

191.21.2. Mr Choeu testified that he advised Mr Matjila that, because the contract was in excess of R3 million, there was a process that had to be followed. That was that it could not just be approved by Mr Matjila, but had to be approved by the Chief Executive in consultation with Exco. Also, it had to be subject to the approved budget.<sup>2170</sup>

191.21.3. On 29 April 2014 Mr Howa wrote to Mr Choeu and said that the draft contract was different to “the one agreed between us previously”.<sup>2171</sup> He had a problem with the exit clause that allowed Eskom to exit the contract on notice (i.e. without breach) and stated “I am sure this is an oversight in drafting and is easily correctible. After which I would be happy to receive a corrected version.”<sup>2172</sup>

191.21.4. Mr Choeu acknowledged in evidence that this was a key protection for Eskom and certainly not an “oversight” in drafting.<sup>2173</sup> Mr Choeu forwarded the email to the legal team, including Mr Mohamed Adam, the Senior General Manager for Legal and Compliance in Eskom, and asked them to respond.<sup>2174</sup> Mr Adam responded, “Chose, you need to make a call based on commercial need. It was not an oversight. It was deliberately drafted to allow for cancellation on 30 days’ notice. I would recommend retaining our wording.”<sup>2175</sup>

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<sup>2170</sup> Transcript 30 October 2019, p 190 (line 19) – 191 (line 25).

<sup>2171</sup> Exhibit MM2, p 67.

<sup>2172</sup> Transcript 30 October 2019, p 201, lines 10-20.

<sup>2173</sup> Transcript 30 October 2019, p 201 (line 23) – 202 (line 2).

<sup>2174</sup> Exhibit MM2, p 67.

<sup>2175</sup> Exhibit MM2, p 80.

191.21.5. Mr Choeu testified that, after this he *would have* informed the CEO about this and would have responded to Mr Howa to inform him that this clause was what Eskom wanted.<sup>2176</sup> However, this is not supported by the correspondence. Instead, Mr Choeu responded a couple of days later, on 2 May 2014. In this email to Mr Matjila, he said that the parties had reached agreement on most clauses but TNA did not want Eskom to include the exit clauses on 30 days' notice – he quoted the clauses. He then said, “You will notice that they have removed the clause from both signed versions of the contracts.”<sup>2177</sup>

191.21.6. The contract itself said that it was signed by Mr Matjila for Eskom on 30 April 2014. It was witnessed by Mr Choeu on that same date.<sup>2178</sup> When confronted with this during his evidence, Mr Choeu then claimed that he must have told Mr Matjila about the termination clause verbally sometime before 30 April 2014.<sup>2179</sup>

191.22. It is not clear precisely what went on between Mr Adam's response, the signing of the contract, and the email from Mr Choeu to Mr Matjila two days thereafter. However, it is clear that Mr Choeu knew about the removal of the termination clause because of Mr Adam's email to him indicating that it should be retained to protect Eskom. On Mr Choeu's version, he communicated this to Mr Matjila at some point before Mr Matjila signed the contract (albeit that the written record of this notification occurred after the contract had in fact been signed). It is, therefore, fair to conclude that at least Mr Choeu knew that the critical clause had been omitted. In so far as Mr Matjila is concerned, if he signed the contract

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<sup>2176</sup> Transcript 30 October 2019, p 205, lines 4-7.

<sup>2177</sup> Exhibit MM2, p 83.

<sup>2178</sup> Exhibit MM2, p 114.

<sup>2179</sup> Transcript 30 October 2019, p 213, lines 1-9.

without knowing that the clause had been removed, then he committed Eskom to a contract without properly vetting it and ensuring that it adequately protected Eskom. If Mr Matjila did know that the provision had been removed, then he knowingly acted against Eskom's best interests. In any event, both he and Mr Choeu concluded this contract with TNA for R43 million at a time when TNA was mired in controversy, questioned by Parliament and the Public Protector, and the contract offered Eskom no verifiable value.

- 191.23. Mr Choeu testified that he had no idea the SNG report made findings against him in this regard or that they made recommendations about the taking of disciplinary action against him. He confirmed that no such disciplinary action was ever taken against him for this.<sup>2180</sup>

#### **The contracts constituted fruitless and wasteful expenditure**

192. The business briefings/breakfasts would involve a Minister or official appearing at the breakfast. The most exposure that Eskom gained from these breakfasts was some opportunity to display its branding at the breakfast.<sup>2181</sup> This included hanging some banners. While Eskom would be given an opportunity to speak, this would not be on air. The Minister appearing on the show would not discuss Eskom, energy efficiency or the 49M campaign at all. Mr Pretorius testified that there would not be value to Eskom in spending money on such an event and it "did not make sense" to him.<sup>2182</sup>

193. Mr Pretorius explained that it was not even the Eskom logo or colours that were displayed, but, rather, the 49M logo, with different colours.<sup>2183</sup> Because the banners and

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<sup>2180</sup> Transcript 30 October 2019, p 215, lines 4- 25.

<sup>2181</sup> Transcript 29 October 2019, p 73, lines 15-25.

<sup>2182</sup> Transcript 29 October 2019, p 74 (line 3) – 75 (line 12).

<sup>2183</sup> Transcript 29 October 2019, p 75, lines 20-25.

the show provided no context for the logo, market research showed that many people thought 49M was a radio station and had no association with Eskom or energy saving.<sup>2184</sup>

194. In addition, the Morning Live show was not even aimed at or watched by the target audience for the 49M campaign because those people would have already been at work at that time.<sup>2185</sup> Mr Pretorius therefore testified that he would not have paid R1million for a breakfast briefing would have negotiated a totally different package but was “forced” to agree to this one.<sup>2186</sup>

195. Mr Pretorius compared this event to the “POP17” that the Mail and Guardian had hosted and for which Eskom had paid only R300 000 as a sponsor. That event had at least discussed sustainability and topics relevant to Eskom’s interests. When this was compared to the TNA business breakfasts, it made no financial sense for Eskom to spend over R1million on the breakfasts.<sup>2187</sup>

196. Mr Pretorius explained that all Eskom would get for this R1million was two tables of 10 people at the event. He said the reputation of the breakfasts and TNA was so bad that they eventually struggled to fill those seats. Eskom would pay for the costs of the event – the venue hire, décor and food (a simple breakfast). Mr Pretorius explained that the rest of the tables were sold by TNA to make further money. Accordingly, the costing charged to Eskom made no sense. If the money was not going to paying the costs of the event and TNA was selling further seats to make profits, where was Eskom’s

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<sup>2184</sup> Transcript 29 October 2019, p 76, lines 1-7.

<sup>2185</sup> Transcript 29 October 2019, p 76, lines 9-22.

<sup>2186</sup> Transcript 29 October 2019, p 76 (line 24) – 77 (line 4).

<sup>2187</sup> Transcript 29 October 2019, p 77, lines 10-25.

sponsorship money going? Eskom was, after all, spending public money.<sup>2188</sup> In fact, TNA was not even required to pay SABC 2 for using its time on Morning Live.<sup>2189</sup>

197. Mr Pretorius also explained that, if they wanted to get a message out to the public on load shedding, it would have been a matter of public interest and they could have just called a press conference for free.<sup>2190</sup>

198. Mr Choeu confirmed in his evidence that, on a previous occasion, the SABC had aired a segment where they had followed the Minister around to people's houses and watched him change a lightbulb to a more energy efficient option. This was directly related to the 49M campaign and it was aired for free by SABC.<sup>2191</sup>

199. In so far as the reach of the TNA's newspaper circulation was concerned, when TNA claimed to have a distribution of 100 000, this was simply how many copies of the newspaper it printed. TNA claimed to sell 39 000 of these and the rest were dropped off for free at various SOEs.<sup>2192</sup> Media Shop determined that TNA was only reaching 0.5% of the target LSMs of the 49M campaign (LSMs 6-10).<sup>2193</sup>

200. The Media Shop also researched, using estimates of readership (circulation figures not being available), that the cost to reach one person under TNA was R317 whereas the cost per person with Business Day, for example, was R276, 47.<sup>2194</sup> Accordingly, the publication also did not provide value for money as compared to other publications.

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<sup>2188</sup> Transcript 29 October 2019, p 78 (line 2) – 79 (line 6).

<sup>2189</sup> Transcript 29 October 2019, p 89, lines 3-6.

<sup>2190</sup> Transcript 29 October 2019, p 80, lines 9-23.

<sup>2191</sup> Transcript 29 October 2019, p 68, lines 15-21.

<sup>2192</sup> Transcript 29 October 2019, p 90, lines 7-20.

<sup>2193</sup> Transcript 29 October 2019, p 92, lines 13-18. See also Exhibit MM1, p 18, para 59.3.

<sup>2194</sup> Exhibit MM1, p 18 and transcript 29 October 2019, p 93, lines 1-10.

201. Mr Pretorius said that, as a marketer, he did not believe that Eskom derived any benefit from these events or the advertising and there were no verified circulation figures from which to assess such value.<sup>2195</sup>
202. Mr Choeu stated in his affidavit to the Commission that the business breakfasts by TNA yielded a tangible return on investment because it allowed Eskom to obtain 2.5 hours broadcasting on SABC 2 which it otherwise would not have.<sup>2196</sup> However, in his oral testimony, he conceded that it was only 57 minutes and that Eskom did not actually get this time allocated to broadcasting Eskom-related matters. He ultimately conceded that there was no basis to say that Eskom obtained substantial airtime.<sup>2197</sup> He also conceded there was no basis to say there was any tangible return on investment because such an analysis was never done – he simply made an “assumption”.<sup>2198</sup>
203. Mr Choeu confirmed during his evidence that the contracts were concluded without making any assessment as to the value that could be extracted from the commitment.<sup>2199</sup> Despite having no evidence for this, Mr Choeu claimed he did believe that TNA would have some potential value in the future, but that it became apparent that it could not deliver on this potential and it had a bad reputation – this was in 2012, when the first Parliamentary questions began.<sup>2200</sup>
204. Mr Choeu did not consider it his responsibility to worry about wasteful expenditure of public funds. He conceded that this was his concern under the first two contracts, but not the third as the CEO took over this responsibility; it was not the responsibility of his

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<sup>2195</sup> Transcript 29 October 2019, p 86, lines 10-25 and p 87, lines 1-15.

<sup>2196</sup> Exhibit MM2, p 3, para 3.2, bullet 3.

<sup>2197</sup> Transcript 29 October 2019, p 141 (line 10) – 143 (line 19).

<sup>2198</sup> Transcript 29 October 2019, p 144, lines 1-10.

<sup>2199</sup> Transcript 30 October 2019, p 71 (line 25) – 72 (line 3).

<sup>2200</sup> Transcript 30 October 2019, p 77, lines 2-4 and p 78, lines 1-25.

division. In respect of the third contract, he believed this was only Exco's role and not his.<sup>2201</sup>

205. This evidence clearly shows that there was no or negligible value for Eskom in sponsoring the TNA business breakfasts. It also shows that the advertising spend for *The New Age* newspaper was unjustified and its effectiveness could simply not be measured – save that its cost of reach per person was far higher than its competitors.

206. As will be set out in greater detail below, the Board of Eskom, when called to ratify the third TNA contract (which was worth R43 million) did not at any point evaluate the commercial value of the contract. The only thing that the Board of Eskom did do was to stipulate that Eskom must “extract maximum value” from the contract. However, Mr Pretorius explained that the Strategic Marketing Department, which would have been charged with this responsibility, did nothing to extract value from the contract.<sup>2202</sup> Mr Pamensky, a member of the incoming Eskom Board that passed this resolution also admitted that the Board never followed up to make sure this ever happened.<sup>2203</sup>

## **Ratification of the third contract**

### “Compliant” facilitator CEOs

207. Mr Zola Tsotsi testified that he had no knowledge of the first and second TNA contracts; nor the correspondence between Parliament and Eskom or with the Public Protector. In fact, he said that Mr Dames gave him the impression, when he joined Eskom in August 2011, that Eskom was already involved in a contractual relationship with TNA

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<sup>2201</sup> Transcript 30 October 2019, p 179, lines 12-15. Then p 179 (line 25) – 180 (line 25).

<sup>2202</sup> Transcript 29 October 2019, p 108, lines 23-25.

<sup>2203</sup> Transcript 31 October 2019, p 82 (line 19) – 83 (line 5).

and that the subsequent contracts were “renewals”, including the third contract for R43 million – even though this occurred after a gap of a year.<sup>2204</sup>

208. Mr Tsotsi testified that, when Mr Dames left as CEO, the Board wanted to appoint Dr Steve Lennon as the interim or acting CEO and to restructure the business of Eskom. Mr Tsotsi got approval from Minister Gigaba for this appointment and Dr Lennon had agreed. Then Minister Gigaba called Mr Tsotsi and shouted at him for trying to appoint a white person when there was a pending general election. Mr Tsotsi said that Mr Gigaba said in effect that appointing a white person would have resulted in the ANC losing support. Mr Tsotsi testified that Minister Gigaba was “irate” and he suspected that someone had put him up to saying this. He said that he had known Mr Gigaba for a long time and the two of them had had a good relationship. Mr Tsotsi said that it was uncharacteristic of Mr Gigaba to speak to him the way he did on that occasion. Thereafter, the Minister instructed Mr Tsotsi to stop the restructuring efforts until a CEO was appointed and he requested that Mr Matjila be appointed as the acting CEO.<sup>2205</sup> In his testimony before the Commission, Mr Gigaba denied that he had been angry during his discussions with Mr Tsotsi or that he had changed his mind. However, he did confirm that he was against the appointment of Dr Lennon because he wanted to promote the transformation agenda and therefore proposed Mr Matjila.<sup>2206</sup> In this connection I believe Mr Tsotsi’s evidence and prefer it to that of Mr Gigaba. There appears to be no reason why Mr Tsotsi would have fabricated this story about Mr Gigaba. Mr Tsotsi seemed to remember the occasion very well.

209. Shortly after Mr Matjila had joined Eskom as the acting CEO, he approved the third TNA contract which did not have the termination protection clause that Eskom would usually

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<sup>2204</sup> Transcript 23 January 2020, p 10 (line 1) – p 22 (line 3).

<sup>2205</sup> Transcript 23 January 2020, p 27 (line 20) – 30 (line 24).

<sup>2206</sup> Transcript 21 June 2021, p 215, lines 11-25



include in such a contract. A complaint about the third contract was lodged with the Audit and Risk Committee of Eskom. As a result, an investigation was launched.<sup>2207</sup>

210. During the investigation it appeared that Mr Matjila had been improperly attempting to influence and communicate with the team at Sizwe Ntsaluba Gobodo (*SNG*) that was investigating the matter. For example, he sent an email to one of the investigators asking for details about the investigation. Mr Tsotsi testified that he had no knowledge of this but it was surprising, given that Mr Matjila was the subject of the investigation.<sup>2208</sup> According to Mr Tsotsi, it would not have been appropriate for Mr Matjila to involve himself in an investigation in this way when he was the subject of the investigation.<sup>2209</sup>
211. Mr Tsotsi explained that the third contract came to the Board's attention through a whistle blower who approached the Audit and Risk Committee (ARC) and claimed that Mr Matjila had not followed proper procedure in concluding the R43 million contract.<sup>2210</sup>
212. Before approaching the Board, the ARC reached the conclusion that the contract was irregular and that they required a forensic audit to establish whether this was the case.<sup>2211</sup> SNG was appointed as the audit firm.<sup>2212</sup>
213. Mr Tsotsi testified that, while the investigation was going on,<sup>2213</sup> Mr Tony Gupta called him and asked to see him at the Sahara offices in Midrand. Mr Tsotsi went to the meeting. He said that at the meeting, Mr Gupta expressed a concern about the investigation into Mr Matjila's signing of the TNA contract and wanted Mr Tsotsi to "make

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<sup>2207</sup> Transcript 23 January 2020, p 25, line 11-20.

<sup>2208</sup> Exhibit MM6, p 218. Transcript 23 January 2020, p 36 (line 3) – 37 (line 15).

<sup>2209</sup> Transcript 23 January 2020, p 38, lines 4-10.

<sup>2210</sup> Transcript 23 January 2020, p 25, line 11-20.

<sup>2211</sup> Transcript 23 January 2020, p 35, lines 17-25.

<sup>2212</sup> Transcript 23 January 2020, p 36, lines 1-2.

<sup>2213</sup> Transcript 23 January 2020, p 44, lines 13-14.

it go away". Mr Tsotsi said that Mr Tony Gupta said that the investigation was impeding the conclusion of the contract.<sup>2214</sup> Mr Tsotsi testified that he told Mr Gupta that he did not have the authority to stop the investigation. He testified that Mr Gupta was visibly upset and remarked that Mr Tsotsi was not interested in helping him.<sup>2215</sup>

214. Despite Mr Tsotsi's claim that he refused to help Mr Gupta, on 16 October 2014, Mr Tsotsi instructed the company secretary of Eskom to write to SNG instructing it not to release its report on the TNA contract until he had first spoken to SNG's chairman and CEO.<sup>2216</sup> Mr Tsotsi claimed that this was because Mr Matjila felt he was not getting a fair treatment by Eskom in this investigation and Mr Tsotsi wanted to speak to SNG and prevent litigation against Eskom in this regard.<sup>2217</sup> However, in the light of the request from Mr Gupta, this conduct on Mr Tsotsi's part seems suspicious, particularly because later in the year, Mr Tsotsi was one of only two members of the Board who were allowed to be part of the next Board of Eskom. If the Guptas were too unhappy with him, they would not have allowed him to go to the next Board and be its Chairperson.

215. On 29 October 2014 the Public Protector wrote to Mr Tsotsi. The letter stated that the Public Protector had read in the media that Mr Matjila had signed a R43 million contract with TNA. The letter stated that the Public Protector was dismayed to see the contract was concluded despite the fact that she was investigating the legality of the other two TNA contracts. This was particularly so in circumstances where the contract was concluded against internal legal advice and was in excess of the sponsorship budget. She implored Mr Tsotsi, in the interests of corporate governance, transparency and

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<sup>2214</sup> Transcript 23 January 2020, p 41 (line 20) – 42 (line 25).

<sup>2215</sup> Transcript 23 January 2020, p 43, lines 5-17.

<sup>2216</sup> Exhibit MM6, p 221.

<sup>2217</sup> Transcript 23 January 2020, p 40, lines 1-19.

accountability, to hold the new contract in abeyance pending the release of her provisional report in respect of the first two TNA contracts at Eskom.<sup>2218</sup>

216. On 31 October 2014 a new CEO, Mr Tshediso Matona, was appointed.<sup>2219</sup> Mr Matjila was then removed as acting CEO and reverted to serving Eskom only in the capacity of a member of the Board.<sup>2220</sup> Mr Matjila resigned from the Board in December 2014.<sup>2221</sup>

217. In his evidence, Mr Tsotsi denied that Mr Matjila's removal had anything to do with the TNA contract or the letter from the Public Protector.<sup>2222</sup>

218. On 7 November 2014 the ARC sent the SNG report to the Board.<sup>2223</sup>

219. The key conclusions of the SNG investigation report were that the contract was irregular because it did not fall under Mr Matjila's delegation of authority and that it was a sponsorship and not an investment. The guidelines set out for sponsorship agreements had not been followed. In addition, the report found that the early termination clause had been removed against the advice of the legal department at Eskom.<sup>2224</sup> The report found that Mr Choeu and Mr Matjila had been responsible for the removal of the clause.<sup>2225</sup>

220. On 24 November 2014 there was a Board meeting.<sup>2226</sup> At the meeting the Board discussed the findings of the investigation that the R43 million contract was irregular

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<sup>2218</sup> Exhibit MM6, pp 364-365.

<sup>2219</sup> Transcript 23 January 2020, p 49, lines 8-24.

<sup>2220</sup> Transcript 23 January 2020, p 50, lines 7-10.

<sup>2221</sup> Transcript 23 January 2020, p 50 (line 16) – 51 (line 3).

<sup>2222</sup> Transcript 23 January 2020, p 50, lines 1-8.

<sup>2223</sup> Transcript 23 January 2020, p 51, lines 12-15. The SNG report appears in exhibit MM6, p 233.

<sup>2224</sup> Transcript 23 January 2020, p 56, lines 4-22.

<sup>2225</sup> Transcript 23 January 2020, p 57, lines 1-12.

<sup>2226</sup> Exhibit MM3, p 336.

and, therefore, needed to be reported in the Eskom financial statements. The auditors addressed the Board on what steps had to be taken to address the irregularity in those statements.<sup>2227</sup> This meeting was held to determine how to deal with the irregularity in the interim financial statements.<sup>2228</sup>

221. During the meeting Mr Tsotsi raised the fact that he had received a letter from Mr Matjila complaining about the SNG investigation and making allegations against the financial director of Eskom, Ms Tsholofelo Molefe.<sup>2229</sup> Ms Molefe had queried the contract around the time of its conclusion. In an email of 7 May 2014, she had raised the issue that she had understood that the contract was going to be for a shorter duration with fewer breakfast briefings in order to be aligned with Eskom's sponsorship strategy. She noted in the email that the budget had not been approved for the contract.<sup>2230</sup>

222. Mr Tsotsi testified that one of the recommendations from the SNG report was that Eskom should obtain a legal opinion on the disciplinary action Eskom should take against Mr Matjila and Mr Choeu, as well as the company's position in respect of the contract.<sup>2231</sup> The Board therefore instructed a law firm, Ledwaba Mazwai, to provide an opinion on the legal effects of Mr Matjila's conduct in regard to the third TNA contract.

223. The next Board meeting occurred on 3 December 2014.<sup>2232</sup> At this meeting, the Board considered Ledwaba Mazwai's advice on the legal effects of Mr Matjila's actions with respect to the third TNA contract.

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<sup>2227</sup> Transcript 23 January 2020, p 52, lines 17-22.

<sup>2228</sup> Transcript 23 January 2020, p 53, lines 1-6.

<sup>2229</sup> Transcript 23 January 2020, p 54, lines 2-19.

<sup>2230</sup> Transcript 23 January 2020, p 55, lines 10-21.

<sup>2231</sup> Transcript 23 January 2020, p 58, lines 14-25.

<sup>2232</sup> Exhibit MM3, p 343.

224. The minutes of the meeting record that Mr Mazwai's report back was that, if the contract was ratified, there would be no irregularity; that Mr Matjila had exceeded his authority in concluding the contract; and that Mr Choeu had removed the termination clause against legal advice, but that Mr Matjila appeared not to have known about this. It is not clear whether Mr Mazwai was aware of the email from Mr Choeu to Mr Matjila of 2 May 2014 in which he alerted Mr Matjila to the termination clause's removal.
225. Mr Tsotsi agreed during his testimony that, given Eskom's precarious financial position, it was essential that there was an exit clause in a contract for R43 million with TNA in case the spend was no longer viable for Eskom.<sup>2233</sup>
226. Mr Mazwai also indicated in his advice to the Board that disciplinary action should be taken against Mr Choeu. The minutes of the 3 December 2014 meeting reflect that the Board took the view that it was not their responsibility to take disciplinary action against Mr Choeu because he did not report to the Board and was an employee of Eskom.<sup>2234</sup>
227. However, as set out above, the PFMA provides that the Board was the accounting authority of Eskom and was responsible for ensuring that appropriate disciplinary action be taken where someone was engaging in irregular expenditure.
228. Mr Tsotsi accepted that this was the correct legal position even though this was not recorded in the minutes.<sup>2235</sup> Mr Tsotsi stated that every Board member is required to acquaint themselves with their legal responsibilities from their first day in office and should continue to ensure that legal advice is sought when difficult legal issues arise.<sup>2236</sup> Mr Tsotsi confirmed that he understood that it was the Board's responsibility to take

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<sup>2233</sup> Transcript 23 January 2020, p 62, lines 17-25.

<sup>2234</sup> Exhibit MM3, p 345.

<sup>2235</sup> Transcript 23 January 2020, p 64 (line 15) – 65 (line 5).

<sup>2236</sup> Transcript 23 January 2020, p 67, lines 13-23.

effective disciplinary action against Eskom employees who committed irregular or wasteful expenditure and that the Board was expected to do so when it discussed and deliberated upon the R43 million contract.<sup>2237</sup>

229. Mr Tsotsi testified that the minutes did not reflect this understanding but that it was indeed what was discussed and agreed at the meeting. He said that the Board had intended for management to execute the required disciplinary process.<sup>2238</sup>

230. This position was confirmed by Mr Mkwanazi's testimony. Mr Mkwanazi, another outgoing member of the Eskom Board, also testified about the SNG forensic report and the conclusions it reached about Mr Matjila and Mr Choeu and their misconduct under the PFMA. He agreed that the Board had an obligation under the PFMA to take action in this regard. He testified that he understood that Mr Matjila had reverted to being a non-executive director and that "corrective" or disciplinary action could not be taken against him in this regard; and that Mr Choeu was still an employee of Eskom and that disciplinary action had to be taken against Mr Choeu. It was his understanding that the new Board was going to take that action.<sup>2239</sup>

231. The minutes of the meeting of 3 December 2014 reflected that "from the standpoint of the financial status of Eskom, the contract could not be regarded as a good contract".<sup>2240</sup> It was resolved that a special Board meeting should be convened on 8 December 2014 to "finalise this issue".<sup>2241</sup>

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<sup>2237</sup> Transcript 23 January 2020, p 68 (line 23) – 69 (line 1).

<sup>2238</sup> Transcript 23 January 2020, p 65, lines 3-22. See also p 66 (line 23) – 67 (line 7).

<sup>2239</sup> Transcript 17 July 2020, p 228 (line 10) – 229 (line 18).

<sup>2240</sup> Exhibit MM3, p 347.

<sup>2241</sup> Exhibit MM3, p 348.

232. On 4 December 2014 the Board received Ledwaba Mazwai's final report.<sup>2242</sup> The report was to the effect that the Board could ratify the contract if it represented good value for money when compared to the costs of sponsorship.<sup>2243</sup> Ledwaba Mazwai confirmed that they could not offer any input on whether the contract was good value for money.<sup>2244</sup> They said that the Board would have to make this judgement call itself.
233. On 8 December 2014 the Board had another meeting.<sup>2245</sup> Mr Tsotsi testified that the major purpose of the meeting was to discuss the legal opinion.<sup>2246</sup> The Board made a note that under the National Treasury regulations, it was required to notify the Minister, National Treasury and the Auditor General of Mr Matjila's conduct. It was found that he was in wilful breach of the PFMA requirements and this conduct had to be reported. However, Mr Tsotsi testified that he did not recall this ever having happened and there were no records that this was done.<sup>2247</sup> He conceded that it ought to have been done.<sup>2248</sup>
234. The minutes also stated that the Board had to determine whether the contract was wasteful and fruitless expenditure based on whether it had commercial value.<sup>2249</sup> The minutes recorded that Mr Tsotsi noted that the discussions up to that point had been about irregularity and that this should be separated from the issue of fruitless and wasteful expenditure – i.e. the commercial value of the contract. He stated that “the Board had to be convinced that the contract was not a bad one.” Thereafter, Ms Luthuli, who was the Chair of ACR at the time, recorded that “the handover report had to reflect

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<sup>2242</sup> Transcript 23 January 2020, p 75, lines 17-20. See exhibit MM3, p 180.

<sup>2243</sup> Exhibit MM3, p 190, para 4.1.3.2

<sup>2244</sup> Exhibit MM3, p 190, para 4.1.4.

<sup>2245</sup> Exhibit MM3, p 349.

<sup>2246</sup> Transcript 23 January 2020, p 77, lines 10-19.

<sup>2247</sup> Transcript 23 January 2020, p 74, lines 4-17.

<sup>2248</sup> Transcript 23 January 2020, p 77 (line 20) – 78 (line 14); p 79, lines 19-21. See also exhibit MM3, p 351.

<sup>2249</sup> Exhibit MM3, pp 351-352.

that the Board had considered whether or not the contract was a bad one and had concluded that the contract was not good at this time.”<sup>2250</sup>

235. Mr Tsotsi confirmed that the Board was of the view that the contract was not a good one and that that finding needed to be reflected in the handover report to the new Board.<sup>2251</sup> He confirmed that the Board considered the contract and concluded that it “was not a good contract for Eskom at this time”.<sup>2252</sup>

236. Mr Mkwanazi clarified that it was clear already to the Board that the conclusion of the contract by Mr Matjila was irregular because he had exceeded his authority, the termination clause had been removed, and there was no budget.<sup>2253</sup> However, as to whether it was fruitless and wasteful expenditure, he testified that one needed to have a specialist to determine what value Eskom was getting for the R43million. He explained that the outgoing Board had not yet engaged in that analysis.<sup>2254</sup>

237. Mr Mkwanazi stated that the reference to the contract being a “bad contract” in the minutes of the meeting 8 December 2014 of the Board was both that it did not have an exit clause and that Eskom was experiencing financial difficulties at the time and did not have a budget for this expense. He said that to spend R43 million on this contract would make it a “bad contract.”<sup>2255</sup> Mr Mkwanazi also confirmed that this conclusion about it being a bad contract had to be conveyed to the new Board through the handover report.<sup>2256</sup>

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<sup>2250</sup> Exhibit MM3, p 352.

<sup>2251</sup> Transcript 23 January 2020, p 82 (line 22) – 83 (line 2).

<sup>2252</sup> Transcript 23 January 2020, p 83, lines 12-16.

<sup>2253</sup> Transcript 17 July 2020, p 230, lines 13-15; p 231, lines 1-15.

<sup>2254</sup> Transcript 17 July 2020, p 229 (line 19) – 230 (line 6).

<sup>2255</sup> Transcript 17 July 2020, p 234, lines 5-15.

<sup>2256</sup> Transcript 17 July 2020, p 235 (line 24) – 236 (line 4).



238. The Board also resolved at this meeting that Ledwaba Mazwai and the company secretary should prepare a summary and final resolution on the discussions and decisions around the TNA Sponsorship contract for signing by the chairman of the Board and the ARC for inclusion in the handover report to the new Board.<sup>2257</sup>

239. The outgoing Board did not vote on the ratification of the contract, even though it had received the reports of SNG and Ledwaba Mazwai and had already received Mr Matjila's representations on the value of the contract and its regularity (dated 27 November 2014), prior to their final meeting on 8 December 2014.<sup>2258</sup> This suggests that it was not yet in a position to vote on the ratification and wanted further information in order to do so. However, when the new Board came in, they were given no additional information and yet saw fit to ratify the contract. This decision is considered in greater detail below.

240. On 11 December 2014 the outgoing Board was replaced by the new Board.<sup>2259</sup>

#### The timeline of the ratification – the incoming Board

241. There had been advertisements for new Eskom Board members in September 2014. Mr Gigaba had been Minister of Public Enterprises from 1 November 2010. He was Minister of Public Enterprises until May 2014. Ms Lynne Brown succeeded him after the general election of May 2014.<sup>2260</sup>

242. There was evidence presented to the Commission that Mr Tony Gupta and his associate, Mr Salim Essa, were close to Minister Brown and that they were involved

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<sup>2257</sup> Exhibit MM3, p 353.

<sup>2258</sup> Transcript 31 October 2019, p 36 (line 1) – 38 (line 23). The response is exhibit MM6, pp 238- 243.

<sup>2259</sup> Transcript 23 January 2020, p 83, lines 19-22.

<sup>2260</sup> Transcript 23 January 2020, p 86, lines 8-15.

with Minister Brown's selections of the new Board and the allocation of Board members to different Board committees. Mr Tsotsi testified that Mr Essa sent him a document stating which Board committees he had been allocated to; and then Minister Brown sent him a document setting out an identical allocation. In addition, Mr Tsotsi testified that he was summoned to Minister Brown's house briefly and instructed to make allocations as set out in the document that Ms Brown had given him which was the same as the one Mr Tsotsi had received from Mr Essa. Mr Tsotsi testified that, when he came to Ms Brown's residence, Mr Gupta and Mr Essa were both present at Minister Brown's house.<sup>2261</sup>

243. Mr Pamensky was a member of the new Board of Eskom that took office after 11 December 2014.<sup>2262</sup> Mr Pamensky is a chartered accountant and he had sat on 25 boards before taking this position.<sup>2263</sup>

244. Mr Pamensky testified that he discovered the Board position being advertised around 28 September 2014 and felt he had the appropriate skills to apply for the position.<sup>2264</sup> However, it transpired that he was also, at the time of applying for the position, a director of Oakbay Resources and Energy Limited – a Gupta-affiliated company.<sup>2265</sup> He became a director on 25 September 2014, a matter of days before the advert came out for the Eskom board position and his application for that role. Mr Pamensky testified that he became a director of Oakbay after being approached by Mr Atul Gupta.<sup>2266</sup> He also

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<sup>2261</sup> Transcript 23 January 2020, p 90 (line 17) – 96 (line 16).

<sup>2262</sup> Transcript 31 October 2019, p 5, line 3.

<sup>2263</sup> Transcript 31 October 2019, p 5, lines 16-20.

<sup>2264</sup> Transcript 31 October 2019, p 6, lines 5-10.

<sup>2265</sup> Transcript 31 October 2019, p 8, lines 20-25.

<sup>2266</sup> Transcript 31 October 2019, p 9, lines 15-20.

explained that he met Mr Tony Gupta in June 2014 at the Gupta home in Saxonwold.<sup>2267</sup>

Then he had a follow up meeting with Mr Atul Gupta in August 2014.<sup>2268</sup>

245. This information, together with Minister Brown's close association with the Guptas during the selection of the new Board, raises serious questions about the Board's independence. This was the very Board that went on to approve and ratify the R43 million contract with TNA without determining whether the contract was good value for money. In fact elsewhere in this report the Commission finds that that Board was not independent and, in many ways, made decisions that advanced the interests of the Guptas about those of Eskom.

246. The new Board had its first meeting on 16 January 2015. At no point during this meeting was the ratification of the R43 million contract discussed, despite the fact that it had been held over from the previous year and required attention.<sup>2269</sup> The next Board meeting was scheduled for 16 February 2016.<sup>2270</sup> However, between these two dates, a round robin resolution was circulated for the Board to ratify the R43 million TNA contract.<sup>2271</sup>

247. Furthermore, contrary to the intentions of the previous Board, the handover report to the new Board made no mention of the findings of the previous Board regarding the financial value of the contract and it being a bad one for Eskom at the time.<sup>2272</sup> Under "outstanding issues", it recorded only "Reportable irregularity identified by the external auditors during the review of the 30 September 2015 interim results. This matter was

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<sup>2267</sup> Transcript 31 October 2019, p 10, lines 1-5.

<sup>2268</sup> Transcript 31 October 2019, p 11, lines 13-18.

<sup>2269</sup> Transcript 23 January 2020, p 96 (line 20) – 97 (line 21). See also the minutes, exhibit MM3, p 366.

<sup>2270</sup> Transcript 23 January 2020, p 108, lines 10-15.

<sup>2271</sup> Transcript 23 January 2020, p 106, lines 11-13.

<sup>2272</sup> Exhibit MM6, p 361 (the ARC report).

reported to and dealt with by the Board.”<sup>2273</sup> Mr Pamensky, an incoming Board member, testified that the “outstanding issues” portion of the ARC report in the Board’s handover reports, indicated to him that the irregular expenditure issue of the TNA contract had been dealt with by the previous Board and was therefore not an issue coming across for the new Board to deal with.<sup>2274</sup>

248. Mr Tsotsi confirmed that the minutes of the Board meetings of 24 November, 3 December and 8 December 2014 should also have formed part of the handover report but were inadvertently excluded.<sup>2275</sup> Mr Tsotsi conceded that, when the new Board voted on the round robin resolution regarding the TNA contract, there was important communication that the new Board should have seen about the old Board’s view on the TNA contract.<sup>2276</sup> Mr Pamensky testified that, now having read the minutes of 3 December 2014, it was relevant that the old Board had determined it was necessary to assess whether there was value in the TNA contract.<sup>2277</sup> He also confirmed that, as a new member of the Board, he believed it was necessary for him to know about the minutes of the 3 and 8 December 2014 meetings and the conclusion that the contract with TNA was a “bad contract”. In fact, he said the remaining directors were “duty bound” to inform the new Board of this.<sup>2278</sup>

249. Mr Tsotsi testified that it would have been the job of the secretariat to convey the correct handover information to the new Board.<sup>2279</sup> However, he accepted that he and Ms Mabude were the only two non-executive directors who were retained from the old

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<sup>2273</sup> Exhibit MM6, p 361.

<sup>2274</sup> Transcript 31 October 2019, p 29, lines 20-25.

<sup>2275</sup> Transcript 23 January 2020, p 99 (line 24) – 101 (line 21).

<sup>2276</sup> Transcript 23 January 2020, p 102 (line 16) – 103 (line 15).

<sup>2277</sup> Transcript 31 October 2019, p 36 (line 22) – 37 (line 1).

<sup>2278</sup> Transcript 31 October 2019, p 41, lines 1-13.

<sup>2279</sup> Transcript 23 January 2020, p 103, lines 5-24.

Board and therefore the only ones who would have known about the need to ensure that the correct information was given to the new Board. Mr Tsotsi, therefore, accepted that, as Chair of the Board and a member of the old Board, he was responsible for ensuring the handover information was correct and that the Board's views at the 8 December 2014 meeting were accurately reflected.<sup>2280</sup>

250. Mr Tsotsi admitted that the incoming Board did not have all the information it needed to make a properly informed decision on the TNA contract in the round robin resolution.<sup>2281</sup>

251. The round robin resolution was circulated on 3 February 2015.<sup>2282</sup> The document contained a "summary of facts".<sup>2283</sup> Despite Mr Tsotsi having signed the document to confirm that its contents were correct, he admitted during his testimony that he did not in fact read the document and he now accepted that there were errors in it.<sup>2284</sup> He explained that he realised later that the document erroneously stated that Mr Choeu was no longer an employee of Eskom.<sup>2285</sup>

252. The round robin statement was also incorrect in a number of ways.

252.1. It stated that the SNG report was only presented to the Board on 8 December 2014, when it was already with them on 24 November 2014.<sup>2286</sup>

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<sup>2280</sup> Transcript 23 January 2020, p 104, lines 1-6.

<sup>2281</sup> Transcript 23 January 2020, p 107, lines 10-25.

<sup>2282</sup> Exhibit MM6, p 234.

<sup>2283</sup> Exhibit MM6, pp 236-237.

<sup>2284</sup> Transcript 23 January 2020, p 111, lines 10-20.

<sup>2285</sup> Transcript 23 January 2020, p 112, lines 20-25.

<sup>2286</sup> Transcript 23 January 2020, p 117, lines 5-13.

- 252.2. It stated that the parties involved in the TNA contract were “no longer within the sphere of Eskom’s operations”. This was not true as Mr Choeu was still an employee.<sup>2287</sup>
- 252.3. There was also a statement that Mr Tsotsi admitted did not make any sense.<sup>2288</sup> This is that statement: “The parties involved [it is not clear which parties] had divergent views on the specific aspects of the matter as such scarce resources would have to be deployed to bring these contentious matters to finality.”<sup>2289</sup>
- 252.4. It also stated: “Considering the representations made by the then Interim CE, there exists a difference of interpretation regarding the provisions of the Company’s Delegations of Authority (“DoA”) that needs to be reviewed and clarified further in order to close any gaps which may be present.”<sup>2290</sup> However, Ledwaba Mazwai had rejected Mr Matjila’s interpretation of his delegation of authority. They had no difficulty in doing so.<sup>2291</sup> Mr Matjila’s version was that the TNA contract was an investment and the delegation allowed him to conclude investment agreements to the value of the TNA contract. Ledwaba Mazwai, however, considered there to be no merit in this interpretation. Mr Matjila’s interpretation was simply untenable. Therefore, for the round robin statement to have framed this as a legitimate “difference of interpretation” was misleading. Mr Tsotsi testified that he did not write this statement and he did not vet the document well enough. Had he done so, he would have phrased this point differently.<sup>2292</sup>

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<sup>2287</sup> Transcript 23 January 2020, p 117, lines 15-25.

<sup>2288</sup> Transcript 23 January 2020, p 118, line 20.

<sup>2289</sup> Exhibit MM6, p 236.

<sup>2290</sup> Exhibit MM6, pp 236-237.

<sup>2291</sup> Transcript 23 January 2020, p 119, lines 8-16.

<sup>2292</sup> Transcript 23 January 2020, p 122, lines 14-18 and p 119, lines 20-22.

252.5. The most egregious misrepresentation in the document is the statement that “The Board recognises that there is value in platforms that enable Eskom to interact with the public to communicate and garner support for the work that it is doing to ensure that South Africa has sufficient energy. In this regard, the Contract provides an opportunity for Eskom to achieve the aforesaid objectives.”<sup>2293</sup> This directly contradicts the finding of the previous Board that this was not a good contract for Eskom and that no investigation *at all* had been done into the commercial value of the contract.

253. Mr Tsotsi’s testimony was in accordance with that of Mr Mkwanazi. He and Mr Mkwanazi accepted that the old Board had never actually determined whether the contract had commercial value.<sup>2294</sup> Mr Tsotsi therefore admitted that this round robin was circulated and voted on without the Board ever determining whether the contract had commercial value for Eskom.<sup>2295</sup>

254. Mr Tsotsi testified that the Board had to determine whether to cancel or ratify the contract and they ultimately decided it was better to ratify it because otherwise there would be considerable financial implications for Eskom.<sup>2296</sup>

255. However, he conceded that there could not have been consensus on this point, because then the outgoing Board would simply have ratified the contract then, instead of leaving it to the new Board.<sup>2297</sup> Leaving the issue to be resolved by the incoming

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<sup>2293</sup> Exhibit MM6, p 237.

<sup>2294</sup> Transcript 23 January 2020, p 124 (line 10) – 125 (line 18).

<sup>2295</sup> Transcript 23 January 2020, p 125, lines 19-25.

<sup>2296</sup> Transcript 23 January 2020, p 128 (line 10) – 129 (line 6).

<sup>2297</sup> Transcript 23 January 2020, p 129 (line 9) – 130 (line 5).

Board, implied that the outgoing board considered it necessary to determine the commercial value of the contract before ratifying it – which was never done.

256. Mr Tsotsi also conceded that the way the draft round robin resolution was phrased was such as to give the impression that it had been determined that there was commercial value, which was not the case.<sup>2298</sup>

257. The round robin resolution also did not even include the actual contract that the Board was being asked to ratify. Mr Tsotsi said it was “meant to be included”.<sup>2299</sup> The minutes were also meant to be included, according to Mr Tsotsi, but were not.<sup>2300</sup>

258. Mr Tsotsi admitted that, even though he realised there were errors in the document, he did not go back to the Board members after they had cast their votes to alert them to these errors.<sup>2301</sup> He said he was going to explain the errors at the next Board meeting of 19 March 2015 but the minutes of that meeting do not reflect that this was discussed.

259. Mr Tsotsi admitted that Mr Choeu was supposed to be disciplined and this was part of the fiduciary duties of the Board. However, he testified that he left the Board of Eskom at the end of March 2015 and so did not know what the Board did in this regard.<sup>2302</sup> This was not a proper discharge of his duties as Board member. Mr Tsotsi accepted that the new Board was misled about Mr Choeu’s continued employment at Eskom. He was one of only two continuing Board members who would have been aware of the outgoing Board’s intention to discipline Mr Choeu. His failure to ensure that this took place was

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<sup>2298</sup> Transcript 23 January 2020, p 130 (line 24) – 130 (line 2).

<sup>2299</sup> Transcript 23 January 2020, p 133, lines 15-20.

<sup>2300</sup> Transcript 23 January 2020, p 134, lines 1-6.

<sup>2301</sup> Transcript 23 January 2020, p 114, lines 19-23.

<sup>2302</sup> Transcript 23 January 2020, p 139 (line 11) – 140 (line 5).



a dereliction of duty. Leaving the organisation is no excuse. It ought to have been part of the round robin resolution or resolved shortly thereafter.

260. Mr Tsotsi also confirmed that Eskom never even attempted to renegotiate the contract with TNA.<sup>2303</sup>

#### The breached obligations of the Board

261. The number of inaccuracies in the round robin resolution; the fact that the round robin resolution was used instead of a proper Board meeting, when there was a new Board and the outgoing Board had seen fit to meet several times regarding the TNA issue; the fact that Mr Tsotsi – upon realising how many mistakes and omissions were in the round robin resolution – does not appear to have ever corrected them with the incoming Board; together with his interactions with the Guptas and his actions in respect of the Public Protector (set out below), seems to indicate that there is a very real possibility that Mr Tsotsi actively sought to “sweep the contract under the rug” and try to have it ratified.
262. This could have been, as Mr Mkwanazi’s evidence seemed to indicate, from the desire to just fix an “irregularity” that would have been a headache for the Board from an auditing perspective (and legally under the PFMA). However, this could have also been more sinister, and stemming from direct or indirect/general pressure from the Guptas or their sympathisers. Regardless, even if Mr Tsotsi did not wilfully attempt to influence the ratification of the contract, at best for him, he acted negligently and in contravention of his fiduciary duties and his legal duties as a member of an accounting authority of a public entity. This negligence facilitated wasteful expenditure and the siphoning of public funds from an already overburdened public body.

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<sup>2303</sup> Transcript 23 January 2020, p 151 (line 21) – 152 (line 7).

263. As for the other members of the Board, Mr Pamensky testified that, had he known various information that was not apparent from the round robin draft resolution, he would have been more sceptical about ratifying the contract. This included the following:

263.1. Mr Pamensky testified that he was “surprised” to learn that there was no Eskom branding at the breakfast briefings, and that the address by the sponsor was not even aired. He concluded that this was not helpful in promoting the Eskom 49M campaign.<sup>2304</sup> Mr Pamensky noted that, if he had been aware of what Mr Pretorius said in his evidence about the lack of branding and the utility of the campaign, then he would have been very sceptical about it.<sup>2305</sup> He added that he would have also been very concerned if he had been aware that because of TNA’s reputation, Eskom was finding it difficult even to fill its tables at the breakfast briefings.<sup>2306</sup>

263.2. Mr Pamensky testified that he was not aware at the time that the round robin resolution was incorrect about Mr Choeu no longer being with Eskom.<sup>2307</sup>

263.3. Mr Pamensky testified he was unaware of the fact that Eskom had been asked to answer Parliamentary questions about TNA and he did not know that the Public Protector had expressed concern about the contract and the business briefings, nor of what was in the media and thus he did not realise that there was any reputational or other risk to Eskom in continuing with the contract.<sup>2308</sup>

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<sup>2304</sup> Transcript 31 October 2019, p 46 (line 18) – 47 (line 10).

<sup>2305</sup> Transcript 31 October 2019, p 47 (line 23) – 48 (line 6).

<sup>2306</sup> Transcript 31 October 2019, p 48, lines 7-16.

<sup>2307</sup> Transcript 31 October 2019, p 55, lines 15-20.

<sup>2308</sup> Transcript 31 October 2019, p 71 (line 10) – 72 (line 4).

He testified that, if he had realised that, it would have given him pause for thought about the contract.<sup>2309</sup>

263.4. Mr Pamensky stated that he reached the conclusion that the TNA contract had some value because of what Mr Matjila said in his representations. In his representations, Mr Matjila had said:

263.4.1. there had been two prior contracts with similar subject matter but what he neglected to mention was that those two contracts were also irregular – which Mr Pamensky accepted would have made him more sceptical.<sup>2310</sup>

263.4.2. the platform had been a success in promoting awareness of the 49M campaign. However, he did not state that the Media Shop, in response to questions from Parliament about the contract, had told Eskom that there was no way to establish if the business briefings had anything to do with that success. He also accepted that, if he had known this, he would have been more sceptical.<sup>2311</sup>

263.4.3. the contract was a renewal and that it allowed savings of 17%.<sup>2312</sup> Mr Pamensky accepted that he did not use the word “renewal” but that that is the impression created because he said that there were two previous contracts of the same subject matter that had expired.<sup>2313</sup> Mr Matjila’s representations did not reveal that there had been a gap of a year between the second and third contracts which meant that it could not

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<sup>2309</sup> Transcript 31 October 2019, p 72, lines 5-7.

<sup>2310</sup> Transcript 31 October 2019, p 95 (line 5) – 96 (line 5).

<sup>2311</sup> Transcript 31 October 2019, p 96 (line 20) – 97 (line 11).

<sup>2312</sup> Transcript 31 October 2019, p 102 (line 23) – 103 (line 20).

<sup>2313</sup> Transcript 31 October 2019, p 104, lines 1-17.

have been an extension of an existing service or contract. Mr Pamensky accepted that, if he had known this and that the gap was caused by the reputational problems with TNA, he would have approached what Mr Matjila said differently.<sup>2314</sup>

263.4.4. Mr Pamensky testified that he also took comfort in the fact that the Chair had submitted this round robin resolution – he believed the Board viewed the contract to have value.<sup>2315</sup>

263.5. Mr Pamensky accepted that under the PFMA it is an act of financial misconduct to knowingly or negligently permit fruitless and wasteful expenditure; and that the Board was therefore required, in ratifying the contract, to ensure that there was value in the contract so that it was not fruitless and wasteful.<sup>2316</sup> He accepted that, if the Board knew everything that Mr Pamensky knew now, the ratification of the contract with TNA would have constituted wasteful expenditure.<sup>2317</sup> He agreed he would have called for further investigation and would not have ratified the contract.<sup>2318</sup>

263.6. Mr Pamensky testified that he was not aware that the Public Protector had written to Mr Tsotsi on 29 October 2014, and again thereafter, requesting that the contract be put on hold pending her report. He stated that, if he had known this, he would have taken the request very seriously.<sup>2319</sup>

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<sup>2314</sup> Transcript 31 October 2019, p 104 (line 18) – 105 (line 5).

<sup>2315</sup> Transcript 31 October 2019, p 98, lines 1-10.

<sup>2316</sup> Transcript 31 October 2019, p 109 (line 19) – 110 (line 16).

<sup>2317</sup> Transcript 31 October 2019, p 111, lines 6-9.

<sup>2318</sup> Transcript 31 October 2019, p 129, lines 7-10.

<sup>2319</sup> Transcript (31 October 2019, p 124 (line 20) – p 125 (line 9).

263.7. It was put to Mr Pamensky that one of his fellow board members, Ms Klein, had stated before the Parliamentary Portfolio Committee that she had raised the issue that Mr Choeu had not been disciplined at a subsequent board meeting. Mr Pamensky testified that he was not in that meeting but if he had been, he would have asked for an investigation.<sup>2320</sup>

264. Mr Pamensky therefore made a number of fair concessions about the inadequacy of the information that was placed before the Board. He was also clear that, had this information been known to him at the time, he would have demanded that the necessary investigations take place. Mr Pamensky certainly cannot be accountable for what he did not know unless his ignorance was as a result of him not taking reasonable steps to inform himself about matters. However, he and his fellow Board members were accountable for what they did know and the decisions they took based on what was placed before them.

265. From a proper consideration of the round robin pack alone, it should have been apparent to any reasonable person who considered it that the summary of facts made very little sense and was ambiguous. It would also have been glaringly clear that the draft resolution pack did not even contain the very contract that the Board was being asked to ratify. Nobody who sits on a Board of a company and knows what they are doing can ratify a contract that he or she has not seen or read unless he or she does not care about the interests of the company or seeks to achieve someone else's agenda. It would also have been obvious that there was no proper assessment of the value of the contract. Despite this, the Board was being asked to ratify a R43 million

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<sup>2320</sup> Transcript 31 October 2019, p 127, lines 4-12.

contract at a time when the government had just given Eskom a R23 *billion* support subsidy a few months earlier.<sup>2321</sup>

266. The Board members ought to have been aware of the provisions of the PFMA, particularly section 51 (as set out above) which requires the Board to prevent irregular and wasteful expenditure, but, the evidence of Mr Pamensky and Mr Tsotsi confirms that they had no sense of the value of the contract before ratifying it. The Board was also obliged to *identify* wasteful expenditure under the PFMA, and take action against those who caused it, but could not do so if it never evaluated the commercial value of the contract. Mr Tsotsi's conduct in ratifying this contract and in failing to ensure that the new Board was made fully aware of all the facts about this contract and what the previous Board – of which he was the Chairperson – had said about this contract can only lead to the conclusion that he was either advancing the agenda of the Guptas or was so incompetent that he should never have been a director of a company, not to speak of being Chairperson of Eskom. It is incomprehensible how he could have acted in the manner he did unless the situation was one of the two.

267. Mr Pamensky testified that at the stage when he was asked to ratify the TNA contract, he did not familiarise himself with the PFMA, even though he had never served on a public board before.<sup>2322</sup> Mr Pamensky agreed that it was important for board members of state owned enterprises to be familiar with the PFMA and that there were heightened obligations for board members of state owned entities compared to those in private companies because they are spending public funds.<sup>2323</sup> Mr Pamensky said he accepted

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<sup>2321</sup> Transcript 31 October 2019, p 15, lines 5-11.

<sup>2322</sup> Transcript 31 October 2019, p 15, lines 12-18.

<sup>2323</sup> Transcript 31 October 2019, p 16, lines 2-15.

at the level of principle that each member of the accounting authority should know what is required of them so as not to engage in financial misconduct.<sup>2324</sup>

268. Strangely, however, Mr Pamensky testified that he only became familiar with the PFMA about six months after he had been appointed as a member of the Eskom Board.<sup>2325</sup> In this regard he particularly referred to the obligation under section 51(1)(e) that the Board was responsible for taking disciplinary action against employees that were guilty of causing irregular or wasteful expenditure.<sup>2326</sup> He later claimed that a Board member could only be expected to understand their full obligations under the PFMA after about 3 to 4 years of serving on the Board.<sup>2327</sup>

269. Quite clearly, this is a self-serving and preposterous claim. Board members are individually liable under the PFMA for performing their functions and keeping other officials and delegates accountable for the performance of their duties. They are given no grace period for doing so. Failure to do so would necessarily amount to negligence or even gross negligence.

270. There was one reason that could serve as justification for ratifying the contract. It was that it would be in the best interests of Eskom for the Board to ratify the contract because otherwise Eskom would have been bound by the contract in any event; failure to ratify the contract would amount to a repudiation; and TNA could have claimed damages for the full value of the contract (R43 million) while Eskom would get no value out of it. However, the new Board could not justifiably argue that ratifying this contract was in the

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<sup>2324</sup> Transcript 31 October 2019, p 22 (line 25) – 23 (line 3).

<sup>2325</sup> Transcript 31 October 2019, p 16, lines 20-25.

<sup>2326</sup> Transcript 31 October 2019, p 19, lines 1-15.

<sup>2327</sup> Transcript 31 October 2019, p 34, lines 1-22.

best interests of Eskom. How could they argue that when they did not even know the terms of the contract when they ratified it?

271. There was an option open to the Board which does not appear to have been considered.

271.1. Mr Tsotsi testified that he had no idea that the Board could have gone to court to have the contract set aside as invalid and was therefore not obliged to ratify it.<sup>2328</sup>

271.2. Mr Pamensky claimed that he was under the impression that, if the Board did not ratify the contract, this was tantamount to repudiation and they would have had to pay damages to TNA.<sup>2329</sup> He claimed that Eskom would then have suffered R43 million in damages but received no value.<sup>2330</sup> He said that this belief came from the Ledwaba Mazwai opinion furnished to the new Board.<sup>2331</sup>

272. This perception unfortunately stems from some hasty legal advice sought by the outgoing Board from Ledwaba Mazwai. It must be borne in mind that the instructions to Ledwaba Mazwai were given on a very urgent basis and also asked only about two options in respect of the contract – the prospects of ratification or cancellation. The brief was to answer two questions, namely:

272.1. whether the ratification of the TNA contract was an option available to Eskom, and, if it was, what the implications of ratification were; and

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<sup>2328</sup> Transcript 23 January 2020, p 152, lines 20-25.

<sup>2329</sup> Transcript 31 October 2019, p 76 (line 15) – 77 (line 25).

<sup>2330</sup> Transcript 31 October 2019, p 77, lines 1-5.

<sup>2331</sup> Transcript 31 October 2019, p 78 (line 20) – 79 (line 20). Relying on the opinion, exhibit MM3, p 190, para 4.1.3.2.2.



272.2. whether cancellation of the contract was available to Eskom and what the implications thereof were.<sup>2332</sup>

273. The brief did not seek all solutions pertaining to the contract. Indeed, the legal report/opinion is hedged with the following qualification: "The underlying assumption is that Eskom is faced with only two choices which are either to ratify or not ratify the conclusion of the TNA contract, where the latter is consistent with an intention to cancel."<sup>2333</sup>

274. A prudent Board member reading that qualifier ought to have asked about the assumption and whether it held true, or whether there were further options available to Eskom to avoid this R43 million liability. If the Board had asked that question, it would have been apparent that the conclusion of the contract constituted unlawful administrative action that could have been set aside by the High Court on review.

275. Even if this were not so, it is also patently incorrect that TNA would be entitled to the full R43.2 million in damages and Eskom would be left with nothing if it cancelled the contract. This does not take into consideration that TNA would have had an obligation to mitigate its damages and that it would have had to tender its performance under the contract (or at least the value thereof) to Eskom in order to be eligible for the compensation under the contract.

276. This legal misunderstanding appears to have cost Eskom an enormous sum of money. Greater care by the Board in providing instructions and affording appropriate time to answer legal questions, and a more diligent approach to understanding their legal obligations, could have avoided this.

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<sup>2332</sup> Exhibit MM3, p 181.

<sup>2333</sup> Exhibit MM3, p 189, para 4.

277. It must be considered why the Board did not ask for further legal clarity. Common sense would suggest that there should be some form of recourse for a public institution where an official approves a contract without any authority to do so. Otherwise, the Board's powers could be usurped without their approval and public funds wasted. If Mr Pamensky and Mr Tsotsi's belief about the consequences of failing to ratify the contract were correct – there would be very little purpose in ever having a system of ratification. The Board would always be bound to automatically ratify any contract concluded illegally by an unauthorised employee, because failure to do so would allow the other party to recover the entire contract price with no value for Eskom. This simply does not make any sense.
278. As set out above, the negative reputation that TNA had garnered in the independent media did not help to prevent the conclusion of the third contract.
279. This contract was concluded because two individuals, Mr Choeu and Mr Matjila, were determined that they would conclude it, regardless of the law and the legal obligations they had to Eskom. The Board failed dismally in the exercise of its duties and ratified the contract to make the administrative inconvenience of an "irregularity" go away and they never bothered to take any further action against those who had originally committed Eskom to this expenditure.
280. However, other democratic safeguard institutions also failed to provide an effective mechanism to prevent this unlawful spending.

## Parliamentary questions

281. About a week after the second contract had been signed, on 14 November 2012, Parliament directed various questions to Eskom about the TNA contracts.<sup>2334</sup>

282. Some of the questions Parliament asked were:

282.1. Whether an independent analysis to determine whether TNA was being read by the intended market had been conducted prior to Eskom placing advertisements in the TNA?

282.2. Who conducted that analysis and what were their recommendations?

282.3. Were there any independent studies conducted about the effectiveness of the advertisements on the target market?<sup>2335</sup>

283. Mr Pretorius testified that the responsibility to answer the questions fell upon him as Head of Strategic Marketing at Eskom. He said that he asked Mr Laiza Zikalala from the Media Shop to assist him to answer the questions.<sup>2336</sup>

284. Mr Pretorius said that Mr Zikalala explained that there had been no analysis of the newspaper because it had not been certified by ABC for circulation figures, nor through organisations to measure readership. He explained that this was why the Media Shop had recommended that Eskom not use TNA but they were instructed by Eskom to do so and to spend a particular amount of money.<sup>2337</sup> Mr Zikalala explained that, since

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<sup>2334</sup> Transcript 29 October 2019, p 109, lines 2-10.

<sup>2335</sup> Transcript 29 October 2019, p 109 (line 20) – 110 (line 2). See also exhibit MM1, p 661.

<sup>2336</sup> Exhibit MM1, p 666.

<sup>2337</sup> Exhibit MM1, p 665. See also Transcript 29 October 2019, p 111, lines 18-25.

then, AMPS had conducted behavioural research on readership and concluded that TNA had 39 000 readers (compared to The Citizen's 508 000 and The Star's 643 000).<sup>2338</sup> Mr Zikalala stated that they could not perform an advertising effectiveness measure to ascertain whether the advertising had resulted in a reduction of electricity use.<sup>2339</sup>

285. Despite this, the response to the Parliamentary questioning was that AMPS had since performed a readership analysis and that "the findings confirmed that the paper reached Eskom's intended market."<sup>2340</sup> Mr Pretorius testified that this statement was false.<sup>2341</sup>

286. The Parliamentary questions therefore failed as a safeguard for four reasons:

- 286.1. Eskom employees were willing simply to lie to Parliament and no further investigations were done;
- 286.2. the Parliamentary questions were concealed from the new Board voting on the ratification of the contract;
- 286.3. the new Board members appeared not to be concerned to keep abreast of what the media was reporting about Eskom; and
- 286.4. individuals within Eskom were determined to ensure that the contract was concluded irrespective of the fact that there was no discernible value to Eskom in supporting TNA in this way.

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<sup>2338</sup> Exhibit MM1, p 665 See also Transcript 29 October 2019, p 112, lines 1-8.

<sup>2339</sup> Exhibit MM1, p 665 See also Transcript 29 October 2019, p 112, lines 11-22.

<sup>2340</sup> Exhibit MM1, p 676, para 3.

<sup>2341</sup> Transcript day 184, p 114, lines 19-21.

### Public Protector questions

287. On 3 June 2013 the Public Protector wrote to Mr Matona, Director-General of Public Enterprises, to advise him that the office was investigating allegations of fruitless and wasteful expenditure in connection with the sponsorship of the business breakfasts.<sup>2342</sup>
288. The letter stated that the allegation was that the Department of Public Enterprises exerted undue influence on public enterprises to enter into these sponsorship agreements. This, despite the fact that TNA was not a member of the ABC and its circulation figures could not be verified. The Public Protector then asked various questions about the policy on sponsorships, the amounts spent on the TNA sponsorships, the proposals and other relevant information.<sup>2343</sup>
289. Mr Pretorius was asked to address the questions from the Public Protector about advertising with TNA. He gave what he considered to be honest answers and sent them to the Head of the Legal Department at Eskom, Mr Willie Du Plessis, who reported to Mr Adam. The response he received was that the answers he prepared were not “sufficient”. Mr Pretorius told Mr Du Plessis that he could not in good conscience write something untrue.<sup>2344</sup>
290. Mr Pretorius testified that he then received a phone call from Mr Adam who said that they needed to write that Eskom had benefitted from this advertising and that it was a good thing to do.

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<sup>2342</sup> These questions are at Exhibit MM1, p 727.

<sup>2343</sup> Exhibit MM1, pp 727-729.

<sup>2344</sup> Transcript 29 October 2019, p 115, lines 11-25.

291. As a result, the Eskom responses to the Public Protector's questions did not reflect reality.<sup>2345</sup> Mr Pretorius recalled rewriting the document on Mr Adam's instruction so that it "look[ed] a little bit better" than his original draft.<sup>2346</sup> Mr Pretorius said that he did not want to lie to the Public Protector; that he had got legal advice that he would be in a lot of trouble if he did so; and that it was unethical and against his professional ethical obligations. However, in the end, he confessed that he was ultimately "forced to do it".<sup>2347</sup>

292. Mr Pretorius admitted that a number of the statements made to the Public Protector were false. They included that:

292.1. "The primary benefits were brand awareness for 49M and the opportunity to highlight the need to save electricity. The sponsorships provided significant exposure through the print and broadcast media and to engage more businesses in the private sector."<sup>2348</sup>

292.2. "Recent research undertaken with regard to 49M indicated that opportunities such as the sponsorship of the business briefings contributed to a 73 percent awareness by the public of the 49M Campaign."<sup>2349</sup>

293. The Public Protector's investigation continued. As set out above, on 29 October 2014, the Public Protector wrote to Mr Tsotsi asking him to hold the new (third) TNA contract in abeyance pending the release of her provisional report.<sup>2350</sup>

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<sup>2345</sup> Transcript 29 October 2019, p 116, lines 5-10.

<sup>2346</sup> Transcript 29 October 2019, p 119, lines 10-22.

<sup>2347</sup> Transcript 29 October 2019, p 119 (line 23) – 121 (line 25).

<sup>2348</sup> Transcript d29 October 2019, p 123, lines 8-17.

<sup>2349</sup> Transcript 29 October 2019, p123, lines 18 -25.

<sup>2350</sup> Exhibit MM6, pp 364-365.

294. The Public Protector also met with representatives of Eskom on 27 November 2014 in this regard.<sup>2351</sup>
295. Only after the outgoing Board had its final meeting, did Mr Tsotsi respond to the Public Protector's letter. On 9 December 2014, Mr Tsotsi responded.<sup>2352</sup> The letter stated that the third contract was very different to the first two contracts – though there is no basis for this statement. It also explained that minutes of discussions about the contract were not available. This was also peculiar.
296. The Public Protector responded on 15 December 2014 to again implore the Eskom Board not to proceed with the contract until her report had been issued.<sup>2353</sup>
297. Mr Tsotsi conceded that none of this correspondence was ever brought to the attention of the incoming Board when they were voting to ratify the third TNA contract. He admitted this would have been “useful information” for the new Board.<sup>2354</sup>
298. The Public Protector's efforts to curb the TNA spend were frustrated because employees in Eskom felt compelled to lie because their seniors instructed them to do so. As with Parliament's questions, the fact of the Public Protector's enquiries was kept away from the new Board when they were asked to ratify the third TNA sponsorship contract for R43million.

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<sup>2351</sup> See the reference to this at exhibit MM6, p 442, para 2.

<sup>2352</sup> Exhibit MM6, p 444.

<sup>2353</sup> Exhibit MM6, p 446.

<sup>2354</sup> Transcript 23 January 2020, p 148, lines 1-25.

## Subscriptions

299. In addition to sponsoring the business breakfasts, Eskom also subscribed for copies of the TNA newspaper.
300. Eskom commenced its subscriptions to *The New Age* newspaper with a contract for 30 copies per day for an amount of R25 148 for the year for *The New Age* newspaper.<sup>2355</sup>
301. This figure then suddenly jumped up to 2 000 copies of the newspaper per day at a cost of R1.3 million to Eskom.<sup>2356</sup> It is noteworthy that around the same time, Eskom procured 140 copies per day of the *Business Day* for R319 000 per year.
302. The Head of Communications at Eskom, Ms Wadja, provided an affidavit to the Commission in which she stated that she was instructed by Mr Choeu to increase the subscriptions in this manner.<sup>2357</sup> Mr Choeu denied this in his evidence and claimed that he had nothing to do with newspapers.<sup>2358</sup> However, when confronted with a letter from him instructing this increase,<sup>2359</sup> he was forced to concede that he did indeed do so and in fact asked for an increase to 4 000 copies a day which would have cost Eskom R7 million<sup>2360</sup>.
303. Mr Choeu could not provide any explanation for his attempted increase and then claimed it must have been a “mistake”.<sup>2361</sup> This is not a credible response. Mr Choeu was content to deny any knowledge of his role in the subscriptions until he was

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<sup>2355</sup> Exhibit MM1, p 805.

<sup>2356</sup> Transcript 185 30 October 2019, p 231, lines 1-3.

<sup>2357</sup> Exhibit MM1, p 799.

<sup>2358</sup> Transcript 30 October 2019, p 227, lines 10-20.

<sup>2359</sup> Transcript 30 October 2019, p228 (line 3) – 229 (line 10). See exhibit MM1, pp 816-817.

<sup>2360</sup> Transcript 30 October 2019, p 230, lines 17-19.

<sup>2361</sup> Transcript 30 October 2019, p 229, lines 13-22.



confronted with clear evidence that he had given an instruction for an increase in the subscriptions with the TNA. When this conduct is viewed alongside the role he played in committing Eskom to the business breakfasts, it is clear that Mr Choeu saw fit to put the interests of TNA ahead of those of Eskom. This makes one ask the question: What was in it for him that he could look after the Guptas so well at the expense of Eskom, his employer?

## **Conclusion**

304. From the evidence set out above, a pattern emerges about the role players in Eskom.
305. Mr Matjila was the key facilitator at Eskom. Shortly after he took up the position of Acting-CEO, he approved the largest sponsorship contract with TNA that Eskom had ever entered into. He did so despite not having the authority to enter into a contract of this size and at a time when there was no evidence of any value to be derived from the services offered by TNA.
306. Mr Matjila received rule 3.3 notices about the evidence presented at the Commission's hearings. He did not respond to any of them. The Commission's investigators also made a number of attempts to contact Mr Matjila directly but none of them was successful. Mr Matjila, therefore, elected not to put his side of the story before the Commission. The result is that the evidence implicating him in wrongdoing is undisputed.
307. In addition to Mr Matjila, the incoming Board of Eskom that was appointed in December 2014 was also a facilitator. It was content to ratify a very controversial contract, where it had not assessed its commercial value, and in circumstances where the media, Parliament and the Public Protector had expressed grave concern about the legality and value of the contract.

- 307.1. Mr Tsotsi concealed important information from the new Board before it ratified the contract.
- 307.2. Mr Pamensky was happy to ratify a contract he had not even seen, based on a round robin resolution that did not make sense and without any proper appreciation for his legal obligations under the PFMA as a member of the accounting authority of Eskom. The rest of the Board appointed in December 2014 did exactly the same. At least those members of the Board who ratified the third TNA contract.
308. It is unlikely that any of this would have been possible without those who:
- 308.1. those who ensured that these contracts were concluded and implemented despite not going through the correct procedures; and
- 308.2. those who were willing to give false justifications to the Public Protector and Parliament for expenditure that was nothing short of wasteful.
- 308.3. a Board that had no regard for its fiduciary duties and put the interests of the Guptas above those of Eskom and the people of South Africa.
309. Mr Choeu demonstrated very little, if any, sense of duty to Eskom. He stated on many occasions that he believed that any questioning of authority would have been viewed as insubordination and that it was just “not done” in a “corporate culture”. The problem with this is that Eskom is not a private company. It is a public enterprise performing a vital function for the public, using scarce public money to do so. If “subordinates” (in this case as high up as *division executives*) do not feel any duty to act with integrity or speak out when processes are blatantly ignored because of “pressure from the CEO”, then public institutions will be very vulnerable to corruption and irregularities of this nature.

To the extent that Mr Choeu was advancing this as an excuse for his conduct, his “excuse” must be rejected as totally unacceptable. He was simply an “enabler” of the capture of Eskom by the Guptas.

310. Mr Choeu also actively supported the unjustified increase of subscriptions of *The New Age* newspaper to an absurdly high amount that could never be justified.
311. Mr Pretorius was far more pained and anxious at having to thwart well-established policies and processes in order to facilitate the TNA contracts. He took some steps to try and address the unlawful conduct but, ultimately, he capitulated under orders from his superiors and even allowed false information to be provided to the Public Protector because of the pressure under which he was placed. In the case of Mr Pretorius, it can be accepted that he took part in this wrongdoing because of orders or pressure from some of those above him. That cannot be said of Mr Choeu.
312. Eskom had policies and protocols in place to ensure that sponsorships went through appropriate approval mechanisms. However, this did not appear to help in preventing significant irregular and wasteful expenditure on the TNA newspaper and business briefings. The delegation of authority was only R3 million in respect of sponsorships and yet the acting-CEO, Mr Matjila, approved a sponsorship for R43 million and had this ratified by the Board, with apparently no consequences for the people involved.
313. This demonstrates that, while accountability structures are indeed useful, if the Board of a public entity fails in its duties to ensure that they are observed, they will prove useless in the fight against irregular and wasteful expenditure. If officials can be compromised and they exercise delegations of authority for nefarious purposes or ignore them altogether and suffer no consequences, then, again, the policies and processes serve no purpose. Finally, if employees responsible for carrying out those processes can be intimidated into proceeding with contracts without following due

process then these policies and processes will be of little value. All that will happen is that those employees will assist in creating a paper trail of proposals and justifications that purport to legitimise the expenditure and prevent exposure of unlawful and wasteful transactions.

## **TRANSNET**

314. The Commission heard evidence from three witnesses in respect of TNA's contracts at Transnet:

314.1. Mr Mkwanazi was the Chair of the Board of Transnet from December 2010 to December 2014. He was the acting Group CEO from 16 December 2010 to 11 February 2011 pending the appointment of a Group CEO.<sup>2362</sup>

314.2. Mr Jackson was the Brand and Publicity Co-Ordinator for the Transnet Group Corporate and Public Affairs from 2006 to December 2014.<sup>2363</sup>

314.3. Mr Phatlane was the Senior Coordinator: Stakeholder Relations at Transnet from 2011 to 2017.<sup>2364</sup>

## **TNA contracts with Transnet**

315. Transnet concluded separate contracts with TNA for advertising in *The New Age* newspaper and for the different sponsorship arrangements.

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<sup>2362</sup> Transcript 17 July 2020, p 156 (line 11) – 157 (line 4).

<sup>2363</sup> Transcript 24 January 2020, p 57, lines 22-25.

<sup>2364</sup> Transcript 24 January 2020, p 120, lines 23-25.

315.1. In respect of advertising, Transnet employees were instructed to use *The New Age* newspaper exclusively for all the recruitment and tender advertisements;

315.2. In respect of sponsorship, Transnet concluded:

315.2.1. contracts with TNA for The Big Interview, to the value of R24.8 million from 2011 to 2016 (contracts were renewed every six months);<sup>2365</sup> and

315.2.2. five long term contracts and one *ad hoc* contract for TNA Business Briefings/Breakfasts, to the value of R122 809 526.70, from 2011-2017,<sup>2366</sup> as follows:

315.2.2.1. the first contract was concluded as a “sponsorship” on 7 and 14 May 2012<sup>2367</sup> for 16 breakfasts at R16 million;<sup>2368</sup>

315.2.2.2. the second contract was concluded on 19 April 2013 as a “partnership agreement” for 15 breakfasts at R15 million;<sup>2369</sup>

315.2.2.3. in January/February 2013, the parties concluded an ad hoc “sponsorship agreement” for two breakfast briefings at R3million;<sup>2370</sup>

315.2.2.4. the third contract was concluded on 6 June 2014 as a “partnership agreement” for 20 sessions at R20 million;

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<sup>2365</sup> Transcript 24 January 2020, p 108, lines 22-25 and p 109, line 5.

<sup>2366</sup> Exhibit MM4, p 111, para 16.

<sup>2367</sup> Exhibit MM4, p 21-27.

<sup>2368</sup> Transcript 24 January 2020, p 161, lines 1-12.

<sup>2369</sup> Exhibit MM4, p 33 - 43.

<sup>2370</sup> Exhibit MM4, p 36.

315.2.2.5. the fourth contract was concluded on 14 April 2015 as a “partnership agreement” for 20 sessions at R21,2 million,<sup>2371</sup>

315.2.2.6. the fifth contract was concluded on 9 March 2016 as a “partnership agreement” for 20 sessions at R21,2 million.<sup>2372</sup>

### **Gupta meeting with Acting Group CEO**

316. Prior to all of the advertising spend set out above, Mr Tony Gupta approached the acting Group CEO, Mr Mkwanazi, and requested that a significant proportion of the Transnet advertising budget be allocated to TNA.

317. Mr Mkwanazi testified before the Commission that he received a phone call from Mr Tony Gupta in January 2011, which was shortly after he had been made acting Group CEO of Transnet. Mr Tony Gupta told him that he obtained his number from Minister Gigaba.<sup>2373</sup>

318. In a response to a rule 3.3 notice sent to Mr Gigaba arising from Mr Mkwanazi’s evidence, Mr Gigaba denied that he had provided Mr Mkwanazi’s number to Mr Gupta.<sup>2374</sup> Mr Gigaba’s denial falls to be rejected. Mr Gigaba probably had Mr Mkwanazi’s number because he and Mr Mkwanazi had had a meeting either at the end of October 2010 on Mr Mkwanazi’s version or before the 14th November 2010 on Mr Gigaba’s version where Mr Gigaba offered Mr Mkwanazi the position of chair of the Transnet Board. On his own version, Mr Gigaba was friends with Mr Ajay Gupta and Mr

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<sup>2371</sup> Transcript 4 February 2020, p 30, lines 20-25.

<sup>2372</sup> Exhibit MM4, p 94-106.

<sup>2373</sup> Transcript 17 July 2020, p 160, lines 18-22.

<sup>2374</sup> Exhibit MM7, p 8, para 7.1.

Gigaba's legal advisor, Mr Siyabonga Mahlangu, met frequently with Mr Tony Gupta. So, if Mr Tony Gupta wanted the number of the Chairperson of the Board of Transnet, Mr Gigaba would have been the most obvious person he would have approached and Mr Gigaba would probably have given him the number. Why would he not have given the number to his friend's brother? In this regard it needs to be remembered that Mr Gigaba admitted that he and Mr Ajay Gupta were friends.

319. After receiving this call from Mr Tony Gupta, Mr Mkwanazi met him at the Gupta residence in Saxonwold.<sup>2375</sup> Mr Duduzane Zuma, the former President's son, was also present at the meeting.<sup>2376</sup> According to Mr Mkwanazi, Mr Tony Gupta indicated to him that he was friends with President Zuma.<sup>2377</sup> He also stated that he was aware that Transnet had a marketing budget of R1billion,<sup>2378</sup> and that he wanted 30-50% of that budget to be allocated to TNA.<sup>2379</sup> Mr Ajay Gupta had said something similar to Mr Themba Maseko in or around October 2010 but in that case Mr Ajay Gupta had demanded the whole government advertising budget of R600 million to be spent on the New Age newspaper.

320. Mr Mkwanazi testified that he told Mr Gupta and Mr Zuma that they would have to go through the ordinary channels of procurement in order to provide the state with services and that he was not the correct person to approach in this regard.<sup>2380</sup>

321. Mr Mkwanazi testified that in response to this rebuff, Mr Gupta said how close he was to the then President, that they met once a week and that President Zuma came to their

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<sup>2375</sup> Transcript 17 July 2020, p 160, lines 24-25.

<sup>2376</sup> Transcript 17 July 2020, p 161, lines 10-12.

<sup>2377</sup> Transcript 17 July 2020, p 161, lines 22-23.

<sup>2378</sup> Transcript 17 July 2020, p 161, lines 24-25.

<sup>2379</sup> Transcript 17 July 2020, p 161 (line 25) – 162 (lines 1-2).

<sup>2380</sup> Transcript 17 July 2020, p 162, lines 2-15.

social events. Mr Mkwanazi testified that it was evident that Mr Tony Gupta was “deep friends” with the President. Mr Tony Gupta even said that the President sang “Umshini Wam” for them.<sup>2381</sup> This is a song that Mr Zuma frequently sang for his supporters in political rallies after his dismissal by President Mbeki as Deputy President of the country and before he became President of the ANC and of the country.

322. Mr Mkwanazi explained that he felt that the Guptas were abusing their friendship with President Zuma. He testified that he asked Mr Duduzane Zuma whether what Mr Gupta said about President Zuma was correct and Duduzane Zuma confirmed that it was.<sup>2382</sup> Mr Mkwanazi stated that that was the only statement that Mr Duduzane Zuma made during the meeting – otherwise, he was silent and Mr Tony Gupta did all the talking.<sup>2383</sup>

323. Mr Mkwanazi testified that he knew that a figure of R1billion was incorrect for the Transnet marketing budget. While he did not know the exact figure, he knew this was too large and must have been a “thumb suck”.<sup>2384</sup> In fact, the marketing budget for Transnet was R27 005 399 for 2010 and R95 530 394 for 2011.<sup>2385</sup>

324. Mr Mkwanazi testified that Mr Gupta was trying to convey how influential and powerful he was at this meeting by referring to being friends with cabinet ministers and members of Parliament.<sup>2386</sup>

325. Mr Mkwanazi testified that he then asked for a second meeting with Mr Gupta because he said he wanted somebody within the Department of Public Enterprises to also

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<sup>2381</sup> Transcript 17 July 2020, p 162 (line 16) – 163 (line 8).

<sup>2382</sup> Transcript 17 July 2020, p 162 (line 16) – 163 (line 8).

<sup>2383</sup> Transcript 17 July 2020, p 175, lines 8-17.

<sup>2384</sup> Transcript day 234 (17 July 2020), p 169, lines 21-25.

<sup>2385</sup> Exhibit MM7, p 34 Para 3 – 4.

<sup>2386</sup> Transcript 17 July 2020, p 172, lines 20-25.



witness what was being asked of him.<sup>2387</sup> Mr Mkwanazi explained that he requested that Mr Siyabonga Mahlangu, the advisor to Minister Gigaba, accompany him to the second meeting.<sup>2388</sup> He wanted Mr Mahlangu to act as a witness, particularly because Mr Gupta had indicated that he had received Mr Mkwanazi's number from Minister Gigaba.<sup>2389</sup> Mr Gupta then contacted Mr Mkwanazi again to schedule the second meeting.<sup>2390</sup>

326. The second meeting took place about two weeks after the first meeting (so, still around January 2011),<sup>2391</sup> and was attended again by Mr Zuma and Mr Gupta. This time, Mr Mahlangu was also in attendance.<sup>2392</sup> Mr Mkwanazi testified that at this second meeting, he again made it clear that he was not the appropriate person to speak to about the allocation of the marketing budget to TNA and that there was a procurement process that had to be followed.<sup>2393</sup> Mr Mkwanazi testified that Mr Gupta appeared to accept this answer. Mr Mahlangu merely observed and did not talk. Thereafter, the meeting ended.<sup>2394</sup>

327. Shortly after this meeting, a permanent appointment was made for Group CEO to replace Mr Mkwanazi. Mr Brian Molefe was appointed as the new Group CEO on 16 February 2011<sup>2395</sup> and went on to play a significant role in facilitating TNA contracts at Transnet.

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<sup>2387</sup> Transcript 17 July 2020, p 174, lines 10-15.

<sup>2388</sup> Transcript 17 July 2020, p 177, lines 15-25.

<sup>2389</sup> Transcript 17 July 2020, p 178, lines 10-16.

<sup>2390</sup> Transcript 17 July 2020, p 178, lines 18-24.

<sup>2391</sup> Transcript 17 July 2020, p 186, lines 8-11.

<sup>2392</sup> Transcript 17 July 2020, p 179, lines 19-25.

<sup>2393</sup> Transcript 17 July 2020, p 183, lines 3-14.

<sup>2394</sup> Transcript 17 July 2020) p 184, lines 10-13; p 185, lines 8-12.

<sup>2395</sup> Transcript 17 July 2020, p 156 (line 11) – 157 (line 4).

328. A few months after these meetings, on 9 June 2011, there was an article in the Business Day stating that Mr Mkwanazi was going to be removed from his position at Transnet by Minister Gigaba.<sup>2396</sup> Mr Mkwanazi said he was shocked to read this;<sup>2397</sup> he said there had been no discussion with him that he would be removed.<sup>2398</sup>
329. In the Cabinet Memorandum of 25 May 2011,<sup>2399</sup> which recorded the proposal that Mr Gigaba made to Cabinet, it is indeed reflected that Mr Gigaba proposed that Mr Mkwanazi be removed as chairman of the board of Transnet and that he be replaced with Mr Iqbal Sharma.<sup>2400</sup> However, the outcome of the Cabinet meeting was that Mr Gigaba was unsuccessful and Mr Mkwanazi was not replaced.<sup>2401</sup>
330. Mr Mkwanazi testified that there may have been a connection between his reaction at the meetings with Mr Gupta and Mr Zuma and the efforts to remove him but he did not know this as a fact.<sup>2402</sup>
331. When Mr Mkwanazi was asked why he did not come forward earlier to disclose the nature of the meetings with Mr Gupta, he said that he did not feel the need to come forward because it was fairly well known that officials were being approached by the Guptas in this manner – he said that he felt that “whatever the Gupta family is doing, it is a well-known thing within the ruling party.”<sup>2403</sup>
332. Despite the fact that Mr Mkwanazi did not accede to the Guptas’ demands in early 2011, as will be shown below, they were successful in acquiring a significant proportion of the

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<sup>2396</sup> Exhibit MM7, p 37.

<sup>2397</sup> Transcript 17 July 2020, p 187, lines 19-22.

<sup>2398</sup> Transcript 17 July 2020, p 192, lines 22-25.

<sup>2399</sup> Exhibit MM7, p 38.

<sup>2400</sup> Exhibit MM7, p 38, para 2.2 and p 39, para 3.2.

<sup>2401</sup> Transcript 17 July 2020, p 196, lines 9-10.

<sup>2402</sup> Transcript 17 July 2020, p 199 (line 21) – 200 (line 1).

<sup>2403</sup> Transcript 17 July 2020, p 212 (line 20) – 213 (line 2).

Transnet marketing budget and did so without going through the procurement “processes” through which Mr Mkwana had told them they had to go.

### **Advertising at The New Age newspaper**

333. Mr Jackson was the Brand and Publicity Co-ordinator for the Transnet Group Corporate and Public Affairs from 2006 to December 2014.<sup>2404</sup> In that role, Mr Jackson was responsible for advertising management for Transnet.<sup>2405</sup>

334. Mr Jackson explained that, absent some specific strategic objective that it had to promote, Transnet’s only advertising was for tender and recruitment purposes.<sup>2406</sup> Transnet would generally use an advertising agency to organise its advertising. This was done by a company called “The Agency”.<sup>2407</sup> The Agency would advise Transnet about where to place adverts depending on the needs of a particular campaign. They would advise on demographic and circulation and they would negotiate on Transnet’s behalf.<sup>2408</sup>

335. Unlike Eskom, which had an advertising or sponsorship policy, Transnet had no official advertising or sponsorship policy. Instead, there was an unofficial advertising guideline.<sup>2409</sup> However, according to Mr Jackson this draft policy or guideline did contain some of the guidelines that Transnet would use for advertising decisions such as (a)

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<sup>2404</sup> Transcript 24 January 2020, p 57, lines 22-25.

<sup>2405</sup> Transcript 24 January 2020, p 59, lines 10-18.

<sup>2406</sup> Transcript 24 January 2020, p 60, lines 10-16.

<sup>2407</sup> Transcript 24 January 2020, p 60, lines 17-25.

<sup>2408</sup> Transcript 24 January 2020, p 61, lines 3-12.

<sup>2409</sup> Transcript 24 January 2020, p 61, lines 13-20.

using resources cost-effectively to reach a particular target market and (b) measuring advertising to know what works.<sup>2410</sup>

336. Mr Jackson explained that, when he took over the advertising portfolio, he was responsible for the placement of adverts and how they appeared.<sup>2411</sup> He said that at some point in time, he was instructed by his superior, Mr Mboniso Sigonyela, to advise his colleagues that, from then on, they were required to advertise for tenders and recruitment in the TNA.<sup>2412</sup> Mr Jackson testified that Mr Sigonyela simply told Mr Jackson that it “must be done” but did not give him a reason.<sup>2413</sup> His instruction pertained to all advertising of tenders and recruitment.<sup>2414</sup> Mr Jackson explained that Mr Sigonyela had never before prescribed to him specific media that had to be used.<sup>2415</sup>

337. Mr Jackson testified that he carried out Mr Sigonyela’s instructions, even though he knew nothing about the circulation, demographics or readership figures of TNA because it was a new newspaper.<sup>2416</sup>

338. Mr Jackson testified that his view was that the different divisions within Transnet were autonomous and could make their own decisions, depending on their budget and discretion. He said that, for that reason, his position was that he would only “recommend” that various divisions use TNA.<sup>2417</sup>

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<sup>2410</sup> Transcript 24 January 2020, p 62 (line 17) – 63 (line 2).

<sup>2411</sup> Transcript 24 January 2020, p 63, lines 10-17.

<sup>2412</sup> Transcript 24 January 2020, p 63, lines 20-23.

<sup>2413</sup> Transcript 24 January 2020, p 64, lines 1-5.

<sup>2414</sup> Transcript 24 January 2020, p 64, lines 10-20.

<sup>2415</sup> Transcript 24 January 2020, p 64, lines 22-23.

<sup>2416</sup> Transcript 24 January 2020, p 67, lines 15-19.

<sup>2417</sup> Transcript 24 January 2020, p 68, lines 9-25.

339. Mr Jackson testified that he was verbally reprimanded for not having followed this instruction and for using the word “recommend”. He said that Mr Sigonyela told him that he was incompetent and, if he did not comply, he would find someone else to do Mr Jackson’s job who would follow instructions.<sup>2418</sup>

340. Ultimately, as will be evident from what follows, Mr Jackson did eventually assist TNA in securing significant Transnet spending on TNA advertising.

### **The Big Interview**

341. Mr Jackson explained that The Big Interview was an insert in the TNA newspaper, where it profiled a media personality.<sup>2419</sup> The interview had nothing to do with Transnet.<sup>2420</sup>

342. On 1 December 2011, Mr Jacques Roux of TNA emailed a proposal to a representative of The Agency for Transnet to sponsor The Big Interview in the TNA.<sup>2421</sup> The proposal would allow Transnet to advertise in the “ear space” on either side of the newspaper where Transnet would place their logo as well as naming rights – so the piece would be headed, the Transnet Big Interview.<sup>2422</sup> This was being offered for an amount of R327 576 for the month.<sup>2423</sup> The amount for the six month contract period was R1 965 456.<sup>2424</sup>

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<sup>2418</sup> Transcript 24 January 2020, p 69, lines 17-23.

<sup>2419</sup> Transcript 24 January 2020, p 72, lines 10-13.

<sup>2420</sup> Transcript 24 January 2020, p 72, lines 21-23.

<sup>2421</sup> Exhibit MM5, p 8, para 34. The proposal is at exhibit MM5, p 42.

<sup>2422</sup> Transcript 24 January 2020, p 76 (line 15) – 77 (line 5).

<sup>2423</sup> Transcript 24 January 2020, p 77, lines 6-13.

<sup>2424</sup> Exhibit MM5, p 42.

343. Ms Hanlie van Eck worked for Planet Media which was an advisory expert on media placement for Transnet. She would advise on the return on investment for a particular advertisement in a newspaper.<sup>2425</sup> Ms van Eck advised The Agency and Transnet via email on 14 December 2011 that the Big Interview sponsorship was extremely expensive and was not worth the return on investment. She recommended that Transnet not proceed with the opportunity.<sup>2426</sup>
344. When approached again on this matter, Ms van Eck again said that, based on the given costs, they could not justify the feature. She made the additional point that there was no ABC certification on circulation. She therefore concluded that she did not support the offer.<sup>2427</sup>
345. Mr Jackson also confirmed that there was no information available about the reach of the TNA newspaper or who was reading it. So, it was not clear that advertising Transnet's logo would give Transnet any value at all.<sup>2428</sup> He also conceded that, with a public entity like Transnet, it was not clear what value they would get from sponsoring this interview as there was already brand awareness.<sup>2429</sup>
346. Mr Jackson testified that he found the decision by Mr Brian Molefe, pursuant to the recommendation of Mr Sigonyela (as set out below), to participate in the sponsorship of The Big Interview by Transnet to be suspicious and not justifiable. The advice

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<sup>2425</sup> Transcript 24 January 2020, p 80, lines 18-25.

<sup>2426</sup> Exhibit MM5, p 146.

<sup>2427</sup> Exhibit MM5, p 57.

<sup>2428</sup> Transcript 24 January 2020, p 85, lines 9-18.

<sup>2429</sup> Transcript 24 January 2020, p 86 (line 7) – 87 (line 11).

received from Transnet's consultant was that it was not worth the money, but then, a day later, the decision was taken to go ahead.<sup>2430</sup>

347. Mr Jackson explained that he raised these concerns about circulation, data and value with Mr Sigonyela,<sup>2431</sup> but was told that the concerns were not important at that stage.<sup>2432</sup>

348. Mr Sigonyela produced an internal memorandum on the sponsorship of TNA, on 14 February 2012, addressed to Mr Brian Molefe, the Group CEO at the time.<sup>2433</sup> The proposal stated that TNA "is one of the key publications that Transnet targets for positioning its brand and its image as part of its reputation management strategy."<sup>2434</sup> Mr Jackson testified that this was false.<sup>2435</sup>

349. The memorandum also stated that "this platform will afford Transnet the opportunity to send key messages to our stakeholders".<sup>2436</sup> Mr Jackson testified that this was also not a justifiable statement as there was no way to measure the reach of the newspaper to Transnet's stakeholders.<sup>2437</sup>

350. In fact, in the end, the Big Interview was not even called the Transnet Big Interview, as had been suggested in the proposal.<sup>2438</sup> It was just called the "Big Interview" with no affiliation to its sponsor.

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<sup>2430</sup> Transcript 24 January 2020, p 93, lines 7-13.

<sup>2431</sup> Transcript 24 January 2020, p 94, lines 6-17.

<sup>2432</sup> Transcript 24 January 2020, p 94, lines 6-17.

<sup>2433</sup> Exhibit MM5, p 66.

<sup>2434</sup> Exhibit MM5, p 66, para 2.

<sup>2435</sup> Transcript 24 January 2020, p 96, lines 2-9.

<sup>2436</sup> Exhibit MM5, p 67.

<sup>2437</sup> Transcript 24 January 2020, p 96, lines 10-20.

<sup>2438</sup> Exhibit MM5, p 181. Transcript 24 January 2020, p 100, lines 12-20.

351. Despite this, the recommendation was to accept the proposal from TNA for the Big Interview and it was signed by Mr Sigonyela and Mr Molefe.<sup>2439</sup>
352. Mr Molefe signed the proposal on 23 February 2012,<sup>2440</sup> but there is an email from Ms van Eck confirming that she had authorisation from Transnet for the sponsorship to go ahead, which was dated 15 February 2012.<sup>2441</sup> Mr Jackson testified that the only person who had the delegated authority to give this authorisation at the time was Mr Sigonyela.<sup>2442</sup> He clearly gave this instruction before he received proper internal approval from Mr Molefe.<sup>2443</sup> Further instructions were also given about the “flow plan” of the sponsorship – how it would be inserted in the newspaper and on what dates – prior to Mr Molefe’s authorisation of 23 February 2012.<sup>2444</sup>
353. Mr Jackson, having seen this premature instruction, had then intervened by email to say that the internal processes had not yet been complied with as Mr Molefe had not signed off on the proposal.<sup>2445</sup> Mr Jackson testified that Mr Sigonyela told him he was hindering the process and making it go too slowly. Mr Jackson testified that he was put under extreme pressure by Mr Sigonyela who was very eager to get the arrangement in place as quickly as possible. Mr Sigonyela told Mr Jackson that, because progress was too slow, he had to provide him with a formal progress report to ensure that he was

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<sup>2439</sup> Transcript 24 January 2020, p 96 (line 20) – 97 (line 7).

<sup>2440</sup> Transcript 24 January 2020, p 98, lines 5-7.

<sup>2441</sup> Exhibit MM5, p 72.

<sup>2442</sup> Transcript 24 January 2020, p 101, lines 14-15.

<sup>2443</sup> Transcript 24 January 2020, p 101, lines 16-21.

<sup>2444</sup> Transcript 24 January 2020, p 102, lines 3-12. See exhibit MM5, p77.

<sup>2445</sup> Transcript 24 January 2020, p 102 (line 15) – 103 (line 4). Exhibit MM5, p77.



doing his job.<sup>2446</sup> Mr Jackson testified that Mr Sigonyela had never put him under this level of pressure before.<sup>2447</sup>

354. Mr Jackson also testified that he, himself, had also prepared certain internal memoranda on TNA. One such memorandum was in support of the “renewal” of the New Age Big Interview sponsorship. However, this time, the memorandum referred to it not as a sponsorship but as a “partnership”.<sup>2448</sup> Despite this name change, Mr Jackson confirmed that the deal was no different to the first one and that, in reality, it was a sponsorship.<sup>2449</sup>

355. Mr Jackson explained that, while he did not support the TNA arrangement, it was already a done deal and he was just concerned with getting the formal processes done.<sup>2450</sup>

356. Ms Palesa Ngoma provided the Commission with an affidavit.<sup>2451</sup> During the relevant period covered by Mr Jackson’s testimony, she was a communications specialist at Transnet.<sup>2452</sup> Her affidavit deals with Transnet’s support of the Big Interview and TNA business breakfasts.<sup>2453</sup>

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<sup>2446</sup> Transcript 24 January 2020, p 103 (line 11) – 104 (line 2).

<sup>2447</sup> Transcript 24 January 2020, p 104, lines 18-22.

<sup>2448</sup> Exhibit MM5, pp115-116.

<sup>2449</sup> Transcript 24 January 2020, p 106, lines 12-15.

<sup>2450</sup> Transcript 24 January 2020, p 105(line 20) – 106 (line 3).

<sup>2451</sup> Exhibit MM5, p 175-180.

<sup>2452</sup> Exhibit MM5, p 175, para 5.

<sup>2453</sup> Exhibit MM5, p 176, para 6.

357. Ms Ngoma confirmed that she was also instructed by Mr Sigonyela to produce memoranda in support of Transnet partnering with SABC in TNA business breakfasts.<sup>2454</sup> She said that she wrote six proposals.<sup>2455</sup>
358. Transnet ultimately spent a total of R24.8 million on the Big interview from 2011 to 2016.<sup>2456</sup>
359. No evaluation was ever done on whether Transnet was getting value for money for this spend.<sup>2457</sup> Mr Jackson testified that, in his view, Transnet did not get any value for money and, if anything, its reputation was damaged by the association with the TNA brand.<sup>2458</sup>
360. The Big Interview sponsorship contracts were irregular in that they did not follow the ordinary processes set out (albeit informally) in Transnet. It is also clear that the spending was wasteful and fruitless expenditure as Transnet derived no value from it. No transparent and competitive processes were followed by Transnet in obtaining these services.

### **TNA Breakfast Briefings**

361. Mr Phatlane was the Senior Coordinator Stakeholder Relations at Transnet from 2011 to 2017.<sup>2459</sup> He also reported to Mr Siyongela.<sup>2460</sup> In this role, sponsorships and

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<sup>2454</sup> Exhibit MM5, p 176, para 10.

<sup>2455</sup> Exhibit MM5, p 177, para 14.

<sup>2456</sup> Transcript day 24 January 2020, p 108, lines 22-25 and p 109, line 5.

<sup>2457</sup> Transcript 24 January 2020, p 109, lines 1-3.

<sup>2458</sup> Transcript 24 January 2020, p 109, lines 14-22.

<sup>2459</sup> Transcript 24 January 2020, p 120, lines 23-25.

<sup>2460</sup> Transcript 24 January 2020, p 121, line 4.

donations fell under his area of responsibility.<sup>2461</sup> This mandate fell under the office of the Group CEO, Mr Molefe.<sup>2462</sup>

362. Mr Phatlane testified before the Commission and explained that the ordinary process for approving a sponsorship at Transnet was for a party to send a proposal to Transnet and then a process of assessment would follow along the following lines:

- 362.1. a team would assess whether the proposal was in line with the draft sponsorship and donation policy;
- 362.2. Transnet would perform a due diligence to check if the request was legitimate and whether it would be helpful to Transnet – it would look for benefits to Transnet and whether those were in line with its objectives;
- 362.3. a memorandum would then be generated and directed to the General Manager who had authority to approve the sponsorship if it fell under the amount set out in his delegation of authority;
- 362.4. if the General Manager approved it, the sponsorship would be executed and Transnet would ensure it received what was agreed;
- 362.5. if the monetary amount exceeded the General Manager's authorised amount, the proposal would go to a person with higher authority; and
- 362.6. when a sponsorship was approved, a sponsorship contract would be drafted and, if signed, payment would follow.<sup>2463</sup>

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<sup>2461</sup> Transcript 24 January 2020, p 123, lines 12-14.

<sup>2462</sup> Transcript 24 January 2020, p 123, lines 15-17.

<sup>2463</sup> Transcript 24 January 2020, p 123 (line 22) – 125 (line 6)

363. Mr Phatlane explained that he first encountered Mr Jacques Roux of TNA in 2011. He noted that Mr Roux had been visiting and meeting with the GM, Mr Siyongela for a number of days – but Mr Phatlane said he did not know exactly what the meetings were about at that stage.<sup>2464</sup>
364. In September 2011 Mr Roux sent the first business breakfast request to Mr Phatlane. The letter consisted of one page and was addressed to Mr Sigonyela. It set out a proposal for Transnet to sponsor the business breakfasts with TNA. The proposal was for two such breakfasts with a total cost of R1 471 000.<sup>2465</sup> The offer contained no detail about value or the nature of the sponsorship “opportunity”. It simply provided a table of the prices. There was no motivation provided in the document.<sup>2466</sup> However, as will be seen below, the proposal was recommended by Mr Sigonyela and approved by Mr Molefe.
365. Mr Phatlane explained that Transnet never interrogated why they were being asked to pay for the catering and costs of the breakfast or what value Transnet would be getting out of the sponsorship.<sup>2467</sup>
366. Mr Phatlane stated that, after receiving the proposal, Mr Sigonyela instructed him to prepare a memorandum in support of the business breakfasts/briefings.<sup>2468</sup> When asked whether he performed the due diligence requirement that is part of the process for sponsorship approval, his answer was evasive and he ultimately explained that he

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<sup>2464</sup> Transcript 24 January 2020, p 140, lines 1-10.

<sup>2465</sup> Transcript 24 January 2020, p 141, lines 3-6.

<sup>2466</sup> Exhibit MM4, p 15.

<sup>2467</sup> Transcript 24 January 2020, p 159, lines 18-25.

<sup>2468</sup> Transcript 24 January 2020, p 142, lines 1-5.

was not aware of what process to follow for such a large amount and was waiting to hear from the GM about what to do.<sup>2469</sup>

367. Mr Phatlane's memorandum<sup>2470</sup> stated that TNA was one of the key publications that Transnet targeted for the positioning of its brand and to improve its image.<sup>2471</sup> Mr Phatlane testified that Mr Sigonyela instructed him to write this.<sup>2472</sup> The memorandum was directed to the Acting Group Executive: Corporate Services at the time, Mr Siyabulela Mapoma, but Mr Mapoma did not approve the proposal.<sup>2473</sup> Accordingly, Mr Sigonyela prepared another memorandum in support of the proposal, this time by-passing Mr Mapoma and going straight to Mr Molefe.

### **The first contract**

368. On 20 March 2012 Mr Sigonyela directed the second memorandum to the Group CE, Mr Molefe.<sup>2474</sup> Mr Phatlane testified that he drafted the memorandum.<sup>2475</sup> The memorandum sought to encourage Mr Molefe to approve a sponsorship contract with TNA in terms of which Transnet would purchase, through a contract with TNA, 16 breakfasts worth R16 million.<sup>2476</sup> This was a departure from the earlier proposal which was for *ad hoc* business breakfasts/briefings. The motivation in the memorandum was brief. It claimed that the breakfast briefings were popular and would provide a public platform for "robust discussions" to take place, that would give Transnet space for "maximum media exposure to highlight its achievements and its role in broader society".

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<sup>2469</sup> Transcript 24 January 2020, p 147 (line 16) – 149 (line 3).

<sup>2470</sup> Exhibit MM4, p 16, dated 26 September 2011.

<sup>2471</sup> Exhibit MM4, p 16, para 2.

<sup>2472</sup> Transcript 24 January 2020, p 149, lines 10-25.

<sup>2473</sup> Transcript day 24 January 2020, p 153, lines 2-19.

<sup>2474</sup> Exhibit MM4, p 18.

<sup>2475</sup> Transcript 24 January 2020, p 160, lines 20-25.

<sup>2476</sup> Transcript 24 January 2020, p 161, lines 1-12.

It claimed, without supporting evidence, that the “branding and speaking opportunities provided by this platform will be exploited to reiterate key messages through statements and questions intended to emphasis [Transnet’s] profile and role in the development of the economy”.<sup>2477</sup> The proposal was ultimately approved by Mr Molefe on 23 March 2012.<sup>2478</sup>

369. The contract giving effect to this proposal was concluded on 14 May 2012.<sup>2479</sup> It was signed by the Acting Group CE (Mr Molefe was away at the time). The contract was labelled as a sponsorship agreement.<sup>2480</sup>

370. In this agreement, the early termination clause allowing Transnet to exit the agreement on notice, was struck out of the agreement,<sup>2481</sup> just as it had been in the Eskom agreements, set out above.

371. Mr Phatlane testified that he did not know why this had been done and did not ask about it at the time. He simply saw the agreement on his desk and archived it.<sup>2482</sup> He did, however, confirm that in the standard Transnet contracts, there was an exit clause to protect Transnet and that he had ensured that such a clause was in this contract – but, when he received the signed version, he noted that the parties had struck out that clause.<sup>2483</sup> As will be set out in greater detail below, the deletion of this clause, which clause was standard in Transnet sponsorship contracts and critical to protect its financial interests, was against legal advice and was contrary to the interests of

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<sup>2477</sup> Exhibit MM4, p 19.

<sup>2478</sup> Transcript 24 January 2020, p 165, lines 1-7.

<sup>2479</sup> Exhibit MM4, p 21-27.

<sup>2480</sup> Transcript 24 January 2020, p 167, lines 2-15.

<sup>2481</sup> Exhibit MM4, p 25. Transcript 24 January 2020, p 168, lines 6-19.

<sup>2482</sup> Transcript day 205 (24 January 2020, p 168 (line 20) – 169 (line 1)).

<sup>2483</sup> Transcript 24 January 2020, p 169, lines 2-13.

Transnet. The removal of this clause shows that TNA was being preferred over ordinary media vendors, for reasons that were not explained.

### **The second contract**

372. On 7 March 2013 TNA provided another proposal for the TNA business briefings. This one was for 20 briefings for a total of R20million.<sup>2484</sup>

373. The GCE's limit under the delegation of authority at this time was a cumulative annual total of R10million.<sup>2485</sup> He would therefore not have the authority to conclude this agreement – it would have had to be done by the Board of Transnet.<sup>2486</sup>

374. After this proposal had been submitted, Mr Phatlane assisted in creating another memorandum supporting this proposal on 11 March 2013.<sup>2487</sup> The memorandum was from Mr Sigonyela to Mr Molefe. In this memorandum, unlike the first memorandum, the contract was described as a “partnership” instead of a “sponsorship”. It seems that this was done in order to bring the contract within the Group CEO's authority threshold, so that the agreement could be approved by him and did not require Board approval. This recasting of the nature of the contract in order to seek to have it fall within the delegation of authority of the Group Chief Executive Officer is a pattern that appears to have emerged in the TNA contracting. As set out above, when Mr Matjila at Eskom approved the R43 million contract for the business breakfasts with TNA, he tried to argue that it was within his delegated authority because it was an “investment” rather than a

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<sup>2484</sup> Exhibit MM4, p 30.

<sup>2485</sup> The delegation of 1 May 2012 (Exhibit MM4, p 141) provided that the Group CEO had authority in sponsorship contracts of up to R10million; contracts between R10-20million had to be approved by a Board Committee called the Social and Ethics Committee; and above R20million had to be approved by the Board itself. The delegation is also cumulative – the amount of R10million is for the entire year (Exhibit MM4, p 167, clause 5.8.5.).

<sup>2486</sup> Transcript 24 January 2020, p 172, lines 9-16.

<sup>2487</sup> Transcript 24 January 2020, p 174, lines 1-4. The memorandum is at exhibit MM4, pp 31-32.

sponsorship. If it had been a sponsorship, it would have had to have gone to the sponsorship committee for approval.

375. The same *modus operandi* appears to have been used at Transnet. Once the monetary value of sponsorship of a business breakfast exceeded R 10 million in a year, the Group CE had no authority to approve it and it needed to be approved by the Board. To avoid following this correct procedure, the contracts were “recast” as “partnership” deals and then approved by the Group CE, without Board approval.

376. At both SOEs, the corporate governance policies in place evidently sought to place restraints on the CEO’s authority to conclude costly sponsorship contracts. Sponsorships were singled out, presumably because they provide less direct and quantifiable benefit to the organisation and the measurement of their value is more complicated. As a result and as a responsible check and balance in the system, there was a special committee at Eskom that was required to assess any sponsorship proposal over a certain monetary threshold. At Transnet, the Board was supposed to fulfill this function. In both cases, TNA had to try and get around this policy to get approval without scrutiny by the appropriate bodies. This was achieved by disguising what was evidently a sponsorship agreement, as some other kind of agreement, and particularly, a type of agreement that the CEO did have authority to conclude in higher monetary amounts. At Eskom, Mr Matjila tried to claim that he had authority to conclude the agreement as it was an investment. At Transnet, Mr Molefe tried to claim it was a partnership. These were blatant attempts to avoid the corporate governance processes in place to avoid mismanagement of public funds.

377. Mr Phatlane testified that he did not know why it would be called a partnership as there was no documentation about a partnership. He was, nonetheless, instructed by Mr



Sigonyela to call it a partnership.<sup>2488</sup> He was also instructed to reduce the spend to R15 million which was then approved by Mr Molefe.<sup>2489</sup>

378. The agreement that was ultimately concluded in this regard, on 19 April 2013, was entitled “Branding and Advertising Partnership Agreement”.<sup>2490</sup> The agreement committed Transnet to provide an amount of R15 million (excluding VAT)<sup>2491</sup> for 15 sessions.<sup>2492</sup> Payment had to be made by Transnet within 7 days after the signing of the agreement.<sup>2493</sup> This was a change from the previous agreements that allowed payments to be made in 30 days after TNA had presented an invoice. When Mr Phatlane was questioned about this change, he testified that Mr Sigonyela had told him that he had a meeting with someone from TNA who had insisted on this more onerous payment arrangement.<sup>2494</sup>

379. Mr Makode, the Executive Manager of Communications at Transnet, provided the Commission with an affidavit, setting out the budgets for Transnet during that time.<sup>2495</sup> The 2013 marketing budget for Transnet was a total of R138 648 799.20 – R72 857 070 which belonged to the Corporate Affairs Department budget.<sup>2496</sup>

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<sup>2488</sup> Transcript 24 January 2020, p 174, lines 12-25.

<sup>2489</sup> Transcript 24 January 2020, p 175, lines 12-19.

<sup>2490</sup> Exhibit MM4, p 33.

<sup>2491</sup> Exhibit MM4, p 37, clauses 7.2 and 7.3.

<sup>2492</sup> Exhibit MM4, p 36, clause 3.9 (for a twelve-month period).

<sup>2493</sup> Exhibit MM4, p 37 clause 7.2.

<sup>2494</sup> Transcript 24 January 2020, p 180, lines 1-25.

<sup>2495</sup> Exhibit MM4, pp 200-201.

<sup>2496</sup> Exhibit MM4, p 201, para 4.

380. The agreement concluded on 19 April 2013 by Mr Molefe and Mr Howa was for R15 million which is approximately 20% of the budget.<sup>2497</sup> Mr Phatlane confirmed that this was a significant proportion of the Transnet Corporate Affairs budget.<sup>2498</sup>

381. This 2013 agreement was clearly irregular. Although it was no different from the 2012 sponsorship agreement, it was recast as a partnership agreement. However, that recasting did not change its nature. It was a sponsorship agreement. Mr Molefe did not have the authority to conclude it as it fell within the authority of the Board. Despite this, Mr Molefe went ahead and concluded the agreement, committing Transnet to pay R15 million within 7 days for a service that did not produce any discernible value for Transnet. The expenditure was therefore also fruitless and wasteful.

#### **Ad hoc contract**

382. Mr Phatlane testified that on 24 January 2014 he was involved in the drafting of another memorandum.<sup>2499</sup> This memorandum proposed two business briefings that would cost R3 million – a substantial increase in price from the previous contract, from R1 million per breakfast, to R1.5 million.<sup>2500</sup>

383. Mr Phatlane testified that he queried this higher amount and objected to it as unfair to Mr Vida Talliep who was Mr Phatlane's counterpart in TNA. Mr Talliep told Mr Phatlane he was being rude and the matter was ultimately escalated to Mr Howe, the TNA CEO, and to the Transnet GM, Mr Sigonyela who ordered Mr Phatlane to include the higher price in the memorandum.<sup>2501</sup>

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<sup>2497</sup> Exhibit MM4, p 43. Transcript 4 February 2020, p 11, lines 10-20.

<sup>2498</sup> Transcript 4 February 2020, p 12, lines 9-17.

<sup>2499</sup> Exhibit MM4, p 36.

<sup>2500</sup> Exhibit MM4, p 37.

<sup>2501</sup> Transcript 24 January 2020, p 184 (line 16) – 185 (line 6).

### *The third contract*

384. On 31 March 2014 TNA made a further proposal, significantly, for “sponsorship” of the TNA business briefings.<sup>2502</sup> The proposal claimed that the sponsorship would allow exposure for Transnet to 3 million people at a peak time.<sup>2503</sup>

385. Mr Phatlane’s memorandum in respect of this proposal was prepared on 14 April 2014 and was styled as a request to “renew the New Age/SABC Business Briefing Sessions Partnership”.<sup>2504</sup> The memorandum repeated the claim that the business briefings reached an audience of 2-3 million people.<sup>2505</sup>

386. Mr Phatlane testified that he had verified these figures by contacting the SABC marketing department. However, the evidence from the SABC was that only 600 000 adults actually watched the show in 2012. When Mr Phatlane was asked about this, he testified that he had no evidence or records of his interaction with the marketing department at SABC to obtain these figures.<sup>2506</sup>

387. This memorandum led to the conclusion of another “partnership” agreement in 2014. It was for 20 sessions valued at R20 million. It was signed on 6 June 2014 by Mr Molefe.<sup>2507</sup> This was once again far in excess of Mr Molefe’s delegated authority of R10 million for sponsorships.

387.1. The contract that was concluded also did not contain the usual early termination clause that would allow Transnet to cancel on 30 days’ notice. Mr Phatlane

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<sup>2502</sup> Exhibit MM4, p 50.

<sup>2503</sup> Exhibit MM4, p 52.

<sup>2504</sup> Exhibit MM4, p 55. Emphasis added.

<sup>2505</sup> Exhibit MM4, p 55, para 3.

<sup>2506</sup> Transcript 4 February 2020, p 16 (line 3) – p 17 (line 13). See also exhibit MM1, p 16, para 57.2.

<sup>2507</sup> Exhibit MM4, pp 55-69.

testified that he had drafted the contract to include the standard early termination clause. This was queried by TNA and Mr Sigonyela told Mr Phatlane that he was being difficult and causing problems in the conclusion of the contract. Mr Sigonyela told Mr Phatlane to go to the legal department for advice on the inclusion of the clause.

387.2. Mr Phatlane testified that he approached the legal department which told him that the clause should remain in the contract for Transnet's protection.

387.3. Mr Phatlane said that, later, the representative from the legal department met with Mr Sigonyela and the two of them went up to Mr Molefe's office for a number of hours. Mr Phatlane testified that he eventually went home before they came back and then was on leave the next day (a Friday). He testified that, when he returned to work, the signed contract was on his desk and the termination clause had been amended to allow termination only by mutual agreement between the parties.<sup>2508</sup> This meant that Transnet could not unilaterally exit the agreement on notice even if it realised that the agreement was bad for it. Once again, TNA was entitled to an upfront payment of that R20 million.<sup>2509</sup>

388. Mr Phatlane testified that, by around 2014, there was a lot of negativity around any association with the Guptas. As a result, many people who worked in the area of communication at Transnet wanted the TNA contract to scale down or even cease altogether. However, they were not able to do anything about it.<sup>2510</sup>

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<sup>2508</sup> Transcript 4 February 2020, p 18 (line 14) - 24 (line 25).

<sup>2509</sup> Transcript 4 February 2020, p 28, lines 7-9.

<sup>2510</sup> Transcript 4 February 2020, p 27, lines 1-10.

### **The fourth contract**

389. In 2015 Transnet concluded another agreement for business briefings with TNA. This was also styled as a “partnership” agreement and was signed on 14 April 2015 by Mr Molefe.<sup>2511</sup> This contract was for a further 20 sessions at a cost of R21 200 000.<sup>2512</sup> Once again, there was no early termination clause, just a clause providing for a termination by mutual agreement between the parties.<sup>2513</sup>

### **The fifth contract**

390. On 9 March 2016 Mr Phatlane was involved in yet another memorandum of support for a further “partnership” with TNA.<sup>2514</sup> This was approved by Mr Sigonyela and Acting Group CE, Siyabonga Gama. By this stage, Mr Molefe was no longer at Transnet as he had moved across to Eskom. The 2016 “partnership” was for 20 sessions at a cost of R21 200 000 (excluding VAT). The contract was signed on 9 May 2016 by Mr Gama. As with its predecessors, it had no early termination clause and the money was required to be paid upfront to TNA.<sup>2515</sup> An amount of R24 168 000 was paid in two tranches during 2016 (that is R21 200 000 plus VAT of 14%).<sup>2516</sup> In fact, it appears that an additional amount of R24 168 000 was again paid in 2017. However, the Commission does not have insight into the contracts or circumstances underpinning the 2017 payment.

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<sup>2511</sup> Exhibit MM4, p 74- 87.

<sup>2512</sup> Transcript 4 February 2020, p 30, lines 20-25.

<sup>2513</sup> Exhibit MM4, p 82, clause 11.

<sup>2514</sup> Exhibit MM4, p 90-92.

<sup>2515</sup> Exhibit MM4, p 94-106.

<sup>2516</sup> Exhibit MM4, p 112.

## The value to Transnet

391. The Manager of Group Governance Risk at Transnet, Ms Helen Walsh, provided the Commission with an affidavit setting out Transnet's total spend on the TNA business briefings from 2012 to 2017. The amount was R122 809 526.70. For the Big Interview, the spend was R24 872 200.16.<sup>2517</sup>
392. Mr Phatlane confirmed that, apart from Transnet's logo being broadcast in the background at the breakfast briefings and having someone connected with Transnet being present at the breakfast, Transnet was not featured in these business briefings and yet paid all the expenses associated with them.<sup>2518</sup>
393. Mr Phatlane explained that eventually he struggled to find sufficient people from Transnet to fill the seats at the business briefings as the support from Transnet declined heavily.<sup>2519</sup>
394. Then, in 2016, there was a change in leadership and the new GM for communications, Mr Molatwana Likhetho,<sup>2520</sup> cancelled the Big Interview. At that stage, there were around 6 business briefings that still had to take place but Mr Likhetho changed the way they were done. He got Mr Phatlane to craft the content of the briefing so that it actually focused on what Transnet was doing. Transnet began scripting the interviews and interviewing people from within Transnet and its stakeholders. They were now directly supporting and promoting Transnet's business.<sup>2521</sup> Mr Phatlane testified that they were

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<sup>2517</sup> Exhibit MM4, p 111.

<sup>2518</sup> Transcript 4 February 2020, p 44, lines 6-15.

<sup>2519</sup> Transcript 4 February 2020, p 59 (line 19) – 60 (line 3).

<sup>2520</sup> Exhibit MM4, p 7, para 11.

<sup>2521</sup> Transcript 4 February 2020, p 61 (line 1) – 62 (line 12)

never afforded this opportunity in the previous five years and had merely had the terms dictated to them by TNA.<sup>2522</sup>

395. By way of illustration, one breakfast dealt with jobs and procurement scams in companies during a time when Transnet was running a campaign about the issue; one breakfast focused on the Transnet rail network; one on the ocean economy with the focus being on Transnet's marine operations; and one was on the pipeline network. They began to be about social issues facing the public and profiled Transnet executives who participated in panel discussions to educate the public on Transnet's importance in the economy and the scale of its operations.<sup>2523</sup>

## **Conclusion**

396. From the above evidence, it is apparent that Mr Molefe and Mr Sigonyela were directly facilitating the use of public funds for TNA spending. They did not appear to put up any resistance and indeed appeared determined and anxious to ensure that these contracts were concluded (and on extremely disadvantageous terms for Transnet). Mr Sigonyela used threats and intimidation to ensure that his subordinates complied with instructions to advance the interests of TNA. The spend on these contracts was irregular, fruitless and wasteful.

397. Both Mr Molefe and Mr Sigonyela received rule 3.3 notices related to the evidence presented at the Commission.

397.1. Mr Sigonyela's lawyers informed the Commission in correspondence that they would consider Mr Sigonyela's position after the evidence had been presented

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<sup>2522</sup> Transcript 4 February 2020, p 62, lines 13-20.

<sup>2523</sup> Exhibit MM4, p 7, para 11.

and, if necessary, make application to cross examine the witnesses. Despite this indication, however, no such applications were received.

397.2. Mr Molefe did not respond to the rule 3.3 notices. However, he did give evidence at the Commission and was questioned about these contracts with TNA. The gist of his evidence was that the millions of Rands that were spent on the Big interview were justified because Transnet needed to “move away from paying for adverts and move our brand to the mainstream news . . . and the Big Interview was an opportunity to do that”.<sup>2524</sup>

397.3. However, this justification does not hold water. The Big Interview did not move Transnet away from paying for advertisements. On the contrary, it cost Transnet handsomely – a total of more than R24 million.

397.4. Furthermore, the branding opportunity that the Big Interview presented for Transnet were also not ever verifiable because there had been no ABC certification on circulation done for the newspaper and so its reach was entirely unknown.

397.5. On the business breakfasts, Mr Molefe was questioned on two aspects: how Transnet derived value for money from the breakfasts and why they had changed from being described as “sponsorships” to “partnerships”. Mr Molefe testified that the business breakfasts had value because they allowed for good news about Transnet to be covered in the media and gave the Transnet CEO an opportunity to speak about Transnet.<sup>2525</sup> However, this “value” could not have been worth the amount paid for it. The speech that the Transnet CEO had

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<sup>2524</sup> Transcript 10 March 2021, p 138, lines 18-23

<sup>2525</sup> Transcript 29 April 2021, p 258, lines 14-18



an opportunity to present was not aired on SABC and so it was made only to the people in the room at the time. It is nonsense to suggest it was justified for Transnet to pay R 1 million for its CEO to make a ten minute presentation to a room full of people whose identity would not even be known beforehand.

397.6. On the question of the change from “sponsorship” to “partnership”, the issue was whether this change had been a deliberate one to keep the approval power with Mr Molefe because the change in description coincided with a change to his own delegation of authority from the Board of Transnet. If the contracts had not been changed from being described as “sponsorships”, then Mr Molefe would not have been able to approve them himself from 2013. They would have required Board approval.

397.7. When Mr Molefe was first questioned about this during his testimony, he did not have an answer and asked for an opportunity to submit an affidavit.<sup>2526</sup> He was afforded that opportunity but produced an affidavit that did not provide a credible response. Mr Molefe stated in his affidavit that the description was changed because “we found that Partnership was a more accurate reflection of the nature of our relationship with the SABC and the TNA . . . classifying the briefings as sponsorships did not reflect the fact that Transnet was benefitting commercially from the briefings in the form of exposure for the brand as well as advertising”.

397.8. However, the explanation that Mr Molefe has provided does not explain why the manner in which the parties described the contract mattered. This was a contract between the TNA and Transnet. They were the only parties affected by it and they could have called it whatever they wanted, unless what they

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<sup>2526</sup> Transcript 29 April 2021, p 263, lines 8-9

called it had some bearing on whether it would be approved or not. That is the issue around the name change that Mr Molefe never squarely addresses. The only relevance that the name change could have had is if the description mattered for some purpose. The only purpose that has been proffered is the one that Mr Molefe does not directly address, namely, that the description mattered because if it remained a “sponsorship”, then Mr Molefe could not approve it on his own and it would have to go to the Board. Finally, it is not clear that calling the arrangement a “partnership” is any more accurate a way to convey the fact that it presented a branding opportunity. The commercial benefit of sponsorships also lies in the branding opportunities that they present.

398. Mr Molefe’s efforts at justifying the TNA contracts do not, therefore, bear scrutiny.
399. Neither Mr Jackson nor Mr Phatlane were direct facilitators for the Guptas. They did register their disapproval of the TNA spending. However, they failed to bring their concerns to the attention of anyone beyond their immediate superiors. They also failed to resist the instructions that they received. They therefore allowed themselves to be used to support spending with the TNA for which there was no legitimate justification. They allowed the contracts to continue for many years.
400. The only time some value was extracted from the contracts was when personnel were replaced in 2016 and Mr Likhetha saw to it that Transnet at least took steps to ensure that the last six business breakfasts provided exposure for Transnet in the manner addressed above.
401. The business breakfast contracts were clearly not partnerships. They were sponsorships that exceeded the Group CE’s delegation of authority. This ought to have been picked up just as Mr Matjila’s efforts to commit Eskom to the business breakfasts was found by Eskom’s auditors to have been beyond his delegation of authority.

However, even that exposure did not justify the excessive amounts that Transnet was paying to TNA.

402. At Transnet, there does not appear to have been any proper interrogation of these contracts by the internal audit function or the external auditors. There were simply no checks and balances to hold officials accountable for this level of expenditure. There was also no formal process in place for sponsorship and advertising approval, which allowed Mr Molefe to conclude contract after contract with impunity.

403. As with Eskom, more junior personnel were asked to justify decisions already taken by their superiors by preparing recommendations that made it look as though proper processes were being followed and that the superiors were merely approving a proposal by their subordinates, rather than driving the process themselves. These memoranda again served to give the impression that the expenditure was legitimate.

404. This pattern has also been uncovered in the aviation evidence heard by this Commission.<sup>2527</sup> In that case, the SAA Board would reach a decision and then, in a reversal of proper process, seek a recommendation from management to justify the decision. This type of ex post facto generating of a paper trail and this veneer of proper process and justification obfuscated the true state of affairs at these entities and allowed state capture and corruption to flourish.

## **SAA**

405. The Commission heard evidence from two SAA witnesses about the airline's relationship with TNA. They were:

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<sup>2527</sup> This is set out in greater detail in the Aviation evidence analysis.

405.1. Mr Vuyisile Kona, the chair of the SAA Board and Acting-CEO; and

405.2. Ms Cheryl Carolus, Mr Kona's predecessor as chair of the SAA Board.

### **Approach to Ms Carolus**

406. Ms Carolus was the chair of the SAA Board between 2009 and 2012.<sup>2528</sup>

407. She testified that in 2011, TNA had approached SAA seeking advertising spend for the newspaper. This went through the Bid Adjudication Committee (BAC), which decided that the newspaper did not meet the business criteria for SAA and, therefore, declined the bid.<sup>2529</sup>

408. Thereafter, Ms Carolus received a phone call from the DG of Public Enterprises, Mr Matona, summoning her to an urgent meeting about this decision.<sup>2530</sup> Ms Mzimela, the SAA CEO, was also summoned to the meeting.<sup>2531</sup> Mr Matona and Mr Mahlangu, Mr Gigaba's advisor, attended this meeting.<sup>2532</sup>

409. Ms Carolus testified that the meeting had not followed due process within the organisation because ordinarily an appeal against a fair competitive procurement process would have at least first gone to the CEO before it reached Board members. She regarded it as inappropriate for the Director General to choose this forum to plead his case to her as Chair of the Board.<sup>2533</sup>

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<sup>2528</sup> Transcript 29 November 2018, p 9, lines 5-8.

<sup>2529</sup> Transcript 29 November 2018, p 68-69.

<sup>2530</sup> Transcript 29 November 2018, p 69, lines 8-15.

<sup>2531</sup> Transcript 29 November 2018, p 69, line 21 and p 70, lines 9-10.

<sup>2532</sup> Transcript 29 November 2018, p 70, lines 9-11.

<sup>2533</sup> Transcript 29 November 2018, p 75-76.

410. At the meeting, Mr Matona told Ms Mzimela, the CEO and Ms Carolus, the Chair, that TNA was a new entrant in the market and so in order to promote media diversity, SAA should support TNA.<sup>2534</sup>
411. Ms Carolus testified that, while she had sympathy with the mandate of developing new entrants to the media, this was not the role or mandate of SAA. This fell to entities like the IDC and PIC. SAA had to spend money only on advertising that would reach a very particular segment of the population and was targeted so that it would increase profitability. TNA was not such a newspaper. It would have therefore been a violation of SAA's mandate and role to invest in TNA the way Mr Matona was requesting.<sup>2535</sup> Ms Carolus regarded Mr Matona's appeal to them as inappropriate.<sup>2536</sup> Ms Carolus said during the meeting that the correct processes must be followed, that she had no legal standing to speak to them on SAA's behalf, and that it was inappropriate to be entering into discussions with them during the meeting.<sup>2537</sup>
412. Ms Carolus testified that she could not remember all of the details of the meeting because she ended it very soon. However, she could recall that Mr Mahlangu played an important role at the meeting.<sup>2538</sup> Mr Mahlangu had attempted to exert pressure on the Board of SAA to influence their decisions about, among other things, TNA and that the mass resignation of the Board in 2012 was more of a constructive dismissal to pave the way for a more compliant Board.<sup>2539</sup>

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<sup>2534</sup> Transcript 29 November 2018, p 71, lines 20-23.

<sup>2535</sup> Transcript 29 November 2018, p 72 (line 7) – 74 (line 15).

<sup>2536</sup> Transcript 29 November 2018, p 76, lines 8-10.

<sup>2537</sup> Transcript 29 November 2018, p 76.

<sup>2538</sup> Transcript 29 November 2018, p 76.

<sup>2539</sup> Transcript 29 November 2018, p 111, lines 10-25.

413. Mr Mahlangu responded to this evidence in an affidavit presented to the Commission. He denied that he placed any pressure on Ms Carolus at this meeting. Instead, he described the meeting as “cordial” and nothing more than a discussion about the public policy position to promote media diversity.<sup>2540</sup> His evidence was that his interactions with SOEs and the Guptas were in the discharge of his duties as Minister Gigaba’s advisor. This would mean that he would have reported back to Mr Gigaba on his interactions with SOEs and the Guptas.
414. The problem with this response, however, is that it overlooks the vital point that public entities like SAA are spending public funds. They must therefore make procurement decisions based on the proper processes and only if it is in the interests of the business. As Ms Carolus herself testified, there needed to be real value in the media spend for the entity, in order for it to be justified. However, not one of the witnesses before the Commission who promoted and supported the TNA was able to show that any of the SOEs derived value for the millions of Rands that were spent on the TNA.

### **The subscription agreement**

415. Mr Kona was the Chair of the SAA Board from 28 September 2012 to 26 February 2013 – when he was removed from office.<sup>2541</sup> He was appointed acting CEO from 12 October 2012.<sup>2542</sup> He was suspended from his position as Acting Chair on 11 February 2013,<sup>2543</sup> and was replaced by Ms Duduzile Myeni.<sup>2544</sup>

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<sup>2540</sup> Annexure SM 28 to Mr Mahlangu’s affidavit dated 9 September 2020 paras 53 to 55

<sup>2541</sup> Transcript 4 February 2020, p 74, lines 20-25.

<sup>2542</sup> Transcript 4 February 2020, p 75, lines 8-9.

<sup>2543</sup> Transcript 4 February 2020, p 75, lines 16-19.

<sup>2544</sup> Transcript 4 February 2020, p 77, lines 7-10.

416. Mr Kona explained that, when he first got to the airline, SAA was already doing business with TNA, but TNA was not happy with the quantity of advertising that SAA was giving them. After Mr Kona's appointment on 12 October 2012 (but before 6 November 2012),<sup>2545</sup> TNA approached Mr Kona and asked that the TNA newspapers' volumes be increased.<sup>2546</sup> The approach was made on behalf of the TNA by Mr Siyabonga Mahlangu, who was the advisor to Minister Gigaba at the time.<sup>2547</sup>
417. Mr Kona told Mr Mahlangu that the TNA would need to approach the supply chain management committee in this regard.<sup>2548</sup>
418. On 6 November 2012 the Bid Adjudication Committee (BAC) submitted a proposal for Mr Kona's approval<sup>2549</sup> for a dramatic increase in volumes of TNA newspapers from 3000 to 7000 per day.<sup>2550</sup>
419. The BAC submission did not, however, actually provide any reasons or justification for the increased volume.<sup>2551</sup> The submission proposed an extra R2.4million to be spent on TNA subscriptions over the next year.<sup>2552</sup> The BAC submission also did not deal at all with whether SAA could afford an increase from 3000 to 7000 newspapers a day.<sup>2553</sup> There was, however, a statement on the submission from the operations manager, Ms Ramasia, that "there is currently no budget on operations" for this.<sup>2554</sup>

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<sup>2545</sup> Transcript 4 February 2020, p 124, lines 11-12.

<sup>2546</sup> Transcript 4 February 2020, p 123, lines 14-21.

<sup>2547</sup> Transcript 4 February 2020, p 124, lines 17-23.

<sup>2548</sup> Transcript 4 February 2020, p 124, lines 23-25.

<sup>2549</sup> As acting CEO - Transcript 4 February 2020, p 131, lines 20-25.

<sup>2550</sup> Exhibit DD17, p 13.

<sup>2551</sup> Exhibit DD17, p 13. Discussed in transcript 4 February 2020, p 132 (line 25) – 133 (line 5).

<sup>2552</sup> Transcript 4 February 2020, p 136, lines 14-16.

<sup>2553</sup> Transcript 4 February 2020, p 140, lines 5-8 and p 141, lines 1-10.

<sup>2554</sup> Exhibit DD17, p 15.

420. Despite these glaring deficiencies in the BAC submission, Mr Kona approved the requested increase. When he testified at the Commission, he was asked to explain his decision. Mr Kona said that the absence of any budget did not concern him because he thought that the operational changes and expansion of the SAA network that he was planning to implement would free up some cashflow and so it would be affordable.<sup>2555</sup> He accepted, however, that he made the decision to approve the increase without any knowledge of what the TNA readership was at the time.<sup>2556</sup> Furthermore, why did he have to do all that just to accommodate a request by the Guptas that SAA should increase the volume of their subscriptions drastically?
421. Mr Kona's approval of the increased subscription with no evidence of effectiveness, circulation, affordability or commercial value, was a breach of his fiduciary duties to SAA and of his obligations under the PFMA to avoid irregular expenditure as there was no budget to support the increase. It also amounted to wasteful expenditure as there was no information about the commercial value of the subscription to SAA.
422. There were also a series of text messages between Mr Kona and Mr Mahlangu regarding the TNA subscription that are curious.<sup>2557</sup> Mr Kona testified that because Mr Mahlangu had approached him initially about the increase in subscription volumes for TNA, he had to keep him updated about the supply chain management process.<sup>2558</sup> It is strange for a Chief Executive Officer of an SOE to be keeping an advisor to the Minister updated on supply chain management matters within the entity.
423. It is not entirely clear in what capacity Mr Kona engaged with the Guptas and their entity, TNA. While his agreement to the subscription increase tends to indicate that he was a

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<sup>2555</sup> Transcript 4 February 2020, p 144, lines 1-15 and p 145, lines 1-11.

<sup>2556</sup> Transcript 4 February 2020, p 146, lines 1-7.

<sup>2557</sup> Exhibit DD17, p 16 – 17.

<sup>2558</sup> Transcript 4 February 2020, p 148, lines 7-12.



facilitator of TNA business at SAA, there was a further interaction that he had with the Guptas towards the end of 2012 which tends to indicate that he put up some resistance to their advances. However, in the end, he did facilitate their transaction of increased volumes of TNA newspaper and he did so without any credible justification.

### **Approach to Mr Kona**

424. On 29 October 2012<sup>2559</sup> Mr Kona was asked by Minister Malusi Gigaba's advisor, Mr Mahlangu, to go to Saxonwold to meet with members of the Gupta family.<sup>2560</sup> Mr Mahlangu acted as the link between Minister Gigaba and Mr Kona.<sup>2561</sup> This was confirmed by Mr Mahlangu himself in his affidavit presented to the Commission.<sup>2562</sup>

425. Mr Kona met Mr Mahlangu at the Gupta family home in Saxonwold.<sup>2563</sup> He was met first by members of a security team that took his cellphone. He was instructed this was standard procedure for people entering the property.<sup>2564</sup> Mr Kona and Mr Mahlangu met with Tony Gupta, Duduzane Zuma, and Tshepiso Magashule, the son of the former Free State Premier, Mr Ace Magashule.<sup>2565</sup>

426. Mr Kona's account of the meeting has a number of similarities with that of Mr Mkwana. Mr Kona testified that only Mr Gupta spoke during the meeting. Mr Zuma and Mr Magashule were totally silent.<sup>2566</sup> According to Mr Kona, Mr Gupta first flattered him

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<sup>2559</sup> Transcript 4 February 2020, p 78, lines 13-17.

<sup>2560</sup> Transcript 4 February 2020, p 79, lines 1-10; p 83, lines 17-22.

<sup>2561</sup> Transcript 4 February 2020, p 82, lines 13-16.

<sup>2562</sup> Mr Mahlangu's affidavit dated 9 September 2020 para 74.

<sup>2563</sup> Transcript 4 February 2020, p 85, lines 13-15.

<sup>2564</sup> Transcript 4 February 2020, p 86, lines 2-4.

<sup>2565</sup> Transcript 4 February 2020, p 85, lines 20-23.

<sup>2566</sup> Transcript 4 February 2020, p 106, lines 11-20.

which put him at ease.<sup>2567</sup> Then he “welcomed” Mr Kona “into the family” and offered him R100 000 as an introduction to the family.<sup>2568</sup> Mr Gupta also said he was aware that Mr Kona had not been paid the previous month. Mr Kona was surprised that Mr Gupta knew this because this was private company information that only Mr Mahlangu or someone inside SAA would have known.<sup>2569</sup>

427. When Mr Kona questioned the money, and indicated that he would not accept it, Mr Gupta then offered him R500 000.<sup>2570</sup> Mr Kona informed Mr Gupta that he did not need this money and he refused to take it.<sup>2571</sup> After this point, Mr Gupta began to ask Mr Kona about the consultant that SAA was seeking to appoint.<sup>2572</sup>

428. Mr Kona had the discretion to award contracts up to R100 million without Board approval but had, nevertheless, asked the supply chain management officials to determine which consultant company offered the best price to create a turn-around plan on an urgent basis, for SAA. SAA had sought quotes from three companies for the production of the plan. Mr Kona could not recall what the third company’s quote had been. However, he testified that Lufthansa and McKinsey both bid for the contract. Lufthansa’s quote was for R6million while McKinsey’s was R40million. The price difference had been great and the best and most-cost effective competitor was Lufthansa Consulting.<sup>2573</sup>

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<sup>2567</sup> Transcript 4 February 2020, p 87, lines 13-23.

<sup>2568</sup> Transcript 4 February 2020, p 93, lines 15-17.

<sup>2569</sup> Transcript 4 February 2020, p 95 (line 23) – 96 (line 12).

<sup>2570</sup> Transcript 4 February 2020, p 93, lines 18-24.

<sup>2571</sup> Transcript 4 February 2020, p 94, lines 8-15.

<sup>2572</sup> Transcript 4 February 2020, p 94, lines 14-15.

<sup>2573</sup> Transcript 4 February 2020, p 89 (line 4) – 91 (line 25).

429. By the time of the meeting, Mr Kona had already informed Lufthansa that it had the contract.<sup>2574</sup> When he told Mr Gupta this news, Mr Gupta was “livid”.<sup>2575</sup> The meeting then abruptly ended and Mr Kona was told that he could leave.<sup>2576</sup> Before he left, Mr Gupta called the DG of Public Enterprises, Mr Matona, in front of Mr Kona, and told him to come and explain immediately what was going on.<sup>2577</sup>
430. When Mr Kona was driving out of the building, Mr Matona called him and questioned why he had given the contract to Lufthansa.<sup>2578</sup> Mr Kona explained that it was the supply chain management committee that decided to award the contract to Lufthansa. Mr Matona left it at that.<sup>2579</sup> However, the following week, Mr Kona received a letter from the Department of Public Enterprises saying that they wanted to investigate his decision to award the contract to Lufthansa.<sup>2580</sup>
431. What followed thereafter were a series of allegations and counter-allegations about Mr Kona’s conduct at SAA. Mr Kona was suspended on 11 February 2013. This resulted in litigation, which was still pending at the time Mr Kona testified before the Commission. Despite the Commission having asked Mr Kona for copies of the papers in these proceedings, they have not been provided to the Commission.

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<sup>2574</sup> Transcript4 February 2020, p 100, lines 1-4.

<sup>2575</sup> Transcript4 February 2020, p 100, line 5.

<sup>2576</sup> Transcript4 February 2020, p 101, lines 5-13.

<sup>2577</sup> Transcript 4 February 2020, p 101 (line 16) – 102 (line 10).

<sup>2578</sup> Transcript 4 February 2020, p 102, lines 13-22.

<sup>2579</sup> Transcript 4 February 2020, p 102 (line 20) – 103 (line 1).

<sup>2580</sup> Transcript 4 February 2020, p 103 (lines 1-3).

432. Mr Kona was ultimately removed from his position as a Board member on 26 February 2013.<sup>2581</sup> The circumstances surrounding his removal are dealt with in more detail in the section of the report that deals with SAA.

433. Mr Kona's actions in respect of the TNA subscriptions took place before the meeting at the Gupta residence. He testified that the issue of TNA was not raised at the meeting.<sup>2582</sup> However, Mr Kona's willingness to approve an increase in subscriptions of an untested newspaper for many millions of Rands still remains inadequately explained.

## CONCLUSION

434. The evidence before the Commission paints a picture of a calculated strategy by the Guptas to appropriate public funds from state-owned enterprises.

435. It was key to their efforts to have facilitators within the SOEs and government departments, such as GCIS, who would ensure that the entities committed millions of Rands to the TNA despite there being no discernible value for the entities or government departments.

436. One of the earliest acts of state capture by the Guptas was to secure the removal of Mr Themba Maseko from GCIS. The influence they exerted over former President Zuma was considerable. They managed to ensure that a well-performing and principled public servant was removed at lightning speed when he refused to accede to their demands to divert millions of Rands of public money to enrich their media business. Former President Zuma replaced Mr Maseko with a facilitator, in the form of Mr Mzwanele Manyi. During Mr Manyi's term as DG of GCIS, millions of Rands were spent on TNA

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<sup>2581</sup> Transcript 4 February 2020, p 74, lines 20-23. See also p 76, lines 1-3. Mr Kona's removal is recorded in a shareholder resolution dated 11 March 2013, annexure MB3 to the affidavit of Bongisizwe Mpondo, Exhibit DD 34.13, p 1245.

<sup>2582</sup> Transcript 4 February 2020, p 126, lines 4-10.

in circumstances where there was no credible readership information nor certified circulation figures for the newspaper. It is inconceivable that this would have been allowed to occur if Mr Maseko had remained at the helm of GCIS.

437. Within the SOEs, the facilitators required subordinates who would follow their instructions and do what was necessary to ensure that the processes for contracting were adjusted so that the TNA could benefit from these contracts. The adjustments included removing standard termination clauses, providing for up-front payments, misrepresenting the value of the contracts to watchdog bodies like Parliament and the Public Protector, and recasting the agreements as something different to what they really were so that they fell within the delegated authority of the facilitators.
438. There seems to have been a significant lack of checks and balances operating at the entities that allowed this conduct to continue for as long as it did. The contracts concluded by the SOEs were often patently irregular and wasteful by definition because their value simply could not be established. The fact that this was never picked up and addressed, bar a whistleblower report (that was effectively swept under the carpet by the new Eskom Board), reveals a staggering lack of accountability in the public sector between 2011-2017, while millions of Rands from the public purse were diverted to the TNA.
439. Section 83 of the PFMA makes accounting authorities, and each member of the Board of an accounting authority, liable for financial misconduct if they willfully or negligently make or permit irregular or fruitless and wasteful expenditure.
440. The TNA investigation conducted by the Commission has shown that contracts concluded between TNA and Transnet, Eskom and SAA were not only irregular but wasteful, too.

441. The Boards and executives of those entities who supported and facilitated the conclusion of these contracts were likely guilty of financial misconduct. In some instances, that misconduct probably also amounted to a breach of their fiduciary duties to the SOEs. In particular, the Eskom Board members who failed in 2015 to discipline Mr Choeu and to report Mr Matjila to the shareholder breached their obligations under section 51(1)(e) of the PFMA.
442. This failure occurred despite the previous Board having been explicit about the need for these further steps to be undertaken by the new Board. The new Board's conduct was therefore, at a minimum, grossly negligent.
443. Section 86(3) of the PFMA makes such conduct an offence and carries a sentence, on conviction, of either a fine or a period of imprisonment not exceeding five years.
444. The TNA investigation shows that state capture thrived at our country's SOEs despite the fact that the necessary laws to prevent it were in place. The PFMA clearly and definitively made every one of the TNA contracts unlawful. State capture thrived because the people given power and authority in the SOEs simply flouted its terms. One way to prevent this in the future is to ensure that those who ignored their legal obligations are held to account for their conduct.
445. It is recommended that the law enforcement agencies should investigate a possible crime of corruption against Mr Tony Gupta on the basis of Mr Kona's evidence that he offered him initially R100 000 and later R500 000 in their meeting at Saxonwold on or about 29 October 2012.
446. These matters should therefore be handed over to law enforcement agencies for further investigation and, where warranted, prosecution.

447. In so far as Eskom is concerned, the Commission's limited time and resources did not make it possible to consider the position of every one of the 2015 Eskom Board members. All of the 2015 Eskom Board members received rule 3.3 notices related to the Eskom TNA evidence presented at the Commission.

448. Only three responded.

448.1. Ms Klein provided the statement that she had previously submitted to Parliament's Public Enterprises Portfolio Committee. She indicated that she had not supported the round robin resolution to ratify the third TNA contract.

448.2. Both Dr Pathmanathan Naidoo and Ms Devapushpum Naidoo also responded to the Commission. Ms Naidoo explained that she was influenced by the Ledwaba Mazwai report in deciding to ratify the contract. In his affidavit, Dr Naidoo indicated that he was influenced by the impact the TNA contract had for the company's interim results.

448.3. The remaining board members did not respond to their rule 3.3 notices.

449. The position of each of the new 2015 Board members of Eskom will therefore need to be investigated further before any charges could be brought against any of them individually.

450. Given Mr Brian Molefe's role in the conclusion of the contracts referred to above between Transnet and TNA, particularly his misrepresentation that some of those contracts were partnerships when they were sponsorships, it is recommended that the law enforcement agencies conduct such further investigation as may be necessary with a view to the possible prosecution of Mr Brian Molefe by the National Prosecuting Authority for fraud and/or contravention of the PFMA.

451. Given Mr Collin Matjila's role in the conclusion of the contracts referred to above between Eskom and TNA, particularly his misrepresentation that one or more was a partnership or were partnerships when they were sponsorships, it is recommended that the law enforcement agencies conduct such further investigation as may be necessary with a view to the possible prosecution of Mr Collin Matjila by the National Prosecuting Authority for fraud and/or contravention of the PFMA.



# Judicial Commission of Inquiry into State Capture Report: Part 1

Vol. 3: South African Revenue Services (SARS)  
and  
Public Procurement in South Africa



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

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

Report of the Judicial Commission of Inquiry into State Capture: Part 1: Vol. 3



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

Report: Part 1  
Vol. 3: Chapter 3 – South African Revenue  
Services (SARS)  
and  
Chapter 4 – Public Procurement in  
South Africa

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

# PART 1: VOLUME III

## CHAPTER 3 - SOUTH AFRICAN REVENUE SERVICE

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## A: INTRODUCTION AND TERMS OF REFERENCE

1. The South African Revenue Service (SARS), as its name suggests, is the revenue service of the South African government. It is mandated to collect revenue and ensure compliance with tax and customs legislation.
2. Although the Public Protector's report: "State of Capture" did not mention SARS, the SARS evidence is central to the mandate of this Commission, namely, to inquire into allegations of state capture, corruption and fraud in the public sector. The Terms of Reference of this Commission that are relevant for present purposes include the obligation to investigate and report on the following issues:
  - "[1.1] Whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOEs.
  - [1.4] Whether any public official breached or violated the Constitution or legislation by facilitating the unlawful awarding of tenders by organs of State to benefit any person or corporate entity doing business with government or any organ of State;
  - [1.5] The nature and extent of corruption in the awarding of contracts to companies by public entities under Schedule 2 of the PFMA; and
  - [1.6] The nature and extent of corruption, if any, in the awarding of contracts and tenders to companies by government departments, agencies and entities."
3. As an oversight body, SARS has featured prominently in allegations of state capture. The actors in question weakened and misdirected the revenue gathering function of SARS.

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

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

4.2. the purging of competent top officials;

4.3. the strategic positioning of compliant individuals;

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

4.5. the climate of fear and bullying.

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

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

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

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

## **B: OVERLAP WITH THE NUGENT COMMISSION**

6. A particular feature of the SARS evidence is its connection with the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service (“the Nugent Commission”) that Commission operated under Terms of Reference published on 18 June 2018. The Nugent Commission was required to inquire into, make findings, report and make representations, on eighteen specific issues.<sup>2583</sup>
7. There is an overlap between the work of the two commissions. The Nugent Commission focused on irregularities at SARS, including the seizing of SARS by Mr Moyane and others, while this commission is investigating the state capture of public entities, including SARS. However, the central question to be answered by this commission fell outside the scope of the Nugent Commission’s terms of reference.
8. To determine the correct dividing line between what is a permissible topic of enquiry and finding for this commission and what is not because it has already been dealt with, it is necessary to consider what was investigated and found in the Nugent Report.
9. In its final report the Nugent Commission made the following overarching findings:
  - 9.1. there has been a massive failure of integrity and governance at SARS, demonstrated by what SARS once was and what it has become. That state of affairs was brought about by the (at least) reckless mismanagement of SARS on the part of Mr Moyane;

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<sup>2583</sup> Transcript 23 March 2021, p 6, lines 14-18.



- 9.2. what occurred at SARS was inevitable the moment Mr Moyane set foot there. He dismantled the elements of governance one by one. This was more than mere mismanagement. It was seizing control of SARS as if it was his to have;
- 9.3. the failure of good governance was manifest inter alia from the fact that senior management was driven out or marginalised at SARS; senior management appointed by Mr Moyane were simply compliant and neglected their oversight function; the development of SARS' sophisticated Information Technology systems was summarily halted; the organisational structure of SARS that provided oversight was pulled apart; dissent was stamped out by instilling distrust and fear; accountability to other State authorities was defied; and capacity for investigating corruption was disabled; and
- 9.4. instead of fostering a culture of healthy dissent, Mr Moyane engendered a culture of fear and intimidation. There was a purging of competent officials.<sup>2584</sup>
10. This commission has no desire to repeat the work of the Nugent Commission, nor does it seek to re-enter the fray. In the absence of any judicial review of the Nugent Commission's Report, its factual findings will stand, and no evidence in contradiction of any such findings can be accepted.
11. While the remit of that report is wide, there are certain issues which were not investigated by Judge Nugent, which were the focus of this Commission's work in relation to SARS. Matters concerning SARS which were not within the remit of the Nugent Commission's work, or in respect of which evidence was not led and which are relevant to this commission's work, formed the subject matter of testimony before this Commission.

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<sup>2584</sup> Transcript 23 March 2020, p 7–8.



12. The first focus was on Bain's actions in connection with SARS. The Nugent Commission concluded that Bain had not told the full story. In addition, there was emphasis on Mr Moyane's role in SARS. Mr Moyane did not give evidence before the Nugent Commission. Finally, evidence was brought before the Commission on the impact of the capture of SARS upon the institution, especially its compliance capabilities.
13. The Nugent Report makes detailed findings as to the institutional dismantling of SARS, but this commission's mandate requires that the strategic significance of this alleged "capture" of SARS be contextualised within the "big picture" of the state capture inquiry.<sup>2585</sup>
14. Adverse findings were made against Mr Moyane in the final report of the Nugent Commission. Despite this, in his testimony before this commission, Mr Moyane said that he "did not have time to read it, because [he] felt that it had nothing to do with [him]". He said it was "an inquiry that was done outside [his] scope".<sup>2586</sup>
15. When the conclusions of the report were put to Mr Moyane, he said that he did not "take this report seriously, because it was prepared in order to tarnish "[his] organisation".
16. Mr Moyane said that he was "denied the right of participation in the SARS Commission and subsequent to his "lodgement of legal objections to its processes," he was "legally precluded from such participation".<sup>2587</sup>
17. Initially, Mr Moyane denied having been invited to participate at all. After being shown communications between his lawyers and the Nugent Commission<sup>2588</sup> and a number of

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<sup>2585</sup> Transcript 23 March 2020, p 8–10.

<sup>2586</sup> Transcript 26 May 2021, p 50, line 5.

<sup>2587</sup> Transcript 26 May 2021, p 71–72.

<sup>2588</sup> Transcript 26 May 2021, p 77–78.

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

18. Mr Moyane raised various objections before the Nugent Commission, and sought relief on a number of grounds, including that the proceedings be discontinued.<sup>2591</sup> All these objections were dismissed but Mr Moyane still did not appear at the Commission thereafter.<sup>2592</sup>
19. Mr Moyane was also invited to furnish written submissions to the Nugent Commission as to why its preliminary findings and recommendations should not be made final. This invitation was not taken up either.<sup>2593</sup>
20. In the result, the commission of inquiry which had been set up in order to investigate SARS had to proceed to issue its final report without the benefit of the testimony of the sitting Commissioner.<sup>2594</sup> When asked why he did not go before the Nugent Commission and put his side of the story, Mr Moyane eventually said that he had no comment.<sup>2595</sup> That answer was telling! Mr Moyane knew that, from the moment the Nugent Commission was appointed, there was a lot he had to account for which he had done that was wrong in respect of which he would have no answers. He knew the meetings he had with Bain about SARS even before he was appointed as Commissioner of SARS.

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<sup>2589</sup> Transcript 26 May 2021, p 79–80.

<sup>2590</sup> Transcript 26 May 2021, p 82 and 92.

<sup>2591</sup> Transcript 26 May 2021, p 87–88.

<sup>2592</sup> Transcript 26 May 2021, p 88, lines 10-13.

<sup>2593</sup> Transcript 26 May 2021, p 90–91.

<sup>2594</sup> Transcript 26 May 2021, p 91, lines 16-21.

<sup>2595</sup> Transcript 26 May 2021, p 96, line 15.

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

## **C: WITNESSES**

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

### **Mr Athol Williams**

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

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

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

25. At the end of August 2019 he resigned, because he was of the view that Bain had not been transparent with him and the South African authorities regarding their investigation into what happened at SARS under their tenure. He made various statements to the media to this effect in 2019.

### **Mr Vlok Symington**

26. Secondly, the Commission heard from Mr Vlok Symington ("**Mr Symington**"). Mr Symington is a senior employee of SARS.
27. Mr Symington was asked by the Commission to submit himself to an interview in connection with what has been described as a hostage incident that occurred at the SARS offices in October 2018.

### **Mr Johann Van Loggerenberg**

28. Thirdly, Mr Johan Van Loggerenberg ("**Mr van Loggerenberg**"), a former SARS employee, gave evidence.
29. He was approached by the Commission regarding the Commission's investigations into compliance units at SARS and the fate of those units and how they had been affected by the restructuring which took place under Bain and Mr Moyane.

### **Mr Tom Moyane**

30. Mr Moyane, the former Commissioner of SARS, was due to give evidence on the 24<sup>th</sup> of March 2021. However, the day before he was due to appear, the Commission was informed that Mr Moyane was too unwell to appear.
31. Mr Moyane's testimony was rescheduled for the 26 May 2021, and he appeared to give evidence on that day under subpoena.

## **Minister Gordhan**

32. Mr Moyane was granted leave to cross examine Minister Pravin Gordhan (**“Minister Gordhan”**). He did so on two separate occasions.
33. Minister Gordhan’s testimony is dealt with below.

## **D: METHODS OF CAPTURE**

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

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

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

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<sup>2596</sup> Transcript 25 March 2021, p 57, lines 11-14.

Loggerenberg told the Commission.<sup>2597</sup> As a result of how effective SARS became at enforcement and oversight, it was “praised and studied worldwide”.<sup>2598</sup>

36. During this period, there were improvements in Information Technology, including what would later become known as eFiling, improvements in human resource management, fiscal management within the institution, productivity, and planning, and aligning that with the medium-term expenditure framework.<sup>2599</sup>
37. Mr van Loggerenberg told the Commission that there were dedicated units, creatures of statute, within SARS which were mandated to assist law enforcement agencies to control organised crime, from a revenue and customs and excise perspective.<sup>2600</sup> These units went on to make a marked impact against organised crime from a tax, customs, and excise perspective. What Mr Symington said about how highly regarded SARS was internationally before it was subjected to capture by Bain under Mr Moyane’s leadership is no different from what I was told about SAA at some stage, Eskom at some stage and Denel at some stage each of which were subsequently run down considerably with rampant corruption and state capture. All of which happened under happened under the watch of the Government of the ruling party, the African National Congress. Most, if not all, of these entities were led by the Chief Executive Officers and Boards of Directors who would have been approved by the ruling party through its national deployment committee. These entities did not drop overnight from the internationally highly regarded entities that they once were to what they subsequently became. The decline happened over a number of years but both the government and the ruling party failed dismally to

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<sup>2597</sup> Transcript 25 March 2021, p 90, lines 17 - 20.

<sup>2598</sup> Transcript 25 March 2021, p 91, lines 1 - 2.

<sup>2599</sup> Transcript 25 March 2021, p 65, lines 14 – 20.

<sup>2600</sup> Transcript 25 March 2021, p 66, 14-24.

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

38. It is clear, therefore, that SARS was a highly effective service at both oversight and enforcement. Mr Williams said that no one, at that stage, could have legitimately described SARS as dysfunctional.<sup>2601</sup> Against this background, there was simply no need for the services of a management consultancy.
39. This notwithstanding, Mr Williams told the Commission about how Bain was contracted to perform consultancy services at SARS, including recommending and implementing a “profound strategy refresh” and complete organisational restructure, to the tune of R167 million over 27 months. For Bain to recommend restructuring, which is usually a last resort, suggests that SARS was completely dysfunctional and needed a complete overhaul of vision, mission and strategic plans and operations. Mr Williams said that one would be hard pressed to find any knowledgeable person who could justify the claim that this is what SARS needed.<sup>2602</sup>
40. It is Mr Williams’s evidence, therefore, that there was a plan between Bain and the Executive, particularly Mr Moyane as the Commissioner of SARS and President Jacob Zuma (“**President Zuma**”), to enter SARS and to cause damage to this institution. Key to this from Bain’s side was the managing partner, Mr Vittorio Massone (“**Mr Massone**”), who was Bain’s senior representative in Johannesburg. This collusion was, without a doubt, unethical and improper, Mr Williams told the Commission.<sup>2603</sup>

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<sup>2601</sup> Transcript 23 March 2021, p 209, lines 8 - 9.

<sup>2602</sup> Transcript 23 March 2021, p 210, lines 19-21.

<sup>2603</sup> Transcript 24 March 2021, p 95, line 19.

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

#### Bain and Ambrobrite

42. On 1 November 2013, Bain entered into a “Business Development and Stakeholder Management Contract” with a company known as Ambrobrite (Pty) Ltd (“**Ambrobrite**”). By Bain’s own due diligence, this company did not have any internet presence or website. It never filed any financial statements. It had a tax certificate which SARS seemed to think was fraudulent and it had no trading history.<sup>2604</sup>
43. The company was set up by Mr Duma Ndlovu, a TV producer, and Mr Mandla KaNozulu. Both men are artists who do creative work. So, together they describe their business as an events management company.<sup>2605</sup>
44. The written contract stated that Bain, in collaboration with Ambrobrite, had identified the government and State-Owned Enterprise (“**SOE**”) sector as a “strategic priority”. In addition, the contract states that, according to Ambrobrite intelligence, in the next few years a number of SOEs would be subject to leadership and strategic changes and would require “significant transformation and turnaround processes”. The contract states that Bain was of the opinion that a collaboration with Ambrobrite would substantially benefit its business and the probability of success in this sector.<sup>2606</sup>
45. The contract talks about business development and giving Bain strategic advice, which is “bizarre” according to Mr Williams, because Bain was one of the preeminent strategy

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<sup>2604</sup> Transcript 23 March 2021, p 115 –116.

<sup>2605</sup> Transcript 23 March 2021, p 115 –116.

<sup>2606</sup> Transcript 23 March 2021, p 118, lines 1 - 3.



consulting firms in the world. Seeking strategic advice from two artists does not make sense.<sup>2607</sup>

46. This aside, Mr Williams said that what is stated in the contract compared with what materialised is “shocking”. The contract seemed to portray itself as one where local experts would help Bain to be successful in the public sector by facilitating the introduction or directly introducing Bain partners to key leaders and decision makers. Mr Williams said that the reality is that these were two individuals who were very close to politicians and were able to open doors to politicians for Bain.<sup>2608</sup> In Mr Williams’s view, the real intent of the contract was for Bain to take advantage of Ambrobrite’s proximity to President Zuma and other senior politicians and to use that to their advantage to gain non-public information for their commercial advantage. In other words, to gain access to consulting opportunities that took advantage of those relationships.<sup>2609</sup>
47. The fees which Bain paid for these services was R3.6 million per year, which made Ambrobrite the second highest paid of the 53 advisors that Bain worked with worldwide. It was paid 50% higher than the next highest paid advisor.<sup>2610</sup>
48. A formal contract was concluded on 1 November 2013, but Bain was doing work with Ambrobrite prior to the conclusion of this written contract. For example, in September 2013, Bain arranged a party with President Zuma. This shows that Bain had commenced a business relationship with Ambrobrite prior to having concluded the written contract.

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<sup>2607</sup> Transcript 23 March 2021, p 118.

<sup>2608</sup> Transcript 23 March 2021, p 119, lines 3 - 5.

<sup>2609</sup> Transcript 23 March 2021, p 150, lines 15 -17.

<sup>2610</sup> Exhibit WW1, p 24.

Mr Williams commented that this in itself was extremely unusual for Bain, as a “highly professional organisation” that would “cross T’s and dot I’s”.<sup>2611</sup>

49. Bain itself, through its due diligence process, had established some concerning features of this relationship. These concerns were raised, for example in an email exchange between the Director of Finance in Bain’s London Office, Mr Geoff Smout (“**Mr Smout**”) and Ms Nicole Olmesdahl (“**Ms Olmesdahl**”), who worked in finance in the South African office. In email correspondence, Mr Smout said, “this whole situation seems very dodgy” and that “for some reason, I do not trust the situation”. Ms Olmesdahl responded that SARS suspected that Ambrobrite’s Tax Compliance Certificate was fraudulent.<sup>2612</sup>

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

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

“it is simply business development arrangement where these people would inform us if they are aware of changes in the key positions in a few selected companies ...”<sup>2614</sup>

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

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<sup>2611</sup> Transcript 23 March 2020, p 128, lines 16-17.

<sup>2612</sup> Exhibit WW1, p 193.

<sup>2613</sup> Exhibit WW1, p 207.

<sup>2614</sup> Exhibit WW1, page 213.

<sup>2615</sup> Transcript 23 March 2020, p 132, lines 16-19.

53. Despite these concerns which were raised by very senior people at Bain, the contract was signed. This contract was renewed every six months up until June 2016.<sup>2616</sup> Mr Williams commented that the contract did not contain the type of wording or attention to detail that would normally be found in a standard Bain contract.<sup>2617</sup> It was not a document that Bain would normally produce, let alone sign.<sup>2618</sup>
54. In addition, there were a number of activities which Bain conducted with Ambrobrite, which seemed to fall outside of their contractual arrangement and which are unusual against what you would normally see a management consulting firm doing. These included arranging parties with political attendees and facilitating meetings between South African and Italian senior police officials.
55. Although Bain initially applied to cross examine Mr Williams, they later withdrew their application. They withdrew after I made it clear to them that, if they sought leave to cross-examine, they would have to give their full version. That is what Rule 3.3 of the Rules of the Commission required.

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

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

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<sup>2616</sup> Transcript 23 March 2020, p 138, lines 10-11.

<sup>2617</sup> Transcript 23 March 2020, p 145, lines 7-6

<sup>2618</sup> Transcript 23 March 2020, p 145, line 9

57. Mr Massone's explanation for this was that these were marketing meetings, where Bain was seeking to display their capabilities to President Zuma. There was no intent to gain any consulting work, but merely part of their strategy to gain access to the public sector, to have President Zuma aware of Bain's capabilities.<sup>2619</sup>
58. It is absurd, Mr Williams said, that it would take 17 odd meetings to market Bain. After assessing the documents that were discussed at these meetings, Mr Williams said that these were not designed as marketing materials. In addition, Bain removed all of their corporate identity from these documents, which does not make sense if the purpose of the meetings was marketing.<sup>2620</sup>
59. At this point, there was no formal contract between Bain and President Zuma, or Bain and the South African government. Indeed, this was before Mr Moyane was appointed to SARS. Despite this, there were at least 12 times that representatives from Bain met with President Zuma between 2012 and 2014. This frequency and the fact that they were all after hours and behind closed doors or at the President's official residence was, on the face of it, a cause for concern.<sup>2621</sup>
60. There is an email dated 26 February 2014 from Mr Massone to Fabrice Franzen ("**Mr Franzen**"), Mr Dutiro and Mr Nkano, all partners of Bain at the time. The subject is "Quick Note, please keep confidential". The body of the email reads:
- "Guys, met president yesterday night in CT. All good. There was also a Tom (a guy we met via SARS) and it really seems he is getting that job after election. He was very friendly with me and seems a smart guy to work with."
61. Mr Williams explained that Mr Massone had met Mr Moyane a few months before this Cape Town meeting, hence the reference here to "a Tom" who he had met "via SARS".

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<sup>2619</sup> Transcript 23 March 2021, p 154, lines 6 – 10.

<sup>2620</sup> Transcript 23 March 2021, p 154 - 155.

<sup>2621</sup> Transcript 23 March 2021, p 149, lines 2 – 9.

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

62. Not only is it highly irregular that Bain, let alone anyone else, should know of this appointment before it took place, Mr Williams said that it was highly unusual for a management consultancy like Bain to be meeting with the President of a country at all. This is just not the work that management consultants do.<sup>2623</sup> Typically, Bain works with executives of companies and with SOEs on operational issues. The relationship is usually with the Directors-General (“**DGs**”), or with the CEOs of SOEs.
63. Between 2012 and 2015, Bain created a series of documents containing far-reaching plans, not only to restructure certain government agencies and SOEs, but also to restructure entire sectors of the South African economy. The details of these plans will be discussed below, but, for present purposes, the point is that these documents were all presented to President Zuma. At these meetings were also various other senior politicians.<sup>2624</sup>
64. One of the plans in the documentation which Bain presented to President Zuma was that “a delivery agency could be set up to overcome execution roadblocks”. Mr Williams’ understanding was that this delivery agency would sit outside of the executive and report directly to the President. The idea was that the President would set up a special delivery agency filled with people who could deal with so-called “execution roadblocks”. Some of their powers were that they could approve projects, supervise budgets and they

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<sup>2622</sup> Transcript 23 March 2021, p 155 – 157.

<sup>2623</sup> Transcript 23 March 2021, p 148 – 149.

<sup>2624</sup> Transcript 23 March 2021, p 159, lines 8 – 19.

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

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

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

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

"we have been involved in preparing a high level outside-in 'strategic turnaround' document on the SA Revenue Services SARS. The person we prepared the document with and who pitched it to the SA President is most likely going to be appointed as Commissioner in the next few weeks/months and Bain will be assisting him should he get the job. SARS is one of the largest and highly estimated government agencies and a large Bain client in the previous dispensation."<sup>2628</sup>

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

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<sup>2625</sup> Transcript 23 March 2021, p 180 – 181.

<sup>2626</sup> Transcript 23 March 2021, p 185, lines 1 – 8.

<sup>2627</sup> Transcript 23 March 2021, p 185, lines 12 – 16.

<sup>2628</sup> Transcript 23 March 2021, p 186 – 187.

69. If Bain were genuinely developing ideas to improve certain SOEs or sectors of the economy, Mr Williams said he would expect that they would present such plans to the DG of the appropriate Ministry, or to the Minister, not to the President.<sup>2629</sup>
70. There seems, Mr Williams thought, to have been a very specific, beneficial reason for presenting these to the President that one might not ordinarily expect. It is suggested in the documents that these projects be designated as a President's Program. The significance of designating a project in this way is that it removes governance and oversight. It allows the SOE or state organs to go directly to the President, bypassing the Minister's discretionary power.<sup>2630</sup>
71. In Bain's application to cross-examine, Mr Stuart Min ("**Mr Min**") deposed to an affidavit. Therein he said that there was nothing untoward at all about the series of meetings between Mr Massone and the former President. He said that there was also nothing untoward about the content of any of the plans proposed.<sup>2631</sup>
72. Mr Williams disagreed with this assessment and said that the context of these meetings and their frequency illustrate a level of familiarity which is not benign.<sup>2632</sup>

#### "Executive training"

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

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<sup>2629</sup> Transcript 23 March 2021, p 191, lines 8 – 13.

<sup>2630</sup> Transcript 23 March 2021, p 191 – 192.

<sup>2631</sup> SEQ 44/2020 in Bundle 1, page 10.

<sup>2632</sup> Transcript 23 March 2021, p 198 - 199.

74. However, Mr Williams said that there are a number of points which render this explanation unconvincing, and which depart quite significantly from what Mr Williams would expect to see from CEO coaching. These are: the level of detail that is presented in these plans, the fact that Mr Massone never mentions CEO coaching in his internal emails or assessments, and the fact that the plan was presented to the former President. For these reasons, the interaction with Mr Moyane was in Williams' assessment more in line with a complete high-level strategic plan than with CEO coaching.<sup>2633</sup>
75. Emails from Mr Massone indicated not a description of coaching, but developing a high-level strategy plan with the expectation that, if this plan was approved and the senior executive got the job, Bain would most likely be hired to work with the CEO in its detailing and implementation.<sup>2634</sup>
76. Mr Williams made the point that CEO coaching is a big investment on the management consultant's part. Typically, this level of investment would only be made if there is already a relationship with the company, or when Bain has expertise in that area or where there is an assurance that the person to whom you are providing the coaching is actually going to get that job. However, Bain did not have a relationship with Mr Moyane, nor did they have expertise about SARS. What did seem to exist was a common understanding amongst some at Bain that Mr Moyane was going to get the job at SARS.<sup>2635</sup>
77. Mr Williams told the Commission that it was fairly standard for Bain, when working with a new CEO, to have a "First 100 Days Plan". The idea is to prepare to the extent that you can from the outside, what to expect in broad terms when you arrive in the new

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<sup>2633</sup> Transcript 23 March 2021, p 211 – 212.

<sup>2634</sup> Exhibit WW1, p 482.

<sup>2635</sup> Transcript 23 March 2021, p 212 – 214.



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

78. On 26 May 2014, months before Mr Moyane was appointed as Commissioner of SARS, he was presented with a First 100 Days Plan.
79. What surprised Mr Williams about this plan was the level of specific guidance it contained. This, he opined, suggested that it was not purely based on the outside in approach. It suggests instead that there might have been some inside information coming from inside SARS. This was information that no one outside of SARS could possibly know.
80. Additionally, across Africa Bain had no tax authority experience. So, the fact that Bain was able to develop a document with the level of detail which this one had raised a red flag.<sup>2636</sup>
81. Mr Franzen indicated in an email to Mr Chris Kennedy ("**Mr Kennedy**") of Bain on 3 September 2018 that Bain had multiple meetings with Mr Jonas Makwakwa ("**Mr Makwakwa**"), Head of Internal Audit at SARS. In addition, there are emails and documentation (including a document prepared by Mr Makwakwa which was fed to Bain) which show that there were meetings between Mr Massone and Mr Makwakwa.
82. It appears clear that this senior executive at SARS was feeding sensitive information to persons outside of SARS. Not only was this illegal, it also meant that Bain had access to confidential information which was not in the public domain.<sup>2637</sup>

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<sup>2636</sup> Transcript 23 March 2021, p 201 - 202.

<sup>2637</sup> Transcript 24 March 2021, p 31, lines 10 – 15.

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

- 1) keep the ball rolling;
- 2) gain the higher ground; and
- 3) take control.

84. In addition, the document noted that the plan was to “build a healthy sponsorship spine to accelerate change and **identify individuals to neutralise ...**”.<sup>2638</sup> (Emphasis added)

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

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

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<sup>2638</sup> Exhibit WW1, p 493.

<sup>2639</sup> Transcript 26 May 2021, p 153, lines 1 – 17.

<sup>2640</sup> Transcript 26 May 2021, p 154 – 155.

<sup>2641</sup> Transcript 26 May 2021, p 157 – 158.

87. Mr Moyane was not, however, aware of an updated plan where these offending words were deleted.<sup>2642</sup>
88. Mr Williams said that in all his years at Bain he had never used in business or consulting the idea of “neutralising” someone. Bain’s explanation for this was the idea of taking people who were detractors, people who might not support your plan and turn them into people who were neutral towards you.
89. The attempts by Bain and Moyane to explain away the obvious intention behind the use of the words “neutralise” were unconvincing. The clear intention signified in plain language was to identify people within SARS to get rid of. The significance of this aspect of the plan will be discussed in further detail in a later section.

#### Bain’s actual plan: restructuring SARS and centralising procurement

90. While Mr Massone and others insinuated that what was happening with SARS was merely CEO coaching, the evidence suggests something much broader and more sinister.
91. Mr Moyane’s response to this was that there was an Annual Performance Plan of 2014/2015 which spoke of the re-organisation of SARS. Parliament in its wisdom was aware of certain shortfalls in the organisation, said Mr Moyane.<sup>2643</sup> This document was not produced to the Commission by Mr Moyane.
92. The consistent theme in the documents that Bain created is that of restructuring. It was Mr Williams’ view that this was aimed at bringing as many organisations and as many

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<sup>2642</sup> Transcript 26 May 2021, p 161 – 162.

<sup>2643</sup> Transcript 26 May 2021, p 149 and 193.

financial resources under more concentrated control as possible, which could greatly facilitate state capture.<sup>2644</sup>

93. This type of work is not within the expertise that management consultants typically would have. One would expect an economist or policy advisor to be doing this type of work.<sup>2645</sup>
94. Mr Williams says that restructuring an organisation is something that you do with utmost care and you always want to find other ways of improving before you restructure. In fact, it is the last thing that you do in an organisation because of the institutional memory which is lost if you restructure an entity like SARS.<sup>2646</sup>
95. Mr Symington told the Commission that in around August 2015 the new model for SARS (designed by Bain) was presented to the executives of SARS as a *fait accompli*. He said that they were never even consulted “about their divisions or their expertise or anything”. When they saw this model, they said that it was foreign to them and they could not see themselves in that model. He said that they could not see how the new model was going to be more efficient than what they had at the time.<sup>2647</sup>
96. Mr Moyane, however, said that he could confirm without contradiction that he ran a consultative organisation in which everything was put before a team for discussion and approval. He said that he never took a “dictatorial position”.<sup>2648</sup>
97. Bain did not limit its plans just to SARS – the documents speak of reshaping the South African economy through restructuring organisations and sectors.<sup>2649</sup> Mr Williams

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<sup>2644</sup> Transcript 23 March 2021, p 159 – 162.

<sup>2645</sup> Transcript 23 March 2021, p 160, line 17.

<sup>2646</sup> Transcript 23 March 2021, p 161, line 21 – 25.

<sup>2647</sup> Transcript 25 March 2021, p 55, lines 10 – 20.

<sup>2648</sup> Transcript 26 May 2021, p 62, line 21.

<sup>2649</sup> Transcript 26 May 2021, p 160, lines 10 – 19.

pointed to eight documented plans which were labelled “reshaping the South African Economy”.<sup>2650</sup> These included plans to reshape various sectors like ICT, energy and infrastructure.

98. These plans included a vision of how various SOEs were imagined to be dismantled and reassembled “like a puzzle” into a particular operating model.<sup>2651</sup>

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

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

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

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<sup>2650</sup> Exhibit WW1, p 40.

<sup>2651</sup> Transcript 23 March 2021, p 167, lines 13 – 23.

<sup>2652</sup> Transcript 23 March 2021, p 168, lines 1 – 9.

<sup>2653</sup> Transcript 23 March 2021, p 183.

<sup>2654</sup> Transcript 23 March 2021, p 183 - 184.

102. Mr Williams identified what he thought were the various stages in the strategy. Stage A is to create a new macro structure in the target sector. Stage B is to restructure individual organisations within the macro structure. Stage C is to exert control of those repurposed originations and pursue private, financial enrichment through corrupt procurement and other means.<sup>2655</sup>
103. There were also documents which spoke of plans of an entirely different nature. These were entitled “ANC Manifesto implementation”. According to the records of meetings, Mr Massone had “3 – 5” meetings to discuss the topic of the ANC manifesto and what he called a “100 days’ plan”. This was presumably a blueprint of action for the ANC, much like the blueprint created for Mr Moyane at SARS. These ANC manifesto documents include a discussion relating to the Cabinet planning process and performance agreements for Ministers and Directors-Generals (DGs). The documents make explicit reference to the ANC Top 6 and DGs in the Presidency.<sup>2656</sup>
104. It is a notable feature of the SARS evidence, in contrast to the rest of the evidence which the Commission heard, that this is one of the few instances where President Zuma was himself directly and personally involved in the activities and plans to take over a government entity, namely, SARS. Another was Eskom which is discussed elsewhere in this Report.

#### Bain’s knowledge of Mr Moyane’s appointment

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

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

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<sup>2655</sup> Transcript 23 March 2021, 189 – 190.

<sup>2656</sup> Exhibit WW1, p 32, paragraph 74.3

Central procurement agency: he loves it, wants an implementation plan

. . .

asked us to organise a workshop with the new cabinet of ministries after the elections . . .

So I would say very well. .”<sup>2657</sup>

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

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

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

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

“Guys, just had a call and heard that the SARS announcement should happen tomorrow or Monday. Meeting later in the office to also discuss a procurement process.”<sup>2659</sup>

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

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<sup>2657</sup> Exhibit WW1, p 470

<sup>2658</sup> Transcript 23 March 2021, p 157

<sup>2659</sup> Transcript 24 March 2021, p 24-25, lines 24-5, 1-3

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

110. All of the interactions described above took place before Bain had any contractual agreement in place between itself and SARS or the South African government.
111. Due to the fact that SARS is a public institution, it is required by law to conduct an open tender process before it procures any goods or services. Bain was appointed to perform consultancy services in January 2015. There are a number of irregularities in the procedure which preceded this appointment.
112. The Request for Proposals (RFP) that SARS issued in October 2014 described in detail the scope of work that was to be performed, including a comprehensive organisational and strategy review of SARS and a redesign of SARS. The document contemplated the appointment of an external consultant. The process was recorded to be by a closed tender – meaning it would only be sent to a closed list of consulting firms.<sup>2660</sup>
113. The first problem is one that was dealt with right at the start of this section of the Report: the need for consultancy services at all. At that point in time, SARS was a well-functioning and highly effective organisation. There was no justifiable reason for it to hire external consultants to perform the stated services. In addition, the deliverables (like how to improve SARS's collection capability and enhance SARS' operational performance through restructuring) were ones which were far-reaching and extreme.
114. Organisations hire management consultants for their particular expertise. In this instance, Mr Massone said in an email dated 18 November 2014:

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<sup>2660</sup> Transcript 24 March 2021, p 38, line 10



“As much as it is ‘designed for us’ . . . we need to make sure they feel comfortable with the team and our expertise (and we know that we can’t claim to have done much on the specific topic)”.<sup>2661</sup>

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

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

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

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

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

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<sup>2661</sup> Exhibit WW1, p 573

<sup>2662</sup> Transcript 24 March 2021, p 66, lines 2-12.

<sup>2663</sup> Transcript 24 March 2021, p 66, lines 1-17.

119. Thirdly, evidence shows that there was a request for information and references from Bain at a time prior to the RFP having been issued.<sup>2664</sup> Communication with potential bidders prior to the issuing of an RFP is irregular, in terms of the governing legislation. The communication was a request for references regarding any public entity relationships which Bain had.
120. The communications were from a Ms Mogogodi Dioka, a person from SARS' executive procurement department. She deposed to an affidavit to the Commission in which she denied any irregularity in relation to having asked Bain for references.<sup>2665</sup> On her own version, she did not deny that the references requested were for procurement purposes. She said that the references were related to the piggybacking procedure (discussed below). It still raises the question of why SARS was seeking references from Bain before any tender process or contracting process had begun.
121. This exchange suggests that SARS had already decided as early as 2 December 2014 that Bain would be their consultant.
122. Fourth, there was an attempt to "piggyback" off the contract that Telkom had with Bain, in order to give a mandate to Bain. Piggybacking is the process when one uses an existing contract to acquire the same services on the strength of another public entity contract. In an email from Mr Massone to Mr Sipho Maseko, the then Chief Executive Officer of Telkom, on 4 December 2014, it was acknowledged that this was explicitly to "enable an immediate start avoiding long and complicated tender processes".<sup>2666</sup>
123. As it turned out, this method was not used. It was determined by Mr Maseko and Telkom that this was not an appropriate arrangement. In any event, the discussion of this as an

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<sup>2664</sup> Exhibit WW1, p 580.

<sup>2665</sup> Exhibit WW7, p 42.

<sup>2666</sup> Exhibit WW1, p 582.

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

124. SARS issued an RFP in December 2014 to which Bain and other consulting firms responded. It was for a six-week piece of work which they referred to as the diagnostic.
125. In January 2015 Bain made a submission to SARS in response to the RFP which SARS had sent out. The document was headed “The Bain team brings considerable experience and expertise to the table”.<sup>2667</sup> This was clearly an attempt by Bain to demonstrate their apparent expertise that might be applicable to the work at SARS.
126. However, when one conducts a consulting project, the main source of the expertise on the consultant team derives from the partners and the most senior people on the team. Mr Massone and Mr Franzen were the partners on this team and Mr Williams said that they had no apparent expertise working with tax authorities around the world, in Africa or at SARS. Mr Massone’s expertise was in telecommunications and Mr Franzen’s was in financial services, mainly banking.<sup>2668</sup>
127. It was put to Mr Moyane that the Bain leadership that was ultimately appointed by SARS as consultants had no revenue authority experience. Mr Moyane responded that, based on the discussions that he had with them, they had done consultancy with other organisations – specifically benchmarking with international revenue organisations in the world.<sup>2669</sup> He said that he would not know that the consultants did not have experience in the relevant field.

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<sup>2667</sup> Exhibit WW1, p 620.

<sup>2668</sup> Transcript 24 March 2021, p 44 - 45, lines 21-25.

<sup>2669</sup> Transcript 26 May 2021, p 190 - 1911.

128. The Bid Adjudication Committee at SARS expressed some discomfort with parts of Bain's proposal. Despite this, Bain was awarded their first contract in January 2015. However, the Committee made it very clear that, if there were to be any additional work, SARS had to go back to the market to open tender.<sup>2670</sup>
129. This work began in January 2015 and continued until March 2015.
130. Fifth, when the first contract came to an end, there was a flouting of the procurement legislation in order to extend what was originally supposed to be a six-week contract for around R2.6 million, into one that lasted 27 months and cost SARS around R164 million.<sup>2671</sup>
131. Email communications between Bain and SARS show that there was collusion between the consultants and SARS to get around the procurement process which was required for a valid extension of the original contract. The Commissioner, at this point Mr Moyane, apparently had communications with the people involved in the procurement decision making. Mr Makwakwa told Bain "do not worry" about the extension because they were "going to make a plan" because the Commissioner had "gone to see" the people in procurement.<sup>2672</sup>
132. After back-and-forth communications, a solution – a "legal way" to get around having to have the work go out to open tender - was arrived at.<sup>2673</sup> This was for SARS to declare the Bain project an emergency or that Bain was the sole source provider. This is an example of an unlawful use of the deviation provisions as provided for in the Treasury Regulations. This was clearly not an emergency. Mr Williams said that no one could say

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<sup>2670</sup> Transcript 24 March 2021, p 48 - 49.

<sup>2671</sup> Transcript 24 March 2021, p 49, lines 10 - 5.

<sup>2672</sup> Transcript 24 March 2021, p 50, lines 4 - 7.

<sup>2673</sup> Transcript 24 March 2021, p 54, lines 12 - 4.

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

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

134. In this instance, the competitive tender process was avoided by Bain arguing that, if phase three of the work was not done by Bain, then phases one and two would be meaningless. Those earlier phases, it was argued, would have no impact on SARS and it would render the expenditure thereon wasteful. National Treasury then had their hands tied because they did not want to incur wasteful expenditure. Mr Williams explained, however, that phase three was actually focused on something different from the earlier two phases. So in that sense, the argument held no water.<sup>2676</sup>

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

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

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

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<sup>2674</sup> Transcript 24 March 2021, p 55, lines 6 - 8.

<sup>2675</sup> Transcript 24 March 2021, p 55 - 56, lines 24. – 5.

<sup>2676</sup> Transcript 24 March 2021, p 56 - 57, lines 21-25.

<sup>2677</sup> Transcript 24 March 2021, p 57, lines 5-6.

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

138. Contrary to the explanation they give, the evidence shows that Bain did not arrive at SARS as an unwitting participant in the events that followed. In fact, Bain arrived at SARS, as Mr Moyane did, with a restructuring agenda. The evidence shows that that was designed months before either of the parties was formally appointed.
139. The scene was set for Mr Moyane to execute the plans which had been developed together with Bain and presented to and accepted by President Zuma.
140. Before examining what changes Mr Moyane made while Commissioner, the next section of the Report looks at how various strategic appointments and dismissals within SARS facilitated the execution of the plans which had been developed, prior to Mr Moyane arriving at SARS, starting, of course, with his own appointment.

### **The strategic positioning of compliant individuals**

141. Minister Gordhan (whose evidence is recounted in greater detail later, in Section E) told the Commission that the post of SARS Commissioner was advertised by the Ministry of Finance in the latter half of 2013. The closing date for applications was 13 September 2013.<sup>2679</sup> The Ministry received more than 120 applications.<sup>2680</sup>
142. Minister Gordhan became aware that the former President wished to exercise his powers to appoint the new Commissioner. The Minister advised him that he may wish

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<sup>2678</sup> Transcript 24 March 2021, p 73, lines 11 – 24.

<sup>2679</sup> Exhibit WW1, p 77.

<sup>2680</sup> Exhibit WW1, p 14, para 33.

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

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

“At some point in the very early part of 2013, the President informed me, in strict confidence, that he intended to appoint me to the position of SARS Commissioner”.<sup>2682</sup>

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

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

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

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<sup>2681</sup> See section 6 of the South African Revenue Services Act 34 of 1997.

<sup>2682</sup> Exhibit WW6, p 29; Transcript 24 March 2021, p 96, lines 12-5.

<sup>2683</sup> Transcript 26 May 202, p 108, lines 14-6.

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

### **The purging of competent top officials**

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

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

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

151. Mr Hore was also the individual specified in the section of Mr Moyane’s First 100 Days Document that he was advised to “neutralise.” His name was specifically mentioned in this document which Bain had prepared for Mr Moyane, with the words “Test BH the COO”, meaning test Mr Hore.<sup>2687</sup>

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<sup>2684</sup> Transcript 26 May 202, p 46, lines 15-8.

<sup>2685</sup> Transcript 25 March 2021, p 57, lines 8-13.

<sup>2686</sup> Transcript 24 March 2021, p 62, lines 2-5.

<sup>2687</sup> Transcript 24 March 2021, p 59, lines 18-23.



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

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

“Good bye Barry Hore . . . Now I am scared by Tom. This guy was supposed to be untouchable and it took Tom just a few weeks to make him resign. Scary.”<sup>2689</sup>

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

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

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

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<sup>2688</sup> Transcript 26 May 2021, p 165, lines 7-20.

<sup>2689</sup> Transcript 24 March 2021, p 59, lines 8-16.

<sup>2690</sup> Transcript 26 May 2021, p 176, lines 1-10.

<sup>2691</sup> Transcript 26 May 2021, p 167, lines 2-6.

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

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

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

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

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

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

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

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

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

### **The restructuring and deliberate weakening of institutional functions**

#### SARS' oversight and enforcement function

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

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

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

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<sup>2692</sup> Transcript 26 May 2021, p 186 – 8.

<sup>2693</sup> Exhibit WW2, p 74, para 208.

The SCU was mandated to assist law enforcement agencies to control organised crime, from a revenue and customs perspective.<sup>2694</sup>

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

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

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

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

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<sup>2694</sup> Transcript 25 March 2021, p 65.

<sup>2695</sup> Transcript 25 March 2021, p 67.

<sup>2696</sup> Transcript 25 March 2021, p 68 – 69.

who were “not necessarily doing the right thing in society”. This enabled government to address the non-compliance.<sup>2697</sup>

168. Around 2005 Mr van Loggerenberg was tasked with amalgamating the several enforcement units countrywide into a single unit, then named the SARS National Enforcement Unit (“**NEU**”).<sup>2698</sup>

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

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

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

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<sup>2697</sup> Transcript 25 March 2021, p 69.

<sup>2698</sup> Transcript 25 March 2021, p 69.

<sup>2699</sup> Transcript 25 March 2021, p 71.

<sup>2700</sup> Transcript 25 March 2021, p 73 – 74.

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

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

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

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

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

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<sup>2701</sup> Transcript 25 March 2021, p 83.

<sup>2702</sup> Transcript 25 March 2021, p 92.

<sup>2703</sup> Transcript 25 March 2021, p 74.

<sup>2704</sup> Transcript 25 March 2021, p 84 – 85.

176. The last of the five units was the High-Risk Investigation Unit, which provided auxiliary support assistance to the other investigative units and also to the other law enforcement agencies.<sup>2705</sup>
177. These enforcement units had the overall aim of monitoring illicit activities and ensuring that revenue was collected as it ought to be and that persons who were not complying with the law were apprehended and dealt with.
178. SARS' ability to enforce the laws it oversaw and its capacity to do so became increasingly effective over the years, ultimately being praised and studied worldwide.<sup>2706</sup>
179. By 2015, when Mr van Loggerenberg resigned, the PEMTS sub-division was at the forefront of investigating organised crime and was running at least 87 projects. These included investigations into smuggling activities with specific emphases on tobacco and alcohol related products.<sup>2707</sup>
180. One of these was Project Honey Badger. This focused on the tobacco trade. The cigarette industry in particular, which is a sub-element of the tobacco trade, has always been a problem and government and legitimate businesses suffer as a result.<sup>2708</sup>
181. In the 2011/12 fiscal year SARS collected R10.8 billion in excise from the tobacco sector. In the 2013/14 fiscal year, as a result of the activities in the revenue services including Project Honey Badger, this amount increased to R11.5 billion. Then in 2013/14, it went up to R13.1 billion. For the period that Honey Badger was in operation, there was a 15%

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<sup>2705</sup> Transcript 25 March 2021, p 87.

<sup>2706</sup> Transcript 25 March 2021, p 90 – 91.

<sup>2707</sup> Transcript 25 March 2021, p 94.

<sup>2708</sup> Transcript 25 March 2021, p 133 and 137.

year-on-year increase in excise flow attributable to just this small sector in the economy.<sup>2709</sup>

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

#### Dismantling of PEMTS

183. Despite its effectiveness, or, perhaps because of it, the PEMTS was dismantled and its projects brought to a close in a very short space of time after Mr Moyane had taken over.
184. The net effect of dismantling PEMTS in particular was that all the cases which Mr van Loggerenberg described and many others were negatively affected in one way or another by slowing them down completely, allowing insight into SARS' evidence and giving those subjects under investigation an advantage over SARS. This ultimately led to SARS having no really effective means to address the illicit economy or organised crime from a tax and customs perspective.<sup>2711</sup>
185. There are some common features between all these cases. The first is that they came to a halt in and around 2014, when Mr Moyane was appointed Commissioner. Second, the beneficiaries affected in those cases were persons in virtually every single one of them had connections to politicians and politics. Third, all of them relate to sophisticated

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<sup>2709</sup> Transcript 25 March 2021, p 137.

<sup>2710</sup> Transcript 25 March 2021, p 138.

<sup>2711</sup> Exhibit WW2, p 74, para 209.



and complicated criminal schemes. Finally, all of them allegedly involved state intelligence operatives.<sup>2712</sup>

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

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

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

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

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<sup>2712</sup> Transcript 25 March 2021, p 144.

<sup>2713</sup> Transcript 25 March 2021, p 139.

<sup>2714</sup> Exhibit WW6, p 32, para 66.12.

<sup>2715</sup> Transcript 26 May 2021, p 58.

## Resistance to SARS' investigations

190. Before the dismantling referred to above, the revenue services started making an impact in the early 2000s, by putting illegal drug dealers and drug manufacturers and cash in transit heist offenders in jail for tax evasion. At first, some of the “crooks and rogues” responded by trying to corrupt officials at SARS.<sup>2716</sup>
191. By the time the SCU was operating, these people had altered their response. Typically, they would delay when they were obliged to submit information or they would ask for extra time. They also would “name drop”. They would insinuate that they had connections with Ministers and that, if they were pursued by SARS, SARS would be “touching” those important people, too.<sup>2717</sup>
192. There were also threats made against SARS employees. Mr van Loggerenberg said that this escalated by the mid-2000s to the point where SARS people were being held hostage, shot at, murdered, assaulted, their families threatened and their equipment stolen.<sup>2718</sup>
193. Mr van Loggerenberg said that, despite these threats, SARS were good at mitigating the risks as best they could. Because they were effective in countering these attacks, the resistance changed. It began to turn into personal attacks on individuals, usually in the form of rumours or an accusation contained in a dossier, which was completely unsubstantiated. This became “par for the course” by 2014.<sup>2719</sup>

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<sup>2716</sup> Transcript 25 March 2021, p 95 – 96.

<sup>2717</sup> Transcript 25 March 2021, p 96 – 97.

<sup>2718</sup> Transcript 25 March 2021, p 97.

<sup>2719</sup> Transcript 25 March 2021, p 98 - 99.

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

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

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

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

### **The climate of fear and bullying**

#### **Attacks on SARS**

197. Mr van Loggerenberg said that from the end of September 2014, when the appointment of Mr Moyane as Commissioner was announced “out of the blue”, two things happened.<sup>2721</sup>

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<sup>2720</sup> Exhibit WW2, p 33, para 85.

<sup>2721</sup> Transcript 25 March 2021, page 99.

198. First, almost “overnight” when Mr Moyane took over, the public attacks on SARS and its officials ran unabated. By the end of 2014 these dossier type attacks were coming “thick and fast”. Persons from within the state intelligence environment allegedly began to feed these dossiers into the media.<sup>2722</sup>
199. Second, Mr Moyane did “absolutely nothing” to defend SARS or allow people in SARS who were able to defend SARS and its work to do so. The dossiers began to gain incredible traction in the media. There was no opportunity for implicated individuals to deal with or respond to these dossiers as they came in, let alone to be given a chance to see them.<sup>2723</sup>
200. Mr van Loggerenberg said that on one occasion he was told that, if he released a statement to the media in response to one of these dossiers which implicated him personally, it would be regarded as gross misconduct on his part and he would render himself liable to summary dismissal.
201. Mr van Loggerenberg attempted to engage with Mr Moyane with a view to explaining to him clearly that there was something bigger at play and that he could help to protect the revenue services. When his attempts were ignored, he engaged legal representatives to defend himself against what he said were consistent scurrilous and defamatory attacks that were aimed at discrediting him.
202. In what he described as the final attack, Mr van Loggerenberg told the Commission that a dossier appeared on the 12<sup>th</sup> of October 2014, alleging that senior investigators at SARS, located in the SPU, were part of what was styled a “rogue unit”, a label to which Mr van Loggerenberg took grave exception. Among other things, it was said that the

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<sup>2722</sup> Transcript 25 March 2021, p 99 - 101.

<sup>2723</sup> Exhibit WW2 at page 33, para 86.

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

203. The tenor of the allegations, which were published as fact, were that Rogue Unit members had broken into the former President's home and following this, listening devices had been found in his home.<sup>2725</sup>
204. Mr Moyane never questioned the veracity of these claims. In fact, Mr van Loggerenberg said that the attacks on SARS and the specific individuals implicated suited him perfectly. He immediately began to target SARS management by suspending the Executive Committee in November 2014, following the "fake news" headline about brothels being run by SARS.<sup>2726</sup>
205. Despite the serious allegations appearing in the Sunday Times over an extended period of time and allegations being made against senior officials within SARS, Mr Moyane never approached any of those officials against whom allegations were made in the press to establish their response to the allegations. This was strange behaviour on Mr Moyane's part as the Commissioner of SARS because, it would be expected that, if he knew nothing about the allegations in those articles, he would have raised the issue with the individuals concerned. One would not have expected him as the leader of SARS, concerned with the image and reputation of SARS to just keep quiet when there were so many articles in newspapers which were negative about SARS. The fact that he kept quiet suggests that he knew well where the allegations were coming from. In addition,

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<sup>2724</sup> Transcript 25 March 2021, p 105.

<sup>2725</sup> Transcript 25 March 2021, p 105.

<sup>2726</sup> Transcript 25 March 2021, p 120.

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

206. The six members of the SARS High-Risk Investigations Unit (the so-called “rogue unit”) wrote to Mr Moyane and other senior SARS officials on 16 October 2014. They indicated that all the claims in the newspaper were false, and they requested that an investigation be initiated. There was a number of requests which they made to Mr Moyane, including that SARS bring legal action against the Sunday Times. They offered to be polygraphed and made other suggestions aimed at demonstrating their innocence.<sup>2727</sup>
207. Instead of engaging with the implicated people who called for his assistance, Mr Moyane used the reports instead to launch an investigation into “rogue” activities at SARS and to suspend the former Acting Commissioner, Mr Ivan Pillay, as well as most of the agency's investigative staff, led by Mr van Loggerenberg. A large number of people was affected.
208. The sequel to the Rogue Unit saga is that each and every component of what turned out to be the false narrative in relation to the High-Risk Investigative Unit has been dismantled and there have been definitive judicial findings in respect thereof. The Sunday Times withdrew their allegations unconditionally and issued an apology. Mr van Loggerenberg said that the newspaper also admitted that they had been used as part of a project to cause harm to state institutions.<sup>2728</sup>
209. Most significantly, the Full Bench of the Gauteng Division of the High Court handed down a judgment in 2020 in relation to the lawfulness of the unit. The court said it could “...find no factual or legal basis upon which it can be concluded that the establishment of the

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<sup>2727</sup> Transcript 25 March 2021, p 112. See also Exhibit WW2, p 84.

<sup>2728</sup> Transcript 25 March 2021, p 128.

unit was unlawful...”.<sup>2729</sup> The court held that the manner in which the Public Protector determined that the unit was unlawful, was “...not only wrong in law, but irrational and falls to be reviewed and set aside”.<sup>2730</sup>

210. The court also held that the conclusion reached by the Public Protector ‘that the allegation that Minister Gordhan during his tenure as the Commissioner of SARS established an intelligence unit in violation of the South African Intelligence prescripts is substantiated’, was “without foundation particularly as this conclusion is based on discredited reports and unsubstantiated facts. This finding is further wrong in law...”.<sup>2731</sup>
211. Despite the definitive findings of a Court in the Full Bench judgment, Mr Moyane, even at the stage he gave oral evidence in March 2021, still maintained that the unit was unlawful.<sup>2732</sup> His stance has no rational basis. It is telling that he still clung to an entirely discredited view. He could not himself say why the Full Bench of the High Court was wrong. In any event, until that judgment is overruled, it set the legal position.
212. References to the “rogue unit” loomed large during Mr Moyane’s tenure at SARS, and he raised it at every turn as a justification for his actions.<sup>2733</sup> The evidence suggests that as Commissioner Mr Moyane based a number of his decisions and actions on the propositions that there was an unlawful rogue unit. One of those decisions was the decision to disband the Executive Committee. The departure of a number of senior people discussed above was also connected with allegations of the existence of the so-called Rogue Unit. Mr Moyane’s vehement denial of this assertion is at odds with the findings of the Nugent Commission.<sup>2734</sup> The alleged existence of the Rogue Unit was a

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

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

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

<sup>2732</sup> Transcript 25 May 2021, p 206, line 2-10.

<sup>2733</sup> Transcript 26 May 2021, p 205, line 21-24.

<sup>2734</sup> Transcript 25 May 2021, p 206, line 2-10.

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

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

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

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

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

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

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<sup>2735</sup> Transcript 26 May 2021, p 55, line 8-11.

<sup>2736</sup> Transcript 26 May 2021, p 55, line 16.



#### Mr Symington hostage situation: background

218. In what constituted an extreme example of the culture of fear and bullying that characterised Mr Moyane's tenure, Mr Symington found himself in the middle of efforts to criminally charge then Finance Minister Gordhan. It seems that by this stage, Minister Gordhan had fallen out of favour with President Zuma, as he was an obstacle to those parties involved in state capture.<sup>2737</sup> The alleged narrative was that President Zuma was trying to appoint an ally in Treasury and Minister Gordhan was an obstacle to controlling the public purse.
219. The Hawks and NPA were investigating a broad range of serious allegations against Minister Gordhan, which included him approving Mr Pillay's early retirement and for his involvement in the so-called "rogue unit" discussed above, established during his tenure at SARS.<sup>2738</sup>
220. On around the 28<sup>th</sup> of February 2016 General Berning Ntlemeza ("**General Ntlemeza**"), the former head of the Hawks, wrote a letter to Minister Gordhan requiring him to answer a list of 27 questions relating to the so-called "rogue unit ". Certain of those questions related to Mr Pillay and his functions at SARS, his early retirement and his engagement as an independent contractor.<sup>2739</sup> At the relevant time, he was the head of the enforcement function at SARS. The letter also referred to a specific criminal case number, which was in relation to charges laid in May 2015 by Mr Moyane against a number of people.
221. Minister Gordhan responded to these questions. Following this, on the 11<sup>th</sup> of October 2016, the then National Director of Public Prosecutions, Advocate Shaun Abrahams

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<sup>2737</sup> Exhibit WW3, p 4, para 15.

<sup>2738</sup> Exhibit WW3, p 4, para 17.

<sup>2739</sup> Exhibit WW3, p 57.

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

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

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

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

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<sup>2740</sup> Exhibit WW3, p 6, para 21-23.

<sup>2741</sup> Exhibit WW3, p 163 – 176

<sup>2742</sup> Exhibit WW3, p 78 – 84.

called upon the NDPP unconditionally to withdraw the charges, failing which they would bring legal proceedings.<sup>2743</sup>

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

#### The events of the 18<sup>th</sup> of October 2016

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

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

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<sup>2743</sup> Exhibit WW3, p 84.

<sup>2744</sup> Exhibit WW3, p 141-142.

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

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

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

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

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

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<sup>2745</sup> Exhibit WW3, p 10, para 38-40.

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

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

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

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

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

235. At some point Mr Symington began to video and audio record the events using his cell phone. He kept asking why the Hawks wanted the documents back, when he had not finished the affidavit answering the questions. He also could not understand why they would want to hand him a copy of the same bundle of documents in exchange for his bundle. At some point, Brigadier Xaba told him that it was not the NPA letter, but the attachments to the letter that they required.
236. Mr Symington was confused by this, and paged through the documents towards the attached emails which had by now become the documents that the Hawks actually wanted. In doing so, he recorded an email which unbeknown to him at the time contained evidence of possible criminal conduct.
237. Eventually, Mr Symington was allowed to leave the boardroom where he had been kept against his will, but, once he was outside the office, Titi physically grabbed Mr Symington's hand and took the documents from him and off he and the Hawks went.
238. Mr Symington's copy of the letter contained certain attached emails to which he had not paid any attention. From the videos he recorded, however, Mr Symington later came to realise that the emails included correspondence from Mr David Maphakela ("**Mr Maphakela**"), a partner at the law firm Mashiane, Moodley and Monama, who was advising SARS on pursuing criminal charges against Minister Gordhan and his colleagues. This email chain originated at the NPA, then went to the Hawks, then to Mr Maphakela and then to Mr Moyane's office.

239. Mr Maphakela had written, “On ethical reasons, I cannot be involved in this one, as I hold a different view to the one pursued by the NPA and the Hawks”.<sup>2746</sup>
240. In around April 2018, at a meeting (with the then acting Commissioner Mr Mark Kingon (“**Mr Kingon**”) and another SARS employee Mr Wayne Broughton (“**Mr Broughton**”) Mr Maphakela explained that he had given a written legal opinion to Mr Moyane in November 2014 when SARS wanted to know his view on the lawfulness of the early retirement of Mr Pillay. He had advised in his opinion that there was nothing unlawful about Pillay’s early retirement. This was the first time that Mr Symington had become aware of Mr Maphakela’s opinion, which supported the conclusion in his own 2009 Memorandum.
241. Mr Symington testified that not only was his 2009 Memorandum not revealed officially by SARS to the Hawks or the NPA, but the opinion by Mr Maphakela confirming the lawfulness of Mr Pillay’s early retirement was also not made available apparently to the Hawks or NPA or both.

#### The aftermath of the hostage situation

242. On the same day that he had been held against his will, Mr Symington emailed Messrs Moyane and Louw, in which he recorded the events of that day. He got no response from Mr Moyane.
243. On the 19<sup>th</sup> of October 2016 Mr Symington emailed Messrs Moyane and Louw, stressing that he saw a need to explain to the NPA why he had not completed the affidavit as requested. After receiving this mail, Mr Louw invited Mr Symington to a meeting on the 20<sup>th</sup> of October 2016, attended also by Mr Moyane, who expressed regret for what had

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<sup>2746</sup> Exhibit WW3, p 162.

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

244. Mr Symington's conclusion was that the Hawks and Mr Moyane had an interest in retrieving the emails attached to the letter given to him by the Hawks, firstly because the November 2014 legal opinion was not known at that point, and secondly, because Mr Maphakela had said to Mr Kingon and Mr Broughton that he had shared his view with both the Hawks and the NPA. In his view then, if anyone were to see the mail, it would lead to questions being asked.
245. In the result, Mr Symington concluded that Mr Moyane had withheld critical evidence, including exculpatory evidence from the Hawks and/or the NPA relating to the criminal charges against Minister Gordhan *et al*. This is because the 2009 Memorandum was available to Mr Moyane on Mr Pillay's HR file which was held in his office. He was also aware of Mr Maphakela's legal opinion of November 2014.
246. Mr Moyane was given other opportunities to reveal the Maphakela memoranda, first when the 27 questions were given to Minister Gordhan in February 2016, and later, in October 2016, when Mr Abrahams invited Mr Moyane to make representations as to why the charges should not be withdrawn.
247. Essentially, Symington uncovered that SARS had either failed to share Mr Maphakela's discomfort on pursuing the charges against Minister Gordhan with the NPA and Hawks, or that the Hawks and NPA had seen it, but continued to investigate Minister Gordhan regardless.

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<sup>2747</sup> Exhibit WW3, p 143.



248. Mr Symington reported the hostage incident to IPID.<sup>2748</sup> He also launched a grievance against Mr Titi. The latter was investigated by Mr Thihe Mothle, an attorney. Initially, Mr Mothle drew up a report which upheld Mr Symington's version and found that there was fault on the part of Mr Titi, and that an inquiry should be convened in relation to Mr Titi's conduct.<sup>2749</sup>
249. Thereafter, effectively out of the blue, Mr Symington received an "addendum report" in which his own conduct was scrutinised and he was found to have committed misconduct.
250. After consulting with certain SARS officials, Mr Symington said he found out that, after Mr Mothle had submitted his first report, he was called to a meeting at SARS' offices. He was instructed to prepare an additional report which also dealt with Mr Symington's behaviour. With regards to this addendum report, no additional evidence was presented prior to reaching the conclusions and recommendations. Mr Symington drew the conclusion that there was only one reason for the second report and that was effectively to remove him from SARS.
251. In a confirmatory affidavit lodged with the Commission, Mr Kingon said that at a meeting which was held with himself and Mr Mothle, he gained the impression that Mr Mothle had been coerced into preparing the addendum report. Given some of the words used during the engagement, it was his perception that the purpose of the instruction to prepare an addendum report was to "get" Symington by any means possible.<sup>2750</sup>
252. The NPA's pursuit of the charges against Minister Gordhan et al was eventually abandoned. On 31 October 2016, Mr Abrahams, on behalf of the NPA, withdrew all the

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<sup>2748</sup> Exhibit WW3, p 36-37.

<sup>2749</sup> Exhibit WW3, p 43 – 44.

<sup>2750</sup> Exhibit WW 7, p 576- 579, p 578

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

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

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

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

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<sup>2751</sup> Exhibit WW3, p 106 – 131

<sup>2752</sup> Exhibit WW3, p 132-140

<sup>2753</sup> Exhibit WW3, p 9.

256. This saga illustrates an extreme example of the culture of fear and bullying which characterised Mr Moyane's tenure at SARS. It also illustrates the lengths that he went to have certain people, who were obstacles to state capture, removed. Mr Symington described this time as a "nightmare" time at SARS, and to visibly see the efficiency rate dropping during Mr Moyane's tenure was something he hoped would never happen again.
257. In an affidavit submitted to the Commission, Mr Moyane responded to Mr Symington's affidavit. Mr Moyane said in his affidavit that the thrust of Mr Symington's evidence (that had the Hawks been given his 2009 Memorandum and Mr Maphakela's legal opinion, the charges would not have been pursued and Minister Gordhan and others would not have been prosecuted) was based on a false premise, namely, that Mr Symington's memorandum had declared the Pillay retirement to be lawful and problem-free, apparently without any qualification. Mr Moyane said that this was "the biggest lie ever told in support of the unfounded allegations against me". In effect, he contended that the 2009 Memorandum did not in any way indicate that the Pillay retirement was lawful.<sup>2754</sup>
258. In his oral evidence, Mr Symington responded that there was no other reason for him to have done the research and written his memorandum than to address the lawfulness or otherwise of the retirement scheme. He said that he regarded it as "absurd" for Mr Moyane to say that the Memorandum did not speak to the lawfulness or otherwise of the scheme.<sup>2755</sup>
259. Mr Symington's description of the context within which the memorandum was drafted, and the reasons for it, bear out his explanation.

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<sup>2754</sup> Exhibit WW 6, p 20.

<sup>2755</sup> Transcript 25 March 2021, p 39, line 10-12

## E: MINISTER GORDHAN

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

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

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

### Mr Moyane's application to cross-examine Minister Gordhan

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

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

- 263.2. Minister Gordhan faced personal and institutional attacks from Mr Moyane which led to a deterioration in their relationship;<sup>2756</sup>
- 263.3. Mr Moyane falsely maintained that he had played no role in approving the appointment of a company called New Integrated Credit Solutions (Pty) Ltd ("**NICS**"), which was owned by a friend of his, Mr Patrick Monyeki ("**Monyeki**"), to provide debt collection services for SARS. In this regard, Mr Moyane provided Parliament with false information;<sup>2757</sup>
- 263.4. On 15 May 2015 Mr Moyane laid charges against Minister Gordhan relating to the High-Risk Investigations Unit within SARS (the so-called "**Rogue Unit**") formed years earlier. As a consequence, on or about 19 February 2016, in the week before his budget speech, Minister Gordhan received an envelope containing 27 questions addressed to him from the Hawks. This envelope was delivered with a demand that the questions be answered by 2 March 2016;<sup>2758</sup>
- 263.5. There was an orchestrated campaign against Minister Gordhan and other leaders of National Treasury within the Cabinet, the institutions of State and on certain media and social media platforms. As part of this campaign, Minister Gordhan became the target of malicious and seemingly politically motivated criminal charges;<sup>2759</sup> and
- 263.6. The filing of the charges and the demand from the Hawks that he answer the 27 questions was the beginning of what appeared to be a campaign to force

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<sup>2756</sup> Exhibit N1, p 46.

<sup>2757</sup> Exhibit N1, p 590 – 593.

<sup>2758</sup> Exhibit N1, p 37.

<sup>2759</sup> Exhibit N1, p 49.

him to resign as Minister of Finance and to continue the efforts to capture the National Treasury thereafter.<sup>2760</sup>

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

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

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

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<sup>2760</sup> Exhibit N1, p 38.

<sup>2761</sup> Exhibit N3, p 271-272

<sup>2762</sup> Exhibit N3, p 272.

<sup>2763</sup> Exhibit N3, p 272.

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

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

"9. I intend to cross-examine Gordhan extensively on this issue [the laying of criminal charges] so as to assist the Commission in evaluating:

9.1. the actual events and evidential material which led me to lay the charges so as to assess whether or not there was probable cause, a reasonable person in my position would have performed differently, or whether, as implied by Gordhan, I was acting out of malice and personal vindictiveness and the like..."<sup>2764</sup>

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

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

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

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<sup>2764</sup> Exhibit N3B, p 264.

<sup>2765</sup> Exhibit N3B, p 731- 760, 758.

<sup>2766</sup> Clarificatory Affidavit para 7 and 8 page 7.

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

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



271. Notwithstanding the above, Minister Gordhan expressed the view that his cross-examination of him by Mr Moyane's counsel regarding Mr Moyane's personal motive for filing the complaint that led to the criminal charges and his personal belief that those charges were part of a campaign to force his resignation from the post of Minister of Finance so as to facilitate the capture of National Treasury, "is unlikely to assist the important and urgent work of the Commission given its time and resource constraints".
272. The evidence put up by Minister Gordhan in his affidavit and his clarificatory affidavit was not entirely consistent on the issue of Mr Moyane's motivation in laying the charge.
273. On the one hand, as pointed out above, Minister Gordhan said he had not stated that Mr Moyane had acted maliciously. On the other hand, he said that Mr Moyane had acted without proper cause and in the advancement of State Capture. These two stances were not easily reconcilable.
- 273.1. In Mr Moyane's submissions filed in response to Minister Gordhan's clarificatory affidavit, Mr Moyane made the following main points:
- 273.2. it was clear from Minister Gordhan's affidavit that Minister Gordhan did in fact allege malice against him; and
- 273.3. furthermore, Minister Gordhan had repeatedly made it clear that his Mr Moyane's alleged malicious conduct was aimed at "advancing State Capture and the capture of the National Treasury in particular" and that the entire enterprise maliciously triggered by Mr Moyane was "part of the campaign to capture State institutions".<sup>2767</sup>

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<sup>2767</sup> Moyane's Submissions dated 28 May 2019 para 7, 9 and 10.

274. The only version put up by Mr Moyane in his submissions was “that he acted bona fide and as any reasonable Commissioner of SARS would have in the circumstances”.
275. The Nugent Commission Report was also raised in various contexts in Mr Moyane’s application for leave to cross examine Minister Gordhan
276. Mr Moyane said in his founding affidavit<sup>2768</sup> that Minister Gordhan gave “foundational evidence” in the Nugent Commission aimed at portraying himself as the architect of good governance, on the one hand, and Mr Moyane as the destroyer of SARS, on the other. He described these as false and self-serving claims in pursuit of the “Moyane removal campaign”.<sup>2769</sup> Under the Eskom workstream of the Commission Mr Koko referred to what he called the “Koko hunt”.
277. So, too, Minister Gordhan in his various affidavits placed reliance on the Nugent Commission Report.<sup>2770</sup> The first point made in Minister Gordhan’s answering affidavit is that most of the areas of cross-examination identified by Mr Moyane in paragraphs 6 and 7 of his founding affidavit were already the subject of the Nugent Commission investigation and fell outside this Commission’s terms of reference.
278. More explicitly, in his clarificatory affidavit Minister Gordhan relied expressly on certain findings by Justice Nugent, which he said form the basis of my belief that Mr Moyane’s actions as SARS Commissioner were part of the State Capture project”.
279. I gave my second ruling in relation to Mr Moyane’s application on 25 November 2019. I pointed out, with reference to extracts from Minister Gordhan’s statement, why it could be said that Minister Gordhan had indeed alleged malice on the part of Mr Moyane. I

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<sup>2768</sup> Exhibit N3.

<sup>2769</sup> Exhibit N3, p7.

<sup>2770</sup> Exhibit N3, p 389 at paras 13.5; p 390 at para 15; p 393 at para 23; p 394 at para 23; paras 28 -34 at p 394 – 397

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

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

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

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

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

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<sup>2771</sup> State Capture Commission Ruling of 25 November 2019 at para 18.

<sup>2772</sup> State Capture Commission Ruling of 25 November 2019 at para 22.

<sup>2773</sup> State Capture Commission Ruling of 25 November 2019 at para 27.

- (b) Whether, in laying the criminal complaint against Mr Gordhan, Mr Moyane was motivated wholly or in part by, or, he sought to advance the objectives of State Capture;
- (c) In laying the criminal complaint against Mr Gordhan, Mr Moyane was abusing a legal process for his own personal goals that had either or nothing or little to do with a legitimate complaint relating to an alleged crime;
- (d) Whether, as Commissioner of SARS, Mr Moyane sought to advance “the State Capture project”;
- (e) Whether, Mr Moyane’s “personal goals” while he was SARS Commissioner included the advancement of the State Capture project.” (“the 5 topics”).

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

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

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

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<sup>2774</sup> Exhibit WW6, p 13 – 19 at paras 15-30.

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

#### Cross-examination of Minister Gordhan

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

- 286.1. a meeting which he and the then Deputy Minister of Finance had with Mr Moyane on 14 December 2015 where they left Moyane with ten guidelines and requests, one being that the issue of the governance of SARS was a matter that had to be discussed;
- 286.2. His request for an opportunity to review what was then being called SARS' new operating model, because that concept was something foreign to both the Minister and Deputy Minister;
- 286.3. His attempt to establish whether any person at SARS was involved in leaking information to the Sunday Times and his clear indication that if that was so, it should stop because it was not in the best interests of SARS;
- 286.4. His message that as far as communications went, SARS should limit itself to customs and related matters of administration; and

- 286.5. The Minister's personal experience that the standing and capability of SARS in tax collection and putting an end to illicit trade had been compromised over the relevant period of Mr Moyane's tenure.
287. Minister Gordhan emphasised that he had personal knowledge of the fact that, as a consequence of the dismantling, or reorganisation, of the various capabilities and institutions he had been involved in setting up within SARS, which had advanced tax compliance and led to increased revenues being collected, tax compliance had deteriorated giving rise to what is known as "the tax gap". Minister Gordhan testified that the acts of dismantling and reorganization of SARS served the cause of state Capture and institutional deterioration and destruction.
288. Eliciting this evidence was necessary in order to establish whether Minister Gordhan based his belief that Mr Moyane was involved in state capture purely on the strength of the Nugent Commission findings, or whether there were also facts of which he had personal knowledge which supported that conclusion.
289. Under cross-examination, Minister Gordhan accepted that it is was by then common cause that Mr Moyane did not in fact lay a criminal complaint against him, Minister Gordhan, personally, but only against other named individuals. He explained that, until shortly before he gave evidence in this Commission in November 2020, he had not been in possession of the relevant documentation from the SAPS and the fact that Mr Moyane had not laid a complaint against him only became apparent when the relevant documentation became available through the offices of the Commission itself. Minister Gordhan accepted that issues (a), (b) and (c) in my ruling on cross-examination were therefor based on a supposition which turned out not to be correct. He explained that his error was based partly on the fact that the so-called 27 questions posed to him by the Hawks made reference to a case number which is the same as that under which the

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

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

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

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<sup>2775</sup> Transcript 23 March 2021, p 315 line 12 – p 316 line 2

<sup>2776</sup> Transcript 30 November 2020, p 47 lines 12-16

<sup>2777</sup> Transcript 30 November 2020, p 53 lines 11 – 14.

<sup>2778</sup> Transcript 30 November 2020, p 62 lines 17 – 20 and p 67 lines 22-23.

292. Minister Gordhan agreed that during Mr Moyane's tenure as SARS Commissioner, at which time Mr Moyane was accountable to Minister Gordhan as the then Minister of Finance, hostilities between the two did develop.<sup>2779</sup>
293. It was put to Minister Gordhan that the animosity between them arose as follows. Firstly, it was as a consequence of Minister Gordhan's general arrogance towards him. Secondly, it was caused by petty jealousies about his role at SARS. Thirdly, it originated from Minister Gordhan's racism towards Mr Moyane specifically and perhaps towards African people in general. Fourthly, it was motivated by the Minister's desire to deflect from his own alleged involvement in State Capture and corruption. Fifthly, it was contended on Mr Moyane's behalf that there was hostility because he (Moyane) blew the whistle on the illegal and corrupt activities Minister Gordhan left behind at SARS, including that involving the so-called Rogue Unit and the issue of Mr Pillay's early retirement.<sup>2780</sup>
294. Minister Gordhan emphatically denied that any of those assertions had any foundation and contended that these issues were merely a cover-up for what Mr Moyane had really done at SARS. He denied in particular the charge of racism, pointing to his struggle credentials. Minister Gordhan contended that Mr Moyane "had connections" which in effect allowed him to feel protected at SARS and thus behaved towards Minister Gordhan as he did.<sup>2781</sup>
295. Of course, it is not for the Commission to investigate any of these issues summarised in the paragraph above except insofar as they might relate to State Capture. Indeed, what bedevilled much of the cross examination of Minister Gordhan was that the topics which

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<sup>2779</sup> Transcript 30 November 2020, p 74 lines 20-25.

<sup>2780</sup> Transcript 30 November 2020, p 82 line 17 – p 83 line 22.

<sup>2781</sup> Transcript 30 November 2020, p 85 line 17 – p 86 line 3



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

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

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

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<sup>2782</sup> Transcript 30 November 2020, p 128 line 9 - 130 line 19

<sup>2783</sup> Transcript 23 March 2021, p 287 at line 3 – 11

<sup>2784</sup> Transcript 23 March 2021, p 306 at line 1 – 307 at line 1

<sup>2785</sup> Transcript 30 November 2020, p 95 lines 20-25.

<sup>2786</sup> Transcript 30 November 2020, p 96, lines 5 – 9.

298. When pressed on what evidence he had, Minister Gordhan first referred to the Nugent Commission Report, but then also to matters within his personal knowledge. These are reflected in the paragraphs which follow.
299. Minister Gordhan highlighted specific instances after his appointment in December 2015 as Minister of Finance where Mr Moyane refused to submit to his authority. For example, Minister Gordhan said that, in respect of leave forms, Mr Moyane said he would submit them to the President and not to Minister Gordhan as the responsible Minister. When Minister Gordhan said it was necessary to review the so-called “new operating model”, Mr Moyane simply went ahead with the appointment of new people without such review.<sup>2787</sup> When it came to the question of paying bonuses to SARS employees, Minister Gordhan told Mr Moyane to put a hold on them until the two of them had discussed whether their payment was justified but Mr Moyane simply went ahead and instructed that the bonuses be paid. It was clear to Minister Gordhan that Mr Moyane did not respect him as a person or his office as Minister of Finance and that he openly defied his authority.
300. Minister Gordhan said that he saw the classic signs of state capture at SARS, including where the perpetrators “get rid of good people”, and, for example, give VAT refunds to family and friends.<sup>2788</sup>
301. According to Minister Gordhan, part of state capture is to take control of an institution either at Board level or CEO level as well as to protect yourself from questioning or transparency in relation to the damage caused within the institution. Minister Gordhan

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<sup>2787</sup> Transcript 30 November 2020, p 24 line 12 – p 24 line 1.

<sup>2788</sup> Transcript 30 November 2020, p 107 lines 6 – 9.

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

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

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

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

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<sup>2789</sup> Transcript 30 November 2020, p 114 lines 20 – 24.

<sup>2790</sup> Transcript 23 March 2021, p 291 at line 5 – 292 at line 3.

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

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

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

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<sup>2791</sup> Transcript 30 November 2020 p 202 line 17 – p 203 line 13.

<sup>2792</sup> Transcript 30 November 2020, p 206 lines 2 – 25.

<sup>2793</sup> Transcript 30 November 2020, p 208 lines 10 – 25.

<sup>2794</sup> Transcript 30 November 2020, p 209 lines 14 – 18.

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

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

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

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

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<sup>2795</sup> Transcript 30 November 2020, p 210 line 23 – p 211 line 9.

<sup>2796</sup> Transcript 30 November 2020, p 213 line 24 – p 215 line 5.

<sup>2797</sup> Transcript 30 November 2020, p 223 lines 11 – 19.

<sup>2798</sup> Transcript 30 November 2020 p 225 line 17 – p 226 line 24.

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

310. In light of recent High Court judgments (referred to above), cross-examination regarding the lawfulness or otherwise of the unit takes the matter nowhere. The High Court has ruled that the existence of the unit was lawful and that finding stands. So too, the issue of whether Minister Gordhan played a role in establishing the unit is of little moment in the light of the finding that it was lawful. In any event, I ruled that the existence and lawfulness of the unit is not a topic for cross-examination because Minister Gordhan never implicated Mr Moyane in connection therewith.
311. Nevertheless, what is relevant is whether, before the pronouncements of the High Court, Mr Moyane had a genuine, bona fide basis to regard the establishment of the Unit as unlawful, such as to legitimately found the basis for a criminal complaint.
312. Minister Gordhan's testimony was that Mr Moyane did not have any such basis. According to him, Mr Moyane laid his complaint on 16 May 2015 but by at least September of 2015 he had access to legal opinions to the effect that the establishment of the unit was lawful and so he could (and ought to) have withdrawn the complaint.<sup>2799</sup> This is corroborated by the testimony of Mr Symington, summarised earlier.
313. In answer to the assertion on behalf of Mr Moyane that in laying the complaint he was simply acting as a reasonable Commissioner was obliged to act, Minister Gordhan explained what he would have done had he been Commissioner and seen the front-page story in the Sunday Times regarding the alleged existence of a rogue unit which had allegedly bugged former President Zuma's telephones. He explained that he would

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<sup>2799</sup> Transcript 30 November 2020, 300 line 13 – p 301 line 6

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

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

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

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

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<sup>2800</sup> Transcript 23 March 2021, p 317-318.

<sup>2801</sup> Transcript 23 March 2021, p 325-326.

<sup>2802</sup> Transcript 30 November 2020 p 298 at line 16 – p 299 line 13

317. Minister Gordhan agreed that this was true but explained the context as follows. SARS was going to reach the R1 Trillion mark at some stage because that is the logic of economic growth and of inflation and of tax compliance and economic activity within an economy and was logically going to happen whoever the Commissioner might have been at a particular time. To him, the more important question was whether there was an improvement in SARS's performance. According to Minister Gordhan, how could there be if the tax gap actually widened during Mr Moyane's tenure as Commissioner.<sup>2803</sup>
318. In my view, although he was accused of having no evidence that Mr Moyane was involved in state capture, and although he often relied on hearsay and what was found by the Nugent Commission, Minister Gordhan's evidence provides important general corroboration of the specific testimony of the other witnesses whose evidence is recounted above. He observed first hand that Mr Moyane refused to answer to him as the responsible Minister, instead running SARS as he wished, would not reveal and discuss what changes he was making at SARS, refused to discuss his new operational model, and carved out some of the institutions most senior people as well as SARS' compliance capacity. This is important evidence of the capture of the institution.

## **F: CONCLUSION**

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

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

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<sup>2803</sup> Transcript 23 March 2021, p 338-339.



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

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

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

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

321. SARS' investigatory and enforcement capacity presented a hurdle to those involved in organised crime, and was, therefore, a target for those engaged in state capture. The involvement of the media in perpetuating false narratives which discredited targeted people as well as providing grounds for their removal was a notable feature of the evidence led in regard to the capture of SARS.

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

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

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

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

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

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

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

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

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

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

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

## **G: RECOMMENDATIONS**

326. It is recommended that:

- 326.1. in the light of the facts pertaining to Bain's unlawful role in SARS, all Bain's contracts with state departments and organs of state be re-examined for compliance with the relevant statutory and constitutional provisions.
- 326.2. law enforcement agencies conduct such investigations as may be necessary with a view to enabling the National Prosecuting Authority to decide whether or not to initiate prosecutions in connection with the award of the Bain & Co contracts.
- 326.3. that the SARS Act of 1997 as amended, be amended to provide for an open, transparent and competitive process for the appointment of Commissioner of SARS.
- 326.4. Mr T Moyane be charged with perjury in relation to his false evidence to Parliament.

## CHAPTER 4 – PUBLIC PROCUREMENT IN SOUTH AFRICA

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

327. The government is the single biggest procurer of goods and services in the country. In 2017, for example, South African Reserve Bank statistics show that the government channeled R967 billion through public procurement, which equates to 19.5% of the GDP.<sup>2804</sup> The estimated total procurement spend of government for goods and services is over R800 billion per year.<sup>2805</sup>
328. The public procurement system must operate in a way which advances the national interest. It must do so in accordance with a system which, in the words of section 217 of our Constitution, is fair, equitable, transparent, competitive and cost effective.<sup>2806</sup> It must simultaneously address the exclusions and the discrimination of the past. In sum, the Constitution requires the economic and efficient use of public funds in order to promote good service delivery, that is to say, value for money achieved by way of a fair process and an equitable outcome.
329. Section 217 reads as follows:

### **“217 Procurement**

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

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

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

<sup>2806</sup> Section 217 (1) of the Constitution, 1996.

- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –
  - (a) categories of preference in the allocation of contracts; and
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

330. International experience suggests that of all Government activities, public procurement is one of the most vulnerable to fraud and corruption.<sup>2807</sup> It is widely acknowledged that a public procurement system will only be fit for purpose if it is founded on good governance and good management and enforced through effective monitoring and oversight measures which ensure accountability. Anything less renders the system open to abuse.

331. One of the reasons this Commission was established was to enquire into the working of public procurement in South Africa following widespread concerns that the system was rife with corruption. These concerns are reflected in certain of the Commission’s Terms of Reference, as follows:

[1] The Commission shall inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector’s state of capture report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016:

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

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<sup>2807</sup> OECD (2009), ‘Principles for Integrity in Public Procurement’, OECD, Paris at page 9.

Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state;

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

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

[1.5] the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organisations by Government departments, agencies and entities. In particular, whether any member of the National Executive (including the President) public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.

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

333. This Chapter:

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

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

<sup>2810</sup> Undue influence involves one person bringing influence to bear on another to prevail on that other to act in breach of duty.

- 333.1. identifies the patterns of corruption which have been shown to exist in each stage and at every level of the procurement cycle;
- 333.2. calls attention to the associated collapse of governance in state departments and state owned enterprises;
- 333.3. identifies the primary risks to the integrity of the procurement system and calls attention to the lack of effective protection against those risks;
- 333.4. points to structural weaknesses in both the design and the implementation of procurement which facilitates corruption;
- 333.5. recommends remedial measures.

334. It is one thing to identify through the evidence the nature and the extent to which corruption may have penetrated the system; it is quite another to say *how* that could have happened. The latter enquiry involves a review of the procurement cycle as a whole in order to identify the points of systemic weakness which, however unintentionally, contributed to the growth and spread of corruption. So, for example, the marked decentralisation of our procurement system might seem to be far removed from the present enquiry until one considers how that decentralisation may have hampered effective monitoring and oversight whilst simultaneously involving a substantial increase in the number of trained procurement officials required to work the system. Hence the wide-ranging considerations that are here addressed.

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

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

336.1. Pre-tendering

336.1.1. Needs assessment

336.1.2. Planning and budgeting

336.1.3. Definition of requirements

336.1.4. Choice of procedures

336.2. Tendering

336.2.1. Invitation to tender

336.2.2. Evaluation

336.2.3. Award

336.3. Post-award

336.3.1. Contract management

336.3.2. Order and payment

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

337.1. Transparency

- 337.1.1.           **Principle 1.** Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.
- 337.2.           **Principle 2.** Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.
- 337.3.           Good Management
- 337.3.1.           **Principle 3.** Ensure that public funds are used in public procurement according to the purposes intended.
- 337.3.2.           **Principle 4.** Ensure that procurement officials meet high professional standards of knowledge, skills and integrity.
- 337.4.           Prevention of Misconduct, Compliance and Monitoring
- 337.4.1.           **Principle 5.** Put mechanisms in place to prevent risks to integrity in public procurement.
- 337.4.2.           **Principle 6.** Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.
- 337.4.3.           **Principle 7.** Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.
- 337.4.4.           **Principle 8.** Establish a clear chain of responsibility together with effective control mechanisms.

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

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

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

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

### **Pre-tendering phase**

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

339. The evidence shows that goods and services were often procured when they were not needed, and often in duplication of work which had already been done.

#### *Transnet*

340. The evidence from Transnet shows that large amounts of money were extracted through payments for advisory services from consultancies like McKinsey, Regiments and Trillian. Certain advisory services were procured by Transnet even though Transnet had the requisite internal capacity and expertise and did not require such services.<sup>2811</sup>

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<sup>2811</sup> Exhibit BB8 (d), p 11, 13; Exhibit BB3, p 18, para 5.5.9.



341. In some cases, advisory services were procured for certain projects without the participation, knowledge or approval of the business owners of those projects.<sup>2812</sup> In other cases, transaction advisory services were procured for activities which had already been competently executed by Group Treasury. The procurement of advisory services was not needs-based. Instead, it was driven by certain high level executives deciding to give business to these companies.<sup>2813</sup>
342. Not only were these services not needed, in some cases Transnet's own Treasury warned that the transaction advice provided by Regiments and Trillian was dangerous and should not be followed.<sup>2814</sup>
343. Despite McKinsey having been appointed for certain transaction advisory service at Transnet, there was a parallel appointment of Regiments for the same services. No procurement event preceded this agreement and Regiments had no contractual relationship with Transnet.<sup>2815</sup> This meant that there were two contracts for the same work.

#### *Eskom*

344. In relation to Eskom, Ms Mosilo Mothepu ("Ms Mothepu"), former senior manager at Regiments (and later CEO at Trillian Financial Advisory), stated in her affidavit to the Commission: "Eskom internal teams had the expertise and skills to perform the duties that Trillian Financial Advisory/Trillian Management Consulting/Trillian Capital Partners ("**TFA/TMC/TCP**") was mandated to perform. The absorbent (sic) fees that

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<sup>2812</sup> Exhibit BB10, p 31-32, paras 126 – 127.

<sup>2813</sup> Exhibit BB3, p 39, para 9.1.2.

<sup>2814</sup> Exhibit BB10, p 33-35, paras 131 – 140.

<sup>2815</sup> Exhibit BB3, p 7, para 5.1.14; Exhibit BB8(a), p 79.

TFA/TMC/TCP charged were unjustifiable and Eskom did not get any value for money”.<sup>2816</sup>

#### *Free State Provincial Government*

345. The Commission heard evidence relating to the Free State/Estina Vrede Dairy to the effect that Mr Mosebenzi Zwane (“Mr Zwane”), MEC for Human Settlements, declared in a provincial cabinet meeting in December 2010 that he would ensure that the unspent money in his budget would be committed before the end of the financial year, which was less than two months away. This was because, if unspent, it could not be rolled over to the next financial year. He committed not to go on holiday and to oversee efforts to ensure the money was committed. In January, Mr Mosebenzi Zwane told his colleagues that 66% of the budget had been spent over the holidays in building houses.<sup>2817</sup>

346. In fact, this money was paid to supposed service providers before any work had been done, without any proper procurement process.<sup>2818</sup> Some of these providers had no expertise in building houses nor were they registered with the National Home Builders Registration Council nor did they comply with other public procurement requirements. R631m was dispersed rapidly in early 2011 on these contracts. The department later struggled to find any housing that had been delivered in return.

#### *SARS*

347. Mr Vlok Symington told the Commission that by 2008/2009 the South African Revenue Service (“SARS”) was recognised internationally as one of the best and most efficient

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<sup>2816</sup> Exhibit U31, p26-28, para.52.9-52.12.

<sup>2817</sup> Exhibit X5, p. 2

<sup>2818</sup> Transcript 28 August 2019, p.168, line 9-11.

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

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

349. This notwithstanding, Mr Williams told the Commission how Bain was contracted to perform consultancy services at SARS, including recommending and implementing a “profound strategy refresh” and complete organisational restructure, to the tune of R167 million, over 27 months. For Bain to recommend restructuring, which is usually a last resort, suggests that SARS was completely dysfunctional and needed a complete overhaul of vision, mission and strategic plans and operations. Mr Williams said that one would be hard pressed to find any knowledgeable person who could justify the claim that this is what SARS needed.<sup>2823</sup>

## **City of Johannesburg**

350. Procurement abuse is not limited to the provincial and national levels of government. There has also been malfeasance related to procurement at a local government level.

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<sup>2819</sup> Transcript 25 March 2021, p. 57, line 9-15.

<sup>2820</sup> Transcript 25 March 2021, p. 90, line 17-20.

<sup>2821</sup> Mr Van Loggerenberg, Transcript 25 March 2021, p. 90-91.

<sup>2822</sup> Mr Williams, Transcript 23 March 2021, p. 209, line 8-10.

<sup>2823</sup> Transcript 23 March 2021, p. 210, 13-18.

It was alleged in hearings before the Commission that suspicious payments flowed to a company owned by Johannesburg Mayor Mr Geoff Makhubo and to the ANC in the months directly before and after the technology company EOH was awarded major contracts with the City of Johannesburg.

351. Evidence was given by EOH chief executive Mr Stephen van Coller<sup>2824</sup> who had tasked ENS law firm to investigate irregularities at EOH. Mr van Coller and Mr Steven Powell (who had led the ENS investigation)<sup>2825</sup> told the Commission how an apparent front company was used as a vehicle allegedly to channel money for the ANC's benefit and to Mr Makhubo.
352. The alleged front company, Mfundu Mobile, was paid by EOH purportedly for work done on City of Johannesburg projects, but ENS's forensic investigations did not find evidence of work done by Mfundu Mobile in exchange for these payments.
353. In total, ENS identified tens of millions in "suspected payments" related to City of Johannesburg contracts "where the evidence suggests no work was done". Mr Powell told the Commission that this applied to several alleged service providers. And when they looked at the deliverables clauses in the agreements, these were either in blank or had nebulous content in which consulting services were described in terms which are "as broad as they can be".<sup>2826</sup>

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<sup>2824</sup> Exhibit VV1 and Transcript 23 November 2020.

<sup>2825</sup> Exhibit VV2 and Transcript 25 November 2020.

<sup>2826</sup> Transcript 25 November 2020, p 35 – 36.

### Frivolous use of deviation policy

354. The procurement mechanism that applies by default is the open-tender process.<sup>2827</sup> Regulation 16A6.4 of the Treasury Regulations provides for deviation from the normal procurement processes. Cases where deviation may be permitted are in cases of emergency or where the goods or services are from a sole supplier. In other words, there are very limited circumstances when deviation from normal procurement processes would be permitted. Mr Mathebula gave a thorough explanation of the way that this has been abused, which is outlined in the subsequent paragraphs.<sup>2828</sup>
355. The Accounting Authority<sup>2829</sup> is required to report to the relevant Treasury and the Auditor General in the cases of deviation. Accounting Officers/Authorities are required to report within ten working days to the relevant Treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process.
356. Due to the abuse of Treasury Regulation 16A6.4, in 2008, National Treasury issued Practice Note No. 8 of 2007/8 with threshold values for the procurement of goods, works and services by means of petty cash, verbal/written price quotations or competitive bids. The Note informed Accounting Officers/Authorities of departments, constitutional institutions and public entities listed in Schedule 3 to the PFMA that should it be impractical to invite competitive bids for specific procurement (e.g. in urgent or emergency cases or where there is a sole supplier) the required goods or services may

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<sup>2827</sup> Exhibit BB2, p 55, para 125 .

<sup>2828</sup> Exhibit B1, p 21, para 4.6.6.3 and its subparagraphs.

<sup>2829</sup> See further paragraph 153 of this Chapter.

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

357. Following the issuance of Practice Note No. 8 of 2007/8, there was a trend that developed regarding expansion and variation of contracts which required another intervention. Consequently, National Treasury issued Instruction Note 32 on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management on 31 May 2011 directing departments, constitutional institutions and public entities listed in Schedule 3 to the PFMA on how to manage expansion or variations of orders against the original contract in exceptional cases as well as prescribing a threshold for contract variations. The limit for normal goods and services was set at 15% or R15 million whichever is the lowest and for construction related contracts at 20% or R20 million of the original contract value whichever is the lowest (including all applicable taxes). Any deviation in excess of the set threshold will only be allowed subject to prior written approval of the relevant treasury.

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

359. In 2016 National Treasury issued Instruction No. 3 2016/17 as the revised instruction to manage deviations and variations, directing departments, public entities listed in schedules 2 & 3 and constitutional institutions to only deviate from inviting competitive bids in cases of emergency or sole supplier status as well as re-emphasizing the limits set in Instruction Note No. 32 of May 2011 in terms of contract expansion or variations. Paragraph 8 of Instruction No. 3 of 2016/17 dealing with deviations from normal bidding process provides that departments, public entities and constitutional institutions may dispense with a competitive bidding process as long as it is an emergency (e.g. a natural disaster) or where there is a sole source service provider. Further, it means that departments, public entities and constitutional institutions may vary contracts as long as they remain within the set thresholds.
360. Deviations from normal competitive bidding processes are an exception. However, the number of applications for deviations submitted to National Treasury for consideration in the recent past demonstrates the level of poor planning by departments and public entities. Deviations appear to be the norm rather than exception and this resulted in unintended institutionalisation of deviations which is contrary to section 217 of the Constitution, sections 38 and 51 of the PFMA.
361. The potential risk in this practice is that certain service providers and suppliers get preferential treatment in the allocation of government contracts, it opens up room for potential abuse of the SCM system; it may promote corruption; it leads to the exclusion of broader participation of suppliers; creates the opportunity for anti-competitive practices to take root; supports the promotion of monopolies; constrains the assessment of opportunity cost for value for money, and leads to the creation of barriers to entry of new players, SMMEs and enterprises owned by designated persons.