

Judicial Commission of Inquiry into State Capture Report: Part VI

Vol. 4: All the Recommendations

*Corrected
Version*



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
Chief Justice of the Republic of South Africa

Report of the Judicial Commission of Inquiry into State Capture: Part VI: Vol. 4 Corrected Version



Explanatory Note

This volume of the Commission's Report is Volume 4 of Part VI of the Report that contains all the recommendations made by the Commission in all the volumes of the Report and it replaces the version of Vol 4 of Part VI that was handed over to the President on 22 June 2022. The words: "corrected version" appear on the outside cover of this volume to make sure that this volume is not confused with the one it replaces. That will enable everyone to know whether a particular copy of the Volume is the corrected and official volume or whether it is the uncorrected one which is not an official version.

The replacement of the version of Vol 4 of Part VI of the Report that was handed over to the President on 22 June 2022 by this version of Vol 4 of Part VI is in compliance with the order of the High Court, Pretoria, of 5 October 2022 issued under case number 22791/22.

ALL THE COMMISSION'S RECOMMENDATIONS
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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 VI

Vol. 4: All Recommendations

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

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SUMMARY OF THE COMMISSION'S RECOMMENDATIONS

PART I VOLUME 1 SOUTH AFRICAN AIRWAYS AND ITS ASSOCIATED COMPANIES

1. Below are the recommendations made by this Commission regarding South African Airways (SAA) and its associated companies.

Conclusion and Recommendations

2. The Commission's Terms of Reference required it to establish the extent to which state capture, corruption and fraud was prevalent in the public sector. In particular, the Terms of Reference required the Commission to investigate, make findings and report on whether public officials or functionaries had unlawfully awarded tenders to benefit any family, individual or corporate entity (paragraph 1.4 of the Terms of Reference). The Terms of Reference also required the Commission to determine whether any officials or functionaries within the various SOEs had benefitted personally from acts of corruption (paragraph 1.9 of the Terms of Reference).
3. These key aspects of the mandate of the Commission guided the investigation undertaken into the affairs of SAA, its subsidiary SAAT, as well as SA Express.
4. The investigation endeavoured to uncover not only what had happened within these entities but also why and how it happened. The investigation therefore had a broad compass because it was motivated by a desire to understand the weakness within the public sector that makes it vulnerable to state capture, corruption and fraud.
5. As the findings set out above show, SAA declined during the tenure of Ms Myeni to an entity racked by corruption and fraud. Despite this, she was retained as its Chairperson

well beyond the point at which she should have been removed. Two successive Finance Ministers have explained to the Commission that this was because of the personal preferences of former President Zuma. This is the antithesis of accountability. President Zuma fled the Commission because he knew there were questions that would be put to him which he would not have been able to answer. He could not have justified his insistence that Ms Myeni be retained at SAA nor could he have credibly denied Mr Gordhan's and Mr Nene's evidence that he wanted Ms Myeni retained at SAA.

6. The appointment of individuals to boards of SOEs must be justifiable based on their skills expertise, experience and knowledge.
7. Functionaries within SOEs must be held to the highest standards of accountability because they use public funds to manage the businesses they oversee.
8. Those responsible for governance at SAA, SAAT and SA Express displayed a wanton disregard for these standards. Rather than acting in the entities' best interests, they were motivated by their own personal interest. This should never be allowed to occur again. In particular, the Commission makes the following recommendations for action following this report.

Mr X's evidence

9. The Secretary of the Commission has already laid a criminal complaint against Ms Myeni for her disclosure of Mr X's identity during her testimony. This matter needs to be brought to finality by the law enforcement agencies and the National Prosecuting Authority.

10. The evidence of Mr X also merits further detailed investigation and possible charges of corruption being laid against all the individuals involved in the scheme to securing millions of Rands for the personal benefit of Ms Myeni and the Jacob Zuma Foundation.

Pembroke Transaction

11. Ms Myeni knowingly misrepresented to the Minister of Public Enterprises that the Board of SAA had taken two decisions when it had not. Those misrepresentations caused financial losses to SAA. It is likely that her conduct constitutes the crime of fraud. The Commission recommends that the National Prosecuting Authority considers, subject to such further investigation as may be considered necessary, whether Ms Myeni should be prosecuted for fraud.

LSG SkyChefs

12. Ms Myeni and Ms Kwinana displayed a wanton disregard for the best interests of SAA in their decision-making on the lounge catering contract. They acted in gross disregard of their fiduciary duties to SAA when they took this decision. However, they both ceased being directors of SAA more than 24 months ago. Accordingly, the shareholder is not now in a position to bring proceedings to have them declared delinquent directors under section 162 of the Companies Act.
13. This time bar may be amended by Parliament in order to permit applications to be brought even after two years, on good cause shown. This will mean that in cases such as this one, where the true extent of the Board members' breaches of duty are only uncovered a number of years later, steps can still be taken by the executive to ensure that such directors are declared delinquent and are thereby prevented from serving on the boards of companies in the future.

Swissport

14. SAA's conclusion of a five-year ground handling contract took place a month after Swissport had concluded a service level agreement with JM Aviation in terms of which JM Aviation was paid R28.5 million. That money, according to Mr Daluxolo Peter, was then used to pay millions of Rands to those who had assisted in "facilitating" the finalisation of the SAA / Swissport contract. The people who received payments from that amount of R28.5 million were:
 - 14.1. Mr Daluxolo Peter;
 - 14.2. Mr Vuyisile Ndzeku;
 - 14.3. Mr Lester Peter; and
 - 14.4. Adv Nontsasa Memela.
15. These payments were therefore likely to have been kick-back payments to those who had secured the conclusion of the Swissport ground handling contract with SAA or were to be involved in its implementation. The Commission recommends that the law enforcement agencies should further investigate the role of Swissport in these dealings and where warranted, the National Prosecuting Authority should consider the prosecution of all those involved in criminal acts.
16. JM Aviation appears not to have paid VAT to SARS on the R28.5 million it received from Swissport prior to the ground handling contract being concluded with SAA. It is recommended that SARS should consider this matter further and take such steps as it may be advised to take.

AAR / JM Aviation components tender

17. The award of the components tender for five years to the Joint Venture of AAR and JM Aviation was unlawful, irregular and unfair.
18. AAR and JM Aviation were favoured during the process by the SAAT Head of Procurement, Adv Nontsasa Memela and its Board.
19. The then Head of Procurement, Adv Nontsasa Memela, and the Chairperson of the Board of SAAT, Ms Yakhe Kwinana, received payments from JM Aviation around the time that these decisions were taken.
20. The payments were likely kick-back payments to these officials. It is recommended that the National Prosecuting Authority should seriously consider prosecuting the JM Aviation directors, the members of the Board of SAAT at the time, and Ms Memela for corruption or related crimes. It should also consider engaging with the United States Department of Justice regarding the role played by AAR in this scheme.

The concealment

21. The Commission's investigations revealed that Mr Ndzeke, 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 Ndzeke and Ms Kwinana tried to hide the payments made by or on behalf of JM Aviation or Mr Ndzeke to Ms Kwinana's company.
22. They did so by fabricating agreements in order to ensure that they appeared as though they were arms-length transactions unrelated to the decision-making that took place in SAAT at the time. This conduct probably constitutes fraud. The Commission recommends that the National Prosecuting Authority seriously considers to prosecute

them after such investigation as the National Prosecuting Authority may decide should be conducted.

23. In addition, both Ms Memela and Ms Mbanjwa are officers of the court. Ms Memela is an advocate and Ms Mbanjwa, an attorney. Despite this, they have participated in a fraudulent scheme to try to hide money that was paid as a kick-back to Ms Memela. It is recommended that the Legal Practice Council should investigate whether the two should not be removed from the roll of attorneys, in the case Ms Mbanjwa, and, from the roll of advocates, in the case of Ms Memela.
24. Furthermore, Ms Mbanjwa continued to act on behalf of Ms Memela and Ms Kwinana in circumstances where she was personally implicated in their impugned conduct. At times, Ms Memela and Ms Kwinana implicated each other. There is a clear apparent conflict of interest in Ms Mbanjwa's representation of either of them in these proceedings, and a conflict in representing both of them. Ms Mbanjwa's independence and objectivity would have been compromised by her personal involvement. The personal involvement of a lawyer in a case in which she acts as a legal representative has been found by the courts to be an undesirable practice. Her conduct in this regard should also receive the attention of the Legal Practice Council.
25. The Commission will recommend that the NPA consider prosecuting Ms Memela and Ms Kwinana for the offence of corruption.

State Security Matters

26. 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

27. 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.
28. It is recommended that:
 - 28.1. 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;
 - 28.2. The law enforcement agencies investigate these contracts with a view to:
 - 28.2.1. 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;
 - 28.2.2. 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
 - 28.2.3. 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.

- 28.2.4. The law enforcement agencies investigate the role of Mr Brickman, Mr Visnenza and Nedbank in relation to these contracts with a view to the National Prosecuting Authority prosecuting Mr Brickman, Mr Visnenza and / or Nedbank on charges under section 6(b)(ii) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;
- 28.2.5. the Asset Forfeiture Unit of the National Prosecuting Authority recovering Nedbank's profits under the interest swap contracts under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 unless Nedbank has a valid defence to such recovery claims.
29. 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.
30. It is recommended that:
- 30.1. The law enforcement agencies investigate the award of Bid No RFP 085/13 with a view to.
- 30.1.1. 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;

- 30.1.2. 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;
- 30.1.3. 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
- 30.2. 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

31. 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

32. 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.

33. 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.
34. 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.
35. In my view, no prospect on any basis for SAA or SAAT to keep Ms Nhantsi in her employment. I recommend summary dismissal.

Auditors

36. 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,
37. The South African Institute of Chartered 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 Chartered 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

38. 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.
39. 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.
40. 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.

41. 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.
42. Where prosecutions have been recommended in this section, it is also recommended that the Asset Forfeiture Unit of the National Prosecuting Authority takes steps to recover under Chapter 5 or Chapter 6 of Prevention of Organised Crime Act 121 of 1998 any amounts that constitute the proceeds of unlawful activities or the instrumentality of an offence.

PART I VOLUME 2 THE NEW AGE AND ITS DEALINGS WITH GOVERNMENT**DEPARTMENTS AND STATE OWNED ENTITIES**

43. Below are the recommendations made by the Commission regarding The New Age.
44. 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.
45. These matters should therefore be handed over to law enforcement agencies for further investigation and, where warranted, prosecution.
46. 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.
47. Only three responded.
- 47.1. 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.
- 47.2. 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.

- 47.3. The remaining board members did not respond to their rule 3.3 notices.
48. 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.
49. 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.
50. 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.

PART I VOLUME 3 SOUTH AFRICAN REVENUE SERVICE

51. Below are the recommendations made by this Commission regarding the South African Revenue Services (SARS) and its associated companies.

Recommendations

52. It is recommended that:

52.1. 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.

52.2. 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.

52.3. 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.

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

PART I VOLUME 4 PUBLIC PROCUREMENT IN SOUTH AFRICA

53. The Commission makes the following recommendations for consideration by the President.

Recommendation 1: The National Charter against Corruption

53.1. 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;

53.2. The National Charter should be signed by or on behalf of:

53.2.1. the President and the Cabinet

53.2.2. the Provincial Premiers and members of the Provincial Cabinets;

53.2.3. the local authorities;

53.2.4. all State-Owned enterprises;

53.2.5. the political parties represented in Parliament;

53.2.6. constitutional entities;

53.2.7. the institutional representatives of the business sector;

53.2.8. listed public companies;

53.2.9. Trade Unions

- 53.2.10. Anti-corruption bodies in civil society;
- 53.3. 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;
- 53.4. 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;
- 53.5. the content of the National Charter and the Code of Conduct should be widely publicised;
- 53.6. 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

54. That the Government introduce legislation for the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA).
55. That such legislation constitutes the Agency:
- 55.1. as an independent body subject only to the Constitution and the law;
- 55.2. which has jurisdiction throughout the Republic;
- 55.3. which is impartial and must perform its functions without fear, favour or prejudice;

55.4. which is financed from:

55.4.1. money that is appropriated by Parliament for the Agency;

55.4.2. fees payable to the Agency by all tenderers for public procurement contracts;

55.4.3. money received from any other source.

56. That such legislation must provide that the Agency consists of:

56.1. The Council consisting of 5 members:

56.1.1. of whom the chairperson shall be a senior legal practitioner with expertise in procurement matters; and

56.1.2. 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;

56.1.3. 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."

56.1.4. an Inspectorate;

56.1.5. a Litigation Unit;

56.1.6. a Tribunal;

56.1.7. a Court.

57. That the function of the Council is to:

- 57.1. initiate measures to protect procurement systems from corruption
- 57.2. issue guidelines for the betterment of procurement practice;
- 57.3. prohibit any practice which facilitates corruption, fraud or undue influence in public procurement;
- 57.4. formulate measures for the making of reports to the Agency by whistle blowers and for their protection and incentivisation;
- 57.5. implement measures to increase the integrity and transparency of public procurement practices;
- 57.6. negotiate agreements with any regulatory or oversight authority to co-ordinate and harmonise the exercise of jurisdiction over public procurement;
- 57.7. participate in the proceedings of any regulatory or oversight authority and advise or receive advice from such authorities;
- 57.8. issue regular reports for public and media attention, detailing the nature and extent of corruption, fraud and undue influence identified by the AACIPP.

58. That the function of the Inspectorate is to:

- 58.1. monitor and inspect public procurement activity to detect and expose corruption;
- 58.2. establish, maintain and update a comprehensive and secure data base recording and listing:

- 58.2.1. every public procuring entity, together with its procurement procedures and the names and qualifications of the procurement officials employed;
- 58.2.2. information obtained from Whistle Blowers and complaints registered by tenderers;
- 58.2.3. the reports and information provided by oversight authorities;
- 58.2.4. reports of disciplinary proceedings relating to procurement officials conducted by any governmental, SOE or constitutional entity;
- 58.2.5. any other information in respect of the foregoing;
- 58.3. institute electronic procedures to facilitate the monitoring and inspection of public procurement activity;
- 58.4. undertake *in situ* inspections, where necessary without notice, of public procurement activity by the procuring entities;
- 58.5. review the procurement systems utilised by the procuring entities to ensure the adequacy of in-built protections against corruption;
- 58.6. issue Mandatory Compliance Notices requiring the prompt implementation of remedial measures by a procuring entity to address deficiencies or irregularities detected in any procurement system or in respect of any tender or the award of any contract calling upon the affected entity to take immediate steps to rectify same;
- 58.7. refer all instances of non-compliance with such Notices to the Litigation Unit for further action;

- 58.8. promptly investigate any information received concerning fraud or corruption in the grant of tenders or contracts and take active steps to protect informants against intimidation or revenge;
 - 58.9. investigate any circumstances suggesting the giving of a bribe or other gratification for the award of a tender or contract including the making of donations to political parties in connection with the award of tenders;
 - 58.10. investigate all complaints concerning corruption made by tenderers or other informants and refer matters arising from such investigations to the Tribunal.
59. That the function of the Litigation Unit is to:
- 59.1. 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;
 - 59.2. receive and negotiate Deferred Prosecution Agreements and refer such Agreements to the Tribunal for approval;
 - 59.3. seek remedial action from the Tribunal where Notices of Compliance issued by the Inspectorate have not been rectified;
 - 59.4. 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;

- 59.5. 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;
- 59.6. 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.
60. That the function of the Tribunal is to:
- 60.1. grant or refuse warrants of search and seizure of documents to the Inspectorate at the request of the Litigation Unit;
- 60.2. review and approve either with or without conditions any DPA or to reject same;
- 60.3. 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;
- 60.4. 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;
- 60.5. 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.
61. That the function of the Court is to:

- 61.1. determine civil actions instituted by the Litigation Unit for recompense to the State in respect of losses suffered through corrupt acts;
- 61.2. act as a Court of Appeal in respect of decisions of the Tribunal.

Recommendation 3: Protection for Whistle Blowers

62. That the Government introduce legislation or amend existing legislation:
 - 62.1. 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;
 - 62.2. identifying the Inspectorate of the Agency as the correct channel for the making of such disclosure;
 - 62.3. 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;
 - 62.4. 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

63. 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:

- 63.1. that a company has self-reported facts from which criminal liability could be inferred and has co-operated fully in making such report;
- 63.2. that the company has agreed to engage in specific conduct intended to ensure that such conduct is not repeated;
- 63.3. that the company has paid a fine;
- 63.4. or been subject to other remedial action;
- 63.5. 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

- 64. 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.
- 65. Such professional body will fix the qualifications and the necessary training and experience necessary for membership of the profession.
- 66. Such training and qualification to include high standards of integrity and a commitment to resist mismanagement, waste and corruption.
- 67. 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.

68. 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

69. 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

70. 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”)

71. 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

72. 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:

73. Consideration be given to the enactment of legislation for:

73.1. the greater centralisation of public procurement in certain aspects;

73.2. the better harmonisation of the legislation applying to public procurement;

73.3. the better guidance of public procurement officials in applying the legislation governing public procurement;

73.4. the better training of public procurement officials;

73.5. the discontinuance of any deviation based on the concept of a sole source service provider.

PART II VOLUME 1 TRANSNET

74. This report is an account of the recommendations that the Commission gave in relation to Transnet.

Recommendations in relation to the kickback and laundering of the proceeds of unlawful activities

75. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution here or abroad of Mr Essa and his various companies (Regiments Asia, Tequesta, JJ Trading FZE and Century General Trading FZE) and the relevant functionaries of CSR Zhuzhou Electric Locomotives Co, CNR and CRRC on charges of corruption as contemplated in any law, including Chapter 2 of PRECCA, and the racketeering offences and the offences relating to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA, in relation to the various contracts (including BDSAs and exclusive agency agreements) concluded between 2012 and 2016 that led to the payment of at least R7.34 billion in kickbacks to companies controlled by Mr Essa and the Gupta enterprise.
76. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with the view to the possible prosecution of Regiments Capital (Pty) Ltd, Mr Wood, Mr Essa (and any company under his control), Mr Moodley (and any company under his control) and Mr Singh, as well as any persons associated with them in illegal conduct, on charges of fraud, corruption as contemplated in Chapter 2 of PRECCA, and the racketeering offences and the offences related to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA in relation to the alleged arrangement and agreement whereby it was agreed to appoint Regiments as an SDP on Transnet contracts in exchange for Regiments paying 30-50% of its fees to Mr Essa and/or his associated companies and 5% of its fees to Mr Moodley and/or

his associated companies amounting to more than R1 billion for little or no consideration.

Recommendations in relation to the receipt of gratification by individuals

77. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Gigaba, Mr Gama, Mr Pita and Mr Jiyane on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to cash payments allegedly received by them during visits to the Gupta compound in Saxonwold in the period 2010-2018.
78. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe and Mr Singh on charges of corruption as contemplated in Chapter 2 of PRECCA in relation to cash payments that were allegedly made to them at the Three Rivers Lodge, Vereeniging in July 2014 by two unidentified Chinese men.
79. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on charges of corruption as contemplated in Chapter 2 of PRECCA in relation to his Dubai travel expenses during the period between April 2014 and June 2015, which were allegedly paid for by Sahara Computers.

Recommendations in relation to the unjustifiable reinstatement of Mr Gama

80. It is recommended that steps should be taken by Transnet in terms of section 77 of the Companies Act 71 of 2008 to recover from those members of the board who supported the unjustifiable settlement agreement between Transnet and Mr Gama concluded on

23 February 2011, the amount of approximately R17 million paid to and for the benefit of Mr Gama pursuant to the agreement.

81. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine whether the crime of fraud was committed by any person in relation to the payment of R1 399 307.11 on 16 April 2015 by Transnet to Langa Attorneys (in respect of costs allegedly owed to Mr Gama).
82. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary, with a view to the possible prosecution on a charge of corruption in terms of Chapter 2 of PRECCA, and/or a racketeering charge in terms of Chapter 2 of POCA, to determine whether the reinstatement of Mr Gama as CEO of TFR at the instance of Mr Zuma, Mr Gigaba and Mr Mkwanazi constituted an improper inducement to Mr Gama to do anything, thus amounting to corruption.

Recommendation in relation to the settlement agreement with GNS/Abalozi

83. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine whether Mr Brian Molefe acted wilfully or grossly negligently in contravention of sections 50 or 51 of the PFMA with a view to his prosecution on a charge in terms of section 86(2) of the PFMA in relation to his agreement on 16 January 2016 to pay GNS/Abalozi an unjustifiable payment of R20 million.

Recommendations in relation to the procurement of the 95 locomotives

84. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe and Mr Gama on a charge of contravening section 50(1)(a) of the PFMA and/or

on an offence relating to the proceeds of unlawful activities and/or racketeering as contemplated in Chapter 2 and 3 of POCA in relation to their decision to recommend to the board the change in the evaluation criteria in the procurement of the 95 locomotives so as to favour CSR as a bidder for the tender.

85. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary to determine if the board (the accounting authority) of Transnet wilfully or grossly negligently contravened section 51(1)(b)(i) of the PFMA by failing to recover delay penalties allegedly due to Transnet in terms of the LSA concluded between Transnet and CSR in 2012 in respect of the procurement of the 95 electric locomotives.

Recommendations in relation to the procurement of the 100 locomotives

86. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Jiyane and Mr Gama on a charge in terms of section 86(2) of the PFMA of wilfully or grossly negligently contravening section 50 or 51 of the PFMA by presenting misleading information and failing to disclose material information to the board of Transnet in January 2014 regarding the acquisition of 100 electric locomotives from CSR by means of confinement.
87. It is recommended that the law enforcement agencies conduct such further investigations as may be required with a view to the possible prosecution of any official of Transnet in terms of section 86(2) of the PFMA in respect of the authorisation of advance payments of approximately R3 billion to CSR in the period between March 2014 and November 2014 with no security in the form of advance payment guarantees being in place.

88. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the board or any official of Transnet on a charge in terms of section 86(2) of the PFMA of wilfully or grossly negligently contravening section 50 or 51 of the PFMA by agreeing to or condoning an unjustifiable price increase in the amount of R740 million in relation to the procurement of 100 electric locomotives from CSR.

Recommendations in relation to the procurement of the 1064 locomotives

89. It is recommended that the law enforcement agencies conduct such further investigations as may be required with a view to the possible prosecution of any official of Transnet on a charge in terms of section 86(2) of the PFMA by wilfully or grossly negligently contravening section 51 of the PFMA by wrongfully deviating from the evaluation criteria of the instruction note of National Treasury of 16 July 2012 and the provisions of regulations 5 and 6 of the PPPFA regulations in relation to the evaluation of the bids for the 1064 locomotives.
90. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh and Mr Gama for fraud and on a charge in terms of section 86(2) of the PFMA of contravening section 50(1)(b) of the PFMA by misrepresenting to the board of Transnet in April 2013 and May 2014 that the ETC of R38.6 billion for the procurement of the 1064 locomotives excluded provision for forex and escalations when it in fact did so in the amount of R5.892 billion.
91. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge of fraud by misrepresenting to the Minister of Public Enterprises in an email of 31 March 2014 that the ETC of R38.6 billion approved by the Minister in August 2013

excluded provision for the impacts of foreign exchange and escalations when it in fact included provision for such costs in the amount of R5.892 billion.

92. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any official or employee or former employee of Transnet on a charge of fraud or in terms of section 86(2) of the PFMA in wrongfully adjusting the prices of the bid of CSR by an irregular adjustment for the TE scope and by an inappropriate reduction of CNR's Best and Final Offer ("BAFO") price in the procurement of the 1064 locomotives so as to favour them and with the result that their bids succeeded when they should not have.
93. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh and Mr Jiyane on a charge of fraud or in terms of section 86(2) of the PFMA by wrongfully agreeing to increase the price of the procurement of the 1064 locomotives by including an unjustifiable provision of R2.7 billion for batch pricing when there was no contractual obligation to do so.
94. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the negotiations team that conducted the post tender negotiations on behalf of Transnet in relation to the procurement of the 1064 locomotives on charges of corruption in terms of Chapter 2 of PRECCA, or in terms of section 86(2) of the PFMA for wilfully or grossly negligently contravening section 50(1)(b) of the PFMA, by acting corruptly or not acting in the best interests of Transnet in managing its financial affairs by agreeing to the payment of excessive advance payments to CSR and CNR and not complying with the local content requirements of the RFPs of the tender in relation to this transaction.

95. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge of fraud by misrepresenting to the board of Transnet that the 1064 locomotive project was Net Present Value ("NPV") positive and profitable by applying an inappropriate hurdle rate of 15.2% when the project may in fact have had a negative NPV.
96. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any member of the board or any official of Transnet on a charge in terms of section 86(2) of the PFMA of wilfully or in a grossly negligent way contravening sections 50 or 51 of the PFMA by agreeing to or condoning an unjustifiable price increase in the amount of R9.124 billion in relation to the procurement of the 1064 locomotives from the relevant OEMs.
97. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of the majority directors of CNRRSSA, BEX, Mr Shaw, Integrated Capital Management, Confident Concepts and any other associated persons and companies on a charge of corruption as contemplated in Chapter 2 of PRECCA, and the racketeering offences and the offences related to the proceeds of unlawful activities contemplated in Chapter 2 and 3 of POCA in relation to the payment of approximately R76.59 million made by CNRRSSA to BEX on 25 September 2015.
98. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Nair and the members of the negotiations team that represented Transnet in the negotiations with CNRRSSA and Bombardier concerning the relocation of the

manufacturing and assembly lines to Durban in 2014-2015 on a charge in terms of section 86(2) of the PFMA for contravening section 50(1)(b) of the PFMA by failing to act in the best interests of Transnet in managing its financial affairs by negotiating and agreeing to variation orders in the total amount of approximately R1.2 billion, when there may in fact have been no proper basis for agreeing to the payment of that amount.

Recommendations in relation to the financial advisors

99. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Wood, Regiments and any other person associated with them in illegal conduct on charges of corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA, and in terms of section 86(2) of the PFMA (where appropriate) for contravening section 50(1)(b) of the PFMA by acting corruptly and receiving and laundering an amount of R79.23 million paid by Transnet to Regiments on 30 April 2014.
100. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama on a charge in terms of section 86(2) of the PFMA for contravening section 51(h) of the PFMA by concluding a contract in 2017 with Nkonki valued at R500 million in contravention of paragraph 9 of National Treasury Practice Note 3 of 2016 thereby not complying with legislation applicable to Transnet.
101. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge in terms of section 86(2) of the PFMA of contravening section 51(1)(b)(iii) of the PFMA in that on 27 August 2014 he breached his duty to prevent expenditure not complying with the operational policies of Transnet by recommending to the board a

proposal made by Regiments that was not in line with Transnet's policy regarding the fixed-floating debt ratio.

102. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Singh on a charge in terms of section 86(2) of the PFMA of contravening section 50(1)(b) of the PFMA by not acting in the best interests of Transnet by recommending to the board the conclusion of a loan of USD1.5 billion on 4 June 2015 at a price substantially above the market norm.
103. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Singh, Regiments, Mr Wood, Mr Moodley, Albatime and Sahara Computers on charges of corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA and (where appropriate) in terms of section 86(2) of the PFMA in relation to the payment by Transnet to Regiments on 11 June 2015 of an amount of R189.24 million and the on payment of R147.6 million of that amount to Albatime and Sahara Computers by Regiments.
104. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gama, Mr Ramosebudi, Mr Pita, Mr Wood, Mr Essa, Trillian and Albatime on charges of fraud, corruption in terms of Chapter 2 of PRECCA, racketeering and offences relating to the proceeds of unlawful activities in terms of Chapter 2 and 3 of POCA in relation to the payment by Transnet to Trillian on 4 December 2015 of an amount of R93.48 million and the on payment of R74.78 million of that amount to Albatime.

105. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Ramosebudi and Mr Wood on a charge of corruption in terms of sections 12 and 13 of PRECCA and racketeering offences in terms of Chapter 2 of POCA in relation to his soliciting or offering to accept a gratification from Mr Wood, Trillian or Mr Nyhonyha on 12 September 2015 in the form of a discount or reduction of the price payable for a Range Rover Sport motor vehicle from Land Rover Waterford for his benefit as an inducement to award a contract appointing Trillian for a fee of R93.4 million to replace JP Morgan as the lead arranger of the ZAR12 billion club loan.
106. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Ramosebudi, Mr Pita, Regiments Capital (Pty) Ltd, Regiments Fund Managers (Pty) Ltd, Mr Wood, Mr Shane and any other persons associated with them in illegal activity on charges of fraud, corruption or in terms of Chapter 2 of PRECCA, racketeering and the offences relating to the proceeds of unlawful activity under Chapter 2 and 3 of POCA, or where appropriate in terms of section 86(2) read with section 50(1)(b) of the PFMA, in relation to the realised losses of more than R1.5 billion caused to Transnet and the fees paid to Regiments Fund Managers in the amount of R229 million in respect of various interest rate swaps, cross-currency swaps and credit default swaps executed by Regiments on behalf of Transnet in the period between 2015 and 2019.

Recommendations in relation to the MEP

107. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Reddy and Mr Padayachee with corruption as contemplated in section 3, section 12(1) or section 13 of PRECCA in their offering in July 2013 to accept a gratification (in the form

of an appointment as an SDP) from Hatch as an inducement for influencing officials at Transnet to award Hatch the tender in relation to phase 1 of the Manganese Expansion Project (“MEP”).

108. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Essa and Mr Singh on charges of corruption in terms of Chapter 2 of PRECCA and racketeering offences in terms of Chapter 2 of POCA in demanding or soliciting in early 2014 a gratification (an SDP appointment for a company favoured by Mr Essa) for the benefit of Mr Essa’s company and himself and as an inducement (by influencing officials at Transnet) to award the tender in relation to a contract for performing work and providing services on phase 2 of the MEP to Hatch.

Recommendations in relation to the IT contracts

109. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Khan, Homix, Neotel and Mr Van der Merwe on charges of corruption in terms of section 13 of PRECCA and on racketeering and offences relating to the proceeds of unlawful activity in terms of Chapter 2 and 3 of POCA in relation to the offering by Mr Khan to accept 10% commission, in the amount of approximately R34 million, from Neotel as an inducement to influence officials at Transnet to award a tender to Neotel for supplying equipment to Transnet from Cisco and in relation to the on payment of such funds to the laundering vehicles of the Gupta enterprise.
110. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Neotel, Mr Joshi, Mr Van der Merwe, Mr Khan, Homix and any other person associated with them in illegal activity on charges of corruption in terms of Chapter 2 of PRECCA,

racketeering offences in terms of Chapter 2 of POCA and offences relating to the proceeds of unlawful activity in terms of Chapter 3 of POCA, in relation to the payment by Neotel of R41.04 million to Homix and the promise by Neotel to pay R25 million to Homix in the period between December 2014 and February 2015 supposedly for services rendered in relation to the MSA and asset buyback agreement concluded between Neotel and Transnet in December 2014.

111. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Shane and Mr Nagdee on a charge in terms of section 86(2) of the PFMA for contravening section 50 of the PFMA by acting prejudicially to Transnet's financial interests in a meeting of the BADC on 13 February 2017 by unjustifiably favouring the bid of T-Systems on spurious grounds.

PART II VOLUME 2 DENEL**Recommendations**

112. The evidence heard by the Commission with regard to Denel is that at some stage this was a state owned entity that was highly regarded internationally. Yet now it is an entity that is almost on its knees. The question that arises is: how did this come about and why was it allowed to happen? It is quite clear that a very important reason relates to the quality of leadership or lack thereof that is given to these SOEs. By Minister Lynn Brown's own admission, the 2011-2015 Board of Directors performed its duties very well. She even said that their performance had placed Denel in a position which was "music" in her ears. By her own admission that Board had achieved 88% of its targets in the 2014/2015 financial year. That, by any standard was excellent performance. The Board only served one term and it could have been asked to serve another term. It was not. The question that arises is: why did Minister Brown not ask it to?
113. During the period 2011 to 2015 it was not only the Board that was performing excellently at Denel but also the Group CEO, Mr Riaz Saloojee. Early in 2014 the then Chairperson of the Board of Directors, Mr Z Kunene, had written to Mr Saloojee extending his term of appointment and had said in the letter that one of the reasons the Board was extending his term was that he had shown exceptional performance and leadership as Group CEO of Denel. Yet, the 2015 Board made sure that one of the first decisions it made was to suspend the Group CEO with the Group Chief Financial Officer and the Company Secretary. Consequently, from the second half of the new Board's first year in office and the whole of their second year Denel was without these exceptional performers, namely the 2011 Board and the Group CEO. The result in the year that followed tells it all. In media reports Denel is now associated with liquidation and business rescue.

114. The appointment of members of Boards of Directors and of Chief Executive Officers for state owned entities is a matter of serious concern. The evidence heard by the Commission in regard to not just Denel but also certain other state-owned entities has revealed that the Executive very often failed to appoint the right kind of people these positions in SOEs. In regard to Denel, Minister Brown appointed as Chair of the Board an attorney who had previously been struck off the roll of attorneys for a long lists of acts of misconduct. In SAA, as is reflected in Part I Volume 1 of this Commission's Report the Executive appointed Ms Dudu Myeni who went on to do serious damage to the national airline. In Transnet the Executive appointed Mr Mafika Mkwanazi and certain other Board members in December 2010 who went on to enter into the strangest settlement agreement in regard to a dismissal dispute that has ever been seen which was very prejudicial to the interests of Transnet and they reinstated Mr Gama as CEO of TFR in circumstances that even Mr Mkwanazi conceded made their decision indefensible. Also at Transnet the Executive appointed both Mr Brian Molefe and Mr Siyabonga Gama to the position of Group CEO one after the other and they caused serious damage to Transnet.
115. It was also the Executive who appointed Dr Ben Ngubane as Chairperson of the Eskom Board of Directors after Mr Zola Tsotsi had effectively been expelled by that Board and he went on to allow not only himself but also his Board to be dictated to by the Guptas or their associates what resolutions it should pass and, of course, he and his Board caused serious damage to Eskom. Even though this does not relate to an SOE, it is, of course, also true that it was the Executive who appointed Mr Tom Moyane as Commissioner of SARS and he went on to cause untold damage to SARS, an organisation that was once the envy of other similar organisation internationally.
116. When regard is had to all of the above, it is quite clear that the appointment of members of Boards of Directors of SOEs as well as senior executives such as Chief Executive

Officers and Chief Financial Officers can no longer be left solely in the hands of politicians because in the main they have failed dismally to give these SOEs members of Boards and Chief Executive Officers and Chief Financial Officers who have integrity and who have what it would take to lead these institutions successfully. They are all going down one by one and, quite often, they depend on bail outs.

117. It is therefore necessary that a body be established which will be tasked with the identification, recruitment and selection of the right kind of people who will be considered for appointment as members of Boards of SOEs and those who will be appointed as Chief Executive Officers and Chief Financial Officers at these SOEs.
118. It would be completely unacceptable to allow this situation to continue as before without any change in how members of Boards of SOEs and Chief Executive Officers and Chief Financial Officers are appointed. However, the actual recommendation of the body that will be recommended to play a key role in this regard will be dealt with in Part III of the Commission's Report when other SOEs which have not so far been covered in Part I and Part II of the Report will have been covered.
119. On the evidence heard by the Commission the 2015 Board of Directors of Denel that was led by Mr L D Mantsha failed to carry out its fiduciary duties in suspending the three executives, in failing to ensure that a disciplinary inquiry was or inquiries were held within a reasonable time, in failing to agree to reasonable proposals made by the suspended executives which were aimed at and would have ensured that the allegations against the executives were tested expeditiously and the matter was resolved without undue delays and in making the payments that the Board made to the Executives to get them to leave Denel. In this regard it is recommended that law enforcement agencies should conduct such further investigations as may be necessary with a view to possible prosecutions of members of the Board of Directors of Denel

appointed in 2015 who supported the decisions taken by the Board in regard to the Executives for possible contravention of Section 51 and 51 of the Public Finance and Management Act 1 of 1999.

120. Mr Mantsha and the other directors who supported his campaign against the three executives have prima facie shown themselves unfit to be directors of a company. Section 162 of the Companies Act prescribes that certain specified persons and bodies may apply to court for an order declaring a director or former director delinquent or under probation, amongst other situations where the director or former director grossly abused the position of director, intentional or by gross negligence inflicted harm to a company or its subsidiary. The court on making a declaration of delinquency may make a range of consequential orders, including orders precluding such a person from exercising the office of a director or imposing conditions on the exercise of such an office.
121. However, all the persons and institutions entitled to apply for such orders must do so at the latest within 24 months after the director ceases to hold office as a director. The measure does not necessarily count this period from the time the director left the company where he misconducted himself. It is sufficient if the allegedly errant person was a director within 24 months of the institution of proceedings,
122. Denel itself, the DPE and the Companies and Intellectual Property Commission established by s 185 of the Companies Act would all have standing to consider bringing appropriate proceedings against Mr Mantsha and other erstwhile members of the 2015 Denel board shown to have abetted Mr Mantsha in his efforts to capture Denel for the Guptas. It is therefore recommended that they all be asked by the Government to consider bringing such proceedings.

123. The Legal Practice Council should be made aware of the findings made by the Commission against Mr Mantsha so that that body may conduct such investigation as it may consider necessary to establish whether Mr Mantsha is fit and proper to practise as an attorney.
124. The facts before the Commission have shown the inadequacy of punitive measures which currently form part of our law. Egregious violations of the Constitution have been demonstrated. Two forms of that abuse have been demonstrated by the evidence regarding Denel: the constitution of a board of directors for the purpose of achieving a result in direct conflict with the obligations imposed on directors by the Companies Act and other applicable legislation and measures; and the use of the suspension power in an administrative context for improper purposes. The methods by which unscrupulous persons can abuse public power are legion and abuses of public power pervade our public life. The present case merely demonstrates two of the potential violations of the duties attendant on public power which can arise.
125. Abuse of public power per se is not a criminal offence and, as has been shown in the present case, egregious abuses of public power tend not to be identified by legal processes until the perpetrators or those that protect them are out of power and then the assessment of the relevant facts will be a cumbersome, time consuming exercise, requiring as it does procedural fairness towards those accused of such abuse.
126. It is therefore recommended that the Government give consideration to the creation of a statutory offence rendering it a criminal offence for any person vested with public power to abuse public power vested in that person by intentionally using that power otherwise than in good faith for a proper purpose. Such potential violations might range from the case of a president of the Republic who hands a large portion of the national

wealth, or access to that wealth, to an unauthorised recipient to the junior official who suspends a colleague out of motives of envy or revenge.

127. Such a statutory offence would therefore require considerable sentencing powers and might provide as follows in the operative section of the statute creating the offence:
128. Any person who exercises or purports to exercise any public power, including any such power vested in such person by the Constitution, national or provincial legislation, any regulation made pursuant to national or provincial legislation or by municipal bylaw, otherwise than in good faith and for the purpose for which such power was conferred, shall be guilty of an offence and liable on conviction to a fine of up to R200 million or imprisonment for up to 20 years or to both such fine and imprisonment.
129. The Hulls contract, the Denel Land Services (“DLS”) Single Source Contract and the DVS Single Source Contract (Land Systems South Africa (Pty) Ltd was renamed DVS) that Denel awarded to VR Laser were all irregularly awarded in breach of section 217 of the Constitution. It is recommended that the law enforcement agencies should conduct such investigations as may be necessary to establish whether the provisions of sections 38, 50 or 51 of the PFMA were contravened.
130. It is recommended that the law enforcement agencies should conduct such further investigations as may be necessary to determine whether those members of the Board of Directors of Denel who supported the suspensions of the three executives and failed to agree to the executives’ proposal for an expedited process to test the allegations against them and failed to convene a disciplinary inquiry against the three executives and supported the decisions to pay out the large amounts that were paid out to the three executives did not act in breach of section 50(1)(a), (2) – and section 51 of the PFMA with a view to their possible criminal prosecution.

PART III BOSASA

Recommendations

131. The evidence establishes a *prima facie* case of money laundering in terms of section 4 of POCA against the following persons in respect of whom the matter is referred for further investigation and prosecution:

131.1. Angelo Agrizzi;

131.2. Andries Johannes van Tonder;

131.3. Carlos Bonifacio;

131.4. Jacques van Zyl;

131.5. Riaan Hoeksma;

131.6. Gregg Lacon-Allin; and

131.7. the entities AA Wholesalers, Riekele Konstruksie, Jumbo Liquor Wholesalers, Lamozeest, and Equal Trade 4 and Equal Food Traders.

132. The evidence establishes a *prima facie* case of corruption in terms of section 3 of PRECCA against the following persons in respect of whom the matter is referred for further investigation and prosecution:¹

132.1. Angelo Agrizzi;

¹ Read with sections 4 to 16 of PRECCA, as relevant.

132.2. Andries Johannes van Tonder;

132.3. Jacques van Zyl;

132.4. Johannes Gumede;

132.5. Papa Leshabane;

132.6. Thandi Makoko;

132.7. Leon van Tonder;

132.8. Richard le Roux;

132.9. Petrus Venter;

132.10. William Daniel Mansell;

132.11. Sesinyi Seopela;

132.12. Linda Mti;

132.13. Frans Vorster;

132.14. Carlos Bonifacio; and

132.15. Riaan Hoeksma.

133. The evidence establishes a *prima facie* case of fraud against the following persons in respect of whom the matter is referred for further investigation and prosecution:

133.1. Angelo Agrizzi;

133.2. Andries Johannes van Tonder;

133.3. Carlos Bonifacio;

133.4. Jacques van Zyl;

133.5. Greg Lacon-Allin; and

133.6. Riaan Hoeksma.

134. The evidence establishes that there is a reasonable prospect that further investigation will uncover a *prima facie* case of money laundering, corruption and/or fraud against the following persons and the matter is accordingly referred for further investigation:

134.1. Carien Daubert;

134.2. Rieka Hundermark;

134.3. Gavin Hundermark;

134.4. Cedric Frolick;

134.5. Patrick Littler;

134.6. Danie van Tonder;

134.7. Ishmael Dikane;

134.8. Syvion Dlamini;

134.9. Trevor Mathenjwa; and

134.10. Ryno Roode.

135. This must not, however, be taken as a finding by the Commission against any persons that did not receive rule 3.3 notices.

136. The evidence establishes a *prima facie* case of the failure to report suspicious or unusual transactions, in contravention of section 52 of FICA, against the following persons in respect of whom the matter is referred for further investigation and prosecution:

136.1. Angelo Agrizzi;

136.2. Andries Johannes van Tonder;

136.3. Carlos Bonifacio;

136.4. Jacques van Zyl;

136.5. Carien Daubert;

136.6. Rieka Hundermark;

136.7. Gavin Hundermark;

136.8. Johannes Gumede;

136.9. Papa Leshabane; and

136.10. Thandi Makoko.

137. The evidence establishes a *prima facie* case of assisting another to benefit from the proceeds of unlawful activities, in contravention of section 5 of POCA, against Gregory Lawrence, in respect of whom the matter is referred for further investigation and prosecution.
138. The evidence establishes that Petrus Venter was aware of the illegal transactions taking place at Bosasa and failed to report them. Further investigations should take place for a failure to comply with section 34 of PRECCA and other relevant legislative requirements. The matter is referred to the SAPS for this purpose. The matter is also referred to SARS and the SA Institute of Tax Practitioners (“SAIT”) for further investigation.
139. The evidence establishes *prima facie* instances of various tax offences. These matters are referred to SARS for further investigation in conjunction with relevant law enforcement agencies.²
140. Messrs Agrizzi, van Tonder and Bonifacio are facing pending charges of corruption, fraud and conspiracy to commit fraud. The matter is nonetheless referred to the SAPS, the DPCI and the Investigating Directorate, to ascertain whether those charges cover all instances of corruption revealed in the evidence before the Commission and, if not, for the charges to be expanded accordingly.
141. The matter of forms of inducement or gain being paid to persons in the NPA for Bosasa to have been able to gain possession of confidential documentation is referred for further investigation.

² See also the section titled “Instances not covered by terms of reference 1.1, 1.4, 1.5 and 1.9”.

Analysis and findings with reference to TOR 1.4

Introduction

142. The questions raised by TOR 1.4 are -

142.1. whether any of the identified public office bearers facilitated the unlawful award of tenders in the governmental or SOE sectors;

142.2. whether they thereby breached the Constitution, any relevant ethical code or legislation; and

142.3. if so, whether they did so in order to benefit any family, individual or corporate entity doing business with government or any organ of state.

143. The range of potential facilitators in respect of whom the question is asked, includes the President, members of the National Executive, including deputy ministers, public officials,³ and employees of SOEs.

144. The focus thus moves from those seeking to influence, discussed in relation to TOR 1.1, to those subject to the attempts at influence. The question raised is, in effect, whether the targets of the attempts responded by facilitating the unlawful award of tenders in the governmental or SOE sectors, for their own or another person or family's benefit.

145. This term of reference is approached by assessing particular tender awards and then focussing on those implicated in facilitating them.

³ For reasons elaborated upon below, this would include members of Parliament.

146. The analysis is best commenced with reference to the evidence of what took place in relation to the DCS tenders.

Contracts with the Department of Correctional Services

147. A supply management system must be fair, equitable, transparent and competitive. The system requires a department to conduct a needs assessment for the provision of goods or services and to prepare precise specifications for the services to be procured to ensure *inter alia* that value for money is achieved.
148. In the analysis that follows, the award of four contracts (and various renewals and an extension of these contracts) by the DCS to Bosasa and its affiliate companies is assessed for compliance with these requirements and in order to establish whether or not there was corrupt facilitation of the kind contemplated by TOR 1.4.

Mr Mti

149. Given that Mr Mti was implicated in the evidence of Messrs Agrizzi, le Roux, Vorster, van Tonder, Blake and Venter, he was issued with five notices in terms of rule 3.3 as detailed above. He was also issued with a regulation 10(6) directive. Mr Mti refused to comply with the directive, primarily because he stated that it infringed his right to remain silent and his right to a fair trial. Mr Mti's position and the Commission's response is set out above.
150. Mr Mti facilitated the unlawful award of tenders in breach of the Constitution and legislation in order to benefit himself, his family, Bosasa and its associates and the Watson family. Mr Mti's conduct thus falls squarely within that contemplated by TOR 1.4.

151. With reference to TOR 7, in addition to offences already referred to, there is a prima facie case against Mr Mti in respect of at least the following offences:

151.1. the general offence of corruption in section 3 of PRECCA;

151.2. offences in respect of corrupt activities relating to public officers in section 4 of PRECCA;

151.3. offences in respect of corrupt activities relating to members of the prosecuting authority in section 9 of PRECCA;

151.4. offences in respect of corrupt activities relating to contracts in section 12 of PRECCA;

151.5. offences in respect of corrupt activities relating to procuring of tenders in section 13 of PRECCA;

151.6. the common law offences of fraud, theft and perjury.

152. Mr Mti is already facing pending charges of corruption, fraud and conspiracy to commit fraud. The matter is nonetheless referred to the relevant authorities for investigation and prosecution, to the extent that the existing charges do not cover any of the conduct on the part of Mr Mti set out in this report.

Mr Gillingham

153. Mr Gillingham was summonsed to appear before the Commission but failed to do so. For the reasons given above, an adverse inference may be drawn from his failure to rebut the evidence that was given against him.

154. In the absence of Mr Gillingham appearing before the Commission to dispute the evidence implicating him, there is undisputed evidence that Mr Gillingham breached the Constitution and legislation by facilitating the unlawful award of tenders by the DCS to benefit himself, his family, the Watson family, Bosasa and its associated business entities.
155. It is established that Mr Gillingham facilitated the unlawful award of tenders as contemplated by TOR 1.4.
156. Based on the evidence, Mr Gillingham breached the following obligations applicable to him as a senior official of the DCS:
- 156.1. Section 217 and 195 of the Constitution.
- 156.2. The duty to ensure that the system of financial management and internal control established for DCS is carried out within his area of responsibility as CFO.
- 156.3. The responsibility for the effective, efficient, economical and transparent use of financial and other resources within his area of responsibility.
- 156.4. The obligation to take effective and appropriate steps to prevent irregular expenditure.
- 156.5. The obligation to comply with the provisions of the PFMA.⁴

⁴ Sections 45 and 57 of the PFMA.

157. In addition to the constitutional and statutory breaches detailed above, the evidence reveals a *prima facie* case that Mr Gillingham facilitated the award of tenders to benefit himself and his family in contravention of section 3, 4, 12 and 13 of PRECCA.
158. Mr Gillingham facilitated the unlawful award of tenders in breach of the Constitution and legislation in order to benefit himself, his family, Bosasa and its associates and the Watson family. Mr Gillingham's conduct thus falls squarely within that contemplated by TOR 1.4.
159. With reference to TOR 7, in addition to offences already referred to, there is a *prima facie* case against Mr Mti in respect of at least the following offences:
- 159.1. the general offence of corruption in section 3 of PRECCA;
 - 159.2. offences in respect of corrupt activities relating to public officers in section 4 of PRECCA;
 - 159.3. offences in respect of corrupt activities relating to members of the prosecuting authority in section 9 of PRECCA;
 - 159.4. offences in respect of corrupt activities relating to contracts in section 12 of PRECCA;
 - 159.5. offences in respect of corrupt activities relating to procuring of tenders in section 13 of PRECCA;
 - 159.6. the common law offences of fraud, theft and perjury.
160. Mr Gillingham is already facing pending charges of corruption, fraud and conspiracy to commit fraud. The matter is nonetheless referred to the relevant authorities for

investigation and prosecution, to the extent that the existing charges do not cover any of the conduct on the part of Mr Gillingham set out in this report.

Other officials

Mr Cedric Frolick

161. Mr Agrizzi testified that Mr Frolick assisted Bosasa in resolving an impasse with Mr Smith who was, at the time, Chairperson of the Portfolio Committee on Correctional Services and was considered “anti-Bosasa”. He testified that, in return for doing so, a payment was made to Mr Frolick at a meeting held with him and Mr Butana Komphela (then chair of the parliamentary Portfolio Committee on Sport) at the office park where Bosasa is situated, and that further monthly payments were made to Mr Frolick after that.⁵
162. Taking all of this into account there are at least reasonable grounds for suspecting that Mr Frolick’s conduct in assisting Bosasa in the respects set out above and in the summary of the evidence, was in return for payments corruptly made to him in contravention of section 3 and 7 of PRECCA. Section 7 of PRECCA deals with offences in respect of corrupt activities relating to members of the legislative authority as described in section 43 of the Constitution.
163. With reference to TOR 7, the matter is referred to the relevant investigative authorities on the basis that there is a reasonable prospect that further investigation will uncover a prima facie case of corruption in terms of sections 3 and 7 of PRECCA.

Ms Jolingana and other DCS officials

⁵ Transcript, day 76, pp 9 – 14.

164. According to Mr Agrizzi, during the period from 2007 until approximately 2016 payments were made to the following DCS officials on a monthly basis: Josiah Maako; Maria Mabena; Shishi Matabella; Mandla Mkabela; Dikeledi Tshabalala; Zach Modise; and Mollet Ngubo. These officials had been identified to look after Bosasa's DCS contracts and Ms Jolingana is said to have ensured the extension of the catering contract. All of the officials are recorded in the extracts from Mr Agrizzi's black book.⁶
165. The payments to Ms Jolingana recorded in Mr Agrizzi's black book were *quid pro quo* for the extension of the catering contract. Such conduct is, in addition to the contraventions of the Treasury Regulations, *prima facie* in contravention of sections 3, 4, 12 and 13 of PRECCA for purposes of criminal liability. By receiving the corrupt payments, she benefitted herself and by facilitating the extension of the catering contract, she benefitted Bosasa, its associates, and the Watson family. Her conduct falls squarely within TOR 1.4.
166. With reference to TOR 7 there is a *prima facie* case against Ms Jolingana of offences under PRECCA as listed above and the matter is referred to the relevant authorities for investigation and prosecution accordingly.
167. The remaining officials said to have received cash payments from Bosasa to ensure that they continued to "look after" its contracts with the DCS were issued with notices in terms of rule 3.3. Save for Josiah Maako and Dikeledi Tshabalala, no official has challenged the evidence against them. There is therefore undisputed evidence establishing that they facilitated the unlawful award of tenders in the DCS in return for corrupt payments, as contemplated in TOR 1.4.

⁶ See annexure HH to Mr Agrizzi's Supplementary Affidavit, pp 85 – 91.

168. With reference to TOR 7 there is a prima facie case against these officials of offences under sections 3, 4, 12 and 13 of PRECCA and the matter is referred to the relevant authorities for investigation and prosecution accordingly.
169. In relation to Mr Maako and Ms Tshabalala, while they have, through an attorney's letter, denied the allegations against them, they have not made an application in terms of rule 3.4, nor denied the allegations under oath. They have failed adequately to dispute the truth of Mr Agrizzi's evidence. On that basis it may be accepted that they facilitated the unlawful award of tenders in the DCS in return for corrupt payments, as contemplated in TOR 1.4 and in prima facie contravention of sections 3, 4, 12 and 13 of PRECCA.
170. With reference to TOR 7, there is a prima facie case of offences under the said provisions of PRECCA, and the matter is referred to the relevant authorities for investigation and prosecution accordingly.

Ms Ngwenya

171. In Mr Bloem's evidence, he referred to a fellow Portfolio Committee member, Ms Ngwenya, having shown bias towards Bosasa during the deliberations of the Portfolio Committee on Correctional Services. According to Mr Bloem, Ms Ngwenya informed him that there was money involved in meeting with Bosasa.
172. For her and the other members of Parliament referred to above, given that they were holders of a public office, "public official" includes within its ambit a member of Parliament. Her conduct therefore falls squarely within TOR 1.4.
173. With reference to TOR 7, there is *prima facie* case of a contravention of sections 3 and 7 of PRECCA and the matter is referred to the relevant authorities for investigation and prosecution accordingly.

Mr Vincent Smith

174. Mr Smith deposed to an affidavit on 3 August 2020 and testified before the Commission on 4 September 2020. Mr Smith's evidence was in response to evidence given by Mr Agrizzi, Mr Richard le Roux and Mr Blake. Initially, in response to a 10(6) directive, Mr Smith had relied on his right to remain silent and right to a fair trial as a basis not to respond to the directive issued by the Commission compelling him to answer certain evidence against him.⁷ Despite assurances from the Commission, Mr Smith initially failed to place his version before the Commission in response to rule 3.3 notices dated 23 January, 28 March and 1 July 2020 (the latter was addressed to Mr Smith's daughter, Brumilda Doreen Smith), as well as the 10(6) directive.

175. With reference to TOR 7, Mr Smith is already facing pending charges of corruption, fraud and conspiracy to commit fraud. The matter is nonetheless referred to the relevant authorities for investigation and prosecution, to the extent that the existing charges do not cover any of the conduct on the part of Mr Smith set out in this report.

Mr Mnikelwa Nxele

176. The evidence before the Commission is that the Regional Commissioner of the DCS in KwaZulu Natal, Mr Mnikelwa Nxele, received a monthly payment in exchange for ensuring that undue pressure was placed on Mr Petersen, the then National Commissioner of Correctional Services, and the DCS to continue the DCS's association with Bosasa.⁸

⁷ The 10(6) directive was issued on 21 August 2019. In response, Mr Smith's legal representatives filed written submissions on his behalf regarding Mr Smith's right not to incriminate himself and to remain silent. See annexure VGS12, Exhibit T30, p 80.

⁸ Transcript, day 38, p 95.

177. Mr Nxele's name is recorded in the extracts from Mr Agrizzi's black book.⁹ Mr Nxele was issued with a notice in terms of rule 3.3 on 24 January 2019. He did not make an application in terms of rule 3.4 for leave to cross-examine Mr Agrizzi or present evidence at the Commission. This evidence implicating him in corrupt activities and in failing to discharge his duties as an official of the DCS in good faith is therefore unchallenged. He benefitted personally. His conduct is in breach of section 195 and 217 of the Constitution, section 45 and 57 of the PFMA and thus falls within the ambit of TOR 1.4.
178. With reference to TOR 7, this conduct gives rise to a prima facie case of corruption in terms of sections 3 and 4 of PRECCA. The matter is referred to the relevant authorities for investigation and prosecution accordingly.

Contracts with the DoJ&CD

179. Mr Agrizzi testified that he was instructed by Mr Watson to make cash available to Mr Seopela for purposes of making payments to influential persons.¹⁰
180. Mr Agrizzi testified that Sondolo IT was awarded the contract with the DoJ&CD for the installation of access control across courts nationally, that the award of this contract was irregular and that certain officials received payments as lobbying fees or bribes.¹¹ However, save for Mr Thobane and Ms Nyambuse, no particulars were given as to the identity of these officials.
181. Mr Thobane¹² and Ms Nyambuse¹³ were implicated in Mr Agrizzi's evidence as having received bribes. He testified that he had direct evidence of these payments. Ms

⁹ See annexure HH to Mr Agrizzi's Supplementary Affidavit, pp 85 – 91.

¹⁰ Transcript, day 37, p 51.

¹¹ Transcript, day 41, pp 31-32.

¹² Norman Thobane was an official at the DoJ&CD - see transcript, day 41, p 37.

¹³ Mams Nyambuse was an official at the DoJ&CD - see transcript, day 41, p 37.

Nyambuse and Mr Thobane's names appear in Mr Agrizzi's black book.¹⁴ Neither Mr Thobane nor Ms Nyambuse was issued with a rule 3.3 notice informing them that Mr Agrizzi's evidence implicated them. No adverse findings are therefore made against them. Nevertheless, if Mr Agrizzi's evidence is true, Mr Thobane and Ms Nyambuse should be arrested and charged with corruption. However, it is up to the investigating authorities as to whether they decide to take the matter further insofar as these officials are concerned and, among other things, seek to obtain their version on this evidence if they elect to provide it. Although no finding is made against Ms Nyambuse and Mr Thobane, there is no reason why the law enforcement agencies should not have regard to this report, investigate the matter further including by taking statements from the two and if, thereafter, the law enforcement agencies believe no further investigation is warranted, terminate the investigation but, if they believe a further investigation is warranted, continue with the investigation.

Contracts with the Department of Transport

182. The evidence presented before the Commission by Mr Agrizzi that payments were made to a certain "Mlungise" at the Department of Transport in order to secure the award of the contract for fleet management to Kgwerano, and to other officials in that Department to secure the extension of the contract, is dealt with above in discussing TOR 1.1.
183. From the perspective of TOR 1.4, there is a lack of evidence about the identity of the persons alleged to have received corrupt payments from either Mr Leshabane or Mr Seopela and therefore of persons responsible for facilitation of the unlawful award of tenders. Further investigation would be required to ascertain their identities. No referral

¹⁴ Mr Agrizzi's Supplementary Affidavit, pp 87-88.

is made in this regard. It is up to the investigating authorities to decide whether to take the matter further.¹⁵

Contracts with the Department of Health in the Mpumalanga Province

184. In the light of Ms Kgasi and Ms Mogale's failure to respond to rule 3.3 notices and their failure to make an application in terms of rule 3.4, the evidence before the Commission is such that there are reasonable grounds for suspecting that their conduct fell within the ambit of TOR 1.4.

185. For purposes of TOR 7, there is a reasonable prospect that further investigation will uncover a prima facie case. The matter is referred to the relevant authorities for investigation accordingly.

Members of the National Executive

Thabang Makwetla

186. Mr le Roux testified that Bosasa provided former Deputy Minister for Correctional Services Mr Thabang Makwetla, with a security installation and maintenance services to the value of more than R308,754.25.¹⁶ The installation was on the instruction of Mr Watson. Mr Agrizzi was not aware of the installation.

¹⁵ As a starting point Vicus Luyt, Alan Chapman, Itu Moraba, Brian Gwebu, Clive Els and the Department of Transport can be contacted for further information.

¹⁶ Transcript, day 44, p 95. See also exhibit T21 paras 53-67 pp 12-14.

187. A rule 3.3 notice was issued to Deputy Minister Makwetla on 18 March 2019. Mr Makwetla testified before the Commission on 19 March and 5 July 2021.
188. In respect of the benefits conferred upon him by Bosasa he was in breach of his constitutional, legislative and ethical duties, as contemplated in TOR 1.4.
189. Mr Makwetla was also under a duty not to solicit or accept a gift or benefit in return for any benefit given in an official capacity and a duty to seek permission to receive and to disclose a gift worth more than R1,000.¹⁷ Mr Makwetla failed to do so.
190. With reference to TOR 7, despite the fact that Mr Makwetla's conduct in discussing the rates in terms of the Bosasa contract with the accounting office of the Department was not explored further in the course of Mr Makwetla's evidence, the evidence establishes a *prima facie* case of corruption in terms of sections 3 and 4 of PRECCA against him. The matter is accordingly referred to the relevant authorities for investigation and prosecution.

Mr Jacob Zuma

191. Introduction
192. Mr Zuma is the most senior public office bearer that Bosasa is said to have attempted to influence. Conduct falling within the Commission's terms of reference involving Mr Zuma is said to have occurred during his tenure as President of the Republic of South Africa.
193. Mr Zuma was issued with a notice in terms of rule 3.3 on 30 January 2019. On 30 April 2019, Mr Zuma was invited to appear before the Commission from 15 to 19 July 2020.

¹⁷ Section 4.

The purpose of this appearance was to address the evidence of witnesses who had implicated him and to answer questions from the Commission.

Conclusion

194. With reference to TOR 1.1, Bosasa and its leadership clearly provided inducements and gain to Mr Zuma, aimed at gaining influence over him. Accordingly, on the basis of the evidence presented in relation to Mr Zuma, there was also conduct falling within TOR 1.1.
195. With reference to TOR 7, and based on the foregoing analysis, there is sufficient evidence to establish that (i) Mr Zuma accepted gratification; (ii) from another person, i.e. Bosasa (or its directors or employees), (iii) which held and sought to obtain contracts with government.
196. With reference to the presumption in section 24(1) of PRECCA, the state can likely show that, despite having taken reasonable steps, it was not able to link the acceptance of the gratification by Mr Zuma, to any lawful authority or excuse for receiving the gratification. This is because Mr Zuma, failed to provide evidence to the contrary to show a lawful authority or excuse for receiving the gratification, either at all or at a level that could give rise to a reasonable doubt. Indeed, he did not testify at all.
197. Section 24(1) of PRECCA would likely deem there to be sufficient evidence to establish that Mr Zuma accepted the gratification from Bosasa and in doing so breached his Constitutional and legislative duties as well as ethical obligations in order to act in one

or more of the “manners” in paragraphs (aa) to (dd) of the PRECCA, being the different statutorily recognised forms of *quid pro quo*.¹⁸

198. The matter is referred to the appropriate authorities for further investigation on the basis that there is a reasonable prospect that such further investigation will uncover a prima facie case in terms of section 3 and/or 4 and/or 11 and/or 12 and/or 13 of PRECCA. Section 11 of PRECCA deals with corrupt activities relating to witnesses and evidential material during certain proceedings.

Ms Nomvula Mokonyane

Introduction

199. The evidence pertaining to Ms Mokonyane must be considered both from the perspective of TOR 1.1 and TOR 1.4. Whilst the focus of -

- 199.1. TOR 1.1 is on whether there were “attempts through any form of inducement or for any gain ... to influence” public office bearers in the identified categories; and
- 199.2. TOR 1.4 is on whether there was facilitation of the unlawful award of tenders by the listed office bearers,
- 199.3. evidence about the inducements is relevant to both TOR 1.1 and TOR 1.4. This is because the conferral of benefits on a public office bearer by a person or entity doing business with the State or SOEs, particularly when the benefits are

¹⁸ The “manners” include that which amounts to illegal, dishonest, unauthorised, incomplete, or biased; a 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; the abuse of a position of authority; a breach of trust; the violation of a legal duty or a set of rules; designed to achieve an unjustified result; or that amounts to any other unauthorised or improper inducement to do or not to do anything.

substantial, leads ineluctably to the question of whether anything was expected in return. The question is relevant to Ms Mokonyane because of the fact that there was evidence of substantial benefits having been conferred on her, some of which are not in dispute. Taking this into account, the evidence pertaining to Ms Mokonyane is dealt with under the rubric of TOR 1.4, whilst at the same time enquiring whether there was conduct as contemplated in TOR 1.1.

200. Ms Mokonyane falls squarely within the lists of public office bearers in both TOR 1.1 and TOR 1.4. She served in various senior roles in the executive at national and provincial level – Premier of Gauteng, Minister of Water and Sanitation, Minister of Communications and Deputy Minister of Environmental Affairs.

Breaches

201. In her various positions in the executive, Ms Mokonyane was subject to the Constitution, her oath of office under the Constitution, the Executive Members Ethics Act, and the Executive Ethics Code referred to in Appendix 1.
202. In terms of section 96 of the Constitution, a member of Cabinet may not expose him/herself to any situation involving the risk of a conflict between his/her official responsibilities and his/her private interests. Further, he/she must act in accordance with a code of ethics prescribed by national legislation, i.e. the Executive Members' Ethics Act and the Executive Ethics Code published in terms of section 2 of that Act.
203. In terms of the Executive Ethics Code, she was not permitted to:
- 203.1. use her position or any information entrusted to her, to enrich herself or improperly benefit any other person;

- 203.2. expose herself to any situation involving the risk of a conflict between her official responsibilities and her financial and/or personal interests;
- 203.3. solicit or accept a gift or benefit which (i) is in return for any benefit received from her in her official capacity; (ii) constitutes improper influence of her; or (iii) constitutes an attempt to influence her in the performance of her duties.
204. In respect of all of the benefits conferred upon her by Bosasa she was in breach of her constitutional, legislative and ethical duties, as contemplated in TOR 1.4.
205. The facilitation provided by Ms Mokonyane in relation to the dams report did not benefit Bosasa within the meaning of TOR 1.4. However, it did benefit Ms Mokonyane herself in that she continued to receive benefits from Bosasa and efforts such as this one would probably have given the impression that she was attempting to look after Bosasa's interests.
206. With reference to TOR 7, and based on the foregoing analysis, there is sufficient evidence to establish that (i) Ms Mokonyane accepted gratification; (ii) from another person, i.e. Bosasa (or its directors or employees), (iii) which held and sought to obtain contracts with government.
207. With reference to the presumption in section 24(1) of PRECCA, the state can likely show that, despite having taken reasonable steps, it was not able to link the acceptance of the gratification by Ms Mokonyane, to any lawful authority or excuse for receiving the gratification. This is because Ms Mokonyane, failed to provide evidence to the contrary to show a lawful authority or excuse for receiving the gratification, either at all or at a level that could give rise to a reasonable doubt.

208. Section 24(1) of PRECCA would, in the Commission's view, deem there to be sufficient evidence to establish that Ms Mokonyane accepted the gratification from Bosasa and in doing so breached her Constitutional and legislative duties as well as ethical obligations in order to act in one or more of the "manners" in paragraphs (aa) to (dd) of the PRECCA, being the different statutorily recognised forms of *quid pro quo*.¹⁹
209. The matter is referred to the appropriate authorities for further investigation and prosecution of Ms Mokonyane on charges of corruption in terms of section 3 and/or 4 and/or 11 and/or 12 and/or 13 of PRECCA.

Ms Dudu Myeni

Introduction

210. The evidence pertaining to Ms Myeni is in certain respects also relevant to TOR 1.1. In this regard she is a director of the board of an SOE as contemplated in that TOR.

Analysis of the evidence: facilitation

211. There is more than sufficient evidence to support a finding that Ms Myeni facilitated the meeting with President Zuma in relation to the oil and gas regulations. In fact, this has been established beyond reasonable doubt. The question, however, is whether that amounts to the facilitation of the unlawful award of a tender as contemplated in TOR 1.4. There is insufficient evidence to sustain such a finding. The incident serves rather as evidence of the influence that Ms Myeni was able to exert over President Zuma and of the closeness of her association with him.

¹⁹ As regards "the manners", see footnote 3272 above.

...

212. Having regard to the foregoing, it is established, in respect of Ms Myeni, that there were attempts made through inducements and gain to influence both her, as Chairperson of the Jacob Zuma Foundation or as someone close to Mr Zuma and director of an SOE and, through her, Mr Zuma, as contemplated in TOR 1.1.
213. With reference to TOR 7, and based on the foregoing analysis, there is a *prima facie* case of corruption against Ms Myeni of corruption in terms of on charges of corruption in terms of section 3 and/or 4 and/ or 9 and/or 11 and/or 12 and/or 13 of PRECCA.
214. The matter is referred to the appropriate authorities for further investigation and prosecution of Ms Myeni accordingly.

Analysis and findings with reference to TOR 1.5

Contracts with ACSA

215. With respect to TOR 7, the evidence establishes a *prima facie* case of corruption against the following persons in respect of whom the matter is referred for further investigation and prosecution:
- 215.1. Thele Lesetsa Moema, Reuben Pillay, and Mohapi Johannes Serobe (employees or former employees of ACSA).
216. The evidence also establishes that there is a reasonable prospect that further investigation will uncover a *prima facie* case of corruption against Siza Thanda for the facilitation of the unlawful award of a contract or tender and the matter is referred for

this purpose. In respect of the following persons, it is up to the investigating authorities to decide whether or not to investigate the matter further (starting, if considered necessary, with obtaining statements from them on their side of the story if they agree to provide statements):

- 216.1. Bongi Mpungose;
- 216.2. Jason Tshabalala; and
- 216.3. Mohammed Bashir (all employees of ACSA).

Contracts with SAPO

217. With respect to TOR 7, The evidence establishes a *prima facie* case of corruption against the following persons in respect of whom the matter is referred for further investigation and prosecution:

- 217.1. Siviwe Luthando Bongani Mapisa and Maanda Benjamin Manyatshe (employees or former employees of SAPO).

Conclusion and findings in relation to TOR 1.5

218. None of those persons implicated in the evidence in this section of the report who were issued with rule 3.3 notices responded to those notices. In the circumstances, the evidence in relation to them remains undisputed.

219. Although the evidence is based on the single witness testimony of Mr Agrizzi, it is corroborated in some instances by the recordal of names in Mr Agrizzi's black book.

The evidence also implicates Mr Agrizzi in criminal activity and is to his detriment, and it is unlikely that he would lie to prejudice himself. His evidence is also supported by the video evidence pertaining to the vaults and the safes where cash was stored and packaged for purposes of corrupt payments.

220. The evidence establishes that there was corruption in the award of contracts or tenders to Bosasa by Schedule 2 SOEs. The undisputed evidence was that the ACSA contract was unlawfully awarded in 2001 and was believed still to be in effect in 2019. The evidence of corruption was both for the facilitation of the original contract and the various extensions of the contract.

221. Returning to the questions arising from TOR 1.5, the evidence establishes that -

221.1. there was corruption in the awarding of tenders in two SOEs that Bosasa had dealings with, ACSA and SAPO;

221.2. the corruption involved the payment of unlawful gratification by way of ongoing monthly payments to various persons to ensure the grant and extension of the contracts to provide security services.

222. An assessment of the extent of the corruption must await further investigation of the persons that did not receive rule 3.3 notices. A total of five implicated employees have received rule 3.3 notices and have not responded.

Analysis and findings with reference to TOR 1.9

223. The questions arising from TOR 1.9 are -

- 223.1. whether there was corruption in the award of contracts and tenders by Government Departments, agencies and entities; and, if so,
- 223.2. what the nature of the corruption was; and
- 223.3. what the extent of the corruption was; and
- 223.4. whether the corruption involved office bearers in the listed categories seeking to benefit themselves, their family members or entities in which they held a personal interest.
224. The focus of the enquiry required by TOR 1.9 is on corruption in the award of tenders by government departments, agencies and entities, as distinct from the major public entities. It also focuses on whether the relevant office bearers sought to benefit themselves, their family members or entities in which they had an interest.
225. To a significant degree, the questions whether there was corruption in the award of contracts and tenders by government departments, agencies and entities and whether the corruption involved office-bearers seeking to benefit themselves, their family members, or entities in which they held a personal interest, have already been answered in the analysis with reference to other terms of reference, particularly TOR 1.1 and TOR 1.4. That already establishes the existence and very substantial extent of the phenomenon of corruption in relation to the awarding of contracts and tenders by government departments involving office bearers in the categories concerned.
226. The analysis in this section will therefore focus on the nature and the extent of the corruption.
227. The evidence reveals that that there was widespread corruption in the awarding of contracts and tenders to Bosasa and its associated business entities or organisations,

by Government departments, SOEs, agencies and entities. Members of the National Executive,²⁰ public officials and functionaries of various organs of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.

228. Mr Agrizzi's evidence suggested that the aggregate value of contracts awarded to the Bosasa Group of Companies by various public departments and entities between 2000 and 2016 was at least R2,371,500,000.00. Mr Agrizzi estimated that approximately R75,700,000 was paid out in bribes.²¹ The breakdown of the various contracts within the Bosasa Group and an estimated value that was paid out in bribes annually, per contract, was provided earlier. These values do not include the value of houses built, fixtures and fittings as well as furnishings, motor vehicles purchased and travel expenses incurred. Mr Agrizzi's estimations must be treated with a measure of caution. However, even on that basis, there was systemic corruption on what is described above as an industrial scale in the forms contemplated in TOR 1.9. Corruption was central to Bosasa's business model.

229. Mr Agrizzi, along with other witnesses, testified and demonstrated that Bosasa (and the Watson family) established a reasonably well-organised network of well-placed, well-connected and powerful people whose loyalty was secured with financial and other material incentives and bribes. It was through this network that they were able to promote and protect the private interests of Bosasa by irregular procurement and practices to extract money from the state in very substantial amounts. In Mr Agrizzi's experience, every one of the contracts in which Bosasa was involved was tainted with bribes and corruption. Where contracts were not awarded as a result of corruption,

²⁰ Including Mr Zuma, Ms Mokonyane (former Minister of Water and Sanitation) and Mr Makwetla (former Deputy Minister of Correctional Services).

²¹ Mr Agrizzi's Supplementary Affidavit, p 10, paras 12, 13.

corruption would creep in once they had been awarded, to ensure their retention and their extension or renewal. These contracts spanned, at least, a 17-year period.

230. With respect to TOR 7, there was massive corruption in the awarding of tenders and contracts to Bosasa and its affiliates by government departments, agencies and entities. The corruption took the form of Bosasa through its directors and employees providing gratification in the form of cash payments and other material benefits to state office bearers as contemplated in TOR 1.9, in exchange for the unlawful award of tenders and contracts to Bosasa and its affiliates.

231. The referrals pursuant to TOR 1.9 are all covered by TOR 1.1 and 1.4.

Instances possibly not covered by terms of reference 1.1, 1.4, 1.5 and 1.9

232. The evidence reveals unlawful activities possibly not covered by the terms of reference detailed above. Those instances are detailed below and where appropriate, are referred for prosecution, further investigation or the convening of a separate enquiry to the appropriate body regarding the conduct of certain persons as contemplated in TOR 7.

233. There is evidence of corruption involving the following persons:

233.1. Mr Simon Mofokeng, former General Secretary of CEPPWAWU for the acceptance of grocery items on a monthly basis to the value of R12,000 to R15,000 (for the offence of corrupt activities relating to the procuring and withdrawal of tenders in terms of section 13 of PRECCA),²²

²² Transcript, day 34, p 99.

233.2. Mr Sydney Mantata, who purchased and delivered the grocery items to Mr Mofokeng.²³

234. but it is not clear whether rule 3.3 notices were issued against them and, in any event, there is a possibility that any crimes committed by them before February 2002 may have prescribed in terms of section 18 of the Criminal Procedure Act No. 51 of 1977. This evidence may be considered by the relevant investigating authorities, but no referral is recommended in this regard.

235. There was evidence to suggest that a number of persons were involved in -

235.1. the destruction of electronic data and files, as well as computer hardware, and documentation, to prevent this evidence being seized by the SIU;

235.2. the destruction of computers and invoicing books from Blake's Travel;

235.3. the destruction of files through the faked server crash;

235.4. the deletion of files due to the SIU investigation; and

235.5. the intimidation of potential witnesses.

236. The persons implicated in this conduct were the following:

236.1. Angelo Agrizzi;

236.2. Johannes Andries van Tonder;

²³ Transcript, day 34, p 97-99.

236.3. Leon van Tonder;

236.4. Matthew Robert Leeson (referred to by Mr Agrizzi as Max Leeson);

236.5. William Brander; and

236.6. Brian Blake.

237. Brian Blake disputes that computers were removed from Blake's Travel, destroyed and later replaced. Mr Blake's version is improbable in the light of the corroborating evidence of Messrs Agrizzi, van Tonder and van der Bank. This is particularly the case as Mr Agrizzi and Mr van Tonder implicate themselves in criminal activity, to their own detriment. It is unlikely that they would lie to prejudice themselves. Matthew Leeson and William Brander failed to respond to rule 3.3 notices issued by the Commission in February and March 2019, respectively and the evidence against them is undisputed.

238. Accordingly, there are reasonable grounds for suspecting that the above conduct occurred and that the persons implicated are guilty of defeating or obstructing the course of justice and/or fraud and/or corrupt activities relating to witnesses and evidential material in terms of section 11 of PRECCA and/or unacceptable conduct relating to witnesses in terms of section 18 of PRECCA and/or unacceptable conduct relating to witnesses in terms of section 19 of PRECCA.

239. There is a reasonable prospect that further investigation will uncover a *prima facie* case. These matters are accordingly referred for further investigation and prosecution.

240. Having regard to the evidence pertaining to them, there is a reasonable prospect that further investigation by the relevant professional bodies will reveal a *prima facie* case of professional misconduct on the part of the following persons or firms:

- 240.1. Brian Biebuyck, through an investigation by the Legal Practice Council (“LPC”).
 - 240.2. Petrus Venter, through an investigation by the SAIT.
 - 240.3. The various attorneys whose trust accounts were used by Bosasa to make various unlawful payments, through an investigation by the LPC.
 - 240.4. D’Arcy-Herrman, through an investigation by the Independent Regulatory Board for Auditors (“IRBA”).
241. The Commission report must be made available to SARS so that it may exercise its investigative powers derived from the provisions of the Tax Administration Act 28 of 2011 (“TAA”) to determine whether any tax offences were committed by Bosasa or its associates. In particular, the following issues are referred to SARS for further investigation:
- 241.1. whether Mr Papadakis breached his obligations in terms of the TAA as an official and/or a former official of SARS;
 - 241.2. the failure to disclose income and false invoicing deriving from the various cash accumulation mechanisms developed and used by Bosasa;
 - 241.3. including the cost of benefits provided to various individuals and state functionaries through the Special Projects Team as operational costs to be deducted from income in Bosasa’s tax returns;
 - 241.4. the deduction of the invoices issued by Mr Mansell for “work” done as expenses;

- 241.5. Bosasa's utilisation of SeaArk's assessed loss, the existence of the assessed loss in BSCM and Bosasa Operations and the equipment write-offs; and
- 241.6. Phezulu Fencing in respect of receipts being hidden under contingent liabilities in the balance sheet instead of the income statement to avoid paying tax of R10.3m.

PART IV VOLUME 1 NATIONAL TREASURY**Recommendations**

242. It is recommended that the National Prosecuting Authority should give consideration to instituting criminal prosecutions against Mr Rajesh Tony Gupta for bribery/corruption arising out of his conduct in offering Mr Mcebisi Jonas millions of Rands if he agreed to be Minister of Finance and to work with the Gupta family

PART IV VOL.1: EOH HOLDINGS (PTY) LTD AND THE CITY OF JOHANNESBURG**Recommendations**

243. The law enforcement agencies investigate the attempts of Mr Jehan Mackay described above to induce Mr Kodwa to interfere with procurement processes in the interests of EOH with a view to the prosecution of Mr Jehan Mackay and any other suspects identified in the investigation on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;
244. The President considers the position of Mr Kodwa as Deputy Minister of State Security having regard to the fact that Mr Kodwa appears to find himself in a position where he is beholden to Mr Jehan Mackay.
245. The terms of reference of the Commission are so wide that it was required to investigate even all kinds of allegations of corruption, state capture, fraud and other wrongdoing even in municipalities. The Commission did not engage in any investigations involving municipalities other than Johannesburg and even then only two or so tenders. However, when one realises what EOH and Mr Makhubo were doing, one realises that there may be many municipalities in which certain entities do exactly what EOH used to do in relation to the City of Johannesburg.

PART IV VOL.1: ALEXKOR

Introduction

246. The Commission investigated various allegations that certain Gupta linked individuals or entities were irregularly or corruptly awarded certain contracts at Alexkor. This part of the Report relates to such investigation as the Commission was able to make within the time available to it.
247. Various allegations have been made of state capture at Alexkor Ltd (“Alexkor”) and its associated companies. Only two witnesses testified before the Commission in relation to Alexkor, namely: i) Mr Gavin Craythorne, a marine mining contractor and a founding member and office bearer of the Equitable Access Campaign (“the EAC”), an organisation that seeks to advance the interests of marine miners contracted to exploit the marine diamond rights in the Richtersveld; and ii) Mr Albert Torres, a director of Gobodo Forensic and Investigative Accounting (Pty) Ltd (“Gobodo”), which was appointed by the Department of Public Enterprises in July 2019 to conduct an investigation into the relationship of Alexkor and its marine mining contractors. In addition, two investigators of the Commission, Mr Peter Bishop and Mr Jakob Dekker, filed detailed affidavits elaborating on some of the evidence tendered by Mr Craythorne and Mr Torres. Although their affidavits were admitted into evidence, neither Mr Bishop nor Mr Dekker testified before the Commission.
248. During the course of its investigation into state capture at Alexkor, the Commission issued several Rule 3.3 notices and requests for information to various implicated and interested parties in relation to the evidence of Mr Craythorne, Mr Torres, Mr Bishop and Mr Dekker. This resulted in the Commission receiving more than 20 statements, requests for additional information, applications for specific directives and applications to cross-examine witnesses, amounting in total to about 8000 pages of documentary

evidence. Unfortunately, the constraints of time and resources made it impracticable for the Commission to formally admit this voluminous information to the record and to afford all the implicated and interested parties an opportunity to testify or to cross examine any witness. As a consequence, the Commission is not in a position to make definitive findings with regard to all relevant matters concerning state capture at Alexkor. There is however sufficient evidence in relation to certain matters that give rise to reasonable suspicion of wrongdoing that justifies recommendations for further investigation by the law enforcement agencies and the board of Alexkor and its associated companies.

249. This report is an account of the recommendations that the Commission gave in relation to Alexkor.

Recommendations

250. It is recommended that the board of Alexkor conduct a full investigation into any contract with and fees paid to Regiments to determine the precise nature of any services rendered by Regiments and whether Alexkor received full consideration and value.
251. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, ABDC, Mr Daniel Nathan and the directors and employees of SSI, ABDC or any associated company on charges of contravening sections 18, 19, 20, 21, 44 or other relevant provisions of the Diamonds Act 56 of 1986.
252. It is recommended that the board of Alexkor and the PSJV investigate whether Mr Bagus, Dr Paul and Mr Korabie (the members of the tender committee) were in breach of their fiduciary duties as contemplated in section 76 of the Companies Act by making a misrepresentation to the board regarding SSI's compliance with the tender

requirements with a view to an application to declare them delinquent in terms of section 162(5)(c) of the Companies Act.

253. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Bagus, Dr Paul and Mr Korabie (the members of the tender committee) for fraud or a contravention of section 214(1)(b) of the Companies Act by deliberately making a misrepresentation regarding SSI's compliance with the tender requirements.
254. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of any director, executive or employee of SSI (ABDC) an/or DNT for a contravention of section 86 of the Diamonds Act by wilfully furnishing false information to the SADPMR or making a false or misleading statement in relation to the right of ABDC to obtain a diamond licence.
255. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Carstens and Ms Kellerman for fraud or a contravention of section 214(1)(b) of the Companies Act for making a misrepresentation to the board that a proper due diligence was performed prior to the award of the tender to SSI.
256. It is recommended that the board of Alexkor and the PSJV investigate whether Mr Carstens and Ms Kellerman were in breach of their fiduciary duties as contemplated in section 76 of the Companies Act by making a misrepresentation to the board regarding the performance of a due diligence on SSI with a view to an application to declare them delinquent in terms of section 162(5)(c) of the Companies Act.

257. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Bagus, Mr Korabie, Dr Paul and other persons who purported to act as board members of the PSJV for contempt of the court order issued by the Western Cape High Court on 4 September 2014.
258. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, Mr Daniel Nathan Trading CC, Daniel Nathan Trading House, Alexander Bay Diamond Company Trading House, Alexander Bay Diamond Company, and the directors, executives or employees of these companies, for a contravention of section 86(c) of the Diamonds Act, by falsely giving out in the registers of SSI that such persons were holders of the required licence when the diamonds were in fact traded by SSI, an unlicensed trader.
259. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, or any director, executive or employee of SSI, on any relevant charge in relation to diamonds of 196.15 carats valued at R5.136 million allegedly not accounted for in the SSI register.
260. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, or any director, executive or employee of SSI on any relevant charge in relation to an alleged underpayment to the PSJV of an amount of R1.718 million in relation to a sale of the diamonds in parcel 248.
261. It is recommended that the SADPMR conduct an inquiry in terms of section 79 of the Diamonds Act to determine if all the buyers to whom SSI sold rough diamonds were in

possession of the requisite licences as contemplated in Chapter IV of the Diamonds Act; and, where appropriate to refer any suspected contraventions of sections 18, 19, 20, 21 or other provisions of the Diamonds Act to the law enforcement agencies for any further investigations as may be necessary with a view to the possible prosecution of such persons for offences under the Diamonds Act or any other law.

PART IV VOL.2: The Free State Asbestos Project Debacle

Recommendations

262. It is recommended that law enforcement agencies should conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Mokhesi by the National Prosecuting Authority for possible corruption arising out of his decision to enter into the agreement that he concluded with Blackhead Consulting/Diamond Hill Joint Venture and/or with a view to Mr Mokhesi's possible criminal prosecution for his possible contravention of sections 38(1)(a)(iii), 38(1)(b) and 38(1)(c)(ii) of the Public Finance Management Act 1 of 1999 in concluding the agreement that he concluded with Blackhead Consulting and Diamond Hill Joint Venture.
263. It is recommended that the Government seek a legal opinion with a view to possibly taking all necessary legal steps to recover from Mr T Mokhesi and any other Government Officials who were involved in the conclusion and implementation of the agreement between the Department of Human Settlements, Free State Province, and Blackhead Consulting Joint Venture all monies paid by the Free State Department of Human Settlements to Blackhead Consulting and Diamond Hill Joint Venture for which the Department did not receive appropriate value.
264. It is recommended that the law enforcement agencies conduct such further investigations against Mr Timothy Mokhesi as may be considered with a view to his possible prosecution by the National Prosecuting Authority for a breach of any provisions of the Public Finance Management Act (PFMA) in the role he played in connection with the Asbestos Eradication Project.

265. It is recommended that every tender or contract between a government department and/or government entity and a service provider or a provider of goods or services should contain a prominent clause to the effect that no service provider may sub-contract or cede its/her/his right to provide the services or the goods to another person or entity or company unless the intended sub-contractor was disclosed in the bid documents as an entity to which the bidder would sub-contract. Consideration may also be given to whether there should not be a statutory provision to this effect that will apply to all tenders in the public service.
266. It is recommended that the Government obtains a legal opinion aimed at establishing whether it would not be able to successfully recover the moneys it paid to Blackhead Consulting and Diamond Hill Joint Venture in regard to the Asbestos Eradication Project for which it received no value or because Blackhead Consulting and Diamond Hill Joint Venture made a misrepresentation to the Department of Human Settlements that it had the qualifications or expertise or skills or experience necessary for the performance of the job when it had no such experience, qualifications, expertise or skills.
267. It is recommended that the National Prosecuting Authority gives serious consideration to instituting a charge of corruption or any other applicable crime or offense against Mr Edwin Sodi and his company, Blackhead Consulting (Pty) Ltd for their roles in paying an amount of R600 000,00 (Six hundred thousand Rand) to a car dealer based in Ballito, KwaZulu-Natal, for the benefit of Mr Thabani Zulu as a reward for Mr Zulu's role in the Asbestos Project or as a bribe to Mr Thabani Zulu so that he could do certain favours for Blackhead Consulting or Diamond Hill or the Joint Venture or Mr Edwin Sodi.
268. is recommended that the National Prosecuting Authority gives serious consideration to instituting a criminal charge or criminal charges relating to corruption or any other applicable crime or offence against Mr Thabani Zulu for his arrangement with Mr Edwin

Sodi and/or Blackhead Consulting (Pty) Ltd to be paid an amount of about R600 000,00 (Six hundred thousand Rand) by Mr Edwin Sodi and/or Blackhead Consulting (Pty) Ltd.

269. It is recommended that the National Prosecuting Authority should give serious consideration to instituting criminal charges of corruption or any other applicable crime or offence against Mr Edwin Sodi and/or Blackhead Consulting (~~Pty) Ltd~~ arising out of the arrangement or agreement that was entered into between Mr Edwin Sodi and Blackhead Consulting (~~Pty) Ltd~~ and Mr Timothy Mokhetsi for the payment of about R600 000,00 to a firm of attorneys in the Free State to enable Mr Mokhetsi or his family Trust to pay for a property in which he would live.
270. It is recommended that the National Prosecuting Authority should give serious consideration to instituting a charge of corruption or other applicable offences against Mr Timothy Mokhesi arising out of his role in the payment by Mr Edwin Sodi and/or Blackhead Consulting of an amount of about R600 000.00 into the trust account of a firm of attorneys in Bloemfontein to enable a property to be bought in which Mr Mokhesi was going to live.
271. It is recommended that to the extent that current legislation or government policies of state owned entities or companies do not prohibit the awarding of a tender or the concluding of a contract for the provision of services or delivery of goods by a person or entity or service provider that does not produce proof that it has the requisite educational qualifications, knowledge or skills and experience for the job awarded to it, consideration should be given to ensuring that legislation and policies of government departments or of state-owned entities require that no entity or person or service provider may be awarded a tender or may conclude any contract with a government department or a state-owned entity or company unless it has produced proof of relevant qualifications, skills experience or expertise required to perform the work.

272. It is recommended that consideration be given to the enactment of legislation that will make it a criminal offence for any official or office-bearer of a government department or of a state-owned entity or company to award a tender to or conclude a contract for the provision of services goods or with any person or entity unless he or she has satisfied himself or herself or itself that such person or entity has produced proof of possession of the minimum academic qualifications or experience or expertise.
273. It is recommended that the National Prosecuting Authority should give serious consideration to instituting criminal proceedings against Mr Edwin Sodi and/or Blackhead Consulting for fraud or other applicable crimes arising out of the fact that, in order to obtain work from the Department of Human Settlements in the Free State, Mr Sodi and/or Blackhead Consulting (Pty) Ltd made a false representation to the Department of Human Settlements, Free State, that he or it had the knowledge, qualifications and/or experience, skills and expertise for the removal of asbestos when, to the knowledge of Mr Edwin Sodi, Blackhead Consulting, Mr Mpambani and Diamond Hill, neither of them had the qualifications, knowledge, expertise and experience needed for the removal of asbestos.

PART IV VOL.2: The Free State R1 Billion Housing Project Debacle

Recommendations

274. It is recommended that law enforcement agencies should conduct such further investigations as may be necessary with a view to a possible prosecution by the National Prosecuting Authority of Mr Moses Mpho “Gift” Mokoena who was the Head of the Department of Human Settlements in the Free State in 2010 and early in 2011 for a possible contravention of sections 38(1)(a)(iii), (b), (c)(ii) and (g) of the Public Finance Management Act 1 of 1999 as amended arising out of the abandonment of the competitive tender process and the decision to implement and the actual implementation of the advance payment scheme.

275. Section 38 of the Public Finance Management Act provides:

“(1) The accounting officer for a department, trading entity or constitutional institution—

(a) must ensure that that department, trading entity or constitutional institution has and maintains—

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

(b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;

(c) must take effective and appropriate steps to—

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct.

(g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board.”

276. Section 86 of the PFMA provides:

“(1) An accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40.

(2) An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.

(3) Any person, other than a person mentioned in section 66 (2) or (3), who purports to borrow money or to issue a guarantee, indemnity or security for or on behalf of a department, public entity or constitutional institution, or who enters into any other contract which purports to bind a department, public entity or constitutional institution to any future financial commitment, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.”

277. To the extent that money paid out by the Free State Department of Human Settlements for which the Department did not receive any value or that was paid out unlawfully in the implementation of the advance payment scheme has not been recovered, it is recommended that all steps that may lawfully be taken to recover such monies be taken against, among others, Mr Moses Mpho “Gift” Mokoena and Mr Mosebenzi Zwane for their respective roles in the approval and implementation of the advance payment scheme.

278. It is recommended that the law enforcement agencies should conduct such further investigations as may be necessary to enable the National Prosecuting Authority to determine whether it should not charge Mr Moses Mpho “Gift” Mokoena, former Head of the Free State Department of Human Settlements, Mr Mosebenzi Zwane and other officials in the Free State Department of Human Settlements with fraud arising out of the misrepresentation on which the advance payment scheme was based with regard to the number of houses that that Department said it could build between

November/December 2010 and the end of March 2011 which was known to the Department not to be true and not to be achievable but was done in order to prevent the National Department of Human Settlements from taking part of their allocated funds and giving them to better performing provinces.

PART IV VOL.3 and 4: ESKOM

Recommendations

279. It is recommended that National Prosecuting Authority (NPA) should consider criminal prosecution of Mr Koko, Mr Mboweni, Dr Nteta and Mr Roux for the contraventions of the legislation and policies of Eskom already referred to above.

280. Further, it is recommended that the NPA should consider further investigation into determining whether the implicated parties have acted in breach of the following provisions of PRECCA:

281. Section 3 and/or section 4: general offence of corruption or offences in respect of corrupt activities relating to public officers

“Any person or 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

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.”

282. Section 12(1), which reads:

“(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 that other person or of another person; or

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-

(i) in order to improperly influence, in any way-

(aa) the promotion, execution or procurement of any contract with a public body, private organisation, corporate body or any other organisation or institution; or

(bb) the fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract; or

(ii) as a reward for acting as contemplated in paragraph (a),

is guilty of the offence of corrupt activities relating to contracts.

(2) Any person who, in order to obtain or retain a contract with a public body or as a term of such contract, directly or indirectly, gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or for the benefit of another person-

(a) for the purpose of promoting, in any way, the election of a candidate or a category or party of candidates to the legislative authority; or

(b) with the intent to influence or affect, in any way, the result of an election conducted for the purpose of electing persons to serve as members of the legislative authority,

is guilty of an offence.”

283. Section 21: attempt, conspiracy and inducing another person to commit offence; which reads:

“Any person who-

- (a) attempts;
 - (b) conspires with any other person; or
 - (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person
- to commit an offence in terms of this Act, is guilty of an offence.”

Huarong Energy Africa (Pty) Ltd

284. Although Eskom did not pay out the raising fee to HEA, I recommend that the prosecuting authority consider the facts of the case with a view to holding those responsible criminally liable.

General conclusion and recommendations: Huarong

Linking these conclusions to the terms of reference of the Commission: Huarong

285. The Commission's findings, report and recommendations on this topic are made pursuant to ToR 1.1, 1.4, 1.5 and 1.9. The attempt to commit Eskom to a contract with HEA providing for an upfront payment of a raising fee of some USD24 million before any money allegedly raised to lend to Eskom amounts to corruption as contemplated in the ToR identified.

Recommendation

286. It is recommended that the law enforcement agencies undertake such further investigations as may be necessary with a view to a possible prosecution of Mr Anoj Singh and Mr Maritz in regard to their respective roles in the HEA transaction.

General conclusions and recommendations: Eskom and McKinsey-Regiments-Trillian**Relevant Terms of Reference**

287. As already shown above, the conduct of the Eskom executives contravened the National Treasury Instruction 1 of 2013/2014, incorporated into Eskom's own Procurement Policy, which provides that it is mandatory for accounting officers and accounting authorities of public entities listed Schedules 2 of the PFMA to implement the cost containment measures referred to in paragraph 4 of the Treasury Instruction.
288. Paragraph 4 of the National Treasury Instruction provides, inter alia, that public entities may only contract with consultants after a gap analysis has confirmed that the public entity concerned does not have the requisite skills or resources in its full time employ to perform the assignment in question. The failure by Eskom executives to comply with these provisions constituted breach of legislation and was, therefore, unlawful.
289. The 2014 Eskom Board failed to exercise their fiduciary duties and prevent financial prejudice to Eskom, as required in Sections 50 and 51 of the PFMA. They instead, allowed irregular procurement in breach of both the law and Eskom policies, and allowed irregular, fruitless and wasteful expenditure in the face of legal instruments that enjoined them to act otherwise. The Board members acted unlawfully and committed financial misconduct, as envisaged in Section 83 of the PFMA. Mr Brian Molefe and Mr Anoj Singh were ex officio members of the Board and therefore equally responsible for the Board's various breaches of its fiduciary duties.
290. Eskom officials also acted in breach of the PFMA which, in section 57, required them to-

“(a) 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) be responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;

(c) 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)

(e) be responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official's area of responsibility.”

291. The Eskom executives used their positions of authority and power within Eskom to benefit Trillian; a corrupt activity under Prevention and Combating of Corrupt Activities Act No. 12 of 2004. Messrs Molefe, Singh and Koko all benefited from the Guptas and/or Mr Salim Essa in various forms, with Messrs Koko and Singh from an Eskom perspective and Mr Brian Molefe as already covered in other reports. This may have constituted the criminal offence of corruption. The conduct of Eskom officials, therefore, implicated several provisions of the Commission's terms of references, namely ToR 1, ToR 4, ToR 5 and possibly ToR 6 (corrupt and irregular awarding of contracts to benefit the Gupta family or their associates) and ToR 9 (corruption to benefit the officials involved).

292. The conduct implicates ToR 1, in that some form of inducement or gain was offered to and received primarily by the three main executives at Eskom (Mr Brian Molefe, Mr Anoj Singh and Mr Koko, from Eskom perspective as regards Messrs Koko and Singh and as dealt with in other reports as regards Mr Brian Molefe) which would have served to influence them to act in the manner referred to above. ToR 4, regarding breach of the Constitution and legislation through the facilitation of unlawful awarding of contracts to McKinsey, is also implicated by the appointment of McKinsey on a sole source basis and at risk, in breach of section 217 of the Constitution, the National Treasury Instruction

and Eskom's Policy on Cost Containment Measures. Also relevant are the provisions of ToR 5, ToR 6 and ToR 9 regarding corruption in the awarding of contracts by public entities either to benefit the Gupta family and their associates and/or to benefit Eskom individual officials involved in the transactions. Rampant corruption is evident in the awarding of contracts and approval of payments to McKinsey and its BBBEE partner, Trillian, in circumstances described in this report.

293. In the result it is recommended that the law enforcement agencies should conduct such further investigation as may be necessary with a view to the possible criminal prosecution of the implicated parties by the National Prosecuting Authority for their part in facilitating the fraud, corruption and financial misconduct against Eskom and the State.

Recommendations

294. In terms of section 50 (1)(a) of the Public Finance Management Act, the 2014 Board of Eskom was under an obligation to—

“exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity”

295. Section 50(1)(b) of the PFMA placed an obligation on the members of the 2014 Board to—

“act with fidelity, integrity and in the best interests of the public entity in managing the financial affairs of the public entity”

296. Section 50 (1)(d) obliged the 2014 Board to—

“seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state”.

297. Section 50(2) of the PFMA placed an obligation on the members of the 2014 Board not to—

“(b) use the position or privileges of, or, confidential information obtained as an accounting of an accounting authority, for personal gain or to improperly benefit another person.”

298. Section 51(1)(b) of the PFMA enjoined the 2014 Board to—

“take effective and appropriate steps to-

(i)

(ii) prevent irregular expenditure, fruitless and wasteful expenditure not complying with the operational policies of the public entity.

299. Section 86(2) makes it a criminal offence for an accounting authority – which was the 2014 Board in his case – to wilfully or in a grossly negligent way to fail to comply with a provision of section 50 or 51.

300. Section 86(2) of the PFMA reads:

“(2) An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.”

301. There are many decisions that were made by the 2014 Board of directors of Eskom which were in breach of their duty in terms of section 50(1) and (2) as well as section 51 of the PFMA including their decision to suspend the executives who were suspended and their decision to push three of those executives out of Eskom and to pay them the millions of rands that they decided should be paid out to them. The amounts paid out to the three executives were in the region of R18 million. It is recommended that the National Prosecuting Authority should consider the evidence that has already been collected by the Commission and the transcript of the evidence led in the Commission

and allow such further investigations as may be necessary to be conducted with a view to the criminal prosecution of all the people still alive who were members of the 2014 Board who made or supported the decisions made by that Board in breach of section 50(1)(a) including the decisions referred to above.

302. It is recommended that, in so far as this has not been done, serious consideration be given to instituting legal proceedings against all members of the 2014 Eskom Board, except Mr Baloyi, to recover all the financial losses that were suffered by Eskom as a result of decisions taken by the 2014 Board against the interests of Eskom.

The acquisition of Optimum Coal Mine (OCM) by Tegeta

303. The characterisation of the payment as a pre-payment for coal supplies was a sham. This is confirmed by the findings of a cash flow analysis which shows that the R659 million was paid towards the acquisition price of OCH by Tegeta, as was the R1.68 billion guarantee which was used to prove to OCH bankers that Tegeta was good for the acquisition price. The context in which these were made, their timing and the urgency with which they were processed, all demonstrate that the R659 million payment and the R1.68 billion guarantee were not made with the purpose of furthering the interests of Eskom. These were made with the single purpose of ensuring that the Guptas' deal in terms of which they acquired the Glencore coal interests did not fall through for want of finance on the part of the Guptas.
304. I cannot accept that the payment and the guarantee were for coal to be delivered. Once it is accepted that Messrs Molefe, Koko and Singh were Gupta agents, prepared when they were called to do so to do the Guptas' bidding, then the possibility that any of them did not know that the money was required to complete the purchase of shares transaction is small. Some private explanation to all of them was required to explain

why the payments were so urgent. There is no suggestion that any of them was misled as to the true purpose for which the money was needed.

305. I, therefore, conclude that there are reasonable grounds to believe that Mr Anoj Singh may be guilty of the theft of this money from Eskom by false pretences or fraud, in that he led Eskom, through the officials who processed the payments, to believe that the payments were in the nature of pre-payments for coal, when in truth and fact they were needed to enable the Guptas to complete and save the share transaction. However, whether he is criminally guilty will be determined by a Court of competent jurisdiction. It is recommended that the National Prosecuting Authority should consider all the evidence before the Commission and have such further investigations conducted as may be necessary with a view to instituting criminal charges against Mr Anoj Singh in this regard. It is also recommended that the NPA should consider possible criminal prosecution of the members of the 2014 Board of Directors who supported the decision to pay this money on the grounds of breach of their obligations imposed on that Board by sections 50 and 51 of the PFMA.

306. There are reasonable grounds to believe that all those Eskom officials who were party to or facilitated the acquisition by bringing pressure to bear on Glencore to dispose of its coal interests to the Guptas and were party to or facilitated payment of this very large sum of R659 million and the R1.68 billion guarantee may be guilty of theft and ought to face criminal charges.

Recommendations

307. Money laundering transactions which Mr Sinton brought to the open session on day 64 by way of an envelope which he said contained matters about which he did not want to testify in public which he described in simple terms as being efforts to disguise the

origins of the proceeds of crime need to be pursued further by the Law Enforcement Agencies for further investigation and prosecution.

308. All those Eskom officials who were party to or facilitated the acquisition by bringing pressure to bear on Glencore to dispose of its coal interests to the Guptas and were party to or facilitated payment of this very large sum of R659 million and the R1.68 billion guarantee are prima facie guilty of theft and ought to face criminal charges for such corruption related conduct.
309. The recommendation for criminal charges is particularly applicable to Mr Anoj Singh and Mr Koko, who by false pretences led Eskom, through the officials who processed the R659 million payment, to believe that the R659 million payment was in the nature of pre-payment for coal, as was the R1.68 billion pre-payment, later converted into a guarantee, when in truth and fact they knew that the prepayment and the guarantee were needed to enable the Guptas to complete and save the sale of share transaction.

The irregular supply of coal to Eskom from Tegeta's Brakfontein Colliery

310. From the above, it is considered that the following parties are implicated in wrongdoing in regard to the Brakfontein Coal Supply Agreement:
- 310.1. Mr Matshela Koko;
- 310.2. Mr Vusi Mboweni;
- 310.3. Dr Ayanda Nteta;
- 310.4. Mr Ravindra Nath of Tegeta;
- 310.5. Mr Jacques Roux of Tegeta; and

310.6. Mr Tony Gupta of Tegeta.

311. Prima facie the evidence before the Commission, it may be concluded that the Eskom officials listed above:

311.1. breached or violated legislation and Eskom policies by facilitating the unlawful awarding of the Brakfontein Coal Supply Agreement to Tegeta;

311.2. their conduct in awarding the Brakfontein Coal Supply Agreement to a Gupta-owned entity, Tegeta, was vitiated by irregularities, corruption and undue influence; and

311.3. their conduct involved abuse of position of power and undue influence on subordinates in order to unduly benefit the Gupta family in the retention of the Brakfontein Coal Supply Agreement with Tegeta; and their conduct potentially caused financial prejudice and loss to Eskom due to procuring some of the coal that they knew was non-compliant, thus potentially causing Eskom to incur losses from sub-optimal power generation and/or adverse impact on the Majuba Power Station generation infrastructure.

Legislative provisions breached

312. Eskom is a major public entity listed in Schedule 2 to the PFMA, thus it is bound by the provisions of the PFMA.

313. Section 57 of the PFMA places certain obligations on officials of public entities.

314. The implicated Eskom officials listed above have prima facie acted in breach of section 57 of the PFMA in that they appear to have-

- 314.1. failed to safeguard the financial interests of Eskom, and
- 314.2. failed to take effective and appropriate steps to prevent irregular expenditure, and fruitless and wasteful expenditure.

Recommendations

315. It is recommended that the National Prosecuting Authority should consider the criminal prosecution of Mr Koko, Mr Mboweni, Dr Nteta and Mr Roux for the possible contraventions of the PFMA and policies of Eskom already referred to above.
316. Further, it is recommended that the law enforcement agencies should consider further investigation into determining whether the implicated parties have acted in breach of the provisions of PRECCA (sections 3 and/or section 4, section 12(1), sections 21).

The Huarong transaction

317. The attempt to commit Eskom to a contract with HEA providing for an upfront payment of a raising fee of some USD24 million before any money allegedly raised to lend to Eskom amounts to corruption as contemplated in the ToR identified.
318. It is little wonder that the Eskom Treasurer, Mr Pillay, resisted this aspect of the transaction so strongly. It remains unexplained why the then CFO, Mr Anoj Singh, who signed the term sheet, and the acting Group CEO, Mr Maritz, who signed the ALFA, should have promoted the transaction so unreservedly.
319. There does not appear to have been any justification for the signing of the term sheet. Signing the term sheet was not in accordance with Eskom's usual practice and it is difficult to see what benefit there was in legally committing Eskom to its terms. It seems

as if the purpose in signing the term sheet was to push Eskom closer to HEA and afford HEA preferential treatment over its competitors for Eskom's business.

320. It does not appear to be in dispute that no board approval was provided for the conclusion of the HEA transaction. This alone rendered the signed contract with HEA invalid. Fortunately, the invoice submitted by HEA was never paid and the HEA transaction therefore caused Eskom no direct loss.
321. Nevertheless, it would appear that there is at least a prima facie case of attempted theft or fraud against Mr Anoj Singh, who signed the term sheet, and Mr Maritz, who signed the contract documents on the strength of which the invoice for USD21 888 000 (twenty-one million, eight hundred and eighty-eight thousand Dollars) was submitted to Eskom. It is possible that a similar case could be made against Mr Thomas of HEA.

Recommendations

322. It is recommended that National Prosecuting Authority consider criminal prosecution of at least a prima facie case of attempted theft or fraud against Mr Anoj Singh, who signed the term sheet, and Mr Maritz, who signed the contract documents on the strength of which the invoice for USD21 888 000 (twenty-one million, eight hundred and eighty-eight thousand Dollars) was submitted to Eskom.
323. The NPA should consider a similar case to be made against Mr Thomas of HEA.

Recommendations

324. The Eskom executives used their positions of authority and power within Eskom to benefit Trillian; a corrupt activity under Prevention and Combating of Corrupt Activities Act No. 12 of 2004. Messrs Molefe, Singh and Koko all benefited from the Guptas and/or Mr Salim Essa in various forms, with Messrs Koko and Singh from an Eskom

perspective and Mr Brian Molefe as already covered in other reports. This may have constituted the criminal offence of corruption. The conduct of Eskom officials, therefore, implicated several provisions of the Commission's terms of references, namely ToR 1, ToR 4, ToR 5 and possibly ToR 6 (corrupt and irregular awarding of contracts to benefit the Gupta family or their associates) and ToR 9 (corruption to benefit the officials involved).

325. The conduct implicates ToR 1, in that some form of inducement or gain was offered to and received primarily by the three main executives at Eskom (Mr Brian Molefe, Mr Anoj Singh and Mr Koko, from Eskom perspective as regards Messrs Koko and Singh and as dealt with in other reports as regards Mr Brian Molefe) which would have served to influence them to act in the manner referred to above. ToR 4, regarding breach of the Constitution and legislation through the facilitation of unlawful awarding of contracts to McKinsey, is also implicated by the appointment of McKinsey on a sole source basis and at risk, in breach of section 217 of the Constitution, the National Treasury Instruction and Eskom's Policy on Cost Containment Measures. Also relevant are the provisions of ToR 5, ToR 6 and ToR 9 regarding corruption in the awarding of contracts by public entities either to benefit the Gupta family and their associates and/or to benefit Eskom individual officials involved in the transactions. Rampant corruption is evident in the awarding of contracts and approval of payments to McKinsey and its BBBEE partner, Trillian, in circumstances described in this report.
326. It is recommended that the law enforcement agencies should conduct such investigations as may be necessary with a view to the possible prosecution by the National Prosecuting Authority of the former Eskom officials referred to above who are implicated in the facilitation of unlawful contracts, corruption and financial misconduct and breaches of the PFMA. It is also recommended that legal steps be taken by Eskom

to recover from members of the 2014 Board and the former Eskom officials referred to above all losses that Eskom suffered as a result of their unlawful conduct.

327. Criminal prosecution should be extended to the 2014 Eskom Board failed to exercise their fiduciary duties and prevent financial prejudice to Eskom, as required in Sections 50 and 51 of the PFMA. They instead, allowed irregular procurement in breach of both the law and Eskom policies, and allowed irregular, fruitless and wasteful expenditure in the face of legal instruments that enjoined them to act otherwise. The Board members acted unlawfully and committed financial misconduct, as envisaged in section 83 of the PFMA. Messrs Molefe and Singh were ex officio members of the Board and therefore equally responsible for the Board's various breaches of its fiduciary duties.

PART V VOLUME 1 STATE SECURITY AGENCY

Summary of Findings and Recommendations

329. On the basis of the oral and documentary evidence placed before it, the Commission sets out below its Findings and Recommendations regarding certain aspects of the State Security Agency in line with the Commission's Terms of Reference. They are not made in any order of importance. The evidence revealed a plethora of problems that bedevilled the SSA; they are almost innumerable. It would serve no purpose to engage in a hair-splitting exercise. Therefore, in making both the Findings and the Recommendations, the Commission will address at least some of the root causes, and not the consequent symptoms.

Regarding the amalgamation, restructuring and re-organization of the erstwhile National Intelligence Agency (NIA) and the South African Secret Service (SASS) into the State Security Agency (SSA)

Findings

330. The period under consideration by the Commission is the period from 2009. Evidence was placed before the Commission presenting the organograms of the national intelligence services in three stages: the period from 1994 to 1997; and then for the period 1997 to 2009; and lastly, for the period 2009 to 2019. The last organogram reflects the structure brought about by former President Zuma through Proclamation 59 of 2009, 11 September 2019. It amalgamated the National Intelligence Agency (NIA) and the South African Secret Service (SASS) into a new structure, namely, the State Security Agency. Until then, the NIA's mandate was domestic intelligence, while the SASS mandate was foreign intelligence.

331. On the evidence presented to the Commission, it has to be accepted that the new intelligence regime resulted in a shift from the spirit, philosophy, and some principles of the Intelligence White Paper, which were reflected in the Constitution. The virtues of the Intelligence White Paper were articulated by amongst others Ambassador Maqetuka, the first Director General of the SSA, who had extensive experience in the field of intelligence, and Mr Shaik. Under the new intelligence regime there was for the first time a dedicated Minister of Security (“Minister of State Security”) as opposed to the past, when a deputy Minister of Justice was only assigned to be responsible for the administration of the NIA but not involved in its working; there was therefore no reporting to a Minister, but directly to the President as also apparent from the two previous organograms.
332. The new 2009 regime also for the first time introduced the concept of “*State Security*” as opposed to “*National Security*”. This brought in a paradigm shift: The emphasis fell on the security of the State, as opposed to National Security which laid emphasis on the security of the people; that is, the welfare of the people. As the evidence indicated, that paradigm shift paved the way for the use of the SSA to serve the power and interests of the incumbents, including especially former President Zuma. In fact, members of the SSA were made to take an additional oath in terms of which they swore allegiance to the President and also to recognize the authority of the Minister of State Authority who was Dr Siyabonga Cwele at the time whereas, prior to that, members only took oath of allegiance to the Constitution and to the Agency.
333. A special section, namely, the Presidential Security Support Services (PSSS) was created by Ambassador Thulani Dlomo within the DSCO to protect former President Zuma, a task that properly belonged to the SAPS; he also irregularly removed the President’s health services from the SANDF to the DSCO. There was also political overreach by the Minister of State Security, Mr David Mahlobo by becoming involved

directly in the operations of the SSA as will be shown below. One of the consequences of the amalgamation was that the powers that were enjoyed separately by the Director General of the NIA, and the Director General of the SASS, were put in the hands of one person, namely, the Director General of the SSA. The result was the potential for its abuse. The evidence before the Commission has shown that such abuse did in fact occur. Most of the problems that beset the SSA were the consequence of the amalgamation. It indeed constituted a paradigm shift from what was espoused by the Intelligence White Paper. That abuse manifested itself in various ways; for example, using the SSA and its resources for political ends; being involved in the ANC's factional battles or to improve its political fortunes etc –more about which later. The proclamation also usurped the powers of Parliament; and the intelligence services were made to report directly to the Minister and no longer to the President.

334. The High-Level Review Panel, as testified to by Dr F S Mufamadi, the chair thereof, also made similar findings regarding the paradigm shift from the Intelligence White Paper.

Recommendations

335. The period prior to 2009 might have had its own challenges and therefore not perfect but the Commission has not been told of any major problems that existed prior to the amalgamation of the NIA with the SASS into the SSA. As already mentioned, in that period there was no dedicated "*Minister of State Security*" and there was no notion of "*State Security*", but of "*National Security*"; all these were in line with the Intelligence White Paper and the Constitution. The Commission therefore recommends a close look once more at the spirit, guidelines and principles of the Intelligence White Paper, while recognizing that it, too, might need to be adapted. As said in the evidence, it is still important and sound. Therefore, there is no need to reinvent the wheel. One of the

characteristics of the pre-2019 era was that there being no dedicated Minister of intelligence, the NIA and the SASS reported directly to the President who directed their activities. Since about August 2021, the country seems to have reverted to that. However, concerns have been expressed, especially in the media, about the concentration of such powers in the President. It is not for the Commission to adjudicate on this, save to state that, in the course of discussions about the Intelligence White Paper, no doubt all the views would be heard and considered.

336. A lot of commendable work was done by the High-Level Review Panel. The Commission therefore commends the recommendations it made for consideration, together with the Intelligence White Paper, which the Panel's Report holds in high regard.

Regarding the barring or discontinuation of investigations against the Guptas and its probable consequences.

Findings

337. The State Security Agency under the leadership of Ambassador Maqetuka as the Director General, Mr Shaik as Head of the Foreign Branch and Mr Njenje as the Head of the Domestic Branch (the trio) wanted to conduct investigations into the Guptas. This followed information that the Guptas had informed Minister Mbalula of his then forthcoming appointment as Minister of Sport and Recreation. In the trio's view, there were three possible sources of information to the Guptas, all of which warranted investigation. Firstly, whether there was a breach of national security in the office of the President in that there was a leak; secondly, whether the Guptas had overheard a discussion where the then President, Mr Zuma, was consulting someone, and they were peddling the information for their own benefit. Thirdly, whether they had suggested Mr Mbalula's appointment to the former President. All the three scenarios would have been

serious, with the latter even more so because it would have meant foreign nationals suggested who should be in the Cabinet of another country. All the three issues fell within the purview of national security. The other concern was that, by informing Minister Mbalula in advance, the Guptas would be creating dependency on the part of Mr Mbalula as Minister of Sport on them that would make him feel beholden to them. This was serious as the Guptas had interests in businesses that included stadia. The Commission's finding is that the investigations were justified.

338. The Commission was, however, told that the investigations were stopped by Minister Cwele, then as Minister of State Security. With regard to President Zuma, although the trio agreed that he never instructed them to stop the investigation, it was clear from what he said and his body language that he disapproved of the investigation. In his evidence, Dr Cwele denied giving instructions that the investigations be stopped. Probabilities are, however, overwhelming that he did not want the investigations into the Guptas to continue and therefore that they be discontinued; for example, his version would not explain why the trio, would have decided of their own to stop the investigation if he did not make it clear to them that the investigation should be stopped or if he did not show himself to be against the investigation. Secondly, it would not explain why the three decided to go and see former President Zuma to pursue the matter; furthermore, at no stage did Minister Cwele ask for an update or progress report on the investigation. Moreover, Minister Cwele's position towards the investigation was given as one of the reasons for the breakdown of their relationship with Minister Cwele. It is also the Commission's finding that former President Zuma did not want the investigation to go on. He said, according to the evidence, that there was no need to investigate the Guptas and said that they were good people with whom he had a good relationship. He defended his friendship with them. Although Mr Zuma may not have given instructions that the investigation be stopped, he said enough at the meeting with the trio to make it

clear to them that his view was that there was no justification for the investigation and, in his view, it should not be pursued.

339. It is also the Commission's finding that a Minister, in the person of Dr Cwele, involved himself in operations of the SSA by interfering with the investigation.

340. The stopping of the investigations into the Guptas demoralized at least some members of the SSA; not least the top three: Ambassador Maqetuka, Mr Shaik and Mr Njenje, to the point that they decided to leave, more or less at the same time for that matter. A question arises as to what otherwise would have prompted all three of them to decide to leave and more or less at the same time.

341. The stopping of the investigation into the Guptas was not a small matter. In all probability, considering all the evidence relating to, for example, their involvement in the businesses of State-Owned Enterprises such as Eskom, timeous investigations could probably have prevented at least some of their activities that led to the State Capture and, by all indications, the loss of billions of Rands.

Recommendations

342. The basic reason why the investigation was discontinued was the interference by Minister Cwele; that is, it was discontinued through conduct which amounted to Ministerial interference in the operations of the country's intelligence services. The Commission recommends in the appropriate section and for the reasons therein stated, that a Minister should not be involved in the operations of the country's intelligence services.

343. The Commission's finding that former President Zuma also inhibited if not stopped the investigations might, as alluded to earlier, itself prompt debates about the President

being involved inasmuch as the SSA reports to him/her and she/he directs their operations. It may, indeed, be an issue for debate, leading to discussions about appropriate checks and balances. This view is, moreover, based on the Commission's finding that a sitting President did in fact himself contribute significantly to the discontinuation of the investigation with serious consequences to the country; that is a sitting President himself interfered with legitimate operations by the country's three most senior intelligence officers who by all indications had legitimate reasons to pursue the investigation.

Executive/Ministers involvement in operational issues and its probable consequences

Findings

344. The creation of the Ministry of State Security and the consequent appointment of "*Minister of State Security*" through the 11 September 2009 proclamation, made the SSA to report to a Minister, at the time Dr Siyabonga Cwele, who was later followed by Mr David Mahlobo; that paved the way for a Minister's involvement in the operations of the SSA, and that was exactly what happened. The evidence is overwhelming that both Ministers in particular did just that.
345. One of the ways in which that happened was when Minister Cwele, on the weight of the evidence before the Commission by the country's then top intelligence chiefs, interfered in the investigation against the Guptas; he said investigating them would amount to investigating former President Zuma. He was also against the Hawks investigating Mr Arthur Fraser. This issue is dealt with separately later.
346. Minister David Mahlobo, on the evidence, not only involved himself in the operations, but also directed them. He was actively involved in for example projects under Project Mayibuye such as Project Wave (about the media), Project Justice about alleged

attempts to bribe some judges. Above all, there was a letter entitled "*Projects approved by the Minister*" which involved the spending of some R130m. In fact, one of his responses was that the law did not prohibit him from being involved. If what he says is correct, the situation would certainly require a very close look. However, even more worrying, was his involvement in the withdrawals, handling and distribution of large sums of money, an aspect that is dealt with separately herein. Former Minister Bongo also involved himself to some extent in the operations.

347. Some of the dangers attendant upon a Minister's involvement in operational matters were clearly articulated by witnesses, in particular, the top three. A few examples were given. The Minister of State Security would have knowledge of the identities of operatives, which knowledge the Minister would take along with upon leaving office; secondly, that he/she might acquire information about other fellow Ministers, which would make him/her better placed than them. Nothing further really needs to be said to make the point that a Minister should not be involved in operations, except to add political bias in favour of his or her own party or own faction in intra-party politics; all of which, on the evidence before the Commission, did happen.

Recommendations

348. Whether the two former Ministers deny involvement in operations or not, does not detract from the importance of the principle against Ministerial involvement. The recommendation, therefore, holds good under any weather; accordingly, the Commission recommends that a Minister should not be involved in the operations of the intelligence services.

Illegal operations by the State Security Agency (SSA)

Findings

349. Section 199(7) of the Constitution prohibits a security service or a member thereof, in the performance of their functions, to prejudice the interests of a political party that is legitimate in terms of the Constitution, or to further any interests of a political party in a partisan manner. Yet, there was evidence that some of the activities of the SSA did just that. There was evidence, for example, that SSA money was withdrawn, at the instance of Ambassador Dlomo, and used to transport, accommodate and feed ANC MK veterans, for the party's January 8 rally in Rustenburg in 2016.
350. A member of the SSA (Dorothy) was also used to assist at the ANC NASREC Conference, for which she withdrew subsistence allowance. There were also some activities undertaken to improve the fortunes of the ANC in the Western Cape, Eastern Cape and Northern Cape amongst the Coloured people.
351. The Special Operations Unit (SOU) of the SSA, particularly under the direction of Ambassador Thulani Dlomo, was a law unto itself, launching many projects that operated illegally as indicated above.
352. Not only were the activities against the Constitution, but there is a strong indication that some of them contravened legislation governing intelligence services.

Recommendations

353. Investigations should be carried out internally for disciplinary action against members, and also by law enforcement agencies against possible criminal statutory contraventions. The use of the resources and services of national intelligence agencies to destabilize opposition parties, to benefit a ruling party and to fan intra-party factions

in order to influence political or electoral outcomes, amounts to a serious threat to democracy. Steps therefore need to be taken to deal with this.

Cash withdrawals, movement of cash and accountability for cash

Findings

354. Cash withdrawals: Large sums of money were withdrawn. Given the covert operations of the SSA, the withdrawal in cash was inevitable. However, what was striking was the huge amounts at any one time; running literally into millions. There was a case where cash in the amount of R145m was stolen within the SSA offices. Varying amounts were withdrawn; for example R38.5m over the period March 2014 to September 2016; money withdrawn by then Minister Mahlobo for, allegedly, former President Zuma at R2.5 pm in 2015/2016 which was later raised to R4.5 pm in 2016/2017. Ambassador Dlomo approved and caused the withdrawal of cash in large amounts; for example, R5m, R13.5m and R4.510m. Mr Arthur Frazer instructed a junior to receive and take cash in the amount of R1.5m to the then Minister Mahlobo; signed in approval the withdrawal of R4.510m to be taken to the then Minister Mahlobo, and for yet another R4.510 the following month to be taken to the then Minister. All these are just examples.
355. Abuse of the advance payment system. Money would be paid in advance and in cash for operations. There were many problems with this; for example, the purpose for the money would be obscure or not set out, nor was the final destination (supposedly some operatives). To sum up, the motivation would be inadequate; financial controls, such as were there, were poor or not adequately enforced.
356. Poor or no accountability. There would be no verification as to what the money was used on because, to start with, the intended use would itself be obscure; no verification as to whether the intended recipient actually got the money, such as in the form of

receipts; one of the service providers was found to be non-existent. Lack of accountability manifested itself in various ways; to give two astonishing examples: Firstly, whereas the person to whom an advance payment was made was disqualified from taking a further advance before accounting for the first one, this rule would be circumvented. A different person would be used in whose name the money was withdrawn and handed over to the one disqualified; one of the people whose name was used in this manner told the Commission as much. The second example was where a person simply acknowledged debt in terms of the money they were unable to account for – with the money amounting to millions – without any effective recovery of the money. Instead, the money, amounting to millions, would be offset against the person's pension; in some instances, such people simply resigned thereafter. A witness estimated that over the period 2012 to 2018 an amount of R1.5b was lost.

357. As shown above, Ambassador Thulani Dlomo, in his capacity as the Head of the Special Operations Unit, handled a lot of cash; in many respects, the use and destination of the monies remained obscure.
358. Minister Mahlobo, too, as shown above, then as Minister of State Security, handled large sums of cash. For example, on the evidence, there was a time when he received R2.5m a month, later increased to R4.5 m a month, which he allegedly said was for former President Zuma. Details were given by two witnesses that in the presence of both of them on at least two occasions, millions in cash were delivered to Mr Mahlobo, and counted, apart from an earlier occasion when that was done by only one of them. The Commission noted the denials by Mr Mahlobo, now Deputy Minister Mahlobo. However, as said, there were at least two eyewitnesses; secondly, the details were too much to be a figment of their imagination. Probabilities are overwhelming against Mr David Mahlobo. After his appointment, the budget of the SSA increased hugely. This

conclusion was based on the scrutiny of the budget as documentary evidence relating to the budget.

359. Mr Arthur Fraser, then DG of the SSA, also handled and caused a lot of cash to be withdrawn, as shown above. After his appointment, budgetary allocations increased from about R42m in the 2016/2017 financial year to about R303m in the 2017/2018 financial year, approximately 74% (R225m) of which was used for covert operations from his office. It was said by the Project Veza investigation team that an amount of about R125m remained accounted for by Mr Fraser, even as investigations were still going on. Add to all these, the findings of the PAN Report that were referred to the Hawks and the NPA.

Recommendations

360. To state the obvious, financial controls and accountability need to be tightened.
361. As already said, the handling and use of cash is inevitable, especially in covert operations. However, consideration should be given to minimizing the amounts involved.
362. There should be consequence management, including the recovery of the monies lost.
363. There was a report, the PAN report, that had been compiled by an internal investigation team which revealed, amongst others, at least *prima facie* criminal activities, which recommended criminal investigations that could have involved Mr Fraser. After the report had been handed over to the Directorate of Special Crime Intelligence Unit (the Hawks), Minister Cwele ordered that the matter be taken from the Hawks. The resumption of the investigations should be reconsidered by the Hawks; it might be that whoever were involved, including Mr Fraser, get absolved; but the investigations should

be allowed to take their normal course. The Commission has noted Ambassador Cwele's denial that he ordered the discontinuance of the investigations, but it would remain a puzzle why they stopped. In any event, the denial is irrelevant to the Commission's recommendations.

364. The role played by Ambassador Thulani Dlomo, Mr Mahlobo, Mr Arthur Fraser and other people involved in the withdrawal, handling and distribution of SSA's money, should be looked into by the law enforcement agencies.
365. The Inspector General of Intelligence should be allowed more access into the activities of the country's intelligence services. There has been evidence by the current IGI that attempts were made to frustrate some of his investigations.
366. Consideration should be given to allowing the Auditor General adequate access to audit the country's intelligence agencies; without prescribing, consideration may be given to giving top clearance certificate to some staff of the Auditor General; consultations with the IGI and the Auditor General should be considered by the SSA. The Commission notes as commendable the efforts of Mr L Jafta, the former Acting Director-General of the SSA, that he has opened the door to the Auditor-General to audit the SSA. It is a step in the right direction and an indication that this recommendation is implementable, particularly subject to other conditions such as security clearance at the appropriate level.

Maintenance of Secrecy: The balancing act

Findings

367. The Commission appreciates and agrees that there is a need for secrecy regarding covert operations. However, there is also a need to balance that with transparency and,

in particular, accountability; be it in the form of financial accountability or accountability in respect of activities carried out to ensure compliance with the law; for example, that intelligence services are not abused to serve the personal interests of some individuals. As was said in the evidence, which must be accepted, not everything should be locked up in the vaults.

368. Various instances of the abuse of the secrecy principle were mentioned. The Commission gives a few examples of them. To start with, there was a ridiculous case in which SAPS Crime Intelligence reportedly withheld information in respect of the purchase of curtains for a house on the basis of secrecy, whereas details of the purchase could have been given without disclosing the address of the house such as where the curtains were bought. Regarding the SSA, it was as a result of reliance on the secrecy principle that no verification could be made that intended beneficiaries did receive monies intended for them; that some service providers were found to be non-existent; that attempts were made to thwart investigations by the Inspector-General of Intelligence; that the Auditor-General arranged with the SSA for a qualified audit annually; and the Hawks were taken off criminal investigations against certain people including Mr Arthur Fraser for the reason that it would not be in the interests of the State or national security to prosecute him, despite Mr Njenje's firm stance that that would not be the case.

Recommendations

369. The Commission recognizes the difficulty in balancing the maintenance of secrecy, on the one hand, with transparency and accountability, on the other.
370. The evidence has revealed abuse of secrecy. The situation should not be left entirely in the hands of the intelligence agencies themselves. There must be some measures to hold them to account, otherwise they would become law unto themselves. The role

of the IGI, the AG, and Parliament through its Joint Standing Committee on Intelligence, must be sharpened. Secrecy should not be used to hide criminal activity; law enforcement agencies should therefore be able to investigate and, where appropriate, the NPA should prosecute, otherwise there would be criminal impunity under the cover of secrecy. A situation cannot be allowed where intelligence officers are their own guardian.

The use of SSA firearms and their disappearance

Findings

371. A few witnesses testified that firearms and ammunition were taken out of the SSA's Armoury, Musanda. On one occasion, they were taken out at the instance of Ambassador Dlomo, the person who collected them did not even have the competence to handle a firearm. They were therefore issued to that person in contravention of prescripts and the law. It was an assortment of firearms including rifles and submachine guns. When instructions were later given by Mr Fraser for their return, only some were brought back; some were still outstanding at the time of the evidence. The purpose for the arms was not explained. Issuing firearms under those circumstances amounted to the abuse of the assets of the SSA. One Johan, who was at the armoury, played a major role in facilitating the irregular issuance of the firearms.
372. The release and distribution of weapons from the SSA armoury appeared to have been lax; for example, it would not be clear what they were to be used for or by whom, or whether the people for whom they were meant had the necessary competence to handle them.

Recommendations

373. The involvement of Ambassador Thulani Dlomo and Johan, constitute, *prima facie*, criminal conduct in violation of the Firearms Control Act, and the SSA prescripts governing the issuance and control of the SSA armoury. The matter calls to be referred to the law enforcement agencies for further and thorough investigation, particularly as some of the firearms and ammunition have not been returned. It is noted, in this respect, that the witness (Dorothy) who was involved in the collection of the firearms on the instructions of Ambassador Thulani Dlomo, testified that she opened a case of missing firearms with the police; the question is: what have the Police done with that matter?
374. The process for the issuance of firearms out of the SSA armoury needs to be tightened up, bearing in mind that even rifles and submachine guns were issued. These are weapons of war. The country presently has a problem with the illegal possession and use of firearms. As indicated earlier, the emphasis of intelligence services should not be on the security of the State (State Security) but on the interests of the citizens (National Security). The wanton distribution of SSA weapons by the SSA undermines its very core function to ensure the security of the citizens.

The abuse of the vetting system

Findings

375. One of the issues before the Commission was the manner, and the purpose for which, the vetting system was conducted.
376. Firstly, the evidence established that, apart from the normal vetting system of the SSA, Ambassador Thulani Dlomo established a parallel vetting system which may well have been probably illegal. He also actually recruited somebody from outside the SSA to do

the vetting of certain people. This created a potential danger to the country in that people who did not qualify were given security clearance. Evidence was further that the process of vetting was flawed in many ways. For example, some forms not being properly completed, a person being interviewed by more than one person thereby breaking the consistency; and names and information not being loaded onto the official system.

377. Then there was the abuse of the vetting system. For example, questions were asked about the regularity of Mr Arthur Fraser himself, the former DG of the SSA, regarding his top-secret clearance certificate which was said to have been issued on an expedited basis; while the practice of expedited clearance was acknowledged, questions arose about the need to do so in his case. Then there was the most glaring abuse of the vetting system by Mr Fraser himself. Once the Inspector General of Intelligence, Dr Dintwe, told him that he was investigating him because of certain activities, Mr Fraser invoked Dr Dintwe's clearance certificate! Dr Dintwe had to go to court to have his certificate restored but the matter was resolved without the Court deciding the matter. Another case of apparent abuse of the vetting system was the withdrawal, or refusal, of the security clearance certificate to the former National Director of Public Prosecutions, Mr Mxolisi Nxasana, who Mr Zuma may have feared was poised to reinstate criminal charges against former President Zuma.

Recommendations

378. It appears from the evidence that the parallel vetting system created and implemented by Ambassador Thulani Dlomo was discontinued. However, given the danger posed to national security by issuing security clearance certificates to people who might not have qualified, makes for a serious matter; moreover, Ambassador Dlomo and those involved might have transgressed the law. An investigation by law enforcement agencies is

warranted. An internal investigation should also be conducted in respect of those whose certificates are suspect.

On the irregular recruitments and appointments to Intelligence Services

Findings

379. Evidence tendered was that there were no clear criteria for the recruitment of non-SSA members. Ministers were even involved in the recruitment of their relatives or people they knew. Ambassador Thulani Dlomo also became involved in the recruitment even before his appointment as General Manager: Special Operations on 18 January 2012. The danger with the recruitment based on connectivity was its potential to make the recruited people beholden to those who brought them in; they might tell those who recruited them only what the latter wanted to hear, thus compromising the objectivity of information. The recruitment was therefore not always done in the best interests of the SSA, but primarily to benefit individuals.
380. Cogent evidence was placed before the Commission by Dr Dintwe, the IGI, regarding irregular appointments, also as to their possible motive and impact on the issue of State capture. There were irregular appointments to both the SSA and to Crime Intelligence. Such appointments, said Dr Dintwe, created instability and a potential for State Capture; in some instances, no criteria were either used or were not there. He gave a few examples, which also indicated executive overreach. In one instance, former Minister Bongani Bongo ordered the National Intelligence Co-ordinating Committee (“NICC”) to appoint someone to a senior position on the basis that the person was personally known to him; shortly after the appointment, the person was promoted, again irregularly, to a higher position. In another instance a senior person caused the advertisement of a vacant post to be withdrawn because his preferred candidate was not shortlisted for

interview. The many other instances mentioned by Dr Dintwe demonstrated beyond doubt that irregular appointments were made to intelligence services.

381. Despite queries raised with her, including *prima facie* evidence that her predecessor (Mr Bongo) contravened the provisions of the Intelligence Services Act, Minister Letsatsi-Duba, then Minister of State Security, failed to respond. There was nepotism including recruitment of families of Ministers. Former Minister Mahlobo, then Minister of State Security, also selected people for recruitment. Such instances were also found with Crime Intelligence; one General in the Free State acknowledged the practice and cited the recruitment of a girlfriend. Dr Dintwe indicated that the people appointed in that way later feel beholden to those who recruited them. The Commission is satisfied that, on the basis of the evidence before it, irregular appointments were made; that Ministers involved themselves in the recruitment and that such appointments were not in the best interests of the intelligence services as they held the potential of non-meritorious appointments; and also that the people would feel beholden to those who brought them in. It is also possible that at least some of them, especially those recruited by Ministers, could have contributed to State Capture; at least such a suspicion, would be well founded. Such appointments must therefore be frowned upon. In one instance, the Director-General refused to recommend, but the Minister made the appointment anyway; in another, 26 people were irregularly promoted during the period of Minister Ayanda Dlodlo.

Recommendations

382. The recruitment criteria must be clear and be strictly adhered to; and certainly there should be no Executive involvement, let alone by bringing in people on familial or other non-professional considerations.

The use of questionable Intelligence Reports

Findings

383. Convincing evidence was placed before the Commission of the danger posed by the use of questionable Intelligence Reports. Those that were referred to as examples were by SAPS Crime Intelligence;
384. At his meeting with Ambassador Maqetuka, Mr Shaik and Mr Njenje to discuss the investigation into the Guptas, President Zuma first raised what was called the Mdluli Report, which was not even on the agenda. It was a report by Police Crime Intelligence which was at the time headed by General Richard Mdluli. The report alleged that there was a plan to topple President Zuma. It turned out that it had been rejected by the trio after a thorough analysis; despite that, former President Zuma told them that he believed it. In fact the people who prepared it were junior to the three.
385. In Mr Shaik's view, the raising of the Mdluli Report bore direct relevance to the issue of the investigation of the Guptas: the fact that the President believed Mr Mdluli over the three most senior intelligence chiefs at the time was an expression of lack of confidence in them meant to impact on the discussion they had come for, namely, the issue of the investigation of the Guptas. As Mr Shaik was to put it later in his evidence before this Commission, the discussion of the Mdluli Report, set the tone for the discussion; the rest is now history! A thoroughly discredited intelligence report had a bearing on that history. The Commission has already noted the probable consequences of the stopping of the investigations into the Guptas in relation to State Capture.
386. The other discredited Police Crime Intelligence report by General Mdluli also played a role in the breakdown of the relationships between former President Zuma and the above trio. The report was given to Ambassador Maqetuka by the then Minister of State

Security, Dr Cwele, on the instructions of the former President for the SSA to have a look at. It alleged that there was a conspiracy by some generals within the SAPS to remove General Mdluli, at the time the Head of Crime Intelligence. After looking at it, the trio rejected it for a number of reasons such as that it was full of inaccuracies and, importantly, that it had been commissioned and prepared by General Mdluli himself thereby raising the issue of a conflict of interest; he should have stood aside and asked one of his senior colleagues to investigate.

387. The well-known alleged intelligence “report” was canvassed by the IGI, Dr Dintwe. It was a report on the basis of which Minister Pravin Gordhan and his then deputy Mr Jonas were recalled by former President Zuma from a trip abroad. The report was to the effect that Mr Gordhan and Mr Jonas were overseas to meet with some foreign agents who were calling for regime change in the country. Dr Dintwe received a complaint about the report from the Democratic Alliance and the South African Communist Party. What he set out to investigate was the origin, authenticity and veracity of the alleged intelligence report. Former President Zuma, according to Dr Dintwe, was the only person who said he had the report. Dr Dintwe set up a meeting with him to ask for the report. He said the former President did not say there was a report; the only thing he said was that, when the time was ripe, he would explain in order for Dr Dintwe to understand; he did not commit himself on whether the report existed or not. Soon after the meeting Dr Dintwe wrote to President Zuma to indicate he was awaiting further engagement to conclude his investigation.

388. As at the date of Dr Dintwe’s evidence before the Commission, he has not heard from the former President; he did not furnish him with a copy of the alleged intelligence report, except to see a badly written document on social media which he could not act on as the former President had not taken ownership of it. Importantly, all the country’s three intelligence agencies told Dr Dintwe that the report was not given by them. Based on all

these, the Commission doubts the existence of any authentic intelligence report on the basis of which former President Zuma removed Mr Gordhan as Minister of Finance and his then Deputy Mr Jonas. It is to be noted that President Ramaphosa criticised the intelligence report when he spoke publicly about Mr Gordhan's removal.

389. Two more questionable intelligence reports were referred to and criticized by Dr Dintwe. They were also issued by Crime Intelligence during the time of Mr General Mdluli. The first report alleged a plot by General Shadrack Sibiyi, Mr Robert McBride and Mr Paul O'Sullivan and others to overthrow the government. The second one related to the alleged unlawful rendition of foreign nationals involving Generals Sibiyi and Dramat.
390. Dr Dintwe said both reports turned out to be untrue. The criminal charges against General Sibiyi and General Dramat relating to the rendition matter were withdrawn. From the Commission's point of view, there was a relevant and important angle to this second report: at the time it was compiled, General Sibiyi was, according to Dr Dintwe, involved in investigations against General Mdluli, then Head of Crime Intelligence.
391. Dr Dintwe had serious criticism of the two reports; for example, that they were incoherent, prepared in a clumsy manner, full of spelling errors and unintelligible and too substandard to be submitted to the Head of State. These reports were not put through the vigorous process of checks and balances. Yet, he said, they were dealing with the lives and rights of people. It is not for the Commission to adjudicate on the veracity of the two reports but there are three worrying things about them. Firstly, that General Sibiyi was investigating General Mdluli who, incidentally, has since been convicted of some crime or crimes which might or might not be related to his investigation by General Sibiyi. Secondly, the poor standard of the reports and, thirdly, the fact that not only did no prosecution ensue, but that, on the contrary, regarding the rendition matter, the charges were withdrawn. These considerations remind all and

sundry, let alone those in power, to be cautious with intelligence reports. Again, as a matter of interest to the Commission, Dr Dintwe's view was that those who compiled the reports did so in the knowledge that their reports would not stand scrutiny before the courts, but were compiled to remove people from their positions who stood in the way of State capture or corruption and looting of state resources.

Recommendations

392. The peddling of false and unsubstantiated so-called intelligence reports can destabilize the country. The country's intelligence structures, as well as those in power to whom they report, need to be alive to those dangers. The bottom line is that sound and effective mechanisms should be in place to be able to sift out false reports. The Commission was told that former President Mandela rejected an intelligence report that there were people planning to overthrow him. A great deal of prudence is required in dealing with intelligence reports. You need to have professional people, appointed on the basis of merit, to be in charge of intelligence services.

South African Police Service: Crime Intelligence

Findings

393. Although there was not much evidence about the SAPS Crime Intelligence, enough evidence was given to enable the Commission to make adverse findings on the SAPS Crime Intelligence reports under the leadership of General Richard Mdluli; they were discredited. The danger of such false intelligence reports has already been pointed out. The findings and the recommendations have already been made.

394. It is SAPS Crime Intelligence which was allegedly involved in attempts to procure the grabber. The grabber was to be used at the ANC's NASREC Conference where the

ANC's national leadership elections were to be held. The evidence was to the effect that part of the excessive price that was to be paid for the grabber would be used to buy votes at the conference. This would, of course, interfere in the internal politics of the party. The Commission finds that the attempts were indeed made as alleged, although it can't make a finding that Crime Intelligence was officially involved; there were, however, strong indicators that that was the case because the intention to procure the grabber was confirmed by a Divisional Commissioner to Dr Dintwe.

395. It is also the Commission's finding that there were irregular recruitments into the Crime Intelligence, because no less than a General admitted that much.

Recommendations

396. The recommendations made in respect of false reports, irregular recruitments and abuse of secrecy made earlier in this report in respect of the SSA, also hold good with regard to SAPS Crime Intelligence.

The role of Parliament as an authority of oversight

Findings

397. Section 3 of the Intelligence Services Oversight Act 40 of 1994 deals with the functions of the Joint Standing Committee on Intelligence (JSCI), namely, to exercise some oversight over the functions and activities of the intelligence services. In executing its duties, the Committee may, amongst others, request relevant officials to explain any aspect of reports furnished it, including reports by the SSA, Police Crime Intelligence, Defence intelligence and the Inspector General of Intelligence. Parliament's Joint Standing Committee on Intelligence (JSCI) failed to properly perform its oversight duty in respect of the SSA; to mention some examples: It is so that through the 11 September

2009 Proclamation, former President Zuma restructured the country's intelligence services. He did that by amalgamating the NIA and the SASS into the SSA, something that could not be done through a mere proclamation but through national legislation; that is, through Parliament. In paragraph 5.1.1 of its Annual Report *"For the Financial Year Ending 31 March 2020 Including the Period Up to December 2020"* published on 13 September 2021, the following is recoded: "The proclamation was announced in July 2019 but only approved in October 2010. The legislation that amended the changes was only approved later in the form of the General Intelligence Laws Amendment Act, No. 11 of 2013. The gap between 2010 and 2013 resulted in serious concerns and illegal functioning of the SSA. The new structure created a powerful DG with powers concentrated on a single individual. The amalgamation also enabled some members of the executive to issue illegal instructions to members of the SSA. These instructions amounted to executive overreach." True, the report was issued by the JSCI of the Sixth Parliament, but there is no evidence before the Commission that any committee before it did anything about such illegal functioning of the SSA in the period 2010 to 2013 when the above Act was passed. A committee could not have justified its failure to raise its voice or to exercise its oversight on the excuse that it would have acted in breach of any law relating to secrecy. Nor is there any evidence that the JSCI dealt with the matter of the executives' illegal instructions and overreach. The report also confirms in its paragraph 5.1.4 that information was given about challenges such as corruption, irregular recruitment of some members of the Special Operations Unit, illegal proactive services, parallel vetting structure that issued fake top secret clearance certificates and sniper training for some non SSA members as was attested to by various witnesses.

398. There was a time when there was no IGI appointed for a period of about 22 months; that is, for all that period, Parliament failed to fill a national position which played a very important oversight role. The Commission was told that a lot of malpractice within the SSA occurred during that period. There can be absolutely no justification for this failure

and Parliament should have ensured that this did not happen or that the executive was held to account for this.

399. The Committee failed to act on the reports submitted to it by the IGI, which set out amongst others the misuse of money, and attempts to procure a grabber (by Crime Intelligence) irregularly.
400. The Committee failed to act on the advice and information given to it by the country's three most senior intelligence officers. The then Director-General of the SSA briefed the Committee for two days about the problems the SSA was experiencing in the execution of its duties; as he put it, that they were in deep trouble. The then chair of the Committee said at the end of the briefing, that they would be called back but nothing further happened; there was not even a follow up.
401. There was a failure on the part of the JSCI to hold the Ministers of the time accountable, especially former Ministers Cwele and Mahlobo. If the Committee accepted that the Ministers had the right to be involved in operations, it failed to hold them accountable given the issues placed before it by the IGI or senior intelligence officers; if the Ministers did not have the right to be involved in operations, that was all the more reason why they should have been hauled before the Committee; either way, there was a failure by the Committee to carry out its oversight duties.
402. By failing to properly carry out its oversight role and to heed the call by the country's then intelligence chiefs, Parliament has, at least to some extent, contributed towards State capture. Because its failure to do its job meant that acts of state capture and corruption were allowed to spread and deepen. It should have stepped in to ensure the continuation of investigations against the Guptas.

403. Some findings of the JSCI and its recommendations: Naturally, the report deals with a number of issues some of which have no bearing on the mandate of this Commission. The Commission therefore mentions only some of the findings in the report which are pertinent to some of the issues raised; these are set out in paragraph 8 of the JSCI's report. The findings are significant in that they show that all was not well within the SSA, Crime Intelligence and to some extent Defence Intelligence; a few examples are mentioned below to illustrate the point.
404. Regarding the SSA: The slow implementation of the High-Level Review Panel Report, security breaches that led to intelligence failures, threats to the Veza investigation team that was investigating irregularities within the SSA, challenges in the financial statements, and instability in the SSA's senior management. The problem of finance management is confirmed by the qualified opinion of the Auditor General, which is an annexure to the Committee's report.
405. Regarding Crime Intelligence: Audited Financial Statements revealed irregularities; its annual report revealed that some senior managers were not vetted, so too over and under expenditures not reported. Certificates of activities by the Office of the Inspector General of Intelligence reported looting of funds from the Secret Services Account, and also lack of operational directives.
406. Defence Intelligence: Audited Financial Statements showed non-compliance with legislation; failure to comply with competitive bid processes for the procurement of goods; lack of compliance with the National Treasury policy and weak financial controls. Its annual report revealed amongst others vetting and human resource challenges. The certificate of activities showed vetting backlog and that some generals and senior managers were not vetted.

407. Regarding the Office of the Inspector-General of Intelligence: The JSCI noted that the office had human resource challenges; and also noted that only 0% to 2% of the OIG's recommendations were implemented. This means that between 98% to 100% of the IGI's recommendations are not implemented.
408. It is to be noted that the above findings of the JSCI are in line with the evidence tendered by various witnesses before the Commission regarding challenges that plagued the above intelligence services.

Recommendations

409. It hardly needs mentioning that Parliament should exercise its oversight role properly and fully.
410. Returning to the report of the JSCI, it is to be noted that in paragraphs 9 and 10, respectively, the Committee makes generic and specific recommendations. These recommendations are aimed at ensuring a better service by the country's intelligence services. It is hoped that they will be seriously considered; the report having been tabled before Parliament for consideration. It is a public document for anybody to access.

Law Enforcement Agencies

Findings

411. An internal team of the SSA conducted an investigation into a project known as the Principal Agency Network (PAN) which had been launched by Mr Arthur Fraser. The report revealed some criminal activity and was handed over to the Directorate for Priority Crime Investigation (the Hawks) and to the NPA for prosecution, both of which indicated at one stage that they were ready to do so. The Hawks even reduced the costs they would charge. The prosecution was, however, stopped by Minister Cwele,

who said it was on the instructions of President Zuma, at the time, on the ground that prosecuting Mr Fraser would compromise national security, this notwithstanding Mr Njenje's insistence that that would not be the case as what was being investigated was pure crime. It is public knowledge that, after Mr Zuma had served a few weeks of his 15-month term of imprisonment imposed on him by the Constitutional Court for defying its order that he appear before this Commission, Mr Fraser who was the National Commissioner of Correctional Services, granted him medical parole under questionable circumstances and against the recommendations of the Parole Board. That matter is the subject of pending litigation in the Courts. However, the picture that emerges is that Mr Zuma put a stop to an investigation that could well have led to Mr Fraser's arrest, prosecution and maybe imprisonment and Mr Fraser put a stop to Mr Zuma's continued incarceration despite the fact that Mr Zuma's incarceration was in terms of an order of the Constitutional Court.

412. Ambassador Cwele's denial that he stopped the investigation as alleged, was noted. However, it boggles the mind why the matter would be taken away from the Hawks, who were ready and willing to proceed; why the top three would abandon the matter after, as they put it, so much effort and resources had gone into the investigation. It also boggles the mind why Ambassador Cwele, having supported the referral to the Hawks, did not demand progress reports when he did not receive any. It also boggles the mind that, thereafter, in September 2016, former President Zuma appointed Mr Arthur Fraser as DG of the SSA. On the basis of all the foregoing, it is the Commission's finding that while Ambassador Cwele might not have personally wished for the criminal investigation by the Hawks and the prosecution to stop, he did say that the former President said it should stop and also that former President Zuma did give instructions for the investigation to stop.

413. Recommendations

414. It is recommended that the law enforcement agencies resume this investigation that was stopped by President Zuma on the basis that it would threaten national security as no evidence has been presented that pursuing the investigation would threaten national security with a view to the NPA possibly considering if there is enough evidence, possible criminal charges against all those implicated including Mr Arthur Fraser. The allegations are serious; they point to a massive abuse of the assets of the SSA, such as the purchase of some 300 vehicles now idling all over Gauteng, and many houses registered in the names of individuals. The issue of a possible compromise to national security can always be discussed with the National Prosecuting Authority with the appropriate intelligence heads, and should not be decided solely by politicians who might have other reasons, possibly political, not related to national security.

On the Inspector General of Intelligence

Findings

415. The Inspector General of Intelligence is meant to exercise oversight over the activities of the country's intelligence services; to that end, he or she accepts complaints from the public, including individuals, against such services. Yet it is the Commission's finding that obstacles were placed to inhibit the IGI in the execution of his duties. The current IGI has testified at length about such obstacles; for example, limited budget and no direct budget; being allowed only restricted or managed access to information by the DG's and other heads of intelligence services.

416. The IGI's complaints to Parliament's Joint Standing Committee on Intelligence would not attract adequate response and his reports were not acted upon. The office could only employ staff upon approval of the Minister through the DG of the SSA, the very body over which he was to exercise oversight; his office shared the IT system (the

server) with the SSA, giving rise to some concern on the part of other intelligence services such as the Police Crime Intelligence.

417. The office of the IGI does not have enough personnel, with some important posts not filled even though funded. It has been indicated above how the Inspector General's security clearance was withdrawn by the then DG of the SSA, Mr Fraser, once the IGI had told Mr Fraser that he was investigating him. The budget of the office of the Inspector General is within that of the SSA, over which he is supposed to exercise oversight.

Recommendations

418. Instead of being weakened or undermined, the office of the Inspector-General needs to be strengthened in many ways. It needs more staff and a budget of its own. The Inspector General should enjoy unfettered access to classified information and be better equipped. The office of the IGI must be independent and respected.
419. The findings and reports of the IGI must be taken seriously by the Executive and Parliament. The IGI told the Commission that the issues he took to the JSCI Parliamentary were not being responded to.
420. The Commission cannot make an exhaustive list of all the steps that need to be taken to make the office of the IGI effective and capable of carrying out its duties; the bottom line is that all the necessary measures must be taken to achieve that objective.
421. The issue of the independence of the IGI is fundamental. In his evidence, Dr Dintwe made this point, and referred to the kind of independence enjoyed by the Hawks and

IPID. In this respect, reference has to be made to the judgments of the Constitutional Court in the *Glenister*²⁴ and the *McBride*²⁵ cases.

422. The *Glenister* case (popularly known as *Glenister II*): In that case, in which the independence of the Hawks was an issue, the Court made the point that it was a constitutional duty of the state, when creating an anti-corruption entity, to give it adequate independence.²⁶ *“We therefore find that to fulfil its duty to ensure that the rights in the Bill of Rights are protected and fulfilled, the state must create an anti-corruption entity with the necessary independence and that this obligation is constitutionally enforceable. It is an intrinsic part of the Constitution itself.”*²⁷ The Court said that failure to create a sufficiently independent anti-corruption entity would infringe on people’s fundamental rights which would otherwise be corroded by corruption.²⁸ It does not have to be full independence, but adequate level of structural and operational autonomy to prevent undue political influence. Obviously, some of the issues that arose in the *Glenister* case do not arise with regard to the IGI; for example, security of tenure. The IGI does enjoy security of tenure, and the method of appointment is constitutionally sound. It is by the President, approved by a resolution of the National Assembly by at least two thirds of its members. However, there is one point that the Court made that applies with equal force, if not more, with regard to the IGI, namely, the issue of public perception as to whether or not the IGI is in fact independent. On this point, the Court said that the appearance or perception of independence plays an important role.²⁹ In this respect, Dr Dintwe says that the other thing that compromises the independence of the office is that it is situated within the Ministry of State Security; the IGI is using the

²⁴ Hugh Glenister vs President of the Republic of South Africa and Others 2011(3) SA 347 (CC)

²⁵ Robert McBride vs Minister of Police and Others 2016(2) SACR (CC)

²⁶ Paragraph 195 of the judgment

²⁷ Paragraph 197 of the judgment

²⁸ Paragraph 198 of the judgment

²⁹ Paragraph 207 of the judgment

ICT infrastructure of the SSA and its server, which means that being the owner of the server, the SSA may access information that belongs to the IGI; this point also unsettles other intelligence services such as the SAP's Crime Intelligence and Defence Intelligence³⁰

423. The McBride case: The case affirmed the principles set out in the Glenister case with regard to the importance of the independence of an anti-corruption entity. At issue was the power of the Minister of Police over and in relation to the Independent Police Investigative Directorate (IPID), in particular the power to unilaterally suspend its Executive Director and to institute disciplinary proceedings against him. The Court referred to and agreed with the majority judgment in the Glenister II judgment, that *“a corruption-fighting entity will have the requisite independence if it can be established that the ‘reasonably informed and reasonable member of the public will have confidence in an entity’s autonomy protecting features’”*.³¹
424. It is recommended that the Inspector General of Intelligence should enjoy adequate independence in line with the guidelines set out above.

On the Auditor-General

Findings

425. The evidence points to the need to have the Auditor General authorised to audit the expenditure of the SSA. It has been pointed out already how large sums of money were not accounted for. Yet, the role of the Auditor General is not properly fulfilled because some information is deemed classified for that office to access. The arrangement between that office and that of the Inspector General of Intelligence, in terms of which

³⁰ Page 315 line 17 to page 317 line 25

³¹ Paragraph 37 of the judgment.

the Auditor General directed the office of the Inspector General on how to carry out some audit, was not adequate; it amounted to a ticking box exercise without depth. An arrangement between the Auditor General and the SSA to agree on a qualified report in respect of the so-called slush fund (which forms a substantial part of the budget) was also not acceptable. It is the Commission's view that the fact that there were the large sums of monies that could not be accounted for, was due at least largely to the fact that the office of the Auditor General could not execute its duties as it should have, and that the implicated people acted with impunity as they were aware of the weaknesses in the system.

Recommendations

426. A way should be found to enable the auditing of the SSA by the Auditor General while preserving the required secrecy; for example, by granting the appropriate security clearance to some staff within the office of the Auditor General. As stated above, the Inspector General has indicated that his office does not have the expertise and capacity to audit the intelligence services. The bottom line is that the current situation cannot be left as it is; at the very least the office of the Inspector General should be properly capacitated – an exercise which might require a lot of resources. The Commission has noted that the former Acting Director-General of the SSA, Mr L Jafta had accepted that the SSA be audited by the Auditor-General.

The role of some key players

Findings

427. In the midst of all the questionable activities of the SSA from the period after its formation in 2009, there are certain prominent role players. The role of each one of them was testified to by various witnesses, as appears in the summary of evidence. For

the sake of convenience, the witnesses in respect of each such role player are grouped together, with their respective evidence being restated more or less as it appears in the summary.

428. Former President Jacob Zuma: One of the most important roles he played was to restructure the intelligence services by collapsing, through the 11 September 2009 Proclamation, the NIA and the SASS into the SSA. The amalgamation had disastrous consequences. For a start, it was not competent to do this through a mere proclamation; it concentrated powers of the former NIA and the former SASS in the hands of one person, namely, the Director-General of the SSA, Ambassador Maqetuka and later Mr Arthur Fraser; he, for the first time, created the Ministry of State Security and drifted away from the guidelines and principles of the Intelligence White Paper that were reflected in the Constitution; it was under him that Ministers of (of State Security) became involved in SSA's operational issues. Crucially, he discouraged the investigation against the Guptas, and stopped the Hawks investigations against *inter alia* Mr Arthur Fraser whom, some three years thereafter, he appointed Director-General of the SSA, notwithstanding the findings against him that were referred to the Hawks and the NPA which he knew about.
429. As it is known, former President Zuma failed to return to the Commission to put his own version with regard to evidence against him.
430. The Commission has already made a finding that stopping investigations against the Guptas was one of the factors that contributed towards State Capture. Therefore, by discouraging investigations against the Guptas, former President Zuma, wittingly or unwittingly, contributed towards State capture. In this respect, it may be convenient to restate and put together the evidence by the trio, Mr Shaik, Mr Njenje and Ambassador Maqetuka here.

431. Mr Shaik: The former President listened calmly; he did not scream or shout. In his response, he told them about his long-standing relationship with the Guptas; that they were businesspeople; that they once assisted his son Duduzane Zuma when nobody was going to employ him; that they were introduced to the ANC by people associated with President Mbeki; that the relationship with them was of long standing, dating back to the Mbeki administration. To him there was no need to investigate. It was clear to them that he did not want the investigation to continue. President Zuma cast himself as a victim by peddling the narrative that the Gupta investigation was because they wanted to get at him, something that was hurtful to the three of them as they all had had a long relationship with him. Mr Shaik even had a feeling as though the three of them were seen as part of the people wanting to topple him. The bottom line of Mr Shaik's evidence was that former President Zuma did not want the investigation to go on as there was no need. His son stayed with the Guptas in India when he went there for studies; the relationship, according to the former President, was not on the basis of him being President; again, with the narrative of being a victim, he said people wanted to topple him.³² This narrative could also be linked to the Mdluli Report. However, although the former President did not in so many words instruct them to stop the investigation, he made it clear, by pointing to his long relationship with the Guptas that the investigation should stop. After the meeting with the President, they decided that the investigation should not continue; if it did, it would be at the cost of their jobs.³³ He did not raise the issue of Mr Njenje's business interests as the Minister had done. With all the arguments the former President raised, he was making the point that it was not necessary to continue with the investigation. Mr Shaik's view was that from what the former President said, pushing the investigation would have made them appear as part of the people who wanted to topple the former President.³⁴ The former President was very loyal to his

³² Page 170 line 6 to page 173 line 8

³³ Page 173 line 11 to page 174 line 23

³⁴ Page 186 line 1 to page 188 line 14

friendship with the Guptas. The investigation did not continue, even though the top three wanted it to. However, Mr Shaik had no doubt that, had they proceeded with the investigation regardless, they would have been removed from office; he gave the case of one Billy Masetla, then Director General of the National Intelligence Agency, who was dismissed from a senior intelligence position.

432. Mr Njenje's evidence: Mr Njenje confirmed Mr Shaik's evidence that after the trio had had a difficult meeting with Mr Cwele when they insisted on investigating the Gupta family, they went to see the President to raise their concerns about Mr Cwele with President Zuma.³⁵ At that meeting President Zuma confirmed his good relationship with the Guptas; how they had taken his son Duduzane into their company, and that they came from a good family. Zuma's view was that the Guptas should not be investigated.³⁶ The former President's statement that the Guptas did not need to be investigated had a negative effect on the morale of Njenje's teams. The former President would say give me reports but on that occasion it was clear that he did not want the investigation to go on despite being told that those were intelligence matters justifying an investigation; he did not give adequate reasons but simply said that there was nothing wrong with the Gupta family.³⁷
433. The evidence of Ambassador Maqetuka: The former President listened throughout, though, according to the witness, his body language showed he did not like what he was being told; at one time he asked for the report which the witness said he could not give to him as he, the former President, was conflicted. The former President was calm, and also talked about his relationship with the Guptas; the meeting could have taken more than two hours; the former President would not rush them whenever they met with

³⁵ Page 138 line 8 to line 21

³⁶ Page 138 line 22 to page 140 line 18

³⁷ Page 142 line 18 to page 144 line 18

him.³⁸ During the meeting the former President did not raise the issue of Mr Njenje's conflict of interest, even though he was told the Minister had raised it.³⁹ According to the witness, the former President did not express a view as to whether the investigation should stop or not, except that he gave a long explanation about his relationship with the Guptas and how it started.⁴⁰ When Mr Njenje briefed the former President, he was not presenting a formal report, but rather reading from his notes; nor did the witness see a formal report or a scoping report until he left in 2012 (the witness explained what a scoping report was).⁴¹

434. The totality of the above evidence by the three witnesses: Although the witnesses differ on some details regarding what transpired at their meeting with the former President Zuma, they all agree that it became clear that he did not want the investigations against the Guptas to continue; that was why he went on and on about the fact that they were good people, his friends and that they had helped his son. Moreover, there are other pointers. He never asked for a progress report. Also important was what Mr Njenje said earlier in his evidence. He testified about an occasion when he accompanied the then Minister of Mining, Susan Shabangu, to the Presidential residence where she was to meet with one of the Guptas at the behest or with the blessing of the former President. They were actually received by Mr Gupta in the President's study. In that meeting Mr Gupta hassled the former Minister into expediting their application for some mining, until Mr Njenje objected to the way Mr Gupta was treating the former Minister. The incident points strongly to the Guptas having enjoyed a special relationship with the former President, something which would be consistent with the evidence that he did not want any investigations to be conducted against them. Yet another indicator was the pressure

³⁸ Page 197 line 19 to page 200 line 20

³⁹ Page 201 line 9 to page 202 line 1

⁴⁰ Page 202 line 8 to line 15

⁴¹ Page 202 line 18 to page 203 line 19

that was brought to bear on Ms Mtshali and her business partner to part with their shares in a company in favour of the Guptas.

435. As said already, it is the view of this Commission that the stopping of the investigation at the behest of former President Zuma contribute to State Capture, in the country. This conclusion is not reached simply on a default basis, but after thorough consideration of all the evidence placed before it, including evidence relating to some State-Owned Enterprises.

436. Regarding the amalgamation of the NIA and the SASS into the SSA, through the proclamation, compelling evidence by the country's three former most senior intelligence officers that it resulted in problems some of which are referred to above; that it was the case of a faction (within the ruling party) asserting power by taking control of the country's intelligence; those who refused to serve that broader agenda, including those who had been in exile with former President Zuma such as the above three were – like them – replaced to enable the pursuance of the agenda; the difficulties that arose when the three wanted to investigate the Guptas such as the fallout they found themselves in as a result, was given to demonstrate the point. Some of the appointees are referred to below. As said already, it is the view of this Commission that the stopping of the investigation at the behest of former President Zuma, if not the fundamental cause of State Capture, certainly one of them. In the absence of explanations by the former President which he chose not to proffer despite compulsion, the Commission agrees with the above view. This conclusion is not reached simply on a default basis, but after thorough consideration of all the evidence placed before it, including evidence relating to some State-Owned Enterprises. The evidence relating to the State Security Agency cannot and should not be considered in isolation.

437. 773.2 Ambassador Thulani Dlomo: The evidence shows Mr Dlomo's massive involvement in operational issues and, secondly the handling of cash. Witness K and Mr Y's affidavit: The affidavit of Mr Y, who was too ill to come and testify in person, together with the evidence of Ms K which confirmed the contents thereof, show Ambassador Thulani Dlomo's massive involvement in the activities and operations of the SSA. He was appointed to the SSA on 18 January 2012 as General Manager Special Operations. Investigations by the Veza team established that some of the operations that were run by the Chief Directorate Special Operations under him fell outside the lawful mandate of the SSA; prescribed procedures were not followed and applicable governance, financial and operation directives of the SSA totally ignored.⁴² Shortly after Ambassador Dlomo's appointment on 18 January 2012 (as General Manager Special Operations) the scope of his authority was expanded further. Presidential Security Support Service and the Cover Support Unit were brought under his control as General Manager Special Operations.⁴³ He recruited non-SSA people outside of the vetting procedures of the SSA. Through the Chief Directorate Special Operations (CDSO) under him, the SSA assumed responsibility for former President Zuma's food and toxin security, his physical security and the static protection of the President's aircraft; and sources that should have been used by legitimate intelligence structures were channelled through this parallel structure that served the interests of President Zuma rather than national interests.⁴⁴
438. Witness Dorothy: On the evidence of Dorothy, Ambassador Dlomo's activities included the irregular issuance and distribution of firearms from the SSA Armoury, some of which were said to be still missing at the time of the hearing; in the process, not only infringing prescripts within the SSA, but also the provisions of the Firearms Control Act 60 of 2000.

⁴² Page 71 line 11 to page 72 line 9 and paragraph 3.8 of Mr Y's affidavit

⁴³ Page 112 line 17 to page 113 line 13 and paragraph 4.20 of Mr Y's affidavit

⁴⁴ Page 86 line 22 to page 91 line 18 and paragraph 4.7 of Mr Y's affidavit

He possibly could have contravened the law in terms of activities relating to the establishment of parallel vetting structures, providing protection to civilians, and taking away protection services to former President Zuma from the SAPS VIP protection services to the Special Operations Unit (SOU) he had created, thereby usurping the function of the SAPS; he did the same with the health services for former President Zuma that used to be the responsibility of the SANDF; his SOU also offered protection services to some private individuals, which should not have been given without a prior threat assessment by the SAPS; which protection could, at any rate, have only been given by the police once it was to be at the taxpayers' expense. Ambassador Dlomo, at least *prima facie*, acted irregularly.

439. Ambassador Dlomo was also involved in the withdrawal of large sums of cash and its movement, for which no proper accounting was made. This related largely to certain projects under the umbrella project, Project Mayibuye. There were a number of such smaller projects. Reference to only part of the evidence of Ms K will illustrate the point. The witness pointed out that, without describing activities for which the money was meant and without effective financial controls, an amount of R24million, over the initial R30million granted, was given without sufficient financial details, which was in contravention of the prescripts.⁴⁵ Although she did not look at other units within the SSA to compare with, Ms K was sure that at least they would have indicated in their motivations the financial implication of their operation plans.⁴⁶ It was also her evidence that regarding project Construcao, vague and undetailed invoices were paid (in cash). A company with pseudonym Carrot Export Company issued three invoices totalling R20million (R10m, R5m and R5m) using up almost all the money allocated within three months; the invoices simply said it was for services rendered; the point the witness was making was that no details were given on the invoices as to what was being paid for

⁴⁵ Page 74 line 21 to page 76 line 11, and paragraph 614 of Mr Y's affidavit

⁴⁶ Page 76 line 25 to page 78 line 1

and the existence of the company could not be verified.⁴⁷ How the monies were spent under the name of all the projects need to be looked into.

440. Minister Cwele: He was at the relevant time the Minister of State Security. He involved himself in operational issues; he, either alone or on the instructions of former President Zuma, *inter alia*, stopped investigations against the Guptas, and the criminal investigations by the Hawks against Mr Arthur Fraser and possibly others. The Commission has already dealt with the significance of the stopping of investigations against the Guptas, and the consequences thereof to the country. Regarding the stopping of criminal investigations and possible prosecution of Mr Fraser for his activities in relation to the PAN project, it is possible, without prejudging the outcome, that he might not have been appointed Director-General of the SSA, as it happened about three years after the criminal process had been stopped; therein might lie the significance of the stopping of the investigations against him. Minister Cwele was at the relevant time the Minister of State Security. He involved himself in operational issues. There were two vital investigations he was said to have stopped: Firstly, the investigation against the Guptas (acting alone or together with former President Zuma). Secondly, the investigations against, and possible prosecution of, Mr Arthur Fraser, the former DDG of the SSA. He also sought to argue that the well-known Proclamation 59 of September 2009 was a competent instrument by former President Zuma to amalgamate the former National Intelligence Agency (NIA) with the erstwhile South African Secret Service (SASS) into the State Security Agency (SSA).

Stopping Investigations against the Guptas

441. Mr Shaik: His evidence was that although in his affidavit Mr Maqetuka says he did not recall the Minister instructing directly that the investigation be stopped, his own

⁴⁷ Page 79 line 20 to page 84 line 8, and paragraph 6.15 of Mr Y's affidavit

recollection was that that was the case; but he contended that there was no debate that at the very least, the Minister did put pressure on them, (which would be consistent with the fact that the trio sought to take the matter up with the President).⁴⁸

442. Mr Njenje: He said that Minister Cwele said that the investigations against the Guptas should stop because he felt that that would amount to investigating the former President, but the three told him that they were not investigating the President, but to help him and the Executive to know better how to deal with that family. Mr Cwele's view which he expressed forcefully, was that the investigations should not lead to the President.⁴⁹ The Minister seemed to have had other interests in stopping the investigations other than national interests; in effect saying they would be investigating the President; he did not give any other reasons.⁵⁰ But the three of them indicated to the Minister that they were not convinced why the investigation should stop, and that they were going to continue with it; but he remained unpersuaded.⁵¹

443. Ambassador Maqetuka: He too was clear that in their meeting with Minister Cwele, he said investigations against the Guptas should stop. Although the witness could not recall the Minister giving direct instructions that the investigation should stop, his clear attitude was that it should stop; he said the investigation was Mr Njenje's agenda to safeguard his own interests against the Guptas. The witness could not say how long the meeting lasted, possibly three hours.⁵² In all that period the witness was not given the opportunity to explain to the Minister as to what gave rise to the investigation; the discussion went back and forth about Mr Njenje's alleged conflict of interest and the Minister's contention

⁴⁸ Page 150 line 21 to page 153 line 21 and paragraph 7 of Mr Maqetuka's affidavit

⁴⁹ Page 100 line 4 to line 17

⁵⁰ Page 101 line 4 to line 25

⁵¹ Page 104 line 1 to 6

⁵² Page 190 line 4 to line 20

that it was an investigation about former President Zuma.⁵³ When they could not agree with him, they told him that they wanted to take the matter to the former President.⁵⁴

444. Ambassador Cwele's version: He denied stopping the investigations against the Guptas. We now know that he said he called the meeting because he was concerned that there was some surveillance of the Guptas without a judge's permit; and also Mr Njenje's conflict of interest in investigating them, not because he was opposed to the investigation of the Guptas. It was pointed out to Ambassador Cwele that his evidence before the Commission that he was not opposed to the investigation, contradicted his affidavit in which he said that the absence of a judge's directive made Mr Njenje's conflict of interests even more untenable. It was also pointed out by the evidence leader to him that there was another divergence between his evidence and what stood in his affidavit. In his evidence he said the issue he raised and was concerned about, was the electronic "*interception*" (without a judge's directive); however, in his affidavit, he said what he raised with the top three and was concerned about was the "*surveillance*". Ambassador Cwele's response was that there was no difference between the two, yet, as it was pointed out to him, surveillance did not necessarily take the form of electronic interception and therefore that if it did not take that form, it did not require a judge's permission.⁵⁵ The difference was significant in that Ambassador Cwele's objection against the investigation would have been unfounded because whereas indeed "electronic interception" required a judge's permission, the top three denied conducting it; in other words, they told him that they were conducting the kind of surveillance which did not require a judge's approval since their surveillance was not in the form of

⁵³ Page 190 line 24 to page 191 line 16

⁵⁴ Page 191 line 18 to page 192 line 16

⁵⁵ Page 60 line 4 to page 63 line 24

“electronic interception” (which required a judge’s directive). The premise of Ambassador Cwele’s objection was therefore misconceived.

445. His self-contradictions aside, there is in any case overwhelming evidence that he told the trio to stop the investigation against the Guptas. For one thing, his version does not explain why the three witnesses would have wanted to take the matter up with the former President, which they in fact did. Furthermore, it appeared that he never asked for a report on the investigations. The Commission has already dealt with the significance of the stopping of investigations against the Guptas, and the consequences thereof to the country.

Stopping criminal investigations against Mr Arthur Fraser

446. There is also the matter of the former Minister having stopped criminal investigations by the Hawks and the National Prosecuting Authority against Mr Arthur Fraser and possibly others. These were investigations into the Principal Agency Network (PAN). By 2011 significant progress had been made with the investigation by Mr Njenje’s team. On this aspect the evidence came mainly from Mr Njenje. Him and his team handed over their report to the Directorate for Priority Crime Investigation (the Hawks) and to the NPA and everybody was ready for the prosecution. The investigations involved mainly Mr Arthur Fraser. The crimes investigated were fraud and corruption; properties had been bought with ulterior motives which ended up with private individuals; people were employed without security clearance; 300 cars and computers were bought and not used. The PAN project was supposed to be an extension of the official intelligence structures, the domestic branch of the NIA.⁵⁶ The cars were parked in warehouses all over Gauteng; had been bought by funds earmarked for other operations, thereby putting those operations at a disadvantage. The number of houses bought was

⁵⁶ Page 143 line 23 to page 156 line 25 and paragraph 22 of Mr Njenje’s affidavit

substantial, all-over Gauteng; they were registered in the names of some private people including children. In all, an amount of about R600 million was spent in that way.⁵⁷ Mr Njenje held a meeting with the above law enforcement agencies, following which they were all ready to prosecute. However, he got a call from Mr Cwele for a meeting at OR International Airport. When they met, Mr Cwele said the prosecution of Mr Fraser must stop. Despite Mr Njenje's protest that a lot of time and money had been spent in investigations, the Minister insisted and said it was President Zuma's decision; Mr Cwele said the President said the prosecution would compromise national security, despite Mr Njenje's protest to the contrary, and that what was in issue was pure crime. The Minister knew that Mr Njenje had handed over the file to the NPA as he was being briefed at all steps, and he was the one who had asked for the investigation; Mr Njenje therefore believed the Minister that it was the President's decision.⁵⁸

447. Ambassador Cwele denied stopping the investigations; he said he did not that the matter had been taken away from the law enforcement agencies; even though he had interest in the matter so much so that he referred it to the Inspector General of Intelligence; indeed, he had initially shown interest in the investigations continuing, after the meeting referred to above he did not make any follow-up; he made no inquiries when he did not get any update. In all probability, that was because he was aware that the investigations had been stopped.

448. Regarding the stopping of criminal investigations and possible prosecution of Mr Fraser for his activities in relation to the PAN project, it is possible, without prejudging the outcome, that he might not have been appointed D G of the SSA, which appointment

⁵⁷ Page 157 line 3 to page 160 line 12

⁵⁸ Page 160 line 20 to page 164 line 6 and paragraph 23 of Mr Njenje's affidavit

was made about three years after the criminal process was stopped; therein might lie the significance of the stopping of the investigations against him.

Defending the passing of the 11 September 2009 Proclamation

449. As indicated earlier, the effect of the Proclamation was to collapse the erstwhile National Intelligence Agency and the South African Secret Service into one intelligence structure, namely, the State Security Agency (SSA). It was the evidence of amongst others Mr Shaik that by doing so, the proclamation departed from the intention of the country's new dispensation not to concentrate power in one organization; that, in his view, took the country back to the period under the apartheid regime when there was excessive concentration of power in one organization (the National Intelligence Service that housed both the domestic and foreign operations); whereas under the new dispensation the country wanted separate but coordinated services; the proclamation was therefore contrary to the Intelligence White Paper, which had informed the intelligence laws in 1994.⁵⁹ Importantly, it was pointed out to Ambassador Cwele that the Proclamation was not a competent legislation to bring about the above amalgamation; that it had to be through an Act of Parliament; which was why the General Intelligence Laws Amendment Act 11 of 2013 was passed in an attempt to remedy the situation. All these notwithstanding, Ambassador Cwele, in his response, contended that the passing of the Proclamation was competent. It was an unsustainable argument, begging the question why the Ambassador sought to maintain it.

450. Minister Mahlobo: He followed Ambassador Cwele as the Minister of State Security. There are two main issues about Ambassador Mahlobo: his involvement in operational

⁵⁹ Page 94 line 5 to page 95 line 11

issues, and his receipt and handling of large sums of cash. There is also the matter of his attitude towards the Intelligence White Paper.

451. His involvement in operational matters: He involved himself massively in the operations of the SSA, running a number of projects, such as Project Wave (to influence the media), Project Justice (alleged attempt to influence some judges), Project Tin Roof (which involved one of the wives of the former President) etc. Two documents may be referred to as examples indicative of his involvement in operations beyond doubt (there are others). Firstly, there was a letter indicating to be from him (which he said was not the case), asking for an amount of R130m for a project. A letter dated 4 November 2015 addressed to the Minister for State Security Agency, "*Minister Mahlobo*", which was filed of record as an exhibit, was canvassed with him. This was to contest his statement that he was never involved in operations. In that letter, he approved a request for budget reprioritization and the utilization of certain funds, including the amount of R20m for "*Projects approved by the Minister*". The total amount approved, including the other items, was R130m. In his response, Mr Mahlobo denied that there were any Minister's projects; he said the term "*Minister's projects*" was used incorrectly; the document, he said, was therefore fundamentally wrong; the Minister did not approve projects.⁶⁰ But the letter spoke for itself in so many words, despite his protestations. But he admitted that he signed in approval of the movements of the funds indicated in the requesting letter and said, importantly, that without his approval, nobody would touch the money.⁶¹ Secondly, there was a letter, which was canvassed with him, filed of record dated 31 May 2016. The letter was a "*Request for authorization: Renewal of Cover Project Mayibuye and payment of expenditure related to Project Mayibuye from 01 April 2016 – 31 March 2017*". He was still the Minister at the time as he only left in October 2017. The document says that the recommendation was made by the appropriate person on

⁶⁰ Page 144 line 1 to page 145 line 8

⁶¹ Page 146 line 17 to page 149 line 1

31 May 2016 “As per instructions issued by Minister on 06/05/2016”. The Ambassador’s response was that he did not give any such instructions and anybody saying he did so would have to produce written prove as such an approval would have financial implications, in terms of the PFMA.⁶² There were other documents of a like nature which spoke for themselves, referring to the “Minister’s Project”, in particular relating to Project Mayibuye.

452. His response: Regarding the above documentation relating to the approval of all the projects therein mentioned Ambassador Mahlobo, when asked whether he had read it, said he did.⁶³ But he argued that the purpose of the approval did not amount to the approval of the projects as therein described, this despite the fact that the nature and purpose of each project was clearly stated at the top of every page and that his signature of approval was in respect of each one of the projects, as the evidence leader pointed out to him.⁶⁴ The Ambassador was shown a letter, filed of record, dated 28 November 2016. It was written by Dorothy (pseudo name) as Acting General Manager Special Operations, requesting authorisation for funds for the Project Mayibuye in the sum of R4,510,000.00. He said he had no comment on the letter.⁶⁵ Ambassador Mahlobo’s involvement in the operational projects of the SSA is therefore beyond doubt.

453. Still on the issue of his involvement in operational issues, the contents of the affidavit by Darryl (pseudonym), attested to on 23 November 2020 and filed of record, were put to Mr Mahlobo for his response. There was a section in the affidavit headed “*Minister Mahlobo’s involvement in operational activities*”. Darryl says that one of the challenges he had as the General Manager of the CDSO was Mr Mahlobo involving himself directly in CDSO operations and his personal interest therein. Darryl said Mr Mahlobo used to

⁶² Page 150 line 19 to page 154 line 9

⁶³ Page 166 line 10 to line 19

⁶⁴ Page 166 line 21 to page 168 line 22

⁶⁵ Page 188 line 9 to line 15

boast about having his own sources; he would also report directly to the President. Darryl says he raised his concerns on more the one occasion and warned Mr Mahlobo against taking unverified information to the President. Mr Mahlobo's response to Darryl's affidavit was that he denied the allegations.⁶⁶

454. Minister Mahlobo's involvement in the handling of large sums of cash: Evidence was led relating to instances when large sums of cash were withdrawn and delivered to Mr Mahlobo.
455. Witness Dorothy: The contents of an affidavit by Dorothy, filed of record, was placed before Mr Mahlobo, in which Dorothy said that she confirmed that she had on three occasions withdrawn R4.5m on the instructions of one Darryl (pseudo name) to hand the money to him (Mr Mahlobo). He could not deny that the money was withdrawn as stated but denied receiving it.⁶⁷ The evidence leader then drew Mr Mahlobo's attention to yet another affidavit by Dorothy in response to an allegation by one Mr Mhlanga. This affidavit was also filed of record. The following part of the affidavit was read to Mr Mahlobo: "*I have never told Mr Mhlanga that I have given the alleged cash withdrawals to Mr Mahlobo*";⁶⁸ the point apparently being that she did not share what she knew with Mhlanga and not that what she alleged about Mr Mahlobo receiving money was not true. However, she went on to say that, in the absence of schedules of the cash withdrawals, she could recall only three such occasions; she made those "*temporary*" withdrawals in her name; went to the cashier with Lilly; money counted by cashier in front of Lilly as well who brought the bag for the money to be packed by both of them; the money would then be taken to the official residence of Mr Mahlobo in Waterkloof; twice she did so alone and twice with Lilly; she took over the task of delivering the

⁶⁶ Page 205 line 15 to page 207 line 14 and paragraphs 50 and 51 of Darryl's affidavit

⁶⁷ Page 189 line 1 to page 190 line 2

⁶⁸ Page 190 line 4 to 20

money from Darryl, who had instructed her to use her own name; neither Darryl nor the Minister ever told her of the purpose of the money; Mr Mahlobo would usher her in the house, count the money to make sure it was R4.5m after which she would leave the money in the bag. Mr Mahlobo's response to all these was that, to the extent that his name was mentioned, he denied the allegations.⁶⁹ Mr Mahlobo and his counsel objected to the use of this affidavit on the ground that it was just received that morning. I ruled in their favour and Mr Mahlobo said he was not going to deal with it.⁷⁰

456. Witness Darryl: Under the heading "*Cash delivered to Minister Mahlobo*", Darryl says Ambassador Mahlobo would request money from the CDSO for his own project, something which did not sit well with him as he did not think that a Minister should be handling cash from CDSO. He says on one occasion he was required to deliver cash to Mr Mahlobo. He said that he noticed that SSA members, such as Frank (pseudonym), were withdrawing large amounts of money on a monthly basis. On one occasion he asked Frank what the money he had withdrawn was for and Frank counted the money into different bundles, allocating them to some projects until there was a surplus, which Darryl put in a safe in his office. Darryl assumed that Frank must have told Ambassador Mahlobo about the surplus because he later got a call from Mr Mahlobo requesting money for the ANC Women's League. Darryl says that he handed over the money, on Mr Mahlobo's instructions, to his Chief of Staff, one Jay (pseudonym), at OR Tambo Airport. Jay was in the company of someone else, one Vukhani; he did not make them sign any acknowledgement for the receipt of the funds because the delivery of the cash was on the Minister's instructions. In his response to what Darryl said, Mr Mahlobo

⁶⁹ Page 191 line 2 to page 194 line 3 and the whole of paragraph 2 of her affidavit

⁷⁰ Page, i.a. 201 line 6 to line 25

denied being involved in operations, or that Darryl delivered cash to him; he also denied requesting money for the ANC Women's League.⁷¹

457. Witness Stevens: His affidavit, attested to on 18 November 2020, was filed of record. Certain paragraphs, under the heading "*Further information regarding the payment of Judges by Minister Mahlobo from SSA covert funds*" were put to Mr Mahlobo for his response. Stevens said that records showed that one Dr Langa (then Director of the Domestic Branch of the SSA) authorised the withdrawal of R12m cash from the Special Operations budget; Dr Langa himself also told him so. Dr Langa said the money, packed into paper bags, was received by SSA Special Operations Frank for delivery to Minister Mahlobo for payments to Judges to influence the Judiciary. Frank was the Project Manager of Project Justice with the CDSO under Mr Dlomo. In turn, Frank informed Stevens that he delivered the R12m to Minister Mahlobo who, in Frank's presence, removed R4m cash saying was payment to judges who were his operatives. The rest of the money was for other Special Operations ran by Mr Mahlobo.⁷² Mr Mahlobo's response to this evidence was that the allegations were false, and put the Judiciary into disrepute; he said the person who came up with those allegations was the same person who made false allegations against a certain politician and the head of a Chapter 9 institution and was continuing to do so before the Commission; Mr Mahlobo denied that there was any money delivered to him; he disputed all the above evidence.⁷³ Stevens also said that he was aware of the pressure that Minister Mahlobo had successfully put on Ambassador Kudjoe and the Chief Financial officer, Matthew (pseudonym) for money routinely, without regard to SSA financial prescripts. Stevens said that Minister Mahlobo used to receive large sums of money for the special operations he ran.

⁷¹ Page 207 line 15 to page 209 line 20 and paragraphs 80, 81 and 82 of Darryl's affidavit

⁷² Page 14 line 13 to page 216 line 6 and paragraphs 4B (sic), 49 and 50 of Stevens affidavit

⁷³ Page 216 line 7 to page 217 line 5

458. It is clear from the above evidence that Minister Mahlobo received large sums of cash on some occasions. These monies cry out to be accounted for, and if they were legitimately expended, let it be so established.
459. Regarding the Intelligence White Paper: Another thing was that he tended not to give as much weight to the Intelligence White Paper as other witnesses did, such as Mr Shaik and Ambassador Maqetuka; yet there is ample indication that it greatly informed the structure and organization of the country's intelligence in 1994.
460. Mr Arthur Fraser: Arising out of his heading and running of the Principal Agency Network (PAN), Mr Fraser became the subject of internal investigation. A report that followed implicated him. The report was handed over to the SIU and the National Prosecuting Authority. As the Commission has as already mentioned, his prosecution was stopped by former President Zuma on the ground that it would compromise the security of the State. The extent of his alleged involvement has already been set out above when dealing with Ambassador Cwele. More evidence may be added as examples of his questionable activities.
461. Ambassador Maqetuka: There were several problems with the manner in which the PAN project was carried out by Mr Fraser. It was not linked to the headquarters, in that reports did not go to the headquarters; data base or engine room was housed in Mr Arthur Fraser's house yet for security and other reasons reports should go to the headquarters; violating that would be a serious violation of security protocol. These procedures were not followed; the nerve centre that received the information was located in Mr Arthur Fraser's house, to the detriment of the security of the information and of the informants who were important assets as sources; it would also amount to undermining their trust in the system and that could be treasonable in other countries.⁷⁴

⁷⁴ Page 279 line 8 to page 282 line 11

The witness summed up the problems into three main categories. Firstly, the centralization of power in Mr Arthur Fraser regarding the project (PAN); he acted like he was the Director-General of the SSA. Secondly, lack of accountability; that there was no control by the Director-General; it became a free for all and Mr Fraser was a law unto himself. The third problem was the ability to draw large amounts of cash, while there was no accountability for it.⁷⁵

462. Mr Njenje: There were also serious allegations against Mr Fraser relating to PAN about the irregular acquisition of properties, vehicles and the employment of people who were either members or non-members as part of the PAN programme; these allegations could be summed up as being about the abuse of funds.⁷⁶ Mr Njenje was firm in his evidence that the prosecution of Mr Fraser would not have compromised any national security as the President said. Mr Njenje was an expert in issues of national security; he and his team were the ones who advised the President on security and, had there been any threat to national security, they would have picked it up. The issues raised by the investigation were pure crime. It was also his evidence that about three years later, former President Zuma appointed Mr Fraser as head of State Security Agency.⁷⁷ This was despite serious allegations against him while running the PAN as Deputy Director General Operations, for which he was suspended and later resigned.⁷⁸ His appointment as Director General of the SSA by former President Zuma was to be followed by allegations of abuse of power made against him, examples of which have already been set out above; one or two more may be restated to refresh the mind. There was evidence by Dr Dintwe, the IGI, of a letter by Mr Fraser telling him that his clearance certificate had been withdrawn.⁷⁹ This was simply because Dr Dintwe had dared to

⁷⁵ Page 284 line 8 to line 19

⁷⁶ Page 84 line 16 to page 85 line 10 and paragraph 12 of Mr Njenje's affidavit

⁷⁷ Page 170 line 10 to page 172 line 19

⁷⁸ Paragraphs 81 and 82 above

⁷⁹ Page 273 line 5 to line 12

launch an investigation against him. There was also his involvement in the withdrawals and handling of cash, the involvement of the SSA in political matters and the abuse of the vetting system.

463. Mr Arthur Fraser chose not to present his version to the Commission, despite the fact that the opportunity was offered to him by the Commission.

464. Johan (pseudonym): Ms K confirmed that rather than fulfilling its function to protect the Agency from internal threats, the Chief Directorate Internal Security (CDIS was weakened during Johan's tenure; its vetting integrity was eroded; its members became complicit in facilitating the abuse of the SSA resources, which included enabling CDSO members' illegal access to firearms, the transport of cash for CDSO operations and involvement in a parallel vetting structure.⁸⁰ CDIS members were implicated in the robbery of R17m from a safe inside the SSA complex at Musanda in December 2015. This was confirmed by Johan and that the people were within his unit, and they were still there at the time of the evidence.⁸¹ Johan also facilitated the irregular removal of firearms from the SSA Armoury, such as on the occasion already mentioned at the instance of Ambassador Thulani Dlomo. This is confirmed in his own affidavit too.

465. Members of the Gupta family: Though civilians, members of the Gupta family featured strongly as well; it would be no exaggeration to say that they were central to State capture, if not actual perpetrators. This is particularly so if evidence in other streams of State capture is taken into consideration, such as the evidence relating to their involvement with State Owned Enterprises. They cannot escape mentioning because their relationship with former President Zuma was a catalyst in the irretrievable breakdown of the relationships between the three top intelligence officers, on the one

⁸⁰ Page 5 line 24 to page 6 line 19

⁸¹ Page 6 line 20 to page 7 line 5 and paragraph 5.17 of Mr Y's affidavit

hand, and both Ambassador Cwele as the then Minister, and former President Zuma, on the other hand. The Guptas exploited their close relationship with former President Zuma, which enabled them to wield a lot of power, as demonstrated in one instance attested to Mr Njenje. While attending a Cabinet Lekgotla in 2011, Mr Njenje was asked by one Adv Nongxina, then Director General of the Department of Mining, to accompany him and his Minister, Minister Ms Susan Shabangu, to a meeting the latter was to have with Ajay Gupta; according to the DG, Mr Njenje was to protect them as Mr Gupta was exerting pressure on the Minister.

466. Mr Njenje agreed after approval by the Minister and was told the meeting was going to be at the Sheraton Hotel; however, the Minister was later told by the former President that he knew about the meeting and that it was going to be at Mahlamba Ndlopfu (President's official residence) where, he told the Minister, Mr Ajay Gupta was waiting. When they arrived there, Mr Gupta ushered them into the President's study. The meeting was not a good one, said Mr Njenje. Mr Gupta was pressing Minister Shabangu to fast track their application for some mineral rights, in an overbearing manner. Mr Njenje intervened, reminding him that he was speaking to a Minister whereupon Mr Gupta apologized but kept on nagging. The Minister and Adv Nongxima told him that certain procedures had to be followed first and they would come back to him; he said he did not understand why things he wanted took so long; he wanted them to be done immediately. The meeting did not take long; the four of them were the only people in the meeting.⁸² The fact that the meeting was held at the President's official residence, and in his absence was, in Mr Njenje's view, for the Guptas to show how powerful they were; to show a Government Minister that she could be called to the President's study in his absence.⁸³

⁸² Page 173 line 11 to page 179 line 12 and paragraph 26 of Mr Njenje's affidavit

⁸³ Page 179 line 17 to page 180 line 10

467. One of the witnesses, Mr Shaik, said that the country paid the price for the stopping of the investigations against the Guptas. It is probable that had investigations against them been allowed to continue, they possibly could have been deterred from engaging in some activities that amounted to State capture. They chose not to appear before the Commission to contest what was said about them.

Recommendations

468. It is recommended that the law enforcement agencies should conduct such further investigations to establish whether any of the persons implicated in the wrong in this report did not commit one or other crime. In particular it is recommended that law enforcement agencies conduct further investigations with a view to the NPA possibly bringing criminal charges against such people including Mr Arthur Fraser in relation to the PAN programme and any other matter revealed by the evidence before the Commission and Mr David Mahlobo and Mr Thulani Dlomo in regard to State Security Agency cash received and/or illegitimately handled by each one of them.

PART V VOLUME 1 CRIME INTELLIGENCE**Recommendations: Quis custodiet ipsos custodes?**

469. While the evidence of Col Naidoo includes claims that two Ministers of Police, one former and one present, were implicated in corrupt conduct committed by Gen Lazarus, those allegations do not appear to be corroborated by any evidence produced to the Commission. By this I do not mean either that there is no such evidence or that there is. Whether those allegations, and the other allegations made by Col Naidoo, justify further action against any individual depend on the evidence uncovered by those investigating the allegations in accordance with law.
470. There is evidence that Gen Mdluli appealed to President Zuma to help him in his efforts to escape from the consequences of his crimes in return for the assistance of Gen Mdluli in getting President Zuma elected. There is no evidence however that President Zuma responded in any way to Gen Mdluli's overture.
471. In my view, the conduct of Adv Mrwebi and Adv Jiba in relation to the withdrawal of the charges preferred against Gen Mdluli gives rise to a suspicion that there was something more sinister behind the decision to withdraw than mere professional incompetence and ineptitude. However, I do not consider that the evidence before the Commission goes far enough to convert the suspicion into a conclusion adverse to these two officers on a balance of probabilities.
472. There is no evidence that either Gen Lazarus or Gen Mdluli conducted their criminal deprivations of the secret funds entrusted to their custody for any purpose beyond their own personal enrichment and that of their friends and family and to provide largesse to certain of those who they feared might be in a position to uncover their wrongdoing; in other words to implicate such persons in their schemes as insurance against exposure.

473. This is to place in context the crimes exposed by the evidence before the Commission; not to mitigate or minimise the extent of crimes proved to have been committed and likely to have been committed. Those I have identified were placed in positions of the highest trust in an institution critical to the functioning and the protection of society. They abused that trust over long periods of time for personal gain. In the process they corrupted their subordinates who should have been able to look up to them for example and guidance.
474. This topic concerns alleged and in some instances established criminal conduct by high ranking officers in SAPS. Historically and structurally, the main obstacles to the law's taking its proper course in such cases have been that the tendency of SAPS to close ranks and obstruct the investigations into the conduct of their own and, particularly, to abuse the system of classification of documents which I described above.
475. It is clear too, that where secret state funds fall under the control of scoundrels, as the present case makes clear, only strong oversight institutions can protect the public against the harm that such scoundrels can inflict by invoking, when their conduct is called into question, the very secrecy that should exist only for the public good.
476. *Quis custodiet ipsos custodes? Who will guard the guardians themselves?* This question, attributed to the 1st and 2nd century AD Roman poet Juvenal, is generally considered the embodiment of the philosophical question of how those in power can be held to account. The problem is as old as the institutions themselves, created to protect against wrongdoing but by their nature as such equipped to evade detection and retribution when they go rogue.
477. It seems to me that now that the allegations which Col Roelofse and his team set out with such commendable determination to investigate and place before the prosecuting authorities for further action consistent with law will have seen the light of day both in

evidence before the Commission and in this report, no action is needed other than to ensure that the law takes its course.

478. It is recommended that the Inspector General of Intelligence and the Auditor-General be given such access to relevant SSA records and to the secret accounts referred to in this Report as may be lawful but still that would enable them to their work efficiently including such investigation including as the Inspector-General of Intelligence and the Auditor-General may each consider necessary.

478.1. It is recommended that all and any investigations into corrupt conduct (in the wide sense) within Crime Intelligence continue without any obstruction and receive the appropriate support from all units within SAPS; and

478.2. That those members of SAPS who have been tasked with investigating corrupt conduct within CI be given access by SAPS to all documents which may be relevant to establish whether any person may have committed any offence including corruption while at the same time ensuring that any legitimate state interest in preventing the wider dissemination of such documents is protected.

PART V VOLUME 2 SABC

Conclusions and Recommendations

479. The question to be answered is whether the actions of the Former President by involving himself in the formation and business activities of ANN7 acted unethically or contravened the Code of Ethics.

480. In terms of Government Gazette Notice No. 21399, Notice No. 41, Regulation 6853, the Executive Ethics Code was published. The Executive Code was published in terms of section 2(1) of the Executive Members Ethics Act, 1998 (Act No. 82 of 1998). The Executive Ethics Code was published by the then Acting President J G Zuma. The Executive Ethics Code was published and the members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils are obliged to comply therewith in performing their official responsibilities. Clause 2.3 of the Executive Ethics Code provides:

“Members of the Executive may not –

(a) ...

(b) ...

(c) ...

(d) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person;

(e) ...

(f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;

Conflict of interest

A member must declare any personal or private financial or business interest that the member may have in a matter –

- (a) that is before the cabinet or an Executive Council
- (b) that is before a cabinet committee or Executive Council on which the member serves or
- (c) in relation to which the member is required to take a decision as a member of the Executive.

3.5 For the purposes of the paragraphs 3.1, 3.2, 3.3 and 3.4 the personal or private financial or business interests of a member includes any financial or business interests which to the member's knowledge, the member's spouse, permanent companion or family member has.

5 Disclosure of financial interests

5.1 Every member must disclose to the secretary particulars of all the financial interests, as set out in paragraph 6 of (a) the member; and (b) the member's spouse, permanent companion or dependent children, to the extent that the member is aware of those interests."

The Executive Members Ethics Act No. 82 of 1998 was intended to provide for a Code of Ethics governing the conduct of members of Cabinet, Deputy Ministers and members of Provincial Executive Councils and to provide for matters connected therewith. Its definition in section 1 provides that "Cabinet member" includes the President. The Code of Ethics that has been referred to above emanates from the provisions of section 2 of this Act as aforementioned. The Act provides –

"The Code of Ethics must include provisions prohibiting cabinet members, Deputy Ministers and MECs from – a

- (i) ...
- (ii) acting in a way that is inconsistent with their office.
- (iii) exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.
- (iv) using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person; and
- (v) acting in way that may compromise the credibility or integrity of their office or of the government."

Section 2(c)(ii) provides –

"The Code of Ethics must –

(a)....

(b)....

(c) require cabinet members and Deputy Ministers to disclose to an official in the office of the President designated for this purpose and MECs to disclose to an official in the office the Premier concerned designated for this purpose –

(i) all their financial interests when assuming office; and

(ii) any financial interests acquired after their assumption of office, including any gifts, sponsored foreign travel, pensions, hospitality and other benefits of a material nature received by them or by such persons having a family or other relationship with them as may be determined in the Code of Ethics.”

481. Section 3 of the Act provides that the Public Protector must investigate any alleged breach of the Code of Ethics on receipt of a complaint contemplated in section 4.

482. In this regard Term of Reference, 1.4 reads:

“Whether the President or any member of the present or previous members of his National Executive including Deputy Ministers of public official or employee of any State-owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family individual or corporate entity doing business with government or any organ of state.”

483. The Public Protector in her report dated 14 October 2016 and in her executive summary stated at page 4(i) of the report –

“(i) “State of Capture” is my report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 3(1) of the Executive Members Ethics Act and section 8(1) of the Public Protector Act, 1994.”

484. In her report at page 4(vi) she stated that –

“The investigation emanates from complaints lodged against the President by Father S Mayebe on behalf of the Dominican Order, a group of Catholic Priests, on 18 March 2016, (The First Complainant); Mr Mmusi Maimane the leader of the Democratic Alliance and Leader of the Opposition in Parliament on 18 March 2016,

(The Second Complainant), in terms of section 4 of the Executive Members' Ethics Act, 82 of 1998 ("EMEA"); and a member of the public on 22 April 2016, (The Third Complainant), whose name I have withheld."

485. At page 6 she stated the following –

"6 (vii) In his complaint Mr Maimane stated amongst other things that –

'section 2.3 of the Code of Ethics states that members of the Executive may not –

(a) wilfully mislead the legislator to which they are accountable;

(b)...

(c) act in a way that is inconsistent with their position;

(d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."

"(b) It is our contention that President Jacob Zuma may have breached the Executive Ethics Code by –

(i) exposing himself to any situation involving the risk of a conflict between their official responsibilities and their "private interests;

(ii) acted in a way that is inconsistent with his position; and

(iii) used their position or any information entrusted to them to enrich themselves or improperly benefit any other person."

486. At page 9 she stated –

"The complaint relates to allegations of improper conduct in state affairs and unethical conduct by the President of the Republic and other state functionaries and accordingly falls within my ambit as the Public Protector. None of the parties challenge the jurisdiction of the Public Protector."

487. Section 96(1) of the Constitution provides –

"(a) Members of the cabinet and deputy ministers must act in accordance with a Code of Ethics prescribed by National Legislation.

(b) Members of the cabinet and deputy ministers may not act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibility and private interests; or

(c) Use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.”

488. There can be no doubt that in acting as he did, in relation to the TNA and the ANN7 TV station, President Zuma acted in breach of the Executive Ethics Code. He, as President, abused his office for his own benefit, that of his son and that of his friends, the Guptas. He placed himself in a situation of a conflict of interest and abused his position as President of the country.
489. Mr Sundaram is, according to the evidence, the only witness that placed the former President in the same room with the members of the Gupta family and the managers of their entities who were attending to the formation of the ANN7.
490. The evidence of Mr Sundaram is reliable and credible. It has not been challenged by any of the implicated persons in a manner that would create doubt in its veracity. It has been confirmed by some of the implicated persons, including the former President, in many respects.
491. The members of the Gupta family had used their close relationship with President Zuma to facilitate and extend their business interests from India to South Africa. The extension of Infinity Media and the birth of the ANN7 demonstrate the broadening of such interests.
492. President Zuma had enabled the extension of such business interests for the benefit of his son, Mr Duduzane Zuma.
493. The Gupta family and in turn the President's son, Mr Duduzane Zuma, benefitted from the relationship that the Gupta family had with the President Zuma in that they entered into contracts with various State organs and, in particular the SABC, to the detriment of other potential competitors who operated within the same media space.

494. The Gupta family abused their relationship with President Zuma in that they used one of their employees, Mr Ashu Chawla, to access the Presidential residence as he pleased to liaise directly with the President and arrange and secure meetings for the members of the Gupta Family contrary to the applicable security measures within the Presidency or State protocol.
495. President Zuma enabled the members of the Gupta family as business people to occupy a place of prominence over other businessmen, to the detriment of the empowerment legislative imperatives of the Republic of South Africa.
496. President Zuma enabled, indirectly, the members of the Gupta family to abuse their relationship to the extent of flouting visa and labour laws of the country. It is not denied that through Mr Ashu Chawla visas for the Indian nationals were facilitated in a way that was contrary to law. For instance, Mr Sundaram admitted that his visa was not processed according to law.
497. The allegations made by Mr Sundaram that some of the Indian nationals were employed by the ANN7 without permits were not far-fetched because, after investigations which were conducted by the Department of Home Affairs, it was found that four employees of ANN7 who were Indian nationals had violated the conditions of their permits and were accordingly ordered to leave the country. It is not deemed necessary for the Commission to recommend any steps to be taken in this regard since such persons were ordered to leave the country way back in 2013.
498. In the light of the admitted evidence by President Zuma as stated above, President Zuma acted in breach of the provisions of section 96(1)(a); (b) and (c) of the Constitution.

499. A finding that President Zuma acted in breach of the provisions of section 2 (ii); (iii); (iv); (v); section 3.1 and 3.5 of the Executive Members Ethics Act 82 of 1998, should be made as it is consistent with President Zuma's own evidence and that of Mr Sundaram.
500. By involving himself in the conception and formation of the ANN7, President Zuma breached clauses 2.2 (d) and (f) of the Executive Ethics Code.
501. The costs incurred by the SABC for the TNA broadcasts, coupled with the provision of the relevant services to TNA by the SABC, in the amount of approximately R4 268 887.00 excluding VAT, between 01 April 2011 and 31 March 2017, should be recovered from any of the assets belonging to TNA or any assets held by the members of the Gupta Family.
502. In this regard President Zuma breached his obligations as the President of the country and those that are entrusted in him in terms of the Members Ethics Act.
503. Lastly, the evidence led and dealt with hereinabove justifies a finding that the investigations of the Commission have, on the established facts, proved and answered Clause 4.1 of the Terms of Reference, positively, that:

“1.4 Whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOE's) 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”

504. Many of the events described in this section of the Report occurred even before 2010 and much has changed, though the SABC is still in a dire financial situation. Many of the main actors have left the stage and obviously steps against them by internal processes can no longer be taken.

505. The Guptas have left South Africa and it is not known when extradition proceedings will ensure their return to face criminal proceedings.
506. The New Age newspaper has closed down and MultiChoice did not renew its contract with the ANN7 television channel.
507. There was evidence that the remedial actions proposed by the Public Protector in her report of February 2014 had not all been followed-up.
508. At the very least the appropriate investigating and prosecuting authorities should attempt to recover all monies spent through unlawful and improper actions, if that can still be done. For instance, the ± R11 million “success fee” should be recovered from Mr Motsoeneng.
509. It is clear from the evidence relating to the New Age newspaper and the creation of the ANN7 television channel that the Gupta family and their associates had a close relationship with President Zuma and that he showed a particular interest in their ventures. Mr Motsoeneng, having regard to his own utterances as described by witnesses, and in some instances recorded, saw himself (and probably was) the facilitator between President Zuma and at the very least the news section of the SABC. Whether this was for President Zuma’s personal benefit is impossible to say, but there is clear evidence that it benefited the ANC, and his son Mr Duduzane Zuma.
510. It is further recommended that the SABC should consider instituting civil proceedings against TNA Media or any of its Directors and recover all the costs incurred by the SABC including disgorgement of profits made by TNA Media in relation to the breakfast shows. Zuma who had a 30% share in Infinity Media, a Gupta family company.

511. A number of witnesses gave credible evidence of editorial interference with reference to specific events that were not allowed either to be broadcast or to be commented upon. Former Minister Muthambi handed the reign over SABC editorials to Mr Motsoeneng, as it was put, and allowed him to act above the law.
512. One must wholly agree with the view expressed by Mr Makhathini, the Chairperson since 2017, that “depoliticizing is of paramount importance in the renewal, rehabilitation and strengthening of governance systems. Appointing competent and credible executives with the prerequisite skills and experience is at the heart of the renewal process”.
513. A statutory offence with severe penalties should be created dealing with the abuse of power by public officials in all spheres of government and organs of state. Abuse of power has become endemic in South Africa. It is a recurrent theme almost everywhere, as it was at the SABC, be it by Ministers, members of the Board or Executives.
514. It is recommended that the law enforcement agencies conduct further investigations with a view to a possible criminal prosecution of Ms Lulama Mokhobo, former Group Chief Executive Officer of SABC and Mr Hlaudi Motsoeneng for possible contravention of section 38(1)(b) and (c) of the Public Finance Management Act, in the case of Ms Mokhobo, and of section 45(b) and (c) of the PFMA, in the case of Mr Hlaudi Motsoeneng, in respect of their respective roles in the conclusion of the agreement between the SABC and TNA Media (Pty) Ltd in respect of the so-called TNA Breakfast Briefings.

PART V VOLUME 2 PRASA**Recommendations**

515. Insofar as the awards of the Swifambo and Siyangena tenders is concerned, it bears reiterating that according to the National Head of the DPCI, Lt General Lebeya, the investigations into the criminal complaints relating to those two matters is quite advanced. In the circumstances, as regards these matters, the following recommendations are made.

516. First, as regards the Swifambo matter, it is recommended that the President takes steps to ensure, through the relevant members of the Executive that the following happens:

516.1. all DPCI investigations relating to possible criminal conduct at PRASA are finalised as soon as possible;

516.2. the NDPP immediately appoints a team to oversee the investigations and the prosecutions of those suspected of committing criminal offences in respect of wrongdoing at PRASA;

516.3. in deciding whom to prosecute, the DPCI and the NDPP, in addition to the documents that they have already collated or are in the process of collating, have due regard to the evidence led at Commission, the documents that served before the Commission; the documents that formed part of the record in the review application; and the documents that Mr Ramatlakane's current Board has uncovered recently;

516.4. based on the foregoing, it is further recommended that:

- (a) serious consideration be given to prosecuting the following senior employees who played a role in the award of the locomotives contract to Swifambo: Mr Montana; Mr Mthimkulu; and Mr Chris Mbatha;
- (b) the roles of the following persons, who were members of the BEC that made the recommendation that the locomotives tender be awarded to Swifambo, be examined to determine whether they, or any of them, should be prosecuted: Ms Shezi, Mr Khumalo, Mr Mahlobogwane, Mr Nkosi and Mr Magoro;⁸⁴
- (c) the roles of the following persons, who were members of the CTPC, to determine whether they, or any of them, should be prosecuted: Mr Holele, Mr Mbatha, Mr Mathobela, Ms Motshologane, Mr Bopape, Ms Ngoye, Ms Shezi, and Mr Khuzwayo.
- (d) the prosecutions of Mr Mashaba and Mr Mabunda be speeded up;
- (e) the roles of others who may have received undue benefits from the award of the locomotives contract to Swifambo, as detailed in the Reports of Mr Sacks and the Liquidators be examined to determine whether or not they should be prosecuted.

516.5. the NDPP considers instituting a prosecution, in terms of section 86(2) of the PFMA,⁸⁵ against the following members of the PRASA Board which approved

⁸⁴ It must be recorded that Mr Peter Stow was also a member of the BEC, but it is he who had informed Mr Molefe of the irregularities that tainted its meetings. In the circumstances, Mr Stow may prove to be a source of further information.

⁸⁵ The PFMA serves an important regulatory purpose and allows for disciplinary action to be taken against officials of departments and constitutional institutions. Its significance for present purposes is that section 86(2) creates criminal offences in respect of certain conduct of accounting authorities. As has already been noted, PRASA's Board is its accounting authority. Section 86(2) of the PFMA provides: "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,

the recommendation that the locomotives contract be awarded to Swifambo: Mr Buthelezi, Dr Gasa, Mr Khena, Ms Moore, Mr Nkoenyane, Mr Salanje and Mr Montana.

517. Second, as regards the Siyangena matter, it is recommended that the President takes steps to ensure, through the relevant members of the Executive that the following happens:

517.1. all DPCI investigations relating to possible criminal conduct at PRASA are finalised as soon as possible;

517.2. the NDPP immediately appoints a team to oversee the investigations and the prosecutions of those suspected of committing criminal offences in respect of wrongdoing at PRASA;

517.3. in deciding whom to prosecute, the DPCI and the NDPP, in addition to the documents that they have already collated or are in the process of collating, have due regard to the evidence led at Commission, the documents that served before the Commission; the documents that formed part of the record in the review application; and any further documents that the current PRASA Board may have uncovered recently;

517.4. based on the foregoing, it is further recommended that serious consideration be given to prosecuting the following PRASA employees who played a role in

if that accounting authority wilfully or in a grossly negligently way fails to comply with a provision of section 50, 51 or 55." Among the issues to be considered is whether the Board wilfully or in a grossly negligent way failed to ensure the reasonable protection of PRASA's records [as is required by s 50(1)(a)]; and/or whether it wilfully or in a grossly negligent way failed to ensure that PRASA had and maintained an appropriate procurement and provisioning system that is fair, equitable, transparent, competitive and cost-effective or a system for properly evaluating all major capital projects prior to a final decision on the project [as is required by s 51(1)(a)(iii) and (iv), respectively].

the conclusion of the two impugned contracts: Mr Montana, Mr Gantsho and Ms Ngubane.

517.5. the NDPP considers instituting a prosecution, in terms of section 86(2) of the PFMA against the PRASA Board or any of its members who approved the award of the contracts with Siyangena.

518. Third, as regards Mr Montana's property dealings, it is recommended that it is recommended that the President takes steps to ensure, through the relevant members of the Executive that the following happens:

458.1 the DPCI finalises as soon as possible its investigations into the sale by Mr Montana of the Parkwood Property to Mr Van der Walt's Precise Trade and the assistance that Precise Trade or Mr Van der Walt gave to Mr Montana to pay the deposit for the Hurlingham Property and any of the other properties he acquired or sought to acquire and the assistance that Mr Van der Walt gave to Mr Gantsho to acquire the property in the Point area in Durban.

458.2 the NDPP immediately appoints a team to oversee the investigation into and the prosecution of Mr Montana, Mr Van der Walt and Siyangena (and/or its associated companies) for possible contraventions of sections 12 and/or 13 of the Prevention and Combating of Corrupt Activities Act.

519. I conclude this Report with the following observation. Many, many days of the Commission's hearings were devoted to allegations of the capture of PRASA and strident denials thereof, especially by Mr Montana. However, I am left with the uneasy perception that there is much about the ills at PRASA that has not yet been uncovered. That perception is reinforced by what I have set out in the previous sections relating to the instability at PRASA that was exacerbated by the unacceptable delays having a

permanent Board and a permanent Group CEO appointed for more than three years and five years, respectively, and also what appears of late to be a harking back to the Montana-style of leadership. I worry that if I do not make a general recommendation about these matters, it is unlikely that PRASA will recover. Having given anxious consideration to the issues, I have decided that a special commission of inquiry be appointed to examine specifically the following matters: why PRASA was allowed to slide into almost total ruin, who should be held responsible for that and who could have benefitted from those that unacceptable state of affairs.

PART VI VOLUME 1 VREDE INTEGRATED DAIRY PROJECT**Recommendations**

520. In making recommendations, it has to be noted that in essence, the key deliverable for the Vrede Dairy Project was to introduce the Paras model of using local farmers to farm dairy cows, process their milk and sell milk products into the provincial and national dairy products market.
521. This objective was to be achieved with the empowerment of local Black farmers from the Memel and Vrede areas. These farmers/beneficiaries had been told about the project by MEC Zwane. The promise made to those farmers/community members was never realised. At best a few members of the community were employed at the dairy project as manual workers. None of the local Black dairy farmers were invited to bring their milk for processing at the dairy farm. None were trained in the methodologies that were applied by Paras in India.
522. All the consultancy work on the dairy project appears to have been undertaken by companies from outside South Africa, which companies had some association with the Gupta family enterprises.
523. The modality of using implementing agents was misused by the department. Areas that require considerable tightening up as recommended below are: (a) the use of transfer payments, (b) the re-prioritisation of budgets, (c) the oversight responsibilities of various officials and structures, (d) the modality for ensuring adequate accountability by implementing agents and the officials whom they reported to, and (e) the keeping of reliable financial records with verifiable inventories of the assets of any project that is funded through an implementing agent.

524. The failure to manage the implementing agent is a theme that runs through the evidence tendered by witnesses. The SCM policy documents that departments are expected to comply with appear to be ineffectual to the extent that they can be deviated from with ease.
525. To the extent that National Treasury has not published standard guidelines on the minimum requirements for the appointment of implementing agents, it is recommended on that the guidelines used by the Basic Education department ought to be used to draft standardised pro-forma guidelines for the appointment of implementing agents. Implementing agents should always be appointed in collaboration with the beneficiaries.
526. It will be noted that the reservations were expressed by witnesses relative to the appointment of the same entity as implementing agent and managing agent. These two roles that should not reside in one entity.
527. Similarly, where a strategic partner is brought into a project, there should be no question about a competitive process being followed, the nature of the agreement entered into and the reporting protocols that would apply in respect of the agreement entered into. They must be subjected to a competitive bidding process.
528. The business plan of a project must determine the deliverables. These deliverables must be monitored by the department and where necessary the department must place their experts at the disposal of the project to do quality control.
529. To ensure the viability of projects, the feasibility report and business plans must be available and be approved prior to any funds being transferred to a service provider. These must be tabled at the Provincial EXCO and the National Assessment Panel ("NAP") of the relevant National Department for approval.

530. The department must provide guidance and administrative support where appropriate. Legislation must provide appropriate management, contracting, reporting and enforcement guidelines for those who implement projects on behalf of government.
531. It has been noted that the DARD failed to ensure that the BBBEE prescripts of government are complied with in the appointment of sub-contractors to the Vrede dairy project. Compliance with the transformation imperatives of government is mandatory and remedial action must be taken, including the cancellation of the contract, where an implementing agent fails to comply with these prescripts.
532. The transfer of funds to an implementing agent has now been addressed by National Treasury. The reporting on the recipient of the transferred funds should be clearly noted in the financial statements of departments so as to enable consequence management where funds have not been used for the purpose for which they were allocated.
533. In the event that the beneficiaries to a project have yet to be identified or secured, and work on the project has been initiated by an implementing agent, it is recommended that those assets be registered with the government agency that appointed the implementing agent until such time as the beneficiaries are brought into the project.
534. It is evident that the amendment to the Public Audit Act seeks to support the measures introduced. It is recommended that all MECs, HODs, CFOs and Treasury officials be sensitised to the significance of these legislative measures.
535. It will be noted that in Part 1 of the Commission's Report recommendations have been made for reforms to public procurement in South Africa. These recommendations must be given thorough consideration and implemented.

536. Ms Rockman testified that the adjusted cost of the dairy project from approximately R13 million to R570 million was not discussed with the Provincial Treasury as it would have been procedural to do. No consequences flowed from this omission. Provincial Treasury must have mechanisms that allow for the consequence management of a recalcitrant HOD or CFO.
537. Finally, it is recommended that the institutionalisation of lifestyle audits for all senior managers, and those officials who are involved in Supply Chain Management (SCM).
538. Executive authorities should also be subjected to lifestyle audits on a periodical basis.
539. The whole Vrede Dairy Project happened because Mr Thabethe dismally failed to do his job and failed to protect the interests and assets of the DARD and to protect taxpayers' money. It also happened because Mr Mosebenzi Zwane as MEC was pursuing the agenda of the Guptas and did not do his job to perform oversight over Mr Thabethe. It also happened because the Premier of the Province Mr Ace Magashule, would have also been pursuing the agenda of the Guptas.
540. In this regard, reference can be made to Mr Mxolisi Dukwana's evidence which Mr Magashule did not challenge before the Commission about his and Mr Dukwana's visits to the Gupta residence where on one occasion Mr Magashule had brought Mr Tony Gupta his (i.e. Mr Magashule's) identity document and Mr Magashule told Mr Dukwana that he was going to be in business with the Guptas through his son. Indeed, Mr Magashule authorised or directed that Mr Narayan, a Gupta associate, should accompany Mr Thabethe on the trip to India even though Mr Narayan was at that time not employed by the Provincial Government. Of course, the evidence heard by the Commission is that Mr Magashule then employed Mr Narayan as his advisor. Furthermore, the Executive Council of the Provincial Government approved the implementation of the Vrede Dairy Project including the appointment of Estina or the

conclusion of an agreement between DARD and Estina in circumstances where there had been no compliance with relevant legal requirements and or due diligence had been done. They also did so without satisfying themselves that the Head of Department had done the due diligence he was reasonably required to have done before his department could conclude the agreement it did with Estina and paying millions of Rand in taxpayers' money to Estina.

541. The Provincial Executive Council should have required Mr Zwane and Mr Thabethe to place before it full documentation which showed that all legal and relevant prescripts had been complied with and that the implementation of the project and the appointment of Estina, would be appropriate and reasonable.
542. The evidence of Ms Rockman that the resolution of the Executive Council (EXCO) that the DARD should implement the Dairy project did not imply any breach of the law in the implementation is rejected. This is so because the resolution said nothing about complying with the legal prescripts. But also the EXCO should have preserved giving approval for implementation until they satisfied themselves that implementation could still be lawful which they did not do. The Premier should have performed his oversight function over the MEC, Mr Zwane, and the Head of Department but failed dismally. In respect of the Free State Asbestos Project the Free State R 1 Billion Housing Project Debacle which is dealt with in Part IV of this Report. Mr Ace Magashule also failed dismally to supervise his MECs and now we see the same failure in respect of the Vrede Dairy Project.
543. It is necessary that there be consequences for people who fail to do their job. Otherwise, this corruption and these acts of state capture are going to continue forever to the detriment of the country and all people. Neither the Provincial Legislature nor the ANC called the Premier to account for the Asbestos Project and the R 1 Billion Housing

Project Debacle. Premiers must know that they must supervise the MECs and their Departments.

544. It is further recommended that:

544.1. The law enforcement agencies conduct such investigations as may be necessary to establish whether Mr Mosebenzi Zwane' and Mr Ace Magashule contravened any law in the roles they played in regard to the Vrede Dairy Project if this has not already been done,

544.2. Consideration be given to seeking legal advice about instituting legal proceedings against Mr Mosebenzi Zwane and Mr Ace Magashule to recover such monies as may be recovered from them that were lost by the DARD in the Vrede Dairy Project as a result of their failure on their part to perform their legal obligations.

544.3. The law enforcement agencies conduct such further investigations as may be necessary, if they have not already done so, to whether any of the members of the Gupta family including Mr Tony Gupta. And their associates including Mr Narayan and the director or directors of Estina (Pty) Ltd are guilty of any offence with a view to enabling the NPA to consider bringing criminal charges against any one or more of them if it has not already done so.

544.4. In my view, no prospect on any basis for SAA or SAAT to keep Mr Zwane in his employment. I recommend summary dismissal.

PART VI VOLUME 1 CLOSURE OF THE GUPTA BANK ACCOUNTS

Recommendations

545. Some of the banks which closed the bank accounts of the Gupta companies were prepared to have a discussion with their clients before they could terminate their relationship with them but others appeared not to have been prepared to have such a discussion and thought that all they needed to do was to give their client a reasonable notice of the termination of the relationship. In *Bredenkamp and Others v Standard Bank of SA Ltd* the Supreme Court of Appeal decided that a bank was not obliged to hear its client's side of the story before the bank could terminate the relationship. It seems that the Supreme Court of Appeal's basis for this decision was that the relationship between a bank and a client is a contractual one.
546. Representatives of Banks who testified before this Commission revealed that the banking industry is regulated or is subject to many laws. Banks possess an enormous amount of power. This would become very clear if all the banks were to refuse that you hold an account with them. You would not be able to run any serious business without being able to open a bank account. If you already had a bank account and all the banks in which you have accounts terminated their relationship with you that would be devastating. If you were running a serious business, you would need to close down that may result in job losses. Depending on the size of the business one may be talking about hundreds or thousands of people who would lose jobs. The workers would have to suffer serious consequences even though they may not have done anything wrong themselves.
547. In this day and age in South Africa it is unacceptable that an institution as powerful as a bank should have no obligation to hear – whether in a discussion or in writing what a client has to say before the Bank may close that client's account on suspicion that the

client may be involved in illegal or corrupt transactions. It does not appear to be in line with the kind of society that our Constitutional democracy envisages. A decision to close a client's bank account on those grounds is a decision that could have far reaching consequences for the client and others and it is only fair that banks be required to afford their clients the opportunity to be heard or to make representations to show if they are able to, that there are no grounds for the bank to be concerned. The bank may be persuaded or it may not be persuaded. The bank would need to afford the client a proper opportunity to be heard and should not just go through the motions or pay lip service to the principle of *audi alteram partem* (hear the other side).

548. The fact that the relationship between a bank and a client may be contractual is neither here nor there because there are other relationships which are or were at some stage contractual in nature and Parliament intervened in order to infuse the notion of fairness in the relationship. The first of those is the employment relationship. Under the common law an employer had all the power to terminate an employment relationship for a good reason or for a bad reason or for no reason at all and there was very little that an employee could do about such a termination. Labour legislation was enacted to infuse fairness into the employer-employee relationship and, now, an employer must have a fair reason to terminate the relationship and must follow a fair process to do so. The same applies to certain leases. Some legislation requires that certain tenants be treated fairly. Illegal occupiers of land also need to be treated fairly. In our legal system even those who are accused of rape and murder are not sent to jail without being given an opportunity to tell their side of the story. There is no reason why Banks should not be required to observe this basic principle.

549. It is therefore recommended that relevant existing legislation governing banks be amended to introduce this requirement of fairness or, if warranted, a new piece of legislation be enacted which will make this a requirement

PART VI VOLUME 2 PARLIAMENTARY OVERSIGHT

Summary of recommendations

550. In what follows the Commission summarises the recommendations it has made above.

550.1. It is recommended that Parliament should consider whether it would be desirable for it to establish a committee whose function is, or includes, oversight over acts or omissions by the President and Presidency, which are not overseen by existing portfolio committees.

550.2. It is recommended that Parliament should consider whether introducing a constituency-based (but still proportionally representative) electoral system would enhance the capacity of Members of Parliament to hold the executive accountable. If Parliament considers that introducing a constituency-based system have this advantage, it is recommended that it should consider whether, when weighed against any possible disadvantages of, this advantage justifies amending the existing electoral system.

550.3. It is recommended that Parliament should consider whether it would be desirable to enact legislation which protects Members of Parliament from losing their party membership (and therefore their seats in Parliament) merely for exercising their oversight duties reasonably and in good faith.

550.4. It is recommended that Parliament should consider amending section 6(1) of the Intelligence Services Oversight Act 40 of 1994, so as to ensure that, before an election, the outgoing JSCI is required to report to Parliament on as much as possible of the period preceding the election.

- 550.5. It is recommended that Parliament ensures that adequate funds are allocated, particularly to portfolio committees, to enable effective parliamentary oversight.
- 550.6. It is recommended that, subject to budgetary restraints, the scale and skills of the research and technical assistance made available to the portfolio committees be enhanced.
- 550.7. It is recommended that Parliament needs to make it clear that the practice of late submissions to portfolio committees will not be tolerated.
- 550.8. It is recommended that Parliament should consider whether there is a need to legislate on the issue of reports by representatives of the executive to Parliament.
- 550.9. It is recommended that Parliament needs to make clear that non-attendance by ministers and others scheduled to attend portfolio committee meetings will not be tolerated and to ensure that consequences are visited on those who offend without adequate cause. (Parliament should consider whether there is a need to legislate on this issue.
- 550.10. It is recommended that Parliament implement a system to “track and monitor” implementation (or non-implementation) by the executive of corrective action proposed in reports adopted by Parliament.
- 550.11. It is recommended that Parliament establish an Oversight and Advisory Section to provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of Members of Parliament and the committees to which they belong.

- 550.12. It is recommended that Parliament should consider whether it supports the principle of “amendatory accountability” and, if it does, whether it would be desirable to give detailed substance to this principle in an Act of Parliament, along the lines suggested in the Corder report.
- 550.13. If Parliament should not be minded to enact legislation of the above type, the Commission is of the view that consideration should be given by Parliament to amendments to its own rules, with a view to addressing the problem of ministers who fail to report back to Parliament on what if anything has been done in respect of remedial measures proposed by Parliament or on alternative methods preferred by them to address defective performance highlighted by Parliament.
551. The Commission supports the recommendation that, with the support of a majority of members of a portfolio committee, a portfolio committee could put a minister to terms in respect of remedial action, and could thereafter, through the Speaker intercede with the President, as head of the national executive, in the event of non-compliance. The Leader of Government Business could also play a role in such a process.
552. It is recommended that Parliament should consider whether more representatives of opposition parties should be appointed as chairs of portfolio committees.
553. It is recommended that Parliament consider whether it is desirable to amend its rules to give effect to the proposals by Corruption Watch on appointments by Parliament.

**PART VI VOLUME 3 THE DISSIPATION OF STATE CAPTURE-DERIVED FUNDS
THROUGH LOCAL AND INTERNATIONAL MONEY LAUNDERING NETWORKS**

Recommendations

The Offshore Laundering of State Capture Proceeds of Crime

554. Billions of Rands were paid to the Gupta Enterprise as kickbacks related to State Capture contracts. If the South African state is to recover any of these amounts from offshore, it will first have to trace the current whereabouts of these funds. To this end it is recommended that

554.1. South African authorities should urgently engage with HSBC to require HSBC to assist in the tracing and dissipation of the funds out of Tequesta, Regiments Asia and Morningstar and into the Hong Kong/China laundering network using HSBC accounts.

554.2. The Financial Intelligence Centre (FIC) and the National Prosecuting Authority (NPA) should engage with their counterparts in Hong Kong and China to seek their assistance in the tracing and dissipation of the funds out of Tequesta, Regiments Asia and Morningstar and into the Hong Kong/China laundering network using HSBC accounts.

554.3. The FIC and the NPA should engage with their counterparts in the UAE to seek their assistance in the tracing and dissipation of the funds out of the Tequesta and Regiments Asia accounts in Dubai.

554.4. If the current whereabouts of any proceeds of State Capture payments made to Tequesta, Regiments Asia or Morningstar can be located, the Asset Forfeiture Unit (AFU) of the NPA should approach its counterparts in the

relevant jurisdiction(s) with a view towards having those proceeds frozen and then forfeited to the South African State as proceeds of State Capture crimes.

The South African Laundering of State Capture Proceeds of Crime

555. Tracing the flows of State Capture proceeds of crime has revealed the existence of widespread sophisticated money laundering networks operating within South Africa. The money laundering networks used by the Gupta Enterprise were complex, well established and embedded in a pre-existing *milieu* of criminality and wrongdoing. The money laundering networks appear to service criminal enterprises straddling offences currently regulated and policed by multiple enforcement agencies and have links with international money laundering networks with multi billion rand turnovers.

556. It appears that thus far, enforcement action against these networks has been confined primarily to forfeiture orders issued by the South African Reserve Bank. Important though these forfeiture orders are, they are unlikely to have any significant deterrent effect on the domestic money laundering networks because the scale of their operations is such that forfeiture orders can be absorbed as a cost of doing business. If money laundering is to be brought under control in South Africa, it is essential that those controlling and participating in the domestic money laundering networks in South Africa are prosecuted and subjected to asset forfeiture proceedings so that the costs of the money laundering profession can be made to outweigh its benefits.

557. Sections 4 to 6 of the Prevention of Organised Crime Act 108 of 1998 create statutory money laundering offences in the following terms:

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,

which has or is likely to have the effect-

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) ...

shall be guilty of an offence.”

“5 Assisting another to benefit from proceeds of unlawful activities

Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby-

(a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or

(b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,

shall be guilty of an offence.”

“6 Acquisition, possession or use of proceeds of unlawful activities

Any person who-

(a) acquires;

(b) uses; or

(c) has possession of,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.”

558. The evidence contained in the three reports of Mr Holden to the Commission⁸⁶ should provide ample basis for the investigation and prosecution of a wide range of individuals under sections 4 to 6 of POCA for their role in laundering proceeds of State Capture crimes. It is accordingly recommended that the National Prosecuting Authority consider the three reports of Mr Holden with a view to instituting criminal prosecutions under sections 4 to 6 of POCA against persons involved in laundering the proceeds of State Capture crimes.

559. However, one of the hall marks of the money laundering networks that laundered proceeds of State Capture crimes within South Africa was their flexibility. As soon as particular companies were exposed as laundering vehicles, the networks were able to bypass those companies and to reroute State Capture funds through different entities built into different networks. So, prosecutions for historical contraventions alone, are unlikely to make much of an impact on the money laundering industry within South Africa unless they are part of a sustained ongoing process to target that criminal industry.

560. How best to target money laundering within South Africa is not something that this Commission can prescribe. It is possible however to make a number of general observations in this regard:

560.1. First, because the money laundering industry services a range of criminal enterprises operating across fields regulated or policed by different regulatory and law enforcement agencies, a holistic approach is required on the side of government. A co-ordinated and co-operative approach to targeting money

⁸⁶ Estina Dairy Report (Annexure VV5.1); the Transnet Report (Annexure VV5.2) and the Money Laundering Report (Annexure VV10).

laundering is required from all of the relevant enforcement agencies, and at least the:

- 560.2. Asset Forfeiture Unit of the NPA
- 560.3. Directorate of Priority Crime Investigation (Hawks);
- 560.4. Financial Intelligence Centre (FIC);
- 560.5. Investigating Directorate of the NPA (ID);
- 560.6. South African Revenue Service (SARS);
- 560.7. South African Reserve Bank (SARB);
- 560.8. Special Investigating Unit.
- 560.9. Second, it is necessary to use the anti-money laundering resources of the banks in a more pro-active manner than is currently the case. The South African Anti-Money Laundering Integrated Task Force ("SAMLIT") has been set up under the auspices of the FIC to enable banks to share with each other and with the authorities anonymized information and to discuss general trends. However, the absence of a statutory framework providing for the controlled sharing of detailed anti-money laundering information by banks appears remain an obstacle to fighting financial crime.
- 560.10. Third, there is a need to investigate the effectiveness of the current system of suspicious transaction and cash threshold reporting to the FIC under the FIC Act. If banks are failing to make the necessary reports to the FIC, the FIC needs to take action against them, but if Banks are making the necessary

reports to the FIC but no action is being taken against the money laundering networks, that suggests either a flaw in the current system or its implementation by the FIC and downstream enforcement agencies. In this context, the Commission recommends that the FIC should conduct an urgent review

- 560.11. into the compliance of the South African banks with the FIC Act in relation to proceeds of State Capture laundered through accounts held by them, identifying whether, and to what extent, the FIC was alerted to these activities by reports under the FIC Act;
- 560.12. what action was taken by the FIC pursuant to any relevant reports received from South African banks in this regard;
- 560.13. what reports or recommendations were made by the FIC to other law enforcement agencies; and
- 560.14. what steps, if any, were taken by those enforcement agencies to act on the recommendations of the FIC.

THE ACQUISITION OF OPTIMUM COAL MINE

561. There are reasonable grounds to believe that the persons referred to above including Mr Duduzane Zuma, Mr Salim Essa, Ms Ronica Ragavan, Mr Ashu Chawla and members of the Gupta family may be guilty of contravening section 2 of POCA. In the circumstances it is recommended that law enforcement agencies should conduct such further investigation as may be necessary with a view to the possible criminal prosecution of the said persons by the NPA.

THE EVIDENCE OF LORD PETER HAIN

562. Lord Hain was asked to comment on a possible recommendation that public officials above a certain level as well as executives of companies wishing to do business undergo compulsory and regular lifestyle audits. He commented favourably on the suggestion, noting that this would supplement the proposal in relation to unexplained wealth orders

THE EVIDENCE RELATING TO MR DUDUZANE ZUMA

563. The outline of evidence above shows that Mr D Zuma was a shareholder in several Gupta-related companies and thereby stood to gain financially from contracts awarded to those companies. In some instances, Mr D Zuma appears to have taken part in the decision-making that would lead to the award of those contracts by SOEs to the Gupta-linked companies.

564. Mr D Zuma also seems to have been involved in the appointment of key individuals in SOEs, who in turn facilitated the capture of those SOEs. He also seems to have acted as a conduit between the Guptas and government, particularly his father, Mr JG Zuma.

In several cases, Mr D Zuma was present when bribes were offered to individuals at the Guptas' Saxonwold residence.

565. It is recommended that the law enforcement agencies conduct investigations whether Mr D Zuma has not committed any offence by facilitating acts of corruption or by facilitating bribes or by failing to report corruption that may have been committed in his presence by Mr Tony Gupta when he offered a bribe to Mr Mcebisi Jonas, Mr Mxolisi Dukwana and Mr Vusi Kona

GOVERNANCE OF SOEs

Evaluation of the File contents from the point of view of the Commission

566. Although the File documents envisage the formalisation of the appointment processes including a limited form of public involvement (the public may be invited to identify candidates) the Nomination and Selection of candidates remain firmly controlled by the relevant Government Minister. It is difficult to see why the proposed system will be any better placed to deal with state capture than it was before. There are no effective mechanisms which would prevent cronyism and cadre deployment from continuing to dominate appointment to the Boards and to senior executive officers.
567. The recommendations of the Commission, it is submitted, must insist on a truly independent and transparent process free from political manipulations so that the ultimate appointment made by a Minister is genuinely the result of a merit-based selection process.

**AMENDED RECOMMENDATIONS REGARDING APPOINTMENTS TO BOARDS OF,
AND EXECUTIVE POSITIONS IN, STATE-OWNED ENTERPRISES**

568. In the circumstances the Commission recommends the establishment of a Standing Appointment and Oversight Committee tasked to ensure, by way of a public hearing, that any person nominated for Board appointment or as the Chief Executive Officer, Chief Financial Officer, or Chief Procurement Officer of an SOE meets the professional, reputational and eligibility requirements for such a position. The Committee will also investigate and act upon any complaints received concerning the misconduct of any Board member or senior executive in the discharge of his or her duties.

569. The relevant recommendation reads as follows:

Recommendation for appointments to the boards and to executive office of state-owned enterprises

570. It is hereby recommended that:

570.1. That in order to ensure a transparent process for the appointment of appropriately qualified and experienced persons of high integrity to the Boards of state-owned enterprises and to senior executive positions therein, the Government must introduce legislation:

570.2. to create a Standing Appointment and Oversight Committee having the powers and functions set out in 33.5 below:

570.3. to provide for the relevant shareholder Minister to make appointments to the Boards of SOEs and to senior executive office in accordance with 14 and 15.3 below;

- 570.4. to appoint an Adjudicator having the powers and functions set out in 15 and 16 below.
- 570.5. The powers and functions of the Standing Appointment and Oversight Committee are:
- 570.6. to invite, receive and assess by way of a transparent and public process nominations for appropriately qualified and experienced persons of high integrity willing to accept appointment to fill any vacancy on the Board of a State-Owned enterprise or in a senior executive post;
- 570.7. to recommend to the shareholder Minister concerned the names of at least one but not more than three of the best qualified candidates suitable for appointment for every vacancy on the Board or senior executive post;
- 570.8. to follow the procedures set out in 15 below;
- 570.9. to publish a Code of Conduct which will be binding on Board members and senior executives;
- 570.10. to receive and investigate complaints relating to any misconduct alleged against a Board member or person holding a senior executive post and to pronounce on the merit of the complaint and the steps which should be taken to deal with it.
571. The relevant shareholder Minister shall, upon receipt of any nominations from the Committee either:

- 571.1. proceed to appoint the nominee, where a single nomination has been made, or one of the nominees, where more than one nomination has been made, to the Board or senior executive post in the relevant state-owned enterprise; or
- 571.2. provide the Committee with a written explanation within thirty days from the receipt of the Committee's nomination/s setting out why, in the opinion of the Minister, the nominee/s is not or are not appropriately qualified or appropriately experienced or of high integrity;
- 571.3. if the shareholder Minister neither approves any candidate nominated by the Committee nor provides a written explanation for withholding such approval within the said thirty days the matter shall proceed in accordance with the process set out in 16 below.
572. Where the Minister:
- 572.1. responds in terms of 14.2 above in the case of a single nomination made by the Committee, the Committee must proceed to identify and nominate an alternative candidate for such appointment, and if that alternative nomination is not approved by the Minister, the matter shall proceed in accordance with the process set out in 5 below;
- 572.2. responds in terms of 14.2 above in the case of two or three nominations having been made by the Committee, and has provided the reasons for not so approving then the Committee shall, if it regards the Minister's reasons as valid, proceed to identify and nominate alternative candidates for the Minister to consider for appointment, and again rank such further nominations in accordance with its preference, and if the shareholder Minister also rejects the

alternative nominations the matter shall proceed in accordance with the process set out in 16 below;

572.3. Where the Committee does not accept the written explanation of the Minister as constituting a valid objection to the lack of appropriate qualification or appropriate experience or to the integrity of the nomination/s, or if the Minister neither approves any candidate nominated by the Committee nor provides a written explanation for withholding such approval within the said thirty days the matter shall proceed in accordance with the process set out in 5 below.

573. Where the Minister has failed to make an appointment either from the original list of nominees or from any alternative list of nominees where such has been provided, then the person ranked first in the single list provided to the Minister, or the person ranked first in the alternative list provided to the Minister as the case may be shall be appointed by the Minister.

574. The Committee shall comprise the following persons who shall serve a term of three years:

574.1. a retired Judge, nominated by the Chief Justice, who will preside as Chairperson of the Committee;

574.2. the Minister of Finance or his delegate;

574.3. a senior legal practitioner appointed by the Chairperson of the Legal Practice Council;

574.4. a senior representative from the business community appointed by The National Economic Development and Labour Council;

- 574.5. a senior Trade Union representative appointed by The National Economic Development and Labour Council;
- 574.6. a registered Auditor appointed by the Chairperson of the Independent Regulatory Board for Auditors;
- 574.7. an industry expert appointed by the SOE concerned;
- 574.8. a senior representative of an established anti-corruption non-profit organisation operating in the private sector such organisation to be identified by the Chairperson of the Committee.

Anti-State Capture and Corruption Commission

575. It is recommended that a permanent Commission be established the main function of which will be to investigate, publicly expose acts of state capture and corruption in the way that this Commission did over the past four years, make findings and recommendations to the President. Such a Commission could be called the Anti-State Capture and Corruption Commission. In addition, since it has been found by this Commission that the failure of Parliament to hold the executive, particularly President Zuma, accountable contributed to the Gupta-Zuma state capture, it will be necessary for the Anti-State Capture and Corruption Commission to keep an eye on how Parliament performs its oversight function and whether, in respect of any particular matters, it is performing or it has performed its oversight function effectively and has held the Executive including the President, accountable. Where the Anti-State Capture and Corruption Commission is of the view that Parliament has failed or is failing to perform its oversight function effectively and has not effectively held the executive effectively to account, it must step in, investigate the matter itself properly and call upon anyone to appear before it, testify and answer questions that may be put to him or her by the Chairperson of the Anti-State Capture and Corruption Commission in public and in the full glare of cameras unless the Chairperson decides in a particular matter that that should not happen in public. It must have power to call anyone within the National Executive and officials of government departments, state owned entities and members of Boards of Directors of state owned entities or anyone in the private sector including private businesses. However, it will be important for the Anti-State Capture and Corruption Commission to ensure that as a norm evidence before it and any questioning of persons who appear before it is done publicly and with the media including Television being allowed in the hearing and that it is only in really exceptional cases that the Chairperson of the Commission may decide that the giving of certain evidence and/or the questioning of any person be done with the public excluded. An example of such

cases is where the hearing of particular evidence publicly could endanger national security or where some other strong grounds exist to justify the hearing of such evidence with the public excluded.

576. That there should be a structure that can play this role in relation to Parliament arises out of the fact that the Gupta-Zuma State Capture could have been prevented or stopped in its track quite early around 2012 and 2013 if Parliament had not been prevented by the ANC majority from performing its oversight function and from properly and effectively holding President Zuma to account. However, whenever the opposition parties tried to do the right thing for the country and the people of South Africa and sought answers from the President about his friendship with the Guptas the ANC majority shielded President Zuma and he was able to continue with his friendship with the Guptas to the detriment of South Africa.

577. With the Anti-State Capture and Corruption Commission, it will be possible for the Commission to call upon the President to appear before it and answer questions relating to certain matters. Anyone involved in acts of state capture and corruption must dread the day he or she may appear before the Commission and be subjected to intense questioning in front of the nation and in the full glare of TV cameras. That is not to say that the Commission will necessarily be hostile to those who appear before it but that it will take its job very seriously, it will act without fear or favour or prejudice and will ask the difficult questions that should be asked in the interest of the public and the country. Part of its job will be to expose acts of state capture and corruption and hopefully help to contribute to the significant lowering of the level of the corruption in the country.

Composition of the Anti-State Capture and Corruption Commission

578. The Anti-State Capture and Corruption Commission must be chaired by a Judge. Preferably, the Judge should be a retired Judge. While a Judge who is still in active

service should preferably not chair the Commission or participate in it in any way, this should not be an immutable position. There is no reason why a Judge who is still in active service but is close to retirement and may be left with one, two or three years and who is not going to be availing himself for promotion cannot be appointed to chair the Commission or to be part of the Commission for part of or the balance of the period of his or her active service. That, of course, may require that an acting Judge be appointed to perform the duties in Court that would have been performed by that Judge if he or she had not been appointed to the Anti-State Capture and Corruption Commission.

579. The Chairperson of the Anti-State Capture and Corruption Commission must have power to appoint evidence leaders and investigations and other personnel that he or she considers the Commission needs and will do a good job. The Anti-State Capture and Corruption Commission must have a Secretary and such support staff as may be necessary in order to enable the Commission to perform its function effectively and competently. The evidence leaders and investigators must be people who will perform their respective functions without fear, favour or prejudice. It must not be people who may think that doing their job fearlessly in the Commission may mean that Government will no longer give them work when they leave the Commission.
580. When the President needs to appoint the Chairperson of the Commission, he should approach the Chief Justice and request him or her to give him the name of a Judge who should be appointed by the President. The Chief Justice may then give the President one or two or three names and leave it to the President to choose one from those. The President should not himself or herself indicate any preference to the Chief Justice.
581. The Commission must prepare reports from time to time and submit them to the President at certain intervals.

President must be elected directly by the people

582. In terms of South Africa's electoral system the voters do not elect the President of the country. They vote for political parties. The political parties that get a sufficient number of voters during national and provincial elections send a certain number of people to Parliament in accordance with a certain formula. A political party represented in Parliament may withdraw any of its members serving in Parliament and replace him or her. There is not much an individual can do about it. With regard to a President, he or she first gets put on the list of a political party and takes an oath as a member of Parliament and, after he or she has become a member of the National Assembly, the National Assembly elects the President. When a member of the National Assembly gets elected by the National Assembly as the President, he or she ceases to be a member of the National Assembly.

583. After this Commission heard the kind of evidence it heard over a period of about four years including the evidence played by President Zuma in helping the Guptas loot taxpayers' money in the way they did together with their associates, we are bound to ask the question: how did this country end up having as President someone who would act the way President Zuma acted? Someone that could remove as good a public servant as Mr Themba Maseko from his position just so that he could put someone else into that position who would co-operate with the Guptas and give them business. A President who would fire Minister of Finance just because his friends wanted someone else in that position who would co-operate with his friends and help them to capture the country; National Treasury. Indeed, a President who became party to a scheme created by the Guptas to remove a number of executives from their positions at Eskom so that the Guptas could put their own associates in those positions so as to facilitate the looting of Eskom.

584. The country got Mr Zuma as President because he was able to ascend to the position of President of the African National Congress and the majority of the voters in the 2009 national and provincial elections voted for the ANC. During the elections of 2009 it would have been clear to all that, if the ANC obtained the majority of voters, Mr Zuma would be the President of the country. It may well be that, despite having more than 700 of charges pending against him, he would have won the majority of voters if it was a Presidential election where the voters voted for the President directly. However, there may have been voters who voted for the ANC but who would never have voted for Mr Zuma as President if they had an opportunity not to vote for Mr Zuma and still vote for the ANC.
585. No single measure that can be recommended and put in place will on its own be adequate to prevent state capture in the future or will be adequate on its own to rid our country of corruption it will take a number of measures that will each contribute in their own way towards that goal. As already suggested before, Mr Zuma may have been helped by the fact that there may have been voters who wanted to vote for the ANC but not necessarily for Mr Zuma but felt that they had no choice but to help him because their votes helped the ANC with the election and effectively give the ANC the prerogative to choose the President of the country. In other words, a voter who wanted to vote for the ANC but did not want Mr Zuma to be the President of the country was forced to choose between either not voting for the party that he or she liked, namely, the ANC and thereby enhance the prospects of Mr Zuma being President of the country or not voting at all for the political party for which she wanted to vote. That was a difficult choice to make. Many voters who may have found themselves in that situation may have ended up voting for the ANC and hoped that the ANC would not make Mr Zuma the President of the country. Of course, the ANC made Mr Zuma the President of the country.

586. The proposal that consideration be given to making necessary constitutional amendments to ensure that the President of the country is elected directly by the people, is aimed at ensuring that anyone who becomes President of the country does so on the basis of their own popularity with the people, not on the basis that, if voters vote for a particular party, that party will make him or her President. Of course, if this recommendation is accepted and necessary constitutional and legislative changes are made and it is implemented, that will not necessarily give the people of this country any guarantee that somebody similar to of Mr Jacob Zuma or even worse than Mr Jacob Zuma will ever be elected President of the country. That possibility will always be there. In the USA Mr Donald Trump won the Presidential election against all odds. That is a good reminder that a system where the voters vote for the President directly is no guarantee that a person of a wrong character will not win the Presidential election and become the President. However, if that were to happen in South Africa after this recommendation has been accepted and implemented, the consolation will be that the people elected their own queer character or a person who has no integrity and, if he or she ever facilitated a capture of the State by private individuals or entities as Mr Zuma did, the people can blame themselves for electing such a person to the highest office in the land. It will not be that the people voted for a party and it is that party that decided who should be the President of the country.

Electoral Reform

587. It is recommended that serious consideration be given to the majority recommendation on electoral reforms as given in the Report of the Electoral Task Team of January 2003. The Task Team included Dr F Van Zyl Slabbert who was the Chairperson.

THE EVIDENCE OF MR MALUSI GIGABA AND HIS RESPONSE TO THE EVIDENCE OF MS NOMACHULE MNGOMA GIGABA

588. It has already been recommended (in the Report on Transnet) that, based on the evidence of Witness 3, the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on charges of corruption as contemplated in Chapter 2 of PRECCA⁸⁷ and on racketeering charges in terms of Chapter 2 of POCA⁸⁸ in relation to the cash payments allegedly received by him during visits to the Gupta residence in Saxonwold (during the period July to December 2013).⁸⁹
589. Similarly, it is recommended that, based on the evidence of Ms Mngoma, the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to the cash payments received by him during visits to the Gupta residence in Saxonwold in or about 2013.
590. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Gigaba on charges of corruption as contemplated in Chapter 2 of PRECCA and on racketeering charges in terms of Chapter 2 of POCA in relation to the employment of his sister, Ms Nozipho Gigaba, by Sahara Computers in or about 2013.
591. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of Mr

⁸⁷ Prevention and Combatting of Corrupt Activities Act 12 of 2004

⁸⁸ Prevention of Organised Crime Act 121 of 1998

⁸⁹ Report part 2, vol 1, Transnet, para 1090

Gigaba on a charge of corruption in terms of Chapter 2 of PRECCA and/or a racketeering charge in terms of Chapter 2 of POCA, to determine whether:

- 591.1. the Guptas gave Mr Gigaba some R4 to R5 million in cash that was used to pay for the Gigaba wedding in August 2014;
- 591.2. the Guptas paid for the trip taken by Mr Gigaba and Ms Mngoma to Dubai in or about 2014/2015;
- 591.3. the Guptas gave Mr Gigaba cash that was used to effect renovations to his late father's home in Mandeni, KwaZulu-Natal in or about 2013/2014;
- 591.4. the Guptas gave Mr Gigaba R425 000 (or more) to pay off the debts of his sister, Ms Nozipho Gigaba, in or about 2013;
- 591.5. Mr Ajay Gupta gave Mr Gigaba two watches in Dubai during a trip there in or about 2013 - 2015; and
- 591.6. the cash (or part thereof) used by Mr Gigaba to pay his children's school fees in 2015 - 2021 (or part thereof) emanated from the Guptas.

Acknowledgements and appreciation

Since Volume 4 of Part VI of the Commission's Report marks the last of the 19 Volumes of the Commission's Report, this is the right time for me to say a few words of acknowledgement and appreciation.

First of all, I wish to express my appreciation to Justice Mogoeng Mogoeng, former Chief Justice of the Republic of South Africa, for having shown confidence in me way back in January 2018 when he asked me to chair the Commission as well as for the support he constantly gave me throughout the four and a half years of the work of the Commission, particularly when the Commission went through difficult times. It was for me an honour and privilege to serve my country as Chairperson of a Commission as important as this Commission was to the country. In his evidence before the Commission President Ramaphosa compared the responsibility that this Commission carried to the responsibility that was carried by the Truth and Reconciliation Commission which was chaired by the late Archbishop Emeritus Desmond Tutu. He said:

“This month marks 25 years since the first hearing of the Truth and Reconciliation Commission into apartheid era human rights abuse. It was a remarkable moment in our history to hold that commission, the Truth and Reconciliation Commission, demonstrating our determination as a nation to unearth and confront the crimes of our past so that we may make a decisive break with those violations of human rights and so that we may forge a better future for all our people. This Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector carries a similar responsibility. This Commission is the instrument through which we seek as a nation to understand the nature and extent of state capture to confront it. To hold those responsible to account and to take the necessary measures and steps to ensure that such events do not occur ever again in our country.”

I also take this opportunity to thank President Ramaphosa, in his capacity as President of the country, for his unequivocal and unconditional support for the work of the Commission throughout the entire period during which the Commission was doing its work. When the Commission had financial challenges, I would approach him and he ensured that, despite the budgetary limitations that government had, particularly because of the Covid-19 pandemic, funds were made available to the Commission so that it could finish its work. In this regard it is also important to point out that, when I asked President Ramaphosa to appear before the Commission, testify and be questioned on what he may or may not have known about state capture while he served as Deputy President of the country and as Deputy President of the ANC, he readily agreed to appear and to subject himself to questioning. I believe that it was the first time in the history of this country that a sitting President appeared before a judicial Commission of Inquiry, gave evidence and subjected himself to questioning. This was important for accountability. Of course, as a sitting President, President Mandela had appeared before the High Court, Pretoria, testified and subjected himself to cross-examination. President Ramaphosa's preparedness to appear before the Commission and subject himself to questioning promoted accountability and will hopefully serve as an example for future Presidents when called upon to appear before a body such as a Commission of Inquiry and subject themselves to questioning.

The Commission also noted that when the National Executive Committee of the African National Congress had its meetings between 2018 and 2021, it often issued media statements in which it pledged its support for the work of the Commission, even as more and more adverse evidence was heard by the Commission concerning the ANC's role in State Capture and corruption. The Commission noted this support for its work and appreciated it. I also wish to express my appreciation for the support that various political parties represented in Parliament showed for the Commission's work.

I also thank the Director-General in the Presidency and her team for their co-operation and support in regard to the work of the Commission.

I also thank all members of the Commission's Legal Team (evidence leaders) as well as all members of the Commission's Investigation Team for their hard work and commitment to the cause of the Commission throughout the period of four and a half years of the work of the Commission. In particular, I wish to mention that there were times when these teams continued with their work even when they had not been paid for some time because of the budgetary challenges that the Commission had at some stages. Their commitment was incredible. In fact, some of them said to me that there was no way they would leave the Commission without finishing their work because of money issues. They said that the work of the Commission was simply too important for the nation not to be completed.

I also wish to thank the Minister of Justice and Correctional Services and his Department for the co-operation and support that they gave the Commission. I thank the National Treasury as well for their co-operation. I also thank the City of Johannesburg Metropolitan Municipality for making available to the Commission avenue at which the Commission held its hearings for a long time.

I thank the Secretariat and all of the staff of the Commission for their hard work and commitment. During the period of the hearing of oral evidence, the Commission sometimes held double-sessions per day, a day session and an evening session as well as over the weekends and public holidays in order to try and complete the hearing of evidence as soon as possible. During that period staff members had to work very long hours. I appreciated their hard work and their commitment. I particularly wish to thank my research staff who worked extremely hard and often slept a few hours and sometimes did not sleep at all during the period of the writing of the Report.

I also wish to record my appreciation to my wife and children for their support for me during the four and a half years of the work of the Commission when not only did I not have much time for them but also when, through decisions I made in the course of my work as Chairperson of the Commission, I put their safety and lives in danger. I am deeply indebted to them for their support.

I also take this opportunity to express my thanks and appreciation for the wonderful support that the Commission and I got from many members of the public and organisations and other entities which was shown and conveyed to the Commission and to me throughout the period of the public hearings. In particular, I met South Africans from all walks of life in malls, at airports, in functions and elsewhere who encouraged me and the Commission to continue with the good work of the Commission. We appreciate this very much. I am truly grateful to all of them for their support.

One of the occasions when members of the public showed the Commission a lot of support was when the Commission ensured that the principle that everyone is equal before the law would be applied to Mr Jacob Zuma, the former President of South Africa when he refused to appear before the Commission even after the Constitutional Court had ordered him to appear before the Commission. Through its judgment in the contempt of Court application that the Commission instituted against Mr Zuma, the Constitutional Court affirmed the constitutional principle that everyone is equal before the law. The Court sentenced him to 15 months' imprisonment for contempt of Court. He served about two months of that sentence in prison before he was released on medical parole.

It is important to acknowledge the role played by former Public Protector, Adv Thuli Madonsela, in the establishment of this Commission and to thank her for the work she did in her report "State of Capture" and for recommending that a Commission of Inquiry be established to investigate the matters that this Commission investigated. South Africans owe

her a debt of gratitude for undertaking the investigative work that she undertook and for having thought that a Judicial Commission of Inquiry should be established to look into the allegations of State Capture.

Lastly, I thank all those who helped the Commission but may not fall under any of the categories I have mentioned above. I am truly indebted to all of them.

I give this Report to the President as I am required to but I want to say that, in my view, this Report belongs to all those in our country who are truly dedicated to the fight against corruption and State Capture and who truly want to ensure that South Africa is never again subjected to State Capture. Ultimately, the people of South Africa must take their destiny in their own hands and make sure that South Africa is free of State Capture and corruption.

Justice RMM Zondo
Chief Justice of the Republic of South Africa

and

Chairperson of the Commission
10 October 2022