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

363. Despite numerous instructions that the National Treasury has issued to regulate the management of procurement through deviations, there has been an increase in such requests. Weak contract management and poor planning contributed to the so called emergencies that underpinned the deviations requested. As a consequence, some government institutions apply deviations as the norm rather than the exception.

Free State Provincial Government

364. The Former CFO of the Free State Department of Agriculture and Rural Development Ms Seipati Dlamini was requested to explain why she had approved a particular deviation involving Paras. She explained that: "if it is not practical to invite bids, the reasons should be recorded why you are deviating. So, I am saying with regard to the reasons that were recorded, I looked at the explanation of the job opportunities that the Vrede Dairy Project is going to bring in that area, I looked at the issue of the investment

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

365. She was asked to explain why it was "impractical" to invite competitive bids. Ms Dlamini answered that she "found it not practical from the point where I was sitting to say how do I subject an investment to a bidding process". But in fact there was nothing impractical in this case to invite competitive bids.[2830] This was clearly a misuse of the deviation process, and Ms Dlamini eventually agreed that there was nothing that could have prevented the department from inviting competitive bids. In effect, Ms Dlamini allowed deviations from inviting competitive bids where there was an entity that had already shown interest. This is directly contrary to what Treasury Regulation 16A requires.

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

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

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

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

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

2012. The agreement stipulated that Estina was to be both government's partner in the project and the implementing agent. This was done on the understanding that Estina were working with a dairy company called Paras to set up this project. There has been no sign that Paras was ever involved with Estina on the project.[2833] Despite the fact that the second contract was drawn up by the Department of Agriculture with the help of legal advisors from the Office of the Premier and so should have been in good order, it was full of irregularities. No due diligence was done on either Estina or Paras by the government;[2834] there was no proper procurement process followed,[2835] a deviation was signed off by the Chief Financial Officer, Mr Dlamini and by Mr Thabethe, as the accounting officer, despite stating no grounds for this; and lastly, the contract was signed after the project was already underway and without any existing budget – a serious violation of financial regulations.[2836]

Confinements

368. Confinements are a type of deviation from the default open procurement process and as such are to be approached with great circumspection. A misuse of the confinement process would have the effect of undermining competition and entrenching monopolies. Confinements were thus limited strictly to the following instances: (a) genuine urgency; (b) limited supplier source; (c) standardization and (d) goods or services that are highly specialized and largely identical to those previously procured from the supplier.[2837] It is not the principle of restricted bidding, but rather it's potential for abuse that creates a

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

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

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

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

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

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

Transnet

369. During the period 2012-2015, Transnet awarded at least seven contracts to McKinsey for various consultancy work by way of a confined tender process, in addition to the advisory contract. The combined value of the contracts, as well as the advisory contract, as at the date of award was about R1.6 billion. However, some of contracts were subsequently amended to increase the scope of work and value to about R2.1 billion. These contracts proved to be problematic because none of these cases met the required grounds for confinement and should have gone out to open tender. The confinements were not in Transnet's best interests.[2839] The sheer volume of business confined to McKinsey created a monopolistic situation, contrary to Transnet's procurement guidelines. McKinsey was routinely engaged to commence work even before the tender process had been concluded, immediately after the confinement memo had been approved. It seems as if the confinements amounted to little more than an *ex post facto* exercise to justify the award of business that had already occurred. This was part of a larger trend at Transnet.[2840]

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

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

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

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

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

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

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

Eskom

372. At Eskom, in May 2015, Mr Molefe approved a proposal for the appointment of McKinsey & Company Africa for the development of Eskom's internal consulting capacity, primarily by training Eskom's own engineers through McKinsey's "TOP Engineers programme". The proposal document states that McKinsey would be hired without any competitive bidding process and that McKinsey would work on an 'at risk' basis. This was going to be self-funded through "savings" achieved for Eskom. Mr Molefe approved the proposal on the same day that it was submitted by the Acting Group Executive: Technology and Commercial.[2844] The proposal was approved by the relevant Executive Committee, including the approvals for a sole-source procurement.

373. Later that month, Ms Suzanne Daniels issued a memorandum setting out that she deemed the necessary procurement process requirements to have been met when the EXCO gave their approval for the sole source strategy for the 'Top Engineers

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

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

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

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

Programme'. In her memorandum, Ms Daniels pointed to Eskom policy allowing sole sourcing where "as a result of in-depth market analysis, only one supplier in the market has been identified as being capable or available to supply the assets, goods or services in the existing circumstances" and that the necessary form motivating for this had been provided.[2845]

374. Ms Goodson, who joined Trillian in January 2016 and questioned why Eskom was willing to award McKinsey a contract without going out to tender, believed that it was clear that the consulting services were being used to satisfy the objectives of this programme and not any specialised services.[2846] Thus, if the alleged justification for the sole source tender had to do with specialisation, then it is fair to ask what type of skills and experience McKinsey and Trillian actually brought to the programme.

Free State Provincial Government

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

Transnet

376. At Transnet, China South Rail ("**CSR**") unduly benefited from irregular procurement when Transnet sought the urgent acquisition of 100 "19E type" locomotives for its coal export line. The urgency of the procurement of these locomotives was predicated on the delay experienced in the 1064 acquisition to release locomotive to General

[2845] Exhibit U33, p 23-26.

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

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

Freight.[2848] The TFR division had prepared a business case for the confined procurement of these locomotives from Mitsui & Co African Railway Solutions (Pty) Ltd (MARS).[2849] MARS was able to quickly deliver "19E type" locomotives identical to those already used by Transnet, thus meeting the need for urgency while also standardising the coal line fleet.[2850] This business case was approved for presentation to the Board Acquisition and Disposals Committee meeting held on 21 October 2012 but was withdrawn by Mr Molefe.[2851]

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

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

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

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

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

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

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

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

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

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

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

378. As the "prime author" of the business case motivating for MARS, Mr Callard recounted to the Commission how he was "taken aback" upon discovering these "unilateral changes" to the memorandum.[2859] He contends that these changes were made without consulting him or his technical and operational colleagues. [2860]

379. Mr Callard had serious concerns that technical requirements would not be met, delivery would be negatively impacted, the locomotives would be inoperable, additional costs would be suffered and that the procurement process was compromised.[2861] The 20E type locomotives are not inter-operable with the 19E type locomotives. Despite this, the Board was presented with the revised memorandum and was not informed about Mr Callard's concerns.[2862] Senior management actively created a false impression as to the validity of the confinement process involving CSR, and the minutes did not reflect that Mr Callard's concerns were conveyed to the BADC. As a result, the 100 locomotives were consequently confined to CSR.[2863]

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

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

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

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

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

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

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

380. On 26 February 2014, Mr Molefe issued an RFP to CSR.[2864] Since CSR did not in fact manufacture the required "19E type" locomotives, TFR personnel were then requested to develop a specification for tendering purposes. This process was irregular as representatives from CSR were involved in discussions about how to adapt their "20E type" locomotives for use on Transnet's heavy haul coal line operations. As a result of the design changes, a new class ("21E") was created for the 100 locomotives from CSR.[2865] Notwithstanding these changes, CSR's accepted proposal did not comply with some of the bid conditions in the RFP, such as the minimum threshold for local content production. Transnet made the award to CSR in March 2014.

381. The acquisition of the wrong kind of locomotives caused delays in the delivery of the 100 locomotives, thus negating the urgent basis on which the confinement to CSR was justified. This harmed Transnet's operations and set back plans to optimise operations on the coal line by standardising the fleet. The decision by management to arbitrarily and unilaterally change from MARS to CSR, without obtaining technical or operational advice, was characterised by Mr Callard as being "irresponsible in the extreme."[2866] The irregular confinement resulted in significant financial and operational harm to Transnet while unduly favouring CSR over a stronger competitor, MARS.

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

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

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

The Tendering Phase

Parcelling

Transnet

382. Parcelling occurs when high-value contracts are split into multiple smaller contracts, so that each contract is under the upper limit of the Delegation of Authority ("**DOA**") for confinement. In the case of Transnet however its GCE was authorised to approve contracts below the upper limit without seeking board approval or following any of the procurement processes. This is explicitly against Transnet's procurement guidelines.[2867]

383. It is clear that parcelling took place when several contracts for similar services were awarded to the same firm within a few days of one another, as occurred with McKinsey. Mr Volmink explains how this happened at Transnet. Over a period of 4 days (31 March 2014 to 3 April 2014), the GCE approved four confinements to McKinsey: (1) the coal contract of R130 million; (2) the iron ore contract of R239 million; (3) the manganese contract of R150 million; (4) the NMPP contract of R100 million. Given the fact that the transactions related to the same or similar services and were awarded to the same firm within a few days of each other, Transnet effectively awarded one package of projects to McKinsey valued at R619m. This should have been taken to the BADC for approval. Instead, they were split into four contracts so that they fell under the DOA for confinement given to the GCE (up to R250m), and so avoided the confinement approval process. This is explicitly against Transnet's procurement guidelines.[2868]

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

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

South African Police Service

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

Abuse of preferential procurement and "Supplier Development Partners" policies

385. Procurement has a legitimate transformation role to play in South Africa. State institutions are permitted to use procurement as a policy tool to advance the interests of various designated groups.[2871] However, evidence shows that the ideals of empowerment were grossly manipulated and abused to advance the interests of a few individuals.[2872]

386. Supplier development partnering is the process of working with certain suppliers on a one-to-one basis to improve their performance for the benefit of the buying organisation, leading to improvements in the total added value from that supplier in terms of B-BBEE rating. Supplier development helps to achieve high preferential procurement targets, by ensuring the development of capable suppliers in key areas.

Transnet

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

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

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

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

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

rigorous evaluation process.[2873] The result is that Regiments was awarded millions of Rands worth of work, despite never having bid for any Transnet contracts or going through the robust procurement processes that were set up at Transnet. This abuse is evidenced by the fact that the supplier partner was included only after the main tender process was complete.

SAA

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

389. In the SONA President Zuma said that "Government will set aside 30% of appropriate categories of State procurement for purchasing from SMMEs, cooperatives, as well as township and rural enterprises." There was no mention in the SONA of how this would be implemented at the time.

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

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

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

[2874] Exhibit DD16, p 8 – 12.

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

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

393. Ms Kwinana and Ms Myeni instructed Dr Dahwa not to leave the office until the letters of award were done for both. He was not willing to do so. He was concerned that the whole 30% set aside process was not lawful. He was also concerned that the process which had been used to identify the beneficiaries of the 30% was not regular or in accordance with proper procurement practices. Dr Dahwa raised this specific concern with the Head of Legal and asked how he was going to be able to justify appointing a pre-selected entity without having gone out on open tender to procure the most cost-effective service provider for SAA.

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

395. On another occasion, Mr Wolf Meyer, the SAA CFO at the time, attended a meeting with BidAir along with Ms Kwinana. She informed the BidAir executives that 30% of their contract had to be given to an unspecified SAA nominated black owned small business. BidAir was already a BBBEE company, at least 63% black owned. There was also no formal communication in writing to BidAir.

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

Communication with bidders

Transnet

397. Mr Tshiamo Sedumedi (of MSN Attorneys)[2875] testified that in late 2011, Transnet issued a tender worth R2.7 million for the supply of 95 electric locomotives for its general freight business. In December 2012, the tender was awarded to China South Rail Zhuzhou Electric Locomotive ("**CSR**"), which owned 70% of the consortium with its local partner Matsetse Basadi owning the remaining 30%. The forensic investigations into the procurement of these 95 locomotives found that CSR unduly benefited from a special relationship with Transnet. There were improper communications between senior Transnet executives and CSR before and during the procurement process.[2876] In particular, Mr Molefe met and discussed the tender with CSR before the issuance of the RFP and Mr Pita (Group Chief Supply Chain Officer) played an active role in ensuring CSR was aware of the RFP documents.

SAA

398. Mr Schalk Human, the acting head of department for supply chain management at SAAT told the Commission that during a tender process to procure aviation components, an official from AAR Aviation had been in touch with SAA's CEO at the time. He said it is unusual for a supplier to be in touch with the company while a tender

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

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

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

SARS

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

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

401. Not only is it hugely problematic that the RFP was designed for Bain, it is also a further example of consultancy services being procured when they were not needed. Moreover, Bain itself knew it did not have the expertise to complete the work.

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

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

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

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

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

City of Johannesburg

403. Mr Powell told the Commission that a small group of people at EOH would get an inside track on tenders with the City of Johannesburg before they were even advertised. They would get advance notice and more information than their competitors, or they would get sensitive information on tenders before their competitors did.[2881] There were some instances where confidential information relating to the tenders was leaked to EOH, and in other situations the EOH employers actually wrote the content of the tender themselves. This was to exclude other bidders or to make them more likely to win the tender.[2882]

404. Not only was there communication with bidders, the evidence of money flows related to the City of Johannesburg shows that millions of Rands worth of donations which were made, before and after certain contracts were awarded. Emails show that a month before a certain contract was awarded, Mr Makhubo (then Mayor of Johannesburg) asked EOH for a donation to the ANC. A week after the contract was awarded, Mr Makhubo asked for another donation. Of particular note was R50m donated to the ANC for the 2016 local government elections.[2883]

405. Mr Powell pointed to the elementary fact that tenderers should not be making any donations to political parties or their proxies in connection with the award of a tender during any adjudication. The evidence shows that there was a pattern of regular solicitation of donations, coupled with the award of tenders. The extent of this practice showed that "it was almost as if the tenders were being granted in exchange for financial

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

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

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

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

Free State Provincial Government

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

Retroactive changes to bid criteria

Transnet

407. On more than one occasion Transnet changed the criteria used to evaluate bids during the adjudication process. This appears to have been done to favour specific bidders. For example, the requirement for a B-BBEE certificate was changed to benefit CSR which would otherwise have been disqualified in the evaluation process. CSR scored zero for B-BBEE by virtue of being a foreign company without the mandatory B-BBEE certificate. The retroactive change of the evaluation criteria was irregular as it compromised the fairness, transparency and competitiveness of the procurement process.[2886] Legitimate qualms about the evaluation criteria should have resulted in the tender being re-issued with the changed criteria.[2887]

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

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

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

[2887] Exhibit BB2, p 23.

Post Award

Contract variations and expansions

408. Mr Mathebula says that the existing prescripts provide Accounting Officers/Authorities and accounting authorities of departments, public entities and constitutional institutions with authority to vary or extend contracts within the set limit of 15% or R15 million and 20% or R20 million without the approval of the relevant Treasury. [2888]

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

Transnet

410. With reference to Transnet procuring consulting and advisory services from McKinsey, Regiments and Trillian,[2889] Mr Mohamed Mahomedy noted that each increase in the contract value was justified by a supposed variation in the scope of the advisory work. Each variation would have required a new procurement event to be effected in terms of Transnet's procurement policies, which did not happen.

[2888] Exhibit B1, para 4.6.6.4 .

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

SARS

411. The SARS evidence shows that there was a flouting of the procurement legislation in order to extend what was originally supposed to be a six week contract for around R2.6 million, into one that lasted 27 months and cost SARS around R164 million.[2890]

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

413. After back and forth communications, a solution – a so-called "legal way" to sidestep the requirement that the work go out to open tender – was found.[2891] The solution was for SARS to declare the Bain project an emergency project and claim or that Bain was the sole source provider. This is an example of an unlawful use of the deviation provisions as provided for in the Treasury Regulations. This was clearly not an emergency. Mr Williams said that no one could say that SARS "drastically and urgently needed to be restructured" or that Bain was the only organisation in the country who could do that.[2892] Nevertheless, the extension into phase two of the work took place via this procedure.

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

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

[2891] Transcript 24 March 2021, p 54.

[2892] Transcript 24 March 2021, p 55.

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

415. In this instance, the competitive tender process was avoided by Bain arguing that if phase three of the work was not done by Bain, then phases one and two would be meaningless. Those earlier phases standing alone, it was argued, would have no value for SARS and the expenditure incurred would be wasted. National Treasury was thereby misled into authorising phase 3. Mr Williams explained, however, that phase 3 was actually focused on something different from the earlier two phases, so in that sense the argument held no water.[2894]

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

C: The collapse of governance in State Owned Enterprises

417. The patterns of abuse which appear in every stage of the procurement cycle evidence multiple areas of near collapse in the procurement system. Those patterns, by themselves, do not tell the whole story by any means. What has happened in the governance of state owned enterprises needs to be detailed separately in order to understand to what extent the procurement system has been rendered unfit for purpose.

418. As the representative government shareholder, the Minister is responsible for the appointment of directors to the boards of SOEs. Obviously the Board and senior management are both critical in ensuring good governance in SOEs. The Board is responsible for directing and overseeing the affairs of the SOE to secure its long-term sustainability and is also responsible to ensure compliance with all legislative and regulatory requirements. Directors on the Board have onerous fiduciary duties and must at all times act in the interests of the SOE. They remain accountable for leading the organisation ethically and effectively, and report to the Minister as the representative

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

[2895] Transcript 24 March 2021, p 58.

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

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

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

Transnet

421. At Transnet, by centralising procurement decision-making, it was possible for parties inside and outside Transnet to collude in the award of contracts to redirect substantial public resources into private hands. Power was centralised in Group leadership to enable individuals to make certain procurement decisions, as opposed to committees and acquisition councils.

422. Historically, the Board of Transnet did not have direct authority over procurement-related activities, under the Delegation of Authority ("**DOA**") framework. Under this framework, only the duly delegated person or body may (a) approve the issue of a Request for Proposal i.e., an invitation to tender; (b) adjudicate and approve the award of the tender; and (c) conclude the contract or issue a letter of intent to do so.

423. During 2011 a sub-committee of the Board (the Board Acquisition and Disposals Committee or "**BADC**") was created, which gave the Board powers to approve the approach to market and to conclude contracts for certain high-value transactions

(exceeding R500 million). The BADC and the Board also had powers to appoint consultants and to approve confinements.[2896] During 2012, the BADC and the Board were given tender approval authority of up to R2 billion and above R2 billion, respectively. By 2016 these approval authorities had increased to R3 billion and above R3 billion, respectively.[2897]

424. The creation of the BADC and its creeping authority resulted in the concomitant disempowerment of Transnet's operating divisions in relation to procurement decisions that would directly impact their work. A previously decentralised, democratic procurement system was restructured to concentrate decision-making for high-value contracts at the level of the Board and senior management. The mechanism of one-person acquisition councils further concentrated power in the hands of a few individuals, such as the CFO and GCEO.

425. The centralisation of approval authority at the level of the Board and senior management had the effect of shielding procurement processes from the scrutiny of a wider group of Transnet officials who could have detected and reported irregularities. There was a tendency to avoid the governance function, which required key procurement documents, such as RFPs, confinements, condonations and variations, to be properly assessed to ensure compliance with the regulatory framework. Increasingly, internal structures were marginalised from procurement processes and their functions were outsourced to private firms.

426. This is corroborated by Mr Volmink, who said that the primary challenge to good governance within SCM emanates from people at the top end of the organisation, i.e. the Exco and Board. The bulk of the R8.2 billion on irregular expenditure that Transnet

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

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

recently incurred is directly attributable to decisions made by executives and board members. Also, all the transactions that lie at the heart of the state capture allegations at Transnet were decided by Exco and/or board members. A parallel universe existed within Transnet. On the one hand there was a highly-ordered system with clear controls and procurement rules in place. However, those seem to have been applied more readily to relatively lower-value transactions. On the other hand there appears to have been [an] alternative system, where decisions were made with scant regard to applicable procurement rules. This alternative system seems to apply to high-value transactions within the Board or Exco's delegation."[2898]

Eskom

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

Free State Provincial Government

428. The Commission heard evidence that Mr Ace Magashule, as Premier of the Free State from 2009, immediately moved to centralise Government functions under his office,

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

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

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

Strategic appointments and dismissals

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

430. Dr Popo Molefe explained that there is a discernible pattern with Board appointments.[2902] Key positions are first filled by individuals who have the veneer of professionalism and possess the appropriate experience. They lodge themselves in the vital positions such as CEO, CFO, procurement and the Treasury. From these vantage points, they are then able to manipulate people, processes and systems to their ends and for the advancement of the agenda of looting. They create parallel processes that do not come under scrutiny, they weaken governance systems and they focus on high-value tenders.

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

[2900] Exhibit X5, p.28.

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

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

inappropriate.[2903] After the removal of Ms Hogan as Minister, her successor made a range of board and executive appointments that set in motion the repurposing of Transnet. These appointments were followed by the award of key contracts that benefitted the network of people who had influenced the appointments. Through the strategic position of these individuals and the weakening of governance structures in Transnet, the SOE was repurposed so that wealth could be extracted through corrupt and unaccountable procurement practices.

432. In many ways, Transnet can be considered to have been the Gupta's pilot project at capturing an SOE and was a primary victim of State Capture. This is in keeping with the evidence given by Barbara Hogan, who said in her witness statement that: "the nature of the interventions described by me in Transnet and Eskom manifested the beginnings of the President, and certain members of his Cabinet, unduly influencing the appointments of key executives and board members in SOEs".[2904]

Eskom

433. According to Mr Zola Tsotsi, former Chair of the Board of Eskom, when Mr Brian Dames resigned as Group CEO, the Board wished to appoint Mr Steve Lennon, a divisional executive at Eskom, as Acting CEO. This was broached with Minister Malusi Gigaba who originally agreed, but, later, Mr Gigaba changed his mind. According to Mr Tsotsi, Mr Gigaba phoned Mr Tsotsi and was irate, and said that Mr Lennon could not be made Acting CEO because he was white and there was an election coming up and that would not bode well for the ANC in attracting support.[2905]

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

[2904] Exhibit L, para 106.

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

434. Mr Tsotsi felt that this was not like Mr Gigaba whom he knew very well and that "somebody put him up to what he said"[2906]. Mr Gigaba in a subsequent conversation asked Mr Tsotsi to inform the Board that he would like Mr Colin Matjila who was a Board member at the time, to have the Acting position. (Mr Tsotsi also characterises this as an "instruction").[2907] While the rest of the Board members were unhappy on hearing this, they, nevertheless, saw to it that Mr Matjila was made Acting CEO.[2908] While he was acting Group CEO of Eskom, Mr Matjila helped the Guptas and their associates get contracts with Eskom. This include the New Age Breakfasts. He was also prepared to sign a certain contract that Mr Salim Essa was pursuing which Ms T Molefe who was the Financial Director of Eskom at the time, refused to sign. The appointment of Mr Matjila as Acting Group CEO is yet another instance where Mr Gigaba had a role in the appointment of someone who assisted the Guptas. Mr Brian Molefe is another. There are others.

SAA

435. At SAA, it appears that Ms Dudu Myeni, as Chairperson, would remove any executives who refused to carry out her instructions. She was intimately involved with the appointment and dismissal of executives.

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

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

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

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

Transnet

437. According to Ms Hogan, Mr Zuma "thwarted all the legal and legitimate procedures [she] took to obtain Cabinet approval for any appointments whatsoever to Transnet, including the appointment of a CEO."[2909]Mr Zuma insisted that Ms Hogan appoint Siyabonga Gama to the position of Group CEO, despite the fact that (1) the board had already chosen their preferred candidate through an extensive and professional selection process,[2910] and (2) Gama (who was the CEO of one of Transnet's subdivisions, Transnet Freight Rail) was facing serious allegations of misconduct including misconduct connected with irregularities in tenders at the time.[2911] Mr Zuma insisted that no appointment be made until after the disciplinary case against Gama had been concluded.[2912]

438. Ms Hogan described Mr Zuma's conduct as unprofessional in that there was never an aide present at his meetings with her; he frequently held meetings in his house, which were arranged by his housekeeper. There were no records made or kept of these meetings. His approach was to issue instructions to his Cabinet without bothering to justify them – he was "in charge of the show", according to Hogan, and did not appreciate that she had certain duties and responsibilities as an executive authority that she had to fulfil.[2913]

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

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

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

[2911] Exhibit L, p 10, para. 36.

[2912] Exhibit L, p 10, para. 34.

[2913] Exhibit L, para. 93.

appointments via the ANC Deployment Committee.[2914] The practice of consultation with the ruling party was further tainted by a lack of transparency and the presence of conflicts of interest.[2915] She said that factional battles within the ANC encouraged and entrenched nepotism and patronage, which compromised the integrity of the deployment process and damaged SOEs.[2916]

440. According to Ms Hogan the ANC wanted Mr Gama and no-one else in that position.[2917] Ms Hogan was put under pressure to appoint Mr Gama by other cabinet ministers and senior ANC leaders (such as Mr Jeff Radebe, Mr Simphiwe Nyanda and Mr Gwede Mantashe). A number of media statements put out by organisations such as the ANC Youth League, the South African Transport Union and the SACP accused Transnet of persecuting Mr Gama and cast Ms Hogan and the board as "anti-transformation" and "racist". According to Ms Hogan, Mr Zuma did not protect her from these attacks, but had "hung [her] out to dry".[2918] She experienced this media exposure as "an enormous amount of pressure being put on [her] publicly to accede to their demands".[2919]

441. Mr Zuma did not allow the appointment of a CEO until Mr Gama's disciplinary process was finalised.[2920] After Gama had been found guilty and dismissed, President Zuma did not respond to Ms Hogan's correspondence or requests for a meeting concerning the appointments. She was dismissed three days after requesting that Mr Zuma expedite the placing of a memo concerning Transnet appointments onto the Cabinet agenda.[2921]

[2914] Exhibit L, p, 6, para. 22.

[2915] Transcript 21 November 2018, pp 39 – 45.

[2916] Exhibit L, p 7, para. 25.

[2917] Transcript 21 November 2018, p 105.

[2918] Transcript 21 November 2018, p 94 - 109.

[2919] Transcript 21 November 2018, p 102.

[2920] Transcript 21 November 2018, p 26.

[2921] Exhibit L, p 14-15, paras 52–57.

442. Ms Hogan was replaced by Mr Malusi Gigaba. Mr Gigaba was able to make the necessary appointments at Transnet without the delays from Mr Zuma and his cabinet that had effectively put a halt to the appointment process under Ms Hogan. A month into his term, cabinet approved Mr Gigaba's recommendations for the Transnet board, including Iqbal Sharma, an associate of Salim Essa[2922] and the Gupta Family.

443. Mr Gigaba appointed Brian Molefe as GCEO of Transnet in February 2011, an appointment which had already been reported in the Gupta newspaper *The New Age* before it was announced.[2923] Mr Gigaba appointed Mr Brian Molefe ahead of a candidate who had scored higher points than him in the interviews. Mr Gama was reinstated as CEO of TFR on the grounds that his misconduct had not been serious enough to warrant his dismissal. His reinstatement was on very strange terms that were very favourable to him and very prejudicial to the interests of Transnet. That matter is dealt with under Transnet.[2924]

SAA

444. Ms Mzimela described SAA under Barbara Hogan and Cheryl Carolus as strong on corporate governance. According to Ms Mzimela, governance was well managed and transparent, and there were clear distinctions between the spheres of competency between the Ministry, the Board, and the executive management of SAA. The Board

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[2922] Exhibit L, p 15, paras 59–62.

[2923] Transcript May 7 2019, p15.

As early as March 2011, COSATU had raised concerns about Brian Molefe's relationship with the Guptas, and the Gupta's apparently growing influence over government. Other board appointments had also been accurately predicted by *The New Age.* By March 2011, the media was reporting several anomalies associated with the "miraculously quick" appointment of Molefe as the new CEO of Transnet. Details of the appointment process suggested Molefe's appointment had been predetermined.

Prior to appointing Molefe, Gigaba tried to appoint Iqbal Sharma as chair of the board, but this was not approved by Cabinet. There are media reports that Cabinet was worried Sharma was too close to the Guptas – but this was denied by Gigaba. See National Assembly Portfolio Committee on Public Enterprises, "Eskom Inquiry: Malusi Gigaba" (Parliamentary Monitoring Group, March 13, 2018), https://pmg.org.za/committee-meeting/25974/.

[2924] Transcript 21 November 2018, p 118.

deliberately focused on ensuring good governance given “historical breakdowns” in the governance of the institution.[2925]

445. Ms Carolus characterised Minister Hogan’s approach in much the same way. According to Ms Carolus, Minister Hogan expected the board to adhere to the letter and the spirit of the relevant legislation and good governance policies. She also expected the Board to have due regard for the government’s wider objectives of economic growth, job creation, transformation and good governance. Ms Carolus emphasised that there was a clear separation of the three areas of responsibility and the respective responsibilities of the shareholder representative (the Minister), the Board, and the management team.[2926]

446. Communication under Minister Hogan was clear and transparent, and always took the form of formal written communication. This was enhanced by a clear delineation of roles within SAA and the DPE, so that it was always clear who one needed to contact for various issues. Under Minister Gigaba, the management of information and communication became chaotic, as multiple Ministry officials with no connection to SAA would initiate communication without following the correct protocols.[2927]

447. Ms Hogan was dismissed by Mr Zuma on 31 October 2010, which she believed was due to her resisting his attempts to appoint certain preferred candidates as board members or CEOs of state owned entities.[2928] She was replaced by Mr Gigaba.

[2925] Exhibit DD14, p 3-6, paras 4 -11.

[2926] Transcript 29 November 2018, p19–20;. See also exhibit R3, paras 4–6.

[2927] Transcript 13 September 2019, p 53–54, and 59.

[2928] Exhibit L124, para 108.

Demarcation between the Board and executive decision makers

448. Not only was there political involvement in the operations of the SOEs, there was also no clear demarcation between the role of the Board as an oversight body and the role of the executive as the operational controllers of the SOEs.

Transnet

449. The evidence relating to the award of high-value contracts bears out Mr Volmink's evidence that recommendations were routinely presented directly to the Board for approval, rather than benefitting from the process put in place to ensure the involvement of Transnet's management committee, operating divisions or governance structures. For example, the decision to change from MARS to CSR as the supplier of 100 "type 21E" locomotives was made without consulting Transnet Freight Rail (a subsidiary company) for operational advice.

450. The result was that high-value procurement decisions by the Board were often uninformed or made on the basis of questionable advice received from external advisors and consultants. For example, the resolution of the Locomotive Steering Committee to approve an Estimated Total Cost for the 1064 locomotives acquisition of R38.6 billion excluding rather than including the potential effects of forex heading and escalation.[2929]

451. There are examples at Transnet where the Board directly overruled recommendations made by the Executives. Notwithstanding the fact that Ms Pillay, as the acting GCEO, had signed off on the award to Neotel, the Commission heard evidence that Mr Molefe instructed Mr Singh not to issue the letter of intent to Neotel as he wanted to review the

[2929] Exhibit BB8(b), p11.

award.[2930] Mr van der Westhuizen, who was intimately involved with the procurement process, recounts that he was called to a meeting with Mr Molefe during November 2013 to discuss the network services tender. He recalls that he and the other attendees were requested to hand over their cellular phones before entering Mr Molefe's office. At this meeting, Mr Molefe indicated that he did not support the award to Neotel and that he instead intended to award the tender to T-Systems. Mr van der Westhuizen recounts that he was the only attendee who raised objections to Mr Molefe's reasoning in support of T-Systems. After realising that his comments were not being well received, he took no further part in the meeting since he felt that the continued "verbalisation of [his] objections would be tantamount to professional suicide." [2931]

452. The reasons put forward by Mr Molefe for overturning the award to Neotel are reflected in the memorandum that Mr van der Westhuizen was subsequently instructed to draft, notwithstanding his strong disagreement with the position he was required to justify. The reasons proffered were that the R248 million discount offered by T-Systems should have been taken into account; Neotel posed a "concentration risk" as Transnet was their biggest client; and that a complaint had been received that Neotel was diluting its shareholding to the detriment of its B-BBEE partners.

453. Mr Molefe lacked the authority to take the decision, as the powers vested in the GCEO to award the tender had already been exercised by Ms Pillay as the acting GCEO. Even assuming Mr Molefe had the power to rescind the award, his decision to rescind was taken in a procedurally unfair manner. Transnet's procurement Practice Manual states that an Acquisition Council cannot substitute its own decision for that of the evaluation

[2930] Exhibit BB7, p 22.

[2931] Exhibit BB7, p 28.

team which is what Mr Molefe did without following proper processes for resolving any dispute.

SAA

454. At SAA, an open tender process was followed for catering services and the winning bidder was LSG Skychef. Air Chefs, SAA's catering subsidiary participated in the tender but their bid was not successful following the adjudication process. A letter of award was issued to LSG on 21 August 2015 in line with the standard practice.

455. Following this meeting, the Board then passed a resolution to cancel the tender to LSG, and award it to Air Chefs. The letter informing LSG that their award had been retracted was then sent. Air Chefs was then given a letter of award for the contract.

Transnet

456. A slightly different issue, but also related to the demarcation between the board and the executive is the following. Evidence shows that executives presented propositions to the Board for approval which were misleading. From the record of the discussion about the acquisition of 100 locomotives at Transnet, it appears that the BADC was misled by senior management. First, the minutes do not reflect that Mr Callard's concerns were conveyed to the BADC so that the problems with procuring "20E type" locomotives from CSR were not disclosed. Secondly, it appears that senior management actively created the false impression that the confinement process involving CSR had been valid.[2932] Mr Brian Molefe used his position as Group CEO to override his own procurement and contract management teams.

[2932] Exhibit BB4(a), p 53.

D: Preliminary Observations

457. The evidence given to the Commission covers multiple cases of procurement corruption. The few examples discussed above are typical of the abuse patterns encountered in high value contracts. The lessons to be learnt from these selected examples are discussed later in this Chapter but it may be helpful to note some of the headline concerns at this point.

458. The examples illustrate the involvement of senior Government officials (including the former President and members of the Cabinet) in questionable relationships, to say the least. Misconduct permeated the boards of the SOEs and also implicated senior administrative officials. The private sector entities identified in the examples were active in forming and perpetuating irregular arrangements involving:

458.1. McKinsey and Company in its relationship with Transnet and Eskom;

458.2. Trillian (a Gupta Family related entity) in its relationship with Transnet;

458.3. Regiments (a Gupta Family related entity) in its relationship with Transnet;

458.4. Bain in its relationship with SARS;

458.5. China South Rail in its relationship with Transnet;

458.6. EOH in its relationship with the City of Johannesburg.

459. In most, if not all, of these cases, the pattern of abuse extended through various stages of the procurement cycle evidencing an embedded corrupt relationship.

460. These examples illustrate:

460.1. the use of political influence for malign purposes;

460.2. the appointment of pliable officials to oversee the improper grant of tenders or contracts;

460.3. the bullying or replacement of officials who objected to irregular practices;

460.4. the diversion of money, being the proceeds of corruption, to the benefit of the ANC;

460.5. the collapse of governance in the SOEs;

460.6. a lack of transparency;

460.7. the growth of a culture of impunity;

460.8. the ineffectual nature of oversight;

460.9. the absence of proper monitoring;

460.10. the absence of consequences;

460.11. the readiness with which the implicated private sector entities initiated or participated in corrupt arrangements and the absence of any internal safeguards in their corporate structures.

461. All these matters need to be addressed if the procurement system is to be properly reformed. They are addressed in the subsequent sections of this Chapter.

E: Was the Procurement System Prone to Corruption Before State Capture?

462. It is important to know whether the procurement system had been functioning properly prior to the onset of State Capture. If so, the State Capture period was an aberration which temporarily damaged a viable procurement system. If, however, the record shows that corruption and criminality had manifested itself well prior to State Capture, then one must face the sober reality that the procurement system as presently configured is not fit for purpose.

463. Academic writers and public interest bodies have been assessing the procurement system over the last 20 years and their conclusions bear directly on this question.

464. As early as 2002, and well before the grotesque events which we now call State Capture, the Public Affairs Research Institute ("**PARI**") had published a paper which identified South Africa's public procurement system as a system in crisis. In its paper "Reforming the Public Procurement System in South Africa"[2933] PARI found that there were five major causes of the crisis:

464.1. public procurement is subject to extensive political interference;

464.2. there are major deficits in the capacity of public procurement functions at regulatory and operational levels;

464.3. public procurement is subject to a complicated, fragmented and often inconsistent regulatory regime;

[2933] Brunette. R, Klaaren. J (2002) Reforming the Public Procurement System in South Africa. *Position Papers on State Reform*. Public Affairs Research Institute

464.4. public procurement involves stark tradeoffs between the procedural integrity necessary for fairness and to protect public funds, and the flexibility associated with the operational substance of purchasing;

464.5. there is a mismatch between the formalistic approach to regulation and government's commitment to using public procurement to achieve social and developmental objectives.

465. In 2002 the procurement system operated through a State Tender Board and was therefore essentially a centralised procurement system and remained so until about 2008. Since 2002 the procurement system has been changed and modified in significant respects. More particularly the legislative framework which has been enacted to regulate procurement has been extensively expanded. Did these changes put an end to well-informed criticisms of the system or did these nonetheless persist?

466. In 2012 Ambe and Badenhorst-Weiss published their observations[2934] regarding public procurement challenges in which they noted a lack of proper knowledge, skills and capacity; non-compliance with policies and regulations; inadequate planning; a lack of accountability and increased fraud and corruption; inadequate measures for the monitoring and evaluation of public procurement and pervasive unethical behaviour. They also identified undue decentralisation of the procurement system and the ineffectiveness in achieving the objectives of broad based black economic empowerment.

[2934] Procurement challenges in the South African public sector published in the Journal of Transport and Supply Chain Management 2012.

467. In 2013 Tarisma Maharaj and Professor Anis Karodia examined the impact which supply chain management had on fraudulent activities in the public sector and concluded:

> "… the reality [is] that there is massive fraud, misallocation of funds, and the breach of law. It also points to the fact that the flouting of SCM processes have become the order of the day in South Africa and that fraud, corruption and the violation of the law in the SCM chain has now become endemic. All of this compromises the Government of the day and further compromises South Africa on the international stage and makes the country a poor destination for investment. In addition it compromises growth, development and hampers service delivery which leads to massive strikes and protests by the population at large."[2935]

468. In 2017 Mazibuko and Fourie published their conclusions in an article titled "Manifestation of Unethical Procurement Practices in the South African Public Sector".[2936] They listed unethical procurement practices including uncompetitive bids; employees bids awards; non-compliance with supply chain management legislation, inadequate contract management, ineffective control systems, uncompetitive bidding, acceptance of less than three quotations, using an incorrect preferential point system and thresholds and irregular expenditure. They noted that unethical procurement practices were dangerous and ubiquitous, and that they could produce economic and social ills to society.

469. The substance of these criticisms has remained the same over the years and that has been the case before, at the outset of, and during the State Capture period. It must also be noted that in essential respects the evidence given at this Commission confirms these criticisms. What was noted as far back as 2002 has not changed in its essential character, it has simply gotten much worse.

[2935] Singaporean Journal of Business Economics and Management Studies Volume 2, No. 3, 2013.

[2936] African Journal of Public Affairs Volume 9 December 2017.

470. State capture, then, was not the beginning of the subversion of the procurement system albeit that it was the most concentrated and aggressive attack upon it. To use the analogy of the current pandemic, state capture aggressively attacked a system which was already weakened by long standing co-morbidities.

471. In the circumstances any serious attempt to address the problems which beset public procurement must go well beyond state capture. It must assess the adequacy of the procurement framework which is set out in the national legislation, to see whether that framework is compatible with the realities on the ground or whether there are fundamental design deficiencies. It must also answer the troubling question: why has the system been so susceptible to misuse?

F: A Review of the Framework Design for Procurement in the National Legislation

472. The selected examples, and the evidence overall, show how poorly the procurement system has been working in practice. The picture is one of a procurement system which is vulnerable to extensive patterns of abuse. The design of this procurement system is set out in the national legislation. Manifestly the framework design was intended to be strong enough to withstand the very abuses to which it has fallen prey. A closer look at the legislative design is therefore unavoidable to see why and how the theory of procurement has so diverged from the practice of procurement.

473. There are two steps in the descriptive narrative which follows. First, the many relevant legislative enactments which contributed to the overall framework must be identified. Within that context it will be necessary to pay specific attention to the supply chain management policy (SCM).

474. To give effect to the constitutional requirements in section 217, framework legislation was enacted to regulate public procurement. The three critical statutes are the Public

Finance Management Act 1 of 1999 ("**PFMA**"), the Local Government: Municipal Finance Management Act 56 of 2003 ("**MFMA**") and the Preferential Procurement Policy Framework Act 5 of 2000 ("**PPPFA**").

475. The PFMA prescribes the general system for public procurement that must be followed by national and provincial governments, the public entities listed in the Act, constitutional institutions, Parliament and provincial legislatures.

476. The MFMA regulates public procurement on local government level. It is to be read with the Local Government: Municipal Systems Act 32 of 2000.

477. The PPPFA provides the legislative scheme for preferential procurement pursuant to the provisions of section 217(2) and 217(3) of the Constitution. Section 217(2) and (3) of the Constitution provides:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
> (a) categories of preference in the allocation of contracts; and
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination."

478. The provisions of the PPPFA need to be harmonised with the more general provisions of the other statutes regulating public procurement.

<u>The PFMA</u>

479. The PFMA grants National Treasury a host of general functions and powers of oversight, which also apply to public procurement and which can be viewed as fulfilling

the mandate given in section 216(1) of the Constitution.[2937] These principal statutes enable the National Treasury to play its crucial role in guiding and overseeing the otherwise highly decentralised system of public procurement.

480. The legal mandate of the National Treasury under the PFMA is threefold: (a) to create norms and standards; (b) to enforce a regulatory regime; and (c) to assist organs of state in implementing that regime.

481. The PFMA provides that every department, trading entity and constitutional institution on national and provincial level must have an accounting officer. [2938]The accounting officer has to ensure that the department, trading entity or constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.[2939] Every public entity must appoint an accounting authority which will be accountable in terms of the PFMA. This accounting authority fulfils the same role in public entities as the accounting officer fulfils in state departments, trading entities and constitutional institutions.[2940]

482. In the result, the institutional scheme that emerges from the PFMA in respect of public procurement is that organs of state (through their Accounting Officers/Authorities) have the power to formulate their own rules governing procurement by that entity and to procure in terms of those rules, but that these functions must be fulfilled in terms of the framework created by the National Treasury and under its supervision.[2941]

[2937] Exhibit B1, para 4.6.4.9.

[2938] Section 36, PFMA.

[2939] Section 38 (1)(a)(iii), PFMA.

[2940] Section 49 (2), PFMA.

[2941] Exhibit B1, para 4.6.4.13.

483. As noted by Mr Mathebula, the particular rules which govern the procurement processes of individual entities are formulated at the entity or department level and are the responsibility of the accounting officer or the accounting authority. The same accounting officer/authority is also primarily tasked with ensuring compliance with the Rules.

484. The PFMA provides that National Treasury may issue National Treasury Regulations for the determination of a framework of appropriate procurement and provisioning systems.[2942] Acting in terms of section 76 of the PFMA, the National Treasury has made the Treasury Regulations, which include regulations on public procurement, the most important of which for present purposes is Regulation 16A.

485. Regulation 16A binds entities to additional instructions from the National Treasury in implementing their supply chain management systems. These include the threshold values in terms of which particular methods of procurement must be adopted, the minimum training required of officials staffing supply chain management units, the procedure for appointment of consultants, and ethical standards to be adhered to.[2943]

486. The ethical standards to be adhered to are found in the Code of Conduct for SCM Practitioners. This includes requirements that an official must disclose any conflict of interest that may arise, treat all suppliers and potential suppliers equitably, may not use his or her position for private gain or improperly to benefit another person, ensure that he or she does not compromise the credibility or integrity of the SCM system through acceptance of gifts or hospitability or any other act, be scrupulous in his or her use of

[2942] Section 76(4)(c), PFMA

[2943] Exhibit B1 para 4.6.5.4.

public property and assist Accounting Officers/Authorities in combating corruption and fraud in the SCM system.[2944]

487. There are provisions specifically aimed at preventing the abuse of the system, including that the accounting officer/authority must take all reasonable steps to prevent the abuse of the SCM system. Any allegation of corruption, improper conduct or failure to comply with the SCM system made against an official or another role player must be investigated by the accounting officer/authority.[2945]

488. It is important to note that Regulation 16A has a limited scope of entity application and does not apply to institutions listed in schedules 2, 3B and 3D to the PFMA. The institutions are, respectively, major public entities, national government business enterprises and provincial enterprise. The regulation does, however, apply to transactions beyond procurement, and also includes transactions involving disposal and letting of state assets.[2946]

489. Treasury Regulations grant the National Treasury and provincial treasuries a reporting mandate in terms of which entities must report on their procurement functions to the National Treasury and provincial treasuries and the latter must report to the National Treasury. Entities are obliged to comply with the reporting requirements and the National Treasury is given a wide mandate to formulate the information to be included in such reports. The National Treasury has, for example, implemented this function through its Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management of 31 May 2011."[2947]

[2944] Regulation 16A 8.3 (a) – (f).

[2945] Regulation 16A9.1(a).

[2946] Exhibit B1, para 4.6.5.1.

[2947] Exhibit B1 para 4.6.5.5.

490. The reporting function and its adequacy is an essential element in any effective procurement system. The acid test is whether the mandated reporting system is properly implemented; whether it is sufficient to provide an accurate picture of what is happening on the ground and whether the oversight authority is properly equipped to respond appropriately to the red flags which the reports identify. Moreover, the macro-level oversight function cannot do the work of micro-level monitoring. This issue will be discussed later in the report.

The MFMA and the LGMS

491. The MFMA seeks to secure the sound and sustainable management of the financial affairs of Municipalities and other institutions in the local sphere of Government. Chapter 11 sets out the supply chain management policy which must be followed by Municipal entities in general terms which require the Municipality to cover a wide range of standards and protections which must be covered in that Municipality's procurement processes and which are intended, in the result, to ensure that the process is fair, equitable, transparent, competitive and cost effective.

492. Section 83(1) of the Local Government: Municipal Systems Act 32 of 2000 (LGMS Act) applies as amended whenever a municipality decides to provide a municipal service through a service delivery agreement other than with a national or provincial organ of state or another municipality or municipal entity. In terms of section 83(1) a municipality "must select the service provider through selection processes which –

> (a) comply with Chapter 11 of the [MFMA];
> (b) allow all prospective service providers to have equal and simultaneous access to information relevant to the bidding process;
> (c) minimise the possibility of fraud and corruption;

(d) make the municipality accountable to the local community about progress with selecting a service provider, and the reasons for any decision in this regard; and
(e) takes into account the need to promote the empowerment of small and emerging enterprises."

493. Section 83 includes further provisions, which are dealt with below, aimed at ameliorating unfair discrimination.

The PPPFA and Related Legislation

494. Procurement preference as contemplated by s 217(2) of the Constitution and the consequent preference policy framework enacted by the PPPFA allows a degree of relaxation in the requirements of competitiveness and cost-effectiveness stipulated in s 217(1).

495. Section 2 of the PPPFA provides a framework for implementation of preferential procurement policy. According to this section, a preference point system must be followed.

496. The statutory points system and the allocation of points within it on a transparent basis is, obviously, intended to minimise subjective discretion and maximise the application of objective criteria in the awarding of contracts pursuant to tender.

497. In the legislative scheme of the PPPFA (although not clearly spelled out) a two-stage process is necessarily implied: a *threshold* stage and a stage of *further evaluation*. Only the tenders which comply with the specifications and conditions of the invitation to tender (without regard as yet to relative price or preference criteria) receive further evaluation. All the tenders so complying would be acceptable tenders for purposes of the point system set out in s 2 of the PPPFA. A criterion of *minimum* acceptable quality

or "functionality" (having regard to the invitation to tender) applies at the threshold stage. Those tenders which do not comply with the specifications and conditions of the invitation to tender are excluded from the second stage of further evaluation.

498. It is in the second stage that points are to be awarded in the evaluation of the *acceptable* tenders. It is here that the criterion of competitive price comes into play, along with the specific goals contemplated in s 2(1)*(d)*(i) and (ii) of the PPPFA[2948] that have been specified in the invitation to submit a tender.

499. The "specific goals" contemplated in s 2(1)*(d)*(i) relate to contracts with "historically disadvantaged persons". The "specific goals" contemplated in s 2(1)*(d)*(ii) with reference to the Reconstruction and Development Programme were interpreted and articulated in the 2001 PPPFA Regulations[2949] as follows:

(a) the promotion of South African owned enterprises;
(b) the promotion of export orientated production to create jobs;
(c) the promotion of SMMEs;
(d) the creation of new jobs or the intensification of labour absorption;
(e) the promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;
(f) the promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;
(g) the promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;
(h) the promotion of enterprises located in rural areas;

[2948] the specific goals may include-

i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* No. 16085 dated 23 November 1994;

[2949] The Regulations are available on the Treasury's website at http://www.treasury.gov.za/legislation/pfma/supplychain/gazette_22549.pdf

(i) the empowerment of the work force by standardising the level of skill and knowledge of workers;
(j) the development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and
(k) the upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.

500. The Broad-Based Black Economic Empowerment Act 53 of 2003 ("**the B-BBEE Act**") applies *inter alia* to public procurement. It promotes socio-economic strategies that include but are not limited to "preferential procurement from enterprises that are owned or managed by black people".[2950] Section 9(1) of the Act empowers the Minister of Trade and Industry to issue codes of good practice that may include "qualification criteria for preferential purposes for procurement and other economic activities". Section 10(1) of the B-BBEE Act provides:

> "Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in –
>
> (a) determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;
> (b) developing and implementing a preferential procurement policy;
> (c) determining qualification criteria for the sale of state-owned enterprises;
> (d) developing criteria for entering into partnerships with the private sector; and
> (e) determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.

[2950] Section 1 contains the definition of "broad-based black economic empowerment"

501. The B-BBEE Act is now a central feature of the procurement preference system. The incorporation of B-BBEE status in the regulations governing preferential procurement is dealt with in the next section.

502. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 also applies to public procurement. That Act seeks to give effect to the provisions of the Constitution which prevent and prohibit unfair discrimination and which promotes equality and eliminates unfair discrimination. Its guiding principles include the admonition set out in section 4(2)2951 which recognises the existence of systematic discrimination of the past and underscores the need to take measures at all levels to eliminate such discrimination and inequalities.

503. Section 83 of the LGMS also provides:

> "(2) Subject to the provisions of the [PPPFA], a municipality may determine a preference for categories of service providers in order to advance the interest of persons disadvantaged by unfair discrimination, as long as the manner in which such preference is exercised does not compromise or limit the quality, coverage, cost and development impact of the services.
>
> (3) The selection process referred to in subjection (1), must be fair, equitable, transparent, cost-effective and competitive, and as may be provided for in other applicable national legislation.
>
> (4) In selecting a service provider a municipality must apply the criteria listed in section 78 as well as any preference for categories of service providers referred to in subsection (2) of this section."

[2951] Section 4(2) reads:

> "In the application of this Act the following should be recognised and taken into account:
>
> (a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and
>
> (b) the need to take measures to all levels to eliminate such discrimination and inequalities."

Section 78 of the LGMS Act provides:

"Criteria and process for deciding on mechanisms to provide municipal services

(1) When a municipality has in terms of section 77 to decide on a mechanism to provide a municipal service in the municipality or a part of the municipality, or to review any existing mechanism—

(a) it must first assess—

(i) the direct and indirect costs and benefits associated with the project if the service is provided by the municipality through an internal mechanism, including the expected effect on the environment and on human health wellbeing and safety;

(ii) the municipality's capacity and potential future capacity to furnish the skills, expertise and resources necessary for the provision of the service through an internal mechanism mentioned in section 76(a);

(iii) the extent to which the re-organisation of its administration and the development of the human resource capacity within that administration as provided for in sections 51 and 68, respectively, could be utilised to provide a service through an internal mechanism mentioned in section 76(a);

(iv) the likely impact on development, job creation and employment patterns in the municipality; and

(v) the views of organised labour; and

(b) it may take into account any developing trends in the sustainable provision of municipal services generally.

(2) After having applied subsection (1), a municipality may—

(a) decide on an appropriate internal mechanism to provide the service; or

(b) before it takes a decision on an appropriate mechanism, explore the possibility of providing the service through an external mechanism mentioned in section 76(b).

(3) If a municipality decides in terms of subsection (2)(b) to explore the possibility of providing the municipal service through an external mechanism it must—

(a) give notice to the local community of its intention to explore the provision of the municipal service through an external mechanism;

(b) assess the different service delivery options in terms of section 76(b), taking into account—

(i) the direct and indirect costs and benefits associated with the project, including the expected effect of any service delivery mechanism on the environment and on human health, wellbeing and safety;

(ii) the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service;

(iii) the views of the local community;

(iv) the likely impact on development, job creation and employment patterns in the municipality; and

(v) the views of organised labour; and

(c) conduct or commission a feasibility study which must be taken into account and which must include—

(i) a clear identification of the municipal service for which the municipality intends to consider an external mechanism;

(ii) an indication of the number of years for which the provision of the municipal service through an external mechanism might be considered;

(iii) the projected outputs which the provision of the municipal service through an external mechanism might be expected to produce;

(iv) an assessment as to the extent to which the provision of the municipal service through an external mechanism will—

(aa) provide value for money;

(bb) address the needs of the poor;

(cc) be affordable for the municipality and residents; and

(dd) transfer appropriate technical, operational and financial risk;

(v) the projected impact on the municipality's staff, assets and liabilities;

(vi) the projected impact on the municipality's integrated development plan;

(vii) the projected impact on the municipality's budgets for the period for which an external mechanism might be used, including impacts on revenue, expenditure, borrowing, debt and tariffs; and

(viii) any other matter that may be prescribed.

(4) After having applied subsection (3), a municipality must decide on an appropriate internal or external mechanism, taking into account the requirements of section 73(2) in achieving the best outcome.

(5) When applying this section a municipality must comply with—

(a) any applicable legislation relating to the appointment of a service provider other than the municipality; and

(b) any additional requirements that may be prescribed by regulation.

(6) The national government or relevant provincial government may, in accordance with an agreement, assist municipalities in carrying out a feasibility study referred to in subsection (3)(c), or in preparing service delivery agreements."

Other Relevant Legislative Enactments

504. There are a wide range of legislative enactments which have either a broad and general or a limited and specific application to public procurement. They are identified under the appropriate topic headings.

Judicial Oversight

505. The public procurement process also falls generally within the purview of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

506. The facts of each case will determine what any shortfall in the requirement of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.[2952]

[2952] *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO SASSA and Others* 2014 (1) SA 604 (CC) 2014 (1) BCLR.

507. The provisions of this Act create general offences of corruption and also introduce a specific offence relating to the procuring and withdrawal of tenders. Sections 3, 4 and 13 read as follows:

"**3 General offence of corruption**

Any person who, directly or indirectly –

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner –

(i) that amounts to the –

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the,

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to –

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corruption.

4 Offences in respect of corrupt activities relating to public officers

(1) Any –

(a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner –

(i) that amounts to the –

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the,

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to –

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

ìs guilty of the offence of corrupt activities relation to public officers.

(2) Without derogating from the generality of section 2(4), 'to act' in subsection (1) includes –

(a) voting at any meeting of a public body;
(b) performing or not adequately performing any official functions;
(c) expediting, delaying, hindering or preventing the performance of an official act;
(d) aiding, assisting or favouring any particular person in the transaction of any business with a public body;
(e) aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;
(f) showing any favour or disfavour to any person in performing a function as a public officer;
(g) diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or
(h) exerting any improper influence over the decision making of any person performing functions in a public body.

13 Offences in respect of corrupt activities relating to procuring and withdrawal of tenders

(1) Any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, as –

(a) an inducement to, personally or by influencing any other person so to act –

(i) award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other acts, to a particular person; or

(ii) upon an invitation to tender for such contract, make a tender for that contract which has as its aim to cause the tenderee to accept a particular tender; or

(iii) withdraw a tender made by him or her for such contract; or

(b) a reward for acting as contemplated in paragraph (a)(i), (ii) or (iii), is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.

(2) Any person who, directly or indirectly –

(a) gives or agrees or offers any gratification to any other person, whether for the benefit of that other person or the benefit of another person, as –

(i) an inducement to, personally or by influencing any other person so to act, award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or

(ii) a reward for acting as contemplated in subparagraph (i); or

(b) with the intent to obtain a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, gives or agrees or offers to give any gratification to any person who has made a tender in relation to that contract, whether for the benefit of that tenderer or for the benefit of any other person, as -

(i) an inducement to withdraw the tender; or

(ii) a reward for withdrawing or having withdrawn the tender,

is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders."

508. The Act further provides for severe penalties in the case of any infringement of section 13 involving a maximum sentence of imprisonment for life.

509. Section 34 of POCCA[2953] requires any person who holds a position of authority and who knows, or ought reasonably to have known or suspected, that any person has committed a section 13 offence involving an amount of R100 000.00 or more, to report

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[2953] Section 34

(1) Any person who holds a position of authority and who knows or ought to reasonably to have known or suspect that any other person has committed—
a. an offence under Part 1, 2, 3 or 4 or section 20 or 21 (in so far as it relates to the aforementioned offences of Chapter 2; or
b. the offence of theft, fraud, extortion, forgery or uttering a forged document involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.
(2) Subject to the provisions of section 37(2), any person who fails to comply with subsection (1), is guilty of an offence.
(3)
a. Upon receipt of a report referred to in subsection (1), the police official concerned must take down the report in the manner directed by the National Commissioner, and forthwith provide the person who made the report with an acknowledgement of receipt of such report.
b. The National Commissioner must within three months of the commencement of this Act publish the directions contemplated in paragraph (a) in the Gazette.
c. Any direction issued under paragraph (b), must be tabled in Parliament before publication thereof in the Gazette.
(4) For purposes of subsection (1) the following persons hold a position authority, namely—
a. the Director-General or head, or equivalent officer, of a national or provincial department;
b. in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);
c. any public officer in the Senior Management Service of a public body;
d. any head, rector or principal of a tertiary institution;
e. the manager, secretary or a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);
f. the executive manager of any bank or other financial institution;
g. any partner in a partnership;
h. any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means;
i. any other person who is responsible for the overall management and control of the business of an employer; or
j. any person contemplated in paragraphs (a) to (i), who has been appointed in acting or temporary capacity.

such knowledge or suspicion or cause such knowledge or suspicion to be reported to a Police official in the Directorate for Priority Crime Investigations. Failure to do so renders the person guilty of an offence carrying a maximum sentence of imprisonment for a period not exceeding 10 years.

Construction Procurement

510. Construction procurement in the public sector is governed by the above legislation that applies to procurement in general as well as by the Construction Industry Development Board Act 38 of 2000, ("CIBD Act") the regulations to the CIDB Act and the prescripts issued in terms thereof by the Construction Industry Development Board ("**CIDB**"). Construction procurement presents particular difficulties in practice, particularly where large-scale projects are concerned. As explained by National Treasury –

> "The delivery and maintenance of infrastructure differ considerably from those for general goods and services required for consumption or operational needs, in that there cannot be the direct acquisition of infrastructure. Each contract has a supply chain which needs to be managed and programmed to ensure that the project is completed within budget, to the required quality, and in the time available. Many risks relate to the 'unforeseen' which may occur during the performance of the contract. This could, for example, include unusual weather conditions, changes in owner or end user requirements, ground conditions being different to what were expected, market failure to provide materials, or accidental damage to existing infrastructure. Unlike general goods and services, there can be significant changes in the contract price from the time that a contract is awarded to the time that a contract is completed."[2954]

Transport

511. The integration and regulation of public transport services on land is extremely complex, involving government at national, provincial and municipals levels. The National Land

[2954] Quoted by Anthony AM "Re-Categorizing Public Procurement in South Africa: Construction Works as a Special Case" *PER/PELJ* 2019 (22) DOI.

Transport Transition Act 22 of 2000, as amended by Act No. 26 of 2006, specifically provided that:

> "A transport authority, in awarding contracts for goods and services, must apply a system which is fair, equitable, transparent, competitive and cost-effective, and which is in accordance with the [PPPFA], and any relevant local government laws."

512. In the National Land Transport Act 5 of 2009 there is no similar wording, but there can be no doubt that its provisions for negotiated contracts, subsidised service contracts and commercial service contracts remain subject to the same general public procurement laws except where, by necessary implication, the contrary may pertain.

513. In terms of the National Land Transport Act contracting authorities at all three levels of government have been permitted to enter into negotiated contracts (i.e., without going to tender) with public transport operators in their areas "once only", and not for longer than 12 years.[2955] New subsidised service contracts must not exceed seven years and may be concluded only if the services to be operated in terms thereof have been put out to public tendering and awarded by the conclusion of a contract in accordance with procedures prescribed in other applicable national or provincial laws.[2956]

514. Furthermore, the Minister of Transport may, in consultation with the MECs —

> (a) "prescribe requirements for tender and contract documents to be used for subsidised service contracts which must be binding on contracting authorities, unless the Minister agrees that an authority may deviate from the requirements in a specific case; and
>
> (b) provide model tender and contract documents, and publish them in the *Gazette*, for subsidised service contracts as a requirement for contracting authorities, who may not deviate from the model tender and contract documents, unless this is agreed to in writing by the Minister, but those documents may differ for different authorities or situations."[2957]

[2955] Section 41 of the Act.

[2956] Section 42(4) of the Act.

[2957] Section 42(6) of the Act.

515. New commercial service contracts (as distinct from subsidised service contracts) with public transport operators, which may likewise not exceed seven years, are also specifically subject to a tender process and the Minister may prescribe the requirements to qualify as a tenderer in respect of both these and subsidised service contracts.

516. The Road Traffic Management Corporation Act 20 of 1999 requires procurement to be undertaken in terms of procedures prescribed in terms of that Act.

517. The Administrative Adjudication of Road Traffic Offences Act 46 of 1998 allows the Road Traffic Infringement Agency to appoint agents, or contract with any person, to perform any function vested in it, by following procurement procedures prescribed in terms of that Act.

State Information Technology Agency

518. The State Information Technology Agency Act 88 of 1998 governs procurement of information technology by the national and provincial departments and other agencies listed in the schedules to the Public Service Act, 1994 (Proclamation No. 103 of 1994). Despite any provision in any other law to the contrary, these *must* procure all information technology goods or services either from or through the State Information Technology Agency (Pty) Ltd ("**SITA**").

519. Parliament and provincial legislatures, municipalities, and constitutional institutions and public entities defined in section 1 of the PFMA *may* follow the same procurement procedure – in other words, it is not peremptory for these institutions to do so. The procurement process through SITA is governed in detail by regulations made by the Minister for the Public Service and Administration in terms of s 23 of the Act. SITA itself is listed in Schedule 3 Part A of the PFMA, and its own procurement is thus subject to the PPPFA and the regulations made thereunder by the Minister of Finance.

520. In addition to the foregoing, there are a number of statutes regulating, in greatly varying degrees of specificity, the procurement functions of particular organs of state and/or in relation to specific issues. The following list is not necessarily exhaustive:[2958]

(a) The Financial Management of Parliament and Provincial Legislatures Act 10 of 2009, as amended by Act 34 of 2014, governs procurement of goods and services by Parliament and provincial legislatures.

(b) The Armaments Corporation of South Africa, Limited Act 51 of 2003 requires Armscor to "establish a system for tender and contract management in respect of defence matériel" (meaning any material, equipment, facilities or services used principally for military purposes) and, "if required in a service level agreement or if requested in writing by the Secretary for Defence, the procurement of commercial matériel".

(c) The Nursing Act 33 of 2005 requires the Registrar of the South African Nursing Council to ensure that the Council has and maintains "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".

(d) The Public Audit Act 25 of 2004 requires the Deputy Auditor-General to take all reasonable steps to ensure that the Auditor-General has and maintains "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".

(e) The Health Professions Act 56 of 1974 requires the Registrar of the Health Professions Council to ensure that the council has and maintains "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".

(f) The Housing Act 107 of 1997, as amended by Act No. 4 of 2001, required the Minister of Housing, by not later than April 2002, to determine a procurement policy

[2958] See the evidence of Mr Mathebula, Exhibit B1 para 4.3.1, p7. In the words of Mr Mathebula: "In most cases, these statutes prescribe procedural rules in addition to the rules that would apply to procurement activities mentioned above, in terms of the more general legislation above. In some instances, however, the specific legislation operates to the exclusion of general rules such as in the case of the Financial Management of Parliament and Provincial Legislatures Act, which governs public procurement by Parliament to the exclusion of the PFMA. The level of detail found in these specific pieces of legislation varies significantly.

"which is consistent with section 217 of the Constitution in relation to housing development". This procurement policy is binding on the MECs of provinces. An extensive definition of "procurement" in s 1 goes well beyond s 217 of the Constitution. That definition reads: "the process by which organs of state procure goods, services and works from, dispose of movable property, hire or let anything, or grant rights to the private sector". The appointment of a panel to advise the Minister on housing development must itself occur "in accordance with a procurement policy that is consistent with s 217 of the Constitution" and must follow a public invitation for nominations. The same applies to advisory panels to advise the MECs of provinces.

(g) The Disaster Management Act 57 of 2002 provides, that if a national state of disaster has been declared, the designated Cabinet Minister may make regulations and authorise the issue of directions to the extent necessary concerning emergency procurement procedures. Similar powers are given to Premiers of provinces where a provincial state of disaster has been declared, and municipal councils where a local state of disaster has been declared.

The Supply Chain Management Policy

521. The criteria which govern procurement are set out in section 217 of the Constitution which has been quoted at the commencement of this Chapter. What is required, according to section 217(1), is a system which is fair, equitable, transparent and cost effective, being a system which must be brought to life through a prescribed framework created by National Legislation.

522. The survey of the legislation in this Chapter has tracked a complex legislative mosaic rather than a single comprehensive and easily accessible statement of the required over-arching framework. The legislative treatment of procurement is either piecemeal or it is dealt with as a mere component part of public financial management, subject to general and not specific prescriptions.

523. It is only in section 112 of the MFMA and in Regulation 16A that one encounters a comprehensive framework intended to convert the abstract criteria into a detailed policy being the supply chain management policy. Although section 112 operates in the sphere of local government, the scheme detail is a representative statement of the National framework. Sections 111 and 112 read as follows:

> "111 Supply chain management policy
>
> Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this Part.
>
> 112 Supply chain management policy to comply with prescribed framework
>
> (1) The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following:
>
> (a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;
> (b) when a municipality or municipal entity may or must use a particular type of process;
> (c) procedures and mechanisms for each type of process;
> (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;
> (e) open and transparent pre-qualification processes for tenders or other bids;
> (f) competitive bidding processes in which only pre-qualified persons may participate;
> (g) bid documentation, advertising of and invitations for contract;
> (h) procedures and mechanisms for –
> (i) the opening, registering and recording of bids in the presence of interested persons;
> (ii) the evaluation of bids to ensure best value for money;
> (iii) negotiating the final terms of contracts; and
> (iv) the approval of bids;
>
> (i) screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value;
> (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids;
> (k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117;
> (l) the barring of persons from participating in tendering or other bidding processes, including persons-
> (i) who were convicted for fraud or corruption during the past five years;
> (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or
> (iii) whose tax matters are not cleared by South African Revenue Service;
> (m) measures for-

(i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and
(ii) promoting ethics of officials and other role players involved in municipal supply chain management;
(n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by –
(i) councillors in contravention of item 5 or 6 of the Code of Conduct for Councillors set out in Schedule 1 to the Municipal Systems Act; or
(ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that Act;
(o) the procurement of goods and services by municipalities or municipal entities through contracts procured by other organs of state;
(p) contract management and dispute settling procedures; and
(q) the delegation of municipal supply chain management powers and duties, including to officials.

(2) The regulatory framework for municipal supply chain management must be fair, equitable, transparent, competitive and cost-effective."

524. Section 112 does not provide the local authorities with any mandatory template complete with the nuts-and-bolts content of the desired procurement system. It delegates that task to each municipality and municipal entity, contenting itself with a headline description of the topics to be covered, many of which are aspirational in nature.

525. Presumably this disinclination to set out *how* the design aspirations are to be secured in practice derives from a feeling that each entity knows its own situation best and, hence, flexibility must be built into the system. It may also be thought to be an appropriate approach given the constitutional recognition of status accorded to municipalities and the requirement that they be allowed to govern on their own initiative in regard to the local affairs of the community.[2959]

526. The consequence of devolving the design function in this manner is assessed later in this Chapter bearing in mind that a like dispensation is also enjoyed by the other public procuring entities.

[2959] Constitution section 151.

G: Intractable Problems

527. Some of the problems which continue to affect public procurement have their origin in the legislative design. Others emanate from the ravages of state capture or the systemic weaknesses which facilitated state capture. Dealing with these problems requires a concerted effort and a fixed determination, always acknowledging that many of these matters should have been addressed years ago.

Problems in the legislative design

Difficulties in interpreting the legislative mosaic

528. The sheer number of the Acts and the Regulations which address procurement issues makes it very difficult for conscientious officials to get a clear understanding of what is required from them. There is a need for procurement officers to interpret and to harmonise the various legislative enactments which would not be the case if the legislation was codified and unified. The gaps and the disharmonies occasioned by fragmentation present a considerable challenge to the honest procurement official whilst enabling the dishonest official to exploit obscurities and contradictions in the law. Indeed, it should be noted that, in explaining the high incidence of procurement irregularities, Mr Mathebula attributed as much as half the problem to misunderstanding or misinterpretation of the applicable Rules and half to intentional abuse.[2960]

529. One of the fundamental difficulties inherent in our procurement legislation is to reconcile the particular objectives separately addressed in sections 217(1) and 217(2) of the Constitution. Section 217(1) of the Constitution obliges an organ of state or any other institution identified in national legislation, when it seeks to contract for goods or

[2960] Transcript 21 February 2019 pp 27.

services, to do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Section 217(2) qualifies section 217(1) and provides that section 217(1) "does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for (a) categories of preferences in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. What must, however, be made clear is that because of the injustices emanating from our past, section 217 (2) is critically important. The potential for misunderstanding is increased by the fact that the PFMA and the MFMA collectively address the requirements of section 217(1) leaving the correction of the disparities of the past to be dealt with in separate legislation under the PPPFA. This unco-ordinated approach leaves a critical question unanswered: is it the primary intention of the Constitution to procure goods at least cost or is the procurement system to prioritise the transformative potential identified in section 217(2)? There is an inevitable tension when a single process is simultaneously to achieve different aspirational objectives.

530. There are of course many cases, one hopes the vast majority, in which the award of the tender satisfies both objectives of the Constitution but undoubtedly there are other cases some of which may well be high-value tenders in which one or other of these two objectives must be preferred, and it is in such cases that the legislation fails to give guidance.

531. In the view of the Commission the failure to identify the primary intention of the Constitution is unhelpful and it has negative repercussions when this delicate and complex choice has to be made, by default, by the procuring official.

532. Ultimately in the view of the Commission the primary national interest is best served when the government derives the maximum value-for-money in the procurement process and procurement officials should be so advised.

533. The same problem is encountered when a choice must be made between the competing virtues of localisation and lower cost. Again, the view of the Commission is that the legislation should make it clear that in such a case the critical consideration is value-for-money.

The extent to which the legislation has decentralized the procurement process

534. Excessive decentralisation creates serious problems.

535. The power to procure goods and services in the public sector has been given to the following entities:

535.1. national government departments;

535.2. provincial government departments;

535.3. all municipalities;

535.4. major public entities;

535.5. other public entities;

535.6. all constitutional entities.

536. Within the sphere of local government there are 8 metropolitan municipalities, 44 district municipalities and 226 local municipalities all exercising the right to procure goods and

services on their own initiative. The PFMA lists some 21 major public entities and approximately 154 other public entities (in both cases together with any subsidiaries or entities under their ownership control) and 22 national government business enterprises (and their subsidiaries). To this list must be added 55 provincial public entities (and their subsidiaries) and 15 provincial government business enterprises (and their subsidiaries). To this list must be added 9 constitutional institutions and every department of national and provincial government.

537. It is idle to suppose that the requirements and the skills needed for procurement are available throughout the country and are at the disposal of each procuring entity. The lack of capacity was noted as the second major cause of crisis in the PARI Paper of 2002 (before the full extent of decentralisation had taken place) and was the first challenge identified by Ambe and Badenhorst-Weiss in their assessment in 2012. The same problem featured again in the 2017 article of Mazibuko and Fourie. Mr Mathebula, in giving evidence to the Commission, pointed in particular to a generalised lack in capacity both in contract management and in procurement planning. What was required, he said, was a focus on training and development and he singled out the need for procurement practitioners at least to be able to put together a tender document. That, he said, was one of the reasons why these issues often got before the Courts, simply because of the way the tender documents are crafted. He also noted pervasive misinterpretation of the complex legislation, again an indication of a lack of necessary skill.[2961]

538. One must bear in mind that the present state of extended decentralisation is itself a reaction to the centralised procurement system which was in place in South Africa until 2008. There were good reasons to move away from an over-centralised system but it

[2961] Transcript 21 August 2018 page 57.

now appears that the design has moved to the opposite extreme. The legislation regulating public procurement is in urgent need to find a better balance between these extremes.

539. A fresh approach would take into account:

539.1. the fact that certain goods and equipment may be required on a sectoral basis at national, provincial and local levels and that in cases of that sort a centralised procurement process is probably more efficient than a decentralised one and would further offer benefits in the form of price discounts and the like. Opportunities for centralised procurement would arise, for example, in the purchase of medicines or the acquisition of specialised equipment for hospitals, or in providing educational material for schools. National Treasury should be mandated to consider how centralisation of selected procurement processes could best be introduced;

539.2. special provision should be made in the case of high-value tenders. Such tenders should not be left in the sole care of decentralised procuring entities. National Treasury should be required to allocate an independent expert to attend, participate and report upon the process and to certify the outcome;[2962]

539.3. a mechanism must be found to address the situation where a procuring entity lacks the capacity to operate efficiently. In such cases procurement operations must be taken over by another entity which can do the job. The legislation should provide for the establishment of tender boards which are able to replace malfunctioning procurement entities wherever necessary;

[2962] The qualifications of such experts and their eligibility for appointment will need to be standardised and will involve membership of a regulated procurement profession as addressed in the recommendations.

539.4. decentralisation, on the scale that exists in South Africa, defies adequate monitoring and informed oversight. The result has been a decentralised procurement system which outruns available capacity and is subjected to fragmented and largely ineffectual supervision. That state of affairs must be corrected without delay and is further addressed in the recommendations in this Chapter;

539.5. subject to these constraints and limitations, the decentralised system will begin to operate at an acceptable level of efficiency in order to provide the benefits which a decentralised system should offer.

The efficiency and the competence of procurement officers

540. The extent of the decentralisation places a massive strain on available capacity. A procurement system depends for efficient and ethical performance on the skill, knowledge and standards of conduct of the officials who identify the goods and services needed, accurately specify those requirements in the tender requests and who then administer the system as well as the procurement contracts which result. These activities require proper training as well as significant skills. The evidence given to the Commission indicates that all too often the officials involved have not been adequately trained and so lack the skills and the standards necessary to detect and confront corruption.

541. Training, experience and competence are essential tools in the fight against corruption. Training includes instruction in ethical standards.

542. It is fundamental to this discussion to acknowledge that procurement officials are members of a strategic profession and they are not discharging a simple administrative function by rote. This involves proper training programs and a proper system by which

knowledge and skills are constantly updated and procurement officials supported through the sharing of information and data. In formulating international principles for public procurement the OECD identified, by way of fundamental principle, the need to ensure that procurement officials meet high professional standards of knowledge, skills and integrity. The OECD Report notes in this regard:

> "Recognising officials who work in the area of public procurement as a profession is critical to enhancing resistance to mismanagement, waste and corruption. Governments should invest in public procurement accordingly and provide adequate incentives to attract highly qualified officials. They should also update officials' knowledge and skills on a regular basis to reflect regulatory, management and technological evolutions. Public officials should be aware of integrity standards and able to identify potential conflict between their private interests and public duties that could influence public decision making."

543. The ultimate responsibility for the creation of a regulated profession for procurement officials lies with National Treasury as does the formulation of adequate training programs. In that regard it is a matter of concern to note ongoing difficulties in raising the level of competence which have been experienced in ensuring that procurement officials obtain the necessary skills and qualifications. For the most part it appears that National Treasury has been setting time limits for the achievement of necessary qualifications only to find that it has to extend those time limits on an ongoing basis. That is not a situation which can be allowed to continue.

The Consequences of State capture and Systemic Weaknesses

Corruption in Political Party Financing

544. It is a matter of extreme concern that the evidence given at the Commission establishes a link between the corrupt grant of tenders and political party financing. Such a link can represent an existential threat to our democracy. It is inconceivable that political parties should finance themselves from the proceeds of crime, and yet there is alarming evidence to that effect.

545. In its report entitled "Bribery in Public Procurement (2007)" the OECD noted that political party financing had been identified as a very serious problem area associated with corruption and bribery. It said:

> "**Political party financing** was identified as a very serious problem area associated with corruption and bribery. Examples of corruption in public procurement associated with political party financing have been identified in many countries around the world and public procurement is certainly a means by which political parties divert public funds illegally to finance themselves. Corruption can be seen to enter the political scene in several cases. Politicians may use their powers in view of establishing networks seeking control over sources of rents provided by public procurement. Once the network group obtains access to the administration, it may then put in place its own persons. Resources levied are then used to favour political parties. Bribes or kickbacks do not necessarily involve personal enrichment. Experts noted that corruption in public bidding and within public administrations may reflect a wider corruption phenomenon. Corruption in public markets may lead to a debate on the transparency of political party financing, and vice versa."

546. The examples of corruption manifesting in high value contracts which have been described earlier in this Chapter indicate the likelihood that in at least two instances the proceeds of corruption were diverted to a political party, in both instances the ANC.

547. The one example involves the then Johannesburg, Mayor Mr Geoff Makhubo, in dealings with EOH. In that case it appears that a front company was used as a vehicle to channel money to the benefit of the ANC.

548. According to the evidence Mr Makhubo had solicited a donation to the ANC from EOH and had repeated that request a week after the contract had been awarded to EOH. According to the evidence of Mr Van Coller some R50 million was donated to the ANC by EOH for the 2016 local government elections.

549. Another example involves the Free State Provincial Government in its dealing with Blackhead Consulting. Blackhead Consulting received a number of lucrative contracts including a 2014 asbestos audit tender valued at R255 million from the Free State Government and between 2013 – 2018 Blackhead Consulting made payments amounting to millions of Rands to the ANC.

550. The evidence before the Commission did not seek to establish the full extent of corruption associated with political party financing or the extent to which other political parties may also have been implicated. However, the two examples mentioned are more than enough to sound the alarm. In fact, there is another example. That is BOSASA. The evidence heard by the Commission revealed that BOSASA was deeply involved in corruption for many years which involved tenders from government departments or government entities such as the Department of Correctional Services (prisons) and the Department of Home Affairs and the Airports Company. The evidence also revealed that BOSASA made donations to the ANC in cash and in kind. It cannot be that it only gave the ANC “clean” money or that it did not spend “dirty” money on the ANC.

551. It goes without saying that these cases need to be prioritised by the National Prosecuting Authority but that, alone, will not address the problem. Legislation is

required to prevent, expose and criminalise such activity. Thus far the National Assembly has been tentative in addressing this problem as noted below

552. The recent promulgation of the Political Party Funding Act No. 6 of 2018 (PPFA) is at least a first step but most likely an ineffectual step in addressing this particular abuse. Section 9 of the PPFA requires a political party to disclose to the Electoral Commission all donations received which exceed a prescribed threshold and imposes a similar obligation on any person or entity delivering a donation to a member of a political party other than for political party purposes. Section 19 renders any contravention of this section a criminal offence punishable by a fine or imprisonment.

553. The PPFA has sensibly opened the way to fund political parties by way of the Represented Political Party Fund and the Multi-Party Democracy Fund both of which are supervised by the Electoral Commission established under the Constitution and the Electoral Commission Act. These mechanisms are to be welcomed since they should alleviate, to some degree at least, the financial plight of political parties. The PPFA also moves in the right direction in identifying classes of donations to political parties which need to be prohibited and in requiring the disclosure of donations which are made to political parties. Enforcement is placed in the hands of the Commission and various transgressions are criminalised.

554. Nonetheless, the PPFA does not go as far as it should. Provision must be made to prohibit donations linked to the grant of tenders. The making of any such donations by a prospective tenderer or by a successful tenderer within an extended period of time must be made to constitute a criminal offence as must the receipt of any such payment whether such payment is made directly into the coffers of the political party or by some indirect means. To be effective, it will be necessary for the legislation to require external inspections both of tenderers and political parties by a designated authority with

appropriate powers of search and seizure. Significant monetary penalties need also to be imposed both on the tenderer and on the political party in the event of a breach of these provisions.

The need to encourage Whistle Blowers

555. The whistle blower is one of the most effective weapons against corruption. In most cases the whistle blower has information that provides a detailed insight into hitherto unsuspected criminality which is not readily ascertainable from routine inspection. The present system offers no inducement to the whistle blower to break cover. The *bona* fide whistle blower is actuated by a sense of duty of the highest order.

556. A person contemplating making such disclosures must herself seek out an appropriate recipient and must trust that the disclosure will be treated in strict confidence and that the recipient can offer adequate protection against harm.

557. Recent events in South Africa which will be well known to every reader make it the highest priority that a *bona fide* whistle blower who reports wrongdoing should receive, as a matter of urgency, effective protection from retaliation.

558. Article 32(2) of the United Nations Convention against Corruption suggests that signatory States provide for:

(a) establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting them, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity or whereabouts of such persons;

(b) providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony

to be given through the use of communications technology such as video or other adequate means.

559. The relevant legislation in South Africa[2963] which is intended to provide over-arching protection for whistle blowers is to be found in:

559.1. the Protected Disclosures Act No. 26 of 2000; and

559.2. the Protection from Harassment Act No. 17 of 2011.

560. The Protected Disclosures Act is intended to protect employees in the private and public sector who disclose information regarding unlawful or irregular conduct by their employers or other employees or workers. These protections apply in respect of a disclosure which is classified as a protected disclosure, i.e. a disclosure made to certain classes of persons (a legal adviser or an employer or a member of Cabinet or of a Provincial Executive Council or to various State or constitutional entities) that a criminal offence has been committed or is likely to be committed or that there is a failure to comply with any applicable legal obligation or that a miscarriage of justice has occurred or is likely to occur. An informant who acts in good faith is not liable to any civil, criminal or disciplinary proceedings by reason of that disclosure and in the event of suffering occupational detriment, he or she may seek relief in the Labour Court or the CCMA or like body.

561. The Protection from Harassment Act allows for the issuing of protection orders against harassment, i.e. a course of identifiable conduct intended to cause harm or to inspire

[2963] Other forms of protection are found in sections 186(2)(d), 187(1)(h) and 191(3) of the Labour Relations Act and section 159 of the Companies Act.

the reasonable belief that harm may be caused to the victim (by stalking or verbal and other intrusive communications).

562. This body of legislation although well intended is deficient in important respects. It does not provide a clear-cut procedure for the whistle blower to follow; it does not sufficiently guarantee that the disclosures will be protected; it is not pro-active in providing physical protection; it offers no incentives to the whistle blower and it does not ensure that all such information finds its way to a destination with specialised skills in receiving, investigating and utilising such information effectively.

563. In the view of the Commission the whistle blowing disclosure regarding corruption, fraud and undue influence in public procurement should be received by way of, among others, an electronic reporting system which permits and protects the anonymity of the reporting individual; provides for clarificatory questions and guarantees confidentiality in respect of disclosures. That protection must extend to an indemnity from civil and criminal liability and, once the informant discloses his/her identity, it must be compulsory for adequate physical protection to be provided at the informant's reasonable request and, in the absence of such a request, on the assessment of the designated authority as to whether the informant or her family may be in danger.

564. The importance of limiting disclosure to a single authority, arises from the following:

564.1. the authority will be responsible to devise the optimal system by which disclosure can be made, confidentiality can be guaranteed and effective protections can be provided;

564.2. the format and procedures for disclosure to the authority can be widely published so that the mechanism for making disclosure is simplified for prospective informants and is readily ascertainable by them;

564.3. the authority can encourage the making of disclosure by publishing the range of concrete undertakings which it is obliged to offer in terms of article 32(2) of the United Nations Convention Against Corruption.

565. There remains a further issue of importance. Should whistle blowers be incentivised to make disclosure?

566. The Public Affairs Research Institute (PARI) published a position paper in April 2020 titled *Reforming the Public Procurement System in South Africa* which proposed the introduction by legislation of *qui tam* provisions. The thrust of the proposal which has been motivated in a related article[2964] is that South African public procurement law needs a tougher approach to enforcement and that could be achieved by empowering and incentivising whistle blowers to bring civil claims for the recovery of damages suffered by the State as a result of procurement fraud and corruption.

567. In the explanatory words of the authors:

> "To address these shortcomings, the Public Procurement Bill could adopt a form of law known as qui tam, an abbreviation of the Latin for 'he who sues on behalf of the King as well as for himself.' The essence of qui tam legislation is that it grants to some private persons the right to approach a court to enforce a public law. It simultaneously encourages such efforts with a reward, a financial incentive or bounty, for successful litigation.
>
> The basic idea is simple and elegant. It is applied in a number of legal systems around the world. Incentivising civic efforts covers for gaps in political will and investigative capacity. Inside information is difficult and costly to get to, so qui tam draws this information out, sowing distrust in corrupt combinations and encouraging whistle-blowers to break rank and come forward. In South Africa, a similar mechanism is used in the corporate leniency policy of the Competition Commission, which has proven to be highly effective in disrupting price-fixing cartels."

[2964] Published on 25 March 2020 by Ryan Brunette and Jonathan Klaaren of PARI.

568. These proposals are useful particularly in drawing attention to the need to recoup damages suffered but the Commission favours an alternative which can address these issues more effectively and without the complications that necessarily follow when private individuals are empowered to litigate for personal financial reward but in the name of the State.

569. The Commission recommends that the mandate and the responsibility to litigate on behalf of the State for the recovery of damages or the disgorgement of monies related to corruption in public procurement not be privatised. However, a fixed percentage of monies recovered should be awarded to the whistle blower provided that the information disclosed by the whistle blower has been material in the obtaining of the award.

570. The appropriate recommendations are contained in section J below.

<u>The collapse of governance in state owned enterprises</u>

571. The evidence regarding events at Transnet, Eskom and SAA presented a scarcely believable picture of rampant corruption. The analysis given by Dr Popo Molefe regarding a discernible pattern in which key positions were deliberately given to corrupt actors is borne out by the facts and is corroborated by the further details to which Ms Hogan testified. Much of the abuse is attributable to the way in which appointments have been made to the Boards of the SOEs.

572. Persons appointed to SOE Boards must have the necessary competence, capacity, experience, integrity, reputation and intellectual honesty to fulfil the demanding responsibilities of such an appointment.

573. The government is the sole shareholder of every SOE but it holds those shares in trust for the nation. It follows that the persons responsible for appointing members of these boards owe a duty of care to the citizens of South Africa and must ensure that fit and proper persons are appointed to carry out the mandate of the SOE.

574. The question as to who appoints board members of SOEs is regulated by way of a complex web of overlapping and, at times contradictory, laws.[2965] With respect to most SOEs, there are three different legal frameworks that must be considered, namely the PFMA, the Companies Act 71 of 1998 ("**the Companies Act**") and the specific law establishing the SOE ("**founding legislation**").

575. In addition to these laws, there are various "soft law" instruments like protocols and guidelines that are (usually) not binding but are (supposed to be) influential. Examples are the King III and King IV principles, the Protocol on Corporate Governance in the Public Sector and the Handbook for the Appointment of Persons to Boards of State and State-Controlled Institutions.[2966]

576. In dealing with the question as to who has the authority to appoint board members, the three frameworks present a convoluted picture. The key tenets are as follows:

577. in principle, the PFMA is always applicable to an SOE. However, the PFMA does not explicitly regulate the appointment of Board members. The PFMA includes the power to appoint Board members within its definition of "ownership control". In SOEs, "ownership control" is exercised by the national government, through the relevant Minister. The PFMA, therefore, implicitly locates the power to appoint Board members

[2965] Wandrag, R. (2018) *The legal framework for the appointment and dismissal of SOE board members,* Dullah Omar Institute, University of Western Cape.

[2966] Wandrag, R. (2018) *The legal framework for the appointment and dismissal of SOE board members,* Dullah Omar Institute, University of Western Cape.

in the relevant Minister. However, it does not provide any procedures for appointment and dismissal of such people;

578. the Companies Act applies to all SOEs that are registered as companies. Not all SOEs are registered as such. PRASA, for example, is not. When an SOE is registered as a company in terms of the Companies Act, the Act will apply and provides that its directors are elected at the company's Annual General Meeting. The company's Memorandum of Understanding may provide for another procedure, however;

579. the founding legislation sometimes regulates board appointments. For example, the Broadcasting Act 4 of 1999 deals with the appointment of non-executive SABC board members, but the Eskom Conversion Act 13 of 2001 is silent on the appointment of Board members to Eskom.

580. While the law is unclear, the practice is not. Board members are appointed by the relevant shareholder Minister, ostensibly in or after consultation with Cabinet. This, the evidence has shown, has proven to be problematic and does not represent the "robust and transparent" process recommended by King IV.[2967] Procedures for the appointment of SOE board members lack integrity and are not transparent. In addition, there is often a disjuncture between the fiduciary duties of SOE board members and the profile, skills and expertise of incumbents. There are a number of alarming examples which show that Ministers have appointed persons to the boards who meet none of the required criteria. The system of unstructured appointments does not serve the national interest. As President Ramaphosa remarked in his testimony, there has been a "massive system failure and we need to correct what has happened in the past."[2968]

[2967] IODSA (2016) King IV – Report on Corporate Governance For South Africa, p. 116.

[2968] President Ramaphosa, Transcript 29 April 2021, p. 73.

581. Furthermore, a fundamental divide between the concepts of authority and responsibility has been largely ignored. A Minister should never appoint either the chairperson or the CEO of an SOE. That must be the function of the directors who appoint their leader, the chairperson, and it is the board which should appoint the CEO who in turn leads the management team in implementing the decisions of the board.

582. It is the view of the Commission that the function of appointing directors of SOEs should no longer be left solely to Ministers. As the President remarked in his testimony before the Commission, there was a "massive system failure" on how the Boards of SOEs were appointed. This system failure needs to be remedied urgently.

583. Following the exposure of state capture it may well be that Ministers have been more careful in making appointments and that the SOEs are beginning to show the benefit of better governance. Nonetheless, it is inconceivable that the system of appointments can be left unreformed. The national interest demands that state owned enterprises operate under efficient and professional leadership which requires that the appointment procedure is transparent, not driven by party political interests but made in accordance with objective criteria.

584. Appropriate recommendations to address this weakness are made elsewhere in the report of the Commission in the wider context affecting state owned enterprises.

<u>The problem of dishonest tenderers and their accomplices outside of the public service</u>

585. On the one hand there are the corrupt officers of an organ of state. On the other hand, there are corrupt bidders or contractors who distort the procurement processes by paying bribes or kickbacks. Any reform of the present system must also deal aggressively with criminal acts committed by private sector actors.

586. It is recommended that there be four levels of response. These measures, each of which will be discussed in further detail, are (1) disqualification from participation in tenders, (2) deferred prosecution agreements, (3) criminal prosecution and (4) restitution for damages suffered and monies misappropriated.

Disqualification from participation in tenders

587. The first level involves the disqualification of offending private sector entities from participation in public procurement processes either permanently or for a set time. The jurisdiction so to disqualify private sector entities should vest in the single authority identified in the Chapter sections which follow.

Deferred prosecution agreements

588. The second level is an innovation called a deferred prosecution agreement ("**DPA**").

Introduction

589. Mr Ian Sinton, who gave evidence at the Commission, also proposed the adoption in South Africa of the DPA procedure. This topic has also been referenced – albeit more tangentially – in other evidence before the Commission, in annexures to the evidence of Mr Pravin Gordan[2969] and Lord Peter Hain.[2970]

590. A DPA, in short, entails an agreement between prosecutors and the accused corporation in which the corporation admits facts from which criminal liability could be inferred and agrees to engage in specific conduct in the near future.[2971] In exchange,

[2969] Pravin Gordhan's evidence is contained in exhibits N1 to N3.

[2970] This appears from the annexures to Lord Peter Hain's affidavit, Exhibit QQ a-d [PH].

[2971] Daniel McCarron "Deferred Prosecution Agreements: A Practical Proposal" (2016) *Kings Inns Law Review* 54 at 54; Jake. A Nasar "In Defense of Deferred Prosecution Agreements" (2018) *New York University Journal of Law*

the prosecutor defers the criminal charges – provided that the corporation adheres to the terms and conditions of the agreement.[2972] If the corporation complies with the DPA, the charges are dropped, but if it fails to comply, the prosecution will proceed.[2973]

591. The aim of a DPA is to incentivise self-reporting by, and, secure future compliance from, the misbehaving corporation and to detect and punish serious crimes committed by the natural persons – employees, directors and officers – through which the corporation acted. As such, DPAs may provide a useful alternative to prosecution.

592. The following provides a brief overview of the role of DPAs and their implementation in the UK and the US and suggest that this mechanism may offer a ready, pragmatic and effective solution to some of the acute challenges facing our prosecution system. The suggestion is that DPAs will benefit law enforcement in South Africa by enhancing the

& Liberty 838 at 842; Eugene Illovsky "Corporate Deferred Prosecution Agreements: The Brewing Debate" (2006) *Criminal Justice* 36 at 36; Erik Paulson "Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements" (2007) 82 *New York University Law Review* 1434 at 1436; Michael Bisgrove and Mark Weekes "Deferred Prosecution Agreements: A Practical Consideration" (2014) *Criminal Law Review* 416 at 420; Benjamin M Greenblum "What Happens To a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements" (2005) 105 *Columbia Law* 1863 at 1863; Matt Senko "Prosecutorial Overreaching in Deferred Prosecution Agreements" (2009) 19 *Southern California Interdisciplinary Law Journal* 163 at 169.

[2972] Greenblum "What Happens To a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements" at 1863 - 1864; McCarron "Deferred Prosecution Agreements: A Practical Proposal" 54-55; Elis W Martin "Deferred Prosecution Agreements: 'Too Big to Jail' and the Potential of Judicial Oversight Combined with Congressional Legislation" (2014) 18 *North Carolina Banking Institute* 457 at 463; Illovsky "Corporate Deferred Prosecution Agreements: The Brewing Debate" at 36; F. Joseph Warin and Andrew S Boutros "Deferred Prosecution Agreements: A view from the trenches and a proposal for reform" (2007) 93 *Virginia Law Review In Brief* 121 at 121; F Mazzacuva "Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US systems of Criminal Justice" (2014) 78 in *the Journal of Criminal Law* 249 at 250; Nasar "In Defense of Deferred Prosecution Agreements" at 842; Kathleen M Boozang & Simone Handler- Hutchinson (2009) 35 "'Monitoring' Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care" *American Journal of Law, Medicine & Ethics* 89 at 91; Mary Miller "More Than Just A Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power" (2016) 115 *Michigan Law Review* 135 at 135 and 137; M Koehler "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement" (2015) 49 in *University of California, Davis* 497 at 505; Sara George, Alan Ward and Richard McGarry "Deferred Prosecution Agreement – in Jeopardy of Falling Short?" (2014) 15 *Business Law International* 115 at 115; Tan Yann Xu "Evaluating Deferred Prosecution Agreements in the Context of Singapore" (2019) *Singapore Comparative Law Review* 151 at 151; Wee Toh Loo "The United Kingdom's deferred prosecution agreement regime five years on: is it an effective tool in addressing economic crime perpetuated by companies" (2019) *Singapore Comparative Law Review* at 137 at 138; Wulf A Kaal and Timothy A Lacine "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013" (2014/2015) *The Business Lawyer* 61 at 63 and 69.

[2973] Nasar, In Defense of Deferred Prosecution Agreements" at 842; M Koehler "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement" (2015) 49 in *University of California, Davis* 497 at 509.

efficacy of corporate prosecutions while preventing the negative collateral consequences of this process.

The case for introducing DPAs in South Africa

593. As the evidence discussed above has shown, South Africa suffers from pervasive corruption in both the public and private sectors. Frequently, a corporation is among the participants in a corrupt act. Although companies act through their employees, directors and officers – and those natural persons may be held liable for offences committed in that capacity – corporations may also incur liability for criminal conduct.

594. This is in terms of section 332 of the Criminal Procedure Act 51 of 1977 ("**the CPA"**), which regulates the prosecution of corporations and members of associations – although prosecution can be extended to any juristic entity. Section 332 establishes criminal liability either by:

594.1. holding a corporation or association liable for the unlawful acts or omissions of its directors, servants, or members; or

594.2. holding a director, servant or member, personally liable – either separately or jointly – for the unlawful acts or omissions of a corporation or association in certain circumstances.

595. A corporation may therefore be the subject of prosecution in our law.

596. Although our legal system clearly has the means to hold companies criminally liable for their part in endemic corruption, given the evidence presented to the Commission and public statements made by the NPA, the combatting of corrupt activities and money-laundering is being hampered by the onerous burden of proof upon prosecutors (whose tasks are frustrated by inadequate resources). Indeed, the NPA has been criticised for

the dearth of prosecutions "despite the corruption uncovered by the Zondo Commission" and cases referred by the Hawks to the NPA.[2974] The introduction of DPAs may go some way to improving the situation, particularly in the light of the recommended involvement of the Public Procurement Anti-Corruption Agency (PPACA) and its Litigation Unit and the Tribunal.

597. There is no legislation or precedent that expressly permits the use of DPAs in South Africa. Commentators such as Corruption Watch have gone as far as to point to the lack of provision for DPAs as being "a major issue, hindering law enforcement authorities' ability to detect foreign bribery and severely limiting the scope of voluntary disclosure by companies".[2975] Corruption Watch has also proposed a number of interventions, including the passing of legislation that provides for DPAs.

598. In fact, it was as far back as 2002 that the South African Law Reform Commission proposed that DPAs be introduced. Since then, academics and commentators[2976] have commented favourably on the use of DPAs in the US and have proposed that the NPA adopt the approach of the DoJ, with certain adjustments to accommodate the South African regulatory environment.[2977]

[2974] Recommendation for reform of the National Prosecuting Authority by the Africa Criminal Justice Reform ("**ACJE**") and the Dullah Omar Institute. See https://acjr.org.za/resource-centre/npaprecommendations-2-11-2020-1.pdf.

[2975]https://www.corruptionwatch.org.za/wp-content/uploads/2020/10/Exporting-Corruption-2020_Full-Report_Embargoed.pdf

[2976] Recommendations for reform of the National Prosecuting Authority by the Africa Criminal Justice Reform ("ACJR") and the Dullah Omar Institute. See https://acjr.org.za/resource-centre/npa-recommendations-2-11-2020-1.pdf.

[2977] "*During 2004, the DoJ introduced settlements by companies as part of their effort to combat corruption … The DOA and the non-prosecution agreements have almost replaced prosecution … A DPA is when the government agrees to suspend criminal charges for a specified period if the company made an admission, pays the fine and takes every step possible to rectify the corrupt practices ..*

Fourteen principles were developed over a decade in the use of settlements (Corruption Watch – UK, 2016)and can be summarised as follows: 1) it should be a tool in a broader enforcement strategy where prosecution also plays an important role, 2) the conditions should be to only use it in cases where a company as self-reported and cooperated fully, 3) judicial oversight that includes proper scrutiny of the evidence should be required, 4) settlements should only be used where the company has acknowledged misconduct, 5) these settlements should

DPAs in the United States and the United Kingdom

599. DPAs have been used for many years in the US to achieve non-prosecution outcomes for juristic persons that are potentially vicariously liable for the wrongful acts of their directors and officers. The availability of DPAs to UK juristic persons was introduced by legislation in 2014.

600. The UK's SFO lists a number of high-profile corporations that have entered into DPAs[2978] – including Rolls-Royce[2979], Tesco[2980] and Airbus SE.[2981]

601. In the UK, the lessons have been that the availability of formal leniency to employers that are potentially vicariously liable for the wrongful acts of employees incentivises self-reporting and accountability – which in turn greatly reduces the workload of prosecutors and courts.

602. To qualify for leniency a juristic person that identifies corrupt activities or other crimes by employees (and/or associates in the case of UK persons) is expected to:

entail the strengthening and monitoring of compliance programmes as well as forcing full disclosure of these misconducts, 6) these settlements should require companies to cooperate with all parties involved. 7) companies with previous corruption related misconducts taken against them are excluded and 8) further legal actions should not be precluded in other jurisdictions not a party to the settlement subject to the double jeopardy principle.

It is suggested that the NPA can adopt the DoJ's role based on their authority to prosecute, while the Financial Intelligence Centre (FIC) can adopt the SEC's role on their responsibility for receiving and analysing financial information and distributing the findings to authorities. However, the SEC has a Division of Enforcement handling the civil and administrative proceedings, whereas the FIC forwards its findings to the relevant competent authorities. As a result, it is suggested that an additional department be established within the FIC's structures similar to the Division of Enforcement.

2978 https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/

2979 https://www.sfo.gov.uk/cases/rolls-royce-plc/

2980 https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/

2981 https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global- resolution/

602.1. self-report the knowledge or reasonable suspicion that corrupt activities may have occurred to the authorities;

602.2. appoint independent experts to conduct an unrestricted investigation to establish the facts;

602.3. make full disclosure to the authorities of the results of such investigation;

602.4. agree to disgorge all benefits derived from all corrupt activities identified and, if appropriate, compensate victims who suffered damages caused by the corrupt activities;

602.5. agree to pay a penalty or fine commensurate with the nature and scope of the corrupt activities identified and disclosed;

602.6. agree to remedial action under the supervision of an inspector appointed by the authorities that includes disciplinary action against all directors, officers and employees implicated and adoption of systems, controls and training designed, to the satisfaction of the said inspector, to prevent any recurrence of corrupt activities or other crimes;

602.7. acknowledge that after an agreed period (typically three years) the charges deferred will be withdrawn provided it can be shown to the authorities concerned (including the High Court in the UK) that all the obligations imposed upon the leniency applicant in the applicable DPA have been discharged and no other corrupt activity has occurred in the interim.

603. It should be an offence for a juristic person to fail to prevent an act of bribery by an associate:

603.1. from the evidence being presented to the Commission, it cannot be disputed that agents and supplier development partners ostensibly engaged to assist in winning or retaining business opportunities in furtherance of the government's transformation objectives are in fact being widely used to facilitate and disguise corrupt activities. Consequently, we separately suggest that the failure by a juristic person to prevent an act of bribery by an associate should constitute an offence.

603.2. In the UK, this is provided for in section 7 of the Bribery Act:

> "7 Failure of commercial organisations to prevent bribery
> (1) A relevant commercial organization ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending-
>
> (a) to obtain or retain business for C, or
>
> (b) to obtain or retain an advantage in the conduct of business for C.
>
> (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
>
> (3) For the purposes of this section, A bribes another person if, and only if, A-
> (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence),
> (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.
>
> (4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.
>
> (5) In this section – "partnership" means-
> (a) a partnership within the Partnership Act 1890, or
> (b) a limited partnership registered under the Limited Partnerships Act 1907,
>
> or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,
>
> "relevant commercial organisation" means-
> (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
>
> (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any t part of the United Kingdom,
>
> (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
>
> (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and, for the purposes of this section, a trade or profession is a business."

604. In the view of the Commission DPAs (provided they are subject to oversight) are a useful tool in that they enable investigators and prosecutors to become aware of corporate crimes from the perpetrators and hold them and their implicated employees and agents accountable while avoiding the harsh consequences of an indictment on innocent employees and other stakeholders.

605. The DPA system that would work best in South Africa would be one that incorporates judicial review by the Tribunal. This would curb the potential for prosecutorial overreach and ensure that the terms of the DPA adequately address the violations.

606. However, a DPA should – as far as possible – be accompanied by the criminal prosecution of the implicated individuals. This would ensure that individuals are also held accountable and mitigate against any suggestion that DPAs allow the corporate criminal to "get away" with crime.

Criminal prosecution and the National Prosecuting Authority

607. The third level of response is criminal prosecution and that is a response which depends upon the ability of the National Prosecuting Authority (NPA) to discharge its primary function which is to institute criminal proceedings on behalf of the State.

608. It is of course well known that for many years the NPA has failed to prosecute cases of corruption, and specifically cases of corruption in the procurement process. The extent of that failure can be measured by reference to the almost complete absence of cases brought under the legislation applicable to crimes of this sort.

609. So, for example, the Prevention and Combatting of Corrupt Activities Act came into force in 2004. It was passed for the stated purpose of the strengthening of measures to prevent and combat corruption and corrupt activities. It included a range of offences dealing with corrupt activities which related to public officers i.e. any member, officer or servant of a public body being any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government. It criminalised the offering or acceptance of bribes and it dealt directly with corrupt activities which relate to the procuring and withdrawal of tenders. That Act was in force throughout the state capture period. The evidence given to this Commission identifies multiple cases of corruption to which the Act applied, yet reference to the Law Reports shows that only one prosecution was brought under the Act – *State v Shaik and Others* 2005 (3) SA 211 (D). The same is true of the PFMA which has been on the statute books for more than 20 years. The first prosecution under that Act appears to be the one which was initiated against Mr Agrizzi (who was not a civil servant).

610. The Constitution vests the prosecutorial function in the NPA and therefore the failure of the NPA to have responded adequately, or at all, to the challenges of state capture points to a fundamental failure of a sovereign state function.

611. What will now be required is a thorough re-appraisal of the structure of the NPA in order to understand the causes and the nature of its institutional weaknesses so that these can be addressed presumably by way of legislative reform.

612. The Commission is well aware that remedial action of this sort requires an in-depth analysis of the internal structure of the NPA and the legislative and constitutional context in which it operates.

613. Such an in-depth analysis falls outside the remit of the present Commission and it must be left to the decision and the initiative of the President to order a separate detailed investigation.

Restitution for damages suffered and monies misappropriated

614. As alarming as the absence of prosecution is the absence of civil litigation aimed at the recovery of damages or monies misappropriated. The right of action to pursue such claims vests in the State and would ordinarily be processed through the State Attorney's office. Again there is no evidence that there has been any recourse to litigation other than in cases initiated very recently by the Special Investigating Unit.[2982] The work of the Special Investigating Unit has been commendable and demonstrates what can be achieved by a skilled and committed litigation unit dedicated to the recovery of the proceeds of crime. Nonetheless, the establishment of such a unit is not the ultimate solution in the recovery of looted funds for the reasons given below.

615. Both the Special Investigating Unit and the associated Special Tribunal are created under the provisions of the Special Investigating Units and Special Tribunals Act No. 74 of 1996. The Act vests in the President the power to establish the Units and the Tribunal and to define their mandate. It is intended to operate *ad hoc* and until the completion of its mandate. The entire edifice depends upon the goodwill of the President. It does not represent an appropriate defence mechanism against state capture and is therefore not an adequate solution to the problem of rooting out corruption and, in particular, corruption which may involve political actors.

[2982] Establish to investigate corruption in Eskom and Transnet.

616. In the following sections of this Chapter the Commission proposes, and motivates for the establishment of more appropriate mechanisms which are independent of government control to deal with the recoupment of losses suffered in the course of procurement corruption. This involves a dedicated effort to pursue such litigation on a large scale to make it clear to the fraudsters and thieves who have been looting the procurement system that they face financial as well as criminal accountability.

Problems associated with oversight and monitoring

The fragmentation of oversight responsibilities

617. The oversight function is a vital component in protecting the procurement system from abuse. In South Africa the oversight function has been fragmented both in response to the excessive decentralisation of the procurement system and because of the complicated legislative mosaic which spreads the responsibilities of oversight very wide. In the result, there is a crowded field of oversight entities.

618. These include Parliament; National Departments; Provincial government; the Auditor-General; National and Provincial Treasury and the Department of Public Service and Administration. Parliament's role and how it performed its oversight function over the period under review is dealt with later in the Commission's Report. Accordingly, Parliament's role will not be dealt with in this section of the Report.

619. Many of these Authorities oversee procurement in the course of their more general mandate dealing with all aspects of financial management (e.g. and Treasury) whilst others supposedly supervise the working of procurement in a particular sphere of activities (Provincial Governments and Ministers of Departments).

620. There is no single specialised oversight body which is given the specific mandate to fight corruption in all spheres of procurement, which underlines the need to establish such a body as will be discussed shortly in this Chapter.

621. As can be anticipated, the number of oversight bodies also leads to both overlaps and gaps. An example was identified by Mr Mathebula in regard to the processes followed between Treasury and the Public Service Commission concerning disciplinary measures. Treasury, it appears, does not itself take action when it identifies officials who have been guilty of misconduct; instead it recommends that the Public Service Commission does so. This is in accord with Public Service regulations but, thereafter, Treasury loses sight of the matter and the process has no further record as to what occurs (if anything).[2983]

The poor record of oversight bodies

622. State capture was not a transitory phenomenon. It endured for almost a decade during which time it successfully insulated itself against exposure and accountability. A number of oversight bodies tasked by the Constitution and by legislation to identify, confront and root out corruption in the public domain took no action. This excludes the Public Protector. The critical question however is how, and why, did all the other oversight bodies (all of whom were more directly involved in matters of public procurement) fail? How and why did each of them fail?

Parliament

623. The role of Parliament in terms of performing its oversight function over the Executive is dealt with in another part of the Commission's report.

[2983] Transcript 21 August 2018, pages 39-40, 56 and 59.

National Treasury

624. National Treasury is the architect of the present public procurement system and it has been in the forefront, over the years, in setting and revising policy and its implementation. As noted earlier the PFMA grants National Treasury a host of general functions and powers of oversight which derive from its primary responsibility for financial and fiscal matters.[2984] It falls to National Treasury to promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions.[2985]

625. Nonetheless, National Treasury and, indeed, the Provincial Treasuries, were not able to deal with the corruption unleashed by state capture. There are a number of reasons for this. Where Treasury identified misconduct on the part of an official, the complaint was then handed over to the Department of Public Service and Administration at which stage Treasury appears to have washed its hands of the matter. When Treasury sought to interrogate possible misconduct on the part of the SOEs or other government departments, it was met with obfuscation and general non-co-operation. It does not seem to have been able to follow through in the face of opposition of that sort. Moreover, its oversight responsibilities were merely one component of its involvement in procurement matters and that involvement, again, was only one component amongst its other responsibilities and functions. To that must be added the obvious political difficulties which would have been encountered by Treasury had it sought to confront state capture in a determined manner.

[2984] See PFMA section 5(1).

[2985] *Ibid* section 6(g).

The Auditor-General

626. The Public Audit Act 25 of 2004 requires the Auditor-General to audit and report on the accounts, financial statements and financial management of national and provincial state departments, constitutional institutions, municipalities and other institutions identified in the legislation.[2986] Suspected material irregularities may be referred to a relevant public body for investigation[2987] and, if material irregularities identified in an audit report are not addressed within a reasonable time, appropriate remedial action may be taken.[2988]

627. The Auditor-General is not required to monitor the specific detail of the working of the procurement system or to track the decisions made at the various stages of the cycle; her mandate is a more general one relating to financial management. Of course, an audit may reveal a material procurement irregularity but that is not its dedicated focus.

628. The evidence shows that the Auditor-General has constantly withheld clean audit certification whenever material irregularities are identified. The evidence also shows that for the most part no consequences flow – corruption in procurement is unaffected. This was certainly the case prior to the amendment of the Public Audit Act with effect from April 2019. The amendment greatly strengthened the ability of the Auditor-General to enforce remedial action where an accounting officer or accounting authority has failed to implement the recommendation in an audit report relating to material irregularities within the time frame stipulated in the audit report. Where specific remedial action has not been implemented, the Auditor-General will issue a certificate of debt requiring the

[2986] Section 4.

[2987] Section 5(1A).

[2988] Section 5A.

accounting officer or accounting authority to repay the amount specified in the certificate of debt to the State.

629. These recent amendments, if properly utilised, should provide the Auditor-General with the necessary authority to insist upon proper compliance with the required remedial action. It is too early to assess whether the procedures for the remedial action will work quickly and decisively. It is to be hoped that the appropriate executive authority which must enforce compliance does so promptly lest these procedures become mired in endless delays.

630. It may be desirable to sound a further note of caution in regard to the question of remedial action. In matters of procurement it is particularly important that the Auditor-General tracks irregular expenditure. However, the phrase “irregular expenditure” has been expanded in a way which may undermine its utility as a remedial tool. It is not confined to financial mis-management and corruption but includes also non-compliance with laws and regulations of debatable relevance. In other words, supposed instances of “irregular expenditure” may not be meaningful in the assessment of the utility of the spending or the quality of financial management. Care must be taken to retain the limited but concentrated focus of the phrase “irregular expenditure”.

The question of monitoring

631. Whereas oversight operates at the macro level and tends to be reactive, monitoring operates at the micro level, its purpose is to track the way in which procurement is being implemented by each individual procurement entity. Monitoring requires the detailed observation of procurement processes on the ground; it extends to all stages of the procurement cycle. It examines the decisions which are being made at all points of the procurement activity to both enable irregularities and corruption to be detected and addressed and to satisfy itself that the systems in place are functioning properly.

632. Monitoring must rank as the critical mechanism in safeguarding procurement from corruption.

633. It is therefore a matter of concern that the legislative design makes no proper provision for an effective monitoring function.

634. Monitoring, in the sense of consistent and continuous inspection is, in effect, assigned to two functionaries, the Auditor-General and the accounting officer/authority. The position of the Auditor-General has been discussed in the context of oversight and does not require further comment.

The accounting officer/authority

635. The second entity charged with a monitoring function is the Accounting officer/Authority who are, in addition to designing and implementing the procurement system, also tasked with its monitoring.

636. Whilst it may be natural to vest some form of monitoring power in the top echelon of a procuring entity such a measure, by itself, may not be sufficient, or, even appropriate. The essence of monitoring is that it is undertaken by an outside party with specialized skills.

637. Leaving aside the possibility that the accounting officer/authority may itself be corrupt, there is no guarantee that it has the specialised skills required to detect irregularities nor can there be any confidence in its ability, as it were, to self-medicate.

638. Again it is clear from the evidence that monitoring at the level of the Accounting Officer/Accounting Authority has contributed little in curbing corruption. Indeed the patterns of irregularity, which have been noted above, are of a kind that should immediately have been identified by responsible officials at the Accounting

Authority/Accounting Officer level. Even more troubling, the patterns of corruption are of a kind which could not have taken place in most instances without the active, or at least passive, co-operation of those in charge.

639. Nonetheless, these criticisms regarding the performance of the Accounting Officer/Authority do not tell the whole story. Given the powers entrusted to the Accounting Officer/Authority and their responsibility to oversee the working of the system it is not surprising that stiff penalties are intended to be imposed in cases of contravention whether deliberate or negligent. The penalties which have been imposed involve a fine or imprisonment for a period of up to five years. These penalties may have a paralysing effect on Accounting Officers/Authorities by inhibiting them from taking decisions in good faith which may later be criticised. Some solution is necessary which makes it clear to the dishonest official that there are serious consequences for deliberate infringements whilst simultaneously reassuring the honest official that initiatives taken in good faith will not be punished.

640. In the South African situation there is a pressing need to strengthen the monitoring capability of the procurement system by introducing an external inspectorate committed exclusively to the detailed monitoring of the activities of the multiple procuring entities, a need which is addressed in the following sections of this Chapter.

The absence of any constructive involvement with the private sector

641. South Africa is a signatory to the United Nations Convention Against Corruption. Article 13(1) of that Convention reads in part:

> "1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the

prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption."

642. The legislation under review makes no attempt to engage with civil society organisations in order to present a united front against corruption. An imaginative and open-hearted effort to recruit the stakeholders of civil society into the fight against corruption is entirely lacking. In the result we have no shared Code of Conduct setting out the ethical standards to which both the public and private sectors commit themselves and there is no attempt to give the private sector a voice in the design of procurement systems or to suggest how procurement could be improved and made more transparent. The relevant skills available in the private sector are ignored.

643. During its term the Commission had an opportunity to receive the evidence or submissions and the views of a range of private sector representatives and also to consider a contribution made over the years by academic commentators and anti-corruption organisations. The Commission is satisfied that the involvement of civil society organisations and commentators is a significant but under-utilised control mechanism in dealing with corruption.

644. The constructive involvement of civil society is both a necessary and a legal requirement in the fight against corruption, and that is a function which must be addressed.

<u>The Insufficient Attention Given to Transparency</u>

645. The need for transparency throughout the procurement cycle is essential for its integrity. Section 217(1) insists on transparency and it is a hallmark feature of international principles since it is well known that the more transparent the process, the less easy it is to abuse it.

646. Whilst the legislation contains references to the need for transparency, it does not provide clear and realistic rules for incorporation in any system design and this needs to be addressed.

647. Such Rules should ensure:

647.1. that all potential suppliers and other stakeholders receive the same access to information regarding the entire public procurement cycle. As noted in the commentary on the OECD Principles for integrity in public procurement:

> "Information on procurement particulars should be disclosed as widely as possible in a consistent, timely and user-friendly manner, using the same channels and time frame for all interested parties. Conditions for participation such as selection and award criteria as well as the deadline for submission should be established in advance. In addition, they should be published so as to provide sufficient time for potential suppliers for the preparation of tenders and recorded in writing to ensure a level playing field."

647.2. that transparency requirements are not confined to the tendering phase of the procurement cycle. It is fundamental that all processes followed and decisions made throughout the procurement cycle be properly recorded and be readily available in order to provide an audit trail and to allow dissatisfied tenderers to initiate informed challenges relating to procedural or other irregularities. Such recorded information must be sufficient to enable public scrutiny;

647.3. where there is any deviation from competitive tendering that deviation must be justified and recorded in writing to provide the audit trail and such deviation should accord in clear terms with pre-set requirements which would justify such deviation.

H: 20 years of frustration

648. There were occasions during the Commission hearings when a particular witness stepped back from the detail of the evidence and offered a generalised insight regarding the extent of system malfunction and the feeling of helplessness which it engendered. So, for example, Mr Peter Volmink[2989] was driven to describe the well intentioned and detailed legislative framework as belonging to one universe in sharp contrast to the reality on the ground which, he said, inhabited a 'parallel universe' within the public procurement space. This description, whilst vivid, is unfortunately not an exaggeration. It speaks accurately to a fundamental systemic failure.

649. So, too, the observations of Mr Themba Godi, the former chairperson of the Parliament's Standing Committee on Public Accounts ("SCOPA") are typical and provide a bleak insight into a system which has lost its moral compass.

650. Mr Godi said that, if one looks at SCOPA's resolutions, there are many where there is a call for action to be taken against officials who had not complied with legislation. However, he asked: how do you get things right if there are no consequences? He said that he was talking about Accounting Officers/Authorities in the first instance, but also executive authorities who all these reports which speak of persistent non-compliance, but no action is taken by them.[2990] Mr Godi said that it was "shameful" that Ministers and their Accounting Officers/Authorities and authorities could not deal with corruption.[2991]

651. Mr Godi said that the SCOPA was generally disappointed by the extent to which the accounting authorities and management seemed not to have addressed the financial

[2989] Former Executor Manager: Governance in Transnet's Supply Chain Management unit.

[2990] Transcript 1 February 2021, p. 43, line 11-13.

[2991] Transcript 1 February 2021, p. 73, line 10.

management weaknesses identified in Audit Reports, especially as some of these matters had been raised in the Audit Report of previous years.[2992]

652. He also mentioned that instability of leadership compounds the problem. Throughout the various entities and departments, he said that he would meet with an accounting officer today who would promise that he will sort things out and a year and a half down the line that person is no longer there. You have a new person who is starting from scratch. You can hardly build a culture of compliance where there is instability of leadership.[2993]

653. Linked to this, Mr Godi said that impunity was in a large measure one of the fundamental reasons why non-compliance was persistent, and had actually worsened. In the absence of enforcement, non-compliance merely repeated itself. He said that the inability to take "stern action" against the wrongdoer merely exacerbated the problem, which is a general problem throughout the public service".[2994]

654. Mr Godi's sense of frustration is now shared across the spectrum of public opinion and by Government itself. It seems scarcely believable that the constant flow of legislation over the years had so little impact in curbing corruption and that the combined efforts of Parliament, National Treasury, the Auditor-General, the Provincial Treasuries and National and Provincial Governments could have been so ineffectual.

655. The efforts, albeit failed efforts, to address corruption show that there is no easy solution to the problem. Corruption has strengthened its hold and extended its hold on public

[2992] Transcript 1 February 2021, p. 58, line 13.

[2993] Transcript 1 February 2021. p. 93, line 6-17.

[2994] Transcript 1 February 2021. p. 94, line 1-11.

procurement over a very long period of time. Clearly, a new approach is required; it cannot be the same mixture as before.

I: The way forward

657. Twenty years of frustration which includes a decade of state capture pitilessly exposed the flaws and weaknesses in the public procurement system, flaws and weaknesses which have been exploited by criminals to inflict lasting damage on the South African economy. The promise of service delivery so fundamental to the betterment of our society has not materialised.

658. The years of frustration teach us lessons which we cannot ignore. They include:

658.1. the realisation that the public procurement sector cannot defend itself against those who control the levers of political and state power;

658.2. the excessive decentralistion of our sprawling procurement system which has outrun the collective capacity to manage or operate it efficiently;

658.3. the absence of the robust, detailed and intrusive monitoring of the system undoubtedly facilitates corruption and inefficiency and helps to mask abuse;

658.4. the exclusion of meaningful private sector involvement in formulating policy and in the implementation of policy weakens the procurement system, lessens its transparency and facilities corruption;

658.5. the absence of accountability makes the system unworkable, corrupts those who operate within that system and establishes and embeds criminal relationships involving commercial entities and public officials and, implicates political party funding.

659. Problems as fundamental as these are not capable of easy solution. The process of reform requires a coherent and comprehensive plan of action which needs to bring the public and private sectors together in a joint initiative to restore proper standards and discipline within the procurement system.

660. The Commission's proposals in regard to such a comprehensive plan of reform now follow together with recommendations which it regards as necessary and appropriate.

A National Charter against Corruption

661. State Capture, and its exposure, has dominated the national discourse in recent years. The effect has been predictable and negative: a loss of confidence both in Government and political parties and in the business sector compounded by frustration at the pervasive lack of accountability for wrongdoing.

662. In the view of the Commission it is more than time to take steps to restore broken trust and the first step which needs to be taken in that direction is for all sections of society to jointly endorse a national commitment to eliminate corruption in public life and in the procurement of goods and services.

663. To that end, and by way of a gesture which is both symbolic and substantive to mark the turning of the page, the Commission recommends that a National Charter against Corruption incorporating a standardised Code of Conduct be adopted by Government, the business sector and relevant stakeholders in accordance with the details set out in Recommendation 1.

The creation of an Anti-Corruption Agency

Mandate and Purpose

664. In the view of the Commission and for the reasons which follow, the appropriate starting point for any scheme of reform must include the establishment of a single, multi-functional, properly resourced and independent anti-corruption authority with a mandate to confront the abuses inherent in the present system. That authority could be called the Anti-Corruption Authority or Agency of SA South Africa (ACASA).

665. The Competition Commission with its attendant tribunal and Court provides a useful precedent because it shows how effective such a multi-functional body can be in creating systems and in implementing safeguards to protect economic activity from particular abuses. The Agency or Authority, like the Competition Commission structure, must include specialised departments with particular mandates but which collectively represent a comprehensive response to the challenges which arise.

666. The detail of the functions of the constituent bodies which make up the Agency are set out in Recommendation 2.

The requirement of independence

667. It is a fundamental feature of the Agency that it be independent. There has however been lengthy judicial debate on the question whether such independence can be achieved within a government department or by an entity under Ministerial control. That debate requires careful consideration.

668. The question is a simple one but the answer is fundamental to the Commission's recommendations – put bluntly: should supervision of the procurement system be

located within a government department but with assurances of full independence or must it be located outside of Government control?

669. A like question which arose during 2011 was the subject of the Constitutional Court decision in *Glenister v President of RSA.*[2995] That case dealt with whether the Government which was in the course of disbanding the Directorate of Special Operations (the Scorpions) and replacing it with a successor body (the Hawks) was bound by way of a constitutional obligation to ensure that the successor body was independent of political control or whether it was permissible to locate it within the South African Police Services. The majority of the Court held that there was no such obligation to be found in the Constitution or in the international agreement to which South Africa was a party. The majority of the Court recognised that what was apparent from international instruments was –

> "… the requirement of independence is intended to protect members of the agency from undue influence. This is necessary to ensure that the anti-corruption unit can 'discharge its responsibilities effectively'. The independence of anti-corruption agencies is 'a fundamental requirement for a proper and effective exercise of (their) functions.' This is so because corruption largely involves the abuse of power. In corruption cases involving the public sector, at least one perpetrator comes from the ranks of persons holding a public office. Hence the need to shield anti-corruption units from undue influence. This is a theme that recurs in the international and regional instruments cited by the amicus. Independence in this context therefore means the ability to function effectively without any undue influence. It is this autonomy that is an important factor which will affect the performance of the anti-corruption agency."

670. The Court noted the broad criteria which were offered by the OECD in this regard:

> "Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference. Independence should not amount to a lack of accountability; specialised services should adhere to the principles of the rule of law

[2995] 2011 (3) SA 347.

> and human rights, submit regular performance reports to execute and legislative bodies, and enable public access to information on their work."

671. In the result the majority of the Court concluded that it was permissible to locate anti-corruption agencies within existing structures such as the NPA and the SAPS but that special attention would have to be paid to protect these entities from the risk of interference so that legal mechanisms would be required to limit the possibility of abuse of the chain of command.

672. The then Deputy Chief Justice, Justice Moseneke and Justice Cameron took a different view to that of the majority. They began their judgment by emphasising both the need and the rationale for combatting corruption in these terms:

> "[166] There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the State to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.
>
> [167] This deleterious impact of corruption on societies and the pressing need to combat it concretely and effectively is widely recognised in public discourse, in our own legislation, in regional and international conventions and in academic research. In a statement preceding the text of the United Nations Convention against Corruption (UN Convention), Kofi Annan observed:
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> 'This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.'
>
> …
>
> [170] Perhaps the fullest recital of the insidious scourge of corruption on society and the need to prevent and eliminate it is to be found in our own domestic legislation. The preamble to the Prevention and Combating of Corrupt Activities Act (PRECCA) records that corrupt activities undermine rights; the credibility of governments; the institutions and values of democracy; and ethical values and morality; and jeopardises the rule of law. It endangers the stability and security of societies; jeopardises sustainable development; and provides a breeding ground for organised crime. The preamble notes that corruption is a transnational phenomenon that crosses national borders and affects all societies and economies; that it is equally destructive within both the public and private spheres of life; and that

regional and international co-operation is essential to prevent and control corruption and related crimes.'

…

[176] Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of State contract for goods and services …

[177] The Constitution enshrines the rights of all people in South Africa. These rights are specifically enumerated in the Bill of Rights, subject to limitation. Section 7(2) casts an especial duty upon the State. It requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy, to combat it requires an integrated and comprehensive response. The State's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern State, creates a duty to create efficient anti-corruption mechanisms. Parliament itself has recognised this in the preamble to PRECCA. All this constitutes uncontested public and legislative policy in South Africa. For it has been expressly articulated and enacted by Parliament. That, however, is not the end of the matter."

673. Consistent with the fundamental principles invoked in the minority judgment Justices Moseneke and Cameron noted that according to the legislative framework creating the DPCI (Hawks):

"[232] The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed that those very political executives could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They 'oversee' an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function. Their power over it is unavoidably inhibitory.

[237] The new provisions contain an interpretive injunction: in their application 'the need to ensure' that the DPCI 'has the necessary independence to perform its functions' must be recognised and taken into account. But this injunction operates essentially as an exhortation. It is an admonition in general terms, containing no specific details. It therefore runs the risk of being but obliquely regarded, or when inconvenient, disregarded altogether. This is because the interpretive rule enjoins political executives to take the need to ensure independence into account. At the same time other provisions place power in their hands without any express qualification – power to determine policy guidelines and to oversee the functioning of the DPCI.

[238] It is the structure of the DPCI that brings its capacity to be adequately independent into question, and it is its structure that renders the interpretive injunction potentially feeble. What independence requires is freedom from the risk of political oversight and trammelling, and it is this very risk that the statutory provisions at issue create."

674. State capture has shown that South Africa needs to heed the view given by the minority in that judgment. The evidence that the Commission heard about the DPCI (the Hawks) in regard to their investigation of Minister Pravin Gordhan, the role of the Executive in the suspension of General Anwar Dramat as Head of the DPCI, the evidence heard by the Commission from Mr Innocent Khumba of IPID about General Ntlemeza who replaced General Anwar Dramat in circumstances which suggest an ulterior agenda and the failure by the DPCI to act over a long period on corruption complaints brought to it by the Board of Directors of PRASA under Mr Popo Molefe suggests very strongly that the DPCI was probably captured but this Commission will not make a definitive finding on the DPCI as it may have to be the subject of other process.

675. South Africa requires an anti-corruption body free from political oversight and able to combat corruption with fresh and concentrated energy. Public trust will not otherwise be re-established in the procurement system. The ultimate responsibility for leading the fight against corruption in public procurement cannot again be left to a government department or be subject to Ministerial control. What is required are specialised oversight and monitoring authorities which operate upon the basis that they are independent in the full and untrammelled sense, i.e. that they are subject only to the Constitution and the Law. This also implies that the choice of officials who will lead and staff such bodies is not left in the discretion of Government. Such appointments must be in accordance with a transparent procedure in a public process.

<u>The requirement that the Agency is properly resourced</u>

676. A way in which an institution may be prevented from doing its job effectively and properly is to withhold adequate funding and not to fill vacancies. These measures, taken together, have been responsible in a large measure for preventing wrong-doers being held accountable for their actions.

677. In order to ensure that the Agency is able to do its work effectively and properly it will be necessary to ensure that the adequacy of its funding is proof against political interference. This may be achieved by protections built into the enabling legislation and by providing for sources of revenue additional to Parliamentary funding. In leading the fight against corruption, the Agency will be providing an essential service for both the public and the private sectors and both should contribute in some appropriate way to its funding.

678. There should be no objection to the imposition of a levy payable to the Agency by every person seeking a procurement contract or participating in a tender process. This will provide the Agency with necessary additional funding beyond that supplied by Parliament and other sources.

The Interaction between the Agency and other associated entities

679. The Commission appreciates that the establishment of the Agency to lead the fight against corruption in public procurement requires an adjustment and re-alignment in the functions of National Treasury which exercises the overall supervisory jurisdiction in public procurement matters. The Commission is also aware that National Treasury has published a draft Public Procurement Bill, 2020, which has far-reaching proposals to reform public procurement. The suggested reforms include the establishment of a Public Procurement Regulator within National Treasury who will exercise considerable statutory powers. It would vest the power of debarment in the Regulator and contains other important provisions all based on the assumption that the Regulator is also the appropriate official to lead the fight against corruption.

680. The Commission must make it clear that it does not seek to question the vital leadership role of National Treasury in the design and oversight of the public procurement system in general. The Commission endorses many of the proposals contained in the Bill which will serve to centralise and strengthen public procurement standards. Nonetheless and for reasons already made clear it is not appropriate that any government department be tasked to lead the fight against corruption in public procurement. The vulnerability of any government department to undue political interference remains and will always remain and the answer to state capture does not lie in replicating the very same features that allowed state capture to succeed in the first place. In this regard it needs to be pointed out that the evidence heard by the Commission with regard to National Treasury, between 2014 and President Zuma's resignation as President of the country in February 2018, serious efforts were made by the Guptas, assisted by President Zuma, to capture National Treasury and, although Minister Nene and Minister Gordhan, as well as senior officials of National Treasury put up a brilliant fight or resistance, for four days – during Mr Des Van Rooyen's short stint as Minister of Finance, National Treasury was almost, if not actually captured. South Africa was lucky that enough pressure was put on President Zuma to move Mr Des van Rooyen out of the Ministry of Finance. If in the future a similar attempt were to happen, there is no guarantee that the effort to capture National Treasury will not succeed. If they had succeeded in December 2015, we do not know where this country would be. If in the future such efforts will be tried, this country should have a truly independent Agency.

J: Recommendations

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

Recommendation 1: The National Charter against Corruption

681.1. That the Government, in consultation with the business sector prepare and publish a National Charter against corruption in public procurement, such Charter to include a Code of Conduct setting out the ethical standards which apply in the procurement of goods and services for the public;

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

681.2.1. the President and the Cabinet

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

681.2.3. the local authorities;

681.2.4. all State-Owned enterprises;

681.2.5. the political parties represented in Parliament;

681.2.6. constitutional entities;

681.2.7. the institutional representatives of the business sector;

681.2.8. listed public companies;

681.2.9. Trade Unions

681.2.10. Anti-corruption bodies in civil society;

681.3. every procurement officer in the public service shall, on assuming duty, be required to sign a commitment to observe and uphold the terms of the National Charter;

681.4. every natural or juristic person tendering or contracting to supply goods or services by way of public procurement must sign a like commitment to uphold and to adhere to the terms of the Charter and its Code of Conduct;

681.5. the content of the National Charter and the Code of Conduct should be widely publicised;

681.6. the National Charter and Code of Conduct should be given legal status and effect by an Act of Parliament.

Recommendation 2: The establishment of an independent Agency against corruption in public procurement

682. That the Government introduce legislation for the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA).

683. That such legislation constitutes the Agency :

683.1. as an independent body subject only to the Constitution and the law;

683.2. which has jurisdiction throughout the Republic;

683.3. which is impartial and must perform its functions without fear, favour or prejudice;

683.4. which is financed from:

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

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

683.4.3. money received from any other source.

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

684.1. The Council consisting of 5 members:

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

684.1.2. 4 members chosen for their special skills in accounting, finance and economics with expertise in public procurement matters one of whom shall be a member of the academic staff of a University who is a specialist in matters of public procurement;

684.1.3. the said members of the Council are to be selected by a panel consisting of the Chief Justice, the Auditor-General and the Minister of Finance following a public process."

684.1.4. an Inspectorate;

684.1.5. a Litigation Unit;

684.1.6. a Tribunal;

684.1.7. a Court.

685. That the function of the Council is to:

685.1. initiate measures to protect procurement systems from corruption;

685.2. issue guidelines for the betterment of procurement practice;

685.3. prohibit any practice which facilitates corruption, fraud or undue influence in public procurement;

685.4. formulate measures for the making of reports to the Agency by whistle blowers and for their protection and incentivisation;

685.5. implement measures to increase the integrity and transparency of public procurement practices;

685.6. negotiate agreements with any regulatory or oversight authority to co-ordinate and harmonise the exercise of jurisdiction over public procurement;

685.7. participate in the proceedings of any regulatory or oversight authority and advise or receive advice from such authorities;

685.8. issue regular reports for public and media attention, detailing the nature and extent of corruption, fraud and undue influence identified by the AACIPP.

686. That the function of the Inspectorate is to:

686.1. monitor and inspect public procurement activity to detect and expose corruption;

686.2. establish, maintain and update a comprehensive and secure data base recording and listing:

686.2.1. every public procuring entity, together with its procurement procedures and the names and qualifications of the procurement officials employed;

686.2.2. information obtained from Whistle Blowers and complaints registered by tenderers;

686.2.3. the reports and information provided by oversight authorities;

686.2.4. reports of disciplinary proceedings relating to procurement officials conducted by any governmental, SOE or constitutional entity;

686.2.5. any other information in respect of the aforegoing;

686.3. receive information from whistle blowers in accordance with the procedures mandated by the Council and to provide protection and support in accordance with Article 32(2) of the United Nations Convention against Corruption;

686.4. institute electronic procedures to facilitate the monitoring and inspection of public procurement activity;

686.5. undertake *in situ* inspections, where necessary without notice, of public procurement activity by the procuring entities;

686.6. review the procurement systems utilised by the procuring entities to ensure the adequacy of in-built protections against corruption;

686.7. issue Mandatory Compliance Notices requiring the prompt implementation of remedial measures by a procuring entity to address deficiencies or irregularities detected in any procurement system or in respect of any tender or the award of any contract calling upon the affected entity to take immediate steps to rectify same;

686.8. refer all instances of non-compliance with such Notices to the Litigation Unit for further action;

686.9. promptly investigate any information received concerning fraud or corruption in the grant of tenders or contracts and take active steps to protect informants against intimidation or revenge;

686.10. investigate any circumstances suggesting the giving of a bribe or other gratification for the award of a tender or contract including the making of donations to political parties in connection with the award of tenders;

686.11. investigate all complaints concerning corruption made by tenderers or other informants and refer matters arising from such investigations to the Tribunal.

687. That the function of the Litigation Unit is to:

687.1. apply to the Tribunal for the giving of authority to the Inspectorate to exercise powers of search and seizure against any juristic or natural person including any political party in connection with any investigation into corruption, fraud or undue influence connected to public procurement;

687.2. receive and negotiate Deferred Prosecution Agreements and refer such Agreements to the Tribunal for approval;

687.3. seek remedial action from the Tribunal where Notices of Compliance issued by the Inspectorate have not been rectified;

687.4. institute proceedings before the Court for the recoupment of monies stolen from, or damages suffered by the State as a consequence of corruption, fraud or undue influence in the procurement process;

687.5. apply to the Tribunal for an order debarring any person from participating in any tender process or the grant of any procurement contract either permanently or for a stipulated time and either conditionally or unconditionally;

687.6. apply to the Tribunal for an order striking any procurement official from the roll of professional procurement officers either permanently or for a stated period and whether conditionally or unconditionally.

688. That the function of the Tribunal is to:

688.1. grant or refuse warrants of search and seizure of documents to the Inspectorate at the request of the Litigation Unit;

688.2. review and approve either with or without conditions any DPA or to reject same;

688.3. make any order requiring any procuring entity or other recipient of a Compliance Notice to comply forthwith or subject to such qualifications as the Tribunal may impose;

688.4. issue, where appropriate, an order interdicting any procurement entity from conducting any procurement activity until it has properly complied with any order issued by the Tribunal;

688.5. issue an order debarring any natural or legal person found guilty of corruption, fraud or exercising undue influence from again participating in any tender or receiving the grant of any procurement contract either for a period of time or permanently.

689. That the function of the Court is to:

689.1. determine civil actions instituted by the Litigation Unit for recompense to the State in respect of losses suffered through corrupt acts;

689.2. act as a Court of Appeal in respect of decisions of the Tribunal.

Recommendation 3: Protection for Whistle Blowers

690. That the Government introduce legislation or amend existing legislation:

690.1. to ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in article 32(2) of the United Nations Convention Against Corruption;

690.2. identifying the Inspectorate of the Agency as the correct channel for the making of such disclosure;

690.3. authorising the Litigation Unit of the Agency to incentivise such disclosures by entering into agreements to reward the giving of such information by way of a percentage of the proceeds recovered on the strength of such information;

690.4. authorising the offer of immunity from criminal or civil proceedings if there has been an honest disclosure of the information which might otherwise render the informant liable to prosecution or litigation.

Recommendation 4: Deferred Prosecution Agreements

691. That the government introduce legislation for the introduction of deferred prosecution agreements by which the prosecution of an accused corporation can be deferred on certain terms and conditions:

691.1. that a company has self-reported facts from which criminal liability could be inferred and has co-operated fully in making such report;

691.2. that the company has agreed to engage in specific conduct intended to ensure that such conduct is not repeated;

691.3. that the company has paid a fine;

691.4. or been subject to other remedial action;

691.5. that the terms and conditions of the agreement has been sanctioned by the Tribunal of the Agency.

Recommendation 5: The Creation of a Procurement Officer's Profession

692. It is recommended that consideration is given to enacting legislation that will establish a professional body to which all officials who work in the area of public procurement should belong.

693. Such professional body will fix the qualifications and the necessary training and experience necessary for membership of the profession.

694. Such training and qualification to include high standards of integrity and a commitment to resist mismanagement, waste and corruption.

695. That the procurement system in every procuring entity be managed by a duly qualified public procurement official being a member in good standing of the profession.

696. That the Tribunal of the Agency act as the disciplinary committee of the profession with power to strike a member from the Roll or to impose such other disciplinary sanction as the case may require.

Recommendation 6: The Enhancement of Transparency

697. The Commission recommends that set standards of transparency consistent with the OECD Principles for integrity in public procurement be formulated by National Treasury for compulsory inclusion in every procurement system adopted by a public procurement entity.

Recommendation 7: Protection for Accounting Officers/Authorities acting in good faith

698. It is recommended that the legislation dealing with the duties and responsibilities of Accounting Officers/Authorities be amended to insert a provision which reads:

> "No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act unless such person acts negligently.

Recommendation 8: Suggested Amendment of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 ("PRECCA")

699. In order to strengthen the duty of private sector entities to put in place measures against bribery it is recommended that PRECCA be amended by the introduction of a section 34A reading as follows:

> "34A Failure of persons or entities to prevent bribery
> (1) Any member of the private sector or any incorporated state-owned entity ('A') is guilty of an offence under this section if a person ('B') associated with A gives or agrees or offers to give any gratification prohibited under Chapter 2 to another person ('C') intending-
>
> (a) to obtain or retain business for A or
> (b) to obtain or retain an advantage in the conduct of business for A, save that no offence shall be committed where A had in place adequate procedures designed to prevent persons associated with A from giving, agreeing or offering to give any gratification prohibited under Chapter 2.
>
> (2) For the purposes of section 34A(1), a person ('B') is associated with A if (disregarding any gratification under consideration) B is a person who performs services for or on behalf of A. The capacity in which B performs services for or on behalf of A does not matter."

Recommendation 9: Suggested Amendment of the Political Party Funding Act No. 6 of 2018

700. It is recommended that the Act be amended to criminalise the making of donations to political parties in the expectation of or with a view to the grant of procurement tenders or contracts as a reward for or in the recognition of such grants having been made.

Recommendation 10:

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

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

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

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

701.4. the better training of public procurement officials;

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