

858. Ultimately, Mr Mothibe's explanation was that PWC's impression was based on an industry practice where auditors are appointed for five years, subject to reappointment at the company's AGM, as per the Companies Act. He said that even if an appointment may start as being for one year, in practice, the auditor would continue thereafter for five years. However, when he was pertinently asked whether that was a practice in the private sector *and* the public sector – where appointments must be proceeded by proper procurement processes – he confirmed that he knows the practice exists in the private sector and he was not entirely sure that it exists in the public sector.¹⁴⁹⁵

859. Given that Mr Mothibe confirmed that it was part of the audit procedure to review BAC minutes, he was asked why PWC did not pick up the BAC minutes in 2012¹⁴⁹⁶ that raised concerns about the PWC appointment when there had been no procurement process.¹⁴⁹⁷ Mr Mothibe said that he could not speak to that as he was not in the team in 2012/2013.¹⁴⁹⁸

860. Mr Mothibe conceded that, if he had seen that minute, he would have been concerned but he refused to accept that, based on the fact that the award was only for one year, then PWC's fees over the next four years would constitute irregular expenditure under the PFMA.¹⁴⁹⁹ Mr Mothibe refused to make this concession despite the fact that he had accepted in his evidence that the PFMA required the audit service to go through proper process; that no such proper process had

¹⁴⁹⁵ Transcript 16 July 2020, p 85

¹⁴⁹⁶ Exhibit DD19(c), p117

¹⁴⁹⁷ Transcript 16 July 2020, p 87

¹⁴⁹⁸ Transcript 16 July 2020, p 88

¹⁴⁹⁹ Transcript 16 July 2020, p 95

occurred after year one of the PWC/Nkonki audits; and that irregular expenditure is expenditure that is incurred without proper legal processes being followed.¹⁵⁰⁰

861. PWC and Nkonki were paid a total of R69 760 888 for the years 2013-2016.¹⁵⁰¹ This constituted irregular expenditure, none of which was disclosed in the financial statements of those years.

Conflict of interest

862. Mr Mothibe confirmed that Ms Kwinana, the Chair of the ARC and a non-executive member of the SAA Board, was a director of the auditing firm Kwinana & Associates. PWC had bid together with Ms Kwinana in respect of three tenders in late 2014 and early 2015. One bid was successful and resulted in PWC paying Kwinana & Associates R6 187 799.90 in 2016. Mr Mothibe testified that was the policy of PWC to guard against possible conflicts of interests in these types of joint business relationships.¹⁵⁰²

863. In order to assess whether a joint business relationship with a client or a person from a client is material and significant for purposes of conflict of interest in the auditing work PWC does for the client, PWC considers the business relationship material if it exceeds 5% of the business partners' revenue. Mr Mothibe testified that this was in line with the International Ethics Standards Board for Accounts (IESBA) Code which is an international code. In accordance with its own policy, therefore, PWC had made enquiries with Ms Kwinana about the value of their joint business contracts,

¹⁵⁰⁰ Transcript 16 July 2020, p 96

¹⁵⁰¹ Transcript 16 July 2020, p 97, see exhibit DD19(c), p 49

¹⁵⁰² Transcript 16 July 2020, p 107-108

and whether it met the threshold.¹⁵⁰³ Ms Kwinana had indicated that her firm regarded 10% as significant.¹⁵⁰⁴ Therefore, PWC asked Kwinana & Associates whether their joint business contract was in excess of 10% of Kwinana & Associates' total revenue. Mr Mothibe was unable to point to where in the policy PWC was permitted to simply depart from its own materiality standard and apply that of its partner.¹⁵⁰⁵ However, he later explained that this figure was justifiable based on figures quoted in the IRBA and ISBA guidelines.¹⁵⁰⁶

864. Be that as it may, the email communications from Kwinana & Associates, per Ms Lumka Goniwe (Ms Kwinana's daughter) in 2015 stated that they expected to earn about R4.1million in fees on the joint bid (it later transpired the fees were in fact R6.1million in 2016) and that this was not significant because the firm's turnover in 2015 was more than R50million.¹⁵⁰⁷

865. The investigations of the Commission with SARS revealed that Kwinana & Associates' tax returns showed an annual turnover in that period of only R10 567 581.¹⁵⁰⁸ Mr Mothibe testified that, if he had known this, he would have been concerned.¹⁵⁰⁹ The fees PWC paid to Kwinana & Associates in 2016 were R6.1million and the turnover that year was approximately R21million according to the tax returns. Mr Mothibe was asked whether if PWC known that, it would have entered into that relationship with Kwinana & Associates since it would have

¹⁵⁰³ Transcript 16 July 2020, p 108-109

¹⁵⁰⁴ Transcript 16 July 2020, p 111-112

¹⁵⁰⁵ Transcript 16 July 2020, p 114

¹⁵⁰⁶ Transcript 16 July 2020, p 125

¹⁵⁰⁷ Exhibit DD19(a), p 131-132

¹⁵⁰⁸ Exhibit DD19(c), p 472-486

¹⁵⁰⁹ Transcript 16 July 2020, p 118

compromised PWC's independence. He confirmed that PWC would not have entered into that relationship.¹⁵¹⁰

866. During her evidence, it was put to Ms Kwinana that, as the Chair of ARC and a member of the Board that voted year after year to reappoint PWC, it was problematic that she was in a business relationship with PWC and did not recuse herself from the decision-making or disclose her personal interest. Ms Kwinana refused to accept that there was any problem with this at all.¹⁵¹¹ She claimed that there was no need to disclose her interest because, while she was in business with PWC, the benefit ultimately came from their client and so was not a personal interest under the Companies Act.¹⁵¹² It was put to Ms Kwinana that her firm derived a benefit from the proceeds that flowed from the joint business relationship with PWC. The revenue received from the successful tender was therefore as a result¹⁵¹³ of her relationship with PWC in bidding for the tender.¹⁵¹⁴

867. Ms Kwinana still refused to accept that this was a form of personal interest that needed to be disclosed or that would compromise independence. She claimed that, if that were true, then all chartered accountants could never appoint audit firms because they would have likely done their articles with one of the firms. It was put to Ms Kwinana that this is not an analogous example.¹⁵¹⁵ She then claimed that this would mean that she could never vote on any bid because at some point or another she had worked with all the audit firms. Again, it was put to her that what was relevant was her *current* business relationship with the audit firm and that *at the time* she

¹⁵¹⁰ Transcript 16 July 2020, p 123

¹⁵¹¹ Transcript 7 November 2020, p 191

¹⁵¹² Transcript 7 November 2020, p 192

¹⁵¹³ Transcript 7 November 2020, p 197-198

¹⁵¹⁴ Transcript 7 November 2020, p 193

¹⁵¹⁵ Transcript 7 November 2020, p 194

voted to appoint PWC, she had an ongoing business relationship with it, from which her firm derived benefits.¹⁵¹⁶

868. It was put to Ms Kwinana that Mr Mothibe considered the joint business relationship to be a conflict of interest but she still refused to concede the inappropriateness of her decision-making while benefitting from work with PWC. She simply testified that that “is his opinion.”¹⁵¹⁷ In this regard, Ms Kwinana was referring to Mr Mothibe’s opinion.

869. Ms Kwinana confirmed that Kwinana & Associates were paid R6.1million in fees from the joint business relationship it enjoyed with PWC in respect of a tender with PRASA.¹⁵¹⁸ She was also aware of the 10% threshold above which PWC would not enter a transaction with Kwinana & Associates as a business partner, given that Ms Kwinana was also part of an audit client, SAA.¹⁵¹⁹

870. It was put to Ms Kwinana that her daughter, on behalf of Kwinana & Associates, had advised PWC that its revenue was R50million in a year where potential fees with PWC were R4.1million, when in fact the tax returns of Kwinana & Associates in 2015 showed revenue of approximately R10.5million.¹⁵²⁰ Ms Kwinana was asked whether her daughter misstated the turnover to PWC. Ms Kwinana responded that she could not confirm this. When she was pressed about whether the firm had misstated its revenue in its tax returns, Ms Kwinana said that she would have to conduct her own audit of the tax returns. However, these were tax returns submitted by her own firm of which she was a director. Her unwillingness to accept that either the tax returns

¹⁵¹⁶ Transcript 7 November 2020, p 196-197

¹⁵¹⁷ Transcript 7 November 2020, p 199

¹⁵¹⁸ Transcript 7 November 2020, p 200

¹⁵¹⁹ Transcript 7 November 2020, p 203

¹⁵²⁰ Transcript 7 November 2020, p 208-209

were incorrect or her daughter's communication to PWC was incorrect was shocking.¹⁵²¹ It reflected her lack of candour and dishonesty.

871. The Commission cannot definitively conclude from this evidence alone that there was bias or intentional wrongdoing in the initial appointment of PWC, or their reappointment each year thereafter albeit that the Commission can conclude the reappointments were irregular. However, this is further evidence that SAA, and in particular Ms Kwinana, did not pay regard to due processes or conflicts of interest. This is consistent with her evidence regarding the AAR tender. As the chair of the SAAT, the Chair of the SAA ARC and a non-executive member of the SAA Board, Ms Kwinana displayed a fundamental lack of appreciation of conflict of interest policies and processes. Instead of knowing and applying these policies and processes, she testified that she preferred her own subjective opinion of her own independence. Independence and avoiding conflicts of interest is one of the cornerstones of corporate governance and public accountability. It is, therefore, of great concern that a professional chartered accountant would not accept this principle and instead conduct herself while on the Boards of SAA and SAAT without proper knowledge of, or adherence to, its requirements. Unfortunately, the Commission has to conclude that a number of answers that Ms Kwinana gave to questions aimed at establishing what her understanding was about what could or could not be done by a non-executive director or a director, revealed that either Ms Kwinana had no clue at all or she knew but dishonestly pretended not to know. The Commission takes the view that Ms Kwinana should never again be appointed to as a director of a state-owned entity.

¹⁵²¹ Transcript 7 November 2020, p 211-212

Inadequate audit procedures

Auditor's role and duties

872. The Auditor General is a Chapter 9 constitutional institution. It is therefore independent and accountable only to Parliament. Section 4(3) of the Public Audit Act 25 of 2004 empowers the AG to audit SAA but it is not obliged to do so. The AG will decide to do so if there is sufficient capacity.¹⁵²²

873. Mr Sokombela explained the legislative and policy obligations under which SAA operated in respect of internal audit controls and procedures. He testified that under the PFMA, a state-owned entity is required to be equipped with a fully capacitated and skilled internal audit body; it is also required to ensure that it has comprehensive internal controls, or policies and procedures, to guarantee the proper functioning of the entity's financial administration. These are known as Standard Operating Procedures and they are designed to prevent irregularity, fraud and wastage. The procedures require checks and balances such as the segregation of duties between those procuring goods and services, and those evaluating the services.¹⁵²³

874. As to the role of the external auditors of a public entity like an SOE, Mr Sokombela testified that their role is to provide the independent assurance to the users of the annual report or the financial statements of the SOE. They are also required to provide assurance on applicable laws and regulations to ensure that there has been compliance with those laws. This would be the responsibility of any auditor of a public entity, whether that auditor was a private firm, like PWC, or a public entity like the AG.¹⁵²⁴ In respect of private audit clients, the focus is on whether the financial

¹⁵²² Transcript 20 February 2020, p 28

¹⁵²³ Transcript 20 February 2020, p 30

¹⁵²⁴ Transcript 20 February 2020, p 31

statements have been prepared in accordance with the financial reporting framework whereas in respect of public entities there must also be a focus on compliance. In Mr Sokombela's opinion, the AG will be more experienced with the latter type of auditing than private audit firms that predominantly service private audit clients.¹⁵²⁵

875. Any auditor of a public entity must fulfil the requirements set out in the Public Audit Act which provides for various duties.¹⁵²⁶ Mr Sokombela emphasised the importance of the format and content of the auditor's report,¹⁵²⁷ which must accord with the required template.¹⁵²⁸

876. Mr Sokombela testified that there are limits to the auditor's ability to scrutinize the state of affairs at an SOE. The auditors rely on audit evidence and they rely on the client for that evidence, being the management of the client. In addition, auditors are not required to test every transaction. They select a sample of the total transactions and investigate those.¹⁵²⁹ The sample selection is based on a scientifically tested method about selecting the sample from a population and requires an understanding of the nature of the population itself. In other words, it requires understanding the entity that is being audited and the population set and from that, determining what would be an appropriate and effective sample size.¹⁵³⁰ The sample size depends on the number of total transactions investigated. The main aim is to get sufficient appropriate audit evidence to reach a sound conclusion about the total population size.¹⁵³¹

¹⁵²⁵ Transcript 20 February 2020, p 48

¹⁵²⁶ See sections 25-27

¹⁵²⁷ Section 28, read with the Auditor General's Reporting Guide.

¹⁵²⁸ Transcript 20 February 2020, p 50

¹⁵²⁹ Transcript 20 February 2020, p 32

¹⁵³⁰ Transcript 20 February 2020, p 33

¹⁵³¹ Transcript 20 February 2020, p 34

877. Mr Sokombela said that a vital part of determining the audit methodology to be used and the way the sample size or content would be determined, is the risk assessment process that auditors are required to conduct in order to understand the audit environment so as to identify which potential transactions might pose a particular risk to the audit process. A risk assessment may indicate that particular transactions, not otherwise included in the sample size, pose a risk and so those transactions would be verified separately.¹⁵³² This risk assessment would include considering press articles about the particular transaction in the public domain.¹⁵³³

878. Mr Sokombela also testified that external auditors are not tasked with identifying and reporting on fraud and corruption. The aim of the audit process is to express a fair presentation of the financial statements and to identify any material findings on legislative compliance and key performance indicators in the annual report. However, the audit process could identify possible fraud which should be reported to management.¹⁵³⁴

879. In assessing compliance of an entity, Mr Sokombela testified that it is vital to ensure that the Supply Chain Management body in the SOE complies with section 51 of the PFMA and section 217 of the Constitution. The auditor must consider the processes followed in procurement processes, assess the entity's controls and the capacity of the SCM division and consider the quality of their policies and procedures. All of these things are relevant not only to compliance findings but also to assessing particular risk areas of the entity and, therefore, what sample and what special risk sample ought to be assessed. Once a particular transaction has been identified as requiring an audit, the auditors will completely re-perform the tender process from

¹⁵³² Transcript 20 February 2020, p 36

¹⁵³³ Transcript 20 February 2020, p 37

¹⁵³⁴ Transcript 20 February 2020, p 35

start to finish, with reference to the tender files, to ensure that there was compliance with the correct processes.¹⁵³⁵ Mr Mothibe agreed that this was required of auditors when auditing tenders.¹⁵³⁶

880. Mr Sokombela explained some important concepts.

880.1. Irregular expenditure under the PFMA is expenditure incurred in non-compliance with legislation or legal requirements. This speaks to the process through which the goods were procured.¹⁵³⁷

880.2. The PFMA also refers to fruitless and wasteful expenditure, which Mr Sokombela explained was where the expenditure was not used for the benefit of the entity or did not add any value to the entity.¹⁵³⁸

880.3. Mr Sokombela also explained that a reportable irregularity is a concept defined under section 45 of the Auditing Professions Act 26 of 2005.¹⁵³⁹ It refers an unlawful act or omission that has been committed by someone in a management position which has caused or is likely to cause material financial loss to the entity or which is fraudulent or which involves a material breach of a fiduciary duty. In such a case, the auditor has a legal obligation to immediately notify the Independent Regulatory Board for Auditors (*IRBA*) with details of the reportable irregularity and then, three days thereafter, to report to management

¹⁵³⁵ Transcript 20 February 2020, p 44-45

¹⁵³⁶ Transcript 16 July 2020, p 60 and p 63

¹⁵³⁷ Transcript 20 February 2020, p 38

¹⁵³⁸ Transcript 20 February 2020, p 40. The definition under the PFMA is “expenditure other than authorized expenditure incurred in contravention of or that is not in accordance with the requirement of any applicable legislation including this Act or the State Act 86 of 1968 or any regulations made in terms of that Act or any provincial legislation providing for the procurement procedures in that provincial government.”

¹⁵³⁹ An unlawful act or omission committed by somebody in a senior management position which (1) has caused, or it likely to cause, material financial loss to the entity, or (2) which is fraudulent or amounts to theft, or (3) which present a material breach of a fiduciary duty

and give them an opportunity to explain what happened. The auditor is then required to report back to IRBA and specify their opinion on whether there was such an irregularity.¹⁵⁴⁰

881. Section 55(2)(b) of the PFMA provides that the annual report and financial statements of a public entity must include any material losses through criminal conduct and any irregular expenditure, and fruitless and wasteful expenditure, that occurred during the financial year.

882. Mr Mothibe confirmed that it is part of the role of the auditor in a public entity to identify irregular, fruitless and wasteful expenditure.¹⁵⁴¹

883. Mr Mothibe also testified that auditing procedures for any particular audit are designed by the audit team.¹⁵⁴²

884. He confirmed that part of the audit procedures designed for the SAA audit was to review Board meeting minutes and other relevant Board committees and the BAC, for example.¹⁵⁴³ Mr Mothibe testified that, while it is not a requirement under the formal auditing standards to review media reports as part of this process, the PWC/Nkonki team did consider media reporting “to the extent we could find” them.¹⁵⁴⁴ Indeed, in PWC’s audit report in respect of the 2015 SAA Group audit, it states under “EGA” (engagement evidence gathering) that “in accordance with the risk-based audit approach, we stay up to date on media reports pertaining to SAA

¹⁵⁴⁰ Transcript 20 February 2020, p 42-43

¹⁵⁴¹ Transcript 16 July 2020, p 54-55

¹⁵⁴² Transcript 16 July 2020, p 28

¹⁵⁴³ Transcript 16 July 2020, p 29

¹⁵⁴⁴ Transcript 16 July 2020, p 31. See also exhibit DD19(d), p 443

and to evaluate the effect thereof in the financial statements, identify risks and therefore update our audit approach on a continual basis when necessary.”¹⁵⁴⁵

885. The IRBA Guide on Reportable Irregularities provides that auditors ought to keep abreast of press reporting about the entity they are auditing to assist in identifying reportable irregularities. Mr Mothibe confirmed that “we act according to the guide at all times when we audit our clients”.¹⁵⁴⁶

Inadequate internal controls and procedures

886. The AG took over the audit of SAA for the 2016/2017 year, after the five years of PWC and Nkonki’s joint audit. During the five years of the joint audit, every year the audit opinion was unqualified. It was a clean audit opinion.¹⁵⁴⁷ An unqualified audit is where the financial statements are free from material misstatements whether caused by fraud or error.¹⁵⁴⁸ This is subject to a level of materiality, however. It is not a guarantee there are no errors but it reflects that the statements are materially accurate.¹⁵⁴⁹

887. A qualified audit opinion is where there are concerns arising from the financial statements. The auditors are required to opine on (1) the financial statements, (2) the predetermined objectives or performance information, and (3) on compliance with legislation. The opinion on the financial statements is escalated to the audit report; the performance information opinion is expressed in the management reports

¹⁵⁴⁵ Exhibit DD19(d), p 442-443

¹⁵⁴⁶ Transcript 16 July 2020, p 43

¹⁵⁴⁷ Transcript 20 February 2020, p 106

¹⁵⁴⁸ Transcript 20 February 2020, p 107

¹⁵⁴⁹ Transcript 20 February 2020, p 110

(internal document) and select significant findings are escalated to the audit report; there is no formal opinion on compliance with legislation, instead the auditors make “material findings” and those are all escalated to the auditor’s report. These three areas are prescribed under the Public Audit Act – they do not apply to private firms. Private firms only have their financial statements audited.¹⁵⁵⁰

888. Mr Sokombela explained that a clean audit report means that there were no material findings on performance information or compliance with laws, regulations and processes. PWC and Nkonki had issued such a clean report for SAA for five years in a row¹⁵⁵¹.

889. In the 2015/2016 year, the Minister of Finance, Mr Nene, requested the AG to take over the audit.¹⁵⁵² However, given the capacity required for this large audit and its complexity, the AG advised that it could not take over for that year but it might reconsider in the subsequent financial year when it had some time to prepare and build capacity.¹⁵⁵³ In the following year, the Board of SAA recommended to the shareholder to appoint the AG as the SAA external auditors.¹⁵⁵⁴

890. When the AG took over the SAA audit, it engaged in extensive preparatory work, including comprehensive risk assessment sessions to fully understand the aviation industry and SAA in particular, and to identify high risk areas for the airline. The AG also invested heavily in capacitating itself for the audit.¹⁵⁵⁵

¹⁵⁵⁰ Transcript 20 February 2020, p 115

¹⁵⁵¹ Transcript 20 February 2020, p 112

¹⁵⁵² Transcript 20 February 2020, p 119-120

¹⁵⁵³ Transcript 20 February 2020, p 122

¹⁵⁵⁴ Transcript 20 February 2020, p 122

¹⁵⁵⁵ Transcript 20 February 2020, p 127-131

891. The AG's audit in the 2016/2017 financial year differed markedly from the previous years' audit reports. The audit opinion regressed from an unqualified audit opinion (which refers to the financial statements) with no material findings (which refers to compliance and performance information) to a qualified audit opinion with findings on compliance with legislation as well as findings on performance information or predetermined objectives. In other words, it regressed from being a clean audit to a qualified audit with significant findings.¹⁵⁵⁶

892. This significant deviation from past opinions and findings was not simply a shift in SAA in that new financial year. As part of the audit process, the AG was responsible for confirming or reviewing the "opening balances". In other words, the AG needed to ascertain whether they were starting at the right starting point, by going through the previous auditors' files and working papers with the objective of seeing whether they could rely on that work.¹⁵⁵⁷ In the course of that review, the AG determined that it could not rely on the previous audit of PWC and Nkonki because there was a lack of supporting documentation and they could not test how the opening balances had been determined. The AG, therefore, had to perform additional procedures where they had to ask management to prove the validity of the contents of the balance sheets because the audit files did not contain the support. Vital documents that are required under international standards for aircraft, for example, were missing and other critical source documents were not in the audit files.¹⁵⁵⁸

893. Section 51 of the PFMA provides that the accounting authority:

¹⁵⁵⁶ Transcript 21 February 2020, p 2

¹⁵⁵⁷ Transcript 21 February 2020, p 3

¹⁵⁵⁸ Transcript 21 February 2020, p 5

893.1. must have an effective, efficient and transparent system of financial and risk management and internal controls;

893.2. must also have an appropriate procurement and provisioning system which is fair, equitable, transparent, competent and cost effective; and

893.3. must take appropriate steps to prevent irregular expenditure.

894. Generally, the AG observed very poor internal controls at SAA, including severe problems with record keeping (as Dr Dahwa also confirmed).¹⁵⁵⁹ SAA was also very unstable in that more than 40% of the positions were filled in an acting capacity. The Board was under capacitated; it did not have any aviation experts.¹⁵⁶⁰ The key executive management positions of CEO, CFO, Chief Commercial Officer and Chief Strategy Officer were all vacant at the time, and the Chief Procurement Officer was on suspension. Accordingly, Mr Sokombela explained that there was an incredibly weak control environment at the time, particularly in SCM. SAA officials also lacked appropriate competencies, particularly in the preparation of financial statements and SCM.¹⁵⁶¹

895. Mr Sokombela testified that compliance with legislation was a critically weak area at SAA, and there were many instances of irregular, as well as fruitless and wasteful expenditure. There was also no “consequence management”, i.e. no consequences were imposed for the multiple transgressions of proper processes.¹⁵⁶²

¹⁵⁵⁹ Transcript 21 February 2020, p 6

¹⁵⁶⁰ Transcript 21 February 2020, p 11-12

¹⁵⁶¹ Transcript 21 February 2020, p 12-13

¹⁵⁶² Transcript 21 February 2020, p 13

896. Mr Sokombela also reported that the legal division and the office of the company secretary were severely under capacitated. The legal department was incapable of ensuring that tenders were awarded in accordance with process and that the contract was ultimately signed with the successful service provider. It was operating off simple tender award letters.¹⁵⁶³ This represented an enormous risk to SAA because there was no way to hold suppliers accountable. Nevertheless, these suppliers were simply paid by SAA.¹⁵⁶⁴ Mr Sokombela testified that this practice must have been going on for years because of the magnitude of the problem. SAA had a very large contract register but the *majority* of those contracts could not be located. The scale of the problem indicated that it should have been picked up by previous auditors.¹⁵⁶⁵
897. The problems with the company secretary also presented a risk to SAA. The company secretary advises the board on corporate governance issues and the AG found many instances of transgressions of proper procedures for passing resolutions, and decisions taken contrary to the Companies Act (including unlawful advances of funding to subsidiaries.) CIPC had in fact issued a non-compliance notice to SAA in that regard.¹⁵⁶⁶
898. Mr Sokombela testified that the AG noted that, despite the DTI and National Treasury notifying the Board not to take decisions in conformity with the 30% set aside policy, the Board had continued to implement that policy and the AG could not understand why the company secretary had not warned the Board against this course of action.¹⁵⁶⁷

¹⁵⁶³ Transcript 21 February 2020, p 14

¹⁵⁶⁴ Transcript 21 February 2020, p 15.

¹⁵⁶⁵ Transcript 21 February 2020, p 16-18

¹⁵⁶⁶ Transcript 21 February 2020, p 21

¹⁵⁶⁷ Transcript 21 February 2020, p 22

899. The record keeping problem at SAA was so bad that it would sometimes take three-months for SAA to comply with a request and this resulted in a significant limitation in the scope of the audit that could be performed – without critical source documents. This was particularly so with respect to SCM and assets.¹⁵⁶⁸ A limitation of scope is a qualification the auditors will make in their report. It means that management did not provide them with the requisite documents with the result that they could not make a finding or reach an opinion on the state of affairs in the company.¹⁵⁶⁹
900. The AG concluded that SAA needed intervention in various areas, including financial and performance management and governance. A lack of governance led to a lack of properly documented policies and procedures which represented a risk to SAA. There was no central repository of policies and the policies that were available, were outdated. This meant that no one could be held accountable for anything because their roles and responsibilities were not clearly defined.¹⁵⁷⁰ These critical, systemic problems, should also have been apparent to any auditor in previous years.¹⁵⁷¹
901. Mr Sokombela explained that it was also difficult to make any findings on SAA's performance because there was no head of strategy at the business. He said that there were no reliable key performance indicators or ways of measuring whether the company had met its objectives.¹⁵⁷² Another feature of SAA's internal controls that was concerning was the ineffectiveness of the Information Technology Environment and infrastructure at SAA. There was no coherent Technology Governance Framework that would allow for effective alignment of processes, projects and

¹⁵⁶⁸ Transcript 21 February 2020, p 22

¹⁵⁶⁹ Transcript 21 February 2020, p 26

¹⁵⁷⁰ Transcript 21 February 2020, p 22-23

¹⁵⁷¹ Transcript 21 February 2020, p 25

¹⁵⁷² Transcript 21 February 2020, p 27

structures to support its business. Importantly, the risk management processes lacked maturity and effective oversight – this included the ARC.¹⁵⁷³

Inadequate external audit procedures

902. Mr Sokombela testified that it was cause for concern that a subsequent audit opinion came to such a different conclusion. This is because, while different audit firms may employ different methodologies, they should all conform to uniform audit standards.¹⁵⁷⁴

903. Indeed, in this case, the AG even prepared restatements. Restatements are statements that correct errors made in the previous years' financial statements. The accounting standards provide guidance about how those errors need to be corrected in the following financial statements.¹⁵⁷⁵

904. In the 2017 annual report, SAA disclosed approximately R125million in irregular expenditure – whereas in the 2016 financial year, only R5million had been disclosed as irregular.¹⁵⁷⁶ Even the R125million disclosed in 2017 was found to be an incomplete assessment which resulted in a qualified audit.¹⁵⁷⁷

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

¹⁵⁷³ Transcript 21 February 2020, p 26-29

¹⁵⁷⁴ Transcript 21 February 2020, p 8

¹⁵⁷⁵ Transcript 21 February 2020, p 9

¹⁵⁷⁶ Transcript 21 February 2020, p 13

¹⁵⁷⁷ Transcript 21 February 2020, p 14

expressly on the previous auditors of SAA. He claimed that he had professional ethical responsibilities not to do so. However, he did say that “if the situation at SAA before we took back the audit was the same as the situation that we found SAA to be at, then [we] would have expected then that the previous auditors have identified those findings and maybe perhaps the audit opinion should not have been clean.”¹⁵⁷⁸

906. It was evident from Mr Sokombela’s evidence that the problems at SAA were “systemic” and “the way things have been done at SAA for quite some time”. He stated that “when I looked at the challenges that those guys had there, they were not challenges of that year. They were challenges that are coming from prior years.” He said that the “culture” at SAA was “the wrong way of doing things”.¹⁵⁷⁹

907. Mr Sokombela also emphasised that, while private audit firms had the same duties as the AG when auditing a public entity, the AG’s “specialty” is ensuring compliance with legislation, regulation and SCM processes and policies.¹⁵⁸⁰

908. In fact, Mr Mothibe’s evidence indicated that he saw PWC’s “primary role” to be to assess whether the financial statements fairly represented the entity’s financial position and whether the information therein conformed with general accepted accounting practices.¹⁵⁸¹ Mr Mothibe testified that one of the biggest things on their mind was whether SAA was a going concern and they were preoccupied with this issue.¹⁵⁸² So, while Mr Mothibe conceded that, when PWC audits an SOE, it is obliged to consider matters of compliance, he appeared to consider this a secondary or less critical feature of the auditor’s role.¹⁵⁸³ He also did not regard his role in

¹⁵⁷⁸ Transcript 21 February 2020, p 33

¹⁵⁷⁹ Transcript 21 February 2020, p 67-68

¹⁵⁸⁰ Transcript 21 February 2020, p 56

¹⁵⁸¹ Transcript 16 July 2020, p 44

¹⁵⁸² Transcript 17 July 2020, p 83-84

¹⁵⁸³ Transcript 16 July 2020, p 44-45

auditing a public entity as materially different to auditing a private entity. He said that in both cases, one has to consider the relevant legislation because the International Standards of Auditing (ISA) provide that relevant legislation in an industry will have a material effect on the financial statements as a whole. Just like when they audit a bank, they must consider the impact of the relevant banking legislation. He said that “there are no additional requirements in terms of state-owned enterprises because all the standards that require you to look at applicable law and regulations cover that”. He accepted that in the case of a public enterprise then the PFMA was the relevant legislation.¹⁵⁸⁴

909. Furthermore, Mr Mothibe testified that the AG performed work pertaining to procurement on a more regular basis and they were experts in that area. He stated that compliance, procurement and contract management are complicated and the AG “would like to do a bit more work”.¹⁵⁸⁵

910. This difference in the AG’s approach compared to that of PWC/Nkonki is evident from the vastly differing assessments of irregular and fruitless and wasteful expenditure in their respective audits of SAA. In the AG’s final management report in the 2016/2017 year (a message to management drawing their attention to the auditor’s concerns)¹⁵⁸⁶ the AG spent some time on issues surrounding procurement and the SCM of SAA. He produced a table of sample transactions and identified which of these were irregular. They tested the award of the contracts against compliance with legislation, SCM policy and relevant regulations. They found that 121 of the 140 contracts were irregular. That is a total of R6.6billion out of

¹⁵⁸⁴ Transcript 16 July 2020, p 46

¹⁵⁸⁵ Transcript 17 July 2020, p 43

¹⁵⁸⁶ Exhibit DD20(b), p 572

R7.6billion.¹⁵⁸⁷ Mr Sokombela explained that these irregularities included non-compliance with competitive tender processes, non-compliance with the PFMA and non-compliance with the PPPFA, including awarding contracts that were inconsistent with the terms of the tender.¹⁵⁸⁸ Mr Sokombela stated that only R2.4billion thereof (103 contracts) was categorized as “irregular expenditure” and not simply non-compliance, because that expenditure had already been incurred in that financial year. This constituted 86% of the tenders.¹⁵⁸⁹ Mr Sokombela testified that he believed that this was representative of the overall population of tenders at SAA.¹⁵⁹⁰

911. In the same report, the AG identified steps to prevent irregular and fruitless and wasteful expenditure.¹⁵⁹¹ The report noted that Management disclosed R40.4million of fruitless and wasteful expenditure, and irregular expenditure of R125.9million. Whereas, in contrast, the AG identified the total irregular expenditure as R4.5billion and fruitless and wasteful expenditure was R300.6million, based on the sample.¹⁵⁹² Mr Sokombela testified that the process generally is that the auditors determine a figure from the sample; management goes back and attempts to compile an estimate of the whole population size and reverts to the auditors; the auditors run various additional procedures to test or assess whether that figure is accurate. However, in this case, management could not practically go back and consider the whole population size because it was impossible, given SAA’s shambolic record keeping.¹⁵⁹³ He explained that management could not simply fix the problem

¹⁵⁸⁷ Exhibit DD20(b), p 618, item 4.2.3. See transcript, 21 February 2020, p 47-48

¹⁵⁸⁸ Transcript 21 February 2020, p 49

¹⁵⁸⁹ Transcript 21 February 2020, p 51

¹⁵⁹⁰ Transcript 21 February 2020, p 52

¹⁵⁹¹ Exhibit DD20(b), p 1104

¹⁵⁹² Exhibit DD20(b), p 1105

¹⁵⁹³ Transcript 21 February 2020, p 64-65

because it was “a systemic issue that could not just be corrected within a few weeks or so.”¹⁵⁹⁴

912. This must be compared to the figure of R5.4million for irregular expenditure¹⁵⁹⁵ and R7.3 million for fruitless and wasteful expenditure that PWC and Nkonki had reached in the 2015/2016 financial year.¹⁵⁹⁶ It was put to Mr Sokombela that if the AG’s audit was correct, then it is difficult to think that the 2015/2016 financial year would have had such low figures and that the previous auditors would not have picked up any significant irregular or wasteful expenditure. Mr Sokombela agreed. He also agreed that, in such a case, they could not have issued a clean audit.¹⁵⁹⁷

913. Mr Sokombela testified that he engaged repeatedly with PWC and Nkonki regarding the previous audits. He noted that his team realised while reviewing the audits that there was not much work done on the compliance and SCM area.¹⁵⁹⁸ In fact, Mr Sokombela recounted a meeting that his team had had with the PWC/Nkonki team at which the previous auditors conceded that the work they had done on SCM was inadequate.¹⁵⁹⁹ This was recorded as follows in an email dated 13 September 2017 from Mr Sokombela, to Mr Mothibe and Ms Masasa, who was the lead audit partner from Nkonki:¹⁶⁰⁰

“We have since visited PWC and Nkonki on the 11 September 2017 to relook at the audit file in an attempt to resolve significant matters that were not evident on file

¹⁵⁹⁴ Transcript 21 February 2020, p 65

¹⁵⁹⁵ Transcript 21 February 2020, p 72

¹⁵⁹⁶ Transcript 21 February 2020, p 78

¹⁵⁹⁷ Transcript 21 February 2020, p 77

¹⁵⁹⁸ Transcript 21 February 2020, p 113

¹⁵⁹⁹ Transcript 21 February 2020, p 112-114

¹⁶⁰⁰ Exhibit DD20(d), p 1804

regarding the SAA opening balances. Below is the detailed feedback of our review.¹⁶⁰¹

. . .

Regarding SCM we agreed that there was not much work that was performed in your file and we will not rely on this work.¹⁶⁰² (emphasis in text)

914. When Mr Mothibe was asked about this during his evidence, he attempted to explain it by stating that, since the AG was an expert in SCM, procurement and contract management, “they would be doing a bit more work in that area”.¹⁶⁰³

915. This echoes Mr Mothibe’s earlier evidence about the AG effectively being better equipped and better qualified than a private audit firm, to assess matters of non-compliance.

916. However, this explanation does not avail PWC, or Mr Mothibe. If private audit firms, like PWC, are not equipped or experienced enough to do a proper job of this nature, then they should not be tendering for such work. Mr Mothibe was asked whether he accepted that, when an external auditor like PWC audited an SOE, it did this effectively on behalf of the AG and, therefore, had the same obligations as the AG. The evidence that the AG has special expertise does not serve to limit or reduce PWC’s obligations of an SOE.¹⁶⁰⁴

917. Mr Mothibe’s answer was that PWC was able to perform at the same standard as the AG and that it would not have accepted an appointment if it could not deliver on it.¹⁶⁰⁵ However, in that case, he had no adequate explanation for the email sent by

¹⁶⁰¹ Exhibit DD20(d), p 1804

¹⁶⁰² Exhibit DD20(d), p 1806

¹⁶⁰³ Transcript 17 July 2020, p 48

¹⁶⁰⁴ Transcript 17 July 2020, p 52

¹⁶⁰⁵ Transcript 17 July 2020, p 54

Mr Sokombela and the concession reflected therein that PWC's work in the compliance area was inadequate. The fact of the matter is not that the AG had higher standards than PWC; it is that PWC failed to perform to the standard required of it.

918. On 18 January 2018, after the AG had completed the SAA audit, it convened a meeting with SAA's previous auditors.¹⁶⁰⁶ The purpose of the meeting was to discuss the audit outcomes and their regression since the previous year. At this meeting, the AG warned PWC that the stakeholders would have a lot of questions for PWC/Nkonki about the previous audits based on the dramatic difference in findings and the qualifications in the 2016/2017 audit report. They would want to ask about the stark discrepancy between five years of clean audits and the limited and qualified audit for 2016/2017.¹⁶⁰⁷ The meeting summary records:¹⁶⁰⁸

"What was discussed was key matters to note that may be asked by the stakeholders. They include, among others:

Irregular expenditure has significantly increased;

Why the audit outcome has regressed from a clean audit to a qualified opinion;

Why the significant matters reported by the AGSA in 2016 and 2017 audit were not reported in prior years.

The previous auditors were notified that there is a huge risk on SCM, that stands for Supply Chain Management and SCOPA might need answers from the previous auditors on why this matter was not reported in prior years. The previous auditors need to prepare themselves, especially on SCM if they're called to do a presentation by SCOPA or Parliament."

¹⁶⁰⁶ Exhibit DD20(d), p 1825. See transcript 17 July 2020, p 55

¹⁶⁰⁷ Transcript 17 July 2020, p 57

¹⁶⁰⁸ Exhibit DD20(d), p 1826

919. When this was put to Mr Mothibe, he claimed that a lot of this could be explained by the peculiar circumstances attendant upon the 2016/2017 year.¹⁶⁰⁹ PWC was ultimately comfortable that the qualifications were peculiar to that year and that the financial statements were free of material misstatements in the preceding years.¹⁶¹⁰
920. Mr Mothibe was asked whether PWC and Nkonki were satisfied that the SAA internal controls were adequate from 2014-2016. In response, Mr Mothibe claimed that his team did identify “diversions” from regular practice and they notified management of these “deviations” but they had not “elevate[d] that part to the audit report as required”.¹⁶¹¹ Mr Mothibe accepted that they should have elevated the issue to the audit report but had failed to do so. He also admitted that “they did not identify all the issues”.¹⁶¹²
921. Mr Mothibe’s original statement to the Commission did not make this concession. However, he testified that after reviewing the work again and considering the records, “it became clear that we had erred and we should have elevated some of those items of non-compliance . . . to the . . . report”.¹⁶¹³
922. As set out above, Mr Mothibe agreed that it was necessary to completely reperform the processes that would have been followed in the relevant tender award in order to audit SCM compliance at an SOE. He also said that the PWC/Nkonki team did that work.¹⁶¹⁴ However, when he was asked how he managed to do that when he could not find the relevant tender files, Mr Mothibe responded “for the simple stuff

¹⁶⁰⁹ Transcript 17 July 2020, p 59

¹⁶¹⁰ Transcript 17 July 2020, p 60

¹⁶¹¹ Transcript 16 July 2020, p 57

¹⁶¹² Transcript 16 July 2020, p 57

¹⁶¹³ Transcript 16 July 2020, p 58

¹⁶¹⁴ Transcript 16 July 2020, p 59

we had selected we followed that through and where there were challenges and there were deviations, we found them and we raised them with management and with the audit committee”.¹⁶¹⁵ During his evidence, he accepted that PWC/Nkonki had failed to elevate this issue to the audit report.

923. However, it is not only the failure to elevate these concerns to the audit report that was the issue. It is baffling how PWC could have reached any conclusion about compliance – and not note a scope limitation on their findings – in circumstances where there were no supporting documents. Mr Mothibe was asked how it could have been that, after his team had discovered that the tender files were missing, and notified management about the issue, the matter was then not taken any further. He was asked whether he considered this a dereliction of duty. He testified that it was not. He claimed that there were “reporting steps that we were able to carry out” but it was just that the “last step” should also have been carried out.¹⁶¹⁶ When he was pressed about the fact that this last step was the critical one – the one that would alert the public to the issue because it would then appear in the audit report – he eventually conceded that it was an “omission” of duty.¹⁶¹⁷ This is a difference of semantics. Whether one calls it a “dereliction” of duty or an “omission” of duty, the fact remains that PWC was not in any position to make a determination about SAA’s compliance with legislation if it did not even have at its disposal the records that it would have needed to make this assessment.

924. It is not adequate for auditors of SOEs to alert management and Board committees to the problems that they themselves have created and are incentivized to conceal. Indeed, it was put to Mr Mothibe that the problem with skipping this “last step” is that

¹⁶¹⁵ Transcript 16 July 2020, p 63

¹⁶¹⁶ Transcript 16 July 2020, p 65

¹⁶¹⁷ Transcript 16 July 2020, p 67

the audit opinion, insofar as it talks about compliance and laws and regulations, would be incorrect. Mr Mothibe agreed with this.¹⁶¹⁸

925. Mr Mothibe testified that ultimately when the audit report was finalised, his team considered whether, in the light of the overall evidence, there was material non-compliance with legal requirements and concluded that there was not.¹⁶¹⁹ He attributed this to “an error in judgment” and conceded that they “should have identified those matters as material areas of non-compliance.”¹⁶²⁰

926. When Mr Mothibe testified at the Commission, there was a pending case of alleged professional misconduct against him and Ms Thuto Masasa before the IRBA concerning their audits of SAA. By the time Mr Mothibe testified in July 2020, he had consented to the IRBA making an order against him of non-compliance for failing to identify non-compliance with legislation and internal control deficiencies for the SAA audits from 2014-2016.¹⁶²¹ He testified that he had made the concession that there was inadequate reporting relating to compliance and irregular expenditure.¹⁶²² He also acknowledged that, as a result of there being no tender files available at SAA to review, there were limitations placed on the scope of the audit¹⁶²³ and that the amount stipulated for irregular expenditure must therefore have been inaccurate in the audit report.¹⁶²⁴

927. While it is correct that PWC did eventually make these concessions, it only did so after Mr Sokombela had testified in February 2020. Prior to that, both in relation to

¹⁶¹⁸ Transcript 16 July 2020, p 66

¹⁶¹⁹ Transcript 16 July 2020, p 68

¹⁶²⁰ Transcript 16 July 2020, p 68-69

¹⁶²¹ Transcript 17 July 2020, p 37-38

¹⁶²² Transcript 17 July 2020, p 60

¹⁶²³ Transcript 17 July 2020, p 69

¹⁶²⁴ Transcript 17 July 2020, p 60

IRBA and in relation to the Commission, PWC stood by its audit reports for the 2014-2016 audits of SAA. The deficiencies in PWC's audits ought to have been apparent from the meetings with the AG in late 2016 and early 2017 as well as from the review of the results of the 2016/2017 audit report. It was, therefore, put to Mr Mothibe that "the passage of events suggests. . . that for two years, until the shoe started to pinch, until the public exposure of the deficient auditing work by PWC, PWC was content not to come clean about the errors it had made". It was also put to him that it was only when there was public disclosure through the evidence led in this Commission that "you then had another think and have made the concessions you have made."¹⁶²⁵

928. In response, Mr Mothibe said that the matter of whether PWC had done to its job properly when auditing SAA during the relevant years was pending before the regulator and PWC did not want to anticipate the outcome.¹⁶²⁶ That is not an adequate answer to the question. The question probes why it took PWC so long to accept the inadequacies in its audit work. A responsible auditor would have made these concessions far earlier and certainly after the deficiencies had been brought to their attention by the AG. It should not have taken two more years, and a Commission of Inquiry to achieve this level of accountability from an entity like PWC.

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

¹⁶²⁵ Transcript 17 July 2020, p 80

¹⁶²⁶ Transcript 17 July 2020, p 81

Air Chefs

930. Mr Mothibe testified that he was aware of the lounge catering tender during the audit period and had had sight of the Board minutes of the meeting at which the decision to cancel the LSG Skychefs award and to give it to Air Chefs was taken.¹⁶²⁷ He testified that after reviewing the transaction, he did not think that there were any reportable irregularities.¹⁶²⁸

931. Mr Mothibe testified that he was aware that SAA had awarded a tender to LSG Skychefs but that it had taken “a business decision” “to rather insource the provision of that catering to SAA”. It was a decision to insource rather than to award to an outside party.¹⁶²⁹ When Mr Mothibe was asked whether such conduct was lawful under the PFMA, he stated that a decision to insource does not require a tender process.¹⁶³⁰ It was put to Mr Mothibe that under PAJA and administrative law, a state entity cannot run a tender process and make the administrative decision to award that contract, communicate the decision to the successful party, and then unilaterally withdraw the decision. This would be unlawful. Mr Mothibe responded that PAJA was not one the Acts that the auditors considered.¹⁶³¹

932. It was further put to him that the legal department of SAA had warned its Board of this consequence. It was also pointed out to Mr Mothibe that the opinion and its cautions to the Board were reflected in the Board minutes. Mr Mothibe stated that he

¹⁶²⁷ Transcript 16 July 2020, p 158

¹⁶²⁸ Transcript 16 July 2020, p 158

¹⁶²⁹ Transcript 16 July 2020, p 160

¹⁶³⁰ Transcript 16 July 2020, p 160

¹⁶³¹ Transcript 16 July 2020, p 162

did not recall considering those minutes, or those particular portions of them, and, if he did, it would not have been at that level of detail.¹⁶³² He said that he did not call for any of the documents that served before the Board in making its decision and so he did not consider the memorandum that the Acting-CEO, Ms Mpshe, had prepared.¹⁶³³

933. Mr Mothibe conceded that reading the resolution of the Board which stated that the tender award would be “retracted” and the “catering contract be awarded to Air Chefs without going through the bidding process”, should have “sounded an alarm” to the auditors. It was put to him that more should then have been done and required of management to explain why they had retracted a tender that had been awarded pursuant to a lawful tender process.¹⁶³⁴ Mr Mothibe responded that this would still have looked like a valid decision to insource but he admitted that, when reading the record of the decision in its entirety, it did give rise to questions of possible financial loss and exposure to SAA from retracting a tender and the other obligations the Board had.¹⁶³⁵

934. In his statement to the Commission, Mr Mothibe assumed that the Board was not permitted to award the contract to Air Chefs and retract it from LSG Skycheffs without any process. He said even if that assumption were correct, PWC would *still* not have found any reportable irregularity. This is because PWC “would have required evidence that the SAA Board took this decision with the intention of breaching a law or regulation or that it acted negligently which evidence I did not have at the time.”¹⁶³⁶

¹⁶³² Transcript 16 July 2020, p 162-163

¹⁶³³ Transcript 16 July 2020, p 163

¹⁶³⁴ Transcript 16 July 2020, p 179

¹⁶³⁵ Transcript 16 July 2020, p 182

¹⁶³⁶ Exhibit DD19(a), p 9

Section 45 of the Audit Professions Act defines a reportable irregularity as an unlawful act that amounts to fraud, or that results in a material loss to the company, or that amounts to a material breach of fiduciary duties. There is no necessary requirement that the unlawful act be committed with the intent to break the law.¹⁶³⁷

935. After some debate, Mr Mothibe eventually accepted that an unlawful act resulting in financial loss; or a breach of a fiduciary duty, does not require intention, in order to amount to a reportable irregularity.¹⁶³⁸ Mr Mothibe maintained that insourcing did not require any processes and so insourcing in this manner was lawful. However, he conceded that *assuming* that the decision was an unlawful act, the requirements of material financial loss were met. This is because there was litigation instituted for the loss of the contract by LSG Skychefs, as well as the use of an inefficient service provider that SAA had received complaints about and was undermining its reputation – though he questioned whether this amount would actually fall under the materiality threshold they had set of R250million.¹⁶³⁹ He also conceded that the Board’s decision constituted a breach of a fiduciary duty because the Board acted against SAA’s internal legal advice and its decision was not based on what was in the best interests of the company.¹⁶⁴⁰ In the light of this concession, the Board’s decision ought to have been reported to IRBA as a reportable irregularity. Had this taken place, management would have been required to account to its auditors for the decision.

936. The value of that type of accountability cannot be underestimated given all that we now know about what was going on at SAA towards the end of 2015. As stated above, a few days after the SAA Board had taken the decision to cancel the LSG Skychefs award, Dr Dahwa was subjected to eight hours of abuse from Ms Kwinana

¹⁶³⁷ Transcript 16 July 2020, p 187-188

¹⁶³⁸ Transcript 16 July 2020, p 192

¹⁶³⁹ Transcript 16 July 2020, p 201

¹⁶⁴⁰ Transcript 16 July 2020, p 197-198

and Ms Myeni for refusing to sign letters of award to facilitate the unlawful 30% set aside policy.

937. In addition, Ms Mpshe, who had stood up to the Board over this very decision to cancel the LSG Skychefs award, was eventually charged with insubordination for her conduct. Had SAA's auditors just done their job and the correct attention been drawn to this unlawful decision, some of the devastating events of the next many months at SAA may well have been different. One of those next events was the conclusion of the Swissport ground handling contract in March 2016.

Swissport ground handling

938. Part of the AG's findings was that the Swissport ground handling contract concluded on 14 March 2016, constituted irregular expenditure.¹⁶⁴¹ The contract was identified as part of the AG's "specific selection" of transactions during the risk assessment phase of the audit. This was because the transaction had been in the media.¹⁶⁴² The AG determined that the risks associated with not testing that transaction were very high. Thus, in order to mitigate the audit risk to an acceptable level, the tender had to be selected for testing.¹⁶⁴³ One of the AG's great concerns was that the tender took four years between the closing date of the award and the date the contract was

¹⁶⁴¹ Exhibit DD20(c), p 1077

¹⁶⁴² Transcript 21 February 2020, p 79

¹⁶⁴³ Transcript 21 February 2020, p 88

actually awarded by the Board.¹⁶⁴⁴ Then, when a further contract for five years was concluded in 2016, there was no new tender process.¹⁶⁴⁵

939. Related to the Swissport transaction was the 30% BEE set aside policy that SAA sought to impose on Swissport. The Auditor General found as follows regarding SAA's attempts to implement the 30% set aside policy:¹⁶⁴⁶

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

940. Mr Sokombela noted that the correspondence from the BEE Commissioner and the National Treasury regarding the unlawfulness of the policy was dispatched in September 2015. He also noted that a set aside policy was not a requirement or condition of the tender that Swissport was awarded.¹⁶⁴⁷ Nevertheless, the AG found a memorandum prepared by the CFO of SAA in 2016 about the selection of the BBBEE firm for the Swissport contract, in circumstances where there did not appear to be any selection process. As a result of SAA and Swissport being unable to agree on this issue, SAA terminated Swissport's service on 16 February 2016. Then, pursuant to “off record discussions”, an agreement was reached for a five-year contract. The AG was particularly concerned about why these discussions were conducted off record.¹⁶⁴⁸

¹⁶⁴⁴ Transcript 21 February 2020, p 80

¹⁶⁴⁵ Transcript 21 February 2020, p 86

¹⁶⁴⁶ Exhibit DD20(c), p 1081-1082

¹⁶⁴⁷ Transcript 21 February 2020, p 93-94

¹⁶⁴⁸ Transcript 21 February 2020, p 94-95

941. The AG also raised concerns about JM Aviation, Swissport's ultimate BEE partner, having been appointed without any selection process. The AG investigated the entity further and found that there was a common director between Swissport and JM Aviation which concerned the AG further.¹⁶⁴⁹ That was Mr Ndzeku. This was a red flag and a conflict of interest in circumstances where this information was not disclosed anywhere in the records of SAA.¹⁶⁵⁰
942. Part of the recommendations flowing from this investigation was to investigate the selection process of JM Aviation and to disclose irregular expenditure of R362million arising from the AG's findings.¹⁶⁵¹ The AG also concluded "with regards to the off the record meeting held with Swissport and management, that will not be accepted as the auditors cannot validate the discussions held because they were not recorded. This is an indicator of fraud and further investigation must be done."¹⁶⁵²
943. Mr Mothibe testified that the Swissport contract did not come to the audit team's attention because it did not fall within the sample of transactions that PWC reviewed.¹⁶⁵³ He said that is why PWC did not report it as a reportable irregularity despite the fact that it represented a substantial contract of significant value (R1.8billion) in respect of which there was no procurement process.¹⁶⁵⁴
944. Asked why the contract was not part of the transactions reviewed, Mr Mothibe testified that they were not provided with minutes of the relevant Board meeting, and that Swissport was a longstanding ground handling service provider with the result

¹⁶⁴⁹ Transcript 21 February 2020, p 95

¹⁶⁵⁰ Transcript 21 February 2020, p 96

¹⁶⁵¹ Transcript 21 February 2020, p 97

¹⁶⁵² Exhibit DD20(c), p 1085. See also 21 February 2020, p 99

¹⁶⁵³ Transcript 16 July 2020, p 20

¹⁶⁵⁴ Transcript 16 July 2020, p 206

that the contract did not stand out. He said that the amount was high so it probably went through Board approvals and “obviously the expectation is that it would have gone to the Board after it had gone through the necessary approval processes within South African Airways.”¹⁶⁵⁵

945. This answer gives rise to many concerns. It is no answer to a question whether an auditor should have reported a reportable irregularity for that auditor to claim that he expected that the decision would have been approved by the Board after processes had been followed. The whole point of a reportable irregularity is to identify instances where the management of a company are not acting in accordance with their legal obligations and are approving things that they should not be approving. Furthermore, the size of the transaction was not a reason not to report it; it was a reason to look very closely at the transaction and ensure that it complied with the law. That the contract was of such a significant monetary value was a further reason why the auditors should have included it in the sample of transactions to be considered.

946. Mr Mothibe’s role in performing the audit was to determine if there was any irregular expenditure. The fact that the value of the contract was so high that it would have required Board approval could not answer the question whether it amounted to irregular expenditure. This is because it could have been irregular for having failed to follow any proper procurement process before the Board approved it.¹⁶⁵⁶ When this was pointed out, Mr Mothibe again emphasized that he and his team had not considered the Swissport contract because it was not in their sample.¹⁶⁵⁷

¹⁶⁵⁵ Transcript 16 July 2020, p 208-209

¹⁶⁵⁶ Transcript 16 July 2020, p 209-210

¹⁶⁵⁷ Transcript 16 July 2020, p 210

947. It was therefore necessary to probe further with Mr Mothibe why this contract did not fall into the sample that PWC chose. Mr Mothibe testified that he agreed with Mr Sokombela's evidence that in the audit risk assessment process, the auditor identifies contracts that raise red flags. He also accepted that these red flags could be caused by indicators such as controversy in the media, or through research, there could be something about the contract that concerns them.¹⁶⁵⁸ Mr Mothibe was informed that the AG had identified this contract as one such transaction because there was litigation around it and the contract had taken four years to conclude after the award of the tender. Asked why none of these factors raised a red flag for PWC,¹⁶⁵⁹ Mr Mothibe responded again that Swissport was a long standing service provider and it was being paid amounts consistent with previous years and so there were no red flags.¹⁶⁶⁰

948. Once again this type of answer seems to indicate a frame of mind or approach to auditing that may be appropriate in detecting irregular activity in a private audit client, but would not be appropriate in a public entity that is obliged to regularly put out to tender their contracts in a transparent competitive process. In those circumstances, the fact that a particular service provider may have been providing a service to the client for a long time may itself be a reason for an auditor to include a transaction in a sample.

949. Mr Mothibe testified that he was not aware that Swissport had been providing a service for a long time without a contract. He conceded that it would have been of concern to him to learn that and it would have been something he would have wanted

¹⁶⁵⁸ Transcript 16 July 2020, p 210

¹⁶⁵⁹ Transcript 16 July 2020, p 214

¹⁶⁶⁰ Transcript 16 July 2020, p 215

to interrogate further.¹⁶⁶¹ Swissport had been providing a service to SAA without a contract for three of the years that PWC was auditing SAA and yet it had never been picked up. Mr Mothibe said again that in none of the three years had the contract fallen into the sample of transactions.¹⁶⁶²

950. Ernst & Young performed a review of SAA contracts in the second half of 2015 for the purpose of evaluating procurement and contract management at SAA, and had flagged this contract as a concern.¹⁶⁶³ When this was drawn to Mr Mothibe's attention, he testified that he was aware that Ernst & Young were doing work for SAA but that the final report by Ernst & Young had not been finalised by the time they signed off on their audit report.¹⁶⁶⁴ Mr Mothibe's attention was then drawn to the fact that a draft version of the report, addressed to a Mr Nick Linnell,¹⁶⁶⁵ had been provided to the SAA Board on 10 December 2015.¹⁶⁶⁶ The report considered the Swissport contract and concluded that "Swissport's contract is a month to month basis. SAA is failing to realise the costs savings as a result of delays in entering into a contract with Swissport. The delays will result in SAA overpaying for the ground handling services ... SAA has failed to realise cost savings of R92 936 578."¹⁶⁶⁷

951. Mr Mothibe claimed that PWC had enquired about a copy of any findings of Ernst & Young and had been led to believe that there was no report to consider at that stage.¹⁶⁶⁸ It was then pointed out to Mr Mothibe's attention that the media was

¹⁶⁶¹ Transcript 16 July 2020, p 216

¹⁶⁶² Transcript 16 July 2020, p 216

¹⁶⁶³ Transcript 16 July 2020, p 218

¹⁶⁶⁴ Transcript, 16 July 2020, p 219

¹⁶⁶⁵ Transcript 16 July 2020, p 222

¹⁶⁶⁶ Exhibit DD19(d), p 551. The Swissport contract was considered pertinently in the report at p 597

¹⁶⁶⁷ Transcript 16 July 2020, p 223.

¹⁶⁶⁸ Transcript 16 July 2020, p 226

actually already reporting on Ernst & Young's review findings at that stage.¹⁶⁶⁹ The Business Day reported on 9 December 2015 that the Ernst & Young Report found that as much as 60% of procurement could be subject to weak business controls and it appeared from the article that Business Day were in possession of the report. Mr Mothibe stated that they did not consider this article as part of their media research.¹⁶⁷⁰

952. Unlike for the year 2015, the audit files for 2016 did not contain *any* media articles at all. He was asked whether he could confirm if any media review was performed in that year. At this point, Mr Mothibe turned back to saying it was not a requirement that the auditors perform a media review.¹⁶⁷¹ He said this despite the fact that he had previously admitted that it was part of the designed evidence gathering process for the audit to review media and that it was part of IRBA's guide¹⁶⁷² on reportable irregularities which he professed to follow in every audit.

953. Mr Mothibe was asked to go back and review the audit file for 2016 to ascertain whether any media articles were reviewed by the audit team. Mr Mothibe did so and could not find any indication that media articles had been considered.¹⁶⁷³

954. Mr Mothibe was also directed to another media article about Swissport that his team failed to collect and consider on 17 November 2015. This was a Moneyweb article that spanned four pages and was entitled "SAA Defies National Treasury and DTI Instructions".¹⁶⁷⁴ The article stated: "The SAA Board is persisting with efforts to have 30% of its procurement contracts set aside for transformation partners in defiance of

¹⁶⁶⁹ Exhibit DD19(d), p 324

¹⁶⁷⁰ Transcript 16 July 2020, p 227-228

¹⁶⁷¹ Transcript 16 July 2020, p 230

¹⁶⁷² Exhibit DD19(c), p 129, para 7.1.3

¹⁶⁷³ Transcript day 234, 17 July 2020, p 3

¹⁶⁷⁴ Exhibit DD19(c), p 132.21.1

express instructions by National Treasury and the Department of Trade and Industry to stop this practice. Against this background tensions between board and top officials who continued to war against unlawful practices is reaching a breaking point. This has become clear from a Moneyweb investigation into efforts to amend the SAA ground handling contract with Swissport International.” The article set out the ways in which SAA’s conduct in respect of this contract was unlawful.

955. Mr Mothibe testified that even though the guidance from IRBA provides for considering matters that come to the auditor’s attention, including from the media, this article did not come to their attention and, for that reason, they would not have been able to consider it.¹⁶⁷⁵

956. However, if the auditing team had implemented the media review procedure that was set out in PWC’s own evidence gathering processes, and which appears in the IRBA Guide, it is likely that these articles would have come to the team’s attention. Mr Mothibe was evasive in his answer to this proposition and he reiterated that it was not part of the official standards that they review media articles.¹⁶⁷⁶ He then admitted that “if they had searched . . . it may have come up as part of the search.”¹⁶⁷⁷

957. It was put to Mr Mothibe that if the minutes of the Board meeting and its resolution approving the contract had been studied by the audit team, they would have revealed that no procurement process had been followed because usually minutes considering a tender process would discuss, for example, the recommendation of the BAC. However, the Board resolution of 14 March 2016 read quite differently and

¹⁶⁷⁵ Transcript 17 July 2020, p 15-16

¹⁶⁷⁶ Transcript 17 July 2020, p 17

¹⁶⁷⁷ Transcript 17 July 2020, p 18

mentioned none of these processes.¹⁶⁷⁸ If PWC had looked carefully at the resolution this should have raised concerns. Mr Mothibe said that he could not comment on this question.¹⁶⁷⁹

958. In addition, in one of the Internal Audit Reports, which Mr Mothibe testified he did generally consider, the internal control committee found that the Swissport contract had been concluded irregularly as no competitive process had been followed. This report was dated 15 September 2016.¹⁶⁸⁰ Mr Mothibe confirmed that the audit report was prepared *before* the PWC audit was finalised on 30 September 2016. His response to this obvious “red flag” was to state that the auditors were more concerned with SAA’s cashflow problems and its status as a going concern at that stage,¹⁶⁸¹ and that he could not recall having read that particular report.¹⁶⁸²

959. Despite all this evidence – a Board resolution that committed SAA to more than a R 1 billion expenditure that made no reference to a procurement process having been followed; a report by Ernst & Young that flagged this contract as irregular; media reporting at the time that exposed the illegality of the contract – PWC and Nkonki did not have this contract in their testing sample. The failure to have considered this contract was, to say the least, a significant oversight by SAA’s auditors, that is, if it was oversight at all.

960. As stated above, the very “off the record” discussions that the AG was concerned about in his 2017 audit have been investigated extensively by the Commission. In the month before the ground handling contract was concluded with SAA, Swissport

¹⁶⁷⁸ Exhibit DD19(c), p 132.43

¹⁶⁷⁹ Transcript 17 July 2020, p 24

¹⁶⁸⁰ Transcript 17 July 2020, p 27. Exhibit DD19(c), p 132.53.1

¹⁶⁸¹ Transcript 17 July 2020, p 31

¹⁶⁸² Transcript 17 July 2020, p 28

paid R28.5 million to JM Aviation. JM Aviation then paid those funds to various officials within SAA and others who “facilitated” the agreement between Swissport and SAA. A recommendation has been made elsewhere in this report that prosecutions should be considered by the NPA arising from these dealings.

961. Had SAA auditors done their work properly, had they been doing adequate media reviews in 2015 and 2016, they would have come across these red flags. Had they read Board minutes and resolutions with an enquiring mind and a concern to identify irregular expenditure, then this contract would not, and could not, have escaped scrutiny.

The New Age

962. Mr Sokombela also testified that he selected the spending on The New Age newspaper at SAA as a transaction to test because, despite its relatively small value (R1.3million), during the risk assessment process this was identified as a risky transaction given the media attention around it. When investigating it, SAA was unable to produce any documents evidencing that proper processes were followed in respect of this expenditure.¹⁶⁸³

963. This TNA is dealt with in great detail later in this report. However, the point for present purposes is that, if SAA auditors had flagged TNA spending in previous audit years, this may have had an important effect on SAA’s (and even other SOEs) ability to justify further spending on the TNA and its associated business breakfasts.

¹⁶⁸³ Transcript 21 February 2020, p 102. See also exhibit DD20(c), p 1091

Conclusion

964. PWC and Nkonki gave clean audits to SAA for five consecutive years between 2012 and 2016. During this period, the Board was in a state of precipitous governance decline. It was also engaging in acts of corruption and fraud. None of this was, however, detected by its auditors. Instead, their audit reports each year conveyed to the public that SAA was complying with the law and that irregular expenditure was under control.
965. PWC and Nkonki failed in their duties as a watchdog institution.¹⁶⁸⁴ Had they performed their functions properly, the shambolic state of financial and risk management in SAA would have been picked up earlier, and could have been addressed. It took the intervention of the Auditor General to finally expose these deep deficiencies.
966. The findings of the AG on the parlous state of both internal control and financial and risk management at SAA alone indicates that the Board of SAA had failed to comply with section 51 of the PFMA. Section 51(1)(a) of the PFMA requires the accounting authority of an SOE to ensure that it has and maintains “an effective, efficient and transparent system of financial and risk management and internal controls”. In terms of section 86(2) of the PFMA, an accounting authority that wilfully or grossly negligently fails to comply with this obligation is guilty of an offence.
967. Auditors who correctly discharge their responsibilities and who call management to account for breaching their obligations under the PFMA will contribute significantly

¹⁶⁸⁴ Thoroughbred Breeders v Pricewaterhouse 1999 (4) SA 968 (W)

to curbing the tide of corruption and irregular conduct that engulfed some of South Africa's SOEs over a number of years.

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

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

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

SA EXPRESS

Introduction

972. In May 2018, the Financial Mail published an article entitled “A case study in looting state-owned companies”. It was written by Ms Karyn Maughan and gave rise to serious questions about a number of transactions between South African Express Airways SOC Limited (SA Express) and the Department of Community Safety and Transport in the North West Province (the Transport Department). The by-line of the article read as follows:

“State-owned companies Eskom, PRASA, SAA and Transnet have made headlines in SA’s state capture story. But evidence of corruption at SA Express – the airline set up at the dawn of democracy to connect smaller cities – has remained almost entirely under wraps.”

973. SA Express is a major public entity listed under Schedule 2 to the Public Finance Management Act 1 of 1999 (PFMA).

974. Although the Public Protector’s Report did not, itself, refer to the activities of SA Express, the Terms of Reference of the Commission expanded the reach of the Commission’s mandate beyond the Public Protector’s investigation.

975. The Terms of Reference promulgated on 25 January 2018 required the Commission to investigate, amongst other things, “the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organisations by public entities listed under Schedule 2 to the PFMA” (paragraph 1.5 of the Terms of Reference).

976. Paragraph 1.9 of the Terms of Reference also required the Commission to determine “whether any member of the National Executive, public official or functionary of an

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

977. Ms Maughan’s article alleged that high-ranking officials in the North West government had colluded with functionaries at SA Express to syphon millions of Rands out of the North West government’s coffers. The article also alleged that those same officials and functionaries had benefitted personally from the scheme. The allegations therefore fell squarely within the ambit of paragraphs 1.5 and 1.9 of the Terms of Reference and so the aviation workstream of the Commission investigated the allegations.

978. One of the extraordinary features of the investigation was that, at the time that the Commission began investigating the allegations, a criminal complaint had already been lodged with the authorities in 2016 – three years before the Commission began investigating the matter.¹⁶⁸⁵ By 2019, a criminal investigation was underway and High Court litigation had been instituted. However, despite all of these steps, by the time that the Commission heard evidence emanating from this investigation in June 2019, the criminal process had not gained any substantial momentum and the litigation had not advanced matters.

979. This slow-pace of the criminal investigation is a matter of serious concern because of two key features of the case.

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

¹⁶⁸⁵ Transcript 13 June 2019, p 7

structure of the agreement entered into between SA Express and the Transport Department proved to be an unprecedented act orchestrated by officials of SA Express to loot funds from the North West government.

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

980. These allegations were serious and were substantially supported by documentary and other evidence. Despite this, the Commission investigators' interactions with SAPS revealed that it had taken approximately two years for SAPS to obtain the relevant bank statements and there had been very little progress in the matter.¹⁶⁸⁶

981. The Commission heard oral evidence from number of witnesses connected with this scheme. There were seven in total. These were:

981.1. Ms Babadi Tlatsana,¹⁶⁸⁷ who was a director of an entity called, Koreneka Trading and Projects CC t/a Koreneka Facilities Management (Koreneka).

981.2. Mr Arson Malola Phiri,¹⁶⁸⁸ who was employed as the General Manager for Regional Expansion at SA Express.

¹⁶⁸⁶ Transcript 13 June 2019, p 8

¹⁶⁸⁷ Ms Tlatsana's evidence bundle is DD8

¹⁶⁸⁸ Mr Phiri's evidence bundle is DD6

981.3. Mr Timothy Ngwenya,¹⁶⁸⁹ who was the Divisional Manager: Security Management at SA Express responsible for the security and investigations function within the entity.¹⁶⁹⁰

981.4. Ms Kutlwano Phatudi,¹⁶⁹¹ who was the Chief Financial Officer of the Transport Department in the North West Provincial Government.

981.5. Ms Kalandra Viljoen,¹⁶⁹² who was the owner of an entity called Asset Movement Financial Services CC that ran a “cash in transit” business.

981.6. Mr Vivien Natasen,¹⁶⁹³ who was the sole director and shareholder of Neo Solutions (Pty) Ltd (Neo Solutions).¹⁶⁹⁴

981.7. Prof Tebogo Job Mokgoro,¹⁶⁹⁵ who was the Premier of the North West Province when he testified at the Commission but who had held the position of Acting Director-General in the Office of the Premier during the period under investigation.¹⁶⁹⁶

982. A number of these witnesses were themselves implicated in wrong-doing and were questioned about their role in the scheme. There were also others who were implicated but did not give evidence.

¹⁶⁸⁹ Mr Ngwenya’s evidence bundle is DD5.

¹⁶⁹⁰ Transcript 19 June 2019, p 57

¹⁶⁹¹ Ms Phatudi’s evidence bundle is DD7

¹⁶⁹² Ms Viljoen’s evidence bundle is DD9

¹⁶⁹³ Mr Natasen’s evidence bundle is DD10

¹⁶⁹⁴ Transcript day 132, 12 July 2019, p 34

¹⁶⁹⁵ Prof Mokgoro’s evidence bundle is DD32

¹⁶⁹⁶ Transcript 1 October 2020, p 8

982.1. The former Minister of Transport, Ms Dipuo Peters, did not testify at the Commission in relation to this scheme but did provide the Commission with two affidavits denying the allegations made against her by various witnesses and seeking leave to cross examine those witnesses in the event that they persisted in their allegations against her. The allegations and the response will be dealt with below.

982.2. Mr Brian van Wyk, who was the former Commercial Manager at SA Express, was heavily implicated by the evidence of Ms Tlatsana and endeavoured to have her evidence delayed on the basis that he had not received adequate notice of the evidence.¹⁶⁹⁷ The evidence was not, however, postponed. Instead, I invited Mr van Wyk to bring an application for leave to cross examine any of the witnesses whom he thought had implicated him and whose version he wished to challenge.¹⁶⁹⁸ Despite being invited to do so, however, Mr van Wyk did not bring an application to cross examine any of the witnesses who gave evidence against him nor did he apply to the Commission in terms of Rule 3.3 of its rules for leave to give evidence and dispute their evidence.

982.3. The former Premier of the North West, Mr Supra Mahumapelo, was also implicated in the evidence but despite receiving a rule 3.3 notice from the Commission about the evidence of Mr Ngwenya, Mr Mahumapelo did not respond to the notice. He also did not apply for leave to cross-examine the witnesses who implicated him nor did he apply for leave to give his own evidence and to dispute their evidence.

¹⁶⁹⁷ Transcript 21 June 2019, p 2 – 8

¹⁶⁹⁸ Transcript 21 June 2019, p 21

982.4. What follows is the summary and analysis of the evidence that was given as well as the findings of the Commission in regard to that evidence.

The airports and SA Express

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

984. The North West Department of Tourism (the Tourism Department) accordingly created an initiative to revitalise and activate these airports and sent invitations to the North West government to attend a meeting about it on 26 August 2014. Ms Kuthlwano Phatudi, the CFO in the Transport Department was invited to this meeting. According to Ms Phatudi, the meeting related to the presentation of proposals by invited airlines. The Tourism Department coordinated the meeting and invited the airlines.¹⁶⁹⁹

985. As a consequence of this initiative, six airlines were invited to submit proposals and make presentations for the provision of airline services on two routes — the Mahikeng route (Mahikeng to Johannesburg) and the Pilanesberg route (both Pilanesberg to Johannesburg and Pilanesberg to Cape Town).

¹⁶⁹⁹ Transcript 21 June 2019, p 31-32

986. Out of the six airlines invited, only four airlines submitted proposals. According to Ms Phatudi, the Transport Department was not involved in extending the invitation to the airlines to make proposals.¹⁷⁰⁰

987. The following airlines were invited and responded by making submissions and presentations:

987.1. SA Express;

987.2. Continental Aviation Solution;

987.3. Challenger Air; and

987.4. SA Air-link.

988. The meeting on 26 of August 2014 took place at Sun City and involved the four airlines making presentations about their proposals.¹⁷⁰¹ Representatives from the Office of the Premier, the Tourism Department, the Transport Department, and Treasury attended the meeting. These departments were represented by their Executive Council Members (MECs) and Heads of Department (HODs).¹⁷⁰²

989. At the time of this meeting, the Tourism Department was represented by its acting HOD, Mr Charles Ndabeni; the Transport Department was represented by its HOD, Mr Bailey Mahlakoleng; and Treasury was represented by its HOD, Mr Israel Guneni.¹⁷⁰³

¹⁷⁰⁰ Transcript 21 June 2019, p 32

¹⁷⁰¹ Transcript 21 June 2019, p 31

¹⁷⁰² Transcript 21 June 2019, p 33 and 38

¹⁷⁰³ Transcript 21 June 2019, p 38-39

990. Subsequent to the presentations, a memorandum was prepared and signed by the HOD of the Transport Department, Mr Mahlakoleng, and the MEC of the Transport Department, Mr Molapisi, on 11 and 15 November 2014 respectively.¹⁷⁰⁴
991. Mr Molapisi addressed the memorandum to the Chairperson of the Executive Council (EXCO). EXCO comprised the Executive Council of the Province, consisting of the Premier, Mr Supra Mahumapelo, as its chairperson, and the MECs.
992. The memorandum concerned the proposed introduction of scheduled flights for the Mahikeng and Pilanesberg Airports. It presented a business case for establishing the airline service and provided a summary of the proposals that had been made by the four airlines that responded to the invitation.
993. Ms Phathudi was asked during her evidence if it was ordinary procedure for the Transport Department to seek approval from EXCO. She testified that the correct process was that the department would go out on tender, advertise and follow the procurement process, including going through the relevant bid committees (bid specification; bid evaluation; and bid adjudication), until approval was granted by the HOD.¹⁷⁰⁵ The award of tenders was the responsibility of the HOD as the Accounting Officer for the Transport Department.
994. This process was not followed in the case of the airlines. There were no supply chain management processes followed and it was not advertised.¹⁷⁰⁶ Ms Phatudi testified that she had advised the then HOD that the tender should be advertised. However, her advice was not followed. The HOD told her at the time that “the collective” at the

¹⁷⁰⁴ Exhibit DD7, p 12-21 read with Transcript 21 June 2019, p 35

¹⁷⁰⁵ Transcript 21 June 2019, p 36

¹⁷⁰⁶ Transcript 21 June 2019, p 36-37

meeting at Sun City had recommended that the process go through EXCO instead and so he had prepared the memorandum in line with that decision for EXCO to approve.¹⁷⁰⁷ However, EXCO did not, ordinarily, play any role in the appointment of service providers in the Transport Department. The procurement process explained by Ms Phatudi in her evidence did not include any role played by EXCO in deciding the award of tenders.¹⁷⁰⁸ Despite this, the memorandum was prepared for EXCO's approval.

995. The memorandum concluded that SA Express met the provincial airlift strategy because it was "a state owned entity and not profit driven, while SA Air-link, Continental and Challenger Airlines will be highly dependent on government for profit making".¹⁷⁰⁹ Therefore, SA Express was recommended to be contracted for a period of five years, renewable annually.¹⁷¹⁰

996. However, the memorandum also showed that the SA Express proposal was substantially more expensive than the other proposals. In fact, it was R110 million as compared to R4.5 million.¹⁷¹¹

997. In the face of this substantial price difference, the justification for selecting SA Express over the other airlines would have had to have been compelling. However, no other compelling justification was provided in the memorandum.

998. When Prof Mokgoro, who had been the Acting Director-General in the Office of the Premier at the time, was questioned about this during his testimony before the

¹⁷⁰⁷ Transcript 21 June 2019, p 37

¹⁷⁰⁸ Transcript 21 June 2019, p 44

¹⁷⁰⁹ Transcript 1 October 2020, p 104

¹⁷¹⁰ Exhibit DD7, p 18.

¹⁷¹¹ Transcript 1 October 2020, p 103

Commission, he conceded that the selection of SA Express “did not make sense;”¹⁷¹² that it was, in fact, “absolutely nonsensical”.¹⁷¹³

999. Ms Phatudi testified that, after Exco had been presented with the memorandum, EXCO approved the appointment of SA Express.¹⁷¹⁴ She referred to an extract of the EXCO minutes for this decision.¹⁷¹⁵ However, those very minutes recorded various problems with the memorandum. For example, the EXCO minutes recorded that “The HOD should have done a thorough analysis of all presentations received to outline what it means financially for the Province to subsidise the Mahikeng-OR Tambo route 100%, consider all options and propose the best option for consideration by EXCO”.

1000. Despite this, however, on 3 December 2014, EXCO resolved as follows:¹⁷¹⁶

“(a) Exco agreed that the Department should proceed with the chosen service provider and sign the contract (SA Express).

(b) The submission should serve again on December 2014 with a proper analysis of presentations and options for consideration by Exco.”

1001. EXCO therefore first agreed to sign the contract and then wanted to consider a proper analysis of the presentations later. This sequencing issue was taken up in Prof Mokgoro’s evidence. I questioned Prof Mokgoro as to how it could be that EXCO would first decide to approve a contract, but at the same time say that they wanted

¹⁷¹² Transcript 1 October 2020, p 105

¹⁷¹³ Transcript 1 October 2020, p 82

¹⁷¹⁴ Transcript 21 June 2019, p 44

¹⁷¹⁵ Exhibit DD7, p 381.

¹⁷¹⁶ Transcript 21 June 2019, p 44-45

to consider it further.¹⁷¹⁷ In the end, Prof Mokgoro conceded that this amounted to a contradiction in EXCO's reasoning.¹⁷¹⁸

1002. Ms Phatudi testified that the appointment of SA Express was not in line with the provisions of section 217 of the Constitution¹⁷¹⁹. It did not follow the recognised process for procurement in the Transport Department.¹⁷²⁰ She also confirmed that she was not aware of any exceptional circumstances that would have justified not following a proper procurement process.¹⁷²¹

1003. Despite these serious issues with the appointment process, a contract was concluded with SA Express.

The contract

1004. On 31 March 2015 the Transport Department entered into an agreement with SA Express. In terms of the agreement, SA Express would provide airline services for the designated routes between OR Tambo International Airport (OR Tambo Airport), Cape Town International Airport (Cape Town Airport), Pilanesberg Airport and Mahikeng Airport (Main Agreement).¹⁷²²

¹⁷¹⁷ Transcript 1 October 2020, p 91

¹⁷¹⁸ Transcript 1 October 2020, p 92-93

¹⁷¹⁹Section 217(1) provides: "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

¹⁷²⁰ Transcript 21 June 2019, p 48

¹⁷²¹ Transcript, 21 June 2019, p 49

¹⁷²² Exhibit DD7, p 23-62

1005. The Main Agreement was effective from 27 March 2015 for the OR Tambo Airport, Cape Town Airport and Pilanesberg Airport route, and from 1 May 2015 for the OR Tambo Airport and Mahikeng Airport route.

1006. The agreement between the Transport Department and SA Express was drafted by the legal division of the department under the instruction of the HOD. The HOD, Mr Mahlakoleng, signed the agreement for the department. Mr Inati Ntshanga, the then Chief Executive Officer of SA Express, signed on its behalf.¹⁷²³

1007. The Main Agreement contained the following pertinent clauses:¹⁷²⁴

1007.1. Effective Date: 27 March 2015 for OR Tambo, Cape Town and Pilanesberg routes and 1 May 2015 for OR Tambo and Mahikeng routes;

1007.2. Clause 4.1: SA Express and the Transport Department agreed that SA Express shall, with effect from Effective Date, commence the Airline Service on the Designated Route for a period of 5 (five) years calculated from the Effective Date;

1007.3. Clause 6.1: The Transport Department shall pay to SA Express annually, in advance, the amount stipulated in Annexure A, which amount is subject to review at the end of each year, by agreement between the Parties;

1007.4. Clause 7.1.4: SA Express shall, on quarterly basis, submit a written return to the Transport Department which includes – details of marketing and promotion

¹⁷²³ Transcript 21 June 2019, p 51

¹⁷²⁴ Exhibit DD7, p 23-62

of the Airline Service done during that quarter and that contemplated for the next quarter, together with the costs and/or anticipated costs thereof;

1007.5. Clause 10.1: SA Express shall, with effect from the Effective Date, provide the Airline Service with CRJ 200 aircraft, including suitable replacement aircraft should the aircraft employed in providing the Airline Service be unserviceable; alternatively with an aircraft of similar size, specification and capabilities;

1007.6. Clause 15.1: SA Express shall, in consultation with the Transport Department, appoint a management company responsible for managing certain facilities at Pilanesberg and Mahikeng airports; and

1007.7. Clause 15.3: SA Express shall enter into a Service Level Agreement with the management company, in terms of which performance of the management company will be monitored and evaluated.

1008. The Main Agreement envisaged certain subsidies being paid to SA Express for operating the routes and then certain payments being due to a management company that would take care of the ground handling at the airports but which was not yet appointed at the time that the Main Agreement was concluded.

1009. The subsidies payable in terms of the Main Agreement to SA Express for operating the routes were as follows:¹⁷²⁵

1009.1. Approximately R58 million payable in 2015;

1009.2. Approximately R51 million payable in 2016;

¹⁷²⁵ Exhibit DD7, p 60

1009.3. Approximately R43 million payable in 2017;

1009.4. Approximately R40 million payable in 2018; and

1009.5. Approximately R36 million payable in 2019.

1010. The amounts payable to the management company were as follows:¹⁷²⁶

1010.1. Approximately R51 million payable in 2015;

1010.2. Approximately R31 million payable in 2016;

1010.3. Approximately R31 million payable in 2017;

1010.4. Approximately R31 million payable in 2018;and

1010.5. Approximately R31 million payable in 2019.

1011. These two sets of amounts aggregated to R407 221 142. This meant that SA Express was to be paid just more than R200 million as a subsidy and then it would procure the services of a management company that would run the airports for just short of another R200 million.

1012. Ms Phatudi testified that she became aware of the agreement after it had been signed, when there was a claim for payment made under the contract to the Transport Department at some point in 2015.¹⁷²⁷

¹⁷²⁶ Exhibit DD7, p 60

¹⁷²⁷ Transcript 21 June 2019, p 52

The first invoice

1013. On 16 March 2015 Mr Mahlakoleng prepared and issued a letter to Prof Mokgoro, who, it will be recalled, was the Acting Director-General in the Office of the Premier at the time.¹⁷²⁸ The letter requested the Office of the Premier to process payment to SA Express. Attached to the letter was an invoice from SA Express for an amount of R53 143 564.

1014. During her evidence, Ms Phatudi's explanation for the approach to the Office of the Premier for payment was that during March 2015, when the invoice was received, the Transport Department did not have a budget for the project. It was for this reason that the HOD had written the letter to the Office of the Premier requesting it to pay on behalf of the Department.¹⁷²⁹

1015. This is a particularly concerning feature of the case. Not only was SA Express appointed in circumstances that flouted procurement principles and without any credible justification, it was also clear that the procurement itself had not been budgeted because the very department responsible for the services did not have funds for it. It had to approach the Office of the Premier to pay the first invoice.

1016. The payment was made on 26 March 2015¹⁷³⁰ from the Office of the Premier's budget and approved by Prof Mokgoro.¹⁷³¹

1017. Prof Mokgoro was questioned about his authorisation of this payment during his evidence. Although he initially sought to justify the payment as having come from the

¹⁷²⁸ Exhibit DD7, p 65

¹⁷²⁹ Transcript 21 June 2019, p 68

¹⁷³⁰ Transcript 21 June 2019, p 69, read with Exhibit DD7, p 66A

¹⁷³¹ Transcript 21 June 2019, p 70

R132 million budget that had been set aside for the MRRRP (Mahikeng Recovery Renewal and Repositioning Program),¹⁷³² he eventually conceded during the questioning that the MRRRP funds had been earmarked for projects other than the Mahikeng airport.¹⁷³³

1018. Prof Mokgoro was also asked about a curious handwritten note on the invoice that had been received from SA Express. The invoice itself was for an amount of R53 143 564. However, there was a handwritten note on the invoice that read: “Please process this payment for R50million, the payment agreed to with Treasury and at Exco”.¹⁷³⁴

1019. Prof Mokgoro was questioned about why this handwritten note did not raise alarm bells and require further probing because he was, in effect, being presented with an invoice for a specific amount but being asked to approve a rounded off figure, pursuant to a handwritten note on the invoice. Prof Mokgoro accepted, in his testimony, that he had no idea whose handwriting was on the invoice. He also accepted that it would be unreasonable to process a payment for less than an invoiced amount unless there was some history behind the payment but he then confessed that he could not recall why he had approved the payment of R50 million based on the handwritten note.¹⁷³⁵

1020. Prof Mokgoro was also taken to task during his testimony about the fact that he authorised this payment on 26 March 2015, before the contract between the parties had even been concluded. He accepted that this was irregular but then was at pains

¹⁷³² Exhibit DD32.1, p 8

¹⁷³³ Transcript 1 October 2020, p 73 – 75

¹⁷³⁴ Exhibit DD32.1, p 95

¹⁷³⁵ Transcript 1 October 2020, p 124 – 12

to emphasise that this was a “government-to-government” contract and that he recalled that there was pressure to make the payment because the airline had begun operating but he could not give any details about when this had occurred.¹⁷³⁶

1021. Prof Mokgoro’s evidence on this score was entirely unsatisfactory. As Acting Director General in the Office of the Premier, he was the accounting officer for the Premier’s Office. He testified that he accepted that he had a number of obligations under the Public Finance Management Act 1 of 1999 (PFMA) as a result of his position.¹⁷³⁷ However, he was then unable to provide any credible explanation for the fact that he authorised a payment of R50 million in respect of a contractual obligation that did not yet exist, for an airline subsidy to a state-owned enterprise for which there was no budget in the relevant department. Prof Mokgoro’s conduct in this regard was completely unacceptable and he should not have authorised that payment.

1022. This first payment was then followed by a series of others which, as the next section sets out, found their way into the pockets of state officials.

¹⁷³⁶ Transcript 1 October 2020, p 127 – 133

¹⁷³⁷ Transcript 1 October 2020, p 10 – 12. These obligations included the following:

The Accounting Officer must take into account all relevant financial considerations, including issues of propriety, regularity and value for money, when policy proposals affecting the accounting officer’s responsibilities are considered, and when necessary, bring those considerations to the attention of the responsible executive authority (section 38(1)(c)(i)).

The Accounting Officer must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct (section 38(1)(c)(ii)).

The Accounting Officer for the Department is responsible for ensuring that effective and appropriate steps are taken to prevent unauthorised expenditure (section 39(1)(b))

The money

A comparator?

1023. The amounts to be paid to SA Express and the management company under the Main Agreement were substantial – in excess of R400 million. One of the problems with this type of liability for the North West Province was that, because no proper procurement process had been followed, it was not possible for the Province to know whether the amounts it had agreed to pay SA Express or the management company were market-related.

1024. The Commission therefore investigated what the comparable terms had been on route subsidy agreements that SA Express had concluded in the past. It presented the evidence of Mr Phiri on this issue. He had been the General Manager for Regional Expansion at SA Express in 2010 to 2012. In that role, he had been involved in the conclusion of a series of agreements between SA Express and Dube TradePort for the development of new airplane routes between Kinshasa – King Shaka International Airport and Lusaka, on the one hand, and Harare, on the other.

1025. The nub of Mr Phiri's evidence was that the amounts that the Transport Department had agreed to pay to SA Express under the Main Agreement were overstated and excessive.¹⁷³⁸ He provided a number of examples of these excessive fees but only one is highlighted here.

1025.1. Mr Phiri presented the marketing costs incurred by SA Express over a period of five years. He testified that in the 2014/15 financial year, SA Express spent R1.9 million; in 2015/16, it spent an amount of R1.03 million; in 2016/17, it spent

¹⁷³⁸ Transcript 20 June 2019, p 74

an amount of R7.4 million; and in the 2017/18 financial year, it spent and R7.8 million.¹⁷³⁹

1025.2. In the 2014/15 financial year, where an amount of nearly R2 million was spent, SA Express had introduced three additional routes, namely, Johannesburg/Pietermaritzburg, Johannesburg/Kruger National Park, Mpumalanga and Cape Town/Kimberly. The R1.9 million therefore included marketing and route development costs for all three routes.¹⁷⁴⁰

1025.3. By contrast, in the Main Agreement concluded between the Transport Department and SA Express, the North West government committed to paying R28 million on marketing costs for two routes in year 1 and approximately R9 million from year two to five.¹⁷⁴¹ This was far out of proportion to any of SA Express's other routes.

The management company

1026. Ms Babadi Tlatsana testified before the Commission about the appointment of her company, Koreneka, to do ground handling services at the Mahikeng and Pilanesberg airports.

1027. Her evidence was that she was very keen to be involved in the upliftment of the two airports in the North West. She said that she then began making enquiries at SAA in 2014 and was eventually directed to Mr Brian van Wyk, the Commercial Manager at

¹⁷³⁹ Transcript day 20 June 2019, p 79

¹⁷⁴⁰ Transcript 20 June 2019, p 81

¹⁷⁴¹ Exhibit DD6, p 145

SA Express, because SA Express, and not SAA, dealt with domestic flights within South Africa.¹⁷⁴²

1028. According to Ms Tlatsana, Mr van Wyk was very keen about the idea of having a company that would process passengers from the moment that they left the airport building until they boarded the plane.¹⁷⁴³ He asked her to submit a proposal to his gmail email address. According to Ms Tlatsana, she was told to use the gmail address, rather than an official 'saexpress' one, because Mr van Wyk said that he was often not at the office.¹⁷⁴⁴

1029. After she had submitted the proposal, Ms Tlatsana received a call from Mr van Wyk, who indicated that her company had been selected as the "preferred bidder", albeit that no open tender process had been followed. However, he indicated to her that she would need to ensure that two further individuals were added to her company in order to secure the contract with SA Express.¹⁷⁴⁵ She agreed.¹⁷⁴⁶ The two people who joined Koreneka were Ms Joyce Phiri and Mr Victor Thabeng.¹⁷⁴⁷

1030. Ms Tlatsana subsequently established that Ms Phiri is the mother of Mr van Wyk's life partner, Mr Sipho Levy Phiri.¹⁷⁴⁸ Mr van Wyk also wanted Ms Tlatsana to appoint Mr David Kasilira as the accountant for the business.¹⁷⁴⁹ She also agreed to this appointment.¹⁷⁵⁰

¹⁷⁴² Transcript 21 June 2019, p 111 – 112

¹⁷⁴³ Transcript 21 June 2019, p 114

¹⁷⁴⁴ Transcript 21 June 2019, p 120 – 121

¹⁷⁴⁵ Transcript 21 June 2019, p 131

¹⁷⁴⁶ Transcript 21 June 2019, p 148

¹⁷⁴⁷ Transcript 21 June 2019, p 140

¹⁷⁴⁸ Transcript 21 June 2019, p 147

¹⁷⁴⁹ Transcript 21 June 2019, p 142

¹⁷⁵⁰ Transcript 21 June 2019, p 149

1031. At that stage, Koreneka had an account with ABSA but Mr van Wyk advised Ms Tlatsana that an account should be opened with FNB. He did not give her a reason for this. When Ms Tlatsana was asked in evidence about why she had agreed to open this new bank account, she said that Mr van Wyk was assisting Koreneka to run smoothly and had taken her through the process. In the circumstances, she felt that those were the requirements of SA Express and had trusted Mr van Wyk “with her life”. As a result, she would not ask questions because she thought that whatever he was saying or doing was to help Koreneka.¹⁷⁵¹

1032. Ms Tlatsana then opened an FNB account in January 2015.¹⁷⁵² In April 2015, Mr van Wyk arranged to meet with Ms Tlatsana to sign a contract between SA Express and Koreneka. The meeting took place at Ms Tlatsana’s office. Ms Tlatsana testified that Mr van Wyk brought with him a pile of documents, which Ms Tlatsana did not read before she signed, but Mr van Wyk guided her on how to sign the documents including pointing her to the signature page and where to initial.¹⁷⁵³

1033. Ms Tlatsana testified that she did not retain a copy of the contract but broadly understood that her company would be providing ground handling services at the airports.¹⁷⁵⁴ Work commenced at Pilanesberg Airport on 1 May 2015 and Mahikeng Airport on 1 September 2015.¹⁷⁵⁵

¹⁷⁵¹ Transcript 21 June 2019, p 149 – 150

¹⁷⁵² Transcript 21 June 2019, p 150

¹⁷⁵³ Transcript 21 June 2019, p 151

¹⁷⁵⁴ Transcript, 21 June 2019, p 171

¹⁷⁵⁵ Transcript 21 June 2019, p 176

Flow of Funds and the bribe

1034. The payments that were made to Koreneka were set out in the evidence of Mr Timothy Ngwenya, who was the Divisional Manager of Security Management at SA Express. Mr Ngwenya, in fact, conducted a detailed investigation of these payments and the contracting between SA Express and the Department of Transport, on the one hand, and SA Express and Koreneka, on the other. During the course of his investigation, he was offered a bribe of R3 million to drop his enquiries. He refused.¹⁷⁵⁶

1035. The circumstances around this bribe are concerning. While Mr Ngwenya was doing his investigation, he received a call from the SAA Head of Security, Mr Jason Tshabalala who advised him that someone wanted to speak to him but did not share any specific details. Mr Ngwenya agreed and asked Mr Tshabalala to give his number to that person.

1036. In about 20 to 30 minutes after having spoken to Mr Tshabalala, Mr Ngwenya received a call from an unknown person who asked to meet with him based on a mandate he said he had received from "Luthuli House". Mr Ngwenya told the person he was not a politician and could not talk about mandates from Luthuli House. But he eventually agreed to the meeting and they met at the Intercontinental Hotel at OR Tambo International Airport.

1037. During the meeting, the person who had called Mr Ngwenya introduced himself as "Sipho". This person told Mr Ngwenya that he was from Luthuli House and was

¹⁷⁵⁶ Transcript 22 June 2019, p 173 – 190

mandated to speak to him about the investigation he was doing in the North West and the money involved.

1038. The person told Mr Ngwenya that the money in question was meant to finance political activities of the ANC. During the course of their discussion, the person asked Mr Ngwenya to drop his investigation for R3 million but Mr Ngwenya refused.

1039. The person then moved to speak about an amount of R20 million that was in the account of Koreneka and to which Mr van Wyk had been denied access. He tried to convince Mr Ngwenya to persuade Ms Tlatsana to release those funds since he had a better relationship with her. Mr Ngwenya refused to do so. The person asked him to give it some further thought but Mr Ngwenya said that the answer would remain “No”.¹⁷⁵⁷

1040. Mr Ngwenya’s conduct in this matter is to be commended. Not only did he conduct a detailed investigation but he also resisted the offer of a considerable bribe to stop his investigations. His investigation established the following about the pertinent money flows.

1040.1. On 4 May 2015, Koreneka issued an invoice¹⁷⁵⁸ for R8.5 million to SA Express with a description “airport refurbishment and compliance maintenance and operational setup costs”.¹⁷⁵⁹ No such services were, however, even referred to in the agreement between Koreneka and SA Express, and yet a payment of R8.5 million was made to Koreneka on 6 May 2015.¹⁷⁶⁰

¹⁷⁵⁷ Transcript 22 June 2019, p 173 – 190

¹⁷⁵⁸ Exhibit DD5, p 115

¹⁷⁵⁹ Transcript 19 June 2019, p 151

¹⁷⁶⁰ Transcript 19 June 2019, p 154

1040.2. A second invoice dated 17 August 2015, to the value of R8.5 million with a description “airport refurbishment and compliance maintenance and facility upgrade” was submitted next.¹⁷⁶¹ Despite there being no provision for these services in the agreement with SA Express, the payment of R8.5 million was made on 27 August 2017 following an authorisation process in which Mr van Wyk was involved.¹⁷⁶²

1040.3. The next two invoices¹⁷⁶³, dated 28 August 2015, totalled R14 million. The first invoice was for an amount of R5.84 million and had a description of “facility security management and facility management”; the second invoice was for an amount of R8.16 million and had a description “airport fire truck lease”.¹⁷⁶⁴ These invoices were authorised for payment by Mr van Wyk and were co-signed by the then CEO of SA Express, Mr Ntshanga.¹⁷⁶⁵ Once again, none of these services was referred to in the agreement between Koreneka and SA Express.¹⁷⁶⁶

1041. During Mr Ngwenya’s investigation of these payments, he questioned Ms Tlatsana about the origin of these invoices. Ms Tlatsana indicated to him that the invoices had been prepared by the accountant that Mr van Wyk required her to appoint for the business, Mr Kasilira.¹⁷⁶⁷

¹⁷⁶¹ Transcript 19 June 2019, p 154

¹⁷⁶² Transcript 19 June 2019, p 154 – 155

¹⁷⁶³ Exhibit DD5, p 127 – 129

¹⁷⁶⁴ Transcript 19 June 2019, p 155

¹⁷⁶⁵ Transcript 19 June 2019, p 157

¹⁷⁶⁶ Transcript 19 June 2019, p 159

¹⁷⁶⁷ Transcript 19 June 2019, p 159 – 160

1042. After these payments had been made by SA Express to Koreneka, the invoicing and payments changed. From December 2015, Koreneka submitted invoices directly to the Transport Department and was paid by the Transport Department. This part of the money flow evidence was therefore addressed in Ms Phatudi's evidence.

1042.1. On 7 December 2015, Koreneka submitted an invoice¹⁷⁶⁸ to the value of R20.6 million to the Transport Department. This invoice was approved following the authorisation processes of the Transport Department. At the time (2015/16 financial year), the Transport Department had a budget to meet these costs and the Main Agreement had, by that stage, been amended to allow payment from the Transport Department directly to the management company.¹⁷⁶⁹

1042.2. In 2016, the Transport Department received a second invoice from Koreneka to the value of R15.8 million. This invoice was not paid because the Transport Department was served with a letter from the attorneys representing Ms Phiri.¹⁷⁷⁰ According to the letter, Ms Phiri was a partner in Koreneka. The Transport Department was instructed to withhold payment until the matter had been resolved between the parties.¹⁷⁷¹

The allegations of corruption

1043. In around June 2016, Ms Tlatsana contacted Mr Ngwenya and reported to him that there were people at SA Express interfering with her company and threatened to go

¹⁷⁶⁸ Exhibit DD7, p 113.

¹⁷⁶⁹ Transcript 21 June 2019, p 80 – 81

¹⁷⁷⁰ Exhibit DD7p 115 – 121

¹⁷⁷¹ Transcript 21 June 2019, p 83 – 84

to the media with her allegations. Mr Ngwenya agreed to meet with her.¹⁷⁷² At their first meeting, Ms Tlatsana told him how her engagements with SA Express had unfolded along the lines set out above¹⁷⁷³ and consistent with her testimony before the Commission.

1044. Ms Tlatsana also explained that conflicts had started to arise between her and the individuals whom Mr van Wyk had required her to bring into the Koreneka business. As a result, Mr van Wyk had threatened to take the contract away from Koreneka.¹⁷⁷⁴ Ms Tlatsana then explained that this is precisely what he did. He cancelled the contract with Koreneka and replaced it with an entity called Valotech Facilities Management CC (Valotech).¹⁷⁷⁵

1045. During his investigation, Mr Ngwenya established that Valotech had been paid an amount of R15 million by the Transport Department without rendering any services.¹⁷⁷⁶ Valotech also did not provide any services to SA Express. After Valotech received this payment from the Transport Department, it was subsequently liquidated.¹⁷⁷⁷

1046. When Ms Tlatsana met with Mr Ngwenya, she provided him with a number of documents evidencing the invoices and payments that had been received, as well as recordings of some of the conversations that she had had with Mr van Wyk.¹⁷⁷⁸

¹⁷⁷² Transcript 19 June 2019, p 59 – 60

¹⁷⁷³ Transcript 19 June 2019, p 64 – 65

¹⁷⁷⁴ Transcript 19 June 2019, p 71 – 72

¹⁷⁷⁵ Transcript 19 June 2019, p 75

¹⁷⁷⁶ Transcript 19 June 2019, p 76

¹⁷⁷⁷ Transcript 19 June 2019, p 77

¹⁷⁷⁸ Transcript 19 June 2019, p 85 – 86

1047. The Commission obtained copies of the recordings and played pertinent parts from them during the evidence of Ms Tlatsana. The recordings tell a remarkable story about the grand plan behind this scheme. It is dealt with in more detail below.

1048. Ms Tlatsana also produced a handwritten note,¹⁷⁷⁹ which she claimed had been drawn up by Mr van Wyk during one of the meetings at which she had recorded their conversation.

1049. After receiving this information from Ms Tlatsana, Mr Ngwenya conducted a thorough investigation. He was determined to get to the bottom of how these millions of Rands had been paid to entities for work that was never done. His efforts were tireless.¹⁷⁸⁰ In the end, he concluded that Mr van Wyk had been at the centre of this elaborate scheme of corruption. Mr Ngweyna then took steps to report him to his superiors and to advocate for his dismissal. However, on the day that Mr Ngwenya had planned to confront Mr van Wyk with what he had uncovered in his investigation, Mr van Wyk asked to be excused from the meeting that had been scheduled between them and never returned. According to Mr Ngwenya, Mr van Wyk literally ran from the building and did not come back.¹⁷⁸¹

1050. After Valotech's liquidation, two further entities were appointed as the management company under the Main Agreement. These entities were Pilanesberg Airport Management Company (PAMCO) and Mahikeng Airport Management Company (MAMCO). The contracts appointing these two entities were signed by the then CEO, Mr Ntshanga, a few days before he left SA Express.¹⁷⁸²

¹⁷⁷⁹ Exhibit DD5, p 32

¹⁷⁸⁰ Transcript 19 June 2019, p 108-120

¹⁷⁸¹ Transcript 19 June 2019, p 111 – 115

¹⁷⁸² Transcript 19 June 2019, p 166

1051. These two entities were subsequently paid amounts of R15.8¹⁷⁸³ and R15.5¹⁷⁸⁴ million respectively. The Commission was unable to establish what, if any, work was done to justify these payments. This is a matter that will need to be probed further in the investigation that SAPS needs to complete as swiftly as possible so that those involved in this scheme can be brought to justice.

1052. The money laundering aspects of the Koreneka-leg of the scheme were extensively investigated by the Commission. The outcome of those investigations is set out in the next section.

The money laundering

1053. Ms Tlatsana testified before the Commission about the money that Koreneka had received from SA Express and the Department of Transport. Her story is a staggering one of numerous government officials being paid kick-backs for their role in approving the Main Agreement between the Transport Department and SA Express, as well as the agreement appointing her company as the management company under that agreement.

1054. The salient features of her evidence are as follows.

1054.1. Koreneka would receive payments from time to time into its bank account. Generally, Ms Tlatsana would not know when payments were made into the bank account because this was being managed by the accountant, Mr Kasilira, who had been appointed on Mr van Wyk's suggestion.¹⁷⁸⁵

¹⁷⁸³ Transcript 21 June 2019, p 94, read with Exhibit DD, p 137-147

¹⁷⁸⁴ Transcript 21 June 2019, p 95

¹⁷⁸⁵ Transcript 21 June 2019, p 18 –181

1054.2. Mr Kasilira would manage the bank account of Koreneka and make payments out of it from time to time. When Ms Tlatsana received a bank sms notifying her of these payments, she would sometimes follow-up with Mr van Wyk about them and be told that they had something to do with the airports.¹⁷⁸⁶ The amounts would sometimes be as large as R2 million or R5 million but, when she made enquiries, Ms Tlatsana was always told that it related to the airports.¹⁷⁸⁷

1054.3. Between May and September 2015, three payments were made from the bank account of Koreneka to the AMFS business of Ms Kalandra Viljoen. These payments totalled R9 million.¹⁷⁸⁸

1054.4. In November 2015, two payments of R4.9 million and R5 million were made to the bank account of Neo Solutions. Mr van Wyk told Ms Tlatsana that these payments related to security cameras for the airports.¹⁷⁸⁹

1054.5. At some point in 2015, Ms Tlatsana realised that her company had been “hijacked”¹⁷⁹⁰ by Mr van Wyk and so she commenced a process of trying to uncover the basis for these payments and the eventual destination of the funds.

1054.6. Ms Tlatsana’s investigations revealed that the R9.9 million that had been paid to Neo Solutions was then paid out of that company’s bank account as follows:

¹⁷⁸⁶ Transcript 21 June 2019, p 203 – 204, p 208 – 209 and p 213-215

¹⁷⁸⁷ Transcript 22 June 2019, p 5– 6

¹⁷⁸⁸ Transcript 22 June 2019, p 25 – 26

¹⁷⁸⁹ Transcript 22 June 2019, p 2 –31 and p34

¹⁷⁹⁰ Transcript 22 June 2019, p 23 – 24

1054.6.1. R4 million paid to Batsamai Investment Holdings (Batsamai) on 11 December 2015;

1054.6.2. R3 million paid to Batsamai on 22 December 2015;

1054.6.3. R300 000 paid to Mr van Wyk in cash on 4 January 2016;

1054.6.4. R1.4 million paid to Batsamai on 10 March 2016; and

1054.6.5. R1.2 million paid to Batsamai on 26 March 2016.

1054.6.6. Ms Tlatsana's investigators established that Batsamai had been registered on 11 November 2014 and Mr Sipho Levy Phiri, who was Mr van Wyk's life partner, owned the company.¹⁷⁹¹

1054.7. By the end of 2015, Ms Tlatsana had decided that she needed to get to the bottom of what was going on with her company. Koreneka had also received a payment directly from the Transport Department of R20 million at the end of December and Mr van Wyk had been pressuring her to gain access to those funds.¹⁷⁹² So in early 2016, she set up a meeting with Mr van Wyk at which she planned to record the conversation and get him to level with her about what was going on.¹⁷⁹³ Ms Tlatsana testified that she had bought a recording device specifically for this purpose.¹⁷⁹⁴

¹⁷⁹¹ Transcript 22 June 2019, p 43

¹⁷⁹² Transcript 22 June 2019, p 60

¹⁷⁹³ Transcript 22 June 2019, p 59

¹⁷⁹⁴ Transcript 22 June 2019, p 59 – 60

1054.8. During the recorded conversation, Mr van Wyk gave various explanations for the use to which the funds from Koreneka had been put. He said, for example, that the monies that had been paid to Neo Solutions were used to “take care of people”.¹⁷⁹⁵ According to Ms Tlatsana, Mr van Wyk also provided an explanation of the individuals to whom monies from Koreneka had been paid by drawing these out on a note that he had with him. Ms Tlatsana retained this note after their meeting.¹⁷⁹⁶

1054.9. The note reflected that payments had been made to Minister Lynne Brown and Minister Dipuo Peters;¹⁷⁹⁷ to the Transport MEC, Mr Molapisi, and to the Transport HOD, Mr Mahlakoleng;¹⁷⁹⁸ and to “number 1” in the province, which was a reference to the Premier. Mr van Wyk said that the Premier had only received R5 million so far and so needed a further R 5million as he was due to get R10 million in total.¹⁷⁹⁹

1054.10. The note also indicated that the Transport CFO had received some monies.¹⁸⁰⁰ This was a reference to Ms Phatudi, who herself gave evidence before the Commission and denied that she had ever received any payment. The Commission was unable to find any other independent verification of the fact that Ms Phatudi received any payments from the Koreneka funds.

1054.11. However, as set out in more detail below, a substantial amount of the funds from Koreneka were converted into cash by Ms Kalandra Viljoen’s business,

¹⁷⁹⁵ Transcript 22 June 2019, p 71

¹⁷⁹⁶ Exhibit DD8, p 588

¹⁷⁹⁷ Transcript 22 June 2019, p 79 – 81

¹⁷⁹⁸ Transcript 22 June 2019, p 84

¹⁷⁹⁹ Transcript 22 June 2019, p 97

¹⁸⁰⁰ Transcript 22 June 2019, p 104 – 105

AMFS and, once government funds are converted into cash, there is no way to trace where they ended up without eye witness evidence.

1054.12. Ms Tlatsana also confirmed that she had made a payment of R1 million to the ANC regional office in the North West in early 2016. When she was asked about the reason for this payment during her evidence, she said that Mr van Wyk had asked her to make the donation to the ANC and she had agreed to do so.¹⁸⁰¹ Precisely why a donation of this magnitude needed to be made to a political party by Ms Tlatsana is unclear. She did, however, refer to the fact that she felt that she was being pressurised by Mr van Wyk and so decided to make the payment to avoid any further pressure.¹⁸⁰²

1055. It is important to highlight at this juncture that Mr van Wyk was present at the Commission's hearings on the day that Ms Tlatsana testified. Indeed, he sought to delay the commencement of her testimony. When this request was refused, Mr van Wyk was invited to bring any application for leave to cross examine Ms Tlatsana. It was therefore open to Mr van Wyk to bring such an application or to seek leave to present his own evidence to the Commission, for example, to challenge the authenticity of the tape recording of his meeting with Ms Tlatsana in January 2016. Mr van Wyk did not take up any of these opportunities to contest the evidence against him. That failure will weigh heavily in what the Commission makes of Ms Tlatsana's evidence.

1056. In the main, where there is independent corroborative evidence of Ms Tlatsana's testimony, there is every reason for the Commission to accept it. Her testimony about the flow of funds is corroborated by the detailed analysis that the Commission's

¹⁸⁰¹ Transcript 22 June 2019, p 144 – 145

¹⁸⁰² Transcript 22 June 2019, p 140 – 141

investigators did of the relevant bank statements. These documents show that Mr van Wyk, and persons close to him, such as his life partner, received monies that were drawn out of the North West government's coffers. This documentary evidence is dealt with in greater detail below. They present a compelling case that Mr van Wyk and Mr Sipho Levy Phiri perpetrated acts of corruption.

1057. Ms Tlatsana's conversation with Mr van Wyk in January 2016 was recorded and so that recording, without any challenge to its authenticity, should also be accepted as evidencing what was said between them. That should not, however, be confused with a finding that what Mr van Wyk said in that conversation was true. The Commission is not in a position to make such a finding. This applies, in particular, to the allegation in the conversation that the former Minister of Transport, Ms Dipuo Peters, received a payment from the Koreneka monies. Former Minister Peters provided two affidavits to the Commission in which she denied having received these payments. The Commission was unable to find any further evidence corroborating receipt of these monies. The allegations against her were therefore based on the recorded conversation between Ms Tlatsana and Mr van Wyk and the handwritten note he produced during that conversation. There was no direct evidence from any witness attesting to the fact that Ms Peters had received such a payment. The Commission is therefore not in a position to make a finding on this issue. The issue can only be resolved with further investigation and further interrogation of both Mr van Wyk and Ms Peters' versions. It is therefore imperative that SAPS proceed with their investigations of these matters as swiftly as possible.

1058. One of the other areas that requires further investigation is a full accounting of the use to which all the monies received by Koreneka was put. During her testimony, Ms Tlatsana was not able to provide a satisfactory accounting of all the monies that her company had received out of the arrangement with Mr van Wyk and SA Express.

She was requested to provide such an account after her testimony concluded¹⁸⁰³ but, despite many follow-up by the Commission after her evidence, no such account was produced.

1059. Ms Tlatsana also gave evidence that she had received threats and intimidation after she had revealed the details of this scheme in the High Court litigation that had been brought against her by SA Express. She testified, however, that nothing had happened in relation to her complaint despite the fact that she had made a tape recording of the threats she had received on the phone and had handed these recordings to the police.¹⁸⁰⁴ I, therefore, directed the Commission's Legal Team and the Investigation Team to make enquires about the complaint and the attention it had received from the North West SAPS office in Mahikeng.

1060. Pursuant to the Commission's enquires, the following was revealed: Ms Tlatsana had lodged a case of intimidation with a Warrant Officer at the Mahikeng Detective Service on 4 January 2018. When the Commission started to make enquiries about the progress of the matter, the Deputy Provincial Commissioner for Crime Detection in North West directed that investigations be undertaken to determine what progress had been made on the case and was "dismayed" to learn that there was nothing positive that the investigator assigned to the case had done. The Provincial Office therefore took steps to remove the investigator from the investigation and the matter was handed over to the Provincial Office under the Provincial Organised Crime unit. The members involved were subjected to a disciplinary process.¹⁸⁰⁵

¹⁸⁰³ Transcript 21 June 2019, p 220-221

¹⁸⁰⁴ Transcript 22 June 2019, p 155-159

¹⁸⁰⁵ Transcript 29 August 2019, p 6 – 7

1061. This is a concerning feature of the investigation and one that has been repeatedly revealed in the evidence before the Commission. When people have spoken out about the acts of state capture, corruption or fraud in which they have been involved and which implicates high-ranking officials, they have often been threatened and intimidated. When those same people have sought the protection of the police services, their cases have not been treated with the seriousness or attention that they deserve. Ms Tlatsana had lodged her complaint, together with evidence of the taped conversations in which she was threatened, and yet nothing was done about it for more than eighteen months until the Commission intervened.

The role of Neo Solutions

1062. Money laundering is defined in section 4 of the Prevention of Organised Crime Act 121 of 1998 (POCA) as follows:

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

- a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not: or
- b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect—
 - i. of concealing or disguising the nature, source, location, disposition or movement of the said property or its ownership or any interest which anyone may have in respect thereof
 - ii. (of enabling or assisting any person who has committed or commits an offence whether in the Republic or elsewhere—
 - aa) to avoid prosecution; or

bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence.”

1063. There are a number of important features of this crime. The “property” with which it is concerned includes money.¹⁸⁰⁶ It is committed not only when a person knows that they are dealing with the proceeds of unlawful activities but also when they ought to have known. It is the act of concealing or disguising the nature, source, location, disposition or movement of the money that makes the perpetrator guilty of the offence.

1064. Mr Vivien Natasen, who was the sole shareholder and director of Neo Solutions, was involved in laundering R9.9 million of the money that Koreneka received from SA Express pursuant to its unlawful dealings with the North West government.

1065. Mr Natasen was also a chartered accountant.¹⁸⁰⁷ He served his articles at Deloitte and left in 2003, having held the position of a partner. Mr Natasen had been a registered member of the South African Institute of Chartered Accountants (SAICA) for 22 years, since 2007. Mr Natasen was aware of the Code of Professional Conduct for Chartered Accountants and confirmed that the code applied to him.¹⁸⁰⁸

1066. Mr Natasen testified as follows about the relationship between Neo Solutions, on the one hand, and Koreneka and Batsami, on the other:¹⁸⁰⁹

1066.1. Neo Solutions did not ever render invoices to Koreneka for security cameras;

¹⁸⁰⁶ See the definition of “property” in section 1 of POCA

¹⁸⁰⁷ Transcript 12 July 2019, p 32

¹⁸⁰⁸ Transcript 12 July 2019, p 32 – 33

¹⁸⁰⁹ Transcript 12 July 2019, p 38

1066.2. It did not ever render invoices to Koreneka for any services;

1066.3. No services were ever rendered by Batsamai to Neo Solutions; and

1066.4. Neo Solutions did not ever receive any invoices from Batsamai.

1067. Despite these facts, Mr Natasen explained that he had come to know Mr van Wyk in 2014, and had learnt, through his relationship with him, that he was employed at SA Express and that he was planning to leave SA Express in 2016.¹⁸¹⁰

1068. Mr Natasen confirmed that he received the monies from Koreneka and paid them out on the instructions of Mr van Wyk. His explanation for how this arose was as follows.¹⁸¹¹

1069. According to Mr Natasen, in October 2015 Mr van Wyk approached him and asked if he could transfer R10 million into the bank account of Neo Solutions. Mr van Wyk said that he needed to transfer this money because he was an official of the state, employed by SA Express, and was leaving. He said to Mr Natasen that the money was “clean” and had nothing to do with SA Express or the state. Mr van Wyk also told Mr Natasen that he did not want his employer to know that he had implemented a successful business on the side “as they would be jealous” given that he was in the process of leaving SA Express.¹⁸¹² He also confirmed that he “did not want the money to hit his bank account” because SA Express did lifestyle audits from time to time.¹⁸¹³

¹⁸¹⁰ Transcript 12 July 2019, p 90 – 93

¹⁸¹¹ Transcript 12 July 2019, p 108 – 109

¹⁸¹² Transcript 12 July 2019, p 94 – 96

¹⁸¹³ Transcript 12 July 2019, p 99 – 100

1070. Mr Natasen was taken to task during his testimony about this explanation and why it did not raise any red-flags for him. He first endeavoured to justify receiving the funds on the basis that they related to a planned farming venture that they were going to be embarking upon¹⁸¹⁴ but then struggled to explain why it was that Mr van Wyk then required R7 million of the money to be released to him. Mr Natasen's only explanation for this was that he understood that the money related to a property that Mr van Wyk suddenly needed to acquire urgently and the funds for the farming venture would then be replenished when that project got off the ground.¹⁸¹⁵ Later in his questioning, however, Mr Natasen conceded that there was no reason why his company needed to hold the funds at all in respect of the proposed farming venture because it was just as easy for Mr van Wyk to hold onto the funds until the venture materialised.¹⁸¹⁶

1071. The implausibility of this version, as well as the suspicions that ought obviously to have arisen when Mr van Wyk spoke to Mr Natasen about "life-style audits" and wanting to keep the money "away" from his SA Express colleagues, were raised with Mr Natasen. He conceded, under questioning, that he had never before asked a proposed business partner whether their money was "clean".¹⁸¹⁷

1072. This concession alone makes it clear that, despite Mr Natasen's best efforts to seek to give a normal explanation for his company's receipt of these monies, there were alarm bells going off even for Mr Natasen. Why else would he have been talking to Mr van Wyk about whether the money was "clean"? There is no need to ask about "clean" money, unless you have concerns about "dirty" money. Everything about how Mr van Wyk approached Mr Natasen implied that he needed to hide the money. A

¹⁸¹⁴ Transcript 12 July 2019, p 100 – 106

¹⁸¹⁵ Transcript 12 July 2019, p 109 – 111

¹⁸¹⁶ Transcript 12 July 2019, p 124 – 125

¹⁸¹⁷ Transcript 12 July 2019, p 116 – 117

reasonable person in Mr Natasen's position ought to have known that he was being asked to conceal or disguise "dirty" money. It is evident that Mr Natasen was put on notice that there was suspicious activity afoot; a reasonable accountant in his position would have enquired further as to the source of the funds and would not have been justified in relying on a simple assurance that it was "clean".

1073. Mr Natasen was also questioned about the fact that his company had used the proceeds that it had received from Mr van Wyk. This was relevant because section 6 of POCA makes it a crime for a person to use money which he knows or ought reasonably to have known forms part of the proceeds of unlawful activities. Despite being evasive in response to this line of questioning, Mr Natasen eventually conceded that the discrepancies between his companies' financial statements and bank balances reflected that the money Neo Solutions received from Koreneka had been used in his company.¹⁸¹⁸ When he returned to give evidence in August 2019, Mr Natasen was forced to concede that Mr van Wyk's money had been "mixed-up" with that of Neo Solutions and that the money was used in the operations of Neo Solutions.¹⁸¹⁹

1074. When Mr Natasen was probed about why he had signed off on financial statements for his company that were clearly incorrect, he deflected and sought to blame it on his accounting team.¹⁸²⁰ Later in his evidence before the Commission, Mr Natasen sought to involve another accountant¹⁸²¹ to review his company's financial statements and to provide a veneer of respectability to them, despite the numerous discrepancies that had been exposed about their content during his evidence. He

¹⁸¹⁸ Transcript 12 July 2019, p 170

¹⁸¹⁹ Transcript, 29 August 2019, p 49 – 53

¹⁸²⁰ Transcript 12 July 2019, p 177 – 178

¹⁸²¹ Exhibit DD10A, p 238-274

even tendered to pay back the R217 494 that this accountant had found probably constituted the benefit derived by Neo Solutions as a result of being able to use the money he received from Mr van Wyk in its operations.¹⁸²²

1075. But this tender is not adequate recompense for the role that Mr Natasen played in this looting scheme. Mr Natasen allowed his company to be used to conceal proceeds that the Commercial Manager of SA Express had syphoned out of the North West government's coffers.

The cash in transit leg

1076. One of the most effective ways in which to launder money and to pay bribes is to convert it to cash because then it is not traceable in the official banking system.

1077. Mr van Wyk appears to have been very skilled in his ability to hide portions of the monies that were extracted from the North West government. One of his concealment methods was to engage the services of a business that styled itself as a "cash in transit" operation in order to convert R9 million of the money from Koreneka into cash.

1078. Ms Kalandra Viljoen was the owner of that business. During her evidence before the Commission, she conceded that she did not apply adequate measures within her business to establish and verify the identity of her clients as required under the Financial Intelligence Centre Act 38 of 2001 (FICA).¹⁸²³ Her failure to have adequate measures in place allowed her business to be used by Koreneka, an entity with which she had no prior dealings and whose source of funds she had made no effort to

¹⁸²² Transcript 29 August 2019, p 139 – 141

¹⁸²³ Transcript day 119, 24 June 2019, p 46 – 48; Transcript day 119, 24 June 2019, p 51

establish, ¹⁸²⁴ to convert R9 million of the money it had received from SA Express into cash.

1079. The evidence indicates that this cash was then delivered to Mr van Wyk. This was established from the cash delivery slips¹⁸²⁵ that Ms Viljoen retained from these deliveries. The slips were presented to Ms Tlatsana during her evidence and she confirmed that all three delivery slips bore the signature that she knew to be that of Mr van Wyk.¹⁸²⁶ She was able to identify the signature because she had seen Mr van Wyk's signature on the Koreneka contract they had both signed and also on certain letters that he had signed.¹⁸²⁷

1080. A portion of Ms Viljoen's questioning before the Commission focussed on whether her "cash in transit" business was operating as a genuine cash in transit business under the FICA legislation. The point that was made to Ms Viljoen was that, ordinarily, cash in transit businesses do not receive deposits of cash into their bank accounts. They are rather delivery businesses which collect cash from banks and deliver them to the appointed premises. The sheer value and volume of the deposits that Ms Viljoen's business was conducting on a daily basis tended to indicate that she was not operating a cash in transit business but was rather receiving deposits from the public as an ordinary feature of the business's operations. As such, it was operating the business of a bank and required a licence from the Reserve Bank to do so.¹⁸²⁸

¹⁸²⁴ Transcript day 119, 24 June 2019, p 144 – 145.

¹⁸²⁵ Exhibit DD9, Ms Viljoen's Affidavit, p 64; Exhibit DD9, Ms Viljoen's Affidavit, p 65-66

¹⁸²⁶ Transcript 22 June 2019, p 163 – 164

¹⁸²⁷ Transcript 22 June 2019, p 162 – 163

¹⁸²⁸ Transcript 24 June 2019, p 136 – 137; Transcript 24 June 2019, p 144

1081. Greater vigilance will be required from the financial sector regulatory authorities if this type of operation is to be stopped. Ms Viljoen was clearly running a business that received millions of Rands on a daily basis and converted it into cash. Cash is extremely useful in the hands of those who wish to launder unlawful proceeds because once those proceeds are reduced to cash, they are untraceable. They can then end up in the hands of people of influence.

CONCLUSION AND RECOMMENDATIONS

1082. The Commission's Terms of Reference required it to establish the extent to which state capture, corruption and fraud was prevalent in the public sector. In particular, the Terms of Reference required the Commission to investigate, make findings and report on whether public officials or functionaries had unlawfully awarded tenders to benefit any family, individual or corporate entity (paragraph 1.4 of the Terms of Reference). The Terms of Reference also required the Commission to determine whether any officials or functionaries within the various SOEs had benefitted personally from acts of corruption (paragraph 1.9 of the Terms of Reference).

1083. These key aspects of the mandate of the Commission guided the investigation undertaken into the affairs of SAA, its subsidiary SAAT, as well as SA Express.

1084. The investigation endeavoured to uncover not only what had happened within these entities but also why and how it happened. The investigation therefore had a broad compass because it was motivated by a desire to understand the weakness within the public sector that makes it vulnerable to state capture, corruption and fraud.

1085. As the findings set out above show, SAA declined during the tenure of Ms Myeni to an entity racked by corruption and fraud. Despite this, she was retained as its Chairperson well beyond the point at which she should have been removed. Two successive Finance Ministers have explained to the Commission that this was because of the personal preferences of former President Zuma. This is the antithesis of accountability. President Zuma fled the Commission because he knew there were questions that would be put to him which he would not have been able to answer. He could not have justified his insistence that Ms Myeni be retained at SAA nor could he have credibly denied Mr Gordhan's and Mr Nene's evidence that he wanted Ms Myeni retained at SAA.

1086. The appointment of individuals to boards of SOEs must be justifiable based on their skills expertise, experience and knowledge.

1087. Functionaries within SOEs must be held to the highest standards of accountability because they use public funds to manage the businesses they oversee.

1088. Those responsible for governance at SAA, SAAT and SA Express displayed a wanton disregard for these standards. Rather than acting in the entities' best interests, they were motivated by their own personal interest. This should never be allowed to occur again. In particular, the Commission makes the following recommendations for action following this report.

Mr X's evidence

1089. The Secretary of the Commission has already laid a criminal complaint against Ms Myeni for her disclosure of Mr X's identity during her testimony. This matter needs to be brought to finality by the law enforcement agencies and the National Prosecuting Authority.

1090. The evidence of Mr X also merits further detailed investigation and possible charges of corruption being laid against all the individuals involved in the scheme to securing millions of Rands for the personal benefit of Ms Myeni and the Jacob Zuma Foundation.

Pembroke Transaction

1091. Ms Myeni knowingly misrepresented to the Minister of Public Enterprises that the Board of SAA had taken two decisions when it had not. Those misrepresentations caused financial losses to SAA. It is likely that her conduct constitutes the crime of fraud. The Commission recommends that the National Prosecuting Authority

considers, subject to such further investigation as may be considered necessary, whether Ms Myeni should be prosecuted for fraud.

LSG SkyChefs

1092. Ms Myeni and Ms Kwinana displayed a wanton disregard for the best interests of SAA in their decision-making on the lounge catering contract. They acted in gross disregard of their fiduciary duties to SAA when they took this decision. However, they both ceased being directors of SAA more than 24 months ago. Accordingly, the shareholder is not now in a position to bring proceedings to have them declared delinquent directors under section 162 of the Companies Act.

1093. This time bar may be amended by Parliament in order to permit applications to be brought even after two years, on good cause shown. This will mean that in cases such as this one, where the true extent of the Board members' breaches of duty are only uncovered a number of years later, steps can still be taken by the executive to ensure that such directors are declared delinquent and are thereby prevented from serving on the boards of companies in the future.

Swissport

1094. SAA's conclusion of a five-year ground handling contract took place a month after Swissport had concluded a service level agreement with JM Aviation in terms of which JM Aviation was paid R28.5 million. That money, according to Mr Dulaxolo Peter, was then used to pay millions of Rands to those who had assisted in "facilitating" the finalisation of the SAA / Swissport contract.

1095. The people who received payments from that amount of R28.5 million were:

1095.1. Mr Daluxolo Peter;

1095.2. Mr Vuyisile Ndzeku;

1095.3. Mr Lester Peter; and

1095.4. Adv Nontsasa Memela.

1096. These payments were therefore likely to have been kick-back payments to those who had secured the conclusion of the Swissport ground handling contract with SAA or were to be involved in its implementation. The Commission recommends that the law enforcement agencies should further investigate the role of Swissport and the above individuals in these dealings and where warranted, the National Prosecuting Authority should consider the prosecution of all those involved in criminal acts.

1097. JM Aviation appears not to have paid VAT to SARS on the R28.5 million it received from Swissport prior to the ground handling contract being concluded with SAA. It is recommended that SARS should consider this matter further and take such steps as it may be advised to take.

AAR / JM Aviation components tender

1098. The award of the components tender for five years to the Joint Venture of AAR and JM Aviation was unlawful, irregular and unfair.

1099. AAR and JM Aviation were favoured during the process by the SAAT Head of Procurement, Adv Nontsasa Memela and its Board.

1100. The then Head of Procurement, Adv Nontsasa Memela, and the Chairperson of the Board of SAAT, Ms Yakhe Kwinana, received payments from JM Aviation around the time that these decisions were taken.

1101. The payments were likely kick-back payments to these officials. It is recommended that the National Prosecuting Authority should seriously consider prosecuting the JM Aviation directors, the members of the Board of SAAT at the time, including Ms Y Kwinana, and Adv Nontsasa Memela for corruption or related crimes. It should also consider engaging with the United States Department of Justice regarding the role played by AAR in this scheme.

The concealment

1102. The Commission's investigations revealed that Mr Ndzeke, Ms Memela, and Ms Mbanjwa, conspired to try to hide the true nature of the payments made by JM Aviation to Adv Nontsasa Memela through Ms Mbanjwa and that Mr Ndzeke and Ms Kwinana tried to hide the payments made by or on behalf of JM Aviation or Mr Ndzeke to Ms Kwinana's company.

1103. They did so by fabricating agreements in order to ensure that they appeared as though they were arms-length transactions unrelated to the decision-making that took place in SAAT at the time. This conduct probably constitutes fraud. The Commission recommends that the National Prosecuting Authority seriously considers to prosecute them after such investigation as the National Prosecuting Authority may decide should be conducted.

1104. In addition, both Ms Memela and Ms Mbanjwa are officers of the court. Ms Memela is an advocate and Ms Mbanjwa, an attorney. Despite this, they have participated in a fraudulent scheme to try to hide money that was paid as a kick-back to Ms Memela. It is recommended that the Legal Practice Council should investigate whether the two should not be removed from the roll of attorneys, in the case Ms Mbanjwa, and, from the roll of advocates, in the case of Ms Memela.

1105. Furthermore, Ms Mbanjwa continued to act on behalf of Ms Memela and Ms Kwinana in circumstances where she was personally implicated in their impugned conduct. At times, Ms Memela and Ms Kwinana implicated each other. There is a clear apparent conflict of interest in Ms Mbanjwa's representation of either of them in these proceedings, and a conflict in representing both of them. Ms Mbanjwa's independence and objectivity would have been compromised by her personal involvement. The personal involvement of a lawyer in a case in which she acts as a legal representative has been found by the courts to be an undesirable practice.¹⁸²⁹ Her conduct in this regard should also receive the attention of the Legal Practice Council.

State Security matters

1106. It is recommended that the President must take note of the involvement of the State Security Agency in security vetting and take such steps as may be necessary to ensure that services of the State Security Agency are not abused in the future to serve the interests or agenda of certain individuals.

External Service Providers

1107. The ACSA interest swap contracts with Nedbank and Standard Bank were procured through the corrupt involvement of Regiments Capital, Mr Ramosebudi, Mr Wood and Mr Niven Pillay.

1108. It is recommended that:

¹⁸²⁹ *Carolus and Another v Saambou Bank Ltd; Simth v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 348 and *Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA), in particular para 38

1108.1. ACSA take steps to recover from Regiments Capital, Mr Ramosebudi, Mr Wood and Mr Niven Pillay and failing them, Nedbank and Standard Bank, the amounts paid to Regiments Capital under the interest swap contracts and any additional losses suffered by ACSA on those contracts;

1108.2. The law enforcement agencies investigate these contracts with a view to:

1108.2.1. the National Prosecuting Authority prosecuting Mr Ramosebudi, Mr Wood, Mr Niven Pillay and Regiments Capital on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;

1108.2.2. the Asset Forfeiture Unit of the National Prosecuting Authority recovering the amounts paid to Mr Ramosebudi by Regiments Capital under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998; and

1108.2.3. the Asset Forfeiture Unit of the National Prosecuting Authority recovering the amounts paid to Regiments Capital by Nedbank and Standard Bank Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998.

1108.3. The law enforcement agencies investigate the role of Mr Brickman, Mr Visenza and Nedbank in relation to these contracts with a view to

1108.3.1. the National Prosecuting Authority prosecuting Mr Brickman, Mr Visenza and / or Nedbank on charges under section 6(b)(ii) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;

1108.3.2. the Asset Forfeiture Unit of the National Prosecuting Authority recovering Nedbank's profits under the interest swap contracts under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 unless Nedbank has a valid defence to such recovery claims.

1109. The SAA Working Capital tender awarded to the McKinsey and Regiments Capital Consortium under Bid No RFP 085/13 was procured through the corrupt involvement of Regiments Capital, Mr Ramosebudi, Mr Wood and possibly also Mr Indheran Pillay and Mr Tewedros Gebreselasie. There is no evidence that McKinsey was aware of any of the corrupt conduct linked to the award of Bid No RFP 085/13 and McKinsey has already repaid in full, the amount that it received from SAA in connection with its appointment under this tender.

1110. It is recommended that:

1110.1. The law enforcement agencies investigate the award of Bid No RFP 085/13 with a view to.

1110.1.1. the National Prosecuting Authority prosecuting Mr Ramosebudi, Mr Wood and Regiments Capital on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;

1110.1.2. the National Prosecuting Authority prosecuting Mr Indheran Pillay and Mr Tewedros Gebreselasie on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;

1110.1.3. the Asset Forfeiture Unit of the National Prosecuting Authority recovering from Mr Ramosebudi under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 the amount of R375 606 paid to Riskmaths Solutions (Pty) Ltd by Regiments Capital on 7 November 2013; and

1110.2. the Asset Forfeiture Unit of the National Prosecuting Authority recovering under Chapter 5 or Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 the amount of R6 241 500 paid to Regiments Capital by McKinsey in relation to the SAA Working Capital contract.

Proceeds of unlawful activities

1111. Where the evidence before the Commission has revealed possible acts of corruption and fraud and has recommended that prosecutions take place, steps should be taken by the relevant authorities urgently to seek to recover the proceeds of these unlawful activities.

PRECCA reporting obligations

1112. In order for the Prevention and Combating of Corrupt Activities Act 12 of 2004 (*PRECCA*) to have any prospect of assisting in the fight against corruption, those who were duty-bound to report corruption but failed to do so, must also be held accountable.

1113. Section 34(2) of PRECCA makes it an offence for anyone who holds a position of authority within an entity and who knows or ought reasonably to have known that an act of corruption has been perpetrated, to fail to report the conduct.

1114. In her position as interim CFO, Ms Nhantsi held a position of authority within SAA. She ought, therefore, to have reported the BNP transaction and her suspicions concerning the true motives of Ms Duduzile Cynthia Myeni and Mr Masotsha Mngadi in pushing the transaction forward. Her failure to do so may constitute a crime. The Commission therefore recommends that the law enforcement agencies including the NPA should give the matter further consideration with a view to her possible prosecution.

Auditors

1115. The Auditor General's office should be further capacitated so that it can audit all public entities. To the extent that that is not practicable, serious consideration should be given to private firms being appointed to audit SOEs only if they can demonstrate that they have the requisite skills and also the requisite understanding of their obligations to the public at large when they audit an SOE. There must be a sufficient appreciation that, not only are the financial statements of cardinal importance, but also the entity's PFMA obligations are of great significance,

1116. The South African Institute of Chartered Accountants should investigate whether Ms Kwinana has the requisite knowledge and appreciation of her obligations as a Chartered Accountant and whether she is suitable to continue to practise the profession of a Chartered Accountant. The Commission believes that the answers she gave to certain questions during her evidence revealed either that she has no clue about some of the basic obligations that she should know as a Chartered Accountant or she knew those obligations but dishonestly pretended that she did not know them because it was convenient for her to do so. In either case SAICA should be interested in investigating the matter because either explanation may mean she is not fit and proper to practise the profession of a Chartered Accountant. Her

auditing firm's tax returns should also be investigated by SARS because there may have been a significant understatement of revenue (to the value of approximately R40 million) in the 2016 financial year. It is recommended that SARS should conduct its investigation in this regard.

SA Express

1117. The Commission's investigations into SA Express's dealings with the North West Department of Transport has revealed an elaborate scheme of corruption, designed to take money out of the state's coffers for the benefit of those with power and influence who orchestrated the scheme.

1118. The Commission recommends that all of the government and state officials, as well as private individuals who were involved in this looting scheme, should be brought to justice. There are investigations currently underway in this matter; the case has been open since 2016. They should be brought to a swift conclusion.

1119. Mr Natasen's conduct should form an important part of the authorities' further investigations of this matter. The Commission recommends that serious consideration be given by the National Prosecuting Authority to charging Mr Natasen with money laundering and the use of the proceeds of crime after such further investigation as the law enforcement agencies may conduct and if the further investigations reveals possible contravention of the relevant law ; that his conduct be reported to the SAICA and that the South African Revenue Services should investigate the numerous respects in which Neo Solutions appears not to have accurately and fairly reported its income to the authorities.

1120. The Reserve Bank should also investigate whether Ms Viljoen's AMFS operation was, in fact, a cash in transit business that merely failed to comply with its FICA

obligations, or rather operating as a bank without any lawful licence to do so. The current SAPS investigation should also be extended to interrogate the role of AMFS in more detail. The question that needs to be answered is whether AFMS was providing general money laundering facilities to those who wished to have their proceeds converted to cash without the necessary checks required from the formal banking system.

1121. Where prosecutions have been recommended in this section, it is also recommended that the Asset Forfeiture Unit of the National Prosecuting Authority takes steps to recover under Chapter 5 or Chapter 6 of POCA any amounts that constitute the proceeds of unlawful activities or the instrumentality of an offence.

Judicial Commission of Inquiry into State Capture Report: Part 1

Vol. 2: The New Age



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

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

Report of the Judicial Commission of Inquiry into State Capture: Part 1: Vol. 2



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

Report: Part 1
Vol. 2: Chapter 2 – The New Age and its
dealings with Government Departments and
State Owned Entities

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

PART 1: VOLUME II

CHAPTER 2 - THE NEW AGE AND ITS DEALINGS WITH GOVERNMENT DEPARTMENTS AND STATE OWNED ENTITIES

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INTRODUCTION

1. The extent to which state funds were spent on the TNA Media (Pty) Ltd (*TNA*) formed an important part of the Public Protector's "State of Capture" Report. In particular, the Public Protector referred to both Eskom and SAA's contracts with the TNA and required, in particular, that the TNA contracts with SAA be investigated in the second phase of the investigation.¹⁸³⁰
2. This section of the report therefore focusses on the unjustified public spending that took place between the state owned entities of Eskom, Transnet and SAA, and the Gupta-owned media enterprise, TNA Media (Pty) Ltd (*TNA*), between 2011 and 2017.
3. The Public Protector also focused on the relationship between the South African Broadcasting Commission (SABC) and TNA in her State of Capture Report¹⁸³¹ as well as the allegations made by Mr Themba Maseko regarding TNA and the Government Communication and Information System (GCIS).¹⁸³² Mr Themba Maseko is a former Chief Executive Officer of GCIS. This chapter includes a discussion of the transfer of Mr Maseko out of GCIS whereas the SABC aspects of the TNA story are dealt with in other sections of this report.
4. The Commission's Terms of Reference also required it to investigate, make findings and report on whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of government advertising in the New Age newspaper and other dealings with the Gupta family (paragraph 1.6 of the Terms of Reference).

¹⁸³⁰ Public Protector's State Capture Report para 4.25.

¹⁸³¹ Public Protector's State Capture Report paras 4.26 to 4.30.

¹⁸³² Public Protector's State Capture Report para 5.20.

5. Over the period 2011 to 2017 TNA produced The New Age newspaper, and a television show in partnership with the SABC known as The New Age Business Briefings or Breakfasts. Government departments and state-owned enterprises used scarce public resources to secure advertising in or sponsorships with TNA that defied logic and legal requirements.
6. TNA serves as an example of the way in which state capture took hold in South Africa. It shows the extent of the Guptas' influence in the public sector in South Africa as well as the Guptas' strategy to replace officials that were not compliant with their looting scheme.
7. It is undeniable that numerous public entities were used to siphon public funds to the Gupta media company and its owners. What is less clear to the public is how this was achieved and, perhaps more importantly, how it can be avoided in the future.
8. The Commission's investigations revealed how key role players enabled the project of state capture to take hold in these entities and thrive for a number of years, despite the existence of certain institutions designed to protect our democracy, including Parliament.
9. In particular, the evidence shows that there emerged at least two categories of people within the affected entities which allowed the Guptas to secure millions of Rands of public funds for themselves over a number of years.
 - 9.1. First, a category identified as the "**facilitators**". These were compliant officials who followed the orders from the Guptas seemingly without question or hesitation. They were not concerned about what the Guptas' influence would do to the welfare of their institutions. They ordered their subordinates to be complicit in the facilitation, using them to create some veneer or pretence of

processes being followed. The facilitators used threats and intimidation to ensure that the will of the Guptas was carried out and they relied on a culture of silence and compliance from employees within the entities.

9.2. Second, a category identified as the “**followers**”. These were the subordinates to the facilitators who did not stand up to their superiors or speak out when there was evidence of corruption in their organisations. These followers varied in the degree to which they resisted or complained about the orders they were given, but it is evident that the project of state capture would not have thrived as it did, if these key employees had not participated in the scheme by taking irrational decisions that were not in the best interests of their organisations. While some of these followers attempted to raise red flags, they ultimately compromised themselves and helped to cover up or legitimise public spending on TNA.

10. Importantly, one of the defining features that has emerged in the evidence before the Commission is that in order to divert public funds for private benefit, it was necessary to populate key institutions with people who were going to comply with orders. This might be because they were happy to receive some benefit – like being promoted to a high-status position – or because they received some overt pecuniary benefit.¹⁸³³ Sometimes, however, key public figures were unwilling to comply. These were the “resistors”. In those instances, the “resistors” were removed from their positions and replaced, or were sought to be replaced, with “facilitators”. The primary example of a resistor is Mr Themba Maseko who was unwilling to accede to the Guptas’ demand to divert the whole advertising budget of Government from GCIS to the New Age Newspaper. After he had resisted, he was replaced by Mr Mzwanele Manyi. The

¹⁸³³ It is important to record that the Commission’s investigations did not find evidence of any direct pecuniary benefits being paid to the facilitators.

Commission investigated Mr Maseko's removal from GCIS and his replacement with Mr Manyi in some detail.

11. This part of the report will show that the following individuals were "facilitators" of the Gupta TNA scheme:

12. at Eskom, Mr Colin Matjila, the CEO, as well as the Board of Eskom that took over in December 2014; except for Mr Baloyi,¹⁸³⁴ and Mr Chose Choeu, the Divisional Executive of Corporate Affairs, and

12.1. at Transnet, Mr Brian Molefe, the GCEO, and Mr Mboniso Sigonyela, the General Manager of Transnet Group Corporate and Public Affairs, responsible for advertising and sponsorships.

12.2. at GCIS, Mr Mzwanele Manyi, who replaced Mr Maseko as the CEO and DG of GCIS.

13. The following individuals were "followers":

13.1. at Eskom, Mr Pieter Pretorius, head of strategic marketing; and.

13.2. at Transnet, Mr Joseph Jackson, Brand and Publicity Coordinator and Mr Daniel Phatlane, Senior Coordinator Stakeholder Relations.

14. This section of the report will be structured in four parts:

14.1. the removal of Mr Maseko;

¹⁸³⁴ Mr Norman Baloyi was an Eskom Board member.

- 14.2. the transactions between Eskom and TNA;
 - 14.3. the transactions between Transnet and TNA; and
 - 14.4. SAA's dealings with TNA.
15. After dealing with the removal of Mr Maseko and his replacement by Mr Manyi, the report identifies the “facilitators” and “followers” within each of the remaining three state-owned entities. Consideration is also given to whether there were any structural differences in each of the entities that equipped them better to resist attempts at state capture and private interest influence.
16. Before dealing with these aspects, however, it is necessary to provide some background to the establishment of the TNA.

TNA MEDIA

17. TNA was established by the Gupta family in June 2010. TNA launched *The New Age* newspaper on or about 6 December 2010.¹⁸³⁵
18. Former President Jacob Zuma testified before the Commission that the newspaper was his idea. He said there was a need for a different perspective in the news that would not be so “negative” and critical of the government and one that would not only cover big national news, but also province-specific coverage. He said that he suggested this to the Guptas who said they were interested in going into this business. Mr Zuma said he even came up with the name *The New Age*.¹⁸³⁶ Mr Zuma testified that he told Mr Gwede Mantashe about his discussion with the Guptas concerning this newspaper

¹⁸³⁵ Exhibit M1, p 88-89.

¹⁸³⁶ Transcript 15 July 2019, pp 37-40.

because he wanted to make sure that there was at least one official among the ANC officials who knew of his role in the establishment of the newspaper.

19. TNA conducted its business as a subsidiary of Oakbay Investments (Pty) Ltd, a company owned by the Gupta family and represented by Atul Gupta.¹⁸³⁷ TNA was responsible for the print media (*The New Age* newspaper), while Infinity Media (Pty) Ltd focused on the 24-hour television news channel, ANN7.¹⁸³⁸
20. In an affidavit filed on behalf of TNA in its liquidation proceedings, it explained that, since its launch, its:

“revenue streams were primarily derived from a combination of commercial and public sector advertising, bulk subscriptions from national and provincial government departments and its unique property brand known as the ‘TNA business briefings’. The aforementioned briefings were embarked upon in partnership with the SABC and sponsored, inter alia, by various state-owned enterprises including but not limited to Eskom and Transnet.”¹⁸³⁹

21. In fact, TNA’s primary client base consisted of government departments and parastatal companies.¹⁸⁴⁰
22. One of the Guptas’ earliest efforts to divert government advertising spend to their media business involved an approach to Mr Themba Maseko, the then DG of GCIS.

¹⁸³⁷ Exhibit M1, p 89-90, para 4.5.

¹⁸³⁸ Exhibit M1, p 90-91, para 5.1.

¹⁸³⁹ Exhibit M1, p 89-90, para 4.4.

¹⁸⁴⁰ Exhibit M1, p 93, para 6.6.

MR MASEKO AND GCIS

Mr Ajay Gupta's first approach to Mr Maseko and the call from President Zuma

23. Towards the end of 2010, Mr Ajay Gupta met with Mr Themba Maseko who was the Director-General and Chief Executive Officer of the Government Communication and Information System at the time and demanded that Mr Maseko should spend the whole budget of R600 million allocated for government advertisement in The New Age, a newspaper that the Guptas were about to launch. Mr Maseko's refusal to agree to this demand led to Mr Ajay Gupta telling him on 3 December 2010 that he would report Mr Maseko to his seniors and they would "sort" him "out" and replace him with someone who would co-operate with them. On 2 February 2011 Mr Maseko was removed from his position and was replaced by Mr Mzwanele Manyi under very strange circumstances. What follows is how those events unfolded.
24. During September or October 2010 Mr Maseko received a call on his mobile number from Mr Ajay Gupta requesting a meeting to discuss what he said was a new project which he and his company were launching and which he indicated required Government support.¹⁸⁴¹ He knew Mr Ajay Gupta whom he had met at meetings of the International Marketing Council (IMC), subsequently renamed BrandSA. As CEO of GCIS, Mr Maseko had responsibility for the IMC and Mr Gupta was a board member of that agency.¹⁸⁴² He was also aware at the time that there was talk of the Gupta family's plans to enter the media sector by establishing a newspaper and a television station, but he did not know any details at the time.¹⁸⁴³

¹⁸⁴¹ Exhibit E1, p 10, para 10; Transcript 29 August 2018, p 124 - 125 Later (see Transcript 29 August 2018, p 127-128) Mr Maseko became uncertain as to dates and thought it might have been in May, June or July 2010. But that would have been a departure from all his earlier statements on the matter and is in any event unlikely because GCIS media-buying was first brought in-house in August-September 2010.

¹⁸⁴² Transcript 29 August 2018, p 122-123.

¹⁸⁴³ Exhibit E1, p 11, para 11.

25. Mr Maseko testified that, although reluctant at first, he acceded to the request for a meeting because he thought he should give Mr Gupta a hearing in order to understand more about the “project”. This was in keeping with his general attitude towards all stakeholders in the media industry. A meeting at the Guptas’ Saxonwold residence was arranged. He could not recall the date. He said that he often met with people either at his office or at venues suggested by them and he did not expect the meeting to be anything out of the ordinary.¹⁸⁴⁴

The call from President Zuma

26. What happened next is best presented here in Mr Maseko’s own words. He said:¹⁸⁴⁵

“On the date of the meeting, as I was driving out of the [GCIS]¹⁸⁴⁶ office parking lot, I received a call from Mahlabandlopfu, the President’s official residence. I identified the incoming number as I had had dealings with the residence previously. A female caller said the President wanted to speak to me.

The call was then transferred to the President. After the pleasantries, the President then said the following: ‘*mfokababa. Kuna lamadoda akwa Gupta. Ngifuna ukuthi uhlangane nabo futhi ubancede.*’ The English translation is “My brother, there are these Gupta guys who need to meet with you and who need your help. Please help them.”

I advised the President that the Guptas had already contacted me with a request for a meeting. Further, I advised the President that in fact I was on my way to the meeting with Mr Ajay Gupta at that very moment. The President thanked me for my cooperation and terminated the call.

I was taken aback at the call and wondered whether the Guptas had requested the President to call me to demonstrate their power and influence in the upper echelons of government. However, I avoided jumping to that conclusion and I decided to proceed to the meeting with an open mind. I was clear in mind that I would approach the discussions as I would with any other stakeholder in the media industry, namely, by considering the discussions as objectively as possible.”

¹⁸⁴⁴ Exhibit E1, p 11, paras 12-14; See also Transcript 29 August 2018, p 127.

¹⁸⁴⁵ Exhibit E1, pp 11-12, paras 15-18.

¹⁸⁴⁶ Transcript 29 August 2018, p 130, lines 1-4.

The meeting with Mr Ajay Gupta

27. Mr Maseko proceeded to the Gupta residence to meet Mr Gupta. On arrival, he was led by a staff member to a room which appeared to be a formal lounge. Mr Maseko said: “Mr Ajay Gupta entered the room and was followed by his brother Atul a few minutes later.”¹⁸⁴⁷ The latter did not stay for more than a few minutes.¹⁸⁴⁸
28. After introducing the subject of the meeting, Mr Ajay Gupta told Mr Maseko that he was aware that government was spending around R600m (per annum) on media platforms “and he wanted all that expenditure to be transferred to his company, the would-be media company.”¹⁸⁴⁹ In his evidence Mr Maseko testified thus:

“I then proceeded to explain how the budget and procurement process worked and why it would not be possible to transfer the whole budget to his company. I told him that in any case, the budget didn’t sit with us at GCIS and that we merely acted as an agency for the respective government departments.

He dismissed my explanation and proceeded to tell me that my job is to go and identify, collect and allocate all the communication budget amounts in the various departments to his company.

He then told me that I should let him know if any department or Minister gives me any problems and he would deal with them directly. I asked him to elaborate and he told me that he will personally summon and deal with any Minister who doesn’t cooperate in this regard. I then objected to the way he was talking about Ministers in such derogatory terms. He seemed oblivious to the point I was making and emphasised that he could deal with any Minister who didn’t cooperate.

¹⁸⁴⁷ Exhibit E1, p 12, para 21.

¹⁸⁴⁸ Exhibit E1, p 26. In the Public Protector’s summary of Mr Maseko’s evidence she says: “Mr Maseko met with Mr Ajay Gupta and one of his brothers, whose name he could not recall.” (See Exhibit A1 p 98 para (d)). This is not correct. In the transcript of the interview with the Public Protector’s staff, at the reference cited, Mr Maseko specifically said (and repeated) that the other brother was Atul Gupta. That was consistent with all the statements made in this connection by Mr Maseko, and with his oral evidence: Transcript 30 August 2018, p 13; Exhibit E1 p 6 para 2; Exhibit E1 p 12 para 20; Exhibit E1 p 68 para 20; Exhibit E1, p 85 para 20.

¹⁸⁴⁹ Exhibit E1, p 13, para 25.

Matters such as the inappropriateness of what he was saying and the impropriety of trying to obtain government business in this manner did not seem to matter to Mr Ajay Gupta.”¹⁸⁵⁰

29. In his testimony to the Public Protector, Mr Maseko elaborated on his exchange with Mr Ajay Gupta at the meeting. He said that he had asked Mr Gupta how he was able to do what he threatened to do. Mr Maseko said:

“[Mr Gupta said that he] has regular meetings with the President, so he will talk to the President and the Ministers will be summoned to (indistinct) and they will be instructed to transfer the budget to him”.¹⁸⁵¹

The reference to the President is a reference to the then President Zuma.

30. By the time that he was first approached by Mr Ajay Gupta, Mr Maseko knew that the budgeted ad-spend available to GCIS was about R600 million for the year.¹⁸⁵² This figure did not form part of the operational budget of GCIS itself. The figure of R600m per annum was the quantum of the ad-spend handled by GCIS on behalf of the various government departments which was drawn from their respective budget allocations.¹⁸⁵³ The departments would not have known the aggregate figure of R600 million, yet Mr Gupta evidently knew it. The question is: who had given Mr Ajay Gupta this accurate information?
31. Mr Maseko then ended the meeting and left, Mr Maseko testified that, while Mr Gupta expected his instructions to be implemented with a clear action plan,

“I on the other hand, was convinced that I would not be party to what I considered to be improper and potentially corrupt [arrangement] on his part to secure

¹⁸⁵⁰ Exhibit E1, p 13, paras 26-29.

¹⁸⁵¹ Exhibit E1, p28.

¹⁸⁵² Exhibit E1, p 6, para 3; Exhibit E1, p 66, para 7; Transcript 29 August 2018, p 117, lines 17-20.

¹⁸⁵³ Transcript 29 August 2018, p 118-120.

government business. In this regard, Mr Ajay Gupta did not offer me any personal benefit, he was clearly attempting to force my hand in a threatening manner.”¹⁸⁵⁴

Mr Maseko reports the incident

32. Mr Maseko left the meeting with Mr Ajay Gupta feeling “extremely angry”.¹⁸⁵⁵ He immediately called the then Minister in the Presidency, the late Mr Collins Chabane, to report the incident. Minister Chabane said he would “take care of it”.¹⁸⁵⁶ He said he also had a brief meeting about it with the then Deputy President, Mr Kgalema Motlanthe, at which he raised the issue of the pressure he was getting from the Gupta family.¹⁸⁵⁷ Mr Maseko testified that Mr Motlhanthe was shocked by what Mr Maseko told him had happened. Mr Maseko testified that Mr Motlhanthe told him that there were already some concerns about the influence of the Guptas on the President and the National Executive Committee of the ANC was also concerned about the matter. Mr Maseko also had a conversation with Mr Joel Netshitenzhe, who was the Head of Policy in government at the time. He also approached the former Minister in the Presidency, Mr Essop Pahad, “because I had a good relationship with him, and I knew he was close to the Guptas.” He had not gone back to President Zuma to tell him what had occurred. Mr Maseko said: “[T]he more I spoke to people, [the more] I knew that nothing was going to happen.”¹⁸⁵⁸ Mr Maseko was here referring to the question of addressing the problem of the influence of the Guptas on President Zuma.

¹⁸⁵⁴ Exhibit E1, p 14, para 30.

¹⁸⁵⁵ Exhibit E1, p 28.

¹⁸⁵⁶ Transcript 30 August 2018, p 27. See also Exhibit E1, p 28: “he said I mustn’t worry about it. He will make sure that the matter is attended to.”

¹⁸⁵⁷ Transcript 30 August 2018, p 27-28.

¹⁸⁵⁸ Exhibit E1, p 47.

33. Mr Maseko also reported the incident to Rev Frank Chikane, who was a former DG in the Presidency.¹⁸⁵⁹ Rev Chikane has confirmed this fact on affidavit¹⁸⁶⁰ and again in his oral evidence before the Commission.¹⁸⁶¹ However, there was some inconsistency or discrepancy between Mr Maseko's version and that of Rev Chikane in terms of when Mr Maseko discussed the matter with Rev Chikane but nothing turns on this. It is not necessary to go into details about that discrepancy because it does not detract from the essence of the evidence of what transpired in the meeting between Mr Maseko and Mr Ajay Gupta and what followed thereafter.

Mr Ajay Gupta's further approach to Mr Maseko

34. One Friday towards the end of 2010 when Mr Maseko and his wife were driving to the North West Province for a weekend getaway where they were going to attend a golf tournament – the Nedbank Golf Challenge – in Sun City, Mr Maseko received a call from an employee of the Guptas' media company.¹⁸⁶² This is how Mr Maseko explained what followed:

“Initially the approach was made by way of a call from an unknown employee of the Guptas' media company.

The gentleman requested to meet me the following Monday at 08h00 in the morning to discuss government advertising in the soon to be launched New Age Newspaper.

I told him I would meet with him but that he should call me on Monday morning to set up an appointment as my diary was already packed. In this regard, I wished to ensure that whilst I would listen to any proposal, this had to follow proper procedures and had to be done on a proper basis.

¹⁸⁵⁹ Exhibit E1, p 14, para 31.

¹⁸⁶⁰ Affidavit to the Commission deposited to on 28 May 2019, p 17, para 45.

¹⁸⁶¹ Transcript 19 November 2019, p 9.

¹⁸⁶² Transcript 30 August 2018, p 30-31; Exhibit E1, p 34.

He insisted that the meeting had to take place that following Monday as the launch of their newspaper was imminent. I proceeded to tell him that a Monday morning meeting was out of the question. The call ended unceremoniously.

About an hour later, my phone rang again. This time it was Mr Ajay Gupta. He sounded very agitated and he started the conversation with an aggressive tone.

He said his people told him that I was being difficult. I told him what happened in the conversation with his staff member.

He then responded by saying something to the effect that he will not tolerate any nonsense and that I didn't understand what was going on. He said the meeting must happen on Monday morning.

I was extremely offended by what was going on and the manner in which he spoke to me. I told him that he had no right to give me instructions as he was not my employer. His response was that the meeting must no longer take place on the Monday morning, as they had initially demanded, but should happen the following morning, which was a Saturday. I told him how ridiculous his demand was and that I was out of town for the weekend. He insisted that the meeting will take place on the Saturday morning.

I told him in no uncertain terms that I will not be spoken to in that manner nor dictated to as he was attempting to do. In the process and reflective of my annoyance at an attempt to improperly bully me as a government official, I also used an expletive.

At this point he told me that I was being uncooperative and that he was going to speak to my seniors in government who would sort me out and replace me with people who would cooperate with him. I can't recall whether he or I dropped the call. The call ended abruptly."¹⁸⁶³

35. Mr Maseko says that he attempted that evening without success to reach Minister Chabane by telephone. On his return to Johannesburg the following week, he briefed Minister Chabane about the developments.¹⁸⁶⁴

36. When interviewed by the Public Protector's staff, Mr Maseko said he could not recall the exact date when he received the call from Mr Ajay Gupta while he and his wife were

¹⁸⁶³ Exhibit E1, p 14-15, paras 32.

¹⁸⁶⁴ Exhibit E1, p 15, paras 41-42.

on their way to a golf tournament in Sun City.¹⁸⁶⁵ It was on the Friday evening while he was driving there. In fact it must have been Friday 3 December that this occurred, because, in 2010, the Nedbank Golf Challenge took place from Thursday 2 December to Sunday 5 December.¹⁸⁶⁶ This would also fit with his recollection that Mr Gupta told him that "The newspaper is launching in a few days". In fact, The New Age was launched the following Monday, 6 December 2010.¹⁸⁶⁷ It would also explain why Mr Ajay Gupta was so impatient in his demand for a meeting with Mr Maseko, initially at 8 o'clock on the Monday morning, and then on the Saturday.

President Zuma moves to replace Mr Maseko

37. It was in early December 2010, as we have seen, that Mr Maseko rebuffed the second attempt of Mr Ajay Gupta to bully him into providing government financial support to TNA in obvious contravention of the law.
38. Mr Maseko testified about a call he received from Minister Chabane towards the end of January 2011. He said:

"I received a call from Minister Chabane asking me to meet him at his office urgently. I met him at his office the following morning. At the meeting, he advised me that he had been instructed by the President to redeploy me or terminate my contract henceforth.

He told me that, although he [had] no choice but to implement the instruction from the President, he made a commitment not to throw me in the street because he knew that I was a committed civil servant who had not done anything wrong. He told me he would make a plan to find another post for me in the public service."¹⁸⁶⁸

¹⁸⁶⁵ Exhibit E1, p 28-29.

¹⁸⁶⁶ <https://www.golfchannel.com/tours/sunshine-tour/2010/nedbank-golf-challenge>

¹⁸⁶⁷ Exhibit M1, p 88-89; see also Exhibit NN6, p 316: "the first publication of The New Age was on 6 December 2010."

¹⁸⁶⁸ Exhibit E1, p 16, paras 47-48.

39. During his oral evidence, Mr Maseko provided further important details about this. The call from Minister Chabane was on Sunday, 30 January 2011. The Minister requested a meeting with him that afternoon, but he was unfortunately unavailable and they met on the morning of Monday, 31 January. The Minister informed him that President Zuma, who was out of the country at the time,¹⁸⁶⁹ had called him with the instruction. According to Minister Chabane, said Mr Maseko, the President had said that by the time he returned to the country, Mr Maseko should no longer be at GCIS. The Minister said he had “no choice” but to implement this decision because the President was his boss. Mr Maseko said that Minister Chabane “put it in very clear words to say that he did not agree with the decision.”¹⁸⁷⁰ Mr Maseko testified that Minister Chabane said that there were quite a few vacancies in the public service to which Mr Maseko could be moved. He would talk to his colleagues in Cabinet to see who needed a Director-General.¹⁸⁷¹ It is common cause that Mr Zuma was out of the country from about 26 January 2011 and returned to the country on or about 2 February 2011.
40. Events moved very rapidly after that. The transfer of Mr Maseko out of GCIS and his replacement as CEO by Mr Mzwanele Manyi was announced at the Cabinet meeting two days later, Wednesday, 2 February, under curious circumstances. According to Mr Maseko, he did not learn until that announcement was made that his destination was to be the Department of Public Service and Administration.
41. Giving evidence before the Commission in July 2019 former President Zuma flatly denied that he ever instructed Minister Chabane to transfer Mr Maseko or terminate his

¹⁸⁶⁹ President Zuma was evidently attending an African Union summit. Exhibit E1, p 35; Transcript 6 November 2019, p 41. This is supported by the fact that the 16th Ordinary Session of the African Union (AU) Summit, held in Addis Ababa, ended on Monday 31 January 2011. See <https://europafrica.net/2011/02/03/decisions-and-declarations-of-the-january-2011-au-summit/>

¹⁸⁷⁰ Transcript 30 August 2018, p 52.

¹⁸⁷¹ Transcript 30 August 2018, p 40-41.

contract. He said that it was the Minister who may have discussed with him the fact that he would like to transfer Mr Maseko. Mr Zuma testified before the Commission and said: “I think there was an issue between them. I cannot remember the details.”¹⁸⁷² He said that ultimately, the decision to transfer was his as President, but it was not at his instance. He said “at times people use the name of the President”.¹⁸⁷³

42. Mr Chabane is unfortunately deceased and, therefore, cannot be asked for his version or defend himself against the former President’s insinuation of dishonesty and cowardice on his part over the transfer of Mr Maseko.
43. The relationship between Mr Maseko and Minister Chabane was a close personal one as well as a political one. Mr Maseko said that they had “a very solid relationship”.¹⁸⁷⁴ They played golf together.¹⁸⁷⁵ No-one – apart from former President Zuma – has suggested that there was any friction or “issue” between them which might have given rise to a motivation on Mr Chabane’s part to have Mr Maseko moved. During his time at GCIS, said Mr Maseko, there was never even once any complaint about his performance and nobody had raised any issue in that regard.¹⁸⁷⁶ In December 2010, Minister Chabane, responding to a panel’s assessment of Mr Maseko’s performance in GCIS, had recommended “a pay progression for Mr Maseko’s overall performance”.¹⁸⁷⁷

¹⁸⁷² Transcript 16 July 2019, p 25.

¹⁸⁷³ Transcript 16 July 2019, p 29.

¹⁸⁷⁴ Transcript 6 November 2019, p 10.

¹⁸⁷⁵ Exhibit NN1. p 59.

¹⁸⁷⁶ Transcript 30 August 2019, p 56; Transcript 6 November 2019, p 46-47.

¹⁸⁷⁷ Exhibit NN5-DB-156. Mr Maseko had not seen this document before testifying. He said he was “happy” with the performance assessment of 114%. (Transcript 6 November 2019, p 14.) Performance according to standard would be 100%. (Transcript Day 6 November 2019, p 18.) “I think the message we could get out of that number is that performance was exceptional.” (Transcript 6 November 2019, p 20.) There “has never been a year where I got a negative allocation of marks – points” i.e. less than 100% (Transcript 6 November 2019, p 18, 20.)

Mr Zuma himself has not suggested that Mr Maseko was anything less than a good and committed public servant.

44. Mr Maseko's version is corroborated in important respects by other witnesses whose evidence refutes Mr Zuma's testimony in regard to Minister Chabane and the move to replace Mr Maseko as CEO of GCIS.
45. Mr Abednigo Hlungwani gave evidence to the effect set out below.¹⁸⁷⁸
46. His employment in the public service had spanned some 22 years. At the time of the transfer of Mr Maseko, he was the private secretary to Minister Chabane in the Office of the President. He was later made chief of staff to Minister Chabane in the Presidency, moving with him to be his chief of staff at the DPSA. At the time of his testimony to the Commission, Mr Hlungwani was Chief Director in the Office of the DG in the Department of Mineral Resources and Energy.¹⁸⁷⁹
47. He had wished not to have to come and give evidence. His reluctance to appear at the Commission was for two reasons. First, he had been close to Minister Chabane for years and his passing away had pained him emotionally for months and he did not want to come to the Commission and open an emotional wound.¹⁸⁸⁰ Second, on 16 July 2019 (the second day of Mr Zuma's evidence at the Commission during which questioning on the removal of Mr Maseko was continuing), he had received an anonymous phone call from a male who warned him not to say anything about Mr Maseko's removal from office. He did not recognise the voice. The same evening, he received an abusive and

¹⁸⁷⁸ Transcript 26 August 2019, p 28; Exhibit JJ2. Mr Hlungwani's first name was spelled incorrectly in his affidavit (deposed to on 22 August 2019); apart from that he confirmed its contents as correct: see Transcript 26 August 2019, p 29.

¹⁸⁷⁹ Transcript 26 August 2019, p 29-31; Exhibit JJ2, p 1-3, para 3.

¹⁸⁸⁰ Transcript 26 August 2019, p 76.

threatening SMS from a number which he did not recognise.¹⁸⁸¹ The purpose, to say the least, was to discourage him from testifying.¹⁸⁸² Nevertheless, when requested to do so by the Commission, he had obliged.¹⁸⁸³

48. Mr Hlungwani said that, although he had great respect for former President Zuma, he was taken aback to hear him testify before the Commission that he did not call Minister Chabane about the removal of Mr Maseko.¹⁸⁸⁴
49. Mr Hlungwani testified that in late January or early February 2011 when he was at the Union Buildings, he had received a call on his cellular phone from one of the President's private secretaries using her cellular phone. He said: "I think she indicated that they were abroad at the time" – saying that the President would like to talk to Minister Chabane. He confirmed that Minister Chabane was in the office and she said he should ask the Minister to expect a call from the President shortly. Mr Hlungwani said that he relayed the message to Minister Chabane. His desk was in a room adjacent to the Minister's office. Mr Hlungwani testified that, within a few minutes, Mr Zuma's private secretary called him again and indicated that the President wished to speak to Minister Chabane. He then handed his cellular phone to Minister Chabane in his office and walked back to his desk, closing the door behind him. Mr Hlungwani testified that, after a few minutes, the Minister "came through from his office and handed the phone back to me and the day continued".¹⁸⁸⁵

¹⁸⁸¹ Exhibit JJ2, p 5 – 6, paras 23 and 24. (Mr Maseko is mistakenly referred to in para 23 as "Minister Maseko". This was clearly just a drafting error. Mr Hlungwani correctly referred to Mr Maseko in para 12 of his affidavit as the CEO of GCIS at the time.) See also Transcript 26 August 2019, p 51-53.

¹⁸⁸² Transcript 26 August 2019, p 54.

¹⁸⁸³ Transcript 26 August 2019, p 32-33 and 51-52.

¹⁸⁸⁴ Transcript 26 August 2019, p 32.

¹⁸⁸⁵ Exhibit JJ2, p 3, paras 10 and 11; Transcript 26 August 2019, p 34-35.

50. At the stage when he had handed the phone to Minister Chabane, it was the private secretary and not the President himself who was on the line.¹⁸⁸⁶ He was not privy to the conversation that took place with Minister Chabane. It is very probable, however, that the call concerned the removal of Mr Maseko from GCIS and his replacement by Mr Manyi. Although receiving a call from the President's private secretary in order to convey a message from the President to the Minister, or, because the President wanted to speak to the Minister, was not unusual,¹⁸⁸⁷ Mr Hlungwani concluded from what happened subsequently that day and shortly afterwards that the replacement of Mr Maseko was indeed the subject-matter of the President's call to Minister Chabane.
51. Mr Hlungwani said that, when Minister Chabane left the office on the day of the call – which “could have been less than an hour” after the call¹⁸⁸⁸ – he indicated to Mr Hlungwani that he would like to talk to “Themba” (i.e. Themba Maseko). Mr Hlungwani immediately telephoned the head of Mr Maseko's office to inform her that Minister Chabane would like to speak to Mr Maseko “at some stage”.¹⁸⁸⁹
52. Mr Hlungwani confirmed in his evidence:

“A few days after Mr Zuma had spoken to Minister Chabane, I was walking [with] Minister Chabane out of the office to his official vehicle when he informed me that we “would have to move” Mr Maseko to another department. I asked the Minister who the replacement would be at GCIS and he stated, “Jimmy Manyi” (“Mr Manyi”).”¹⁸⁹⁰

¹⁸⁸⁶ Transcript 26 August 2019, p 35-36.

¹⁸⁸⁷ Transcript 26 August 2019, p 48-49, 62.

¹⁸⁸⁸ Transcript 26 August 2019, p 56.

¹⁸⁸⁹ Exhibit JJ2, p 3 paras 12-13; Transcript 26 August 2019, p 36-37, 56-57. Mr Maseko thinks, from what Mr Chabane had said to him, that the call from the President to Minister Chabane would have been on the Friday, the Saturday or the Sunday, i.e. Transcript 6 November 2019, p 40.

¹⁸⁹⁰ Exhibit JJ2, p 4, para 14.

53. Mr Hlungwani assumed that this was as a result of the telephonic discussion between Mr Zuma and Minister Chabane that had taken place a few days earlier.¹⁸⁹¹ The impression was then reinforced by the events of 2 February 2011 – the week after the call – when there was an unexpected news media report followed by an announcement to Cabinet that Mr Maseko was to be moved to the DPSA and replaced by Mr Manyi at GCIS – although Minister Chabane had not explicitly told him that he had been instructed to remove Mr Maseko.¹⁸⁹²
54. The combination of events is a reason the President's call to Minister Chabane had remained in his memory. There are certain calls which he remembers specifically (he gave examples) even after many years have passed.¹⁸⁹³ Another reason is that, when Minister Chabane told him that they would have to move Themba, "he just said ai".
55. Mr Brent Adrian Simons also testified. His evidence leaves little room for doubt.¹⁸⁹⁴ Although Mr Simons had become a vocal critic of Mr Zuma and his association with corruption scandals while he was still the President,¹⁸⁹⁵ there are no grounds for concluding that he invented or exaggerated his version of these events. Mr Simons said that he was a member of the ANC.
56. Mr Simons said that he had worked in the public service for some 18 years. At the time of Mr Maseko's removal, he was working at GCIS.¹⁸⁹⁶ He had applied for a Chief Director's post at GCIS but had not yet been appointed. His appointment took place towards the end of 2011, after Mr Manyi had replaced Mr Maseko as CEO. During

¹⁸⁹¹ Exhibit JJ2, p 4 p 15.

¹⁸⁹² Transcript 26 August 2019, p 59-60.

¹⁸⁹³ Transcript 26 August 2019, p 63-71.

¹⁸⁹⁴ Transcript 26 August 2019, p 8; Exhibit JJ1.

¹⁸⁹⁵ Exhibit JJ1, p 12-13; Transcript 14 January 2020, p 149-154.

¹⁸⁹⁶ Transcript 26 August 2019, p 21.

January 2014 he was seconded to the Office of the Minister in the Presidency and worked directly under Minister Chabane as a Chief Director.¹⁸⁹⁷ He said that he respected Minister Chabane, they became close friends, and “he would often confide in me”.¹⁸⁹⁸

57. He was with Minister Chabane in Australia in March 2014 when news came that the Public Protector’s report on her Nkandla investigation was about to be released.¹⁸⁹⁹ Mr Simons testified that, when President Zuma did not heed Minister Chabane’s advice on how to respond to the report, Minister Chabane –

“was visibly upset and told me that the country and the ANC were moving in the wrong direction. He then told me that when Themba Maseko was the DG in GCIS, the department was being well managed. However, he had been personally phoned by the former president, Mr Zuma, and instructed to remove Mr Maseko from his position and replace him with Mr Jimmy Manyi (“Mr Manyi”).

The Minister told me that he did not want Mr Manyi as the DG at GCIS because of the problems caused by him at the Department of Labour after it had been publicised that Mr Manyi had attempted to secure contracts for his private company.

Minister Chabane told me that he tried to persuade the President to reconsider, but he refused and he was forced to remove Mr Maseko.”¹⁹⁰⁰

58. Mr Simons believed that Minister Chabane was not lying – i.e. not inventing this version belatedly as an excuse. It was clear to him that the Minister was still upset about what

¹⁸⁹⁷ When in May or June of that year, Minister Chabane was transferred to the DPSA, he accompanied him there. After Minister Chabane’s death in March 2015, he continued at the DPSA until 2018 when he resigned and took up a position as a unit manager in Parliament. Exhibit JJ1, p 1, para 3. He had been spokesperson to Minister Chabane, both when he was Minister in the Presidency and when he became Minister for Public Service and Administration. Transcript 14 January 2020, p 86.

¹⁸⁹⁸ Exhibit JJ1, p 9, para 37. “The Minister would often open up and have deep discussions [with me] not only about what was happening within the Ministry or the Department but also politically within the organisation because he knew that I was an active member of the African National Congress at that stage so we would have political discussions as well.” Transcript 26 August 2019, p 14.

¹⁸⁹⁹ ‘Secure in Comfort’, Report No: 25 of 2013/24, 19 March 2014.

¹⁹⁰⁰ Exhibit JJ1, p 11, paras 44-46. See also Transcript 26 August 2019, p 20.

had transpired.¹⁹⁰¹ The same story was heard among the rank and file at the time of Mr Maseko's removal.¹⁹⁰² Mr Simons testified that his experience as a senior manager in GCIS was that "there was a very good relationship between the late Minister and Mr Themba Maseko".¹⁹⁰³

59. Mr Simons said that the former President was being untruthful when he suggested that Minister Chabane had simply used his (the President's) name when informing Mr Maseko that he was to be removed from GCIS. Mr Simons said that such "name dropping" was "totally, totally contradictory to the character of the Minister."¹⁹⁰⁴
60. Mr Ronald Shingange provided further strong evidence corroborating Mr Maseko's version and refuting that of former President Zuma.¹⁹⁰⁵ Mr Shingange testified that he was an advisor to Minister Chabane during the period 2009 to 2013,¹⁹⁰⁶ which includes the time when Mr Maseko was removed as CEO of GCIS and replaced by Mr Manyi. Mr Shingange testified that roughly a week after Mr Maseko had been removed, he was walking into a meeting with Minister Chabane when he asked the Minister what had happened. He said he asked the Minister why Mr Maseko had been removed and the Minister told him that he had been instructed.
61. He did not follow up with the Minister as to why as only the President could give the Minister such an instruction. His assumption was that it must have been the President who had instructed him. A lot of changes were still happening following the new

¹⁹⁰¹ Transcript 26 August 2019, p 21.

¹⁹⁰² Transcript 26 August 2019, p 22.

¹⁹⁰³ Transcript 14 January 2020, p 133.

¹⁹⁰⁴ Transcript 26 August 2019, p 17.

¹⁹⁰⁵ Mr Shingange testified on 14 January 2020 (Transcript 14 January 2020, p 73). His witness statement on affidavit is Exhibit E5. The evidence leader was Adv Susan Wentzel.

¹⁹⁰⁶ He had previously served *inter alia* as Chief Executive of the parastatal Corridor Mining Resources Company, a subsidiary of the Limpopo Economic Development Agency, and had also been the acting head of the Department of Public Works. (Transcript 14 January 2020, p 77).

administration and “there was a lot of movement of Director-Generals from one department to another”.¹⁹⁰⁷ Mr Shingange said that, since Mr Maseko was being moved from one department to another, he did not ask further questions at the time.¹⁹⁰⁸

62. Mr Shingange testified that, when President Zuma testified that he did not instruct Minister Chabane to move Mr Maseko, a lot of people – knowing he had been the Minister’s advisor – phoned him to ask if that was possible. His answer was that it was improbable. Because he “spoke too much”, he had ended up now having to give evidence.¹⁹⁰⁹
63. Mr Shingange testified that the relationship between Mr Maseko and Minister Chabane was good. He said: “I never saw any tension between the two of them during the period that they were working together.” This was true right up to the time that Mr Maseko was removed.¹⁹¹⁰
64. He said that the people had also asked him about the evidence of the former President that Minister Chabane had merely used his (the President’s name). Mr Shingange said people asked him: “Is it in the character of Minister Chabane to do something like that? So I said no, it is not possible”.¹⁹¹¹

¹⁹⁰⁷ Mr Zuma also told the Commission: “I know that there was a bit of shifting of the DGs around that time”: Transcript 16 July 2019, p 26. Mr Maseko was not aware of a general situation at that time where people were moved from one department to another, but could not give “a definitive answer to say there were no movements around at that time”. Transcript 6 November 2019, p 36; also p 44-47.

¹⁹⁰⁸ Transcript 14 January 2020, p 79-80.

¹⁹⁰⁹ Transcript 14 January 2020, p 80-82.

¹⁹¹⁰ Transcript 14 January 2020, p 83.

¹⁹¹¹ Transcript 14 January 202, p 83.

Cabinet meeting on 2 February 2011

65. A mere two days later, on Wednesday 2 February 2011, after President Zuma had returned to the country,¹⁹¹² a Cabinet meeting was held. It was attended by Mr Maseko, still in his capacity as CEO of GCIS and government spokesperson. The transfers of Mr Maseko and Mr Manyi were clearly not on the agenda, because Mr Maseko and Minister Chabane at least would have known about that. During the tea break, Mr Maseko learned that eTV was broadcasting “the news about my axing from GCIS”. He informed Mr Chabane accordingly. Mr Maseko testified: “There was no time for him to inform me that DPSA was going to be my next assignment in government.”¹⁹¹³ Minister Chabane consulted with the President during the break.¹⁹¹⁴ Mr Maseko then checked with his office whether there was a letter from either the Minister or the President. “No letter, all they [his staff] told me was that there is a fellow called Jimmy Manyi who wants to come to the office, because he is the new CEO”.¹⁹¹⁵
66. Mr Hlungwani confirmed that Minister Chabane (whom he served as private secretary at that time¹⁹¹⁶) was in Cabinet on that day, 2 February 2011. The Cabinet meeting was in the Union Buildings. The director in Mr Maseko’s office was there to support him, sitting in a cabinet lounge next to his office and she had alerted him to the television report to the effect that Mr Maseko had been removed and would be replaced by Mr Manyi. She asked him if it was true that Mr Maseko was being removed.¹⁹¹⁷ Although Minister Chabane had said to him that “we would have to move Themba”,¹⁹¹⁸ and also

¹⁹¹² Transcript 6 November 2019, p 41-43.

¹⁹¹³ Exhibit NN1, p 18, para 6.9.2.

¹⁹¹⁴ Exhibit E1, p 17 para 51.

¹⁹¹⁵ Exhibit E1 p 36 (transcript of interview with Public Protector’s staff).

¹⁹¹⁶ Exhibit JJ2, p1, para 3.2.

¹⁹¹⁷ Transcript 26 August 2019, p 39.

¹⁹¹⁸ Transcript 26 August 2019, p 38.

that Mr Manyi would be replacing him,¹⁹¹⁹ he did not know whether or not that had been finalised until “the news started filtering through that day”.¹⁹²⁰

67. Mr Maseko vividly remembered the events that followed at the Cabinet meeting. There was no discussion or decision on the matter: instead an impromptu announcement was made by Minister Chabane “right at the end of the meeting”.¹⁹²¹ That was when he learned that he was to be transferred to the DPSA. He had not been consulted specifically about being moved to the DPSA.¹⁹²²

The changeover at GCIS

68. It is clear from the evidence of Ms Phumla Williams, then the Deputy CEO of GCIS, that the exit of Mr Maseko and his replacement by Mr Manyi as CEO of GCIS was sudden and unexplained and came as a shock to the staff of GCIS.¹⁹²³
69. Mr Manyi’s effective takeover of responsibilities from Mr Maseko occurred on 2 February 2011, the day of the Cabinet meeting, and the date on which Mr Maseko issued his last statement to the media in his capacity as CEO of GCIS.¹⁹²⁴ It is headed “Statement on the Cabinet meeting of 2 February 2011”, and its concluding paragraph read as follows:

“Cabinet noted that Mr Themba Maseko was to be redeployed to the Department of Public Service and Administration (DPSA) with immediate effect. Mr Maseko will be replaced by Mr Jimmy Manyi as the new Government Spokesperson and Chief

¹⁹¹⁹ Transcript 26 August 2019, p 43.

¹⁹²⁰ Transcript 26 August 2019, p 41.

¹⁹²¹ Transcript 6 November 2019, p 35.

¹⁹²² Transcript 23 May 2019, p 45.

¹⁹²³ Transcript 31 August 2018, p 26.

¹⁹²⁴ Exhibit M, p 4, para 5.2 and p 23 annexure (Exhibit) RA1; Transcript 14 November 2018, p 88-89.

Executive Officer of the Government Communication and Information System (GCIS).”

The statement bears Mr Maseko’s name and he confirmed having issued it but he told the Public Protector’s staff that he himself “didn’t even do the statement”.¹⁹²⁵

70. Ms Williams recalled the arrival of Mr Manyi at GCIS on the same day that Mr Maseko left his office and was not aware of any process of “handover” between the two within the department.¹⁹²⁶ This is also what happened when Mr Des van Rooyen replaced Mr Nene as Minister of Finance. Mr van Rooyen did not want a handover from Mr Nene. Ms Williams testified: “The moment he [Mr Maseko] left, we then got to be told that Mr Manyi was at the basement in our building. He had clearly been waiting in the wings”.¹⁹²⁷

The documentary evidence

71. Transfers of heads of department are governed by s 12(3) of the Public Service Act (PSA).¹⁹²⁸ That provision reads:

“(3)(a) The President may transfer the head of a national department or national government component before or at the expiry of his or her term, or extended term, to perform functions in a similar or any other capacity in a national department or national government component in a post of equal, higher or lower grading, or additional to the establishment, as the President considers appropriate.

. . .

(d) A transfer in terms of this subsection may only occur if–

(i) the relevant head of department consents to the transfer; or

(ii) after due consideration of any representations by the head, the transfer is in the public interest.”

¹⁹²⁵ Exhibit E1, p 36.

¹⁹²⁶ Transcript 31 August 2018, p 27-28.

¹⁹²⁷ Transcript 31 August 2018, p 20.

¹⁹²⁸ Enacted by Proclamation No. 103 of 1994.

72. The evidence has raised no suggestion of a transfer “in the public interest” or of any representations by Mr Maseko in that regard. There is no doubt that Mr Maseko ultimately consented to his transfer from GCIS to the Department of Public Service and Administration but that was simply because he had no choice in the matter. He had been told by Minister Chabane that Minister Chabane had been instructed by the President to fire him or move him somewhere else. President Zuma did not want to find Mr Maseko at GCIS when he arrived back in the country. Mr Maseko had to choose between consenting to a transfer to the DPSA and still have a job or refuse to consent to the transfer and be thrown into the street. It was no choice at all.
73. However, the question is not whether Mr Maseko consented to the transfer but who initiated the idea of Mr Maseko’s removal from his position or whose was it that Mr Maseko be removed from his position and why. Mr Maseko testified that Minister Chabane told him that Mr Zuma gave him an instruction to remove him. Mr Zuma denied this when he testified before the Commission and said that it must have been Minister Chabane who had wanted Mr Maseko removed and used his name (President Zuma’s name) when speaking to Mr Maseko effectively to falsely implicate Mr Zuma in Mr Maseko’s removal. Of course, Minister Chabane is deceased and can no longer speak for himself but Mr Maseko made it clear that Minister Chabane could not have had any reason to want him removed from his position.
74. Among the exhibits is a letter apparently signed by Mr Chabane as Minister in the Presidency on 2 February 2011 (the same day as the Cabinet meeting), addressed to Minister Baloyi of the DPSA, saying:¹⁹²⁹

“TRANSFER OF MR T J MASEKO TO THE DEPARTMENT OF PUBLIC SERVICE
AND ADMINISTRATION

¹⁹²⁹ Exhibit NN5, p 43.

I concur, subject to the President's approval, with the transfer of Mr T J Maseko, the Director-General of the Government Communication and Information System (GCIS), in terms of section 12(3)(a) to the Department of Public Service and Administration (DPSA). The proposed effective date of the transfer, namely the date following the date that the President signs the President's Minute, is also supported."

75. An undated explanatory memorandum (not a Cabinet memorandum) which appears to have accompanied the unsigned President's Minute to which Mr Chabane referred, includes this paragraph:¹⁹³⁰

"The President's Minute proposes the transfer of Mr TJ Maseko, the Director-General of the Government Communication and Information System (GCIS), to the post of Director-General of the Department of Public Service and Administration (DPSA). The post of Director-General of the DPSA is vacant. The transfer of Mr Maseko is proposed to coincide with the transfer of Mr Manyi, the Director-General of the Department of Labour, to the post of Director-General of the GCIS."

Next to this paragraph, in the left-hand margin, there is a signature which Mr Baloyi has confirmed to be his.¹⁹³¹ Another paragraph of the same document states that "the proposed transfer was discussed with Mr Maseko and he is in agreement."¹⁹³²

76. The President's Minute No. 32 signed by President Zuma on 3 February 2011¹⁹³³ and which Mr Baloyi confirms as having been co-signed by him as "Minister of the Cabinet", stated:

"I hereby, in terms of section 12(3)(a), read with section 12(3)(d), of the Public Service Act (promulgated under Proclamation No. 103 of 1994), transfer Mr T J Maseko from the post of Director-General of the Government Communication and Information System to the post of Director-General of the Department of Public

¹⁹³⁰ Exhibit NN5, p 42, para 2.

¹⁹³¹ Transcript 3 December 2019, p 184.

¹⁹³² Transcript 3 December 2019, p 184, para 4.

¹⁹³³ Mr Maseko (Transcript 6 November 2019, p 84) said that he does not think the signature appearing as that of the President is in fact President Zuma's signature, but it appears very similar to the signature of President Zuma on Proclamation No. 3 of 2018 appointing this Commission. It should be accepted that it was indeed signed by the President.

Service and Administration, with effect from the date following the date on which this President's Minute is signed by the President until 30 June 2012."

77. Thus the effective date of the transfer was to be 4 February 2011. Mr Maseko's contract was due to expire in June 2012. However, Mr Maseko testified that he left GCIS on the same day on which the Cabinet had held its meeting. That was on 2 February 2011.
78. An essentially identical President's Minute No. 33 was signed by President Zuma and co-signed by Minister Baloyi on the same date in order to effect the transfer of Mr Manyi from the Department of Labour to the post of Director-General of GCIS.¹⁹³⁴
79. Valid approval of the transfer of a DG, after the necessary consents and concurrences have been obtained, would mean an exercise of executive authority by the President in terms of s 12(3) of the PSA. That authority has to be exercised "together with the other members of the Cabinet" as contemplated by s 85(2) of the Constitution.¹⁹³⁵
80. Dr Cassius Reginald Lubisi, Director-General in the Presidency and Secretary of Cabinet in 2011 and who still held that position in 2019,¹⁹³⁶ deposed to an affidavit on 18 November 2019 in response to a request from the Commission. In paragraph 5 of

¹⁹³⁴ Exhibit NN5, p 51.

¹⁹³⁵ Section 85 of the Constitution provides:

Executive authority of the Republic

- (1) The executive authority of the Republic is vested in the President.
- (2) The President exercises the executive authority, together with the other members of the Cabinet, by—
 - (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
 - (b) developing and implementing national policy;
 - (c) co-ordinating the functions of state departments and administrations;
 - (d) preparing and initiating legislation; and
 - (e) performing any other executive function provided for in the Constitution or in national legislation.

¹⁹³⁶ <http://www.thepresidency.gov.za/profiles/director-general-dr-cassius-reginald-lubisi%3A-profile>;
<https://www.politicsweb.co.za/documents/cassius-lubisi-new-dg-of-presidency>

the affidavit he recorded that the Commission had requested those parts of the Cabinet minutes of 2 February 2011 that reflected:

- “5.1 any and all noting by Cabinet of the decision to transfer Mr Themba Maseko from the Government Communication and Information System (GCIS”) to the Department of Public Service and Administration;
- 5.2 any and all noting by Cabinet of the decision to transfer Mr Mzwanele Manyi to GCIS;
- 5.3 any and all decisions of Cabinet relating to the transfers of Mr Manyi (to GCIS) and Mr Maseko (from GCIS); and
- 5.4 any recordal of any memoranda that were placed before Cabinet at its meeting of 2 February 2011 in relation to the transfer of Mr Manyi and Mr Maseko.”

81. Dr Lubisi stated that officials within the Presidency had obtained a copy of the relevant minutes and discovered that “no part of the minutes reflected any of the requested items listed in paragraph 5 above.”¹⁹³⁷ He went on to say in paragraph 9 of his affidavit:

“I have personally studied the minutes of the Cabinet meeting of 2 February 2011 and can confirm that the minutes do not record any cabinet memorandum dealing with the transfers of Mr Maseko and Mr Manyi (or indeed any transfers of the Directors-General of GCIS, DPSA or Labour) having served before Cabinet at the meeting of 2 February 2011. I can also confirm that the minutes do not reflect any discussion of, or decision taken in relation to, these transfers.”

Evidence of Mr Baloyi on the transfer of Mr Maseko

82. Mr Baloyi gave evidence¹⁹³⁸ on the transfers of both Mr Maseko and Mr Manyi. After he had testified, he wrote to the Commission asking that he be allowed to testify further,

¹⁹³⁷ Exhibit NN5, p 320.

¹⁹³⁸ Transcript 3 December 2019. Statement of Makaringe Richard Baloyi, Exhibit NN4.

after having considered additional documentation and conducted his own investigation. He was invited to submit an affidavit which he did.

83. At the relevant times Mr Baloyi was the Minister of Public Service and Administration, having been appointed in 2008. He served in that position until October 2011.¹⁹³⁹ He had then moved on to other responsibilities. He said that, because of this and the number of years that had elapsed, a lot of things were now “in the cracks of oblivion”, and he needed to refresh his memory from documents to which he no longer had access. Some had recently been given to him by the Commission.¹⁹⁴⁰ He was invited to specify, in the course of his testimony, any particular document he might need which had not been received, and an attempt would be made to get it.¹⁹⁴¹
84. From memory, he could not be sure whether he was at the Cabinet meeting on 2 February 2011 or not, but that could be verified through Cabinet minutes. The evidence before the Commission had been that he was not at the meeting.¹⁹⁴² It was later confirmed by the President’s Office that the minutes showed that Mr Baloyi was not present, whereas Ms Oliphant, the Minister of Labour, was present.¹⁹⁴³
85. Mr Baloyi stated that the formal process of transferring a DG requires an initiator and involves “consent, concur, concur, approve”. Mr Baloyi explained what he meant by this “song”.¹⁹⁴⁴ If the receiving or the releasing Minister is the initiator, then the DG himself has to consent and the other Minister has to concur. The initiator could however be the

¹⁹³⁹ Transcript 3 December 2019, p 93.

¹⁹⁴⁰ Transcript 3 December 2019, p 94-95.

¹⁹⁴¹ Transcript 3 December 2019, p 96.

¹⁹⁴² Transcript 3 December 2019, p 97.

¹⁹⁴³ Transcript 3 December 2019, p 156.

¹⁹⁴⁴ Mr Baloyi confirmed that he counter-signed the President’s Minute as Minister of the Cabinet. Transcript 3 December 2019, p 157.

DG himself/herself, in which case his or her Minister needs to concur and the Minister to whose department the DG is being transferred also needs to concur.¹⁹⁴⁵

86. Cabinet also has to “concur” and “then the President signs a Presidential minute which is co-signed by the Minister of Public Service and Administration to effect the transfer”. It is the concurrence of the Cabinet “that then gives the President the authority to sign the President’s Minute”.¹⁹⁴⁶ The “concurrence” of the Cabinet would be its participation in the approval of a transfer by the President for purposes of s 85(2) of the Constitution.
87. There are also circumstances, said Mr Baloyi, in which the Minister of Public Service and Administration may initiate the transfer of the DG of another Department. He said whatever the case, “the various consents, concurrences and approvals that [he] talked about” would be needed.¹⁹⁴⁷
88. Mr Baloyi testified that he, as Minister of Public Service and Administration had moved for the transfer of Mr Maseko to the DPSA when he was informed that Mr Maseko’s exit from GCIS “had to happen”. There were only two alternatives in that situation: the redetermination of his contract on a severance package or transfer.¹⁹⁴⁸ He testified:

“(f) I preferred the option of transfer and began to negotiate for such to happen and do so in a manner that he be transferred to the Department of Public Service and Administration, as, at the time, there was a need for such a resource and, considering his experience, he would be suitable for the job, hence I moved for his transfer, after I took a decision his services would be of value to the DPSA.

(g) I discussed with his Principal and obtained concurrence.

(h) I discussed with Mr Maseko and got his consent.”¹⁹⁴⁹

¹⁹⁴⁵ Transcript 3 December 2019, p 99-100.

¹⁹⁴⁶ Transcript 3 December 2019, p 122.

¹⁹⁴⁷ Transcript 3 December 2019, p 100-101.

¹⁹⁴⁸ Exhibit NN4, p 6-7.

¹⁹⁴⁹ Exhibit NN4, p 7.

89. This, said Mr Baloyi, was not out of any special consideration for Mr Maseko, but because he preferred generally that capable DGs should be transferred rather than be lost to the public service every time it was alleged that, in one position, there has been “an irretrievable breakdown of trust”.¹⁹⁵⁰
90. As to Mr Maseko’s transfer, Mr Baloyi testified that the following was required: “The written consent of the releasing Executive Authority, a Cabinet Memorandum requesting the Cabinet to approve the transfer, [a] co-signed [Presidential]¹⁹⁵¹ Minute of the Minister of DPSA and the President,¹⁹⁵² as well as the appointment letter on transfer.”¹⁹⁵³ He said that all these were very important documents.¹⁹⁵⁴
91. Mr Baloyi testified that the Cabinet memorandum “will indicate that Minister so and so has given consent”, but the consent itself will not be attached to the memorandum.¹⁹⁵⁵ He was shown a pro forma Cabinet memorandum used for the filling of posts of heads of department and confirmed that the same type of pro forma memorandum would have been used also in the case of Mr Maseko’s and Mr Manyi’s transfers.¹⁹⁵⁶
92. Mr Baloyi testified that, while the necessary consents and the Cabinet memorandum should ordinarily be submitted to the DPSA at least four weeks before the relevant Cabinet meeting, the timing would in reality depend on the circumstances. He said that it could be far less than four weeks.¹⁹⁵⁷ However, he said that there “must be a Cabinet

¹⁹⁵⁰ Exhibit NN4, p 7-12.

¹⁹⁵¹ In his statement, Mr Baloyi wrote “Cabinet Minute” at this point, but corrected this during his oral evidence: Transcript 3 December 2019, p 105.

¹⁹⁵² The counter-signing of the Presidential Minute was required by s 101 (2) of the Constitution. Transcript 3 December 2019, p 109-110.

¹⁹⁵³ Exhibit NN4, p 12-13.

¹⁹⁵⁴ Transcript 3 December 2019, p 102.

¹⁹⁵⁵ Transcript 3 December 2019, p 104.

¹⁹⁵⁶ Transcript 3 December 2019, p 106.

¹⁹⁵⁷ Transcript 3 December 2019, p 110-113.

Memorandum”, the consent of the releasing authority must be obtained, and Cabinet must make a decision about the transfer.¹⁹⁵⁸

93. The late Mr Chabane was the executive authority (Minister) in the Presidency responsible for Performance Monitoring and Evaluation. He was in charge of matters relating to GCIS and was Mr Maseko’s principal.¹⁹⁵⁹ Mr Baloyi testified that Mr Chabane approached Mr Baloyi as Minister of Public Service and Administration to ask for assistance in managing the exit of Mr Maseko from GCIS.¹⁹⁶⁰ Mr Baloyi stated that the two of them met to discuss the matter. He said that their discussion was not over the phone.¹⁹⁶¹

94. Mr Baloyi could not recall when exactly this occurred and could not say whether it was while President Zuma was out of the country.¹⁹⁶² He said that it could have been that week before the Cabinet meeting on 2 February 2011. Mr Baloyi became “fairly confident” of this, having regard to the letter from Minister Chabane dated 2 February 2011¹⁹⁶³ in which he concurred, subject to the President’s approval, with the transfer of Mr Maseko to the DPSA.¹⁹⁶⁴ He said that it was certainly before Mr Maseko was transferred because he (Mr Baloyi) had initiated the transfer. This was after being asked by Minister Chabane for advice in dealing with exit management. Mr Baloyi said: “I did not become aware [of the transfer] . . . I initiated it.”¹⁹⁶⁵

¹⁹⁵⁸ Transcript 3 December 2019, p 112, 114, 122.

¹⁹⁵⁹ Exhibit NN4, p 14; Transcript 3 December 2019, p 116.

¹⁹⁶⁰ Transcript 3 December 2019, p 129.

¹⁹⁶¹ Transcript 3 December 2019, p 129-130.

¹⁹⁶² Transcript 3 December 2019, p 118.

¹⁹⁶³ Exhibit NN5, p 43.

¹⁹⁶⁴ Transcript 3 December 2019, p 127.

¹⁹⁶⁵ Transcript 3 December 2019, p 119-120, 191.

95. Mr Baloyi testified that Mr Chabane had communicated to him during the discussion that there was an executive authority “position”¹⁹⁶⁶ that Mr Maseko had to leave GCIS. Mr Baloyi testified that Mr Chabane said a decision had been taken that Mr Maseko should leave.¹⁹⁶⁷ Mr Baloyi testified: “There was a decision for his exit.”¹⁹⁶⁸ Mr Baloyi stated that Mr Chabane did not say that it was his decision, but it is the responsibility of the executive authority (i.e. the President in respect of DGs) to transfer. Mr Baloyi did not ask him whether he had approached the President in this regard, but any decision in this regard would have needed the support of the President. Mr Baloyi testified that it was not Mr Maseko who had initiated the move.¹⁹⁶⁹
96. Mr Baloyi said that he and Mr Chabane had “agreed that both of us should consult [Mr Maseko] individually” about the preferred course to be taken.” He said “[I]f the decision of Cabinet was [on] the 2nd [February 2011], it is a decision that should have [been] preceded by these interactions.”¹⁹⁷⁰
97. Mr Maseko’s evidence that he had no discussion with Mr Baloyi before the announcement of the transfer in Cabinet on 2 February 2011 was put to Mr Baloyi.¹⁹⁷¹ Mr Baloyi was adamant that he had discussed the matter with Mr Maseko before the transfer, and that “our discussion went very far”.¹⁹⁷² He said that he was not, as had been suggested by Mr Maseko, confusing this with a later discussion or discussions about Mr Maseko’s future before the latter left the DPSA and government service in

¹⁹⁶⁶ Transcript 3 December 2019, p 129.

¹⁹⁶⁷ Transcript 3 December 2019, p 132.

¹⁹⁶⁸ Exhibit NN4, p 15.

¹⁹⁶⁹ Transcript 3 December 2019, p 131, 132, 194-197. Exhibit NN4, p 7.

¹⁹⁷⁰ Transcript 3 December 2019, p 122-123; Exhibit NN4, p 15.

¹⁹⁷¹ Transcript 3 December 2019, p 133.

¹⁹⁷² Transcript 3 December 2019, p 135.

July 2011.¹⁹⁷³ According to Mr Baloyi, it had occurred “the day before I gave feedback to Minister Chabane”.¹⁹⁷⁴ Mr Baloyi testified that Mr Maseko had questioned what the use was of transferring him to his department so near the end of his contract, especially as in no time he (Mr Baloyi) could decide that Mr Maseko should leave.¹⁹⁷⁵ However, this does not accord with the fact that there were, in fact, still about 18 months left in Mr Maseko’s contract. According to Mr Baloyi, Mr Maseko had not discussed with him why he was required to leave GCIS and Mr Baloyi had not asked.¹⁹⁷⁶

98. Mr Baloyi testified that he had no recollection of receiving a call from Mr Maseko after the Cabinet meeting, either on the same day or the next day. Mr Baloyi said that Mr Maseko’s evidence that Mr Maseko informed him in that call that he was his new DG is not in line with his own recollection of how the transfer happened.¹⁹⁷⁷
99. Mr Baloyi did not say that Mr Maseko’s evidence was “false” – i.e., “saying something deliberately knowing that it is not the truth”.¹⁹⁷⁸ He testified that the Commission would have to decide which of the two conflicting versions to accept.¹⁹⁷⁹ He said that what “the cracks of oblivion” might be affecting both of them. He said that there was no malicious intent.¹⁹⁸⁰ Once it is accepted, as Mr Baloyi himself accepted, that Mr Maseko had not initiated his transfer, the other discrepancies in Mr Maseko’s and Mr Baloyi’s versions are not material for purposes of deciding who initiated Mr Maseko’s transfer and why he initiated it.

¹⁹⁷³ Transcript 3 December 2019, p 135-136, 143.

¹⁹⁷⁴ Transcript 3 December 2019, p 137.

¹⁹⁷⁵ Transcript 3 December 2019, p 141.

¹⁹⁷⁶ Transcript 3 December 2019, p 145.

¹⁹⁷⁷ Transcript 3 December 2019, p 208-209.

¹⁹⁷⁸ Transcript 3 December 2019, p 147.

¹⁹⁷⁹ Transcript 3 December 2019, p 148.

¹⁹⁸⁰ Transcript 3 December 2019, p 150.

100. Mr Baloyi retreated further from certainty when it was disclosed to him during his testimony that an affidavit from the Presidency regarding the minutes of the Cabinet meeting of 2 February 2011 showed that no Cabinet memorandum on the matter of the transfers of Mr Maseko and Mr Manyi was placed before Cabinet and that there was no Cabinet decision on the matter.¹⁹⁸¹ He now acknowledged that he had no independent recollection of a Cabinet memorandum on the matter, but assumed that it existed and had been put before Cabinet because he had co-signed the Presidential Minute the following day. He said that he was basing his evidence on there having been due process and on what normally occurred. The Cabinet memorandum would have been prepared by his department for him. There would have been concurrence by Cabinet. He said that during his term, Cabinet had never given concurrence to a verbal announcement.¹⁹⁸²

101. If, indeed, there had simply been an announcement to Cabinet that Mr Maseko was being transferred from GCIS to DPSA and that Mr Manyi would replace him, said Mr Baloyi, then it was understandable that there was no Cabinet memorandum – but how then could a President's Minute be addressed? He said that it would be very surprising to him if such a situation happened.¹⁹⁸³ He was not convinced that there was no Cabinet memorandum, and wanted to be convinced.¹⁹⁸⁴ He said that it would shock him to know that there was no Cabinet memorandum, no discussion of the matter in Cabinet, and no decision in Cabinet on the two transfers.¹⁹⁸⁵ That was in fact the case. There was no cabinet memorandum, there was no discussion of the matter at Cabinet and there was no Cabinet decision on the matter.

¹⁹⁸¹ Transcript 3 December 2019, p 151-154, 162-163.

¹⁹⁸² Transcript 3 December 2019, p 157-159.

¹⁹⁸³ Transcript 3 December 2019, p 160-161.

¹⁹⁸⁴ Transcript 3 December 2019, p 163.

¹⁹⁸⁵ Transcript 3 December 2019, p 164.

102. Was it possible (he was asked) that he could have co-signed the President's Minute even though there was no Cabinet memorandum by reason of his role in the transfer? He said that he knew that a decision had been taken that Mr Maseko should leave GCIS, and he was asked to advise on managing the exit; on his version, he had a discussion with Mr Maseko who had verbally consented to a transfer; the President had no problem with the transfer, to say the least; the media were already running the story. On his version, too, he was told by Minister Chabane that Mr Maseko had not initiated his transfer.
103. Mr Baloyi said that, if there was a move to sign the President's Minute and fix the rest of the paperwork later, they would be tracing that indeed the paperwork was done, but for him "it is just unthinkable that such a thing can happen."¹⁹⁸⁶ If the urgency was to avoid the impression being created that Mr Maseko was being fired, "what I would have done was to expedite [the formalities] but make sure that the due process is followed." He agreed that due process would have included Cabinet discussing the issue and making a decision. Cabinet concurrence had to be in place before the Presidential Minute – the last step in the process – was signed. He said that he was not the type of person to do something incorrect just because somebody decided that it had to be done.¹⁹⁸⁷
104. Mr Baloyi stated that even his department (the receiving department) would have said: "but where is the due process?" If the DPSA has no record about the matter his position would be one of serious disappointment. He cannot imagine how there could have been

¹⁹⁸⁶ Transcript 3 December 2019, p 166-167.

¹⁹⁸⁷ Transcript 3 December 2019, p 167-169.

a transfer without a Cabinet memorandum.¹⁹⁸⁸ If it existed, one would expect DPSA to have it.¹⁹⁸⁹

105. The fact that eNCA had learned of the transfer on 2 February, the day of the Cabinet meeting, would not have necessitated a departure from the normal practice. Mr Baloyi said that a statement could easily be issued to clarify the matter “and then we deal with the issues accordingly”.¹⁹⁹⁰

106. Mr Baloyi was next referred to the single-page document headed “EXPLANATORY MEMORANDUM”.¹⁹⁹¹ He confirmed that it bore his signature. It “rang a bell” in his memory, but he was uneasy about being asked to deal with it as a loose piece of paper, out of the context of whatever submission or file would have contained it.¹⁹⁹² His signature was on the side of the document, next to paragraph 2 which indicated that the post of DG at DPSA, to which Mr Maseko was being transferred, was vacant. According to Mr Baloyi, the document could be an explanatory memorandum, drafted at the Presidency and attached to the President’s Minute, to which it refers. What was clear was that it was not a Cabinet memorandum.¹⁹⁹³

107. The document also referred to the concurrence of Minister Chabane and said: “see herewith a copy of his letter to the Minister for the Public Service and Administration in this regard”. It must therefore have been drafted, or its draft finalised, after Mr Chabane

¹⁹⁸⁸ Transcript 3 December 2019, p 171, 175-176.

¹⁹⁸⁹ Transcript 3 December 2019, p 180.

¹⁹⁹⁰ Transcript 3 December 2019, p 179. In fact it was “eNews” at that stage: the eNCA brand was introduced later: see <https://en.wikipedia.org/wiki/ENCA#History>

¹⁹⁹¹ Exhibit NN5, p 42, para 75.

¹⁹⁹² Transcript 3 December 2019, p 185, 187.

¹⁹⁹³ Transcript 3 December 2019, p 186-187. Adv Hofmeyr said: “I should be fair and say the documents we have received from both DPSA and Department of Labour are in a state of disarray.” Transcript 3 December 2019, p 188.

had signed his letter on 2 February 2011.¹⁹⁹⁴ The President's Minute was signed on 3 February 2011.¹⁹⁹⁵

108. In his subsequent affidavit to the Commission,¹⁹⁹⁶ Mr Baloyi sought to deal with the fact that the evidence so far left “a space for insinuating that my signature on the document was a reflection of negligence or purposive deviation from established norms in my handling of the transfer of the two officials”.¹⁹⁹⁷ He had now read the affidavit of Dr Cassius Lubisi, the DG in the Presidency.¹⁹⁹⁸ According to Mr Baloyi, the content of Dr Lubisi's affidavit, if confirmed,

“would raise questions of ulterior motives in the process, thus feeding on the perception that the whole project of the transfer was fraught with a desire to facilitate some questionable deals, and ... if not [confirmed], such a simple-minded conclusion would unfairly put the then Government in a bad light, even if done inadvertently.”

109. Unfortunately, Mr Baloyi's affidavit only makes his position worse. In desperation, he tried to build a raft from twigs.

110. In the first place, he claims that “the post-Cabinet statement by Mr Maseko”, which indicated that the Cabinet had “noted” the transfers,¹⁹⁹⁹ shows that DG Lubisi's version of the content of the minutes could well be wrong. Actually, Mr Maseko had said that, while the statement was the last such statement bearing his name, and that he issued

¹⁹⁹⁴ Transcript 3 December 2019, p 188-189; Exhibit NN5, p 43.

¹⁹⁹⁵ Exhibit NN5, p 50.

¹⁹⁹⁶ Affidavit deposited to on 12 February 2020.

¹⁹⁹⁷ Affidavit of 12 February 2020 para 2.1.4.

¹⁹⁹⁸ Exhibit NN5-DB-319 – 321. For ease of reference here, Dr Lubisi states in para 9: “I have personally studied the minutes of the Cabinet meeting of 2 February 2011 and can confirm that the minutes do not record any cabinet memorandum dealing with the transfers of Mr Maseko and Mr Manyi (or indeed any transfers of the Directors-General of GCIS, DPSA or Labour) having served before Cabinet at the meeting of 2 February 2011. I can also confirm that the minutes do not reflect any discussion of, or decision taken in relation to, these transfers.”

¹⁹⁹⁹ Exhibit M, p 24.

it,²⁰⁰⁰ he did not write it himself.²⁰⁰¹ Mr Maseko's direct and first-hand evidence is that there was merely a hurried announcement to Cabinet at the end of the Cabinet meeting, necessitated by the fact that the transfers – which the Cabinet had never considered – had already been leaked to the news media. There was, therefore, in truth no formal “noting” by Cabinet and the absence of any such reference in the minutes makes perfect sense. Mr Baloyi himself was not at the Cabinet meeting. Mr Hlungwani, then Private Secretary to Minister Chabane, has confirmed the sense of surprise on 2 February 2011 that the transfers (which he believed to be still in preparation) were already being reported. The Commission has already gathered all the documentary evidence made available to it, and none of it supports Mr Baloyi's speculative line of defence. He himself has been able to produce nothing further.²⁰⁰²

Did President Zuma instruct Minister Chabane to remove Mr Maseko and, if so, why?

111. Mr Zuma testified that, if he had wanted Mr Maseko out, it would have been strange for him to call from abroad to give such an instruction:

“I will wait until I leave the country and when I am very far away then call[!] It is quite funny. I am not running a department. Why would I have not talked to Minister Chabane when I was here? Why should I wait until I go? It is a little bit fishy.

[I]f the Minister is finding it difficult to say to the DG, I am now saying go, and use the name of the President because I do not see why I should leave the country. Only when I am abroad then I must attend to this issue. It definitely – it is a little bit strange and funny and I – I never phoned Chabane about the – this DG when I was abroad. Not at all.”²⁰⁰³

112. The problem with this reason given by Mr Zuma as to why it must be accepted that he did not instruct Minister Chabane to remove Mr Maseko is that the evidence that the

²⁰⁰⁰ Transcript 6 November 2019, p 57.

²⁰⁰¹ para 69.

²⁰⁰² Affidavit of 12 February 2020 para 3.2.10.

²⁰⁰³ Transcript 16 July 2019, p 29-13.

Commission heard in regard to quite a few instances suggests that he could do terrible things to give effect to the wishes of the Guptas. A few examples will suffice to make the point. He fired Minister Nhlanhla Nene because Minister Nene was not co-operating with the Guptas and they wanted Mr Nene fired. President Zuma got himself involved in the suspension of executives in Eskom which led to the removal of three of them and they were replaced by Gupta associates. Furthermore, he refused to fill the position of Group Chief Executive Officer of Transnet for over two years because he wanted Mr Siyabonga Gama for that position and there is evidence heard by the Commission of a connection between Mr Gama and the Guptas.

113. On the evidence heard by the Commission there is absolutely no doubt that President Zuma did, indeed, instruct Minister Chabane to fire Mr Themba Maseko or move him from his position as DG and CEO of GCIS. There is also no doubt that in giving this instruction, President Zuma was giving effect to the wishes of the Guptas or was complying with their request or instruction to him to remove Mr Maseko because he had refused to co-operate with them. The factors set out in the next 17 paragraphs support this.
114. Mr Maseko did not ask to be removed from GCIS; in this regard it must be stated that Mr Maseko's evidence that he did not initiate his transfer was not challenged. Instead, it was corroborated by Mr Baloyi who said that Minister Chabane told him that Mr Maseko had not initiated the transfer.
115. It was not in the public interest to remove Mr Maseko from his position.
116. Mr Maseko's transfer was not related to any misconduct or allegation of misconduct or breach of contract of employment on his part.

117. Mr Maseko's transfer was not related to any poor or unsatisfactory performance of his duties.
118. Mr Maseko's transfer was not based on any legitimate operational requirements of GCIS or government.
119. Mr Maseko's transfer was not based on any agreement between himself and Mr Manyi.
120. In the meeting between Mr Ajay Gupta and Mr Maseko in October 2010 Mr Ajay Gupta had demanded that Mr Maseko should agree to use the whole of the government's R600 million advertising budget of the year to advertise in the Gupta-linked newspaper, The New Age, and Mr Maseko had rejected this demand.
121. Mr Ajay Gupta adopted a hostile or aggressive attitude towards Mr Maseko at their meeting when Mr Maseko rejected his demand.
122. Mr Ajay Gupta told Mr Maseko at their meeting that he should tell him if any Minister did not co-operate.
123. Mr Ajay Gupta made it clear to Mr Maseko that they (the Guptas) could summon any Minister who did not co-operate.
124. In a telephone conversation early in December 2010 Mr Ajay Gupta had threatened to report Mr Maseko to his seniors who, he said, would "sort Mr Maseko out" and replace him with someone who would co-operate with them.
125. As far as President's Zuma's call to Mr Maseko on the day that Mr Maseko was on his way to meet with Mr Ajay Gupta is concerned, the idea of that call must have been to convey the message to Mr Maseko that the Guptas enjoyed the support of the highest office in the land so that this could work as pressure on Mr Maseko to co-operate with

the Guptas; this has to be so because, Mr Maseko had not refused to meet with the Guptas, but, on the contrary he had agreed to meet with them. The Guptas would not have had a reason to ask Mr Zuma to intervene on their behalf. So the idea must have been to put some subtle pressure on Mr Maseko to co-operate with the Guptas.

126. By President Zuma's own admission, he and the Guptas were good friends.
127. Mr Hlungwane, Mr Simons and Mr Shingange, all of whom worked in the Presidency at certain times, all testified that they were told by Minister Chabane on different occasions that he had been instructed to remove Mr Maseko; the only person who could have instructed Minister Chabane to remove Mr Maseko was President Zuma.
128. President Zuma had an interest in the success of the media business of the Guptas.
129. Although President Zuma was the one who had the final power in law to remove or transfer Mr Maseko, he failed, when he testified before the Commission, to give a definitive answer to the question as to why Mr Maseko was removed from his position.
130. Mr Maseko was replaced by Mr Mzwanele Manyi who co-operated with the Guptas which was in line with the statement by Mr Ajay Gupta to Mr Maseko on 3 December 2010 that he (i.e. Mr Ajay Gupta) would report Mr Maseko to his seniors who would replace him with someone who would co-operate with them.
131. Mr Zuma's version that he did not instruct Minister Chabane to fire Mr Maseko or move him out of GCIS and that Minister Chabane may have requested President Zuma to approve Mr Maseko's transfer because there may have been an issue between Mr Maseko and Minister Chabane is a dishonest version. It is a fabrication by Mr Zuma to avoid accountability for a decision that he took. Mr Zuma falsely implicated Minister Chabane because he knew that Minister Chabane has passed on and will not be there

to refute his evidence. Mr Maseko said that he and Minister Chabane had never had any issues. Another witness also testified that Mr Maseko and Minister Chabane had a good relationship.

132. The finding that President Zuma gave Minister Chabane an instruction to fire Mr Maseko or move him out of GCIS is of great significance in understanding Mr Zuma's role in state capture and advancing the interests of the Guptas and his family at the expense of the interests of the people of South Africa. It shows how far he was prepared to go in order to advance the agenda of the Guptas. It will also become important later for other reasons including the question whether President Zuma gave instructions to Mr Bruce Koloane that he should facilitate the landing of the Gupta commercial aircraft at Waterkloof Air Force Base in 2013. President Zuma was prepared to throw his own comrade in the ANC, Mr Maseko, a well performing civil servant into the street just because he had refused to be party to a corrupt arrangement sought by the Guptas.
133. The fact that President Zuma was prepared to replace Mr Maseko with Mr Mzwanele Manyi as the DG or CEO of GCIS also shows how Mr Zuma operated. Mr Maseko was an excellent civil servant. His most recent performance assessment had been done about six weeks or at least the outcome of that assessment had been released six weeks before his removal. It had revealed that the panel that conducted his performance assessment had given him 114%.
134. The removal of Mr Maseko from GCIS came at great cost to the country. Mr Maseko, was one of the few government officials who was willing to stand up to the pressure exerted by the Gupta family. As the evidence presented before the Commission over three years showed time and again, there were far too few public servants with the integrity and courage of Mr Maseko.

The transfer of Mr Manyi to become CEO of GCIS

135. This was on 2 or 3 February 2011.

How the transfer of Mr Manyi to GCIS was effected

136. At the time of Mr Manyi's transfer into GCIS, Ms Neliswe Mildred Oliphant was the Minister of Labour. She had been appointed to this position with effect from November 2010, replacing Minister Mdladlana. She gave evidence at the Commission. Ms Oliphant does not appear to have had any engagement with Minister Chabane over the transfer of Mr Manyi to GCIS. Moreover, she testified that she had not formally signed any consent to such a transfer.²⁰⁰⁴ If true (and we do not have any documentary evidence to the contrary or any good reason to doubt her truthfulness in this regard),²⁰⁰⁵ this omission would have been irregular.

137. The transfer of Mr Manyi was handled by Minister Baloyi in consultation with Minister Chabane as Minister in the Presidency responsible for GCIS. He was at the same time dealing with Minister Chabane over the question of transferring Mr Maseko from GCIS to the DPSA. He seems to have no independent recollection of the documentation, other than what he recalled when shown the documents in the possession of the Commission. Other than what is reflected in those documents, the extent, if any, of his direct engagement with the President in the actual process of transfer remains unclear.

138. Mr Baloyi acknowledged that, if the facts regarding the transfer of Mr Manyi were as stated in Dr Lubisi's affidavit,²⁰⁰⁶ discussed above in relation to the transfer of Mr

²⁰⁰⁴ Transcript 3 December 2019, p 82.

²⁰⁰⁵ Compare Exhibit NN5-DB-043. Mr Baloyi was not asked whether (contrary to the testimony of Ms Oliphant) there was a formal release of Mr Manyi, or consent to his transfer by the Minister of Labour. There would have been little point in asking him, however, given his lack of specific recall in the absence of documentary reminders.

²⁰⁰⁶ Exhibit NN5, p 319-321.

Maseko, then the transfer of Mr Manyi also did not follow due process: there was no Cabinet memorandum, no discussion by Cabinet and no decision taken by Cabinet on 2 February 2011 in relation to either transfer. There is no reason to doubt the correctness of Dr Lubisi's affidavit. Mr Baloyi said that, in that case, the "serious shock" that he had indicated previously when asked about the transfer of Mr Maseko would apply to both cases.²⁰⁰⁷

139. In the absence of "proof" of irregular removals or transfers, he declined to comment on the suggestion that irregular removals and transfers may be a way of facilitating state capture.²⁰⁰⁸ He was not prepared, on the basis of the documents so far made available to him, to conclude on a balance of probabilities that the transfers of Mr Maseko and Mr Manyi were irregular. He said that in his involvement with the transfers of Mr Maseko and Mr Manyi the issue of the Guptas was never raised.²⁰⁰⁹ He said he could not second-guess the decision of executive authorities. He said that no one had ever mentioned his name as being suspected of involvement in, or, benefitting from, state capture, corruption or fraud. He said that he was simply asked to deal with the process of transferring officials at the instance of Ministers to whom he provided support.²⁰¹⁰

140. This narrow defence, however, does not address the question of his considerable involvement in handling the issue of Mr Manyi's status at the Department of Labour at the request of the Office of the President and in close consultation with Mr Manyi himself. The absence of proper documentation, in particular, of any reference whatsoever to the transfers in the Cabinet minutes of 2 February 2011, cannot be explained away – as has been fully discussed above. Minister Baloyi was engaged

²⁰⁰⁷ Transcript 3 December 2019, p 204-205.

²⁰⁰⁸ Transcript 3 December 2019, p 206-207.

²⁰⁰⁹ In the context of the question to which he was responding, "any other thing" is probably a reference to GCIS spending on TNA. Transcript 3 December 2019, p 205-206.

²⁰¹⁰ Transcript 3 December 2019, p 206.

directly in the final implementation of the transfers (for example co-signing the Presidential Minutes Nos. 32 and 33 dated 3 February 2011)²⁰¹¹ either knowing that there had not yet been a Cabinet decision on the matter or not ascertaining whether or not there had been one.

141. Again in this context the question arises: If Mr Baloyi acted in ignorance, why was it so urgent that he act without checking? The probabilities are that he was responding to a Presidential demand for immediate implementation, whether communicated to him directly by President Zuma or by Minister Chabane. The evidence of the Cabinet minutes – the absence of any reference to the transfers – is very important. While some of the formal transfer documentation which exists could have been assembled later and back-dated (although that is not likely and they should rather be taken at face value), it would have been impossible to insert in the Cabinet minutes a decision that had not been taken, because a falsification in that regard would have been readily detectable by all participants.
142. Thus, as in relation to the transfer of Mr Maseko, it may be concluded on a balance of probabilities that Minister Baloyi acted in haste in effecting the transfer of Mr Manyi, without due attention to lawful and proper procedures, in order to assist in securing forthwith the practical outcome that the President required.
143. When Mr Manyi first testified at the Commission, he was asked about the circumstances under which he was told that he was being moved to GCIS.²⁰¹² Mr Manyi said it was a few days before 3 February 2011. He and Minister Chabane had met at the Protea Hotel in Midrand. Mr Chabane had put to him two options, one being the position of CEO of GCIS and the other being the position of COO (Chief Operating Officer) in the

²⁰¹¹ Exhibit NN5, p 50-51.

²⁰¹² Transcript 14 November 2018, p 90.

Presidency. He opted for the GCIS position because it was a horizontal move, whereas choosing the other position would have meant moving down a grade in public service rankings.²⁰¹³ Since Minister Chabane is deceased, it is not possible to verify this account, nor to reject it. Mr Manyi testified that he had not asked to be moved from his existing position as Director-General of Labour, although he had had a fallout with the (previous) Minister of Labour. That was Mr Mdladlana. Mr Manyi said that he was on special leave, awaiting disciplinary charges which were never brought; months had passed, and he saw the approach from Minister Chabane as trying to deal with the situation. The meeting had been very brief, and Minister Chabane was “telegraphic” in his communication of the two options.²⁰¹⁴ President Zuma never came into the account given by Mr Manyi in this regard.

144. Presenting it in this way was far from the whole truth, as the questioning on Mr Manyi’s second appearance at the Commission and the subsequent evidence revealed. Mr Manyi had earlier proposed, through his attorneys, a transfer out of the Department of Labour. He had, in fact, been charged with various infractions while he was DG of Labour.²⁰¹⁵ There had been meetings, with Minister Baloyi at least, in which his transfer had been discussed and in which he had indicated his willingness to be transferred. He had asked President Zuma to intervene in his case, and it is highly likely that he was well aware of the desire of the latter to have him transferred to GCIS.

145. When asked whether Mr Chabane had understood that he was “on some suspension or special leave”, or that a decision had been made to fire him, Mr Manyi said:²⁰¹⁶

²⁰¹³ Transcript 14 November 2018, p 90-91. See also Transcript 7 November 2019, p 4.

²⁰¹⁴ Transcript 14 November 2018, p 91-92.

²⁰¹⁵ Transcript 6 November 2019, p 149-152.

²⁰¹⁶ Transcript 7 November 2019, p 95-96.

“He spoke to me as somebody who is in the system, so if I was dismissed in the true sense of the word that discussion would not have happened, so in my view he spoke to me with the understanding that it is one of those fallouts and somebody is in suspension but still employed.”

Mr Manyi said he was sure that Mr Chabane must have known that he and Mr Mdladlana had had a fallout, as it was public, but it was not an issue.

146. Mr Manyi said that, although he knew that Mr Maseko was the CEO of GCIS, he had no knowledge that Mr Maseko was to be transferred to another department.²⁰¹⁷ He said that his own consent to be transferred was conveyed verbally to Minister Chabane.²⁰¹⁸

147. It is important to point out that the documentary evidence revealed that Minister Oliphant withdrew Mr Manyi's dismissal that had been effected by her predecessor, Minister Mdladlana, in order to make it possible for Mr Manyi to be transferred to GCIS. Ms Oliphant withdrew the dismissal but did not allow Mr Manyi to resume work as Director-General of the Department of Labour. She said that she was not prepared to have him in the Department of Labour because of what she had heard about him in the Department after her appointment as Minister of Labour. Without Ms Oliphant withdrawing that dismissal, a transfer could not have occurred.

Mr Manyi as DG of GCIS

148. After Mr Manyi was transferred to GCIS in February 2011, he held the position of DG in GCIS until August 2012.

149. During that period, GCIS made its largest ever monthly payment to the TNA. This occurred in March of 2012 and was just short of R6 million. The next largest spend ever

²⁰¹⁷ Transcript 27 November 2018, p 33-34.

²⁰¹⁸ Transcript 27 November 2018, p 33-35.

made during a month to TNA was in December 2015 and it was for less than half the amount spent in March 2012.

150. This information was presented to the Commission by Mr Jan Gilliland on 10 September 2018.²⁰¹⁹ Mr Gilliland was the Director of Operations and Implementation at National Treasury when he gave evidence.

151. Mr Gilliland's evidence bundle included a slide presentation summarising the total spend of various government departments, including GCIS, with the TNA. The slides showed the total spend on the TNA during the period that Mr Manyi was DG of GCIS. This was reflected on page 26 of the slides presented during Mr Gilliland's evidence. The slide does not, however, enable one to add up the total amount spent during Mr Manyi's time at GCIS because the slide is presented as a bar graph and one cannot discern the precise amounts paid during each month for the purposes of calculating the total.

152. Ms Phumla Williams, who was the Acting DG in GCIS, provided the Commission with an affidavit after she had testified in 2018.

153. Ms Williams' evidence shows the following:

153.1. The TNA was launched at the end of 2010.

153.2. Its first year of business was, therefore, the year of 2011.

²⁰¹⁹ Transcript 11 September 2018, p 6, line 6.

- 153.3. During the year 2011 – 2012 (i.e. for the financial year from 1 March 2011 to 28 Feb 2012), and while Mr Manyi was DG of GCIS, GCIS spent R 6,329,082.18 on TNA.²⁰²⁰
- 153.4. That was the second highest amount paid to any media house during the period. GCIS spent the most on the Sunday Times during that year (R 8,479,450.54).²⁰²¹ The second highest spend was with TNA, at a time when TNA had no established readership nor certified circulation figures.
- 153.5. During the second year that Mr Manyi was DG of GCIS, GCIS spent a total of R8,230,218.31 with TNA.²⁰²² Mr Manyi was DG for half of this period because he left in August 2012, which is halfway through the financial year 2012/2013.
- 153.6. These two amounts paid to TNA by GCIS were not the highest annual amounts. R9,548,567.72 was paid to TNA in the financial year 2013/2014 and R 9,952,469.00 in the financial year 2014/2015.
154. When Mr Manyi testified before the Commission, he was asked about this media spend. In particular, he was asked about how GCIS had justified spending millions of Rands on a media business that had no established readership or certified circulation figures.
155. Mr Manyi never provided an adequate answer to this critical question. First, he endeavoured to contend that the comparison between the Sunday Times (which had the highest spend in 2011/2012) and TNA (which had the second highest spend in 2011/2012) was not a valid comparison because the Sunday Times was a “once in

²⁰²⁰ Exhibit NN6, p 353.

²⁰²¹ Exhibit NN6, p 353.

²⁰²² Exhibit NN6, p 355.

seven day newspaper”, whereas TNA was a five day newspaper.²⁰²³ Second, when the evidence leader then asked for an acceptable comparison newspaper, such as the Daily Sun, and repeated her question about how it could ever be justified to spend these sums of money on a newspaper when there was no credible information about the target market of TNA, Mr Manyi deflected again.²⁰²⁴ Finally, when pressed on this for a third time, Mr Manyi denied any accountability for the GCIS spend. He claimed that GCIS was required to act in accordance with the requesting department’s wishes. He said that GCIS was merely “the enabler department”.²⁰²⁵

156. Mr Manyi was correct that GCIS was an “enabler department” under his watch, but not in the sense that he meant it. GCIS was *an enabler of state capture* during Mr Manyi’s tenure. Had it not been for the fact that Mr Manyi was moved in to replace Mr Maseko, the GCIS would likely have resisted the Guptas’ incessant pressure on government departments to divert their media spend to their business.

157. Mr Maseko proved himself to be one of the foremost resisters of state capture. He stood up to the efforts of the Guptas, backed by the then President Zuma, to extract unjustified amounts from the public purse. He was summarily removed from his important position for his act of opposition. Had he remained in his position, it is unthinkable that he would have approved the payment of millions of Rands of public money on a media business with no verified readership and no credible circulation figures simply because a family with close ties to the then President demanded that he do so.

²⁰²³ Transcript 7 November 2019, p 122.

²⁰²⁴ Transcript 7 November 2019, p 122-126.

²⁰²⁵ Transcript 7 November 2019, p 130.

158. In the sections that follow, the report sets out how three SOEs – Eskom, Transnet and SAA – fell victim to the Guptas’ influence and diverted hundreds of millions of Rands to the TNA. Regrettably, they did not have resistors of the calibre of Mr Maseko.

ESKOM

159. The Commission heard oral evidence from five witnesses regarding the TNA contracts with Eskom.

159.1. Three were at Board level, namely Mr Zola Tsotsi (chair of the Eskom Board in 2011 until the end of March 2015);²⁰²⁶ Mr Mark Pamenky (member of the Board from December 2014) and Mr Mafika Mkwanaazi (non-executive director from June 2011 to December 2014).²⁰²⁷

159.2. Two were below Board level, namely Mr Pieter Pretorius (responsible for strategic marketing at Eskom) and Mr Chose Choeu (divisional executive responsible for marketing).

160. Mr Choeu was the Divisional Executive of Corporate Affairs from June 2010 until December 2018.²⁰²⁸ Strategic marketing fell under his portfolio. In 2011 and 2012, Mr Choeu reported directly to the then CEO, Mr Brian Dames.²⁰²⁹ Mr Tshepo Moreme (General Manager) reported to Mr Choeu. Mr Pretorius reported to Mr Moreme. Sponsorship was the responsibility of Strategic Marketing.²⁰³⁰

²⁰²⁶ Transcript 23 January 2020, p 8, lines 8-13.

²⁰²⁷ Transcript 17 July 2020, p 157, lines 15-19.

²⁰²⁸ Exhibit MM2, CAKC-001, para 1.2.

²⁰²⁹ Transcript 29 October 2019, p 134, lines 11-20.

²⁰³⁰ Transcript 29 October 2019, p 135, lines 6-8 and p 136, lines 8-12.

TNA contracts with Eskom

161. TNA concluded three contracts with Eskom:

- 161.1. On 13 April 2012 TNA concluded its first contract with Eskom²⁰³¹ for the provision of both advertising in the newspaper, in the amount of R4million, and sponsorship of six business breakfasts, in the amount of R7 185 628.74.²⁰³² The contract was concluded between TNA (represented by Mr Jacques Roux) and The Media Shop (as Eskom's agent).
- 161.2. On 5 November 2012 TNA concluded its second contract with Eskom.²⁰³³ This time the contract was between TNA (represented by Mr Nazeem Howa), the Media Shop and Eskom itself (represented by Mr Choeu). The contract was for an additional four business breakfasts/briefings in the same 2012 financial year as the previous contract, for an amount of R4million.
- 161.3. On 30 April 2014 TNA concluded its third and final contract with Eskom.²⁰³⁴ This contract was between only Eskom (represented by Mr Colin Matjila, the acting CEO) and TNA (represented by Mr Howa). This contract was for 36 business breakfasts/briefings, for an amount of R43 200 000. How the relationship between TNA and Eskom began is dealt with below.

²⁰³¹ Exhibit MM1, pp 144-149.

²⁰³² Exhibit MM1, p 142.

²⁰³³ Exhibit MM1, p 189-191.

²⁰³⁴ Exhibit MM1, p 193-202.

How the relationship began

162. On 22 March 2011 Mr Jacques Roux, from TNA, sent an email to Mr Choeu proposing a meeting to discuss Eskom advertising with TNA newspaper and setting out an “overview of the product”.²⁰³⁵ The email referred to a prior telephonic conversation between Mr Roux and Mr Choeu. In his response, Mr Choeu asked that a meeting be set up. He copied Mr Pretorius, head of strategic marketing at Eskom. Mr Pretorius says that this was the first time he had heard of TNA.²⁰³⁶
163. Mr Pretorius explained that the staff member responsible for communications at Eskom met with Mr Roux, but realised that the matter pertained to Mr Pretorius’s role, and referred Mr Roux to him.²⁰³⁷ Mr Pretorius explained that his role in “strategic marketing” involved marketing aimed at a specific problem or issue, such as energy saving at Eskom.²⁰³⁸
164. This seems to have caused a delay in anything further taking place with TNA for a number of months.
165. In addition, in a briefing note prepared by the Media Desk for Mr Dames, the CEO, on 10 June 2011, it was stated that the newspaper was marred in controversy. It had a mass resignation of staff because of its editorial policy and had close links to the Zuma family and the ANC.²⁰³⁹ Mr Choeu admitted to knowing this information at the time.²⁰⁴⁰ It also appears that Mr Dames would have been aware of this.

²⁰³⁵ Exhibit MM1, p 117.

²⁰³⁶ Exhibit MM1, p 117.

²⁰³⁷ Transcript 29 October 2019, p 39, lines 11-14.

²⁰³⁸ Transcript 29 October 2019, p 21, lines 6-20.

²⁰³⁹ Exhibit MM2, p 15.

²⁰⁴⁰ Transcript 30 October 2019, p 7 (line 1) – 8 (line 2).

166. Mr Choeu testified that on 1 August 2011, he had a meeting with Mr Atul Gupta, Mr Dames and Mr Roux.²⁰⁴¹ This was a pitch about the TNA to Eskom. Mr Choeu stated that Mr Dames agreed at the meeting that he would support TNA and made a commitment to do so.²⁰⁴² Without following the usual process, Mr Dames simply committed himself to contracting with TNA on behalf of Eskom.²⁰⁴³
167. Then, in September 2011 a TNA representative, whose name Mr Pretorius could not recall, contacted the corporate marketing manager of Eskom, Mr John McArdle, who reported to Mr Pretorius. He asked Eskom to support the TNA and the Business Breakfasts (also interchangeably referred to as “Business Briefings”) on Morning Live on SABC 2.²⁰⁴⁴
168. Mr McArdle arranged a meeting with the representative, together with Mr Pretorius and his general manager, Mr Moreme, in order to discuss the TNA proposal for advertising and Eskom’s participation in the Business Breakfasts.²⁰⁴⁵ At the meeting, the TNA representative presented a proposal about Eskom sponsoring the Business Breakfasts. This was described as a breakfast to be held at a hotel in the city. SABC 2’s Morning Live program would be broadcast from the venue. TNA sold tickets to the event and TNA would promote the business breakfasts through their newspaper, *The New Age*. The SABC also promised to promote the breakfasts with whichever celebrity or Minister

²⁰⁴¹ Transcript 30 October 2019, p 8, lines 9-10.

²⁰⁴² Transcript 30 October 2019, p 10, lines 2-15.

²⁰⁴³ Transcript 30 October 2019, p 13, lines 15-25.

²⁰⁴⁴ Exhibit MM1, p 9-10, para 33.

²⁰⁴⁵ Transcript 29 October 2019, p 41, lines 5-6 and p 43-44, lines 24-2.

would be attending.²⁰⁴⁶ The proposal was that Eskom would sponsor this breakfast for R1million per breakfast.²⁰⁴⁷

169. Mr Pretorius testified that he declined the proposal immediately because one of the requirements for a sponsorship was that the event had to have a proven track record of success. This event had no history, no indication of circulation and no recognised brand association. He testified that he reported his views to Mr Choeu and thought the matter had been settled on that basis.²⁰⁴⁸

170. After this meeting, Mr Nazeem Howa, the CEO of TNA, met with Mr Choeu in Mr Choeu's office.²⁰⁴⁹ Mr Pretorius was invited to the meeting where the breakfast briefings were discussed again and Mr Pretorius testified that he shared his concerns. Mr Howa then asked Mr Pretorius to leave the meeting, because they had other business to discuss, which he did.²⁰⁵⁰

171. During his testimony, Mr Pretorius said that, when he discussed his reservations with Mr Chowe, Mr Chowe said the following to him "Pieter it is an instruction. It comes from the Minister. Brian Dames had told us that you will do this."²⁰⁵¹ Mr Pretorius testified that he asked Mr Choeu to put this instruction in writing, but this was never done.²⁰⁵²

172. Mr Choeu denied that Mr Pretorius raised his concerns about the sponsorship deal with him.²⁰⁵³ He testified that, while he did communicate to Mr Moremi and Mr Pretorius the

²⁰⁴⁶ Transcript 29 October 2019, p 44, lines 6-17.

²⁰⁴⁷ Transcript 29 October 2019, p 44, lines 20-21.

²⁰⁴⁸ Transcript 29 October 2019, p 45, line 8-46 (line 4).

²⁰⁴⁹ Transcript 29 October 2019, p 50, lines 20-24.

²⁰⁵⁰ Transcript 29 October 2019, p 51, lines 13-14 and p 52, lines 7-11.

²⁰⁵¹ Transcript 29 October 2019, p 51, lines 8-10. See also p 52, lines 18-22.

²⁰⁵² Transcript 29 October 2019, p 65, lines 5-20.

²⁰⁵³ Transcript 30 October 2019, p 20, lines 1-11.

outcome of the meeting with Mr Dames, that Eskom must contract with TNA, Mr Pretorius never communicated any disquiet about this.²⁰⁵⁴ Mr Choeu also testified that he never told Mr Pretorius that Mr Dames instructed him to conclude the contract with TNA because this had been an instruction from Minister Gigaba.²⁰⁵⁵

173. Mr Choeu's evidence appears inconsistent on this score because he conceded that he had a meeting with Mr Dames on 1 August 2011 where he made a commitment to contract with TNA and that he had then communicated to Mr Pretorius that there would be a contract with TNA.²⁰⁵⁶ He conceded that he told Mr Pretorius that Mr Dames had told him Eskom must contract with TNA but he denied that he had said that this was in response to concerns from Mr Pretorius about the TNA contract.²⁰⁵⁷

173.1. Mr Pretorius was a frank and candid witness. He accepted responsibility for his role in the process and, as will be set out later, his role in misleading Parliament and the Public Protector about the justification for using TNA. He seemed genuinely anxious about TNA. He also did a presentation for, among others, Mr Choeu about why the TNA proposal should go through proper channels including the Sponsorship Committee in which he expressed grave doubts about TNA. His version is given further credence by the fact that he was excluded from the negotiations of the third contract after he gave this presentation.

173.2. On the other hand, Mr Choeu had, on at least two occasions, denied involvement in certain decisions (such as subscriptions to TNA and witnessing Mr Pretorius's presentation) and was then forced to admit that he was involved

²⁰⁵⁴ Transcript 30 October 2019, p 20, lines 11-25.

²⁰⁵⁵ Transcript 30 October 2019, p 21, lines 11-25.

²⁰⁵⁶ Transcript 30 October 2019, p 25 (line 21) – 26 (line 4).

²⁰⁵⁷ Transcript 30 October 2019, p 29 (line 1) – 20 (line 3).

based on documentary evidence to the contrary. He was evasive at times and did not accept responsibility for his role in the continuing contracts with TNA. This included his role in removing the early termination clause from the TNA contract for R43 million.²⁰⁵⁸ The forensic auditors and the lawyers who had evaluated the facts had found that he was the one who had removed the termination clause.

173.3. Mr Pretorius's version in this regard is more plausible and credible than Mr Choeu's version. It is very unlikely Mr Pretorius did not relay his concerns about TNA to Mr Choeu.

174. Former Minister Malusi Gigaba filed an affidavit with the Commission in response to this claim. He stated that he never gave such an instruction. He stated that such an instruction would have amounted to interference with operations and that was not something that he did.²⁰⁵⁹ However, it must be pointed out that, even on Mr Kona's evidence in relation to SAA Mr Gigaba's advisor, Mr Siyabonga Mahlangu, regularly interfered in SAA operations. Mr Kona was the SAA Board member who was appointed as Acting GCEO of SAA after Ms Mzimela had resigned from that position in 2011 or 2012. Mr Mahlangu testified that all he did in relation to SOES including SAA when he was Mr Gigaba's advisor, he did in the course of his work as Mr Gigaba's advisor. Ms Mzimela also testified to a lot of interference in operational matters by Mr Mahlangu. So, Mr Gigaba's evidence that he would not have been involved in operational matters must be rejected. Mr Gigaba was prepared to do wrong for the Guptas or Mr Zuma. A number of incidents can be pointed out in support of this. His role in the process that led to the indefensible reinstatement of Mr Siyabonga Gama as CEO of TFR at Transnet, his role in the appointment of Mr Brian Molefe as Group CEO of Transnet in

²⁰⁵⁸ This is discussed in detail below.

²⁰⁵⁹ Exhibit MM1, p 778, para 7.

circumstances where, by his own admission, he was a friend of the Guptas and, by Mr Brian Molefe's own admission, too, he (i.e Mr Brian Molefe) was a friend of the Guptas and he (that is Mr Gigaba) overlooked a better candidate, Dr Mandla Gantsho, who had scored higher points in the interview than Mr Molefe and decided to appoint another friend of the Guptas. That was a position that the Gupta-owned newspaper had stated (long before the position was advertised) would be occupied by Mr Brian Molefe. The role he played with regard to the Mumbai route that Jet Airways wanted to take away from SAA can also be referred to. How he was prepared to wait and make everybody wait for about two hours for representatives of Jet Airways to arrive at a meeting and keep quiet as the Chairperson of the meeting while a representative of Jet Airways unfairly attacked the SAA management as if he was in charge of the meeting until Mr Gigaba's deputy (Deputy Minister) intervened also supports this. Mr Gigaba was doing all this to send a subtle message of his support for the Jet Airways' position. In regard to evidence heard with regard to Denel, Mr Riaz Saloojee testified to his being introduced to Mr Gigaba at the Gupta residence where it is clear that the Guptas were using Mr Gigaba to send a subtle message to Mr Saloojee that they had his support and Mr Gigaba was allowing himself to be used by the Guptas in that way. Mr Gigaba's denial of that encounter between himself and Mr Saloojee at the Gupta residence is not credible. There should have been no reason for Mr Saloojee to make that story up.

175. Mr Pretorius testified that this response from Mr Gigaba was false. He explained that Mr Gigaba had interfered in Eskom's operations on many occasions. He stated that there would be no reason why Mr Dames or Mr Choeu would instruct him to enter into these contracts without an instruction from "somebody higher up".²⁰⁶⁰ Mr Pretorius'

²⁰⁶⁰ Transcript 29 October 2019, p 53, lines 17-25.

evidence is in line with other evidence about Mr Gigaba's interference in operational matters.

176. On 20 March 2012 Mr Choeu emailed Mr Pretorius asking him to meet with Mr Roux "so you can close the deal on the TNA 49M Breakfasts as part of the Minister's National Campaign".²⁰⁶¹ Mr Pretorius explained that the 49M campaign was a campaign about energy saving (the population of South Africa being around 49million at the time) which was aimed at higher income groups (LSM 8-10), encouraging them not to waste energy.²⁰⁶²

177. Mr Pretorius asked for a proposal to consider in advance of the meeting which would deal with both the sponsorship of business breakfasts and advertising in the newspaper.²⁰⁶³ Mr Pretorius explained that, while he still retained concerns about doing business with TNA, he was just carrying out the instruction that he had been given by Mr Choeu.²⁰⁶⁴

178. On 21 March 2012 Mr Mzwandile Radebe began being copied on emails between TNA and Eskom at Mr Radebe's Gmail address. Mr Radebe was the liaison between the Minister, the Department of Public Enterprises, on the one hand and Eskom, on the other. Mr Pretorius testified that he found this very unusual and that it was an indication to him that the instruction to work with TNA came from the top.²⁰⁶⁵ Mr Radebe at that

²⁰⁶¹ Exhibit MM1, p 133.

²⁰⁶² Transcript 29 October 2019, p 57, lines 1-20.

²⁰⁶³ Transcript day, 29 October 2019, p 62, lines 1-21.

²⁰⁶⁴ Transcript 29 October 2019, p 63, lines 2-4.

²⁰⁶⁵ Exhibit MM1, p 131; transcript day 29 October 2019, p 64, lines 10-25 read with p 52, lines 15-20.

time was giving verbal orders to many of the SOEs and they were, according to Mr Pretorius, expected to do as he said or he would report them to the Minister.²⁰⁶⁶

179. Mr Roux and Mr Pretorius then met and Mr Roux presented a proposal for both advertising and sponsorship.²⁰⁶⁷ Mr Pretorius asked Eskom's appointed media buying agency, Media Shop, to come up with a more palatable proposal as Mr Roux's proposal required far too large a spend. Media Shop also expressed concerns over the proposed contract but Mr Pretorius told them Eskom had to do this; it was an instruction.²⁰⁶⁸

180. On 27 March 2012 Mr Donald Liphoko of Media Shop sent an email to Mr Pretorius stating that Mr Moreme (referred to as "Kheepe") had impressed upon him the importance of the proposal with TNA and that Eskom had committed R10 million to the TNA, including business breakfasts and the newspaper advertising.²⁰⁶⁹ This would involve R7 million for 6 business breakfasts over the period of a year as well as advertising spend.²⁰⁷⁰

181. Not long thereafter, on 13 April 2012, Eskom signed its first contract with TNA for over R10 million.

²⁰⁶⁶ Transcript 29 October 2019, p 66, lines 1-10.

²⁰⁶⁷ Transcript 29 October 2019, p 67, lines 20-24.

²⁰⁶⁸ Transcript 29 October 2019, p 68 (line 1) – 69 (line 6).

²⁰⁶⁹ Exhibit MM1, p 138 and transcript 29 October 2019, p 71, lines 2-11.

²⁰⁷⁰ Transcript 29 October 2019, p 72 (line 1) – 73 (line 20).

The contracts were irregular

Proper procedure

182. In order to understand whether these contracts were unlawful and/or irregular, it is necessary to understand the legislative framework governing public spending at Eskom (and indeed Transnet and SAA) and the policy processes in place at the entity.

183. As to the legislative scheme, the following provisions are relevant:

183.1. Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

183.2. Eskom, Transnet and SAA are schedule 2 “Major Public Entities” under the PFMA.

183.3. Section 51(1)(a)(iii) of the PFMA²⁰⁷¹ provides that an accounting authority, in this case the Board of Eskom, must ensure that the public entity has and

²⁰⁷¹ Section 51(1)(a) of the PFMA provides:

“General responsibilities of accounting authorities

(1) An accounting authority for a public entity—

(a) must ensure that that public entity has and maintains—

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective; (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;”

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

- 183.4. Section 51(1)(b)(ii) provides that the accounting authority must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.
- 183.5. The PFMA defines “fruitless and wasteful expenditure” as expenditure made in vain and which would have been avoided had reasonable care been exercised. It defines “irregular expenditure” as expenditure incurred in contravention of applicable legislation or as expenditure that is not in accordance with a requirement of any applicable legislation.
- 183.6. Section 56(1)(a) and (b) empowers the accounting authority to assign powers and duties for a public entity, in writing, to an official in that public entity or instruct an official to perform any of its duties.
- 183.7. Section 56(2)(a) provides that a delegation or instruction to an official is subject to any limitations and conditions the accounting authority may impose.
- 183.8. Section 57²⁰⁷² sets out the legal obligations of an official of a public entity. It provides that an official must:

²⁰⁷² Section 57 of the PFMA provides:

“Responsibilities of other officials

An official in a public entity—

(a) must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;

(b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official’s area of responsibility;

183.8.1. ensure that the system of financial management and internal control established for that entity is carried out within the area of responsibility of that official;²⁰⁷³

183.8.2. be responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;²⁰⁷⁴

183.8.3. take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure;²⁰⁷⁵ and

183.8.4. comply with the provisions of the PFMA including any delegations and instructions under section 56.²⁰⁷⁶

184. These responsibilities of the Board, as accounting authority under the PFMA, will become vital in understanding and evaluating the actions of the Board as set out below, particularly in respect of the third TNA contract. The Board must ensure there are internal financial controls in Eskom, that Eskom and its officials follow any policies set out to enhance transparency and competitive processes, and importantly, to ensure that it does not permit officials to make irregular expenditure and fruitless and wasteful

(c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(d) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and

(e) is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility."

²⁰⁷³ Section 57(a).

²⁰⁷⁴ Section 57(b).

²⁰⁷⁵ Section 57(c).

²⁰⁷⁶ Section 57(d).

expenditure. Further – if any officials do so – the Board is required to ensure that disciplinary action is taken against such officials.

185. In addition to these responsibilities, the following provisions of the PFMA are also relevant:

- 185.1. Section 83(1) of the PFMA provides that an accounting authority for a public entity commits an act of financial misconduct if that authority wilfully or negligently fails to comply with sections 50, 51, 52, 53, 54 or 55 of the PFMA or makes or permits an irregular expenditure or a fruitless and wasteful expenditure.
- 185.2. Section 83(2) provides that, if the authority is a board, then the members of the Board are individually and severally liable for any financial misconduct of the authority.
- 185.3. Section 83(3) provides that an official of a public entity to whom a power or duty is assigned in terms of section 56, commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.
- 185.4. Section 83(4) provides that financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member or person mentioned in (2) or (3).
- 185.5. Section 86(2) provides that an accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with sections 50, 51 or 55.

185.6. Regulation 33.1.1 of the Treasury Regulations provides that, if an employee is alleged to have committed financial misconduct, the accounting authority of the public entity must ensure that an investigation is conducted into the matter and, if confirmed, must ensure that a disciplinary hearing is held in accordance with the relevant prescripts.

186. As to the relevant processes and policies applicable at Eskom in regard to these matters, Mr Pretorius testified that, in so far as advertising was concerned, the process was as follows:

186.1. Eskom would prepare a briefing document with the particular issue that Eskom was seeking to advertise about. Eskom would then appoint a media buying agency through a transparent commercial process. The agency was responsible for designing a media buying strategy to meet Eskom's specific advertising needs as set out in the briefing document. The agency would conduct research and indicate which media tools were best designed to meet the target audience. They would prepare a media plan on which Eskom would sign off.²⁰⁷⁷

186.2. Mr Pretorius explained that the most important thing for Eskom to consider was "frequency" and "reach". The frequency is the number of times an advertisement would appear in a particular medium. The reach was the number and type of people that would be exposed to the advert in a particular medium. If one was looking to target particular "LSMs" (living lifestyle measurement),²⁰⁷⁸ then the type of media selected had to reach this particular demographic.²⁰⁷⁹

²⁰⁷⁷ Transcript 29 October 2019, p 24, lines 5-25.

²⁰⁷⁸ Transcript 29 October 2019, p 58, line 5. Lower LSMs are poorer categories of people, LSMs 5-7 are "middle class" and LSMs 8-10 are higher income earners (transcript 29 October 2019, p 57, lines 7-15).

²⁰⁷⁹ Transcript 29 October 2019, p 25, lines 10-19.

The media buying agency was tasked with researching the reach of the medium. This would involve assessing the circulation of the newspaper.

186.3. Eskom had a policy that it would only deal with accredited publications whose viewership had been audited. This meant publications whose circulation figures the Audited Bureau of Circulation (*ABC*) had verified.²⁰⁸⁰ The agency would assess the circulation and the price to assess the most cost-effective options and present a strategy document for Eskom to consider and approve.²⁰⁸¹ Mr Pretorius explained that it would be highly unusual for Eskom to spend on a medium where no market research had been conducted or verified.²⁰⁸²

186.4. While Eskom would try to support new entrants into the media market, it would do so with a small amount of support and then, once there had been some audit of the publication's circulation figures, Eskom would begin to give the publication more support.²⁰⁸³

187. Mr Pretorius testified that for sponsorship approval the process was different. He explained it in this way:

187.1. Sponsorship is a commercial transaction between the sponsor and the sponsorship property owner to secure some benefit for the sponsor. The sponsor would determine whether to enter the agreement based on an understanding that they would get more business through the sponsorship exposure. The sponsorship deal would also need to include advertising the fact

²⁰⁸⁰ Transcript 29 October 2019, p 27, lines 2-5.

²⁰⁸¹ Transcript 29 October 2019, p 25 (line 23) – 26 (line 15).

²⁰⁸² Transcript 29 October 2019, p 27, lines 6-10.

²⁰⁸³ Transcript 29 October 2019, p 27, lines 16-21.

of the sponsorship – to “leverage” the sponsorship. Every R1 used for sponsorship, ordinarily requires R3 for the publicity surrounding it.²⁰⁸⁴

187.2. The process was different from advertising in that, instead of using an agency, Eskom had a sponsorship desk. Policy documents created by Eskom set out the criteria for sponsorship approval and the sponsorship desk would apply this policy to any proposal. If, on the criteria, the applicant scored more than 75%, then the request for sponsorship would go to the Sponsorship Committee for approval – provided there was a budget for it.²⁰⁸⁵

187.3. Once the sponsorship committee had approved the sponsorship, Eskom’s marketing team would negotiate the responsibilities and the terms of the contract with the sponsorship property owner.²⁰⁸⁶

187.4. According to Eskom’s sponsorship policy document applicable at the time,²⁰⁸⁷ if any proposed sponsorship was over R50 000, it had to go to the Sponsorship Committee for approval. That was the Corporate Affairs Division Management Committee sitting as the Sponsorship Committee. Anything less than this amount could be approved by the relevant executive responsible for the sponsorship.²⁰⁸⁸ The Sponsorship Committee had the power to approve sponsorship of up to R10 million but anything more had to be approved by the

²⁰⁸⁴ Transcript 29 October 2019, p 29, lines 13-25.

²⁰⁸⁵ Transcript 29 October 2019, p 30, lines 14-23.

²⁰⁸⁶ Transcript 29 October 2019, p 31, lines 7-15.

²⁰⁸⁷ Exhibit MM1, pp 65-115.

²⁰⁸⁸ Transcript 29 October 2019, p 33, lines 11-14.

Electricity Council. That is equivalent to the Board under the new dispensation.²⁰⁸⁹

187.5. The Policy Document also required a return on investment. This meant that the contract of sponsorship needed various safeguards to ensure impact and results – such as maintaining a particular audience reach.²⁰⁹⁰

187.6. Mr Choeu confirmed that the sponsorship policy at Eskom included various objectives that had to be met. These included increasing “brand equity” and a “tangible return on investment”.²⁰⁹¹

187.7. Mr Pretorius confirmed that it would be “very wrong” for a sponsorship to be approved without going through this process and meeting the criteria set out in the policy document.²⁰⁹² He could not recall any instances of any deviation from these processes prior to the TNA’s proposals to Eskom.²⁰⁹³

Deviation from procedure

188. The first TNA contract, which was from 1 April 2012 to 31 March 2013 and covered six business breakfasts as well as advertising in *The New Age* newspaper, was irregular.²⁰⁹⁴

²⁰⁸⁹ Transcript 29 October 2019, p 33 (line 20) – 34 (line 10).

²⁰⁹⁰ Transcript 29 October 2019, p 35 (line 20) – 36 (line 10).

²⁰⁹¹ Transcript 29 October 2019, p 137, lines 10-15 and p 140, lines 18-25.

²⁰⁹² Transcript 29 October 2019, p 36, lines 13-20.

²⁰⁹³ Transcript 29 October 2019, p 37, line 1-19.

²⁰⁹⁴ Transcript 30 October 2019, p 99, lines 17-25.

- 188.1. Mr Pretorius confirmed that, while the proposal for the first contract from TNA claimed it had circulation of 100 000 people,²⁰⁹⁵ this figure could not be verified because TNA was not registered with the ABC.²⁰⁹⁶ TNA was never registered with ABC during its existence.²⁰⁹⁷
- 188.2. In deciding the cost of advertising, it was important to assess both circulation (the number of copies sold) and the actual readership (how many people actually read the paper).²⁰⁹⁸ The ABC provided circulation figures, other measures, such as AMPS (All Media and Products Study), provided the results of behavioural studies that determine readership.²⁰⁹⁹ TNA had neither.
- 188.3. Mr Pretorius testified that there was no available budget for this expenditure at the time the contract was concluded.²¹⁰⁰ Mr Choeu conceded there was no budget for the TNA contract when it was concluded.²¹⁰¹ Therefore, he explained, this additional budget had to be sourced from the Investment and Capital Assurance Committee (ICAC)²¹⁰² in June 2012. R6million was approved for such a purpose.²¹⁰³

²⁰⁹⁵ Exhibit MM1, p 124.

²⁰⁹⁶ Transcript 29 October 2019, p 39, lines 18-25.

²⁰⁹⁷ Exhibit MM1, p 752.

²⁰⁹⁸ Transcript 29 October 2019, p 89, lines 18-25.

²⁰⁹⁹ Transcript 29 October 2019, p 90, lines 1-5.

²¹⁰⁰ Transcript 29 October 2019, p 87, lines 15-20.

²¹⁰¹ Transcript 30 October 2019, p 40, lines 15-20.

²¹⁰² Transcript 30 October 2019, p 100, lines 20-25.

²¹⁰³ Transcript 30 October 2019, p 101, lines 1-5 and p 102, lines 1-25.

- 188.4. The sponsorship never went to the sponsorship committee, and it was not assessed under the sponsorship criteria in the policy. In other words, the policy requirements for sponsorship were not met.²¹⁰⁴
- 188.5. Mr Choeu corroborated Mr Pretorius's statement that the Sponsorship Committee was supposed to approve all sponsorships but that this had not occurred with TNA and the sponsorship was never evaluated against the sponsorship criteria.²¹⁰⁵ He conceded that the contracts were, therefore, irregular and in breach of the sponsorship policy.²¹⁰⁶
- 188.6. Mr Choeu also conceded that, as far as strategic marketing was concerned, the usual process would be that a problem was identified in the business – like load shedding – and they would approach a media agent to determine the best way of addressing that problem (the platforms and media to use to target the relevant audience). He agreed that it was not customary to go to Media Shop and stipulate that they must spend R6million on Business Breakfasts.²¹⁰⁷
- 188.7. He also agreed that it was very unusual for Eskom to sponsor an enterprise in order for that enterprise to make profits. It was unusual to sponsor commercial companies or corporations for this purpose.²¹⁰⁸
- 188.8. He conceded that this long-standing relationship ceased to be a sponsorship and became a commercial relationship which gave Eskom no value.²¹⁰⁹ Mr

²¹⁰⁴ Transcript 29 October 2019, p 87 (line 23) – 88 (line 15).

²¹⁰⁵ Transcript 29 October 2019, p 148 (line 22) – 149 (line 18).

²¹⁰⁶ Transcript 29 October 2019, p 154 (line 10) – 155 (line 3).

²¹⁰⁷ Transcript 30 October 2019, p 52, lines 8-21.

²¹⁰⁸ Transcript 30 October 2019, p 56, lines 15-21.

²¹⁰⁹ Transcript 30 October 2019, p 59, lines 2-11.

Choeu testified that he began to form this negative view of TNA around the time of the Parliamentary questions about TNA and the negative media reporting. These two events meant that contracting with TNA could have reputational risks for Eskom. According to Mr Choeu, that was why Eskom did not contract with TNA for a year after the second contract (from April 2013 to May 2014).²¹¹⁰

188.9. Mr Choeu corroborated Mr Pretorius's evidence that there was a link in the timing between Minister Gigaba appearing on the business breakfasts on 12 April 2012 and the conclusion of the first contract.²¹¹¹ Mr Gigaba's response to this was that it was an internal matter for Eskom if it decided to sponsor a breakfast because he was speaking at the event.²¹¹² In addition, Mr Gigaba testified that there was value in the business breakfasts because they had "a large viewership" and were attended by "business people from different angles". However, as is set out below, the viewership of the SABC's Morning Live show presented limited value to the SOEs because the briefings themselves were not focused on the SOEs. Also, there were many opportunities for the SOEs to engage with "business people" without having to pay R1million a time to do so.

188.10. Mr Pretorius testified that he raised his concerns about the first contract with Mr Choeu on a number of occasions. He said that he was concerned not only about the fact that Eskom was receiving no value from the contract but also because internal governance procedures had been flouted.²¹¹³ Mr Choeu's response was that he should not fight it because it was happening and must

²¹¹⁰ Transcript 30 October 2019, p 57 (line 20) – 59 (line 15).

²¹¹¹ Transcript 30 October 2019, p 63, lines 10-18.

²¹¹² Transcript 21 June 2021, p 202, lines 13-20

²¹¹³ Transcript 29 October 2019, p 88 (line 20) – 89 (line 1).

just be done.²¹¹⁴ Mr Pretorius testified that Mr Choeu would tell him not to make himself sick with worry about this issue because they were being forced or instructed to do this.²¹¹⁵ As set out above, Mr Choeu denied this happened, but Mr Pretorius's version is more likely to be true for the reasons set out above.

189. The second contract, which was for four business breakfasts and no advertising,²¹¹⁶ was for the same financial year as the first one and added four breakfasts to the existing six in the 2012 period.²¹¹⁷

189.1. Mr Choeu testified that, even though there was no budget for the first contract, in the same financial year TNA approached Eskom again and asked for four more business breakfasts to be sponsored for a further R4million.²¹¹⁸

189.2. Mr Pretorius testified that he had even greater concerns regarding the conclusion of this contract because, since the conclusion of the first contract, Parliament had started to raise queries about TNA.²¹¹⁹

189.3. Mr Pretorius explained that under the sponsorship policy, there had to be monitoring and evaluation of the success and effectiveness of a sponsorship before it could be entered into again, but there was no such evaluation done before the second TNA contract was concluded.²¹²⁰

²¹¹⁴ Transcript 29 October 2019, p 89, lines 1-4.

²¹¹⁵ Transcript 29 October 2019, p 79, lines 6-25.

²¹¹⁶ Transcript 29 October 2019, p 98, lines 20-25.

²¹¹⁷ Transcript 29 October 2019, p 99, lines 1-8.

²¹¹⁸ Transcript 30 October 2019, p 106 (line 21) – 107 (line 8).

²¹¹⁹ Transcript 29 October 2019, p 89, lines 8-14.

²¹²⁰ Transcript 29 October 2019, p 94, lines 1-5.

- 189.4. The second contract was not concluded just between the Media Shop as Eskom's agent, and TNA (as was usual). This time, Eskom itself became a party. This was to ensure that TNA was paid on preferential and faster terms than usually paid by Media Shop to vendors.²¹²¹
- 189.5. Unlike the first agreement, this second agreement was tabled before the sponsorship committee. On 20 July 2012 Mr Choeu and one other member approved the proposal, while the eight other members all rejected it.²¹²²
- 189.6. Mr Pretorius testified that he assumed the contract should, nevertheless, go ahead despite the resolution because of Mr Choeu's instructions in respect of TNA, generally, and in respect of the previous contract.²¹²³ This assumption was confirmed for Mr Pretorius, by the fact that it was Mr Choeu who signed the second contract.²¹²⁴ Mr Pretorius testified that he was asked to sign the second contract but refused to do so because, by that stage, there had been Parliamentary questions about the TNA, and the country generally (the media) was talking about TNA and its links to the Guptas, and Mr Pretorius did not want to be associated with it.²¹²⁵
- 189.7. Mr Choeu accepted that the second contract was rejected by the Sponsorship Committee and that this gave him pause for thought. This was also the time when Parliament began raising questions about TNA.²¹²⁶ Mr Choeu testified, however, that even though the committee tasked with approving sponsorship

²¹²¹ Transcript 29 October 2019, p 94, lines 8-22.

²¹²² Transcript 29 October 2019, p 94 (line 23) – 95 (line 18).

²¹²³ Transcript 29 October 2019, p 96, lines 11-24.

²¹²⁴ Transcript 29 October 2019, p 97, lines 4-9.

²¹²⁵ Transcript 29 October 2019, p 97, lines 11-21.

²¹²⁶ Transcript 30 October 2019, p 108, lines 9-15.

had rejected the proposal for a second contract, there was pressure from the CEO (Mr Dames) and the Minister, Mr Gigaba, to continue with the business breakfasts for the 49M campaign.²¹²⁷ Mr Choeu accepted that the second contract was, therefore, irregular.²¹²⁸ He admitted that he signed it anyway, even though it was irregular, because of pressure from the CEO associated with the Ministerial 49M campaign.²¹²⁹

190. In between the second and third contracts, there was also an *ad hoc* TNA sponsorship that Eskom approved.

190.1. Mr Choeu testified that, even though, after the conclusion of the period of the second contract (April 2013), he had resolved not to do more business or enter into another contract with TNA because of the reputational problems it caused Eskom, the barrage of Parliamentary and media questions they were forced to answer, and the lack of value, he nevertheless approved an *ad hoc* business breakfast at which Minister Gigaba would be speaking. He says he did this, despite disagreeing with the decision, because it came from the chief executive's office and one does not disagree generally with such instructions.²¹³⁰

190.2. Mr Choeu testified that he met regularly with Mr Dames, the CEO, who instructed him to agree to this additional *ad hoc* arrangement. He said he

²¹²⁷ Transcript 30 October 2019, p 109 (line 19) – 110 (line 10).

²¹²⁸ Transcript 30 October 2019, p 111, lines 21-25.

²¹²⁹ Transcript 30 October 2019, p 111 (line 24) – 112 (line 10).

²¹³⁰ Transcript 30 October 2019, p 133 (line 22) – 134 (line 25).

thought it would be insubordination not to do what the CEO told him to do or even indeed to take issue with the instruction at all.²¹³¹

191. The third contract, to sponsor 36 TNA business breakfasts/briefings for R43.2million, was also irregular:

191.1. In April 2014 a new acting CEO was appointed, Mr Matjila.²¹³² There was a restructuring in the governance of Eskom and Mr Choeu was no longer a member of Exco. Instead, he was a divisional head reporting to Ms Erica Johnson, who, in turn, reported to Mr Matjila.

191.2. Mr Choeu testified that Mr Matjila told Ms Johnson that he wanted Eskom to sponsor the business breakfasts in a long-term contract for three years.²¹³³ Ms Johnson told Mr Choeu that she had warned Mr Matjila that the business breakfasts were not a good idea and were not good for Eskom's reputation. Mr Matjila responded that he would deal with all of those problems – he had the authority to conclude the contract and Mr Choeu and Ms Johnson should just worry about creating the correct source document for auditing purposes.²¹³⁴

191.3. Despite Mr Choeu testifying that he was uncomfortable with the sponsorship agreement, he nevertheless proceeded to prepare a proposal endorsing it.²¹³⁵

191.4. In this third contract, the cost per breakfast event was going to be R1.2million (up from R1million). This increase had already been approved by the CEO

²¹³¹ Transcript 30 October 2019, p 135 (line 18) – 137 (line 2).

²¹³² Transcript 30 October 2019, p 142, lines 17-20.

²¹³³ Transcript 30 October 2019, p 143, lines 15-17.

²¹³⁴ Transcript 30 October 2019, p 144 (line 18) – 145 (line 2).

²¹³⁵ Transcript 30 October 2019, p 150 (line 22) – 151 (line 8).

when Mr Choeu put the proposal together.²¹³⁶ This was ultimately negotiated down to R1million per event, provided that Eskom agreed to more events – up to 36 business breakfasts.²¹³⁷

191.5. Mr Choeu explained that it was as though Eskom was required to comply with whatever TNA wanted it to do and that it was the CEO that created this situation.²¹³⁸ He also confirmed that a lot of the pressure that the Eskom staff felt to endorse the contract was because they could see that the Gupta family were very powerful and had connections to the President – they could exert a strong influence.²¹³⁹

191.6. Mr Choeu's proposal for the third TNA contract for R43million contained certain "key assumptions", including that the sponsorship of the business briefings contributed to an 87% awareness of the 49M campaign."²¹⁴⁰ However, during his questioning before the Commission, Mr Choeu admitted that the "study" that was conducted about consumer awareness pertained to the entire 49M campaign and not the business breakfasts.²¹⁴¹ He conceded that the business breakfasts could have contributed anything between 1% or 20% - he did not know.²¹⁴² He ultimately agreed that he should have removed this section from the proposal because it was not, in fact, possible to establish a causal link between the business briefings and awareness of the campaign.²¹⁴³

²¹³⁶ Transcript 30 October 2019, p 153, lines 16-24

²¹³⁷ Transcript 30 October 2019, p 154 (line 5) – 155 (line 1).

²¹³⁸ Transcript 30 October 2019, p 156, lines 5-14.

²¹³⁹ Transcript 30 October 2019, p 156 (line 21) – 157 (line 4) and p 158, lines 3-19.

²¹⁴⁰ Transcript 30 October 2019, p 163, lines 18-25. See also exhibit MM42, p 41.

²¹⁴¹ Transcript 30 October 2019, p 165, lines 1-10.

²¹⁴² Transcript 30 October 2019, p 165, lines 12-20.

²¹⁴³ Transcript 30 October 2019, p 171 (line 20) – 172 (line 8).

- 191.7. The proposal concluded that the use of this sponsorship tool had produced tangible results that ought to be supported.²¹⁴⁴ Mr Choeu agreed that the 87% figure – which he admitted should not have been included – was there to support this conclusion of “tangible results”.²¹⁴⁵ He confirmed this conclusion was what the CEO wanted him to advance in the proposal.²¹⁴⁶
- 191.8. Mr Choeu acknowledged that at the time of writing this proposal he was against the TNA and the sponsorship.²¹⁴⁷ He also accepted that he should not have signed a document that did not reflect his views. He justified his conduct on the basis that “in Corporate that’s how we do it”.²¹⁴⁸ He added that his position was clear that his division did not want to attend the breakfasts; they did not have the money to do it and that the CEO should take charge of it.²¹⁴⁹
- 191.9. After the second contract had been concluded, Mr Pretorius prepared a presentation that motivated for the sponsorship contract to serve before the Sponsorship Committee before the contract was approved.²¹⁵⁰
- 191.10. The presentation stated clearly that the sponsorship was not recommended because it did not meet the minimum requirements for sponsorship; there was reputational risk; and circulation could not be verified.²¹⁵¹

²¹⁴⁴ Exhibit MM2, p 42.

²¹⁴⁵ Transcript 30 October 2019, p 174, lines 18-25.

²¹⁴⁶ Transcript 30 October 2019, p 175, lines 1-4.

²¹⁴⁷ Transcript 30 October 2019, p 175, lines 6-12.

²¹⁴⁸ Transcript 30 October 2019, p 177, lines 1-24.

²¹⁴⁹ Transcript 30 October 2019, p 178, lines 21-23.

²¹⁵⁰ Transcript 29 October 2019, p 100, lines 13-16. The presentation is at Exhibit MM1, p 754.

²¹⁵¹ Exhibit MM1, pp 766-767.

- 191.11. However, Mr Pretorius said in the presentation that if, despite these problems, Mr Choeu was of the view that the sponsorship should proceed anyway for “strategic reasons”, then it should at least follow the process of being passed by resolution before the correct body. In this case, this was the “CAD Manco”²¹⁵² (the Corporate Affairs Division Management Committee) which played the role of the Sponsorship Committee.²¹⁵³
- 191.12. Mr Choeu did not present this to the Sponsorship Committee (CAD Manco).²¹⁵⁴ The matter was then dealt with directly by Mr Choeu and the acting CEO, Mr Matjila. It was never submitted to, nor approved by, the Sponsorship Committee (CAD Manco).²¹⁵⁵ This contract therefore also failed to comply with the policy requirements for sponsorships devised by Eskom.
- 191.13. The negotiations for the contract were concluded between Mr Howa (and his sales people) and Mr Choeu. Mr Pretorius was no longer involved in the discussions around TNA.²¹⁵⁶
- 191.14. The third contract was between Eskom and TNA directly – Media Shop was no longer involved. Mr Pretorius said that he was excluded from discussions about the contract, presumably because he had been vocal about his opposition to it.²¹⁵⁷

²¹⁵² Transcript 29 October 2019, p 103, lines 9-23.

²¹⁵³ Transcript 29 October 2019, p 31, lines 19-25.

²¹⁵⁴ Transcript 29 October 2019, p 104, lines 1-10.

²¹⁵⁵ Transcript 29 October 2019, p 106, lines 1-3.

²¹⁵⁶ Transcript 29 October 2019, p 100, lines 8-12.

²¹⁵⁷ Transcript 29 October 2019, p 105, lines 1-23.

191.15. Mr Pretorius explained that the contract was for R43 million, which was more than *the entire marketing budget of Eskom*.²¹⁵⁸ There was simply no accommodation made for it in the Eskom budget.²¹⁵⁹

Mr Matjila was not authorised to sign the third contract

191.16. The contract was ultimately signed by Mr Matjila.²¹⁶⁰ Mr Choeu testified that he was aware that a sponsorship over R3 million had to be approved by Eskom's board.²¹⁶¹

191.17. There was a report compiled by Sizwe Ntsaluba Gobodo (SNG), an auditing and forensics firm, which concluded that Mr Matjila, as acting CEO, exceeded his authority in concluding the contract.²¹⁶²

191.18. A law firm, Ledwaba Mazwai, confirmed these findings and concluded that the contract was unlawful and irregular insofar as there was no budget approved for it and Mr Matjila's delegation of authority did not cover contracts of R43 million.²¹⁶³

191.19. Ledwaba Mazwai's report also concluded that Mr Matjila had breached various legal obligations in signing the contract, including his fiduciary duties to Eskom,

²¹⁵⁸ Transcript 29 October 2019, p 105, lines 1-23.

²¹⁵⁹ Transcript 29 October 2019, p 105, lines 23-25.

²¹⁶⁰ Transcript 29 October 2019, p 106, lines 4-5.

²¹⁶¹ Transcript 30 October 2019, p 181, lines 15-21.

²¹⁶² Transcript 29 October 2019, p 231, para 4.61. The report was dated 6 November 2014 (Exhibit MM1, pp 208-659).

²¹⁶³ Exhibit MM1, p 190, para 1.4.3.1.

delegated duties of the accounting authority under the PFMA, and the duties of an official of a public entity under the PFMA.²¹⁶⁴

No termination clause

191.20. The report also found that the agreement had been concluded without a termination clause, which was very unusual. Mr Pretorius explained that, because of the volatility of the Eskom business and budget, they had to have an “enabling” contract, which allowed Eskom to exit the contract and not be bound to use advertising if it did not wish to.²¹⁶⁵ The report found that it was Mr Choeu who was responsible for removing that clause, to the detriment of Eskom, and that disciplinary action should be taken against him.²¹⁶⁶

191.21. The Commission’s investigations established the following:

191.21.1. On 24 April 2014 Mr Choeu sent a copy of the third sponsorship contract to Mr Matjila.²¹⁶⁷ Prior to this, the contract had been reviewed by the Eskom lawyers and certain changes had been made,²¹⁶⁸ one of which was in clause 2.2 where an exit clause had been inserted. It stated “Eskom reserves the right to withdraw its sponsorship at any time in the event of a breach by TNA Media of any of the terms of this agreement . . . or for any other reason on 30 days written notice to TNA.”²¹⁶⁹

²¹⁶⁴ Exhibit MM3, pp 185-187.

²¹⁶⁵ Transcript 29 October 2019, p 107, lines 14-23.

²¹⁶⁶ Exhibit MM1, pp 187-189.

²¹⁶⁷ Exhibit MM2, p 51.

²¹⁶⁸ Transcript 30 October 2019, p 185, lines 11-18.

²¹⁶⁹ Exhibit MM2, p 54. See also clause 11.2 on p 59.