript 23 January 2020, p 152, lines 20-25.

[2329] Transcript 31 October 2019, p 76 (line 15) – 77 (line 25).

[2330] Transcript 31 October 2019, p 77, lines 1-5.

[2331] Transcript 31 October 2019, p 78 (line 20) – 79 (line 20). Relying on the opinion, exhibit MM3, p 190, para 4.1.3.2.2.

272.2. whether cancellation of the contract was available to Eskom and what the implications thereof were.[2332]

273. The brief did not seek all solutions pertaining to the contract. Indeed, the legal report/opinion is hedged with the following qualification: "The underlying assumption is that Eskom is faced with only two choices which are either to ratify or not ratify the conclusion of the TNA contract, where the latter is consistent with an intention to cancel."[2333]

274. A prudent Board member reading that qualifier ought to have asked about the assumption and whether it held true, or whether there were further options available to Eskom to avoid this R43 million liability. If the Board had asked that question, it would have been apparent that the conclusion of the contract constituted unlawful administrative action that could have been set aside by the High Court on review.

275. Even if this were not so, it is also patently incorrect that TNA would be entitled to the full R43.2 million in damages and Eskom would be left with nothing if it cancelled the contract. This does not take into consideration that TNA would have had an obligation to mitigate its damages and that it would have had to tender its performance under the contract (or at least the value thereof) to Eskom in order to be eligible for the compensation under the contract.

276. This legal misunderstanding appears to have cost Eskom an enormous sum of money. Greater care by the Board in providing instructions and affording appropriate time to answer legal questions, and a more diligent approach to understanding their legal obligations, could have avoided this.

[2332] Exhibit MM3, p 181.

[2333] Exhibit MM3, p 189, para 4.

277. It must be considered why the Board did not ask for further legal clarity. Common sense would suggest that there should be some form of recourse for a public institution where an official approves a contract without any authority to do so. Otherwise, the Board's powers could be usurped without their approval and public funds wasted. If Mr Pamensky and Mr Tsotsi's belief about the consequences of failing to ratify the contract were correct – there would be very little purpose in ever having a system of ratification. The Board would always be bound to automatically ratify any contract concluded illegally by an unauthorised employee, because failure to do so would allow the other party to recover the entire contract price with no value for Eskom. This simply does not make any sense.

278. As set out above, the negative reputation that TNA had garnered in the independent media did not help to prevent the conclusion of the third contract.

279. This contract was concluded because two individuals, Mr Choeu and Mr Matjila, were determined that they would conclude it, regardless of the law and the legal obligations they had to Eskom. The Board failed dismally in the exercise of its duties and ratified the contract to make the administrative inconvenience of an "irregularity" go away and they never bothered to take any further action against those who had originally committed Eskom to this expenditure.

280. However, other democratic safeguard institutions also failed to provide an effective mechanism to prevent this unlawful spending.

Parliamentary questions

281. About a week after the second contract had been signed, on 14 November 2012, Parliament directed various questions to Eskom about the TNA contracts.[2334]

282. Some of the questions Parliament asked were:

282.1. Whether an independent analysis to determine whether TNA was being read by the intended market had been conducted prior to Eskom placing advertisements in the TNA?

282.2. Who conducted that analysis and what were their recommendations?

282.3. Were there any independent studies conducted about the effectiveness of the advertisements on the target market?[2335]

283. Mr Pretorius testified that the responsibility to answer the questions fell upon him as Head of Strategic Marketing at Eskom. He said that he asked Mr Laiza Zikalala from the Media Shop to assist him to answer the questions.[2336]

284. Mr Pretorius said that Mr Zikalala explained that there had been no analysis of the newspaper because it had not been certified by ABC for circulation figures, nor through organisations to measure readership. He explained that this was why the Media Shop had recommended that Eskom not use TNA but they were instructed by Eskom to do so and to spend a particular amount of money.[2337] Mr Zikalala explained that, since

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[2334] Transcript 29 October 2019, p 109, lines 2-10.

[2335] Transcript 29 October 2019, p 109 (line 20) – 110 (line 2). See also exhibit MM1, p 661.

[2336] Exhibit MM1, p 666.

[2337] Exhibit MM1, p 665. See also Transcript 29 October 2019, p 111, lines 18-25.

then, AMPS had conducted behavioural research on readership and concluded that TNA had 39 000 readers (compared to The Citizen's 508 000 and The Star's 643 000).[2338] Mr Zikalala stated that they could not perform an advertising effectiveness measure to ascertain whether the advertising had resulted in a reduction of electricity use.[2339]

285. Despite this, the response to the Parliamentary questioning was that AMPS had since performed a readership analysis and that "the findings confirmed that the paper reached Eskom's intended market."[2340] Mr Pretorius testified that this statement was false.[2341]

286. The Parliamentary questions therefore failed as a safeguard for four reasons:

286.1. Eskom employees were willing simply to lie to Parliament and no further investigations were done;

286.2. the Parliamentary questions were concealed from the new Board voting on the ratification of the contract;

286.3. the new Board members appeared not to be concerned to keep abreast of what the media was reporting about Eskom; and

286.4. individuals within Eskom were determined to ensure that the contract was concluded irrespective of the fact that there was no discernible value to Eskom in supporting TNA in this way.

[2338] Exhibit MM1, p 665 See also Transcript 29 October 2019, p 112, lines 1-8.

[2339] Exhibit MM1, p 665 See also Transcript 29 October 2019, p 112, lines 11-22.

[2340] Exhibit MM1, p 676, para 3.

[2341] Transcript day 184, p 114, lines 19-21.

Public Protector questions

287. On 3 June 2013 the Public Protector wrote to Mr Matona, Director-General of Public Enterprises, to advise him that the office was investigating allegations of fruitless and wasteful expenditure in connection with the sponsorship of the business breakfasts.[2342]

288. The letter stated that the allegation was that the Department of Public Enterprises exerted undue influence on public enterprises to enter into these sponsorship agreements. This, despite the fact that TNA was not a member of the ABC and its circulation figures could not be verified. The Public Protector then asked various questions about the policy on sponsorships, the amounts spent on the TNA sponsorships, the proposals and other relevant information.[2343]

289. Mr Pretorius was asked to address the questions from the Public Protector about advertising with TNA. He gave what he considered to be honest answers and sent them to the Head of the Legal Department at Eskom, Mr Willie Du Plessis, who reported to Mr Adam. The response he received was that the answers he prepared were not "sufficient". Mr Pretorius told Mr Du Plessis that he could not in good conscience write something untrue.[2344]

290. Mr Pretorius testified that he then received a phone call from Mr Adam who said that they needed to write that Eskom had benefitted from this advertising and that it was a good thing to do.

[2342] These questions are at Exhibit MM1, p 727.

[2343] Exhibit MM1, pp 727-729.

[2344] Transcript 29 October 2019, p 115, lines 11-25.

291. As a result, the Eskom responses to the Public Protector's questions did not reflect reality.[2345] Mr Pretorius recalled rewriting the document on Mr Adam's instruction so that it "look[ed] a little bit better" than his original draft.[2346] Mr Pretorius said that he did not want to lie to the Public Protector; that he had got legal advice that he would be in a lot of trouble if he did so; and that it was unethical and against his professional ethical obligations. However, in the end, he confessed that he was ultimately "forced to do it".[2347]

292. Mr Pretorius admitted that a number of the statements made to the Public Protector were false. They included that:

292.1. "The primary benefits were brand awareness for 49M and the opportunity to highlight the need to save electricity. The sponsorships provided significant exposure through the print and broadcast media and to engage more businesses in the private sector."[2348]

292.2. "Recent research undertaken with regard to 49M indicated that opportunities such as the sponsorship of the business briefings contributed to a 73 percent awareness by the public of the 49M Campaign."[2349]

293. The Public Protector's investigation continued. As set out above, on 29 October 2014, the Public Protector wrote to Mr Tsotsi asking him to hold the new (third) TNA contract in abeyance pending the release of her provisional report.[2350]

[2345] Transcript 29 October 2019, p 116, lines 5-10.

[2346] Transcript 29 October 2019, p 119, lines 10-22.

[2347] Transcript 29 October 2019, p 119 (line 23) – 121 (line 25).

[2348] Transcript d29 October 2019, p 123, lines 8-17.

[2349] Transcript 29 October 2019, p123, lines 18 -25.

[2350] Exhibit MM6, pp 364-365.

294. The Public Protector also met with representatives of Eskom on 27 November 2014 in this regard.[2351]

295. Only after the outgoing Board had its final meeting, did Mr Tsotsi respond to the Public Protector's letter. On 9 December 2014, Mr Tsotsi responded.[2352] The letter stated that the third contract was very different to the first two contracts – though there is no basis for this statement. It also explained that minutes of discussions about the contract were not available. This was also peculiar.

296. The Public Protector responded on 15 December 2014 to again implore the Eskom Board not to proceed with the contract until her report had been issued.[2353]

297. Mr Tsotsi conceded that none of this correspondence was ever brought to the attention of the incoming Board when they were voting to ratify the third TNA contract. He admitted this would have been "useful information" for the new Board.[2354]

298. The Public Protector's efforts to curb the TNA spend were frustrated because employees in Eskom felt compelled to lie because their seniors instructed them to do so. As with Parliament's questions, the fact of the Public Protector's enquiries was kept away from the new Board when they were asked to ratify the third TNA sponsorship contract for R43million.

[2351] See the reference to this at exhibit MM6, p 442, para 2.

[2352] Exhibit MM6, p 444.

[2353] Exhibit MM6, p 446.

[2354] Transcript 23 January 2020, p 148, lines 1-25.

Subscriptions

299. In addition to sponsoring the business breakfasts, Eskom also subscribed for copies of the TNA newspaper.

300. Eskom commenced its subscriptions to *The New Age* newspaper with a contract for 30 copies per day for an amount of R25 148 for the year for *The New Age* newspaper.[2355]

301. This figure then suddenly jumped up to 2 000 copies of the newspaper per day at a cost of R1.3 million to Eskom.[2356] It is noteworthy that around the same time, Eskom procured 140 copies per day of the *Business Day* for R319 000 per year.

302. The Head of Communications at Eskom, Ms Wadja, provided an affidavit to the Commission in which she stated that she was instructed by Mr Choeu to increase the subscriptions in this manner.[2357] Mr Choeu denied this in his evidence and claimed that he had nothing to do with newspapers.[2358] However, when confronted with a letter from him instructing this increase,[2359] he was forced to concede that he did indeed do so and in fact asked for an increase to 4 000 copies a day which would have cost Eskom R7 million[2360].

303. Mr Choeu could not provide any explanation for his attempted increase and then claimed it must have been a "mistake".[2361] This is not a credible response. Mr Choeu was content to deny any knowledge of his role in the subscriptions until he was

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[2355] Exhibit MM1, p 805.

[2356] Transcript 185 30 October 2019, p 231, lines 1-3.

[2357] Exhibit MM1, p 799.

[2358] Transcript 30 October 2019, p 227, lines 10-20.

[2359] Transcript 30 October 2019, p228 (line 3) – 229 (line 10). See exhibit MM1, pp 816-817.

[2360] Transcript 30 October 2019, p 230, lines 17-19.

[2361] Transcript 30 October 2019, p 229, lines 13-22.

confronted with clear evidence that he had given an instruction for an increase in the subscriptions with the TNA. When this conduct is viewed alongside the role he played in committing Eskom to the business breakfasts, it is clear that Mr Choeu saw fit to put the interests of TNA ahead of those of Eskom. This makes one ask the question: What was in it for him that he could look after the Guptas so well at the expense of Eskom, his employer?

Conclusion

304. From the evidence set out above, a pattern emerges about the role players in Eskom.

305. Mr Matjila was the key facilitator at Eskom. Shortly after he took up the position of Acting-CEO, he approved the largest sponsorship contract with TNA that Eskom had ever entered into. He did so despite not having the authority to enter into a contract of this size and at a time when there was no evidence of any value to be derived from the services offered by TNA.

306. Mr Matjila received rule 3.3 notices about the evidence presented at the Commission's hearings. He did not respond to any of them. The Commission's investigators also made a number of attempts to contact Mr Matjila directly but none of them was successful. Mr Matjila, therefore, elected not to put his side of the story before the Commission. The result is that the evidence implicating him in wrongdoing is undisputed.

307. In addition to Mr Matjila, the incoming Board of Eskom that was appointed in December 2014 was also a facilitator. It was content to ratify a very controversial contract, where it had not assessed its commercial value, and in circumstances where the media, Parliament and the Public Protector had expressed grave concern about the legality and value of the contract.

307.1. Mr Tsotsi concealed important information from the new Board before it ratified the contract.

307.2. Mr Pamensky was happy to ratify a contract he had not even seen, based on a round robin resolution that did not make sense and without any proper appreciation for his legal obligations under the PFMA as a member of the accounting authority of Eskom. The rest of the Board appointed in December 2014 did exactly the same. At least those members of the Board who ratified the third TNA contract.

308. It is unlikely that any of this would have been possible without those who:

308.1. those who ensured that these contracts were concluded and implemented despite not going through the correct procedures; and

308.2. those who were willing to give false justifications to the Public Protector and Parliament for expenditure that was nothing short of wasteful.

308.3. a Board that had no regard for its fiduciary duties and put the interests of the Guptas above those of Eskom and the people of South Africa.

309. Mr Choeu demonstrated very little, if any, sense of duty to Eskom. He stated on many occasions that he believed that any questioning of authority would have been viewed as insubordination and that it was just “not done” in a “corporate culture”. The problem with this is that Eskom is not a private company. It is a public enterprise performing a vital function for the public, using scarce public money to do so. If “subordinates” (in this case as high up as *division executives*) do not feel any duty to act with integrity or speak out when processes are blatantly ignored because of “pressure from the CEO”, then public institutions will be very vulnerable to corruption and irregularities of this nature.

To the extent that Mr Choeu was advancing this as an excuse for his conduct, his "excuse" must be rejected as totally unacceptable. He was simply an "enabler" of the capture of Eskom by the Guptas.

310. Mr Choeu also actively supported the unjustified increase of subscriptions of *The New Age* newspaper to an absurdly high amount that could never be justified.

311. Mr Pretorius was far more pained and anxious at having to thwart well-established policies and processes in order to facilitate the TNA contracts. He took some steps to try and address the unlawful conduct but, ultimately, he capitulated under orders from his superiors and even allowed false information to be provided to the Public Protector because of the pressure under which he was placed. In the case of Mr Pretorius, it can be accepted that he took part in this wrongdoing because of orders or pressure from some of those above him. That cannot be said of Mr Choeu.

312. Eskom had policies and protocols in place to ensure that sponsorships went through appropriate approval mechanisms. However, this did not appear to help in preventing significant irregular and wasteful expenditure on the TNA newspaper and business briefings. The delegation of authority was only R3 million in respect of sponsorships and yet the acting-CEO, Mr Matjila, approved a sponsorship for R43 million and had this ratified by the Board, with apparently no consequences for the people involved.

313. This demonstrates that, while accountability structures are indeed useful, if the Board of a public entity fails in its duties to ensure that they are observed, they will prove useless in the fight against irregular and wasteful expenditure. If officials can be compromised and they exercise delegations of authority for nefarious purposes or ignore them altogether and suffer no consequences, then, again, the policies and processes serve no purpose. Finally, if employees responsible for carrying out those processes can be intimidated into proceeding with contracts without following due

process then these policies and processes will be of little value. All that will happen is that those employees will assist in creating a paper trail of proposals and justifications that purport to legitimise the expenditure and prevent exposure of unlawful and wasteful transactions.

TRANSNET

314. The Commission heard evidence from three witnesses in respect of TNA's contracts at Transnet:

314.1. Mr Mkwanazi was the Chair of the Board of Transnet from December 2010 to December 2014. He was the acting Group CEO from 16 December 2010 to 11 February 2011 pending the appointment of a Group CEO.[2362]

314.2. Mr Jackson was the Brand and Publicity Co-Ordinator for the Transnet Group Corporate and Public Affairs from 2006 to December 2014.[2363]

314.3. Mr Phatlane was the Senior Coordinator: Stakeholder Relations at Transnet from 2011 to 2017.[2364]

TNA contracts with Transnet

315. Transnet concluded separate contracts with TNA for advertising in *The New Age* newspaper and for the different sponsorship arrangements.

[2362] Transcript 17 July 2020, p 156 (line 11) – 157 (line 4).

[2363] Transcript 24 January 2020, p 57, lines 22-25.

[2364] Transcript 24 January 2020, p 120, lines 23-25.

315.1. In respect of advertising, Transnet employees were instructed to use *The New Age* newspaper exclusively for all the recruitment and tender advertisements;

315.2. In respect of sponsorship, Transnet concluded:

315.2.1. contracts with TNA for The Big Interview, to the value of R24.8 million from 2011 to 2016 (contracts were renewed every six months);[2365] and

315.2.2. five long term contracts and one *ad hoc* contract for TNA Business Briefings/Breakfasts, to the value of R122 809 526.70, from 2011-2017,[2366] as follows:

315.2.2.1. the first contract was concluded as a "sponsorship" on 7 and 14 May 2012[2367] for 16 breakfasts at R16 million;[2368]

315.2.2.2. the second contract was concluded on 19 April 2013 as a "partnership agreement" for 15 breakfasts at R15 million;[2369]

315.2.2.3. in January/February 2013, the parties concluded an ad hoc "sponsorship agreement" for two breakfast briefings at R3million;[2370]

315.2.2.4. the third contract was concluded on 6 June 2014 as a "partnership agreement" for 20 sessions at R20 million;

[2365] Transcript 24 January 2020, p 108, lines 22-25 and p 109, line 5.

[2366] Exhibit MM4, p 111, para 16.

[2367] Exhibit MM4, p 21-27.

[2368] Transcript 24 January 2020, p 161, lines 1-12.

[2369] Exhibit MM4, p 33 - 43.

[2370] Exhibit MM4, p 36.

315.2.2.5. the fourth contract was concluded on 14 April 2015 as a "partnership agreement" for 20 sessions at R21,2 million,[2371]

315.2.2.6. the fifth contract was concluded on 9 March 2016 as a "partnership agreement" for 20 sessions at R21,2 million.[2372]

Gupta meeting with Acting Group CEO

316. Prior to all of the advertising spend set out above, Mr Tony Gupta approached the acting Group CEO, Mr Mkwanazi, and requested that a significant proportion of the Transnet advertising budget be allocated to TNA.

317. Mr Mkwanazi testified before the Commission that he received a phone call from Mr Tony Gupta in January 2011, which was shortly after he had been made acting Group CEO of Transnet. Mr Tony Gupta told him that he obtained his number from Minister Gigaba.[2373]

318. In a response to a rule 3.3 notice sent to Mr Gigaba arising from Mr Mkwanazi's evidence, Mr Gigaba denied that he had provided Mr Mkwanazi's number to Mr Gupta.[2374] Mr Gigaba's denial falls to be rejected. Mr Gigaba probably had Mr Mkwanazi's number because he and Mr Mkwanazi had had a meeting either at the end of October 2010 on Mr Mkwanazi's version or before the 14th November 2010 on Mr Gigaba's version where Mr Gigaba offered Mr Mkwanazi the position of chair of the Transnet Board. On his own version, Mr Gigaba was friends with Mr Ajay Gupta and Mr

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[2371] Transcript 4 February 2020, p 30, lines 20-25.

[2372] Exhibit MM4, p 94-106.

[2373] Transcript 17 July 2020, p 160, lines 18-22.

[2374] Exhibit MM7, p 8, para 7.1.

Gigaba's legal advisor, Mr Siyabonga Mahlangu, met frequently with Mr Tony Gupta. So, if Mr Tony Gupta wanted the number of the Chairperson of the Board of Transnet, Mr Gigaba would have been the most obvious person he would have approached and Mr Gigaba would probably have given him the number. Why would he not have given the number to his friend's brother? In this regard it needs to be remembered that Mr Gigaba admitted that he and Mr Ajay Gupta were friends.

319. After receiving this call from Mr Tony Gupta, Mr Mkwanazi met him at the Gupta residence in Saxonwold.[2375] Mr Duduzane Zuma, the former President's son, was also present at the meeting.[2376] According to Mr Mkwanazi, Mr Tony Gupta indicated to him that he was friends with President Zuma.[2377] He also stated that he was aware that Transnet had a marketing budget of R1billion,[2378] and that he wanted 30-50% of that budget to be allocated to TNA.[2379] Mr Ajay Gupta had said something similar to Mr Themba Maseko in or around October 2010 but in that case Mr Ajay Gupta had demanded the whole government advertising budget of R600 million to be spent on the New Age newspaper.

320. Mr Mkwanazi testified that he told Mr Gupta and Mr Zuma that they would have to go through the ordinary channels of procurement in order to provide the state with services and that he was not the correct person to approach in this regard.[2380]

321. Mr Mkwanazi testified that in response to this rebuff, Mr Gupta said how close he was to the then President, that they met once a week and that President Zuma came to their

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[2375] Transcript 17 July 2020, p 160, lines 24-25.

[2376] Transcript 17 July 2020, p 161, lines 10-12.

[2377] Transcript 17 July 2020, p 161, lines 22-23.

[2378] Transcript 17 July 2020, p 161, lines 24-25.

[2379] Transcript 17 July 2020, p 161 (line 25) – 162 (lines 1-2).

[2380] Transcript 17 July 2020, p 162, lines 2-15.

social events. Mr Mkwanazi testified that it was evident that Mr Tony Gupta was "deep friends" with the President. Mr Tony Gupta even said that the President sang "Umshini Wam" for them.[2381] This is a song that Mr Zuma frequently sang for his supporters in political rallies after his dismissal by President Mbeki as Deputy President of the country and before he became President of the ANC and of the country.

322. Mr Mkwanazi explained that he felt that the Guptas were abusing their friendship with President Zuma. He testified that he asked Mr Duduzane Zuma whether what Mr Gupta said about President Zuma was correct and Duduzane Zuma confirmed that it was.[2382] Mr Mkwanazi stated that that was the only statement that Mr Duduzane Zuma made during the meeting – otherwise, he was silent and Mr Tony Gupta did all the talking.[2383]

323. Mr Mkwanazi testified that he knew that a figure of R1billion was incorrect for the Transnet marketing budget. While he did not know the exact figure, he knew this was too large and must have been a "thumb suck".[2384] In fact, the marketing budget for Transnet was R27 005 399 for 2010 and R95 530 394 for 2011.[2385]

324. Mr Mkwanazi testified that Mr Gupta was trying to convey how influential and powerful he was at this meeting by referring to being friends with cabinet ministers and members of Parliament.[2386]

325. Mr Mkwanazi testified that he then asked for a second meeting with Mr Gupta because he said he wanted somebody within the Department of Public Enterprises to also

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[2381] Transcript 17 July 2020, p 162 (line 16) – 163 (line 8).

[2382] Transcript 17 July 2020, p 162 (line 16) – 163 (line 8).

[2383] Transcript 17 July 2020, p 175, lines 8-17.

[2384] Transcript day 234 (17 July 2020), p 169, lines 21-25.

[2385] Exhibit MM7, p 34 Para 3 – 4.

[2386] Transcript 17 July 2020, p 172, lines 20-25.

witness what was being asked of him.[2387] Mr Mkwanazi explained that he requested that Mr Siyabonga Mahlangu, the advisor to Minister Gigaba, accompany him to the second meeting.[2388] He wanted Mr Mahlangu to act as a witness, particularly because Mr Gupta had indicated that he had received Mr Mkwanazi's number from Minister Gigaba.[2389] Mr Gupta then contacted Mr Mkwanazi again to schedule the second meeting.[2390]

326. The second meeting took place about two weeks after the first meeting (so, still around January 2011),[2391] and was attended again by Mr Zuma and Mr Gupta. This time, Mr Mahlangu was also in attendance.[2392] Mr Mkwanazi testified that at this second meeting, he again made it clear that he was not the appropriate person to speak to about the allocation of the marketing budget to TNA and that there was a procurement process that had to be followed.[2393] Mr Mkwanazi testified that Mr Gupta appeared to accept this answer. Mr Mahlangu merely observed and did not talk. Thereafter, the meeting ended.[2394]

327. Shortly after this meeting, a permanent appointment was made for Group CEO to replace Mr Mkwanazi. Mr Brian Molefe was appointed as the new Group CEO on 16 February 2011[2395] and went on to play a significant role in facilitating TNA contracts at Transnet.

[2387] Transcript 17 July 2020, p 174, lines 10-15.

[2388] Transcript 17 July 2020, p 177, lines 15-25.

[2389] Transcript 17 July 2020, p 178, lines 10-16.

[2390] Transcript 17 July 2020, p 178, lines 18-24.

[2391] Transcript 17 July 2020, p 186, lines 8-11.

[2392] Transcript 17 July 2020, p 179, lines 19-25.

[2393] Transcript 17 July 2020, p 183, lines 3-14.

[2394] Transcript 17 July 2020) p 184, lines 10-13; p 185, lines 8-12.

[2395] Transcript 17 July 2020, p 156 (line 11) – 157 (line 4).

328. A few months after these meetings, on 9 June 2011, there was an article in the Business Day stating that Mr Mkwanazi was going to be removed from his position at Transnet by Minister Gigaba.[2396] Mr Mkwanazi said he was shocked to read this;[2397] he said there had been no discussion with him that he would be removed.[2398]

329. In the Cabinet Memorandum of 25 May 2011,[2399] which recorded the proposal that Mr Gigaba made to Cabinet, it is indeed reflected that Mr Gigaba proposed that Mr Mkwanazi be removed as chairman of the board of Transnet and that he be replaced with Mr Iqbal Sharma.[2400] However, the outcome of the Cabinet meeting was that Mr Gigaba was unsuccessful and Mr Mkwanazi was not replaced.[2401]

330. Mr Mkwanazi testified that there may have been a connection between his reaction at the meetings with Mr Gupta and Mr Zuma and the efforts to remove him but he did not know this as a fact.[2402]

331. When Mr Mkwanazi was asked why he did not come forward earlier to disclose the nature of the meetings with Mr Gupta, he said that he did not feel the need to come forward because it was fairly well known that officials were being approached by the Guptas in this manner – he said that he felt that "whatever the Gupta family is doing, it is a well-known thing within the ruling party."[2403]

332. Despite the fact that Mr Mkwanazi did not accede to the Guptas' demands in early 2011, as will be shown below, they were successful in acquiring a significant proportion of the

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[2396] Exhibit MM7, p 37.

[2397] Transcript 17 July 2020, p 187, lines 19-22.

[2398] Transcript 17 July 2020, p 192, lines 22-25.

[2399] Exhibit MM7, p 38.

[2400] Exhibit MM7, p 38, para 2.2 and p 39, para 3.2.

[2401] Transcript 17 July 2020, p 196, lines 9-10.

[2402] Transcript 17 July 2020, p 199 (line 21) – 200 (line 1).

[2403] Transcript 17 July 2020, p 212 (line 20) – 213 (line 2).

Transnet marketing budget and did so without going through the procurement "processes" through which Mr Mkwanazi had told them they had to go.

Advertising at The New Age newspaper

333. Mr Jackson was the Brand and Publicity Co-ordinator for the Transnet Group Corporate and Public Affairs from 2006 to December 2014.[2404] In that role, Mr Jackson was responsible for advertising management for Transnet.[2405]

334. Mr Jackson explained that, absent some specific strategic objective that it had to promote, Transnet's only advertising was for tender and recruitment purposes.[2406] Transnet would generally use an advertising agency to organise its advertising. This was done by a company called "The Agency".[2407] The Agency would advise Transnet about where to place adverts depending on the needs of a particular campaign. They would advise on demographic and circulation and they would negotiate on Transnet's behalf.[2408]

335. Unlike Eskom, which had an advertising or sponsorship policy, Transnet had no official advertising or sponsorship policy. Instead, there was an unofficial advertising guideline.[2409] However, according to Mr Jackson this draft policy or guideline did contain some of the guidelines that Transnet would use for advertising decisions such as (a)

[2404] Transcript 24 January 2020, p 57, lines 22-25.

[2405] Transcript 24 January 2020, p 59, lines 10-18.

[2406] Transcript 24 January 2020, p 60, lines 10-16.

[2407] Transcript 24 January 2020, p 60, lines 17-25.

[2408] Transcript 24 January 2020, p 61, lines 3-12.

[2409] Transcript 24 January 2020, p 61, lines 13-20.

using resources cost-effectively to reach a particular target market and (b) measuring advertising to know what works.[2410]

336. Mr Jackson explained that, when he took over the advertising portfolio, he was responsible for the placement of adverts and how they appeared.[2411] He said that at some point in time, he was instructed by his superior, Mr Mboniso Sigonyela, to advise his colleagues that, from then on, they were required to advertise for tenders and recruitment in the TNA.[2412] Mr Jackson testified that Mr Sigonyela simply told Mr Jackson that it "must be done" but did not give him a reason.[2413] His instruction pertained to all advertising of tenders and recruitment.[2414] Mr Jackson explained that Mr Sigonyela had never before prescribed to him specific media that had to be used.[2415]

337. Mr Jackson testified that he carried out Mr Sigonyela's instructions, even though he knew nothing about the circulation, demographics or readership figures of TNA because it was a new newspaper.[2416]

338. Mr Jackson testified that his view was that the different divisions within Transnet were autonomous and could make their own decisions, depending on their budget and discretion. He said that, for that reason, his position was that he would only "recommend" that various divisions use TNA.[2417]

[2410] Transcript 24 January 2020, p 62 (line 17) – 63 (line 2).

[2411] Transcript 24 January 2020, p 63, lines 10-17.

[2412] Transcript 24 January 2020, p 63, lines 20-23.

[2413] Transcript 24 January 2020, p 64, lines 1-5.

[2414] Transcript 24 January 2020, p 64, lines 10-20.

[2415] Transcript 24 January 2020, p 64, lines 22-23.

[2416] Transcript 24 January 2020, p 67, lines 15-19.

[2417] Transcript 24 January 2020, p 68, lines 9-25.

339. Mr Jackson testified that he was verbally reprimanded for not having followed this instruction and for using the word "recommend". He said that Mr Sigonyela told him that he was incompetent and, if he did not comply, he would find someone else to do Mr Jackson's job who would follow instructions.[2418]

340. Ultimately, as will be evident from what follows, Mr Jackson did eventually assist TNA in securing significant Transnet spending on TNA advertising.

The Big Interview

341. Mr Jackson explained that The Big Interview was an insert in the TNA newspaper, where it profiled a media personality.[2419] The interview had nothing to do with Transnet.[2420]

342. On 1 December 2011, Mr Jacques Roux of TNA emailed a proposal to a representative of The Agency for Transnet to sponsor The Big Interview in the TNA.[2421] The proposal would allow Transnet to advertise in the "ear space" on either side of the newspaper where Transnet would place their logo as well as naming rights – so the piece would be headed, the Transnet Big Interview.[2422] This was being offered for an amount of R327 576 for the month.[2423] The amount for the six month contract period was R1 965 456.[2424]

[2418] Transcript 24 January 2020, p 69, lines 17-23.

[2419] Transcript 24 January 2020, p 72, lines 10-13.

[2420] Transcript 24 January 2020, p 72, lines 21-23.

[2421] Exhibit MM5, p 8, para 34. The proposal is at exhibit MM5, p 42.

[2422] Transcript 24 January 2020, p 76 (line 15) – 77 (line 5).

[2423] Transcript 24 January 2020, p 77, lines 6-13.

[2424] Exhibit MM5, p 42.

343. Ms Hanlie van Eck worked for Planet Media which was an advisory expert on media placement for Transnet. She would advise on the return on investment for a particular advertisement in a newspaper.[2425] Ms van Eck advised The Agency and Transnet via email on 14 December 2011 that the Big Interview sponsorship was extremely expensive and was not worth the return on investment. She recommended that Transnet not proceed with the opportunity.[2426]

344. When approached again on this matter, Ms van Eck again said that, based on the given costs, they could not justify the feature. She made the additional point that there was no ABC certification on circulation. She therefore concluded that she did not support the offer.[2427]

345. Mr Jackson also confirmed that there was no information available about the reach of the TNA newspaper or who was reading it. So, it was not clear that advertising Transnet's logo would give Transnet any value at all.[2428] He also conceded that, with a public entity like Transnet, it was not clear what value they would get from sponsoring this interview as there was already brand awareness.[2429]

346. Mr Jackson testified that he found the decision by Mr Brian Molefe, pursuant to the recommendation of Mr Sigonyela (as set out below), to participate in the sponsorship of The Big Interview by Transnet to be suspicious and not justifiable. The advice

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[2425] Transcript 24 January 2020, p 80, lines 18-25.

[2426] Exhibit MM5, p 146.

[2427] Exhibit MM5, p 57.

[2428] Transcript 24 January 2020, p 85, lines 9-18.

[2429] Transcript 24 January 2020, p 86 (line 7) – 87 (line 11).

received from Transnet's consultant was that it was not worth the money, but then, a day later, the decision was taken to go ahead.[2430]

347. Mr Jackson explained that he raised these concerns about circulation, data and value with Mr Sigonyela,[2431] but was told that the concerns were not important at that stage.[2432]

348. Mr Sigonyela produced an internal memorandum on the sponsorship of TNA, on 14 February 2012, addressed to Mr Brian Molefe, the Group CEO at the time.[2433] The proposal stated that TNA "is one of the key publications that Transnet targets for positioning its brand and its image as part of its reputation management strategy."[2434] Mr Jackson testified that this was false.[2435]

349. The memorandum also stated that "this platform will afford Transnet the opportunity to send key messages to our stakeholders".[2436] Mr Jackson testified that this was also not a justifiable statement as there was no way to measure the reach of the newspaper to Transnet's stakeholders.[2437]

350. In fact, in the end, the Big Interview was not even called the Transnet Big Interview, as had been suggested in the proposal.[2438] It was just called the "Big Interview" with no affiliation to its sponsor.

[2430] Transcript 24 January 2020, p 93, lines 7-13.

[2431] Transcript 24 January 2020, p 94, lines 6-17.

[2432] Transcript 24 January 2020, p 94, lines 6-17.

[2433] Exhibit MM5, p 66.

[2434] Exhibit MM5, p 66, para 2.

[2435] Transcript 24 January 2020, p 96, lines 2-9.

[2436] Exhibit MM5, p 67.

[2437] Transcript 24 January 2020, p 96, lines 10-20.

[2438] Exhibit MM5, p 181. Transcript 24 January 2020, p 100, lines 12-20.

351. Despite this, the recommendation was to accept the proposal from TNA for the Big Interview and it was signed by Mr Sigonyela and Mr Molefe.[2439]

352. Mr Molefe signed the proposal on 23 February 2012,[2440] but there is an email from Ms van Eck confirming that she had authorisation from Transnet for the sponsorship to go ahead, which was dated 15 February 2012.[2441] Mr Jackson testified that the only person who had the delegated authority to give this authorisation at the time was Mr Sigonyela.[2442] He clearly gave this instruction before he received proper internal approval from Mr Molefe.[2443] Further instructions were also given about the "flow plan" of the sponsorship – how it would be inserted in the newspaper and on what dates – prior to Mr Molefe's authorisation of 23 February 2012.[2444]

353. Mr Jackson, having seen this premature instruction, had then intervened by email to say that the internal processes had not yet been complied with as Mr Molefe had not signed off on the proposal.[2445] Mr Jackson testified that Mr Sigonyela told him he was hindering the process and making it go too slowly. Mr Jackson testified that he was put under extreme pressure by Mr Sigonyela who was very eager to get the arrangement in place as quickly as possible. Mr Sigonyela told Mr Jackson that, because progress was too slow, he had to provide him with a formal progress report to ensure that he was

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[2439] Transcript 24 January 2020, p 96 (line 20) – 97 (line 7).

[2440] Transcript 24 January 2020, p 98, lines 5-7.

[2441] Exhibit MM5, p 72.

[2442] Transcript 24 January 2020, p 101, lines 14-15.

[2443] Transcript 24 January 2020, p 101, lines 16-21.

[2444] Transcript 24 January 2020, p 102, lines 3-12. See exhibit MM5, p77.

[2445] Transcript 24 January 2020, p 102 (line 15) – 103 (line 4). Exhibit MM5, p77.

doing his job.[2446] Mr Jackson testified that Mr Sigonyela had never put him under this level of pressure before.[2447]

354. Mr Jackson also testified that he, himself, had also prepared certain internal memoranda on TNA. One such memorandum was in support of the "renewal" of the New Age Big Interview sponsorship. However, this time, the memorandum referred to it not as a sponsorship but as a "partnership".[2448] Despite this name change, Mr Jackson confirmed that the deal was no different to the first one and that, in reality, it was a sponsorship.[2449]

355. Mr Jackson explained that, while he did not support the TNA arrangement, it was already a done deal and he was just concerned with getting the formal processes done.[2450]

356. Ms Palesa Ngoma provided the Commission with an affidavit.[2451] During the relevant period covered by Mr Jackson's testimony, she was a communications specialist at Transnet.[2452] Her affidavit deals with Transnet's support of the Big Interview and TNA business breakfasts.[2453]

[2446] Transcript 24 January 2020, p 103 (line 11) – 104 (line 2).

[2447] Transcript 24 January 2020, p 104, lines 18-22.

[2448] Exhibit MM5, pp115-116.

[2449] Transcript 24 January 2020, p 106, lines 12-15.

[2450] Transcript 24 January 2020, p 105(line 20) – 106 (line 3).

[2451] Exhibit MM5, p 175-180.

[2452] Exhibit MM5, p 175, para 5.

[2453] Exhibit MM5, p 176, para 6.

357. Ms Ngoma confirmed that she was also instructed by Mr Sigonyela to produce memoranda in support of Transnet partnering with SABC in TNA business breakfasts.[2454] She said that she wrote six proposals.[2455]

358. Transnet ultimately spent a total of R24.8 million on the Big interview from 2011 to 2016.[2456]

359. No evaluation was ever done on whether Transnet was getting value for money for this spend.[2457] Mr Jackson testified that, in his view, Transnet did not get any value for money and, if anything, its reputation was damaged by the association with the TNA brand.[2458]

360. The Big Interview sponsorship contracts were irregular in that they did not follow the ordinary processes set out (albeit informally) in Transnet. It is also clear that the spending was wasteful and fruitless expenditure as Transnet derived no value from it. No transparent and competitive processes were followed by Transnet in obtaining these services.

TNA Breakfast Briefings

361. Mr Phatlane was the Senior Coordinator Stakeholder Relations at Transnet from 2011 to 2017.[2459] He also reported to Mr Siyongela.[2460] In this role, sponsorships and

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[2454] Exhibit MM5, p 176, para 10.

[2455] Exhibit MM5, p 177, para 14.

[2456] Transcript day 24 January 2020, p 108, lines 22-25 and p 109, line 5.

[2457] Transcript 24 January 2020, p 109, lines 1-3.

[2458] Transcript 24 January 2020, p 109, lines 14-22.

[2459] Transcript 24 January 2020, p 120, lines 23-25.

[2460] Transcript 24 January 2020, p 121, line 4.

donations fell under his area of responsibility.[2461] This mandate fell under the office of the Group CEO, Mr Molefe.[2462]

362. Mr Phatlane testified before the Commission and explained that the ordinary process for approving a sponsorship at Transnet was for a party to send a proposal to Transnet and then a process of assessment would follow along the following lines:

362.1. a team would assess whether the proposal was in line with the draft sponsorship and donation policy;

362.2. Transnet would perform a due diligence to check if the request was legitimate and whether it would be helpful to Transnet – it would look for benefits to Transnet and whether those were in line with its objectives;

362.3. a memorandum would then be generated and directed to the General Manager who had authority to approve the sponsorship if it fell under the amount set out in his delegation of authority;

362.4. if the General Manager approved it, the sponsorship would be executed and Transnet would ensure it received what was agreed;

362.5. if the monetary amount exceeded the General Manager's authorised amount, the proposal would go to a person with higher authority; and

362.6. when a sponsorship was approved, a sponsorship contract would be drafted and, if signed, payment would follow.[2463]

[2461] Transcript 24 January 2020, p 123, lines 12-14.

[2462] Transcript 24 January 2020, p 123, lines 15-17.

[2463] Transcript 24 January 2020, p 123 (line 22) – 125 (line 6)

363. Mr Phatlane explained that he first encountered Mr Jacques Roux of TNA in 2011. He noted that Mr Roux had been visiting and meeting with the GM, Mr Siyongela for a number of days – but Mr Phatlane said he did not know exactly what the meetings were about at that stage.[2464]

364. In September 2011 Mr Roux sent the first business breakfast request to Mr Phatlane. The letter consisted of one page and was addressed to Mr Sigonyela. It set out a proposal for Transnet to sponsor the business breakfasts with TNA. The proposal was for two such breakfasts with a total cost of R1 471 000.[2465] The offer contained no detail about value or the nature of the sponsorship "opportunity". It simply provided a table of the prices. There was no motivation provided in the document.[2466] However, as will be seen below, the proposal was recommended by Mr Sigonyela and approved by Mr Molefe.

365. Mr Phatlane explained that Transnet never interrogated why they were being asked to pay for the catering and costs of the breakfast or what value Transnet would be getting out of the sponsorship.[2467]

366. Mr Phatlane stated that, after receiving the proposal, Mr Sigonyela instructed him to prepare a memorandum in support of the business breakfasts/briefings.[2468] When asked whether he performed the due diligence requirement that is part of the process for sponsorship approval, his answer was evasive and he ultimately explained that he

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[2464] Transcript 24 January 2020, p 140, lines 1-10.

[2465] Transcript 24 January 2020, p 141, lines 3-6.

[2466] Exhibit MM4, p 15.

[2467] Transcript 24 January 2020, p 159, lines 18-25.

[2468] Transcript 24 January 2020, p 142, lines 1-5.

was not aware of what process to follow for such a large amount and was waiting to hear from the GM about what to do.[2469]

367. Mr Phatlane's memorandum[2470] stated that TNA was one of the key publications that Transnet targeted for the positioning of its brand and to improve its image.[2471] Mr Phatlane testified that Mr Sigonyela instructed him to write this.[2472] The memorandum was directed to the Acting Group Executive: Corporate Services at the time, Mr Siyabulela Mapoma, but Mr Mapoma did not approve the proposal.[2473] Accordingly, Mr Sigonyela prepared another memorandum in support of the proposal, this time by-passing Mr Mapoma and going straight to Mr Molefe.

The first contract

368. On 20 March 2012 Mr Sigonyela directed the second memorandum to the Group CE, Mr Molefe.[2474] Mr Phatlane testified that he drafted the memorandum.[2475] The memorandum sought to encourage Mr Molefe to approve a sponsorship contract with TNA in terms of which Transnet would purchase, through a contract with TNA, 16 breakfasts worth R16 million.[2476] This was a departure from the earlier proposal which was for *ad hoc* business breakfasts/briefings. The motivation in the memorandum was brief. It claimed that the breakfast briefings were popular and would provide a public platform for "robust discussions" to take place, that would give Transnet space for "maximum media exposure to highlight its achievements and its role in broader society".

[2469] Transcript 24 January 2020, p 147 (line 16) – 149 (line 3).

[2470] Exhibit MM4, p 16, dated 26 September 2011.

[2471] Exhibit MM4, p 16, para 2.

[2472] Transcript 24 January 2020, p 149, lines 10-25.

[2473] Transcript day 24 January 2020, p 153, lines 2-19.

[2474] Exhibit MM4, p 18.

[2475] Transcript 24 January 2020, p 160, lines 20-25.

[2476] Transcript 24 January 2020, p 161, lines 1-12.

It claimed, without supporting evidence, that the "branding and speaking opportunities provided by this platform will be exploited to reiterate key messages through statements and questions intended to emphasis [Transnet's] profile and role in the development of the economy".[2477] The proposal was ultimately approved by Mr Molefe on 23 March 2012.[2478]

369. The contract giving effect to this proposal was concluded on 14 May 2012.[2479] It was signed by the Acting Group CE (Mr Molefe was away at the time). The contract was labelled as a sponsorship agreement.[2480]

370. In this agreement, the early termination clause allowing Transnet to exit the agreement on notice, was struck out of the agreement,[2481] just as it had been in the Eskom agreements, set out above.

371. Mr Phatlane testified that he did not know why this had been done and did not ask about it at the time. He simply saw the agreement on his desk and archived it.[2482] He did, however, confirm that in the standard Transnet contracts, there was an exit clause to protect Transnet and that he had ensured that such a clause was in this contract – but, when he received the signed version, he noted that the parties had struck out that clause.[2483] As will be set out in greater detail below, the deletion of this clause, which clause was standard in Transnet sponsorship contracts and critical to protect its financial interests, was against legal advice and was contrary to the interests of

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[2477] Exhibit MM4, p 19.

[2478] Transcript 24 January 2020, p 165, lines 1-7.

[2479] Exhibit MM4, p 21-27.

[2480] Transcript 24 January 2020, p 167, lines 2-15.

[2481] Exhibit MM4, p 25. Transcript 24 January 2020, p 168, lines 6-19.

[2482] Transcript day 205 (24 January 2020, p 168 (line 20) – 169 (line 1).

[2483] Transcript 24 January 2020, p 169, lines 2-13.

Transnet. The removal of this clause shows that TNA was being preferred over ordinary media vendors, for reasons that were not explained.

The second contract

372. On 7 March 2013 TNA provided another proposal for the TNA business briefings. This one was for 20 briefings for a total of R20million.[2484]

373. The GCE's limit under the delegation of authority at this time was a cumulative annual total of R10million.[2485] He would therefore not have the authority to conclude this agreement – it would have had to be done by the Board of Transnet.[2486]

374. After this proposal had been submitted, Mr Phatlane assisted in creating another memorandum supporting this proposal on 11 March 2013.[2487] The memorandum was from Mr Sigonyela to Mr Molefe. In this memorandum, unlike the first memorandum, the contract was described as a "partnership" instead of a "sponsorship". It seems that this was done in order to bring the contract within the Group CEO's authority threshold, so that the agreement could be approved by him and did not require Board approval. This recasting of the nature of the contract in order to seek to have it fall within the delegation of authority of the Group Chief Executive Officer is a pattern that appears to have emerged in the TNA contracting. As set out above, when Mr Matjila at Eskom approved the R43 million contract for the business breakfasts with TNA, he tried to argue that it was within his delegated authority because it was an "investment" rather than a

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[2484] Exhibit MM4, p 30.

[2485] The delegation of 1 May 2012 (Exhibit MM4, p 141) provided that the Group CEO had authority in sponsorship contracts of up to R10million; contracts between R10-20million had to be approved by a Board Committee called the Social and Ethics Committee; and above R20million had to be approved by the Board itself. The delegation is also cumulative – the amount of R10million is for the entire year (Exhibit MM4, p 167, clause 5.8.5.).

[2486] Transcript 24 January 2020, p 172, lines 9-16.

[2487] Transcript 24 January 2020, p 174, lines 1-4. The memorandum is at exhibit MM4, pp 31-32.

sponsorship. If it had been a sponsorship, it would have had to have gone to the sponsorship committee for approval.

375. The same *modus operandi* appears to have been used at Transnet. Once the monetary value of sponsorship of a business breakfast exceeded R 10 million in a year, the Group CE had no authority to approve it and it needed to be approved by the Board. To avoid following this correct procedure, the contracts were “recast” as “partnership” deals and then approved by the Group CE, without Board approval.

376. At both SOEs, the corporate governance policies in place evidently sought to place restraints on the CEO’s authority to conclude costly sponsorship contracts. Sponsorships were singled out, presumably because they provide less direct and quantifiable benefit to the organisation and the measurement of their value is more complicated. As a result and as a responsible check and balance in the system, there was a special committee at Eskom that was required to assess any sponsorship proposal over a certain monetary threshold. At Transnet, the Board was supposed to fulfill this function. In both cases, TNA had to try and get around this policy to get approval without scrutiny by the appropriate bodies. This was achieved by disguising what was evidently a sponsorship agreement, as some other kind of agreement, and particularly, a type of agreement that the CEO did have authority to conclude in higher monetary amounts. At Eskom, Mr Matjila tried to claim that he had authority to conclude the agreement as it was an investment. At Transnet, Mr Molefe tried to claim it was a partnership. These were blatant attempts to avoid the corporate governance processes in place to avoid mismanagement of public funds.

377. Mr Phatlane testified that he did not know why it would be called a partnership as there was no documentation about a partnership. He was, nonetheless, instructed by Mr

Sigonyela to call it a partnership.[2488] He was also instructed to reduce the spend to R15 million which was then approved by Mr Molefe.[2489]

378. The agreement that was ultimately concluded in this regard, on 19 April 2013, was entitled "Branding and Advertising Partnership Agreement".[2490] The agreement committed Transnet to provide an amount of R15 million (excluding VAT)[2491] for 15 sessions.[2492] Payment had to be made by Transnet within 7 days after the signing of the agreement.[2493] This was a change from the previous agreements that allowed payments to be made in 30 days after TNA had presented an invoice. When Mr Phatlane was questioned about this change, he testified that Mr Sigonyela had told him that he had a meeting with someone from TNA who had insisted on this more onerous payment arrangement.[2494]

379. Mr Makode, the Executive Manager of Communications at Transnet, provided the Commission with an affidavit, setting out the budgets for Transnet during that time.[2495] The 2013 marketing budget for Transnet was a total of R138 648 799.20 – R72 857 070 which belonged to the Corporate Affairs Department budget.[2496]

[2488] Transcript 24 January 2020, p 174, lines 12-25.

[2489] Transcript 24 January 2020, p 175, lines 12-19.

[2490] Exhibit MM4, p 33.

[2491] Exhibit MM4, p 37, clauses 7.2 and 7.3.

[2492] Exhibit MM4, p 36, clause 3.9 (for a twelve-month period).

[2493] Exhibit MM4, p 37 clause 7.2.

[2494] Transcript 24 January 2020, p 180, lines 1-25.

[2495] Exhibit MM4, pp 200-201.

[2496] Exhibit MM4, p 201, para 4.

380. The agreement concluded on 19 April 2013 by Mr Molefe and Mr Howa was for R15 million which is approximately 20% of the budget.[2497] Mr Phatlane confirmed that this was a significant proportion of the Transnet Corporate Affairs budget.[2498]

381. This 2013 agreement was clearly irregular. Although it was no different from the 2012 sponsorship agreement, it was recast as a partnership agreement. However, that recasting did not change its nature. It was a sponsorship agreement. Mr Molefe did not have the authority to conclude it as it fell within the authority of the Board. Despite this, Mr Molefe went ahead and concluded the agreement, committing Transnet to pay R15 million within 7 days for a service that did not produce any discernible value for Transnet. The expenditure was therefore also fruitless and wasteful.

Ad hoc contract

382. Mr Phatlane testified that on 24 January 2014 he was involved in the drafting of another memorandum.[2499] This memorandum proposed two business briefings that would cost R3 million – a substantial increase in price from the previous contract, from R1 million per breakfast, to R1.5 million.[2500]

383. Mr Phatlane testified that he queried this higher amount and objected to it as unfair to Mr Vida Talliep who was Mr Phatlane's counterpart in TNA. Mr Talliep told Mr Phatlane he was being rude and the matter was ultimately escalated to Mr Howe, the TNA CEO, and to the Transnet GM, Mr Sigonyela who ordered Mr Phatlane to include the higher price in the memorandum.[2501]

[2497] Exhibit MM4, p 43. Transcript 4 February 2020, p 11, lines 10-20.

[2498] Transcript 4 February 2020, p 12, lines 9-17.

[2499] Exhibit MM4, p 36.

[2500] Exhibit MM4, p 37.

[2501] Transcript 24 January 2020, p 184 (line 16) – 185 (line 6).

The third contract

384. On 31 March 2014 TNA made a further proposal, significantly, for "sponsorship" of the TNA business briefings.[2502] The proposal claimed that the sponsorship would allow exposure for Transnet to 3 million people at a peak time.[2503]

385. Mr Phatlane's memorandum in respect of this proposal was prepared on 14 April 2014 and was styled as a request to "renew the New Age/SABC Business Briefing Sessions Partnership".[2504] The memorandum repeated the claim that the business briefings reached an audience of 2-3 million people.[2505]

386. Mr Phatlane testified that he had verified these figures by contacting the SABC marketing department. However, the evidence from the SABC was that only 600 000 adults actually watched the show in 2012. When Mr Phatlane was asked about this, he testified that he had no evidence or records of his interaction with the marketing department at SABC to obtain these figures.[2506]

387. This memorandum led to the conclusion of another "partnership" agreement in 2014. It was for 20 sessions valued at R20 million. It was signed on 6 June 2014 by Mr Molefe.[2507] This was once again far in excess of Mr Molefe's delegated authority of R10 million for sponsorships.

387.1. The contract that was concluded also did not contain the usual early termination clause that would allow Transnet to cancel on 30 days' notice. Mr Phatlane

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[2502] Exhibit MM4, p 50.

[2503] Exhibit MM4, p 52.

[2504] Exhibit MM4, p 55. Emphasis added.

[2505] Exhibit MM4, p 55, para 3.

[2506] Transcript 4 February 2020, p 16 (line 3) – p 17 (line 13). See also exhibit MM1, p 16, para 57.2.

[2507] Exhibit MM4, pp 55-69.

testified that he had drafted the contract to include the standard early termination clause. This was queried by TNA and Mr Sigonyela told Mr Phatlane that he was being difficult and causing problems in the conclusion of the contract. Mr Sigonyela told Mr Phatlane to go to the legal department for advice on the inclusion of the clause.

387.2. Mr Phatlane testified that he approached the legal department which told him that the clause should remain in the contract for Transnet's protection.

387.3. Mr Phatlane said that, later, the representative from the legal department met with Mr Sigonyela and the two of them went up to Mr Molefe's office for a number of hours. Mr Phatlane testified that he eventually went home before they came back and then was on leave the next day (a Friday). He testified that, when he returned to work, the signed contract was on his desk and the termination clause had been amended to allow termination only by mutual agreement between the parties.[2508] This meant that Transnet could not unilaterally exit the agreement on notice even if it realised that the agreement was bad for it. Once again, TNA was entitled to an upfront payment of that R20 million.[2509]

388. Mr Phatlane testified that, by around 2014, there was a lot of negativity around any association with the Guptas. As a result, many people who worked in the area of communication at Transnet wanted the TNA contract to scale down or even cease altogether. However, they were not able to do anything about it.[2510]

[2508] Transcript 4 February 2020, p 18 (line 14) - 24 (line 25).

[2509] Transcript 4 February 2020, p 28, lines 7-9.

[2510] Transcript 4 February 2020, p 27, lines 1-10.

The fourth contract

389. In 2015 Transnet concluded another agreement for business briefings with TNA. This was also styled as a "partnership" agreement and was signed on 14 April 2015 by Mr Molefe.[2511] This contract was for a further 20 sessions at a cost of R21 200 000.[2512] Once again, there was no early termination clause, just a clause providing for a termination by mutual agreement between the parties.[2513]

The fifth contract

390. On 9 March 2016 Mr Phatlane was involved in yet another memorandum of support for a further "partnership" with TNA.[2514] This was approved by Mr Sigonyela and Acting Group CE, Siyabonga Gama. By this stage, Mr Molefe was no longer at Transnet as he had moved across to Eskom. The 2016 "partnership" was for 20 sessions at a cost of R21 200 000 (excluding VAT). The contract was signed on 9 May 2016 by Mr Gama. As with its predecessors, it had no early termination clause and the money was required to be paid upfront to TNA.[2515] An amount of R24 168 000 was paid in two tranches during 2016 (that is R21 200 000 plus VAT of 14%).[2516] In fact, it appears that an additional amount of R24 168 000 was again paid in 2017. However, the Commission does not have insight into the contracts or circumstances underpinning the 2017 payment.

[2511] Exhibit MM4, p 74- 87.

[2512] Transcript 4 February 2020, p 30, lines 20-25.

[2513] Exhibit MM4, p 82, clause 11.

[2514] Exhibit MM4, p 90-92.

[2515] Exhibit MM4, p 94-106.

[2516] Exhibit MM4, p 112.

The value to Transnet

391. The Manager of Group Governance Risk at Transnet, Ms Helen Walsh, provided the Commission with an affidavit setting out Transnet's total spend on the TNA business briefings from 2012 to 2017. The amount was R122 809 526.70. For the Big Interview, the spend was R24 872 200.16.[2517]

392. Mr Phatlane confirmed that, apart from Transnet's logo being broadcast in the background at the breakfast briefings and having someone connected with Transnet being present at the breakfast, Transnet was not featured in these business briefings and yet paid all the expenses associated with them.[2518]

393. Mr Phatlane explained that eventually he struggled to find sufficient people from Transnet to fill the seats at the business briefings as the support from Transnet declined heavily.[2519]

394. Then, in 2016, there was a change in leadership and the new GM for communications, Mr Molatwana Likhethe,[2520] cancelled the Big Interview. At that stage, there were around 6 business briefings that still had to take place but Mr Likhethe changed the way they were done. He got Mr Phatlane to craft the content of the briefing so that it actually focused on what Transnet was doing. Transnet began scripting the interviews and interviewing people from within Transnet and its stakeholders. They were now directly supporting and promoting Transnet's business.[2521] Mr Phatlane testified that they were

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[2517] Exhibit MM4, p 111.

[2518] Transcript 4 February 2020, p 44, lines 6-15.

[2519] Transcript 4 February 2020, p 59 (line 19) – 60 (line 3).

[2520] Exhibit MM4, p 7, para 11.

[2521] Transcript 4 February 2020, p 61 (line 1) – 62 (line 12)

never afforded this opportunity in the previous five years and had merely had the terms dictated to them by TNA.[2522]

395. By way of illustration, one breakfast dealt with jobs and procurement scams in companies during a time when Transnet was running a campaign about the issue; one breakfast focused on the Transnet rail network; one on the ocean economy with the focus being on Transnet's marine operations; and one was on the pipeline network. They began to be about social issues facing the public and profiled Transnet executives who participated in panel discussions to educate the public on Transnet's importance in the economy and the scale of its operations.[2523]

Conclusion

396. From the above evidence, it is apparent that Mr Molefe and Mr Sigonyela were directly facilitating the use of public funds for TNA spending. They did not appear to put up any resistance and indeed appeared determined and anxious to ensure that these contracts were concluded (and on extremely disadvantageous terms for Transnet). Mr Sigonyela used threats and intimidation to ensure that his subordinates complied with instructions to advance the interests of TNA. The spend on these contracts was irregular, fruitless and wasteful.

397. Both Mr Molefe and Mr Sigonyela received rule 3.3 notices related to the evidence presented at the Commission.

397.1. Mr Sigonyela's lawyers informed the Commission in correspondence that they would consider Mr Sigonyela's position after the evidence had been presented

[2522] Transcript 4 February 2020, p 62, lines 13-20.

[2523] Exhibit MM4, p 7, para 11.

and, if necessary, make application to cross examine the witnesses. Despite this indication, however, no such applications were received.

397.2. Mr Molefe did not respond to the rule 3.3 notices. However, he did give evidence at the Commission and was questioned about these contracts with TNA. The gist of his evidence was that the millions of Rands that were spent on the Big interview were justified because Transnet needed to "move away from paying for adverts and move our brand to the mainstream news . . . and the Big Interview was an opportunity to do that".[2524]

397.3. However, this justification does not hold water. The Big Interview did not move Transnet away from paying for advertisements. On the contrary, it cost Transnet handsomely – a total of more than R24 million.

397.4. Furthermore, the branding opportunity that the Big Interview presented for Transnet were also not ever verifiable because there had been no ABC certification on circulation done for the newspaper and so its reach was entirely unknown.

397.5. On the business breakfasts, Mr Molefe was questioned on two aspects: how Transnet derived value for money from the breakfasts and why they had changed from being described as "sponsorships" to "partnerships". Mr Molefe testified that the business breakfasts had value because they allowed for good news about Transnet to be covered in the media and gave the Transnet CEO an opportunity to speak about Transnet.[2525] However, this "value" could not have been worth the amount paid for it. The speech that the Transnet CEO had

[2524] Transcript 10 March 2021, p 138, lines 18-23

[2525] Transcript 29 April 2021, p 258, lines 14-18

an opportunity to present was not aired on SABC and so it was made only to the people in the room at the time. It is nonsense to suggest it was justified for Transnet to pay R 1 million for its CEO to make a ten minute presentation to a room full of people whose identity would not even be known beforehand.

397.6. On the question of the change from "sponsorship" to "partnership", the issue was whether this change had been a deliberate one to keep the approval power with Mr Molefe because the change in description coincided with a change to his own delegation of authority from the Board of Transnet. If the contracts had not been changed from being described as "sponsorships", then Mr Molefe would not have been able to approve them himself from 2013. They would have required Board approval.

397.7. When Mr Molefe was first questioned about this during his testimony, he did not have an answer and asked for an opportunity to submit an affidavit.[2526] He was afforded that opportunity but produced an affidavit that did not provide a credible response. Mr Molefe stated in his affidavit that the description was changed because "we found that Partnership was a more accurate reflection of the nature of our relationship with the SABC and the TNA . . . classifying the briefings as sponsorships did not reflect the fact that Transnet was benefitting commercially from the briefings in the form of exposure for the brand as well as advertising".

397.8. However, the explanation that Mr Molefe has provided does not explain why the manner in which the parties described the contract mattered. This was a contract between the TNA and Transnet. They were the only parties affected by it and they could have called it whatever they wanted, unless what they

[2526] Transcript 29 April 2021, p 263, lines 8-9

called it had some bearing on whether it would be approved or not. That is the issue around the name change that Mr Molefe never squarely addresses. The only relevance that the name change could have had is if the description mattered for some purpose. The only purpose that has been proffered is the one that Mr Molefe does not directly address, namely, that the description mattered because if it remained a "sponsorship", then Mr Molefe could not approve it on his own and it would have to go to the Board. Finally, it is not clear that calling the arrangement a "partnership" is any more accurate a way to convey the fact that it presented a branding opportunity. The commercial benefit of sponsorships also lies in the branding opportunities that they present.

398. Mr Molefe's efforts at justifying the TNA contracts do not, therefore, bear scrutiny.

399. Neither Mr Jackson nor Mr Phatlane were direct facilitators for the Guptas. They did register their disapproval of the TNA spending. However, they failed to bring their concerns to the attention of anyone beyond their immediate superiors. They also failed to resist the instructions that they received. They therefore allowed themselves to be used to support spending with the TNA for which there was no legitimate justification. They allowed the contracts to continue for many years.

400. The only time some value was extracted from the contracts was when personnel were replaced in 2016 and Mr Likhethe saw to it that Transnet at least took steps to ensure that the last six business breakfasts provided exposure for Transnet in the manner addressed above.

401. The business breakfast contracts were clearly not partnerships. They were sponsorships that exceeded the Group CE's delegation of authority. This ought to have been picked up just as Mr Matjila's efforts to commit Eskom to the business breakfasts was found by Eskom's auditors to have been beyond his delegation of authority.

However, even that exposure did not justify the excessive amounts that Transnet was paying to TNA.

402. At Transnet, there does not appear to have been any proper interrogation of these contracts by the internal audit function or the external auditors. There were simply no checks and balances to hold officials accountable for this level of expenditure. There was also no formal process in place for sponsorship and advertising approval, which allowed Mr Molefe to conclude contract after contract with impunity.

403. As with Eskom, more junior personnel were asked to justify decisions already taken by their superiors by preparing recommendations that made it look as though proper processes were being followed and that the superiors were merely approving a proposal by their subordinates, rather than driving the process themselves. These memoranda again served to give the impression that the expenditure was legitimate.

404. This pattern has also been uncovered in the aviation evidence heard by this Commission.[2527] In that case, the SAA Board would reach a decision and then, in a reversal of proper process, seek a recommendation from management to justify the decision. This type of ex post facto generating of a paper trail and this veneer of proper process and justification obfuscated the true state of affairs at these entities and allowed state capture and corruption to flourish.

SAA

405. The Commission heard evidence from two SAA witnesses about the airline's relationship with TNA. They were:

[2527] This is set out in greater detail in the Aviation evidence analysis.

405.1. Mr Vuyisile Kona, the chair of the SAA Board and Acting-CEO; and

405.2. Ms Cheryl Carolus, Mr Kona's predecessor as chair of the SAA Board.

Approach to Ms Carolus

406. Ms Carolus was the chair of the SAA Board between 2009 and 2012.[2528]

407. She testified that in 2011, TNA had approached SAA seeking advertising spend for the newspaper. This went through the Bid Adjudication Committee (BAC), which decided that the newspaper did not meet the business criteria for SAA and, therefore, declined the bid.[2529]

408. Thereafter, Ms Carolus received a phone call from the DG of Public Enterprises, Mr Matona, summoning her to an urgent meeting about this decision.[2530] Ms Mzimela, the SAA CEO, was also summoned to the meeting.[2531] Mr Matona and Mr Mahlangu, Mr Gigaba's advisor, attended this meeting.[2532]

409. Ms Carolus testified that the meeting had not followed due process within the organisation because ordinarily an appeal against a fair competitive procurement process would have at least first gone to the CEO before it reached Board members. She regarded it as inappropriate for the Director General to choose this forum to plead his case to her as Chair of the Board.[2533]

[2528] Transcript 29 November 2018, p 9, lines 5-8.

[2529] Transcript 29 November 2018, p 68-69.

[2530] Transcript 29 November 2018, p 69, lines 8-15.

[2531] Transcript 29 November 2018, p 69, line 21 and p 70, lines 9-10.

[2532] Transcript 29 November 2018, p 70, lines 9-11.

[2533] Transcript 29 November 2018, p 75-76.

410. At the meeting, Mr Matona told Ms Mzimela, the CEO and Ms Carolus, the Chair, that TNA was a new entrant in the market and so in order to promote media diversity, SAA should support TNA.[2534]

411. Ms Carolus testified that, while she had sympathy with the mandate of developing new entrants to the media, this was not the role or mandate of SAA. This fell to entities like the IDC and PIC. SAA had to spend money only on advertising that would reach a very particular segment of the population and was targeted so that it would increase profitability. TNA was not such a newspaper. It would have therefore been a violation of SAA's mandate and role to invest in TNA the way Mr Matona was requesting.[2535] Ms Carolus regarded Mr Matona's appeal to them as inappropriate.[2536] Ms Carolus said during the meeting that the correct processes must be followed, that she had no legal standing to speak to them on SAA's behalf, and that it was inappropriate to be entering into discussions with them during the meeting.[2537]

412. Ms Carolus testified that she could not remember all of the details of the meeting because she ended it very soon. However, she could recall that Mr Mahlangu played an important role at the meeting.[2538] Mr Mahlangu had attempted to exert pressure on the Board of SAA to influence their decisions about, among other things, TNA and that the mass resignation of the Board in 2012 was more of a constructive dismissal to pave the way for a more compliant Board.[2539]

[2534] Transcript 29 November 2018, p 71, lines 20-23.

[2535] Transcript 29 November 2018, p 72 (line 7) – 74 (line 15).

[2536] Transcript 29 November 2018, p 76, lines 8-10.

[2537] Transcript 29 November 2018, p 76.

[2538] Transcript 29 November 2018, p 76.

[2539] Transcript 29 November 2018, p 111, lines 10-25.

413. Mr Mahlangu responded to this evidence in an affidavit presented to the Commission. He denied that he placed any pressure on Ms Carolus at this meeting. Instead, he described the meeting as "cordial" and nothing more than a discussion about the public policy position to promote media diversity.[2540] His evidence was that his interactions with SOEs and the Guptas were in the discharge of his duties as Minister Gigaba's advisor. This would mean that he would have reported back to Mr Gigaba on his interactions with SOEs and the Guptas.

414. The problem with this response, however, is that it overlooks the vital point that public entities like SAA are spending public funds. They must therefore make procurement decisions based on the proper processes and only if it is in the interests of the business. As Ms Carolus herself testified, there needed to be real value in the media spend for the entity, in order for it to be justified. However, not one of the witnesses before the Commission who promoted and supported the TNA was able to show that any of the SOEs derived value for the millions of Rands that were spent on the TNA.

The subscription agreement

415. Mr Kona was the Chair of the SAA Board from 28 September 2012 to 26 February 2013 – when he was removed from office.[2541] He was appointed acting CEO from 12 October 2012.[2542] He was suspended from his position as Acting Chair on 11 February 2013,[2543] and was replaced by Ms Duduzile Myeni.[2544]

[2540] Annexure SM 28 to Mr Mahlangu's affidavit dated 9 September 2020 paras 53 to 55

[2541] Transcript 4 February 2020, p 74, lines 20-25.

[2542] Transcript 4 February 2020, p 75, lines 8-9.

[2543] Transcript 4 February 2020, p 75, lines 16-19.

[2544] Transcript 4 February 2020, p 77, lines 7-10.

416. Mr Kona explained that, when he first got to the airline, SAA was already doing business with TNA, but TNA was not happy with the quantity of advertising that SAA was giving them. After Mr Kona's appointment on 12 October 2012 (but before 6 November 2012),[2545] TNA approached Mr Kona and asked that the TNA newspapers' volumes be increased.[2546] The approach was made on behalf of the TNA by Mr Siyabonga Mahlangu, who was the advisor to Minister Gigaba at the time.[2547]

417. Mr Kona told Mr Mahlangu that the TNA would need to approach the supply chain management committee in this regard.[2548]

418. On 6 November 2012 the Bid Adjudication Committee (BAC) submitted a proposal for Mr Kona's approval[2549] for a dramatic increase in volumes of TNA newspapers from 3000 to 7000 per day.[2550]

419. The BAC submission did not, however, actually provide any reasons or justification for the increased volume.[2551] The submission proposed an extra R2.4million to be spent on TNA subscriptions over the next year.[2552] The BAC submission also did not deal at all with whether SAA could afford an increase from 3000 to 7000 newspapers a day.[2553] There was, however, a statement on the submission from the operations manager, Ms Ramasia, that "there is currently no budget on operations" for this.[2554]

[2545] Transcript 4 February 2020, p 124, lines 11-12.

[2546] Transcript 4 February 2020, p 123, lines 14-21.

[2547] Transcript 4 February 2020, p 124, lines 17-23.

[2548] Transcript 4 February 2020, p 124, lines 23-25.

[2549] As acting CEO - Transcript 4 February 2020, p 131, lines 20-25.

[2550] Exhibit DD17, p 13.

[2551] Exhibit DD17, p 13. Discussed in transcript 4 February 2020, p 132 (line 25) – 133 (line 5).

[2552] Transcript 4 February 2020, p 136, lines 14-16.

[2553] Transcript 4 February 2020, p 140, lines 5-8 and p 141, lines 1-10.

[2554] Exhibit DD17, p 15.

420. Despite these glaring deficiencies in the BAC submission, Mr Kona approved the requested increase. When he testified at the Commission, he was asked to explain his decision. Mr Kona said that the absence of any budget did not concern him because he thought that the operational changes and expansion of the SAA network that he was planning to implement would free up some cashflow and so it would be affordable.[2555] He accepted, however, that he made the decision to approve the increase without any knowledge of what the TNA readership was at the time.[2556] Furthermore, why did he have to do all that just to accommodate a request by the Guptas that SAA should increase the volume of their subscriptions drastically?

421. Mr Kona's approval of the increased subscription with no evidence of effectiveness, circulation, affordability or commercial value, was a breach of his fiduciary duties to SAA and of his obligations under the PFMA to avoid irregular expenditure as there was no budget to support the increase. It also amounted to wasteful expenditure as there was no information about the commercial value of the subscription to SAA.

422. There were also a series of text messages between Mr Kona and Mr Mahlangu regarding the TNA subscription that are curious.[2557] Mr Kona testified that because Mr Mahlangu had approached him initially about the increase in subscription volumes for TNA, he had to keep him updated about the supply chain management process.[2558] It is strange for a Chief Executive Officer of an SOE to be keeping an advisor to the Minister updated on supply chain management matters within the entity.

423. It is not entirely clear in what capacity Mr Kona engaged with the Guptas and their entity, TNA. While his agreement to the subscription increase tends to indicate that he was a

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[2555] Transcript 4 February 2020, p 144, lines 1-15 and p 145, lines 1-11.

[2556] Transcript 4 February 2020, p 146, lines 1-7.

[2557] Exhibit DD17, p 16 – 17.

[2558] Transcript 4 February 2020, p 148, lines 7-12.

facilitator of TNA business at SAA, there was a further interaction that he had with the Guptas towards the end of 2012 which tends to indicate that he put up some resistance to their advances. However, in the end, he did facilitate their transaction of increased volumes of TNA newspaper and he did so without any credible justification.

Approach to Mr Kona

424. On 29 October 2012[2559] Mr Kona was asked by Minister Malusi Gigaba's advisor, Mr Mahlangu, to go to Saxonwold to meet with members of the Gupta family.[2560] Mr Mahlangu acted as the link between Minister Gigaba and Mr Kona.[2561] This was confirmed by Mr Mahlangu himself in his affidavit presented to the Commission.[2562]

425. Mr Kona met Mr Mahlangu at the Gupta family home in Saxonwold.[2563] He was met first by members of a security team that took his cellphone. He was instructed this was standard procedure for people entering the property.[2564] Mr Kona and Mr Mahlangu met with Tony Gupta, Duduzane Zuma, and Tshepiso Magashule, the son of the former Free State Premier, Mr Ace Magashule.[2565]

426. Mr Kona's account of the meeting has a number of similarities with that of Mr Mkwanazi. Mr Kona testified that only Mr Gupta spoke during the meeting. Mr Zuma and Mr Magashule were totally silent.[2566] According to Mr Kona, Mr Gupta first flattered him

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[2559] Transcript 4 February 2020, p 78, lines 13-17.

[2560] Transcript 4 February 2020, p 79, lines 1-10; p 83, lines 17-22.

[2561] Transcript 4 February 2020, p 82, lines 13-16.

[2562] Mr Mahlangu's affidavit dated 9 September 2020 para 74.

[2563] Transcript 4 February 2020, p 85, lines 13-15.

[2564] Transcript 4 February 2020, p 86, lines 2-4.

[2565] Transcript 4 February 2020, p 85, lines 20-23.

[2566] Transcript 4 February 2020, p 106, lines 11-20.

which put him at ease.[2567] Then he "welcomed" Mr Kona "into the family" and offered him R100 000 as an introduction to the family.[2568] Mr Gupta also said he was aware that Mr Kona had not been paid the previous month. Mr Kona was surprised that Mr Gupta knew this because this was private company information that only Mr Mahlangu or someone inside SAA would have known.[2569]

427. When Mr Kona questioned the money, and indicated that he would not accept it, Mr Gupta then offered him R500 000.[2570] Mr Kona informed Mr Gupta that he did not need this money and he refused to take it.[2571] After this point, Mr Gupta began to ask Mr Kona about the consultant that SAA was seeking to appoint.[2572]

428. Mr Kona had the discretion to award contracts up to R100 million without Board approval but had, nevertheless, asked the supply chain management officials to determine which consultant company offered the best price to create a turn-around plan on an urgent basis, for SAA. SAA had sought quotes from three companies for the production of the plan. Mr Kona could not recall what the third company's quote had been. However, he testified that Lufthansa and McKinsey both bid for the contract. Lufthansa's quote was for R6million while McKinsey's was R40million. The price difference had been great and the best and most-cost effective competitor was Lufthansa Consulting.[2573]

[2567] Transcript 4 February 2020, p 87, lines 13-23.

[2568] Transcript 4 February 2020, p 93, lines 15-17.

[2569] Transcript 4 February 2020, p 95 (line 23) – 96 (line 12).

[2570] Transcript 4 February 2020, p 93, lines 18-24.

[2571] Transcript 4 February 2020, p 94, lines 8-15.

[2572] Transcript 4 February 2020, p 94, lines 14-15.

[2573] Transcript4 February 2020, p 89 (line 4) – 91 (line 25).

429. By the time of the meeting, Mr Kona had already informed Lufthansa that it had the contract.[2574] When he told Mr Gupta this news, Mr Gupta was "livid".[2575] The meeting then abruptly ended and Mr Kona was told that he could leave.[2576] Before he left, Mr Gupta called the DG of Public Enterprises, Mr Matona, in front of Mr Kona, and told him to come and explain immediately what was going on.[2577]

430. When Mr Kona was driving out of the building, Mr Matona called him and questioned why he had given the contract to Lufthansa.[2578] Mr Kona explained that it was the supply chain management committee that decided to award the contract to Lufthansa. Mr Matona left it at that.[2579] However, the following week, Mr Kona received a letter from the Department of Public Enterprises saying that they wanted to investigate his decision to award the contract to Lufthansa.[2580]

431. What followed thereafter were a series of allegations and counter-allegations about Mr Kona's conduct at SAA. Mr Kona was suspended on 11 February 2013. This resulted in litigation, which was still pending at the time Mr Kona testified before the Commission. Despite the Commission having asked Mr Kona for copies of the papers in these proceedings, they have not been provided to the Commission.

[2574] Transcript4 February 2020, p 100, lines 1-4.

[2575] Transcript4 February 2020, p 100, line 5.

[2576] Transcript4 February 2020, p 101, lines 5-13.

[2577] Transcript 4 February 2020, p 101 (line 16) – 102 (line 10).

[2578] Transcript 4 February 2020, p 102, lines 13-22.

[2579] Transcript 4 February 2020, p 102 (line 20) – 103 (line 1).

[2580] Transcript 4 February 2020, p 103 (lines 1-3).

432. Mr Kona was ultimately removed from his position as a Board member on 26 February 2013.[2581] The circumstances surrounding his removal are dealt with in more detail in the section of the report that deals with SAA.

433. Mr Kona's actions in respect of the TNA subscriptions took place before the meeting at the Gupta residence. He testified that the issue of TNA was not raised at the meeting.[2582] However, Mr Kona's willingness to approve an increase in subscriptions of an untested newspaper for many millions of Rands still remains inadequately explained.

CONCLUSION

434. The evidence before the Commission paints a picture of a calculated strategy by the Guptas to appropriate public funds from state-owned enterprises.

435. It was key to their efforts to have facilitators within the SOEs and government departments, such as GCIS, who would ensure that the entities committed millions of Rands to the TNA despite there being no discernible value for the entities or government departments.

436. One of the earliest acts of state capture by the Guptas was to secure the removal of Mr Themba Maseko from GCIS. The influence they exerted over former President Zuma was considerable. They managed to ensure that a well-performing and principled public servant was removed at lightning speed when he refused to accede to their demands to divert millions of Rands of public money to enrich their media business. Former President Zuma replaced Mr Maseko with a facilitator, in the form of Mr Mzwanele Manyi. During Mr Manyi's term as DG of GCIS, millions of Rands were spent on TNA

[2581] Transcript 4 February 2020, p 74, lines 20-23. See also p 76, lines 1-3. Mr Kona's removal is recorded in a shareholder resolution dated 11 March 2013, annexure MB3 to the affidavit of Bongisizwe Mpondo, Exhibit DD 34.13, p 1245.

[2582] Transcript 4 February 2020, p 126, lines 4-10.

in circumstances where there was no credible readership information nor certified circulation figures for the newspaper. It is inconceivable that this would have been allowed to occur if Mr Maseko had remained at the helm of GCIS.

437. Within the SOEs, the facilitators required subordinates who would follow their instructions and do what was necessary to ensure that the processes for contracting were adjusted so that the TNA could benefit from these contracts. The adjustments included removing standard termination clauses, providing for up-front payments, misrepresenting the value of the contracts to watchdog bodies like Parliament and the Public Protector, and recasting the agreements as something different to what they really were so that they fell within the delegated authority of the facilitators.

438. There seems to have been a significant lack of checks and balances operating at the entities that allowed this conduct to continue for as long as it did. The contracts concluded by the SOEs were often patently irregular and wasteful by definition because their value simply could not be established. The fact that this was never picked up and addressed, bar a whistleblower report (that was effectively swept under the carpet by the new Eskom Board), reveals a staggering lack of accountability in the public sector between 2011-2017, while millions of Rands from the public purse were diverted to the TNA.

439. Section 83 of the PFMA makes accounting authorities, and each member of the Board of an accounting authority, liable for financial misconduct if they willfully or negligently make or permit irregular or fruitless and wasteful expenditure.

440. The TNA investigation conducted by the Commission has shown that contracts concluded between TNA and Transnet, Eskom and SAA were not only irregular but wasteful, too.

441. The Boards and executives of those entities who supported and facilitated the conclusion of these contracts were likely guilty of financial misconduct. In some instances, that misconduct probably also amounted to a breach of their fiduciary duties to the SOEs. In particular, the Eskom Board members who failed in 2015 to discipline Mr Choeu and to report Mr Matjila to the shareholder breached their obligations under section 51(1)(e) of the PFMA.

442. This failure occurred despite the previous Board having been explicit about the need for these further steps to be undertaken by the new Board. The new Board's conduct was therefore, at a minimum, grossly negligent.

443. Section 86(3) of the PFMA makes such conduct an offence and carries a sentence, on conviction, of either a fine or a period of imprisonment not exceeding five years.

444. The TNA investigation shows that state capture thrived at our country's SOEs despite the fact that the necessary laws to prevent it were in place. The PFMA clearly and definitively made every one of the TNA contracts unlawful. State capture thrived because the people given power and authority in the SOEs simply flouted its terms. One way to prevent this in the future is to ensure that those who ignored their legal obligations are held to account for their conduct.

445. It is recommended that the law enforcement agencies should investigate a possible crime of corruption against Mr Tony Gupta on the basis of Mr Kona's evidence that he offered him initially R100 000 and later R500 000 in their meeting at Saxonwold on or about 29 October 2012.

446. These matters should therefore be handed over to law enforcement agencies for further investigation and, where warranted, prosecution.

447. In so far as Eskom is concerned, the Commission's limited time and resources did not make it possible to consider the position of every one of the 2015 Eskom Board members. All of the 2015 Eskom Board members received rule 3.3 notices related to the Eskom TNA evidence presented at the Commission.

448. Only three responded.

448.1. Ms Klein provided the statement that she had previously submitted to Parliament's Public Enterprises Portfolio Committee. She indicated that she had not supported the round robin resolution to ratify the third TNA contract.

448.2. Both Dr Pathmanathan Naidoo and Ms Devapushpum Naidoo also responded to the Commission. Ms Naidoo explained that she was influenced by the Ledwaba Mazwai report in deciding to ratify the contract. In his affidavit, Dr Naidoo indicated that he was influenced by the impact the TNA contract had for the company's interim results.

448.3. The remaining board members did not respond to their rule 3.3 notices.

449. The position of each of the new 2015 Board members of Eskom will therefore need to be investigated further before any charges could be brought against any of them individually.

450. Given Mr Brian Molefe's role in the conclusion of the contracts referred to above between Transnet and TNA, particularly his misrepresentation that some of those contracts were partnerships when they were sponsorships, it is recommended that the law enforcement agencies conduct such further investigation as may be necessary with a view to the possible prosecution of Mr Brian Molefe by the National Prosecuting Authority for fraud and/or contravention of the PFMA.

451. Given Mr Collin Matjila's role in the conclusion of the contracts referred to above between Eskom and TNA, particularly his misrepresentation that one or more was a partnership or were partnerships when they were sponsorships, it is recommended that the law enforcement agencies conduct such further investigation as may be necessary with a view to the possible prosecution of Mr Collin Matjila by the National Prosecuting Authority for fraud and/or contravention of the PFMA.

Judicial Commission of Inquiry into State Capture Report: Part 1

Vol. 3: South African Revenue Services (SARS) and Public Procurement in South Africa

COMMISSION OF INQUIRY INTO STATE CAPTURE

This is the report of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including organs of state, also known to the public and the media as the Zondo Commission

Chairperson: Justice RMM Zondo
Acting Chief Justice of the Republic of South Africa

Report of the Judicial Commission of Inquiry into State Capture: Part 1: Vol. 3

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Judicial Commission
of
Inquiry into allegations
of
State Capture, Corruption and Fraud in the Public Sector including Organs of State

Report: Part 1
Vol. 3: Chapter 3 – South African Revenue Services (SARS)
and
Chapter 4 – Public Procurement in South Africa

Chairperson: Justice R.M.M. Zondo
Acting Chief Justice of the Republic of South Africa

PART 1: VOLUME III

CHAPTER 3 - SOUTH AFRICAN REVENUE SERVICE

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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

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[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

[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.

<u>Mr Moyane's application to cross-examine Minister Gordhan</u>

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.
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> …
>
> 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

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RECOMMENDATION 1854

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

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[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

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[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]

<u>Abuse of preferential procurement and "Supplier Development Partners" policies</u>

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

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[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]

<u>Retroactive changes to bid criteria</u>

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

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[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

[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

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[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,

is 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,

is 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.

The collapse of governance in state owned enterprises

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.

616. In the following sections of this Chapter the Commission proposes, and motivates for the establishment of more appropriate mechanisms which are independent of government control to deal with the recoupment of losses suffered in the course of procurement corruption. This involves a dedicated effort to pursue such litigation on a large scale to make it clear to the fraudsters and thieves who have been looting the procurement system that they face financial as well as criminal accountability.

Problems associated with oversight and monitoring

The fragmentation of oversight responsibilities

617. The oversight function is a vital component in protecting the procurement system from abuse. In South Africa the oversight function has been fragmented both in response to the excessive decentralisation of the procurement system and because of the complicated legislative mosaic which spreads the responsibilities of oversight very wide. In the result, there is a crowded field of oversight entities.

618. These include Parliament; National Departments; Provincial government; the Auditor-General; National and Provincial Treasury and the Department of Public Service and Administration. Parliament's role and how it performed its oversight function over the period under review is dealt with later in the Commission's Report. Accordingly, Parliament's role will not be dealt with in this section of the Report.

619. Many of these Authorities oversee procurement in the course of their more general mandate dealing with all aspects of financial management (e.g. and Treasury) whilst others supposedly supervise the working of procurement in a particular sphere of activities (Provincial Governments and Ministers of Departments).

620. There is no single specialised oversight body which is given the specific mandate to fight corruption in all spheres of procurement, which underlines the need to establish such a body as will be discussed shortly in this Chapter.

621. As can be anticipated, the number of oversight bodies also leads to both overlaps and gaps. An example was identified by Mr Mathebula in regard to the processes followed between Treasury and the Public Service Commission concerning disciplinary measures. Treasury, it appears, does not itself take action when it identifies officials who have been guilty of misconduct; instead it recommends that the Public Service Commission does so. This is in accord with Public Service regulations but, thereafter, Treasury loses sight of the matter and the process has no further record as to what occurs (if anything).[2983]

The poor record of oversight bodies

622. State capture was not a transitory phenomenon. It endured for almost a decade during which time it successfully insulated itself against exposure and accountability. A number of oversight bodies tasked by the Constitution and by legislation to identify, confront and root out corruption in the public domain took no action. This excludes the Public Protector. The critical question however is how, and why, did all the other oversight bodies (all of whom were more directly involved in matters of public procurement) fail? How and why did each of them fail?

Parliament

623. The role of Parliament in terms of performing its oversight function over the Executive is dealt with in another part of the Commission's report.

[2983] Transcript 21 August 2018, pages 39-40, 56 and 59.

National Treasury

624. National Treasury is the architect of the present public procurement system and it has been in the forefront, over the years, in setting and revising policy and its implementation. As noted earlier the PFMA grants National Treasury a host of general functions and powers of oversight which derive from its primary responsibility for financial and fiscal matters.[2984] It falls to National Treasury to promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions.[2985]

625. Nonetheless, National Treasury and, indeed, the Provincial Treasuries, were not able to deal with the corruption unleashed by state capture. There are a number of reasons for this. Where Treasury identified misconduct on the part of an official, the complaint was then handed over to the Department of Public Service and Administration at which stage Treasury appears to have washed its hands of the matter. When Treasury sought to interrogate possible misconduct on the part of the SOEs or other government departments, it was met with obfuscation and general non-co-operation. It does not seem to have been able to follow through in the face of opposition of that sort. Moreover, its oversight responsibilities were merely one component of its involvement in procurement matters and that involvement, again, was only one component amongst its other responsibilities and functions. To that must be added the obvious political difficulties which would have been encountered by Treasury had it sought to confront state capture in a determined manner.

[2984] See PFMA section 5(1).

[2985] *Ibid* section 6(g).

The Auditor-General

626. The Public Audit Act 25 of 2004 requires the Auditor-General to audit and report on the accounts, financial statements and financial management of national and provincial state departments, constitutional institutions, municipalities and other institutions identified in the legislation.[2986] Suspected material irregularities may be referred to a relevant public body for investigation[2987] and, if material irregularities identified in an audit report are not addressed within a reasonable time, appropriate remedial action may be taken.[2988]

627. The Auditor-General is not required to monitor the specific detail of the working of the procurement system or to track the decisions made at the various stages of the cycle; her mandate is a more general one relating to financial management. Of course, an audit may reveal a material procurement irregularity but that is not its dedicated focus.

628. The evidence shows that the Auditor-General has constantly withheld clean audit certification whenever material irregularities are identified. The evidence also shows that for the most part no consequences flow – corruption in procurement is unaffected. This was certainly the case prior to the amendment of the Public Audit Act with effect from April 2019. The amendment greatly strengthened the ability of the Auditor-General to enforce remedial action where an accounting officer or accounting authority has failed to implement the recommendation in an audit report relating to material irregularities within the time frame stipulated in the audit report. Where specific remedial action has not been implemented, the Auditor-General will issue a certificate of debt requiring the

[2986] Section 4.

[2987] Section 5(1A).

[2988] Section 5A.

accounting officer or accounting authority to repay the amount specified in the certificate of debt to the State.

629. These recent amendments, if properly utilised, should provide the Auditor-General with the necessary authority to insist upon proper compliance with the required remedial action. It is too early to assess whether the procedures for the remedial action will work quickly and decisively. It is to be hoped that the appropriate executive authority which must enforce compliance does so promptly lest these procedures become mired in endless delays.

630. It may be desirable to sound a further note of caution in regard to the question of remedial action. In matters of procurement it is particularly important that the Auditor-General tracks irregular expenditure. However, the phrase “irregular expenditure” has been expanded in a way which may undermine its utility as a remedial tool. It is not confined to financial mis-management and corruption but includes also non-compliance with laws and regulations of debatable relevance. In other words, supposed instances of “irregular expenditure” may not be meaningful in the assessment of the utility of the spending or the quality of financial management. Care must be taken to retain the limited but concentrated focus of the phrase “irregular expenditure”.

The question of monitoring

631. Whereas oversight operates at the macro level and tends to be reactive, monitoring operates at the micro level, its purpose is to track the way in which procurement is being implemented by each individual procurement entity. Monitoring requires the detailed observation of procurement processes on the ground; it extends to all stages of the procurement cycle. It examines the decisions which are being made at all points of the procurement activity to both enable irregularities and corruption to be detected and addressed and to satisfy itself that the systems in place are functioning properly.

632. Monitoring must rank as the critical mechanism in safeguarding procurement from corruption.

633. It is therefore a matter of concern that the legislative design makes no proper provision for an effective monitoring function.

634. Monitoring, in the sense of consistent and continuous inspection is, in effect, assigned to two functionaries, the Auditor-General and the accounting officer/authority. The position of the Auditor-General has been discussed in the context of oversight and does not require further comment.

The accounting officer/authority

635. The second entity charged with a monitoring function is the Accounting officer/Authority who are, in addition to designing and implementing the procurement system, also tasked with its monitoring.

636. Whilst it may be natural to vest some form of monitoring power in the top echelon of a procuring entity such a measure, by itself, may not be sufficient, or, even appropriate. The essence of monitoring is that it is undertaken by an outside party with specialized skills.

637. Leaving aside the possibility that the accounting officer/authority may itself be corrupt, there is no guarantee that it has the specialised skills required to detect irregularities nor can there be any confidence in its ability, as it were, to self-medicate.

638. Again it is clear from the evidence that monitoring at the level of the Accounting Officer/Accounting Authority has contributed little in curbing corruption. Indeed the patterns of irregularity, which have been noted above, are of a kind that should immediately have been identified by responsible officials at the Accounting

Authority/Accounting Officer level. Even more troubling, the patterns of corruption are of a kind which could not have taken place in most instances without the active, or at least passive, co-operation of those in charge.

639. Nonetheless, these criticisms regarding the performance of the Accounting Officer/Authority do not tell the whole story. Given the powers entrusted to the Accounting Officer/Authority and their responsibility to oversee the working of the system it is not surprising that stiff penalties are intended to be imposed in cases of contravention whether deliberate or negligent. The penalties which have been imposed involve a fine or imprisonment for a period of up to five years. These penalties may have a paralysing effect on Accounting Officers/Authorities by inhibiting them from taking decisions in good faith which may later be criticised. Some solution is necessary which makes it clear to the dishonest official that there are serious consequences for deliberate infringements whilst simultaneously reassuring the honest official that initiatives taken in good faith will not be punished.

640. In the South African situation there is a pressing need to strengthen the monitoring capability of the procurement system by introducing an external inspectorate committed exclusively to the detailed monitoring of the activities of the multiple procuring entities, a need which is addressed in the following sections of this Chapter.

The absence of any constructive involvement with the private sector

641. South Africa is a signatory to the United Nations Convention Against Corruption. Article 13(1) of that Convention reads in part:

> "1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the

> prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption."

642. The legislation under review makes no attempt to engage with civil society organisations in order to present a united front against corruption. An imaginative and open-hearted effort to recruit the stakeholders of civil society into the fight against corruption is entirely lacking. In the result we have no shared Code of Conduct setting out the ethical standards to which both the public and private sectors commit themselves and there is no attempt to give the private sector a voice in the design of procurement systems or to suggest how procurement could be improved and made more transparent. The relevant skills available in the private sector are ignored.

643. During its term the Commission had an opportunity to receive the evidence or submissions and the views of a range of private sector representatives and also to consider a contribution made over the years by academic commentators and anti-corruption organisations. The Commission is satisfied that the involvement of civil society organisations and commentators is a significant but under-utilised control mechanism in dealing with corruption.

644. The constructive involvement of civil society is both a necessary and a legal requirement in the fight against corruption, and that is a function which must be addressed.

<u>The Insufficient Attention Given to Transparency</u>

645. The need for transparency throughout the procurement cycle is essential for its integrity. Section 217(1) insists on transparency and it is a hallmark feature of international principles since it is well known that the more transparent the process, the less easy it is to abuse it.

646. Whilst the legislation contains references to the need for transparency, it does not provide clear and realistic rules for incorporation in any system design and this needs to be addressed.

647. Such Rules should ensure:

647.1. that all potential suppliers and other stakeholders receive the same access to information regarding the entire public procurement cycle. As noted in the commentary on the OECD Principles for integrity in public procurement:

> "Information on procurement particulars should be disclosed as widely as possible in a consistent, timely and user-friendly manner, using the same channels and time frame for all interested parties. Conditions for participation such as selection and award criteria as well as the deadline for submission should be established in advance. In addition, they should be published so as to provide sufficient time for potential suppliers for the preparation of tenders and recorded in writing to ensure a level playing field."

647.2. that transparency requirements are not confined to the tendering phase of the procurement cycle. It is fundamental that all processes followed and decisions made throughout the procurement cycle be properly recorded and be readily available in order to provide an audit trail and to allow dissatisfied tenderers to initiate informed challenges relating to procedural or other irregularities. Such recorded information must be sufficient to enable public scrutiny;

647.3. where there is any deviation from competitive tendering that deviation must be justified and recorded in writing to provide the audit trail and such deviation should accord in clear terms with pre-set requirements which would justify such deviation.

H: 20 years of frustration

648. There were occasions during the Commission hearings when a particular witness stepped back from the detail of the evidence and offered a generalised insight regarding the extent of system malfunction and the feeling of helplessness which it engendered. So, for example, Mr Peter Volmink[2989] was driven to describe the well intentioned and detailed legislative framework as belonging to one universe in sharp contrast to the reality on the ground which, he said, inhabited a 'parallel universe' within the public procurement space. This description, whilst vivid, is unfortunately not an exaggeration. It speaks accurately to a fundamental systemic failure.

649. So, too, the observations of Mr Themba Godi, the former chairperson of the Parliament's Standing Committee on Public Accounts ("SCOPA") are typical and provide a bleak insight into a system which has lost its moral compass.

650. Mr Godi said that, if one looks at SCOPA's resolutions, there are many where there is a call for action to be taken against officials who had not complied with legislation. However, he asked: how do you get things right if there are no consequences? He said that he was talking about Accounting Officers/Authorities in the first instance, but also executive authorities who all these reports which speak of persistent non-compliance, but no action is taken by them.[2990] Mr Godi said that it was "shameful" that Ministers and their Accounting Officers/Authorities and authorities could not deal with corruption.[2991]

651. Mr Godi said that the SCOPA was generally disappointed by the extent to which the accounting authorities and management seemed not to have addressed the financial

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[2989] Former Executor Manager: Governance in Transnet's Supply Chain Management unit.

[2990] Transcript 1 February 2021, p. 43, line 11-13.

[2991] Transcript 1 February 2021, p. 73, line 10.

management weaknesses identified in Audit Reports, especially as some of these matters had been raised in the Audit Report of previous years.[2992]

652. He also mentioned that instability of leadership compounds the problem. Throughout the various entities and departments, he said that he would meet with an accounting officer today who would promise that he will sort things out and a year and a half down the line that person is no longer there. You have a new person who is starting from scratch. You can hardly build a culture of compliance where there is instability of leadership.[2993]

653. Linked to this, Mr Godi said that impunity was in a large measure one of the fundamental reasons why non-compliance was persistent, and had actually worsened. In the absence of enforcement, non-compliance merely repeated itself. He said that the inability to take "stern action" against the wrongdoer merely exacerbated the problem, which is a general problem throughout the public service".[2994]

654. Mr Godi's sense of frustration is now shared across the spectrum of public opinion and by Government itself. It seems scarcely believable that the constant flow of legislation over the years had so little impact in curbing corruption and that the combined efforts of Parliament, National Treasury, the Auditor-General, the Provincial Treasuries and National and Provincial Governments could have been so ineffectual.

655. The efforts, albeit failed efforts, to address corruption show that there is no easy solution to the problem. Corruption has strengthened its hold and extended its hold on public

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[2992] Transcript 1 February 2021, p. 58, line 13.

[2993] Transcript 1 February 2021. p. 93, line 6-17.

[2994] Transcript 1 February 2021. p. 94, line 1-11.

procurement over a very long period of time. Clearly, a new approach is required; it cannot be the same mixture as before.

I: The way forward

657. Twenty years of frustration which includes a decade of state capture pitilessly exposed the flaws and weaknesses in the public procurement system, flaws and weaknesses which have been exploited by criminals to inflict lasting damage on the South African economy. The promise of service delivery so fundamental to the betterment of our society has not materialised.

658. The years of frustration teach us lessons which we cannot ignore. They include:

658.1. the realisation that the public procurement sector cannot defend itself against those who control the levers of political and state power;

658.2. the excessive decentralistion of our sprawling procurement system which has outrun the collective capacity to manage or operate it efficiently;

658.3. the absence of the robust, detailed and intrusive monitoring of the system undoubtedly facilitates corruption and inefficiency and helps to mask abuse;

658.4. the exclusion of meaningful private sector involvement in formulating policy and in the implementation of policy weakens the procurement system, lessens its transparency and facilities corruption;

658.5. the absence of accountability makes the system unworkable, corrupts those who operate within that system and establishes and embeds criminal relationships involving commercial entities and public officials and, implicates political party funding.

659. Problems as fundamental as these are not capable of easy solution. The process of reform requires a coherent and comprehensive plan of action which needs to bring the public and private sectors together in a joint initiative to restore proper standards and discipline within the procurement system.

660. The Commission's proposals in regard to such a comprehensive plan of reform now follow together with recommendations which it regards as necessary and appropriate.

A National Charter against Corruption

661. State Capture, and its exposure, has dominated the national discourse in recent years. The effect has been predictable and negative: a loss of confidence both in Government and political parties and in the business sector compounded by frustration at the pervasive lack of accountability for wrongdoing.

662. In the view of the Commission it is more than time to take steps to restore broken trust and the first step which needs to be taken in that direction is for all sections of society to jointly endorse a national commitment to eliminate corruption in public life and in the procurement of goods and services.

663. To that end, and by way of a gesture which is both symbolic and substantive to mark the turning of the page, the Commission recommends that a National Charter against Corruption incorporating a standardised Code of Conduct be adopted by Government, the business sector and relevant stakeholders in accordance with the details set out in Recommendation 1.

The creation of an Anti-Corruption Agency

Mandate and Purpose

664. In the view of the Commission and for the reasons which follow, the appropriate starting point for any scheme of reform must include the establishment of a single, multi-functional, properly resourced and independent anti-corruption authority with a mandate to confront the abuses inherent in the present system. That authority could be called the Anti-Corruption Authority or Agency of SA South Africa (ACASA).

665. The Competition Commission with its attendant tribunal and Court provides a useful precedent because it shows how effective such a multi-functional body can be in creating systems and in implementing safeguards to protect economic activity from particular abuses. The Agency or Authority, like the Competition Commission structure, must include specialised departments with particular mandates but which collectively represent a comprehensive response to the challenges which arise.

666. The detail of the functions of the constituent bodies which make up the Agency are set out in Recommendation 2.

The requirement of independence

667. It is a fundamental feature of the Agency that it be independent. There has however been lengthy judicial debate on the question whether such independence can be achieved within a government department or by an entity under Ministerial control. That debate requires careful consideration.

668. The question is a simple one but the answer is fundamental to the Commission's recommendations – put bluntly: should supervision of the procurement system be

located within a government department but with assurances of full independence or must it be located outside of Government control?

669. A like question which arose during 2011 was the subject of the Constitutional Court decision in *Glenister v President of RSA.*[2995] That case dealt with whether the Government which was in the course of disbanding the Directorate of Special Operations (the Scorpions) and replacing it with a successor body (the Hawks) was bound by way of a constitutional obligation to ensure that the successor body was independent of political control or whether it was permissible to locate it within the South African Police Services. The majority of the Court held that there was no such obligation to be found in the Constitution or in the international agreement to which South Africa was a party. The majority of the Court recognised that what was apparent from international instruments was –

> "… the requirement of independence is intended to protect members of the agency from undue influence. This is necessary to ensure that the anti-corruption unit can 'discharge its responsibilities effectively'. The independence of anti-corruption agencies is 'a fundamental requirement for a proper and effective exercise of (their) functions.' This is so because corruption largely involves the abuse of power. In corruption cases involving the public sector, at least one perpetrator comes from the ranks of persons holding a public office. Hence the need to shield anti-corruption units from undue influence. This is a theme that recurs in the international and regional instruments cited by the amicus. Independence in this context therefore means the ability to function effectively without any undue influence. It is this autonomy that is an important factor which will affect the performance of the anti-corruption agency."

670. The Court noted the broad criteria which were offered by the OECD in this regard:

> "Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference. Independence should not amount to a lack of accountability; specialised services should adhere to the principles of the rule of law

[2995] 2011 (3) SA 347.

> and human rights, submit regular performance reports to execute and legislative bodies, and enable public access to information on their work."

671. In the result the majority of the Court concluded that it was permissible to locate anti-corruption agencies within existing structures such as the NPA and the SAPS but that special attention would have to be paid to protect these entities from the risk of interference so that legal mechanisms would be required to limit the possibility of abuse of the chain of command.

672. The then Deputy Chief Justice, Justice Moseneke and Justice Cameron took a different view to that of the majority. They began their judgment by emphasising both the need and the rationale for combatting corruption in these terms:

> "[166] There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the State to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.
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> [167] This deleterious impact of corruption on societies and the pressing need to combat it concretely and effectively is widely recognised in public discourse, in our own legislation, in regional and international conventions and in academic research. In a statement preceding the text of the United Nations Convention against Corruption (UN Convention), Kofi Annan observed:
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> 'This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.'
>
> …
>
> [170] Perhaps the fullest recital of the insidious scourge of corruption on society and the need to prevent and eliminate it is to be found in our own domestic legislation. The preamble to the Prevention and Combating of Corrupt Activities Act (PRECCA) records that corrupt activities undermine rights; the credibility of governments; the institutions and values of democracy; and ethical values and morality; and jeopardises the rule of law. It endangers the stability and security of societies; jeopardises sustainable development; and provides a breeding ground for organised crime. The preamble notes that corruption is a transnational phenomenon that crosses national borders and affects all societies and economies; that it is equally destructive within both the public and private spheres of life; and that

regional and international co-operation is essential to prevent and control corruption and related crimes.'

…

[176] Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of State contract for goods and services …

[177] The Constitution enshrines the rights of all people in South Africa. These rights are specifically enumerated in the Bill of Rights, subject to limitation. Section 7(2) casts an especial duty upon the State. It requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy, to combat it requires an integrated and comprehensive response. The State's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern State, creates a duty to create efficient anti-corruption mechanisms. Parliament itself has recognised this in the preamble to PRECCA. All this constitutes uncontested public and legislative policy in South Africa. For it has been expressly articulated and enacted by Parliament. That, however, is not the end of the matter."

673. Consistent with the fundamental principles invoked in the minority judgment Justices Moseneke and Cameron noted that according to the legislative framework creating the DPCI (Hawks):

"[232] The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed that those very political executives could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They 'oversee' an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function. Their power over it is unavoidably inhibitory.

[237] The new provisions contain an interpretive injunction: in their application 'the need to ensure' that the DPCI 'has the necessary independence to perform its functions' must be recognised and taken into account. But this injunction operates essentially as an exhortation. It is an admonition in general terms, containing no specific details. It therefore runs the risk of being but obliquely regarded, or when inconvenient, disregarded altogether. This is because the interpretive rule enjoins political executives to take the need to ensure independence into account. At the same time other provisions place power in their hands without any express qualification – power to determine policy guidelines and to oversee the functioning of the DPCI.

[238] It is the structure of the DPCI that brings its capacity to be adequately independent into question, and it is its structure that renders the interpretive injunction potentially feeble. What independence requires is freedom from the risk of political oversight and trammelling, and it is this very risk that the statutory provisions at issue create."

674. State capture has shown that South Africa needs to heed the view given by the minority in that judgment. The evidence that the Commission heard about the DPCI (the Hawks) in regard to their investigation of Minister Pravin Gordhan, the role of the Executive in the suspension of General Anwar Dramat as Head of the DPCI, the evidence heard by the Commission from Mr Innocent Khumba of IPID about General Ntlemeza who replaced General Anwar Dramat in circumstances which suggest an ulterior agenda and the failure by the DPCI to act over a long period on corruption complaints brought to it by the Board of Directors of PRASA under Mr Popo Molefe suggests very strongly that the DPCI was probably captured but this Commission will not make a definitive finding on the DPCI as it may have to be the subject of other process.

675. South Africa requires an anti-corruption body free from political oversight and able to combat corruption with fresh and concentrated energy. Public trust will not otherwise be re-established in the procurement system. The ultimate responsibility for leading the fight against corruption in public procurement cannot again be left to a government department or be subject to Ministerial control. What is required are specialised oversight and monitoring authorities which operate upon the basis that they are independent in the full and untrammelled sense, i.e. that they are subject only to the Constitution and the Law. This also implies that the choice of officials who will lead and staff such bodies is not left in the discretion of Government. Such appointments must be in accordance with a transparent procedure in a public process.

<u>The requirement that the Agency is properly resourced</u>

676. A way in which an institution may be prevented from doing its job effectively and properly is to withhold adequate funding and not to fill vacancies. These measures, taken together, have been responsible in a large measure for preventing wrong-doers being held accountable for their actions.

677. In order to ensure that the Agency is able to do its work effectively and properly it will be necessary to ensure that the adequacy of its funding is proof against political interference. This may be achieved by protections built into the enabling legislation and by providing for sources of revenue additional to Parliamentary funding. In leading the fight against corruption, the Agency will be providing an essential service for both the public and the private sectors and both should contribute in some appropriate way to its funding.

678. There should be no objection to the imposition of a levy payable to the Agency by every person seeking a procurement contract or participating in a tender process. This will provide the Agency with necessary additional funding beyond that supplied by Parliament and other sources.

The Interaction between the Agency and other associated entities

679. The Commission appreciates that the establishment of the Agency to lead the fight against corruption in public procurement requires an adjustment and re-alignment in the functions of National Treasury which exercises the overall supervisory jurisdiction in public procurement matters. The Commission is also aware that National Treasury has published a draft Public Procurement Bill, 2020, which has far-reaching proposals to reform public procurement. The suggested reforms include the establishment of a Public Procurement Regulator within National Treasury who will exercise considerable statutory powers. It would vest the power of debarment in the Regulator and contains other important provisions all based on the assumption that the Regulator is also the appropriate official to lead the fight against corruption.

680. The Commission must make it clear that it does not seek to question the vital leadership role of National Treasury in the design and oversight of the public procurement system in general. The Commission endorses many of the proposals contained in the Bill which will serve to centralise and strengthen public procurement standards. Nonetheless and for reasons already made clear it is not appropriate that any government department be tasked to lead the fight against corruption in public procurement. The vulnerability of any government department to undue political interference remains and will always remain and the answer to state capture does not lie in replicating the very same features that allowed state capture to succeed in the first place. In this regard it needs to be pointed out that the evidence heard by the Commission with regard to National Treasury, between 2014 and President Zuma's resignation as President of the country in February 2018, serious efforts were made by the Guptas, assisted by President Zuma, to capture National Treasury and, although Minister Nene and Minister Gordhan, as well as senior officials of National Treasury put up a brilliant fight or resistance, for four days – during Mr Des Van Rooyen's short stint as Minister of Finance, National Treasury was almost, if not actually captured. South Africa was lucky that enough pressure was put on President Zuma to move Mr Des van Rooyen out of the Ministry of Finance. If in the future a similar attempt were to happen, there is no guarantee that the effort to capture National Treasury will not succeed. If they had succeeded in December 2015, we do not know where this country would be. If in the future such efforts will be tried, this country should have a truly independent Agency.

J: Recommendations

681. The Commission makes the following recommendations for consideration by the President.

Recommendation 1: The National Charter against Corruption

681.1. That the Government, in consultation with the business sector prepare and publish a National Charter against corruption in public procurement, such Charter to include a Code of Conduct setting out the ethical standards which apply in the procurement of goods and services for the public;

681.2. The National Charter should be signed by or on behalf of:

681.2.1. the President and the Cabinet

681.2.2. the Provincial Premiers and members of the Provincial Cabinets;

681.2.3. the local authorities;

681.2.4. all State-Owned enterprises;

681.2.5. the political parties represented in Parliament;

681.2.6. constitutional entities;

681.2.7. the institutional representatives of the business sector;

681.2.8. listed public companies;

681.2.9. Trade Unions

681.2.10. Anti-corruption bodies in civil society;

681.3. every procurement officer in the public service shall, on assuming duty, be required to sign a commitment to observe and uphold the terms of the National Charter;

681.4. every natural or juristic person tendering or contracting to supply goods or services by way of public procurement must sign a like commitment to uphold and to adhere to the terms of the Charter and its Code of Conduct;

681.5. the content of the National Charter and the Code of Conduct should be widely publicised;

681.6. the National Charter and Code of Conduct should be given legal status and effect by an Act of Parliament.

Recommendation 2: The establishment of an independent Agency against corruption in public procurement

682. That the Government introduce legislation for the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA).

683. That such legislation constitutes the Agency :

683.1. as an independent body subject only to the Constitution and the law;

683.2. which has jurisdiction throughout the Republic;

683.3. which is impartial and must perform its functions without fear, favour or prejudice;

683.4. which is financed from:

683.4.1. money that is appropriated by Parliament for the Agency;

683.4.2. fees payable to the Agency by all tenderers for public procurement contracts;

683.4.3. money received from any other source.

684. That such legislation must provide that the Agency consists of:

684.1. The Council consisting of 5 members:

684.1.1. of whom the chairperson shall be a senior legal practitioner with expertise in procurement matters; and

684.1.2. 4 members chosen for their special skills in accounting, finance and economics with expertise in public procurement matters one of whom shall be a member of the academic staff of a University who is a specialist in matters of public procurement;

684.1.3. the said members of the Council are to be selected by a panel consisting of the Chief Justice, the Auditor-General and the Minister of Finance following a public process."

684.1.4. an Inspectorate;

684.1.5. a Litigation Unit;

684.1.6. a Tribunal;

684.1.7. a Court.

685. That the function of the Council is to:

685.1. initiate measures to protect procurement systems from corruption;

685.2. issue guidelines for the betterment of procurement practice;

685.3. prohibit any practice which facilitates corruption, fraud or undue influence in public procurement;

685.4. formulate measures for the making of reports to the Agency by whistle blowers and for their protection and incentivisation;

685.5. implement measures to increase the integrity and transparency of public procurement practices;

685.6. negotiate agreements with any regulatory or oversight authority to co-ordinate and harmonise the exercise of jurisdiction over public procurement;

685.7. participate in the proceedings of any regulatory or oversight authority and advise or receive advice from such authorities;

685.8. issue regular reports for public and media attention, detailing the nature and extent of corruption, fraud and undue influence identified by the AACIPP.

686. That the function of the Inspectorate is to:

686.1. monitor and inspect public procurement activity to detect and expose corruption;

686.2. establish, maintain and update a comprehensive and secure data base recording and listing:

686.2.1. every public procuring entity, together with its procurement procedures and the names and qualifications of the procurement officials employed;

686.2.2. information obtained from Whistle Blowers and complaints registered by tenderers;

686.2.3. the reports and information provided by oversight authorities;

686.2.4. reports of disciplinary proceedings relating to procurement officials conducted by any governmental, SOE or constitutional entity;

686.2.5. any other information in respect of the aforegoing;

686.3. receive information from whistle blowers in accordance with the procedures mandated by the Council and to provide protection and support in accordance with Article 32(2) of the United Nations Convention against Corruption;

686.4. institute electronic procedures to facilitate the monitoring and inspection of public procurement activity;

686.5. undertake *in situ* inspections, where necessary without notice, of public procurement activity by the procuring entities;

686.6. review the procurement systems utilised by the procuring entities to ensure the adequacy of in-built protections against corruption;

686.7. issue Mandatory Compliance Notices requiring the prompt implementation of remedial measures by a procuring entity to address deficiencies or irregularities detected in any procurement system or in respect of any tender or the award of any contract calling upon the affected entity to take immediate steps to rectify same;

686.8. refer all instances of non-compliance with such Notices to the Litigation Unit for further action;

686.9. promptly investigate any information received concerning fraud or corruption in the grant of tenders or contracts and take active steps to protect informants against intimidation or revenge;

686.10. investigate any circumstances suggesting the giving of a bribe or other gratification for the award of a tender or contract including the making of donations to political parties in connection with the award of tenders;

686.11. investigate all complaints concerning corruption made by tenderers or other informants and refer matters arising from such investigations to the Tribunal.

687. That the function of the Litigation Unit is to:

687.1. apply to the Tribunal for the giving of authority to the Inspectorate to exercise powers of search and seizure against any juristic or natural person including any political party in connection with any investigation into corruption, fraud or undue influence connected to public procurement;

687.2. receive and negotiate Deferred Prosecution Agreements and refer such Agreements to the Tribunal for approval;

687.3. seek remedial action from the Tribunal where Notices of Compliance issued by the Inspectorate have not been rectified;

687.4. institute proceedings before the Court for the recoupment of monies stolen from, or damages suffered by the State as a consequence of corruption, fraud or undue influence in the procurement process;

687.5. apply to the Tribunal for an order debarring any person from participating in any tender process or the grant of any procurement contract either permanently or for a stipulated time and either conditionally or unconditionally;

687.6. apply to the Tribunal for an order striking any procurement official from the roll of professional procurement officers either permanently or for a stated period and whether conditionally or unconditionally.

688. That the function of the Tribunal is to:

688.1. grant or refuse warrants of search and seizure of documents to the Inspectorate at the request of the Litigation Unit;

688.2. review and approve either with or without conditions any DPA or to reject same;

688.3. make any order requiring any procuring entity or other recipient of a Compliance Notice to comply forthwith or subject to such qualifications as the Tribunal may impose;

688.4. issue, where appropriate, an order interdicting any procurement entity from conducting any procurement activity until it has properly complied with any order issued by the Tribunal;

688.5. issue an order debarring any natural or legal person found guilty of corruption, fraud or exercising undue influence from again participating in any tender or receiving the grant of any procurement contract either for a period of time or permanently.

689. That the function of the Court is to:

689.1. determine civil actions instituted by the Litigation Unit for recompense to the State in respect of losses suffered through corrupt acts;

689.2. act as a Court of Appeal in respect of decisions of the Tribunal.

Recommendation 3: Protection for Whistle Blowers

690. That the Government introduce legislation or amend existing legislation:

690.1. to ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in article 32(2) of the United Nations Convention Against Corruption;

690.2. identifying the Inspectorate of the Agency as the correct channel for the making of such disclosure;

690.3. authorising the Litigation Unit of the Agency to incentivise such disclosures by entering into agreements to reward the giving of such information by way of a percentage of the proceeds recovered on the strength of such information;

690.4. authorising the offer of immunity from criminal or civil proceedings if there has been an honest disclosure of the information which might otherwise render the informant liable to prosecution or litigation.

Recommendation 4: Deferred Prosecution Agreements

691. That the government introduce legislation for the introduction of deferred prosecution agreements by which the prosecution of an accused corporation can be deferred on certain terms and conditions:

691.1. that a company has self-reported facts from which criminal liability could be inferred and has co-operated fully in making such report;

691.2. that the company has agreed to engage in specific conduct intended to ensure that such conduct is not repeated;

691.3. that the company has paid a fine;

691.4. or been subject to other remedial action;

691.5. that the terms and conditions of the agreement has been sanctioned by the Tribunal of the Agency.

Recommendation 5: The Creation of a Procurement Officer's Profession

692. It is recommended that consideration is given to enacting legislation that will establish a professional body to which all officials who work in the area of public procurement should belong.

693. Such professional body will fix the qualifications and the necessary training and experience necessary for membership of the profession.

694. Such training and qualification to include high standards of integrity and a commitment to resist mismanagement, waste and corruption.

695. That the procurement system in every procuring entity be managed by a duly qualified public procurement official being a member in good standing of the profession.

696. That the Tribunal of the Agency act as the disciplinary committee of the profession with power to strike a member from the Roll or to impose such other disciplinary sanction as the case may require.

Recommendation 6: The Enhancement of Transparency

697. The Commission recommends that set standards of transparency consistent with the OECD Principles for integrity in public procurement be formulated by National Treasury for compulsory inclusion in every procurement system adopted by a public procurement entity.

Recommendation 7: Protection for Accounting Officers/Authorities acting in good faith

698. It is recommended that the legislation dealing with the duties and responsibilities of Accounting Officers/Authorities be amended to insert a provision which reads:

> "No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act unless such person acts negligently.

Recommendation 8: Suggested Amendment of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 ("PRECCA")

699. In order to strengthen the duty of private sector entities to put in place measures against bribery it is recommended that PRECCA be amended by the introduction of a section 34A reading as follows:

> "34A Failure of persons or entities to prevent bribery
>
> (1) Any member of the private sector or any incorporated state-owned entity ('A') is guilty of an offence under this section if a person ('B') associated with A gives or agrees or offers to give any gratification prohibited under Chapter 2 to another person ('C') intending-
>
> (a) to obtain or retain business for A or
>
> (b) to obtain or retain an advantage in the conduct of business for A, save that no offence shall be committed where A had in place adequate procedures designed to prevent persons associated with A from giving, agreeing or offering to give any gratification prohibited under Chapter 2.
>
> (2) For the purposes of section 34A(1), a person ('B') is associated with A if (disregarding any gratification under consideration) B is a person who performs services for or on behalf of A. The capacity in which B performs services for or on behalf of A does not matter."

Recommendation 9: Suggested Amendment of the Political Party Funding Act No. 6 of 2018

700. It is recommended that the Act be amended to criminalise the making of donations to political parties in the expectation of or with a view to the grant of procurement tenders or contracts as a reward for or in the recognition of such grants having been made.

Recommendation 10:

701. Consideration be given to the enactment of legislation for:

701.1. the greater centralisation of public procurement in certain aspects;

701.2. the better harmonisation of the legislation applying to public procurement;

701.3. the better guidance of public procurement officials in applying the legislation governing public procurement;

701.4. the better training of public procurement officials;

701.5. the discontinuance of any deviation based on the concept of a sole source service provider.