Judicial Commission of Inquiry into State Capture Report: Part IV

Vol. 2: The Free State Asbestos Project Debacle
The Free State R1 Billion Housing Project Debacle

COMMISSION OF INQUIRY INTO STATE CAPTURE

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

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

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

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TABLE OF CONTENTS
VOLUME 2

Judicial Commission

of

Inquiry into Allegations

of

State Capture, Corruption and Fraud in the Public Sector Including Organs of State

Report: Part IV

Vol. 2: The Free State Asbestos Project Debacle

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THE FREE STATE ASBESTOS PROJECT DEBACLE

TABLE OF CONTENTS

FREE STATE

399. With regard to the Free State Province, the Commission heard evidence relating to allegations of irregularities and corruption relating to Estina (Pty) Ltd, the Free State Asbestos Project, the Free State R1 Billion Housing Project, the City of Tomorrow Project and interactions between Mr Mxolisi Dukoana and Mr Elias Sekgobelo "Ace" Magashule, on the one hand, and Mr Tony Gupta and other Gupta associates which include a visit by Mr Dukoana and Mr Magashule to the Gupta residence on which Mr Dukoana was offered cash in a briefcase if he signed a document which would have given the Guptas and their associates some work in the Free State. Estina (Pty) Ltd will be dealt with later in this Report. In this part of the Report only the Free State Asbestos Project, the Free State R1 Billion Housing Project, the City of Tomorrow Project and the evidence relating to the bribe referred to above will be discussed.

400. Mr Mxolisi Dukoana was the first witness to give evidence relating to the Free State Province in this Commission. He gave introductory evidence relating to the Free State Asbestos Project and the R1 Billion Housing Project both of which will be dealt with below. He also gave evidence relating to the bursaries or scholarships that the Provincial Government or Mr Ace Magashule secured from various people or companies in the Free State including those who or which obtained contracts or tenders from the Provincial Government which bursaries or scholarships were then awarded to students at institutions of higher learning both inside and outside the country.

401. By way of introduction to his evidence, Mr Dukoana had this to say about himself, the African National Congress and the fact that he had decided to come forward and give evidence before the Commission:

> "3. I have deemed it appropriate to render assistance to the Commission on the State Capture ("the Commission") in respect of the activities that I have encountered

during the period I was elected as a public representative on behalf of the ANC in the Free State Legislature and as a member of the Executive Council in the Free State government. During the said period, 1994-2012 I was assigned to different positions both in the legislature and executive.

4. Prior to the historic first national elections of 1994, I was a political activist or freedom fighter and a member of the ANC at Ntema Moiloa branch, ward 10, Matjhabeng Local Municipality, Lejweleputswa region, Free State."

402. Mr Dukoana testified that he had been an activist from the 1980s. He said that, after the establishment of ANC Provincial structures after 1994, he was elected as a member of the Provincial Executive Committee of the ANC in the Free State. He said that he remained a member of the Committee until 2012. He said that he served two terms as the Provincial Treasurer of the ANC in the Free State from 2005 to 2012.

403. After the 1994 general elections Mr Dukoana was deployed by the ANC to serve as a Member of the Provincial Legislature. In 1996 he was appointed as a Member of the Executive Council of the Provincial Government. From 1996 to 1998 Mr Dukoana was a Member of the Executive Council responsible for education. From 1999 until 2004 he was the Deputy Speaker of the Free State Provincial Legislature. From 2004 to 2008 he served as the Speaker of the Free State Provincial Legislature. From 2008 to 2009 he was a Member of the Executive Council responsible for Safety, Security and Transport. After the 2009 general elections Mr Dukoana was appointed as the MEC for Economic Development by Mr Ace Magashule who became the Premier of the Free State. He was dismissed as MEC for Economic Development on 28 February 2012.

404. In the evidence that Mr Dukoana gave, he implicated Mr Ace Magashule in certain wrongdoing. The Commission served Mr Magashule with Rule 3.3 notices indicating to him that Mr Dukoana was going to give evidence implicating him and furnishing him with Mr Dukoana's affidavit(s) or statement(s). Mr Magashule did not deliver any affidavit to refute Mr Dukoana's evidence.

405. Mr Dukoana testified on two separate occasions. When he testified on the second occasion, he told the Commission that, since his first occasion when he testified, he had received a letter from Mr Magashule's attorneys which threatened him with legal action in connection with the evidence he had given implicating Mr Magashule. Mr Dukoana testified that, in response to that letter, he instructed his attorneys to write back to Mr Magashule's attorneys and tell them that he was ready to meet Mr Magashule in Court at any time if he wanted to sue him about what he had said about him in his evidence. While on the witness stand before the Commission, Mr Dukoana yet again took the opportunity to challenge Mr Magashule to sue him or take him to Court and announced that he was ready to go head-to-head with Mr Magashule in Court.

406. Mr Magashule did not, after that challenge by Mr Dukoana, deliver to the Commission any affidavits or statements to dispute Mr Dukoana's evidence nor did he apply to the Commission for leave to give evidence in his defence or apply for leave to cross-examine Mr Dukoana and, therefore, challenge his evidence implicating him. Mr Dukoana's evidence that Mr Magashule did not challenge or seek to refute includes evidence, as will be seen later in this part of the Report, that on one of the occasions when Mr Dukoana and Mr Ace Magashule met with Mr Tony Gupta at the Gupta residence in Saxonwold, Mr Tony Gupta told Mr Dukoana in Mr Magashule's presence that the Guptas were paying Mr Magashule money every month and Mr Magashule did not dispute what Mr Tony Gupta said. The evidence also includes evidence that on that same occasion Mr Tony Gupta offered Mr Dukoana in Mr Magashule's presence a bribe in the form of cash in a briefcase if Mr Dukoana signed a certain letter or document which would have given the Guptas or a Gupta entity or associate a certain contract.

407. In his evidence Mr Dukoana also covered a trip that he said he made with Mr Ace Magashule to the offices of Sahara Computers, a company that was owned or

controlled by the Guptas, at Mr Magashule's instance in 2008; a visit that he and Mr Magashule made to the Gupta residence in Saxonwold in February 2012, also at Mr Magashule's instance; and a visit that he (i.e. Mr Dukoana) made to the Gupta residence without Mr Magashule after Mr Magashule had dismissed him as a Member of the Executive Council. These will be discussed shortly.

Mr Dukoana's visit to Sahara Computers with Mr Ace Magashule in 2008

408. Mr Dukoana testified that in 2008, when he was still the MEC for Safety, Security and Transport and was also still the Provincial Treasurer of the ANC, he was taken to the offices of Sahara Computers by Mr Magashule where he (i.e. Mr Magashule) gave his identity document to Mr Tony Gupta and told Mr Dukoana that he would be going into business with the Guptas, but, he would not be personally involved in the business and would use his son, Tshepiso.

409. Mr Dukoana testified that this is how that trip came about. He said that he and Mr Magashule happened to be in Johannesburg at the same time. Mr Dukoana had to meet someone at the Southern Sun Hotel in Katherine Street in Sandton, Johannesburg. He testified that, when he had finished his meeting, Mr Magashule approached him and asked him to accompany him to Midrand where he said he was going to meet some important person.

410. Mr Dukoana agreed to accompany Mr Magashule. Mr Dukoana testified that he and Mr Magashule drove together to Midrand in an S600 Mercedes Benz. He did not know whether that car was Mr Magashule's or someone else's. He said that Mr Magashule was driving. At that time Mr Magashule was the MEC for Sport in the Free State under the Premiership of Ms Beatrice Marshoff.

411. Mr Dukoana testified that their trip led them to Sahara Computers. They were welcomed by a man who introduced himself as Rajesh Gupta who referred to himself as "commonly known as Tony" Gupta. Mr Dukoana said that Mr Tony Gupta took them through their offices and to the main computer warehouse and told them the history of the computer business. Mr Gupta then asked Mr Magashule whether he had brought "that" with him in response to which Mr Magashule produced his identity document and handed it to Mr Gupta. Mr Dukoana testified that Mr Tony Gupta said that he was going to make a copy of the identity document. Mr Dukoana said that, as soon as Mr Tony Gupta had left the room, Mr Magashule told him that he (i.e. Mr Magashule) was going to be involved in business with the Guptas but would not be actively involved. Mr Dukoana told the Commission that Mr Magashule said that he would use his son, Tshepiso. Mr Tony Gupta returned from making a copy of Mr Magashule's identity document and jokingly asked Mr Dukoana where his own identity document was, and then walked them out and they left.

The visit to the Gupta residence

412. Mr Dukoana also testified about a visit by him and Mr Magashule to the Gupta residence in February 2012. At that time, he was the Provincial Treasurer of the ANC in the Free State Province and Mr Magashule was the Provincial Chairperson. Mr Magashule was also the Premier of the Free State Province at the time.

413. As Mr Dukoana's evidence about his and Mr Magashule's trip is not disputed, it is convenient to let Mr Dukoana tell this story in his own words as reflected in his affidavit of 19 March 2019. In relevant parts of the affidavit, Mr Dukoana narrates that visit to the Gupta compound thus:

> "46. As stated above, I was the Treasurer of the ANC in the Free State whilst I was MEC for EDTEA. Early February 2012, the Chairperson of the ANC and Premier of

the Free State, Magashule asked me to travel with him to Johannesburg. The reason for traveling to Johannesburg was on the pretext that I was going to meet and address the business people in Johannesburg. In essence, Magashule informed me that as the Chairperson of the ANC, he needed me to address the business people for purposes of fundraising for the ANC in the province. According to Magashule, the business persons I was to address were originally from the Free State but operating in Gauteng.

47. We travelled to Johannesburg by flight, SA Airlink, and the arrangements were made on my behalf by Magashule or whoever he instructed and not my office. Magashule and I were on the same morning flight from Bloemfontein to Johannesburg. Magashule had told me the dinner with business persons I was to address was to be around 18:00. There was no reason provided to me by Magashule why we were leaving for Johannesburg that early when dinner was apparently scheduled at 18:00.

48. On arrival at OR Tambo airport, we were shuttled in different cars by persons unknown to me and not by the VIP Unit of the South African Police Service as the protocol dictates.

49. I was startled when we arrived at the Gupta family residence. I was able to identify it as such because it is the same "compound" that has been on the news pertaining to the high walls apparently built contrary to the By-laws of the City of Johannesburg. I recall at the time, a Democratic Alliance Ward Councillor had complained about the high walls of the residence. At the time, there were two dominant topical issues in the media: the landing of the helicopter at Zoo Lake and the construction on the compound that caused the neighbours' uproar.

50. On arrival, at the compound we were received by Tony who introduced himself to me as such. It appeared to me he had not recognised that we were not meeting for the first time. We had met at Sahara as averted above.

51. I was asked by Tony to hand in my mobile phone and told that I will receive it when I leave the residence. The said phone was an official government phone. I obliged. To my recollection and astonishment, Magashule was not subjected to the same treatment of having to hand in his mobile phone. It seemed to me that it was not Magashule's first visit to the compound by his demeanour.

52. I was alone ushered to a room whilst Tony and Magashule went to a different room. After a while, they joined me and accompanied by other people and the notable was Mr Duduzane Zuma.

53. Tony, in the presence of Magashule, asked me to sign a document purportedly prepared by me on the letterhead of my office addressed to Nulane Management

Services appointing them to run a whole project I presented in the cabinet meeting on a turn-key basis. I refused to append my signature.

54. In the said letter, my surname was written as Dukoana, and only Magashule knew that is how my surname is written because I always preferred and wrote it as Dukwana. Dukoana is a Sesotho version of my otherwise Xhosa surname.

55. In an effort to try to persuade me to append my signature to the said letter, Tony intimated to me that both Magashule and Duduzane Zuma were recipients of monies in cash from a mining project from Jaggersfontein mine. Neither Magashule nor Duduzane Zuma disputed Tony's claim. They both nodded their heads in agreement.

56. Further, Tony told me that Magashule would not benefit from the project because it belonged to me and him (Tony). Magashule did not dispute Tony. From this project, Tony told me that I would receive a monthly payment of R 2m (two million rands). I was told by Tony that if I appended my signature at the time, an instant payment of R2m would be given to me. In this regard, a gentleman of Indian descent was called by Tony and Tony whispered something words in the language unknown to me. The gentleman left the room and came back with a black pilot bag. The same bags frequently used by lawyers.

57. I still persisted that I cannot sign the document to which Tony said that he had spoken to Magashule that upon my signature, the provincial cabinet would ratify the appointment. Tony then opened the pilot bag which was full of R200 South African banks notes stating that the money was mine if I signed the document. I still refused to sign.

58. I went to the extent of suggesting that it would be prudent that the letter I was being compelled to sign should be referred to Mr Venter, Provincial Legal Advisor in the Office of the Premier to give a legal opinion about the legality of the contemplated appointment.

59. After that suggestion, Magashule mumbled something to Tony, to which Tony asked that I give him back the letter. I had intended to keep the letter to refer it to Mr Venter.

60. I intimated to Tony that I am clothed with no powers to appoint any service provider or address any correspondence to it. Only the Head of the Department ("the HOD") had such powers in terms of the PFMA. Tony was not pleased. He asked me to fire my HOD and I told him in the presence of Magashule that in terms of the law, a provincial HOD can only be employed and dismissed by the Premier following a due process. (It must be mentioned that during my stint as the MEC for Economic Development, Tourism and Environmental Affairs (2009-2012), approximately four persons were appointed as HODs in the said department.)

61. Tony, then told me that he had a suitable replacement for me and a phone call was made by him and in no time, a gentleman came through. He was then introduced to me as Richard Seleke and as the one who would help speed up the appointment process. Mr Richard Seleke was eventually appointed as the HOD of the department long after my dismissal.

62. I verily believe that this is the same Richard Seleke who ended up being employed as the Director-General for the Department of Public Enterprise.

63. The meeting in issue took place towards the on or around mid-February 2012 and I am not certain about the dates.

64. At the end of the meeting with Tony which I was not initially informed of by Magashule, I called my office to arrange for my flight back to Bloemfontein. I was transported back to the airport by the same person and I flew back to Bloemfontein having left Magashule at the compound.

65. To me it was also clear in my mind that the purported fundraising dinner meeting I was informed of was the visit to the compound intended and calculated by Magashule to have me initiated as one of the Gupta disciples had I appended my signature to the letter referred to above.

66. I remain startled to this day as to why the presentation I made in the executive council, its details ended up outside with persons who were not in government. I can only deduce that Tony possibly received the details of my presentation from Magashule. I cannot rule out the possibility that Magashule might have instructed someone else to furnish Tony with the said presentation.

67. I was also startled that the Premier of the province brought me to the Gupta compound with a sole intention of corruptly and unlawfully advancing commercial interest of the Guptas. I am not sure why Magashule deemed it apt and under a false pretext to bring the name of the ANC to a corrupt activity when he knew the ANC has nothing to do with the appointment letter, I was expected to sign for a Gupta linked company.

68. This incident occurred seven or so years ago and with the passage of time, it is difficult to recall every detail with precision.

69. As a law-abiding citizen of the Republic, I am duty bound to be of assistance to the Commission to ensure that never again shall this land be subjected to acts of state capture by those entrusted to protect the Constitution of the Republic and its resources."

The "City for Tomorrow" Project

414. The "City for Tomorrow" Project relates to a project by the Free State Provincial Government to build a new city in the Free State because it realised that, since the dawn of democracy in the country, no new city had been built. It would appear from Mr Dukoana's affidavit that this idea came either from him as the then MEC for Economic Development, Tourism and Environment but, based on what he told the Commission, it appears that, after he had introduced the idea to the Executive Council, the concept or documents relating to the concept which were meant to have been kept within the Provincial Government, were unlawfully given to Mr Iqbal Sharma, a Gupta associate who then sought to present the concept as his or as one belonging to his entities or associates.

415. On Mr Dukoana's evidence it would appear that on 4 July 2011 the Executive Council held a meeting in which they deliberated on the concept of the "City for Tomorrow". Mr Dukoana testified that on that day Mr PHI Makgoe was acting in his position as MEC. A memorandum that was prepared for the Executive Council bearing the number 69/2011 with the subject: "City for Tomorrow" which seems to have served before the Executive Council was attached to Mr Dukoana's affidavit. The memorandum was signed on behalf of Ms E Rockman who was the Director-General in the Premier's office. Attached to it was a draft resolution that was intended for the Executive Council to pass.

416. The memorandum stated that its purpose was to obtain the in-principle support of the Executive Council for the "New City" project in the Free State Province and to obtain formal approval of the Executive Council to initiate and pursue a process that would have included the investigation and consideration of all aspects of the viability of the

New City concept. Part of the background to the concept of the City for Tomorrow that was given in the memorandum was this:

"BACKGROUND

(a) No new city has been established in the Republic of South Africa since 1994. The economic potential of the unique geographic location of the Free State province is generally viewed as not being optimally explored to the advantage and benefit of the broader Free State communities.

(b) Various economic opportunities, specifically in the information technology industry, are in development that may maximize the economic benefits to be derived from centrality of the Free State province and it may also serve to revitalize the economy of the Lejweleputswa district. Specifically, the Matjhabeng Local Municipality.

(c) The ERPIAR Cluster considered a presentation on the "City for Tomorrow"-concept on 22 June 2011 from P3 Nulane Consortium. The presentation focused on the following aspects;

(i) introduction "City for Tomorrow"

(ii) Process

(iii) Sustainability

(iv) Regional Analysis

(v) Local Analysis

(vi) Population Density and Scale Comparison

(vii) Site Selection and Criteria

(viii) Site Alternatives

(ix) The Plan

(x) Phase 1

(d) The concept essentially involves the development of a new city for approximately 600 000 residents. The criteria to determine the city and location for the development of a new city include the following:

(i) Accessibility to Freeway

(ii) Accessibility to Rail

(iv) Accessibility to Airport

(iv) Accessibility to Water, Sewer, and Power

(v) Safety and Security

(vi) Adaptability to Natural Topography

(vii) Adaptability to Natural System

(e) A site has been identified that meets the identified criteria between Henneman and Geneva station.

(f) The development of the new city can create up to 35 000 jobs and/or job opportunities and will be implemented over a number of phases. The first phase will focus on the delivery of 6000 housing units.

(g) It was noted that the funding for the development will involve a type of Private-Public Partnership with international funding. There are various cost-benefit options for the provincial government, for example: government can own the whole city and sell off houses, office developments, etc. and this will create an income opportunity. International funding will also be sourced and this is likely to be a more cost-effective option.

(h) It was further noted that the proposal links up with the envisaged PPP-project regarding the ITHub I Techno-park. In addition, the MEC: Economic Development, Tourism and Environmental Affairs has lobbied various national government departments to position to the Free State to serve as the Data Centre hub to host the data services of the national, provincial and local government. A major private sector player in data services has also expressed interest to locate its major data back-up facility in the locality as it is required to duplicate its existing Gauteng-based services."

417. Under paragraph 3 of the memorandum are recommendations that are said to have been made by the ERDIAR Cluster. They included the following:

> "to obtain in principle support of the Executive Council to position the Free State as the data centre hub for national, provincial and local government and to further pursue negotiation with the private sector in this regard and
>
> To obtain formal approval of the Executive Council to initiate and pursue a process that will include the investigation of all aspects of the viability of the New City concept."

418. In the memorandum the Executive Council was requested to approve the resolution that was attached. The acting MEC for Economic Development, Town and Environmental Affairs signed the memorandum with the request that the memorandum

be placed as an appropriate item on the agenda of the Executive Council. The resolution was for the approval of the "City for Tomorrow" concept in accordance with the memorandum.

419. The memorandum was accompanied by a presentation prepared by P3I and Nulane. P3I was associated with Mr John Thomas and Mr Jereon Gerrese whereas Nulane was associated with Mr Iqbal Meer Sharma and Mr Salim Essa both of whom were Gupta associates.

420. Mr Dukoana said that on 6 July 2011 - which was 2 days after the Executive Council had deliberated on the City for Tomorrow concept - Mr Iqbal Sharma sent an email to Mr Dukoana's private email address. In that email Mr Sharma wrote:

> "Dear Honourable MEC,
>
> Please find attached contract for Master Plan in relation to the City of Tomorrow's project. Your comments would be appreciated.
>
> Kind regard,
>
> Iqbal"

421. The Master Plan agreement that Mr Sharma attached to this email was attached to Mr Dukoana's affidavit before the Commission and was marked as "DM5". The agreement was intended to be between "the Provincial Government of the Free State acting through its Department of Economic Development, Tourism and Environmental Affairs" and the "Consortium consisting of:

> "P3 international, LLC Registration No 201014610054, a company duly registered in terms of the laws of the State of California
>
> And
>
> Nulane Investments 204 (Proprietary) Limited t/a Nulane Management Services Registration NO 2008/020988/07, a company duly registered in terms of the laws of the Republic of South Africa."

422. In the definition section of the Master Plan Agreement the term "City of Tomorrow" was defined as meaning "a new city to be designed and built in the Province of the Free State, which new city will include" various features which were listed in the agreement including:

> "1.2.3.1. general infrastructure;
>
> 1.2.3.2 public transportation facilities;
>
> 1.2.3.3. housing;
>
> 1.2.3.4. medical facilities;
>
> 1.2.3.5. high-tech private development;
>
> 1.2.3.6. entertainment;
>
> 1.2.3.7. public safety;
>
> 1.2.3.8. parks, and
>
> 1.2.3.9. the Government Centre."

423. The definition section included a definition for the Government Centre which was defined as "the building, parking and ancillary grounds and structures intended to house the administrative and office function of the Matjhabeng Municipality, such Government Centre to be approximately 160 000 square metres in size. The intention was to build the City of Tomorrow within six months for an amount of R140 Million. In terms of the draft Master Plan Agreement P3I and Nulane were to be appointed to build the City for Tomorrow for R140 million within a period of six months.

424. In response to Mr Dukoana's affidavit that was served on Mr Iqbal Sharma, Mr Iqbal Sharma delivered an affidavit to the Commission in which he responded to what Mr Dukoana had said about him. He did not apply for leave to testify nor did he apply for leave to cross-examine Mr Dukoana. Later, Mr Dukoana delivered an affidavit to the Commission in which he responded to what Mr Sharma had said in his affidavit. Whereas Mr Dukoana gave oral evidence and was questioned by the evidence leader

of the Commission and by myself as Chairperson of the Commission, Mr Sharma did not avail himself for such questioning. He could have availed himself if he had applied for leave to give oral evidence.

425. Mr Sharma's version was that:

425.1. During 2010 a tender was issued for a spatial development Framework for Matjhabeng. He annexed a copy of the tender notice as annexure "IS1" to his affidavit. That tender notice was issued by the Matjhabeng Municipality. The first paragraph of that tender notice read:

> "The Matjhabeng Municipality hereby invites tenders from interested parties (suitably qualified service providers) to submit proposals for professional services to prepare a Spatial Development Framework plan for Matjhabeng", the project duration was given as 18 months."

425.2. It appeared that there were no suitable responses to the tender and ultimately it did not come to fruition.

425.3. he then knew that there "was need as per the tender specification";

425.4. In January 2011 he reached out to Mr Tshepiso Magashule and asked him to facilitate a meeting between him and the MEC for Economic Development, Tourism and Environmental Affairs and Mr Magashule junior undertook to assist.

425.5. In February 2011 he, Mr Tshepiso Magashule and Mr John Thomas of P3I International met with Mr Dukoana to discuss the ideas that they had and the way forward in relation to a new concept or for the lapsed tender.

425.6. At the meeting Mr Dukoana advised them on the process concerning an unsolicited bid (by virtue of the tender having lapsed and that would require the approval of the Provincial Executive Council).

425.7. At the end of the meeting Mr Dukoana instructed him and Mr Thomas to reduce whatever was discussed at the meeting in writing and send him a draft letter "containing these issues so that he could peruse it, amend it to his satisfaction and finalise a formal letter".

425.8. From time to time and when he and Mr Thomas made presentations to Mr Dukoana, Mr Dukoana requested that all items be reduced to writing and sent to him in the form of a draft letter; in this way the risk for a misunderstanding would be minimised;

425.9. They went along with Mr Dukoana's requirements following each meeting or discussion on the understanding that, as the MEC, he would follow the necessary internal protocols, given the importance of his decisions and the fact that he had an entire team to assist him

425.10. Mr Sharma drafted a letter dated 21 February 2011 annexed as "DM8" to Mr Dukoana's affidavit concerning what had been discussed at the meeting with Mr Dukoana and sent it to Mr Tshepiso Magashule under cover of an email dated 24 February 2011 which was annexed as "DM7" to Mr Dukoana's affidavit. The draft letter of 21 February 2011 was addressed to Mr John Thomas of P3 Africa (Pty) Ltd and it was to be from and signed by Mr Dukoana. The letter read:

"Dear Mr. Thomas,

Thank you for meeting with us to discuss our vision for the City for Tomorrow project. The purpose of this correspondence is to confirm our discussion and general agreements and to chart a path moving forward.

As you know, we shall endeavour to design and construct a new, high tech city complete with all of the public and private improvements one would expect from a modern, cutting-edge city. This would include schools, parks, hospitals, universities, theatres, libraries, hotels, convention facilities, recreational facilities, and all necessary streets and infrastructure. The public portions of the project will be funded by the Provincial Government of the Free State, South Africa, while the private improvements will be funded through private investment. As we had discussed, crucial to the development of this project will be a suitable Master Plan that gives form and substance to our vision.

P3 Africa has agreed to prepare the Master Plan for the project at its expense. The Master Plan will be completed and delivered to the government of Free State within twelve weeks. P3 will also attach a complete end to end proposal to develop and manage the entire project together with a funding solution. If the master plan is properly delivered and found to be acceptable, we would then engage with P3 to discuss a possible engagement on the implementation of the project.

Thank you for visiting our Province and for your participation in this exciting project.

Kind Regards,

MEC Economic Development, Free State"

425.11. Annexure "DM8" was a road map which was later presented to the Provincial Council on June 2011 as an unsolicited bid. This presentation is the one attached to Mr Dukoana's affidavit as annexure "DM3".

425.12. The presentation which was done at the expense of P3 as annexure "DM8" (to Mr Dukoana's affidavit) was entirely different to the Master Plan and the Government Centre's Schematic Design which would cost R140 000 000.

425.13. Mr Sharma attached to his affidavit as "IS2" what he called a signed version of annexure "DM8".[336]

[336] Annexure IS2 is at Exhibit X4, p 16. Annexure DM8 is at Exhibit X, p 104.

425.14. After some discussion Mr Dukoana told Mr Sharma and Mr Thomas that he liked their idea and was willing to proceed with the intended project which came to be known as the "City for Tomorrow Project".

425.15. On 9 May 2011 Mr John Thomas sent Mr Dukoana a letter bearing that date on behalf of P3 International, the subject of which was "Proposal for Development Services for the New City in the Province of Free State."[337]

425.16. During June 2011 Mr Dukoana sent P3 and Nulane care of Mr Thomas and Mr Sharma a letter titled: "the City for Tomorrow - the Master Plan and Schematic Design". Mr Sharma attached that letter to his affidavit marked "IS4". Mr Sharma pointed out that a draft of "IS4" was attached to Mr Dukoana's affidavit as "DM9". [338] That letter purported to give Nulane Management Services and P3 "a conditional approval to take all the necessary and customary steps to prepare a Master Plan for the City of Tomorrow Project, a new city to be designed in the province of Free State as well as prepare a Schematic Design for the new Government Centre to be located in the project. In that letter the author undertakes to pay Nulane Management Services and P3 Africa R140 million for the preparation of the Master Plan and the Government Centre's Schematic Design. Note must be taken of the signature in "IS4" which purports to be that of Mr Dukoana. Mr Sharma pointed out that the draft of "IS4" was annexure "DM9" to Mr Dukoana's affidavit. He said it had been prepared following a meeting with Mr Dukoana. Mr Sharma pointed out in his affidavit that a draft of "IS4" was annexure "DM9" to Mr Dukoana's affidavit. He said that that draft had also been prepared following a meeting with Mr Dukoana. He pointed out that, when comparing "DM9" and "IS4", it would be

[337] Exhibit X4, p 17.
[338] The signed version of this letter is at p 18-19 of Exhibit X4. The unsigned version is at p 105-106 of Exhibit X.

noticed that Mr Dukoana had amended the second last paragraph of "IS4" by adding the following:

> "Please note the payment of the amount of one hundred and forty million Rand (ZAR 140 000 000) will be subject to the approval of the proposal by the Free State Provincial Executive Committee and the signing of agreement between the parties."

425.17. Mr Sharma stated that on 22 June 2011 the presentation marked as annexure DM3 to Mr Dukoana's affidavit was presented to the Executive Council.

425.18. Mr Sharma stated that on 6 July 2011 he had emailed a draft Master Plan Agreement to Mr Dukoana at his request, for consideration and process by the Free State Province. Mr Sharma attached that agreement to his affidavit and marked it as annexure "IS5". Special notice should be taken of the signatures in the Master Plan Agreement which purport to be those of Mr Dukoana. "IS5" purports to be an agreement concluded between the Provincial Government of the Free State, on the one hand, and, the "Consortium" made up of P3 International, LLC and Nulane Investments 204 (Proprietary) Limited t/a Nulane Management Services, on the other. It purports to have been signed by Mr Dukoana on behalf of the Free State Provincial Government, on the one hand, and by Mr John Thomas and Mr Iqbal Sharma for the Consortium represented by P3 International and Nulane Management Services, on the other. No witnesses were reflected as having witnessed the signing of the agreement by all these three signatories.

425.19. In terms of the Master Plan Agreement the Free State Provincial Government purported to appoint the Consortium "to undertake the Project in accordance with the terms and conditions of" the Master Plan Agreement. The appointment was for a period of six months. There was no definition of the term "Project" in

the Master Plan Agreement. Nevertheless, what the term 'Project' referred to appeared from clause 2 of the Master Plan Agreement. Clauses 2.1 to 2.3 read:

> "2.1. Free State desires the commissioning and preparation of the Master Plan and the Schematic Design.
>
> 2.2. The Consortium has the necessary skills and expertise to undertake the Project.
>
> 2.3. The parties wish to record their agreement in writing in relation to the appointment by Free State of the Consortium to undertake and deliver the Project."

426. This means that that the amount of R140m was for the "commissioning and preparation of the Master Plan and Schematic Design".

426.1. In terms of clause 6.1 the Free State Provincial Government undertook to pay the Consortium a fixed amount of R140 million in consideration for the Consortium "undertaking and delivering the Project".

426.2. Clause 1.2.14 of the Master Plan Agreement provided for the giving of a notice to proceed by the Free State Provincial Government to the Consortium which would then enable the Consortium to commence work. Mr Sharma said that annexure "DM12" to Mr Dukoana's affidavit was a draft notice to proceed that he had drafted for Mr Dukoana. Mr Sharma said that the signed version of that notice to proceed was attached to his affidavit marked "IS6". Mr Sharma said in his affidavit that the notice to proceed marked "IS6" 'was signed by [Mr] Dukoana on 3 November 2011.[339]

426.3. Mr Sharma said that a workshop was planned for 15 and 16 November 2011 and requested a list of participants for the workshop of 15 and 16 November 2011 which he said was an express requirement in the terms of Annexure "A"

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[339] Exhibit X4, p 39.

to the Master Plan Agreement; Mr Sharma said that the workshop did take place on 15 and 16 November 2011.

426.4. The Free State Provincial Government was obliged in terms of the Master Plan Agreement to make payment to the Consortium within seven days of the notice to proceed and within seven days of delivery of each monthly milestone in accordance with Annexure "A" to the agreement. Mr Sharma said in his affidavit that the Provincial Government did not make the first payment which he said was a breach of the agreement. He said that the first milestone that the Consortium was required to deliver was a workshop and, since the workshop was held on 15 and 16 November 2011, the Consortium delivered and the Free State Government was required to make another tranche payment within seven days thereafter. He said that the Free State Provincial Government failed to make that payment which was a breach of the Master Plan Agreement.

426.5. Mr Sharma said that, when a follow up was made with the Head of Department in the light of the Free State Provincial Government having twice failed to make payments, the Head of Department said that he was not aware of the Master Plan Agreement. Mr Sharma said that, as a result of this, he wrote a letter dated 21 November 2011 to the Head of Department in which he said that he set out the chronology of events. Mr Sharma attached a copy of that letter as "IS7" to his affidavit. That letter read:

> "Dear Sir,
>
> Re: City of Tomorrow Project, Free State Province
>
> Please find below a brief chronology of events relating to the aforementioned project:
>
> 1. The engagement between P3/Nulane and the Free State Province is in the context of the tender shown on the next page.

2. The tender had an expired by end 2010 and no one was awarded the tender.
3. In early February 2011, having read the tender, it was evident to P3/ Nulane that the vision of the province is to create a new Government Centre with all the requisite services would not be achieved by the process outlined in the tender. P3/Nulane prepared an un- solicited proposal wherein we would undertake a turnkey project to plan, design, build and finance the new city.
4. It was determined that the project would be broken into two phases:
   a. Master Plan the new city
   b. Go out on tender for the build and finance component
5. A proposal in this regard was submitted on May 9, 2011 and subsequently we were invited to make a presentation to the Provincial EXCO on June 22, 2011.
6. A Master Plan Contract was executed on October 5, 2011 to deliver a comprehensive Master Plan for the city project with clear deliverables.
7. On November 3, 2011 A Notice to Proceed (in terms of the Contract) was received.
8. The first Master Plan workshop was conducted [on] November 16/17, 2011.

I trust this and the supporting documentation is useful. If you have any further queries, please do not hesitate to contact me at Iqbal.sharma@issar.co.za or 082-410 3001.

Kind regards,

Iqbal Meer Sharma

CEO "

426.6. What is most striking about Mr Sharma's chronology of events in his letter to the Head of Department is that he did not anywhere mention the name of anybody with whom he may have been interacting or corresponding or having meetings. If the Head of Department said in November 2011 that he knew nothing about an agreement that had already been signed on behalf of his department, the most obvious thing to do for Mr Sharma would be to tell the Head of Department who it was that he had been dealing with and who had signed the agreement. On Mr Sharma's version he and Mr Thomas had had a number of meetings with Mr Dukoana and Mr Dukoana had written them quite

a few letters and had even signed the Master Plan Agreement. Therefore, the question that arises is: why did Mr Sharma not tell the Head of Department that he had been dealing with his boss who had even signed the Master Plan Agreement? It was the most natural and obvious thing that Mr Sharma should have done so that the Head of Department could have gone to that person and find out what was happening. Mr Sharma did not do so.

426.7. Mr Sharma said that on 13 December 2011 he wrote a letter to both Mr Dukoana and Mr Osman, the Head of Department, calling upon them to rectify their breach of the Master Plan Agreement within 30 days. He said that he did not receive a response to that letter from either Mr Dukoana or Mr Osman.

426.8. Mr Sharma said that on 2 January 2012 he wrote another letter to the Head of Department, Mr Osman, and copied Mr Dukoana; Mr Sharma said that in that letter he pointed out that Mr Osman's failure to rectify the breach would force them to institute legal proceedings; he invited Mr Osman to meet with him to try and resolve the matter; he told Mr Osman that, if the matter was not resolved, he would institute legal proceedings against the MEC (i.e. Mr Dukoana) and the Department and would involve the Public Protector as well; he indicated in the letter that on 15 December 2011 he had received a call from the Director-General in the Office of the Premier who had told him that communication from the Office of the Head of Department would be forthcoming; however, he said that up to that point there had been no communication from the office of the Head of Department forthcoming.

426.9. Mr Sharma wrote that ultimately, the Master Plan Agreement was not "adhered" to and the City for Tomorrow Project did not proceed;

426.10. Mr Sharma said that legal action was not taken against the Provincial Government of the Free State because Mr Dukoana had since ceased to be MEC and litigation against the State would have been a timely and costly affair. This explanation is most unconvincing as to why legal action was not taken; the fact that Mr Dukoana was no longer MEC was irrelevant if he did sign the agreement, as Mr Sharma said he did. He was MEC when he signed; also the explanation that litigation against the State would have been costly is unconvincing because millions and millions of Rands were involved in the matter.

427. Mr Dukoana furnished the Commission with an affidavit in which he responded to Mr Sharma's affidavit. It will be recalled that Mr Sharma admitted that he had drafted certain letters which were forwarded to Mr Dukoana to put on his letterhead and sign. Mr Sharma said that this was done at the instance and request of Mr Dukoana. Mr Dukoana denied this both in his affidavit as well as in his oral evidence. He said that he never made such requests and his office had enough capacity to draft those letters for him. He went on to say that personally he also had the requisite skills to draft those letters.

428. Mr Dukoana also pointed out that Mr Sharma was a former senior employee of a state owned company and his knowledge of the Public Finance Management Act exceeded his own. Mr Dukoana said Mr Sharma would also have known that an MEC would not be signing agreements but that the Accounting officer would be the right person to sign agreements or contracts on behalf of a Government Department. Mr Dukoana said in his affidavit that the reason why Mr Sharma found it "apposite to deal with" him and not the Head of Department was that "he was under the instructions of [Mr] Magashule in furtherance of advancing the commercial interests of the Guptas". Mr Dukoana added

"There is no other cogent reasons justifying Sharma's persistent conduct towards me as the MEC at the time."

429. Mr Dukoana also questioned why it was necessary for Mr Sharma to ask Mr Tshepiso Magashule to facilitate a meeting with him. He said that arrangements could have been made directly with his office for a meeting. Mr Dukoana also denied ever advising Mr Sharma to approach the Executive Council if they wished to make a presentation.

430. Mr Dukoana testified that he had not signed any of the documents that Mr Sharma attached to his affidavit which he said Mr Dukoana had signed. Mr Dukoana said that all those signatures that purported to be his had been forged. This included the signatures purporting to be his in the Master Plan Agreement and on letters and the notice to proceed. He drew special attention to pages 17 and 18 of the Master Plan Agreement marked "IS 5" and attached to Mr Sharma's affidavit.[340] Mr Dukoana said:

> "A careful glance at pages 17 and 18 of the Master Plan Agreement marked "IS 5" underscores my submission that my purported signatures were brazenly forged. Ex facie my two purported signatures are not identified by any measure and yet the document was signed on the same day, 5 October 2011, in Bloemfontein, apparently in the presence of Sharma and Mr Thomas for P3I."

431. Mr Dukoana also said:

> "On the same pages, I purportedly signed as both the Head of the Department (the HOD) and MEC."

432. He went on:

> "Sharma's knowledge of the legislative framework with regards to public finance ought to have impelled him to remember that as MEC, it would have been unlawful of me to have signed any agreement with Nulane and P3."

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[340] Exhibit X 4, p 36-37. The Master Plan Agreement begins at page 20 of the Exhibit.

433. Mr Dukoana said he wished that Mr Sharma could apply for leave to cross-examine him so that in turn his lawyer could cross-examine him and see how Mr Sharma could explain "the glaring dissimilarities in my purported signatures and his sudden lack of knowledge of the legislative framework as it pertains to public finance and procurement."

434. It will have been clear from what has been said above that there is a sharp dispute between Mr Dukoana and Mr Sharma about the signatures which purport to be Mr Dukoana's in the Master Plan Agreement and the signatures which purport to be Mr Dukoana's in certain letters that Mr Sharma says he had drafted at Mr Dukoana's instance and sent to Mr Dukoana who then signed them and sent them to him with his signature. Mr Sharma says that those are Mr Dukoana's signatures and Mr Dukoana says they are not his and were forged. Mr Dukoana is in effect saying that someone who should be known to Mr Sharma – if it is not Mr Sharma himself – forged his signatures on the Master Plan Agreement and on the specified letters. Mr Sharma says that Mr Dukoana signed the Master Plan Agreement and the specified letters.

435. If Mr Dukoana's version is true and he never asked Mr Sharma to draft letters for him and did not sign the Master Plan Agreement and the specified letters, then either Mr Sharma or someone known to Mr Sharma forged Mr Dukoana's signatures in the Master Plan Agreement and in the specified letters. Whatever the true version, it is a serious matter. Both parties deposed to affidavits on this. Mr Dukoana availed himself for questioning on his version. Mr Sharma did not do the same. Nevertheless, it would be quite strange for anyone to do what Mr Sharma did if Mr Dukoana's version is true, namely, forging the MEC's signature on an agreement. How would he have hoped to enforce the agreement without the Head of Department checking with the MEC whether he had signed the agreement at some stage, of course, the MEC would dispute the alleged signature if the Department did not perform as required by the agreement.

Maybe that is why Mr Sharma and his associates did not go to court when the department did not pay.

436. It is to be noted that there is later correspondence from Mr Sharma to the HOD which revealed that he had been dealing with Mr Dukoana and even says that Mr Dukoana signed the Master Plan Agreement. However, one also asks the question: why would Mr Dukoana have signed an agreement as MEC instead of allowing the HOD to sign the agreement? Furthermore, why would Mr Dukoana have signed the Master Plan Agreement as both MEC and Head of Department when he was not Head of Department?

437. The Commission requested two forensic document examiners – handwriting experts – to examine the disputed signatures. They both gave opinions that the probabilities were that the disputed signatures were Mr Dukoana's but, since these opinions were obtained at a time when the Commission could not hear oral evidence, it seems that this is a matter which the law enforcement agencies can investigate further. It is therefore recommended that the law enforcement agencies should investigate the matter of the disputed signatures further so that, if appropriate, criminal charges may be considered against anyone who may have committed a criminal offence in that regard or who may have lied under oath.

438. Mr Dukoana made certain admissions about his role in Mr Magashule's political life in Free State. He admitted that:

(a) he was one of the people who served in the provincial leadership of the ANC in the Free State who protected, defended and promoted [M]r Magashule to be the long-serving chairperson of the ANC in the Free State;

(b) he was one of those in the leadership of the ANC in Free State who had "actively campaigned for [Mr] Magashule to become Premier when he was overlooked by former Presidents Nelson Mandela and Thabo Mbeki;

(c) he "defended and supported [Mr] Magashule when he was fired for corruption by Mr Mosioua "Terror" Lekota when he was Premier";

(d) he supported Mr Magashule when the ANC Provincial Executive Committee was disbanded under President Mandela's leadership;

(e) due to the immense political support that they gave Mr Magashule, Mr Magashule developed a personality cult and used the ANC "as his shield to hide behind corruption."

439. Mr Dukoana said that, with the benefit of hindsight, he could see that there was wisdom in President Mandela and President Mbeki overlooking Mr Magashule as Premier of the Free State over the years.

440. Mr Dukoana also gave evidence about the Free State Asbestos Project and the Free State R1 Billion Housing Project and he urged the Commission to investigate these projects. The Commission has done so. It is not necessary to detail his evidence separately on these projects. However, it can be accepted that much of what he said is consistent with the evidence uncovered by the Commission. These two projects were debacles. The Free State Asbestos project debacle will be discussed first and, thereafter, will follow a discussion of the Free State R1 Billion Housing debacle.

THE FREE STATE ASBESTOS PROJECT DEBACLE

INTRODUCTION

441. This part of the Report relates to a project that was undertaken by the Free State Department of Human Settlements in 2014/2015. The purpose of the project was the identification of all the houses provided by the Provincial Government of the Free State which had roofs that had asbestos and the removal of asbestos from the roofs of those houses. In other words was a project for the eradication of asbestos from the roofs of houses. The houses were mostly those that belonged to or were occupied by poor people. The rationale for the project was that the presence of asbestos in the roofs of the houses was a serious health hazard. It was identified that most of the people who were affected would not have been able to pay for the removal of asbestos from the roofs of their houses.

442. The Provincial Department of Human Settlements set aside R255 million for this project after it had received and approved an unsolicited proposal for this project from a Joint Venture called Blackhead Consulting/Diamond Hill Joint Venture. The Department gave the job to Blackhead Consulting/Diamond Hill Joint Venture. This was done without following any competitive process. The Department paid about R255 million to the Joint Venture but ultimately no asbestos was removed from the roofs of houses. It turned out that this Joint Venture was not even qualified to undertake the removal of asbestos despite the fact that they had told the Department in their proposal and in the Service Legal Agreement that they signed with the Provincial Department that they had the qualifications, skill, expertise and experience required for the job. This was not a Free State Asbestos Project. It was a Free State Asbestos Project Debacle. Here is how this debacle unfolded.

443. The Free State Asbestos Project was not referred to in the Public Protector's Report: State of Capture. Nevertheless, it falls within the terms of reference of the Commission as it relates to allegations of corruption, fraud and the unlawful awarding of government contracts.

444. The Commission heard evidence and considered documentation pertaining to the Free State Asbestos Project which purported to audit the presence of asbestos in houses and that failed to provide any benefit to any resident of that province other than two businessmen and certain high–ranking Government officials.

445. The conceptualisation and implementation of this project are such as to suggest that this project was a considerable scam from its inception. There is every indication that from the very beginning this Asbestos Audit Project was always intended to unlawfully benefit a certain business consortium and that those financial benefits were extended to at least the Head of the Department of Human Settlements, Free State, and the Director-General of the Department of Human Settlements. That is the Director-General of the National Department of Human Settlements.

OVERVIEW OF THE FREE STATE ASBESTOS CONTRACT, BUDGET AND WORK

446. The following facts are either common cause or not in dispute and provide an outline of the conclusion of a contract entered into during 2014 between the Free State Department of Human Settlements and a Joint Venture known as Blackhead Consulting (Pty) Ltd (Blackhead) and Diamond Hill Trading 71 (Pty) Ltd (Diamond Hill) Joint Venture. The Joint Venture will be referred to as the Blackhead/Diamond Hill Joint Venture.

447. Out of the blue, an unsolicited commercial proposal dated 28 May 2014, emanating from the Blackhead/Diamond Hill Joint Venture,[341] was received at the offices of the Free State Department of Human Settlements.

448. The proposal was headed "Audit, Handling of Hazardous Material, Removal and Disposal of Asbestos-Roofed Houses". The Proposal from the Blackhead/Diamond Hill Joint Venture attached a "scope of work" which included "physical door to door counting, safe removal and disposal of Asbestos-Contaminated Building Rubble and asbestos sheets from various townships across the Free State Province".

449. Mr Nthimotse Timothy "Tim" Mokhesi, Head of the Free State Department of Human Settlements (HOD), wrote to Mr Thabane Zulu, the Director-General of the National Department of Human Settlements,[342] Ms Margaret-Anne Diedericks, the Acting Head of the Gauteng Department of Human Settlements[343] and the Free State Provincial Treasury[344] to obtain approval and authorisation in terms of Treasury Regulation 16A.6 for Blackhead to participate in what had now become known as the "Asbestos Audit and Eradication Project" in the Free State. The letter read:

> "[t]he Free State department of Human Settlements hereby request your Department to exten[d] the services of Blackhead Consulting (Pty) Ltd in line with Treasury Regulation no 16A.6 of March 2005. It is therefore in this regard that approval is hereby sought that you provide written confirmation to extend same in line with your approved terms and conditions as contained in your instruction to perform."

450. The Treasury Regulation 16A6 reads:

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[341] The terms of the Joint Venture Agreement as recorded in Exhibit TT8 page 79 signed on 10 August 2014.
[342] Exhibit TT5.2, p 65.
[343] Exhibit TT14.2, p 161.
[344] Exhibit TT18, p 184.

"16A6.1 Procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.

16A6.2 A supply chain management system must, in the case of procurement through a bidding process, provide for –

(a) the adjudication of bids through a bid adjudication committee;

(b) the establishment, composition and functioning of bid specification, evaluation and adjudication committees;

(c) the selection of bid adjudication committee members;

(d) bidding procedures; and

(e) the approval of bid evaluation and/or adjudication committee recommendations."

451. Financial implications and budget reallocations were dealt with in further correspondence between Mr Mokhesi and Mr Zulu.

452. Ultimately, on 1 October 2014 Mr Mokhesi wrote to Mr Pheane "Edwin" Sodi, Director and Chief Executive Officer of Blackhead, appointing "Blackhead Consulting (Pty) Ltd Joint Venture" to perform "the audit and assessment of asbestos, handling of hazardous material, removal and disposal of asbestos-contaminated rubble and replacement with SABS approved materials in the Free State Province".[345]

453. A Service Level Agreement was entered between the Free State Department of Human Settlements and the Blackhead/Diamond Hill Joint Venture. It described the "Asbestos Eradication Project" as an appointment to "assess/audit houses roofed using asbestos material, handling and disposal of asbestos sheets to an approved, designated disposal site".

[345] Exhibit TT18, p 188.

454. The Instruction to Perform Work[346] was signed by Mr Mokhesi on behalf of the Free State Department of Human Settlements on 2 December 2014. It was divided into Phase 1 and Phase 2 and specified the price to be R850 (eight hundred and fifty rand) (excluding VAT) per housing unit for the Blackhead/Diamond Hill Joint Venture to "Audit, Assess and GPS all pre-1994 government housing units in the Province". The work was to be done from 1 December 2014 to 31 March 2015.

455. Payment totalling R255 million was to be made in four tranches:

455.1. 40% of 50% of the total project cost (R51 million excluding VAT) was payable on commencement (1 December 2014) subject to submission of a valid tax invoice and valid tax clearance certificate;

455.2. 60% of the 50% of the total project cost (R76.5 million excluding VAT) was payable "as progress certificate no 2 on or before 1 March 2015";

455.3. 40% of 50% of the total project cost (R51 million excluding VAT) payable as progress certificate No 3 on or before 1 May 2015; and

455.4. 60% of 50% of the total project cost (R76.5 million excluding VAT) payable as progress certificate no 4 subject to submission of the final project report on or before 1 June 2015.

456. It appears to be common cause that the role of Diamond Hill was to "unlock opportunity"[347] through networking with politicians and state officials in the Free State to procure business opportunities and contract; that the role of Blackhead was to act as a "middleman" and that the work itself was outsourced by the Blackhead/Diamond Hill

[346] Exhibit TT8, p 103.
[347] Exhibit TT 8.1, p 8, para 17. See also Transcript 7 August 2020, p 186.

Joint Venture to one or more subcontractors: Mastertrade 232 (Pty) Ltd (Mastertrade), the Ori Group (Pty) Ltd and Zenawe Consulting (Pty) Ltd.

457. There is a dispute, currently the subject of civil litigation,[348] between Mastertrade and the Ori Group (Pty) Ltd. This apparently concerns their differing understanding of their respective status as either subcontractors or consultants, the quantum of fees and the work done.

458. However, it does appear to be common cause that that aerial images were used to identify houses in the Free State which possibly had asbestos roofs, fieldworkers were trained to carry out physical inspections of houses from the outside only recording their observations on tablets, Global Positioning System (GPS coordinates were marked of such houses, the information was then analysed by project managers and reports were prepared for the Free State Department of Human Settlements. The evidence of Mr Abel Manyike, Director of the Ori Group (Pty) Ltd, Mr Joseph Radebe of Mastertrade and Mr Sibusiso Martin Zwane of Zenawe will be discussed later herein.

459. Some four reports were submitted to the Free State Department of Human Settlements – a preliminary report dated 4 December 2014, a Final Audit Report dated 2 February 2015 (with a later version of the same Final Audit Report dated 13 February 2015), the Report of Houses to be Prioritised dated 25 February 2015 and a Remedial Report dated 2 September 2016 and a presentation was made to the Free State Department of Human Settlements giving an overview of the Asbestos Eradication Project.

460. The Final Audit Report submitted by the Blackhead/Diamond Hill Joint Venture to the Free State Department of Human Settlements on 2 February 2015 purports to have

[348] Ori Group (Pty) Ltd v Mastertrade 232 (Pty) Ltd, Gauteng Division, Pretoria, Case No 69173/18.

been prepared by Mr Ignatius "Igo" Mpambani of the Blackhead/Diamond Hill Joint Venture. Page two of the Report states that the Blackhead/Diamond Hill Joint Venture was appointed to "assess and quantify the entire stock of low density residential housing roofed with asbestos in the Free State Province with the ultimate aim of eradicating these roofs" and that their assessment would enable the Department to formulate a plan to replace the affected roofs". The report claims to have "walked" 617 093 stands in 5 district municipalities of which more than 302 000 stands were captured electronically of which 36 344 units were found to contain asbestos[349]. The report further quotes the further costs for the removal of asbestos roofs, demolition and reconstruction of houses and renovation of houses in the region of R3.8 billion (three billion and eight hundred million Rand) excluding VAT.

461. Inspections were meant to have been conducted and approvals were meant to have been obtained. A representative of the Project Management Unit should have conducted spot checks but, in the case of this Asbestos Eradication Project, these inspections were done visually and there was no testing of or on the asbestos itself. The Chief Engineer for the Project Management Unit, Mr Thabiso Makepe, would have confirmed whether or not the work had been done. Mr Makepe himself confirmed that the Finance Unit would not pay an invoice if there had been no verification of such work by the Project Management Unit. Mr John Matlakala (Mr Matlakala), Head of Procurement for the Free State Department of Human Settlements, stated that the Chief Financial Officer (CFO), Ms Nnyane Leuna (Ms Leuna), was the person who approved the invoices submitted by the Blackhead/Diamond Hill Joint Venture.

462. The Service Level Agreement was to the effect that the sum of R850 (eight hundred and fifty Rand) was to be paid for each unit; the sum claimed was R255 million (two hundred and fifty-five million Rand); the sum actually paid by the Free State Department

[349] Exhibit TT14.2, p 316, para 6.1.

of Human Settlements to the Blackhead/Diamond Hill Joint Venture was R230 million (two hundred and thirty million Rand).

463. Invoices were submitted and paid as follows:

463.1. Invoice #001 – dated 2 December 2014 – R51 million. Paid – R20 million on 22 December 2014 and R31 million on 15 January 2015;

463.2. Invoice #003 - dated 10 February 2015 - R76.5 million. Paid – R25 million on 26 March 2015, R15 Million on 4 June 2015 and R36.5 million on 11 August 2015;

463.3. Invoice #005 – dated 10 November 2015 - R15 million. Paid on 28 April 2016; and

463.4. Invoice #007 for R45 million dated 10 October 2015 and invoice #008 for R32.5 million dated 10 November 2015 appear to have been paid by way of R10 million on 28 January 2016 and R77.5 million on 4 August 2016;

464. This appears to mean that there was an overpayment of R10 million because the two invoices – one for R45 million and the other for R32,5 million – amount to R77,5 million but the payments of R10 million and R77,5 million amount to R87,5 million.

465. The Free State Department of Human Settlements paid the total sum of R230 million (two hundred and thirty million Rand) into a First National Bank (FNB) bank account in the name of Blackhead/Diamond Hill Joint Venture. From this Joint Venture bank account funds were transferred to:

465.1. Blackhead's ABSA bank account in the total amount of R70 863 000,00 (seventy million, eight hundred and sixty-three thousand Rand);

465.2. A FNB bank account in the name of 605 Consulting Solutions (Pty) Ltd (605 Consulting), an entity owned by Mr Mpambani, in the total amount of R112 955 500,00 (one hundred and twelve million, nine hundred and fifty-five thousand, five hundred Rands); and

465.3. Mastertrade's FNB bank account (one of the subcontractors) in the total amount of R36 483 597,90 (thirty-six million, four hundred and eight three thousand, five hundred and ninety-seven Rand and ninety cents).

The Auditor-General

466. Relevant to an understanding of that which follows in this section of the Report is knowledge that the Auditor-General prepared a report on the Free State Department of Human Settlements which was released on 1 July 2015.[350] Firstly, the Auditor-General noted that he was unable to obtain sufficient appropriate audit evidence for commitments disclosed in note 20 to the financial statements as the Department did not maintain accurate and complete records of the contractual information used to determine commitments. He went on to say: "I could not confirm the amounts by alternative means. Consequently, I was unable to determine whether any adjustment to commitments stated at R2 032 824 000 (two billion, thirty-two million, eight hundred and twenty-four thousand Rand) in the financial statements were necessary". The Auditor-General continued and said that "the department incurred irregular expenditure of R80 965 000 (2014: R858 934 000) during the year under review as the department did not design and implement a policy relating to housing contracts that will address the constitutional requirement of fair, equitable and transparent procurement processes."

[350] Exhibit TT14.2, p 370.

467. The Auditor-General found that he could not obtain "sufficient appropriate audit evidence that all contracts were awarded in accordance with the legislative requirements".

The Report Of The Public Protector in terms of Section 182 (1)(B) of the Constitution of the Republic Of South Africa, 1996, and section 8(1) of the Public Protector Act[351]

468. A complaint was lodged with the Free State Office of the Public Protector on 22 October 2015 by Ms L Kleynhans, a Democratic Alliance member of the Free State Provincial Legislature, concerning the contract between the Free State Department of Human Settlements and Blackhead/Diamond Hill Joint Venture.[352] The Public Protector summarised the complaints "In the main, the complaint was that the contract for the eradication of Asbestos roofed houses in the Free State was irregularly awarded to the service provider as it was contrary to Regulation 16A6.6."[353]

469. The Public Protector investigated whether or not the Free State Department of Human Settlements followed proper procurement processes in awarding the contract to the service provider and whether such conduct was improper, unlawful and constituted maladministration; whether the services provided were cost-effective and whether the Department received value for money in the execution of this contract; whether the advance payment made to the service provider was irregular and whether the invoices which the Department made payment on complied with the legislative prescripts.

470. The full Report of the Public Protector was issued on 30 March 2020. The Report dealt with the following issues:

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[351] Exhibit TT14.1, p 1.
[352] The details of the complaints are set out in the Report of the Public Protector.
[353] Exhibit TT14.1, p 3 para (iv) of the Executive Summary.

Whether the Department failed to follow proper procurement processes in awarding the contract to the Service Provider and whether such conduct was improper, unlawful and constituted maladministration

471. The Public Protector found the allegation that there were irregularities and improprieties in the awarding of the contract for the eradication of asbestos roofs in the Free State Province to the service provider, to have been substantiated.[354]

472. The Public Protector also found that the Department participated in an expired contract of the Gauteng Department of Human Settlements (Gauteng Department) and did not conduct a due diligence investigation before participating in this contract. She said that the Department was in possession of the Gauteng Department's Service Level Agreement which had expired. She concluded that this constituted a contravention of the legislative prescripts as interpreted in the *Blue Nightingale* case.[355] She concluded that this conduct amounted to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

473. The Head of Department stated in his response to the notice in terms of section 7(9) of Public Protector Act that, although he held final responsibility in terms of the applicable legislation, he was neither advised by his officials nor the Auditor-General that he could renege on the contract. This is a very strange explanation from somebody occupying the position of the Head of Department. He should have sought legal advice if he was not sure what to do. He was trying to shift the blame to junior officials when he should

[354] Exhibit TT14.1, p 57 at para 6.1.1.
[355] *Blue Nightingale Trading 397 (Pty) Lid t/a Siyenza Group v Amathole District Municipality* 2017 (1) SA 172 at para 43. See Exhibit 14.1, p 5.

have accepted responsibility. His Department continued to pay up to R139 million even after the Auditor- General had declared the procurement irregular.

474. The Department created the impression that they participated in a contract concluded by another state institution (Gauteng Department) while the services were not the same as specified in the Gauteng contract. Also, the price was higher. This was in breach of Treasury Regulation 16A6.6 and amounted to improper conduct.

475. Although the Department created the impression that it participated in a contract in terms of Treasury Regulation 16A6.6, the submission made by the service provider was in fact an unsolicited proposal in terms of Treasury Practice Note No 11 of 2008/2009. The Practice Note required the Department to issue a Request for a Quotation (RFQ) to test the market for the existence of other private entities capable of providing the product or services. The failure to issue an RFQ was a breach of the practice note and paragraph 12.13 of the Department's Supply Chain Management Policy[356]. Furthermore, it was in contravention of Treasury Regulation 16A.9[357] and amounted to abuse of the procurement system. This conduct amounted to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

476. The discrepancies between the services to be provided in the unsolicited proposal, the Service Level Agreement and the letter of appointment created the impression that the appointment was for the assessment, removal of the asbestos material and replacement of asbestos roofs while the Service Level Agreement only referred to assessment and removal. The Instruction to Perform Work was only issued for the assessment. The Service Level Agreement was in contravention of paragraph 12.20 of the Department's SCM policy as it was not an accurate reflection of the terms and

[356] Exhibit TT17, p 132. The document commences at page 104 of Exhibit TT17.
[357] Exhibit TT17, p 60.

conditions reflected in the unsolicited proposal or appointment letter. This conduct amounted to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

477. The Public Protector said that these findings indicated wilful conduct and gross negligence in terms of section 86 of the Public Finance Management Act (PFMA) on the part of the Accounting Officer, Mr Mokhesi, in that he did not comply with section 38 of the Public Finance Management Act. The Public Protector concluded that the HOD failed to execute his fiduciary duties in terms of the PFMA and the SCM Policy of the Department. She stated that this conduct by the HOD amounted to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.[358]

Whether the services provided were cost-effective and the Department received value for money in the execution of this contract

478. The Public Protector found that the allegation that the services provided were not cost effective and the Department did not receive value for money, was substantiated.[359]

479. No evidence was submitted or found that the necessary skills to identify asbestos roofs were available within the Local Municipalities and Department. The R255 million paid to the service provider was not paid for the identification of 36 000 units/houses but for the assessment of 300 000 units at a price of R850 per unit. Eventually 36 344 units were identified as having asbestos roofs. The evidence and documents prove that the project was 100% completed and the reports generated by the Ori Group (company

[358] Exhibit TT14.1, p 57, para 6.1.2.
[359] Exhibit TT14.1, p 59, para 6.2.1.

subcontracted by Mastertrade) at a fee of R21 391 489,30 while the service provider appointed was paid R230 million.

480. The HOD submitted in his response dated 14 February 2020 to the Notice in terms of section 7(9) of the Public Protector Act, that although he held final responsibility in terms of the applicable legislation, he was unaware that the service provider had subcontracted the contract. The Public Protector found that, if the HOD had acted on the Auditor–General's Report, released on 31 July 2015, the further payments of R139 million would have been avoided. She said that the omission by the HOD to act on the report of the Auditor–General released on 31 July 2015, amounted to gross negligence in terms of section 86 of the PFMA on the part of the Accounting Officer in that he did not comply with section 38 of the PFMA. The Public Protector found that he failed to execute his fiduciary duties in terms of the PFMA and the SCM Policy of the Department. This conduct amounted to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.[360]

Was the advance payment made to the Service Provider irregular and did the invoices to the Department comply with legislative precepts

481. The Public Protector found that Treasury Regulations do allow for advance payments on contract amounts if required by the contractual arrangements with the supplier. The contract signed between the service provider and the Department clearly provided for an advance payment of 40% of 50% of the contract price. However, as the contract was irregularly procured, the advance payment was irregular, indeed, as also found by the Auditor–General.

[360] Exhibit TT14.1, p 59-60 paras 6.2.5-6.2.6.

482. The invoices submitted by the service provider to the Department did not comply with the Legislative Prescripts and the payment of these invoices by the Department was irregular. This conduct amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.[361]

Remedial Action of the Public Protector[362]

483. The Public Protector took the following remedial action pursuant to the provisions of section 182(1)(c) of the Constitution:

483.1. The Premier of the Free State was directed to take appropriate steps to ensure that the conduct of the Accounting Officer and the Director: Supply Chain Management was investigated in terms of section 84 of the PFMA and that the conduct was reported in terms of section 86 of the PFMA to the South African Police Service and the Directorate for Priority Crime Investigation (Hawks).

484. The Head of Department was directed:

484.1. to take appropriate steps to ensure that the conduct of the Director: Supply Chain Management was investigated in terms of section 84 of the PFMA;

484.2. take the appropriate steps to ensure that the Department's Supply Chain Management Policy was amended to correctly reflect the legislative prescripts; and

[361] Exhibit TT14.2, p 60-61, paras 6.3.1 and 6.3.2.
[362] Exhibit TT14.1, p 61-62.

484.3. take appropriate steps to ensure that officials are properly trained in the legislative prescripts in respect of Supply Chain Management (SCM).

THE WORK OF THE COMMISSION'S INVESTIGATIONS

485. The Commission caused investigations to be made of the various interactions, transactions and payments prior to and pursuant to this contract between the Free State Department of Human Settlements and the Blackhead/Diamond Hill Joint Venture.

486. This part of the report examines the evidence insofar as it relates to apparent anomalies, irregularities or improprieties and comments thereon with regard to the conclusion of the contract, implementation thereof and payments made pursuant thereto. This part of the report examines the evidence concerning certain apparently untoward payments made to secret beneficiaries.

487. Reliance will be placed in this part of the report on the affidavit and evidence of Mr Jacobus Roets (Mr Roets), the Occupational Hygienist, who qualified himself as an expert for purposes of assisting the Commission in understanding, not only the dangers of asbestos but also, the outcomes of this asbestos audit and assessment by providing a detailed critique in his written affidavit[363] and in giving evidence to the Commission.[364]

Networking for Opportunity

488. Mr Sodi, Chief Executive Officer of Blackhead, stated that he met (the now late) Mr Mpambani of Diamond Hill at a social event in 2010. The Commission was told by Mr Sodi that Mr Mpambani was murdered in 2017. Accordingly, he was not there to give his side of the story.

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[363] Exhibit TT1, p 1-23.
[364] Transcript 4 August 2020.

489. In 2014 Mr Mpambani, who knew that Mr Sodi had been involved in an Asbestos Audit project in the Gauteng province, asked whether Mr Sodi would like him to "pitch"[365] for an asbestos project in the Free State. Both in his first affidavit and throughout his evidence, Mr Sodi said that Mr Mpambani had offered to "unlock the opportunity"[366] in the Free State which Mr Sodi understood to mean that Mr Mpambani was "highly networked"[367] and would be able to "jump certain hurdles … and go to the decision makers"[368] "so that it would lead to our appointment"[369] with the Free State Department of Human Settlements to perform an asbestos exercise.

490. Mr Mpambani reported to Mr Sodi that he had made contact with the relevant officials in the Free State who wanted to implement the programme[370] and had suggested that he "submit a report"[371] with the result that Mr Sodi and Mr Mpambani decided to enter into an agreement to establish a Joint Venture to be known as Blackhead/ Diamond Hill Joint Venture.

491. In terms of the agreement[372] each party would perform their own work and profits would be allocated as to a fifty per centum share between each of them. Mr Sodi said that he knew that Mr Mpambani had never done this type of work before and had no expertise and, accordingly, Mr Sodi "did not anticipate that he was going to bring any meaningful resources to the project".[373] Mr Sodi explained that he understood Mr Mpambani "was instrumental in making sure that we got appointed, that his role was to, you know,

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[365] Transcript 7 August 2020, p 182-183.
[366] Exhibit TT8, p 8, para 17; 7 August 2020, p 185.
[367] Transcript 7 August 2020, p 188.
[368] Transcript 7 August 2020, p 189.
[369] Transcript 7 August 2020, p 185.
[370] Transcript 7 August 2020, p 186.
[371] Transcript 7 August 2020, p 183.
[372] Exhibit TT8, p 79.
[373] Transcript 7 August 2020, p 194.

engage with the relevant officials as he had said, you know, take the proposal and submitting and so forth. That was his role."[374]

492. A proposal was submitted to the Free State Department of Human Settlements. It is common cause that this proposal was received and assented to by the Department of Human Settlements.

493. The response of both Mr Mokhesi and Mr Matlakala to this proposal affirms the value and efficacy of the 'networking' capabilities of Mr Mpambani. Mr Mokhesi states that he had not expected to receive this proposal[375] which he says he referred on to Mr Matlakala for him to determine the appropriate method "that could be utilised to implement the project".[376] Mr Matlakala was also copied in the email from Mr Mpambani addressed to Mr Mokhesi dated 24 July 2014.[377]

494. Mr Mokhesi's attitude suggests that he had foreknowledge of the arrival of the written document and saw no need for any investigation or discussion on the need for or the value of the proposed project. It also suggests that Mr Mokhesi had no concern as to the costs involved, where funds might be found and what other projects would have to be abandoned or discontinued. Thus, merely on receipt of the proposal and without further ado, Mr Mokhesi already had a view that monies should be paid over to the Blackhead/Diamond Hill Joint Venture for the purposes claimed in the proposal and that Mr Mokhesi's only interest was in finding the method for implementation thereof.

495. Mr Matlakala's approach is somewhat similar. He was told by Mr Mokhesi that an email would be arriving and then he received the proposal in his personal Gmail account on 24 July 2014 (as opposed to the official email of the Department). The email from Mr

[374] Transcript 29 September 2020, p 50.
[375] Exhibit TT2.1, p 4, para 9.2.
[376] Exhibit TT2.1, p 55, para 11.2.
[377] Exhibit TT3, p 17.

Mpambani stated that it was sent "for budget adjustment purposes as discussed".[378] That there were some discussions is confirmed by Mr Matlakala when he stated that he met Mr Mpambani "for the first time when he visited me to make a presentation on Asbestos Audit".[379]

496. The wording of the communication indicates that there had not only been personal engagement and discussion on this very topic between Mr Matlakala and Mr Mpambani but that there were indications that a view had already been reached on the proposal, that a decision had been made and that all that remained to be finalised was for budgets that had already been approved to be adjusted to ensure payment would be made.

The Unplanned Project

497. An Occupational Hygienist, Mr Roets, submitted an affidavit (as an expert) and gave evidence to the Commission.[380] His evidence was that there were serious health hazards attendant upon the presence of asbestos in the structures, fittings and furnishing of houses in South Africa.

498. Mr Roets' evidence is common cause evidence from all the witnesses. Concern for these dangers were expressed in some detail in the proposal prepared by the Blackhead/Diamond Hill Joint Venture,[381] advanced by Mr Mokhesi to Mr Zulu, Director-General, National Department of Human Settlements. These were understood and concurred in by the experienced artisans Mr Manyike and Mr Radebe.

499. The Free State Government had not chosen to allocate funds in 2014 (or prior thereto) for the eradication of asbestos from state erected or financed housing in the Free State.

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[378] Exhibit TT3, p 17
[379] Exhibit TT3, p 6, para 9.2.
[380] Exhibit TT1 and 4 August 2020.
[381] Exhibit TT3, p 27.

It would appear that there were other more urgent and more demanding tasks upon which taxpayer funds were to be expended. Accordingly, no projects had been contemplated, discussed, approved, budgeted, organised either to audit and assess the presence of asbestos in the Free State as at 2014 or to remove and dispose of this hazardous substance.

500. It should, therefore, have come as some surprise to officials in the employ of the Free State Department of Human Settlements when a five-page proposal dated 28 May 2014 arrived from a joint venture identified as Blackhead/Diamond Hill, for the "Audit, Handling of Hazardous Material, Removal and Disposal of Asbestos-Roofed Houses".

501. Notwithstanding the absence of any provision for such a project, this proposal received personal, approving and committed attention from the Head of Department of the Free State Department of Human Settlements, Mr Mokhesi. On 19 June 2014 Mr Mokhesi wrote to Blackhead advising that the Free State Department of Human Settlements wished to participate in a process (Treasury Regulation 16A6.6) to extend the participation of Blackhead from another project in Gauteng to the proposed asbestos project in the Free State.[382] One caveat was mentioned – that the appointment of Blackhead was subject to Blackhead securing the necessary funds for this project. Clearly, that letter indicates Mr Mokhesi's intention to implement the proposal within weeks of the creation and delivery of the proposal and without investigations, discussions or negotiations.

502. There has been a half-hearted attempt to justify the apparent enthusiasm for acceptance of this proposal and conclusion of a most expensive contract for an unanticipated and unbudgeted project such as the audit of the existence of asbestos

[382] Exhibit TT8, p 90.

and asbestos removal from roofs of houses. Mr Mokhesi has tried to defend his determination to fund this project on two grounds:

502.1. Firstly, he said that the Matjhabeng Local Municipality had already requested the Free State Department of Human Settlements to do an assessment of houses roofed with asbestos and that this had been done and the asbestos removed[383] which excuse is gainsaid by the inclusion of this same houses in the Matjhabeng Municipality in the contract which Mr Mokhesi ultimately concluded with the Blackhead/Diamond Hill Joint Venture; and

502.2. Secondly, Mr Mokhesi claimed that the Free State Department of Human Settlements had already advertised for qualified asbestos removal contractors to register on the database of the Department. He said that thereafter information from the Blackhead/Diamond Hill Joint Venture audit was made available to them to obtain donor funding.[384] However, this was contradicted by his statement that "the Department will at the right time advertise for [the removal phase] of the project to be undertaken."[385] Furthermore, Mr Matlakala of the Project Management Unit has stated that, before the contract was concluded with the Blackhead/Diamond Hill Joint Venture, no enquiries were conducted with local municipalities to find out whether there were any records of houses containing asbestos.[386] Mr Makepe, Chief Engineer at the Project Management Unit in the Free State Department of Human Settlements, confirmed that he made no inquiries with Free State municipalities as to whether there were any records of houses containing asbestos material,[387]

[383] Exhibit TT2.1, p 7, para 12.4.
[384] Exhibit TT2.1, p 6, para 13.3.6.
[385] Exhibit TT2.1, p12, para 13.5.2.
[386] Exhibit TT3, p 12, para 18.4.
[387] Exhibit TT12, p 21, para 24.1.

explaining that this was not part of the responsibilities or mandate of the Project Management Unit.

503. In short, no attempt was ever made by any officials in the Free State Department of Human Settlements to ascertain whether or not the national and international health concerns surrounding asbestosis were of practical or overwhelming significance in the Free State Province and which needed immediate and costly attention.

504. Mr Sodi testified that Mr Mpambani had told him that the Free State Department of Human Settlements wished "to implement this programme, it was not in their budget for that financial year".[388] Mr Mokhesi was clear that there was no allotted budget for this project but described how the funds would be found from "within the very same budget…projects not performing".[389] This is the reason why it was necessary for him to approach Mr Zulu at the Department of Housing with a motivation for a revised business plan. Mr Zulu confirmed that "there was no provision in the (Free State) budget for the execution of this particular business plan."[390]

505. Mr Sodi identified the lack of funds as one of the obstacles which needed to be overcome.[391] The solution to the immediate lack of funds was to be found in the basis on which the Joint Venture offered to fund the Asbestos Eradication Project in that the proposal stated: "we have pleasure in submitting our request to be appointed on risk basis." The response from Mr Mokhesi in the letter of 19 June indicating a desire to make the appointment was that the appointment of the Joint Venture "will be subject to your company securing funds to roll out the project in line with your proposal."[392]

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[388] Transcript 7 August 2020, p 186.
[389] Transcript 29 September 2020, p 35.
[390] Transcript 11 August 2020, p 73.
[391] Transcript 7 August 2020, p 186.
[392] Exhibit TT8, p 90, para 4.

506. Mr Sodi explained that the Joint Venture had received feedback that it "will be appointed"[393] but that the Department had not made budgetary provision for this project. Mr Sodi explained that they were embarking on the project on a risk basis. He said he was told:

> ". . . if you had gone ahead and rendered services and used your own funds, and the business plan is not approved don't come back and say you are going to sue us, you are doing it on a risk basis, so if you spend money and we don't succeed in getting the business plan approved that is your own baby, it is your own problem and you deal with it." [394]

507. The Joint Venture never did any work or utilised any resources "on risk". It was paid from the outset. The Service Level Agreement[395] provided for a prepayment of some R51 million on signature.

508. Mr Zulu told the Commission that the money for this was to come from the Free State Department of Human Settlements[396] but he gave no indication that he was ever advised which projects or programmes were to be abandoned or have their budgets reduced to accommodate this unexpected new project costing some R255 million. Mr Mokhesi suggested that the monies might have come from other underperforming projects[397] but gave no indication of which projects were underperforming, how selection would be made between projects to be deprived of funds or which projects did eventually have their budgets reduced or were discontinued.

509. Nor is there any indication that any consultation or discussion took place, assessments performed, evaluation conducted of any of the projects or programmes under the aegis of the Free State Department of Human Settlements to ascertain which already

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[393] Transcript 7 August 2020, p 221.
[394] Transcript 7 August 2020, p 211.
[395] Exhibit TT8, p 92.
[396] Exhibit TT5.2, p50, para 2.10.5.
[397] Transcript 21 September 2020, p170.

approved and budgeted programmes were to be displaced or reduced by this novel project which had never previously been discussed or researched. There is also no indication that any comparison was done of this new Asbestos Audit as against already approved programmes. Finally, there is no suggestion that, even if this Asbestos Audit was thought to be of value, consideration was given to the possible postponement of the project which could then take place in another financial year or budget cycle.

510. The haste with which this Asbestos Eradication Project came to fruition is surprising. It appears that little or no consideration was given to whether the project was needed, its timing, its scope and coverage and other matters relevant to the efficient and cost-effective execution of the project. The adequate, lawful and necessary funding of the project was clearly not considered.

511. It was up to the Accounting Officer (i.e. the Head of Department) to process this proposal. Section 1(b) of the PFMA defines "executive authority" in relation to a provincial department as "the member of the Executive Council of a province who is accountable to the provincial legislature for that department" and Section 36(2)(a) of the PFMA provides that the HOD must be the accounting officer for the department. Mr Mokhesi was at all relevant times the Head of Department and the accounting officer for the Free State Department of Human Settlements.

512. Mr Matlakala made it clear that he "did not participate in any way, shape and/or form in recommending the appointment of the JV as such recommendation was not even solicited from me".[398] He did state that he was "responsible for putting all the necessary documents in place for the eventual appointment of the JV."[399]

[398] Exhibit TT3, p 7, para 12.1.
[399] Exhibit TT3, p 7, para 12.1.

No Competitive Bidding Process-Participation in the Gauteng Contract - Reliance on Treasury Regulations 16A6.6

No competitive bidding process

513. The unsolicited proposal emanating from the Blackhead/Diamond Hill Joint Venture had not resulted from an open and competitive bidding process.[400]

514. Nevertheless, on presentation of the proposal there were already indications that it was favourably received and that efforts were being made to ensure its acceptance.[401]

515. It should be noted that an "unsolicited proposal" is defined in National Treasury Practice Note 11 of 2008 (Practice Note) issued in terms of the PFMA as "a proposal/concept received by an institution outside its normal procurement processes that is not an unsolicited bid."[402]

516. If an unsolicited proposal is received, then the relevant institution, in this case the Free State Department of Human Settlements, is required[403] to issue a RFQ to test the market for the existence of other private entities capable of providing the product or service. Only if there is no response to the RFQ may an institution enter into direct contractual negotiations with a proponent outside of a tender process. Should there be a response from the private sector to the RFQ, then the ordinary competitive bidding process must be followed by the institution.

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[400] The implications for "fair, cost etc." will be dealt with in a later section of this Report but the measures taken to circumvent the absence of a competitive public bid are discussed in this section.
[401] TT18, p 169
[402] Such a proposal is distinguished from an "unsolicited bid" which is defined as a product or service that is "innovative", "unique" and "provided by a sole provider". Such bids are regulated by National Treasury Circular "Implementation of Supply Chain Management" dated 27 October 2004.
[403] In terms of the National Treasury Practice Note issues in terms of the PFMA, p 7.

517. In fact, the SCM Policy of the Department prescribes in paragraph 12.3(c) that, if the Department decides to proceed with an unsolicited proposal, the accounting officer must negotiate an unsolicited proposal agreement the sole purpose of which is to guide the process in terms of the National Treasury Practice Note No 11 of 2008/2009.

518. The Department did not issue an RFQ. It made no enquiries to test whether or not "the market", i.e. the private sector, contained other businesses capable of providing either or both of the audit and assessment of asbestos and the removal and disposal of asbestos as proposed in the May proposal of the Joint Venture. That would have meant going public and entering the light of day with a competitive bidding process known to all where service providers, the scope of work, the costs involved would all have been subject to scrutiny and evaluation.

519. Instead, a means was found by the Head of Department, Mr Mokhesi, to conclude a contract for the audit and removal of asbestos without opening the Project up to competitive bidding in a transparent manner.

520. The stratagem through which the contract was concluded was found in the Treasury Regulations of March 2005 for departments, trading entities, public institutions and public entities issued in terms of the PFMA[404]. In the section of these Regulations dealing with Supply Chain Management, Treasury Regulation 16A6.6 is to be found.

521. This contract between the Free State Department of Human Settlements and the Joint Venture of Blackhead/Diamond Hill was arranged through the purported use of Treasury Regulation 16A6.6.

[404] Exhibit TT 17 p 1.

522. In fact, within weeks of receipt of the unsolicited proposal, Mr Mokhesi, advised Blackhead on 19 June 2014,[405] that the Free State Department of Human Settlements wished to "extend" their "current contract secured by the National Department of Human Settlements" in terms of Treasury Regulation 16A6.6[406]. He said that by reason of this extension, it would be permissible for the Free State Department of Human Settlements to appoint Blackhead to perform services for the Department.

Purported Reliance on Treasury Regulation 16A6.6

523. Treasury Regulation 16A6.6 provides:

> "The accounting officer or accounting authority may, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractor".[407]

524. Essentially, this regulation allows one state body to participate in a contract arranged by another state body with similar needs.

525. Mr Mokhesi sought to rely upon an earlier appointment of Blackhead to the Gauteng Panel of Professional Resource Teams in the Gauteng Department of Human Settlements[408] which appointment had been confirmed by the National Department of Human Settlements on 7 April 2014.[409] This contract had been extended by the Acting Head of Department, Gauteng Department of Human Settlements, Ms Diedericks, to 31 August 2014.[410]

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[405] Exhibit TT18, p 169.
[406] Exhibit TT17, p 57.
[407] Exhibit TT17, p 58.
[408] Which appointment is apparently under challenge in litigation.
[409] Exhibit TT18, p 181.
[410] Exhibit TT10, p 15.

526. The correspondence by which Mr Mokhesi sought to both ensure and confirm this extension of the Gauteng contract to the Free State was all initiated subsequent to Mr Mokhesi having advised Mr Sodi on 19 June 2014 that the Free State Department of Human Settlements wished to "extend" the Gauteng contract to the Free State.

527. On 15 July 2014 Mr Mokhesi wrote to Ms Diedericks. He asked for approval, in terms of Treasury Regulation 16A.6, for the Free State Department of Human Settlements to participate in the Gauteng contract to which Blackhead had been appointed.[411] That contract had been for the assessment of the prevalence and existence of asbestos in low cost housing in the Gauteng Province and did not include the removal and disposal of asbestos.

528. In her letter titled "Request to Appoint a Professional Resource Teams", Ms Diedericks confirmed on 4 August 2014 that she had taken a decision on 21 July 2014 to grant "approval for the Free State Department of Human Settlements to participate in the contract arranged by means of a competitive bidding process from the database of the Gauteng Department of Human Settlements for Professional Resource Teams where Blackhead was appointed from."[412]

529. Ms Diedericks thus granted approval for the Free State Department of Human Settlements to participate in the Gauteng contract to which Blackhead was a party. She did, however, alert Mr Mokhesi that the Gauteng Department had a database of service providers that provided Professional Resource Team work and "the data base will lapse at the end of August 2014".

530. The approach by Mr Mokhesi of 19 June 2014 to the Director-General of the National Department of Human Settlements regarding the "Appointment Professional Resource

[411] Exhibit TT10, p 17.
[412] Exhibit TT18, p 176.

Teams to Departmental Panel" and Mr Zulu's response of 13 August 2014 under a similar heading was not the approach and response which purported to or sought to trigger implementation of Treasury Regulation 16A6.6.

Non Compliance with Treasury Regulation 16A6.6

531. This was the process purportedly utilised by the Free State Department of Human Settlements to overcome the behind the scenes negotiations of Mr Mpambani and certain government officials which precluded a competitive bidding process.

532. However, even a cursory examination of the documents shows that the sub regulation was not applicable in this case and could not assist Mr Mokhesi in his endeavours to confirm the appointment of Blackhead/Diamond Hill Joint Venture to a contract as envisaged in their proposal of 18 May 2014.

533. It was suggested to the Commission that one organ of state or department is permitted to participate in the contract of another department or organ of state which has been produced by means of a competitive bidding process. It was said that a new contractual relationship is not formed. It was said that it was no more than expansion of an existing contract, done by way of an addendum, enabling participation of an additional department or organ of state in the existing contract which therefore must presuppose that the same parties, services, price and terms continue.

534. The Panel comprising what were known as Professional Resource Teams which had been appointed in Gauteng included Blackhead,[413] but neither Diamond Hill nor the Joint Venture had been appointed as service providers and neither were included on this Panel of Professional Resource Teams by the National Department. Accordingly, it

[413] Exhibit TT18, p 181 and p 816.

would be lawful to extend the contract of Blackhead from Gauteng to the Free State but there could be no "extension" of any services by Diamond Hill or the Joint Venture to any department in any province in terms of Treasury Regulation 16A6.6.

535. Ms Diedericks stated in her affidavit that Diamond Hill was not on the Gauteng database and, therefore, she would not have been able to give permission because neither Diamond Hill nor the Joint Venture was registered.[414]

536. There had also been a contract in Gauteng for the audit and assessment of asbestos and Blackhead had been one of the appointed service providers[415]. However, that contract only endured until 31 August 2014. Ms Diedericks had so advised Blackhead on 13 May 2014[416] and she had reminded Mr Mokhesi on[417] 4 August 2014.

537. After the end of August 2014 there would no longer be a contract and there was no contract in which the Free State Department of Human Settlements could participate through a recourse to the provisions of Treasury Regulation 16A6.6.

538. Even though Blackhead was a member of the Professional Resource Teams in Gauteng neither Diamond Hill nor the Joint Venture was a party to the erstwhile Gauteng contract and could not, therefore, participate in that contract with the Free State Department of Human Settlements.

539. Ms Diedericks stated that she had never seen the Proposal of 28 May 2014 emanating from the Joint Venture and says that, if this had been "divulged" to her, she would not have issued her letter of 4 August 2014 granting approval for the Free State to

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[414] Exhibit TT10, para 14.
[415] That contract (TT18) was for the "assessment phase" of housing stock roofed with asbestos in Gauteng.
[416] Exhibit TT10, p 15.
[417] Exhibit TT14.2, p 162.

participate in the Gauteng contract.[418] She was very clear that "my decision to use Treasury Regulation 16A6.6 applied to Blackhead and no one else".[419]

540. The subject matter of the Gauteng contract and the proposed Free State contract were not the same. In Gauteng the contract had been occasioned because of a storm which had ripped roofs off houses and thus there was an audit decided upon by then then Premier, Ms Nomvula Mokonyane (Ms Mokonyane)[420] The Gauteng contract was for an audit only. However, in the Free State the proposal emanating from the Joint Venture was titled for "Audit and Assessment, Handling of Hazardous Material (Removal) and Disposal of Asbestos- Contaminated Rubble in the Free State Province" and the objective was identified as "two-fold – Quantify the number of houses roofed with asbestos sheets, and – Remove and dispose asbestos to an approved and accredited disposal site".[421]

541. The price of the Gauteng contract and the proposed Free State contract differed considerably. The Gauteng contract for the audit alone was the sum of R650 (six hundred and fifty Rand) per assessment per house. The price proposed by the Joint Venture was that of R1 350 (one thousand three hundred and fifty Rand) per house for the audit although the figure finally contracted for was R850 (eight hundred and fifty Rand) per house for the audit and R32 760 (thirty two thousand seven hundred and sixty Rand) per house for the handling, removal and disposal of the asbestos.[422]

542. The Gauteng contract was thus completely different to the Free State proposal in both scope of work and cost of project. It was thus not possible for the Free State to 'participate' in the Gauteng project since the terms and conditions of the Gauteng

[418] Exhibit TT10, p 5, para 14.1, 14.4.
[419] Exhibit TT10, p 6, para 16.
[420] Exhibit TT10, p 8, para 22.
[421] Exhibit TT18, p 12.
[422] The proposal commences at TT8, p 83. The rates quoted here are found at p 87.

contract and of the proposed Free State project were not identical and the one could not be subsumed under the other. The only common aspect of the two contracts was the reference to "asbestos".

543. Perusal of the documentation alone indicates that Treasury Regulation 16A6.6 could not be utilised by the Free State Department of Human Settlements to participate in an existing contract in Gauteng. The contract in Gauteng had lapsed and was no longer available for participation by the Free State. The proposed Free State service provider, the Joint Venture, was not and never had been an approved service provider on any database (regional or national). Diamond Hill had never been an approved service provider on any database (regional or national). The agreed upon contract price in Gauteng was R650 per house while the proposal in the Free State was for R1 350 per house plus R32 760 per house. The service to be provided in Gauteng was for only the assessment of asbestos in houses while the proposal in the Free State was for both audit and assessment and removal and disposal of asbestos. So, on the face of the documentation alone, it was never permissible for the Free State Department of Human Settlements to attempt to utilise Treasury Regulation 16A6.6 to enter into a contract with the Joint Venture of Blackhead/Diamond Hill for which there had been no competitive and transparent bidding process.

Was this Incompetence, Negligence or Deliberate Malfeasance?

544. Officials involved in this project sought to explain their reliance upon the applicability of Treasury Regulation 16A6.6 by asserting that they, at all times, believed that it was appropriate to invoke the provisions of Treasury Regulation 16A6.6 so as to render this unsolicited and private proposal and resulting contract regular and lawful.

545. They stated on oath that they knew of the relevant legislation, regulations and practice arising from their knowledge of the Constitution, the PFMA, the Treasury Regulations

as well as their own experience. None claimed to have been unaware of the procedures to be followed. In fact, the use of, and reference to, the relevant legal provisions governing their conduct, the reliance upon earlier appointments and approvals, the phrasing of documents and the existence thereof all point to knowledge of the process being undertaken.

546. It would seem that neither competence nor negligence is in question. However, the context within which the errors were committed and the overwhelming nature thereof lead inexorably to the view that an agenda was being pursued which saw Treasury Regulation 16A6.6 as a ruse behind which to operate rather than a legitimate lawful procedure.

547. In each part of the process there was deceit. There was the obfuscation as to the identity of the parties, unconcern whether correspondence dealt with appointment to a panel or participation in a contract, disregard for the lapse of, and, therefore, absence of any contract in Gauteng in which the Free State could legitimately participate and officials' neglect of the different terms and conditions of the separate contracts. All this suggests more than mere inattention, incompetence and negligence on the part of those who purported to rely upon Treasury Regulation 16A6.6.

548. Firstly, there was selective misinformation as to the identity of the party to the contract with the Free State Department of Human Settlements. When there was no need to rely upon Treasury Regulation 16A6.6, the Joint Venture was named and was referred to but on the two occasions when there was a need to comply with the requirements of Treasury Regulation 16A6.6, the existence of the Joint Venture was concealed and, reference was only made to Blackhead.

549. Both Mr Matlakala and Mr Mokhesi knew, at all times, that Blackhead/Diamond Hill Joint Venture was involved. Mr Matlakala (who stated that he received the proposal from Mr

Mpambani personally) said that Mr Mpambani indicated to him that the proposal emanated from a joint venture including both Diamond Hill and Blackhead.[423] In his first written statement, Mr Mokhesi admitted that he knew the proposal came from a joint venture,[424] that he believed he was dealing only with Blackhead[425] and finally that he did understand that Diamond Hill was a member in a joint venture with Blackhead.[426]

550. The first mention of the collaboration of both members of the Joint Venture is to be found in the proposal of 28 May 2014. The front page of the proposal delivered by Mr Mpambani was said to have been "Submitted by: Blackhead Consulting Diamond Hill Trading 71".[427] The names of both legal entities were displayed on the front page – although that of Blackhead is in bold while that of Diamond Hill is in a smaller and lighter font. Similarly, the first page of the proposal is headed with both names although again that of Blackhead is more prominent than that of Diamond Hill. All subsequent pages are only headed with the name of Blackhead and the document is signed by "Edwin Sodi Chief Executive Officer – Blackhead Consulting". However, the words 'joint venture' are never used.[428]

551. The absence of any reference to Mr Mpambani personally and who was the originator and facilitator of the project (according to Mr Sodi, Mr Matlakala and Mr Mokhesi) and equally prominent reference to his business entity, Diamond Hill, is surprising although explicable when it is known that neither Diamond Hill nor the Joint Venture could secure an appointment to the contract under the guise of Treasury Regulation 16A6.6.

552. Further documents refer to both Blackhead and Diamond Hill and their Joint Venture:

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[423] Exhibit TT3, p 10, 12, paras 14.3, 17.2.
[424] Exhibit TT2.1, p 3, para 81.
[425] Exhibit TT 2.1, p 5, para 10.1.
[426] Exhibit, TT8, p 83.
[427] Exhibit TT8, p 83.
[428] Exhibit, TT8, p 83.

552.1. On 12 August 2014, Mr Sodi wrote to the Free State Department of Human Settlements on a letterhead of the Blackhead/Diamond Hill Joint Venture accepting the extended contract on behalf of the joint venture. This should have reminded all concerned in the Free State that the proposed contract was to be with the Blackhead/Diamond Hill Joint Venture and not with Blackhead as a member of the National Panel of Professional Resource Teams. On 11 September 2014 Mr Mokhesi wrote to the Free State Provincial Treasury appointing the Joint Venture;[429]

552.2. On 1 October 2014, Mr Mokhesi wrote to the Chief Executive Officer, "Blackhead Consulting Pty Ltd JV", to announce that "you have been appointed as a Professional Resource Team to assist the Free State Department of Human Settlements in Eradicating Asbestos in the Free State."[430] By this time the Gauteng contract relating to asbestos had expired;

552.3. On 2 December 2014 Mr Mokhesi wrote to Mr Sodi appointing the Joint Venture – Blackhead/Diamond Hill to the contract[431]; and

552.4. Finally, the undated Service Level Agreement was entered into by "Blackhead Consulting (Pty) Ltd Joint -Venture" (represented by Mr Sodi in his capacity as the Chief Executive Officer) which agreement defines the "service provider" as "Blackhead Consulting (Pty) Ltd and Diamond Hill Trading 71 (Pty) Ltd Joint-Venture". Though not signed by Mr Mokhesi or any representative of the Department of Human Settlements, Mr Mokhesi has not disavowed this Service

[429] Exhibit TT14.2, p 167.
[430] Exhibit TT18, p 188.
[431] Exhibit TT1.2. P 194-195.

Level Agreement and reliance was placed thereon to process payments from the Department.

553. It is interesting to note that the subcontractors who did the work, Mastertrade and the Ori Group (Pty) Ltd knew from the outset, as early as August 2014, that it was "Diamond Hill and Blackhead Consulting (known as Blackhead Consulting JV)" which had been appointed by the Free State Department of Human Settlements.[432]

554. When Mr Mokhesi wrote to Ms Diedericks on 15 July 2014 asking that the Free State Department be allowed to participate in the contract to which Blackhead had been appointed,[433] he made no mention that this was a Joint Venture involving another entity named Diamond Hill. Ms Diedericks was not provided with the Proposal of 28 May 2014.

555. In her affidavit, Ms Diedericks questions "why Mr Mokhesi did not mention Diamond Hill and Blackhead Consulting were in a Joint Venture in his letter of 15th July 2014".[434]

556. Mr Mokhesi's only explanation to the Commission for this failure to mention the intended party to the contract was: "I assumed Diamond Hill must have been part of the Gauteng project".[435]

557. On the one other occasion Ms Diedericks was involved, Mr Sodi wrote to her on 7 August 2014 to confirm that Blackhead was willing to participate in the Gauteng contract, he failed to mention the existence of either Diamond Hill or the Joint Venture.[436]

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[432] See for example, correspondence of Mastertrade 232 Holdings to Ori Group Pty Ltd dated 31 October 2014 at Exhibit TT18, p 200.
[433] Exhibit TT10, p 5, para 14.4.
[434] Exhibit TT10, p 5, para 14.4.
[435] Transcript 29 September 2020, p 14.
[436] Exhibit TT14.2, p 163.

558. In his evidence to the Commission, Mr Sodi conceded that "in hindsight" he should have specified that the proposed contract involved the Joint Venture.[437]

559. In all his written approaches[438] to Mr Zulu, for approval for reallocation of funds in terms of Treasury Regulation 16A6.4, Mr Mokhesi also made reference to Treasury Regulation 16A6.6 and only ever referred to Blackhead and never to Diamond Hill or the Joint Venture. In fact, Mr Mokhesi actually wrote that the "Free State department of Human Settlements hereby request your Department to extend (sic) the services of Blackhead Consulting (Pty) Ltd in line with Treasury Regulation 16A6.6 of March 2005".[439] To the Commission, Mr Mokhesi admitted his continued reference to the panel for a database and failure to identity the Joint Venture and that it had been important to clarify both those issues.[440]

560. Mr Mokhesi made an important admission. It was put to him that the reason the Joint Venture was introduced so late in the day was that, had the Joint Venture been introduced upfront, there would have been no question of transfer of a contract from Gauteng to the Free State. To this proposition, Mr Mokhesi answered "I agree".[441] Mr Mokhesi's agreement was an agreement that there would have been no question of a transfer of the contract from Gauteng had the Joint Venture been introduced upfront.

561. Mr Zulu was adamant that the proposed participation of the Free State Department in the Gauteng contract had nothing to do with the National Department. He pointed out that "[a]s Director-General I was an accounting officer as envisaged in Regulation 16A6.6 and possessed locus standi. However the HOD Free State possessed the locus standi".[442] He continued: "I did not approve Regulation 6.6 I was only concerned with

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[437] Transcript 19 August 2020, p 88, line 12-13.
[438] See letter of 19 June 2014 at Exhibit TT5.2, p 65; an unavailable email of 26 November; and another letter dated 2 December 2014, at exhibit TT5.2, p 74.
[439] Exhibit TT8, p 91 and Exhibit TT5.2, p 65.
[440] Transcript 28 September 2020, p 23, lines 9-18.
[441] Transcript, 28 September 2020, p 29 lines 24-30 and lines 1-8.
[442] Exhibit TT5.2, 48, para 2.7.

the approval that was given by Ms Diedericks".[443] However, Mr Zulu did respond to Mr Mokhesi's letter of 19 June 2014 for approval in terms of Regulation 16A6.6 on 13 August 2014[444] and said "[p]lease be informed that in terms of Treasury Regulations 16A6.6, it is allowed for the Free State Department of Human Settlements to participate in the contract arranged by means of a competitive bidding process from the database of the Gauteng Department of Human Settlements for professional resource teams where Blackhead Consulting Pty) Ltd was appointed from."

562. Mr Zulu remained unperturbed that it was he, in his capacity as Director-General, who had also given permission for the Free State Department to participate in the Gauteng contract. He interpreted his subsequent comments regarding procedures and costing as "I was providing the necessary advice" and "maybe I was trying to clarify".[445] However, even the unflappable Mr Zulu was obliged to agree to the proposition that one cannot extend membership of a panel but can only extend a particular contract.[446]

563. Throughout this time, Mr Mokhesi ordered, perused and signed documents involving the Joint Venture while Mr Matlakala stated that it was he who prepared all correspondence as well as the Letter of Appointment of the Joint Venture. There can be no doubt that Mr Mokhesi and Mr Matlakala and all those involved in concluding this contract and implementing same knew that Blackhead was not the only party to the proposed Free State contract and that the Blackhead/Diamond Hill Joint Venture was involved. However, on the one occasion (in approaching Ms Diedericks) when it was sought to utilise the procedure allowed in Treasury Regulation 16A6.6, there was failure to disclose the Joint Venture.

[443] Exhibit TT5.2, 49, para 2.8.
[444] Exhibit TT5.2, p 67.
[445] Transcript 6 August 2020, p 150, line 2 and 18-19.
[446] Transcript 6 August 2020, p 155, line 16.

564. Further, the appointment of Blackhead to the Gauteng Professional Resource Teams database was known by all to terminate on 31 August 2014. That appointment had been extended for an additional period of five months from 1 April 2014 to 31 August 2014.[447] Ms Diedericks had reminded Mr Mokhesi of this in her letter of 4 August when she "noted that the Gauteng database would lapse at the end of August 2014".[448] Mr Sodi himself knew this from his own correspondence with Ms Diedericks.

565. Accordingly, by the time Mr Mokhesi was asking the Director-General for approval of the deviation from the business plan and also professing to seek approval of the participation of the Free State Department in the Gauteng contract, neither the membership of Blackhead Consulting in the Professional Resource Teams nor the contract itself was still operative.

566. Thus, by the time Mr Mokhesi appointed the Joint Venture on 2 December 2014[449] the membership of Blackhead on the Gauteng Professional Resource Teams database had already lapsed by some three months. The Service Level Agreement [450] is undated.

567. Mr Mokhesi acknowledged from the outset of the investigation that he was aware that the Gauteng database of Professional Resource Teams would lapse at the end of August 2014 but took the view that "this not a bar to any process" and told the Commission that this opinion was because Ms Diedericks had agreed to the participation of the Free State Department in the contract of the Gauteng Department. Mr Sodi himself gave evidence that he knew that the appointment of Blackhead Consulting dated 14 September 2000 was for only three years and had been extended twice, on the last occasion for the period 1 April 2014 to 31 August 2014.

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[447] Exhibit TT8, p 102.
[448] Exhibits TT8, p 101 and TT10, p 15.
[449] Exhibit TT8, p 103.
[450] Exhibit TT8, p 99.

568. The only conclusion which can be drawn from the undisputed facts, is that Mr Sodi and Mr Mokhesi both knew at all times that Treasury Regulation 16A6.6 was not available as a means to legitimise the contract which they both wished to secure without any competitive bidding process. They both took steps to conceal the inconvenient facts – the identity of the service provider and the absence of any Professional Resource Teams appointment or Gauteng contract - when they used Treasury Regulation 16A6.6. This was neither incompetence nor negligence but knowing, deliberate and planned circumvention of lawful processes requiring competitive bidding processes. This process was a sham.

Deviation from the Free State Budget – Approval by the Department of Housing

569. Approval had to be obtained for funds to be reallocated from the Provincial budget for this new and unplanned project. Changes to the existing and approved business plan and budget of the Free State Department of Human Settlements required the approval of Mr Zulu.[451]

570. As Mr Zulu explained in his evidence, projects that are being undertaken by different provincial departments are managed under the national department, including their business plans. Before any project can proceed at provincial level, it requires the approval of its business plan by the national department"[452] and "should there be a deviation, we need to deviate from any process or any project, you will require the approval of the national department."[453] "All business plans approved first at a provincial level and then submitted at national level for confirming the availability of the budget are aligned with the existing budgets".[454]

[451] Transcript 6 August 2020, p 66-70.
[452] Transcript 6 August 2020, p 69, line 20-24.
[453] Transcript 6 August 2020, p 70, line 8-11.
[454] Transcript 20 August 2021, p 71, line 19-22.

571. Accordingly, on 19 June 2014 Mr Mokhesi wrote to Mr Zulu[455] for the purposes of adjusting the budget of the Department and making sufficient funds available to accommodate the project.[456] The heading of his letter claims to be "with reference to your notification 7/4/14 re Blackhead" and is a request of the Free State Department of Human Settlements to extend the services in line with Treasury Regulation 16A6.6.

572. In his first affidavit Mr Mokhesi claimed that he wrote this letter for the purposes of adjusting the budget of the Department and making sufficient funds available to accommodate the project.[457]

573. Mr Zulu told the Commission that he understood that Mr Mokhesi's letter was confirming that "there was no provision in the budget for the execution of this particular asbestos project . . . the budget that is approved in the beginning of every financial year – along the lines then the budgets can be reviewed and, if necessary, also business plans can be reviewed depending on the needs analysis or as circumstances may change.[458] He explained that particular budgets may not be implemented and thus it is permissible to "redirect your budget".[459]

574. Mr Zulu responded to Mr Mokhesi by way of a letter dated 12 August 2014.[460] His letter is similarly entitled "Reference appointment PRT to Departmental Panel." It reminded the Head of the Free State Department of Human Settlements that Treasury Regulation 16A6.6 allowed the Free State to participate in the Gauteng contract. Mr Zulu added the caveat "[t]his will however mean that the said company was properly appointed having followed the due procurement processes". He also cautioned "[k]indly be informed that the Free State Department of Human Settlements will be held liable for

[455] Exhibit TT5.2, p 65, see also Exhibit TT8, p 91.
[456] Exhibit TT2.1 p 17-18, para 19.1, 19.3.
[457] Exhibit TT2.1 p 17-18, para 19.1 and para 19.3.
[458] Transcript 6 August 2020, p 73, line 7-8, 11-12, 18-21.
[459] Transcript 6 August 2020, p 74-75.
[460] Exhibit TT5.2, p 67.

any financial implications or operations of the service provider. If need be you may have to revise your current business plan accordingly, so as to be in line with National Treasury Regulations in order to achieve the objective".[461]

575. Mr Zulu explained this letter to the Commission by saying:

> "I could have been reminding the accounting officer that if you want to make any changes on your business plan first you must make sure that there is budget allocation for that. But secondly also to put into the responsibility and accountability for any changes we make that financially and budget wise they remain the sole responsibility of a provincial department."[462]

576. However, on an unknown date in November 2014 Mr Mokhesi wrote again to Mr Zulu. On this occasion he forwarded what was supposedly a revised business plan and requested an urgent response asking for "priority" attention even setting a date, by which approval had to be granted.

577. Mr Zulu acknowledged receipt of the revised business plan on 26 November 2014 by email and requested Mr Mokhesi to provide his office with a motivation "why this item should receive priority as suggested in your revised business plan preferably before the end of business tomorrow at 27 November 2014".[463]

578. The motivation for the revised business plan was submitted to Mr Zulu by Mr Mokhesi on 27 November 2014. The motivation laments the plight of poor persons living in dilapidated houses containing asbestos, refers to the Constitution, suggests global warming is relevant, states there had been an informal study in the Free State on asbestos and housing. It also stated that the objects of the project were two fold – both to audit and assess houses in the Free State and to remove and dispose of asbestos.

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[461] Exhibit TT5.2, p 67.
[462] Transcript 6 August 2021, p 81, line 4-11.
[463] Exhibit TT18, p 231.

He provided the cost of the project as being R850 per house which he set out as including all those costs associated with the removal of asbestos and disposal thereof.

579. Nowhere did Mr Mokhesi indicate why he had asked for "priority" in attention or response, what reasons there might be for haste, on what basis this project should be dealt with before any others. No explanation was given why he wished the National Department of Human Settlements to deal with this project before the deadline of "close of business on 27 November 2014".

580. Interestingly, Mr Mokhesi failed to indicate the number of houses to be assessed, that the sum of R850 covered only one part of the project which he claimed to have two objectives (both assessment and removal and disposal) or even to indicate the total cost of the project.

581. Absent any mention of the total cost of the project (whether for audit and assessment only (R850 per house) or audit and assessment and removal and disposal of asbestos (R850 plus R32 760) no one would have any idea of the funding now required for this project, the adjustments which would be needed to be made in the Free State budget, where the money could or would be found, what other programmes or business plans had or were to be abandoned and what needs analysis could be done.

582. The sum of R255 million (two hundred and fifty-five million Rand) was nowhere mentioned.

583. Mr Mokhesi told the Commission that the Departmental business plan is revised each year "because we always have projects which do not make it in terms of expenditure" and that this "revision of the business plan, reprioritising and indicating what they can perform.[464] However, for some unknown reason Mr Mokhesi indicated that the details

[464] Transcript 28 September 2020, p 35, line 4-7.

of the projects which would not be pursued and the funds availed from each such contract would not be disclosed. Funds, said Mr Mokhesi, would come from "the very same budget, projects not performing."[465]

584. Mr Mokhesi agreed that his motivation to the Director-General, Department of Housing, for his revised business plan[466] (dated 27 November 2014) covered both the audit for asbestos and the removal of asbestos. All for the sum of R850. Mr Mokhesi stated that it was impossible for both tasks – audit and removal – to be met at a cost of R850 per house as told to Mr Zulu. He explained that the letter to Mr Zulu was actually meant to refer to the Phase 1 of the project."[467] Mr Mokhesi was asked how it had happened that disclosure was made only of the cost (R850 per house) for the audit and not for the removal and disposal of the asbestos. His answer was lengthy and largely incoherent. However, he seemed to concede that the figure of R850 in the letter to Mr Zulu was an error.

585. The motivation for deviation from the business plan and reallocation of funds failed to serve the purpose for which such a process exists.

586. Mr Mokhesi gave no reason why this unexpected project should be addressed as a matter of urgency, what it would cost, whether there were funds available and what the impact would be of utilising those funds.

587. Mr Mokhesi failed to advise of the total project cost (R255 million) of this new project. He thereafter failed to indicate where this sum of R255 million would be found. He failed to give any explanation why this project should take priority over other projects to which funds had been allocated. He failed to indicate which projects were not proceeding or

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[465] Transcript 28 September 2020, p 35, line 13-16.
[466] Exhibit TT18, p 232-235.
[467] Transcript 28 September 2020, p 39, lines 11-12, 18.

had terminated or which projects did not require the funds already allocated. In short, Mr Mokhesi failed to refer to any budgetary considerations at all.

588. All that Mr Mokhesi did was to repeat the motivation of the Joint Venture for having an Asbestos Eradication project. Thereafter, he was duplicitous in the extreme. The project was two-fold and would ensure both the audit and assessment of houses and the project would see to removal and disposal of asbestos. This project in its entirety would cost R850 per unit. There was no mention of the total cost. Mr Mokhesi failed to indicate that he had already appointed the Joint Venture to perform only one portion of the project – the audit and assessment – and that he and the Joint Venture knew the cost was R255 million.

589. There was no motivation to secure approval for deviation from the allocated budget. No budgetary considerations were mentioned or justified. This supposed procedure was all about ticking boxes to secure some correspondence which appeared to permit a deviation from the provincial budget already allocated.

590. Mr Mokhesi was asked when he gave evidence to the Commission how such a mistake could have happened and to respond to the suggestion that he had been grossly negligent. His response was to say: "I hear what you are saying in terms of material omission if there was no problem will have continued into the second phase and this would have been corrected."[468] This comment suggests that Mr Mokhesi was always minded to proceed with the rest of the Proposal to the tune of billions of Rands of taxpayers' money.

[468] Transcript 28 September 2020, p 42, line 20.

No competitive bidding process – recordal of reasons for deviation from competitive bidding process and approval – treasury regulation 16A6.4

591. It is when, and only when, "it is impractical to invite competitive bids", that Treasury Regulation 16A6.4 is available to be invoked. It allows the accounting officer to deviate from inviting competitive bids. The Regulation provides:

> "If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority."

592. The Accounting Officer is granted this discretion to deviate from inviting competitive bids only when the precondition of the impracticality of so doing is met and when the peremptory requirement of having had the reasons for deviating from competitive bids "recorded and approved" is complied with.

593. The exchange of correspondence from Mr Mokhesi to Mr Zulu regarding the revised business plan and the need for "priority" attention, the request by Mr Zulu for motivation for "priority" on 26 November 2014, the motivation from Mr Mokhesi of 27 November 2014 for the project never addressed the issue of competitive bidding and the total absence of such a process.

594. No reasons were given why competitive bids had not been solicited nor obtained. There is no mention that it was "impractical" to invite such bids and no reasons were even suggested for "deviating from inviting competitive bids."

595. The only issue ever addressed by Mr Mokhesi and Mr Zulu was that there would be a deviation from the Free State Budget.

596. Before the Commission, Mr Zulu was unable to answer any details of the project and appeared comfortable in fobbing questions off with answers such as "the accounting officer is better placed to give context to what this pricing meant"[469] or "my responsibility ended at national level"[470] when what he was being asked to explain was the complete absence of any scrutiny by himself at national level of the project costing, the deviation from the approved budget plan of the provincial Department and his failure to interrogate any of the material placed before himself, the requirements of the Regulation and whether or not there had been compliance therewith.

597. Of course, all this correspondence was somewhat irrelevant in that the proposal had already been accepted and the Joint Venture had already been appointed by Mr Mokhesi on 1 October 2014. Only funding remained outstanding, although the Joint Venture was on record as being responsible for arranging the funding. However, this correspondence between Mr Mokhesi and Mr Zulu added nothing whatsoever to the substance and validity of any deviation from the approved budget. Such deviation would, of course, allow Mr Mokhesi to divert funds from anywhere and anyone and any project in the Department to the Joint Venture.

598. On a full conspectus of all the evidence – the documentation and the testimony at the hearings of the Commission – there can be no doubt that this contract was not entered into in a regular or lawful manner. Reliance on Treasury Regulation 16A6.6 was always misplaced and the requirements of Treasury Regulation 16A6.6 were not fulfilled. Furthermore, it can only but be concluded that the breaches and omissions of lawful procedure were deliberate and intentional.

599. The context to this contract was a supposedly unsolicited proposal which turns out to have been discussed by both Mr Matlakala and Mr Mokhesi and to which the immediate

[469] Transcript 6 August 2020, p 92-93.
[470] Transcript 6 August 2020, p 128, line 10.

response was in the affirmative with only financial and budgetary issues to be resolved. The entire process appears to have been one of implementation rather than careful consideration and scrutiny.

600. There is no suggestion of any competitive bidding process having ever been considered or evaluated. There was no attempt to justify the absence of a competitive bidding process.

601. Instead, there was great haste and a sense of urgency when Mr Mokhesi actually requested "priority" attention and decision for deviation from the Provincial Budget.

602. No reasons have ever been given when and why it was decided that this project was essential and to be financed. No justification has been offered why there could be no public and transparent and open competitive bidding process.

603. It is common cause that no enquiries or due diligence were conducted about this entire proposal. No investigation was conducted into one of the parties to the Joint Venture, Diamond Hill. The only VAT certificate attached was that of Blackhead and no effort was made to ascertain whether or not Diamond Hill was even VAT compliant. There was no enquiry into the experience or capacity of either party to carry out that which was proposed in the May proposal. While Blackhead may have been involved in audit and assessment of asbestos in the Gauteng project, Diamond Hill had not. Neither had any track record in the removal and disposal of asbestos. No investigation was done as to whether or either party was even qualified or accredited in the work which they were proposing to undertake in the Free State.

604. In short the need for, the purpose of and the actual implementation of any contract received no attention or consideration from these public officials. All that was of moment was the granting of a lucrative contract to Mr Mpambani and his colleague, Mr Sodi.

605. The value of competitive bidding – as clearly emerged from the statement of Mr Radebe of Mastertrade and the evidence of Mr Manyike of the Ori Group (Pty) Ltd - was completely ignored in pursuit of this one opportunity which Mr Mpambani had unlocked for himself and Mr Sodi.

606. It is not in dispute that Mr Mokhesi knew the procedures which would have to be followed if he were to ensure a speedy conversion of this proposal into a contract. He contacted Ms Diedericks for approval in terms of Treasury Regulation 16A6.6 and Mr Zulu for approval for deviation from the Provincial budget. However, he gave lip service to these legal requirements. He did more than fail to adhere to the law. He deliberately, and without explanation, circumvented the law. He knew that the Proposal emanated from a Joint Venture and failed to disclose this to Ms Diedericks.

607. The conclusion is inescapable that the pretence of following Treasury Regulation 16A6.6 was no more than "ticking boxes" but was never intended to have any real import.

608. This ruse of using Treasury Regulation 16A6.6 was a lot easier (one letter only) than following the procedures prescribed by the SCM Policy or the PFMA. Mr Mokhesi and his department did not issue a Request for Qualification so as to ascertain the existence of other entities in the private sector who could do this business and could assess and audit for asbestos and then remove and dispose of same. If they had issued such an RFQ, then anyone from Mastertrade to the Ori Group (Pty) Ltd to Mr Roets' company, COH, may have responded. An ordinary competitive bidding process would then have followed. If an open and transparent bidding process between competitors had taken place, the evidence before this Commission is that a great deal of taxpayer's money may not have been spent on what appears to have been a project without any useful outcomes.

609. As can be seen neither the scope nor the costing of the contract was scrutinised or questioned by Mr Mokhesi and other officials in the Free State or Mr Zulu in the national department. These aspects will be discussed in the subsequent section of this Report.

The contract and its terms – the service provider – the scope of work – at risk – costing

610. On 1 October 2014 Mr Mokhesi wrote to Blackhead/Diamond Hill Joint Venture informing the Joint Venture of his pleasure in advising that "you have been duly appointed to a Professional Resource Team to assist the Free State Department of Human Settlements in Eradicating Asbestos in the Free State Province".[471] Paragraph 2 stated:

> "The Department wishes to advise that your company has been exclusively appointed for the audit and assessment of asbestos, handling of hazardous material, removal and disposal of asbestos-contaminated rubble and replacement with SABS approved materials in the Free State Province"[472].

611. On 2 December 2014 Mr Mokhesi wrote to the Joint Venture[473] (again addressed as Blackhead Consulting (Pty) Ltd JV) regarding "Instruction to Perform Work (IPW) Phase 1- Audit and Assessment of Asbestos of Housing Units". The letter is identified as "this INSTUCTION TO PERFORM WORK-001 is to instruct you to audit all Pre-1994 Government issued Housing Unit".

612. Following on the Letter of Appointment dated 1 October 2014,[474] a Service Level Agreement was apparently prepared and initialled by "PE" and signed by Mr PE Sodi as the service provider and initialled by Mr Mpambani on an unknown date.[475] This document has not been disavowed by Mr Mokhesi as Head of Department.

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[471] Exhibit TT18, p 188.
[472] Exhibit TT18, p 188.
[473] Exhibit TT8, p 103 and Exhibit TT14.2, p 185.
[474] Exhibit TT18; p 188.
[475] Exhibit TT18; p 189.

Mr Matlakala stated that he had prepared all relevant documents including the Service Level Agreement. The Service Level Agreement was between the Department of Human Settlements and Blackhead/Diamond Hill Joint-Venture represented by Mr Sodi in his capacity as Chief Executive Officer.

613. Mr Makepe, Acting Chief Director for the Project Management Unit, was at pains to make clear that he played no role in the appointment of the Joint Venture[476] since appointment of contractors is the function of the procurement unit of which the supply chain manager was then Mr Matlakala.[477]

Identity of the Service Provider

614. It is common cause that the service provider in this Service Level Agreement was the Joint Venture entered into between Blackhead and Diamond Hill.

615. As already noted, no one in the Free State Department of Human Settlements had done any investigation of the existence, experience or registration of Diamond Hill. There was no enquiry whether Diamond Hill was a service provider on any database in any province. There was not even any attempt to ascertain whether or not Diamond Hill existed or had ever done any work in any field at all. There was no proof of SARS registration of provision of a tax clearance certificate. Interestingly, the tax clearance certificate of Blackhead had been attached to the proposal and it was current.[478] However, the tax clearance certificate subsequently furnished by Diamond Hill was valid for the period 1 June 2014 to 4 June 2015.[479] Diamond Hill therefore appears to have

[476] Exhibit, TT12, p 6, para 9.1.
[477] Exhibit TT12, p 6, para 9.2.
[478] Exhibit TT14.2, p 145.
[479] Exhibit TT3, p 13, para 19.

had no tax clearance certificate at the time of submitting the May proposal. Mr Matlakala stated: "I did not conduct any due diligence on Diamond Hill".[480]

616. There was also no enquiry into the service provider which was not Blackhead or Diamond Hill but the Joint Venture. None of the officials, employees, departments and sub departments in the Free State Department of Human Settlements appears to have made any enquiry at all into this Joint Venture. When was it incorporated and for what purpose was it incorporated? Did it have a tax clearance certificate? Did the Joint Venture plan to do the work and if so, what was its past and current capacity, its experience? Was it a service provider on a database in another province?

617. It appears to have been sufficient that Mr Mpambani had done his "networking", that Blackhead was party to the Joint Venture and that Mr Mpambani had "unlocked opportunity" with the May proposal.

Capacity, experience, qualifications of accreditation of the Service Provider

618. There was no enquiry into whether or not Blackhead or Diamond Hill had qualifications, accreditation, expertise in the scope of work which the Joint Venture had proposed it would carry out in the May proposal which was stated to have a two-fold objective: "to quantify the number of houses roofed with asbestos sheets, and remove and dispose asbestos to an approved and accredited disposal site".[481] While the Instruction to Perform Work of 2 December 2014 was in respect only of "Phase 1 – Audit and Assessment of Asbestos of Housing Units",[482] there was similarly no enquiry how or by whom or with what skills or experience this audit and assessment would be carried out.

[480] Exhibit TT3, p 13, para 19.
[481] Exhibit TT8, p 87.
[482] Exhibit TT8, p 103.

619. The May proposal had made no claims to qualifications, accreditation or expertise on the part of either member of the Joint Venture but, in that proposal, the Joint Venture had offered to perform a number of activities which, according to the proposal itself, necessitated dealing with the highly dangerous material asbestos.

620. The appointment of 1 October 2014 sent by Mr Mokhesi to the Joint Venture advised that the Joint Venture had been "exclusively" appointed to a Professional Resource Teams for "the audit and assessment of asbestos, handling of hazardous material, removal and disposal of asbestos-contaminated rubble and replacement with SABS approved materials in the Free State Province".[483] The motivation forwarded by Mr Mokhesi to Mr Zulu on 27 November 2014[484] repeated that the project had two objectives – "quantify, audit and asses the number of houses roofed with asbestos sheets and remove and dispose asbestos to an approved and accredited disposal site". It went on to state that the requirements of the Occupational Health and Safety Act and Regulations 85 of 1993 would be met, that an approved works plan would be submitted to an Approved Inspection Authority, that the Department of Labour would be notified, that experienced medically fit staff and supervision would be supplied, safety equipment would be supplied and that a registered disposal site would be used. All of this could only mean that the intention was that this Joint Venture would also remove the asbestos. Otherwise why would it have been necessary to tell Mr Zulu that at this stage if the removal would be done by another entity some other time?

621. The Service Level Agreement[485] specifically provided in paragraph 2 under the heading "working relationship" that "the Department appoints the service provider to assess/audit houses roofed using asbestos material, handling and disposal of asbestos

[483] Exhibit TT18, p 188.
[484] Exhibit TT5.2, p 70-73.
[485] Exhibit TT18, p 191-193.

sheets to an approved, designated disposal site". Paragraph 4.2.2. of the Service Level Agreement continued:

> "The SERVICE PROVIDER undertakes that: 4.2.2 they have all the necessary experience skill and capability to render the services in accordance with the requirements and expectations of the DEPARTMENT".

622. It is common cause that neither Blackhead nor Diamond Hill nor the Joint Venture of Blackhead and Diamond Hill had any training, qualifications, expertise, accreditation, experience or knowledge of working with asbestos. It is common cause that no enquiry was ever made by anyone in the Free State Department of Human Settlements to ascertain whether or not the Joint Venture was permitted in law to work with asbestos or had any accreditation or qualification or personnel with such expertise, qualification or accreditation allowing them to work with asbestos.

623. Mr Mokhesi told the Commission: "I was not aware that they do not have the qualifications. I assumed that they should have because they did work in Gauteng".[486] When it was pointed out to by the Commission that his letter of 27 November 2014 to Mr Zulu gave the impression that he was aware of the need for qualifications and special procedures to be followed when working with asbestos, Mr Mokhesi answered: "I was under the impression that Blackhead did have the necessary qualifications or accreditation but had not checked".[487] That a person holding the position of Head of Department could give a company a job for which it would be paid millions of tax payers' money without having checked whether that company has the qualifications, expertise and experience required to do that job is shameful. Such a person is so incompetent that he should never even have been appointed to the position of Director, not to speak

[486] Transcript 28 September 2020, p 56- 57.
[487] Transcript 28 September 2020, p 61-62.

of Head of Department. How do you entrust such a person with the responsibilities that attach to the position of Head of Department?

624. Mr Mokhesi went on to say that "we have always removed asbestos...so have been producing certificate not the first time, have been doing removal as a matter of course...this is the work we have been doing in government things are largely standardised"[488] He told the Commission that, if he had known that Blackhead had no qualifications, he would not have appointed that entity[489] and he, thereafter, conceded that Blackhead had made a misrepresentation.[490]

625. Mr Sodi gave evidence that he, on reflection, he felt that he did not want the Joint Venture to become involved in the asbestos eradication phase as "it could become problematic they would have to get a specialist".[491] Mr Sodi went on to say that "had I applied my mind right at the beginning when we submitted the proposal we certainly wouldn't have included phase 2. To do phase 2, which is the handling and disposal you need to be accredited".[492]

626. Mr Sodi sought to explain that it was only "in an ideal world"[493] that one discloses that one lacks qualifications. What he would have done is to ask the specialist "tell me how much you are going to charge me" and then he would "put my 10% mark-up" but "I certainly don't disclose to you that I am going to get 'so and so'...It becomes my responsibility as the one point of entry and one point of exit to manage those

[488] Transcript 28 September 2020, p 59-61.
[489] Transcript 28 September 2020, p 61-62.
[490] Transcript 28 September 2020, p 62-63.
[491] Transcript 29 September 2020, p 67.
[492] Transcript 29 September 2020, p 67-68.
[493] Transcript 29 September 2020, p 70.

subcontractors".[494] Mr Sodi said that he plays a "project management role" which is the "industry norm".[495]

627. Mr Sodi repeated that "we certainly did not mention that we have got accreditation" but he conceded under questioning that "it was not proper" not to disclose that Blackhead did not have accreditation to do the second phase.[496] Mr Sodi did not accept that Blackhead would not have been appointed to do the first phase of the project if it had been known that Blackhead was not accredited to do the second phase.[497]

628. The official documents attempt to confuse. On the one hand the appointment letter of 1 October 2014 clearly included the "removal and disposal of asbestos" and the undated Service Level Agreement also includes "removal and disposal of asbestos". On the other hand, the Instruction to Perform Work of 2 December 2014 was only in respect of what was called "phase 1 – the audit and assessment" and did not include what became known as phase 2 – the removal and disposal of asbestos phase.

629. It would appear to be on the basis that 'phase 2' was not implemented that it is sought by Mr Sodi and Mr Mokhesi to suggest that skill, expertise, training accreditation for the removal and disposal of asbestos never became a requirement for either Blackhead or Diamond Hill.

630. However, the Joint Venture of Blackhead/ Diamond Hill proposed to do the "removal and disposal of asbestos" and they accepted instructions and appointments so to do. They seek to rely upon the one aberration – the Instruction to Perform Work of 2 December 2014.

[494] Transcript 29 September 2020, p 70-71.
[495] Transcript 29 September 2020, p 71-72.
[496] Transcript 29 September 2020, p 72.
[497] Transcript 29 September 2020, p 75.

631. There can be no doubt that Mr Sodi and Mr Mpambani knew that they were offering to do a task requiring their Joint Venture to work with hazardous materials as their Proposal clearly indicated. Mr Sodi made no pretence before the Commission that he conducted business by purporting the capacity, expertise, skills to perform a task and then procuring "specialists" to do the work. He was open that he would not admit to a lack of necessary capacity, expertise, qualification or accreditation. He was simply a 'project manager' who added his cost to that of the specialist. Ultimately, Mr Sodi conceded the wrongdoing in failing to make disclosure of the lack of skill, qualification or accreditation of the Blackhead/Diamond Hill Joint Venture.

Mr Roets on Accreditation

632. The evidence of Mr Roets was that he had never heard and/or come across entities called Blackhead, Diamond Hill, Mastertrade or the Ori Group (Pty) Ltd in the assessment and quantification of asbestos industry.[498]

633. According to Mr Roets, the phrase "audit and assessment" in the Proposal and in other documents was not clearly defined. This meant that the deliverables from such a project were also not defined. Legally, assessing asbestos is defined as identifying where asbestos is, estimating the quantity, assessing the form of the asbestos, assessing the potential exposure risk, and evaluating the control measures in place to minimise the risk of asbestos fibre release. In the Proposal of the Joint Venture, was proposed to "Audit and Assess" asbestos containing materials in low cost housing in the province, while under the heading "Objective", all that was mentioned was counting houses with asbestos roofs. Mr Roets said that these were clearly two different activities.

[498] Exhibit TT1, p15.

634. As regards the scope of work, Mr Roets stated that the work instruction clearly called for the Joint Venture to audit and assess houses for asbestos in the whole of the Free State province. Audit and assess in terms of legislative requirements means an inventory which includes information such as where, what, quantity, type, condition and potential exposure risk of the asbestos products in each house. A document like this would have served as a Bill of Quantities and guidance to future tenders / contractors to submit a costing for the eradication phase of the project, where they could have had a clear picture of what exactly needed to be done to eradicate asbestos in the province.

635. Mr Roets explained that he had certain diplomas but that his business entity, COH, is accredited in terms of SANS/ISO 17020. ISO is the international standard which is usually adopted by the South African Bureau of Standards or SABS. To obtain and maintain this accreditation, an accreditation body performs tests in accordance with the said standard on a regular basis. Mr Roets said that his entity, COH, was also an Approved Inspection Authority registered with the Department of Employment and Labour in South Africa specialising in occupational hygiene. He said that in terms of the Occupational Health and Safety Act of 1993, it is required that anything in the workplace that can cause ill or adverse health effects to humans needs to be assessed by an Approved Inspection Authority. As an Approved Inspection Authority, part of Mr Roets' business was to assess and quantify hazardous chemical substances in the workplace as well as the existence of asbestos.

636. Mr Roets said he did quite a lot of work involving asbestos. He said that he had also been involved in drafting the regulations relating to the eradication of asbestos in terms of the Occupational Health and Safety Act of 1993.

637. Mr Roets informed the Commission of the properties of asbestos, the negative effects of asbestos, the legislation pertaining to asbestos and the banning of asbestos.

638. Mr Roets explained that "if renovation, demolition and/or removal is planned on asbestos containing materials the law requires that a Registered Asbestos Contractor be contracted to do the asbestos work. The RAC must remove asbestos in accordance with the Regulation and in line with an Approved Plan of Work". He said that an Approved Inspection Authority must be involved with air monitoring and have oversight of any asbestos maintenance or removal activities.[499]

The Budget and Costing – "total project cost"

639. The Proposal of the Blackhead/ Diamond Hill Joint Venture set out the rates to be charged for the work proposed to be done. These were specified as "R1 350 per house ex VAT for door to door assessment, R32 760 excluding VAT for removal and disposal".[500]

640. There is no correspondence indicating the basis upon which the quoted rate was reduced but it appears from the Letter of Appointment of 1 October 2014 that the rates for both audit and assessment as well as for removal and disposal of asbestos had now been reduced to the sum of R850 per house. The same scope of work appears in the Service Level Agreement. The motivation to the Director-General of 28 November 2014 advised that the rate was R850 per unit to audit and assess for asbestos and to remove and dispose of the asbestos. The reason, said Mr Mokhesi, for the reduction in rate was that the "Department found this to be unaffordable".[501]

641. However, the Instruction to Perform Work specified in paragraph1 that the price would be R850 excluding VAT for the Joint Venture to "audit, assess and GPS all pre-1994 government housing units in the Province".[502]In short, the reduced rate of R850 was

[499] Exhibit TT1, p 10-11.
[500] Exhibit TT13.2, p 139.
[501] Exhibit TT2.1, p 10.
[502] Exhibit TT18, p 236.

sometimes intended to cover the cost of both audit/assessment and removal/disposal of asbestos whilst on one other occasion the documentation indicated R850 for the audit and assessment only.

642. The total sum of R255 million (two hundred and fifty-five million Rand) was never mentioned to the National Department when the deviation from budget was under discussion. However, the Instruction to Perform Work of 2 December 2014 made it clear that work was to be done within this total sum up to a maximum sum of 300 000 units (R255 million excluding VAT, hereinafter to be referred to as the total project cost).[503]

"On risk"

643. The Joint Venture proposed on 28 May 2014 that it be appointed "on risk" to carry out the project. This arrangement was confirmed by Mr Sodi to the 'Director Supply Chain Human Settlements Free State" on 20 June 2014 when he wrote to confirm that "our company will be responsible for securing funds to roll out the asbestos eradication project".[504]

644. In his first affidavit, Mr Sodi explained the concept of requesting to be appointed on a risk basis.[505] His explanation was that he was told by Mr Mpambani that he engaged with the Government officials from the Free State Department of Human Settlements. They had told Mr Mpambani that, although they desired an Asbestos Audit to be conducted in their province, there was no budget within the Department of Human Settlements in the Free State to perform an audit of this nature. Mr Mpambani, however, also said that, in order to have some funds allocated, the Free State Department of Human Settlements would have to include the asbestos audit in their Business Plan in

[503] Exhibit TT14.2, p 194.
[504] Exhibit TT14.2, p 160.
[505] Exhibit TT8, p 13.

order to make provision for it in the budget. This process would, however, according to Mr Mpambani, take time. At the end of the day the budget was made available. The Joint Venture was appointed. The Joint Venture was paid, albeit not the full amount. The Business Plan was approved and provision was made in the budget for the asbestos audit. Mr Sodi said: "We therefore ran the risk that, if the Business Plan was not approved or no budget was allocated, we would have suffered a loss".

645. Before the Commission, Mr Sodi explained that "the feedback is that we could be appointed or that we will be appointed. However, the Department at that point in time had not made provision budget-wise for these particular aspects."[506]

646. In short, Mr Mpambani and Mr Sodi as the members of the Joint Venture seemed to feel that this "at risk" offer was merely a means of waiting out the period until funds were allocated or made available. Mr Sodi recalls Mr Mpambani reporting to him that he had made contact with persons in the Free State but that "as much as they want to implement this programme it was not in their budget for that financial year".[507]

647. It is common cause that this particular project had not been allocated funds in the Budget of the Department of Human Settlements in the Free State. The costs were considerable. At R850 per house, the cost of either of the scopes of work (audit only) (audit and removal of asbestos) to be carried out on 300 000 houses amounted to R255 million.

648. The first response from Mr Mokhesi, some 20 days later on 19 June 2014, was to request the approval of Blackwood to have its Gauteng contract extended in line with

[506] Transcript 7 August 2020, p 22.
[507] Transcript 7 August 2020, p 186.

Treasury Regulation 16A6.6. Mr Mokhesi went on: "Your appointment will be subject to your Company Securing Funds to roll out the project in the line with your proposal".[508]

649. In his affidavit, Mr Mokhesi claims that the Free State Department of Human Settlements had advertised for donor funding for the removal of asbestos and he thought that the Joint Venture would be able secure donor funding for the Asbestos Eradication Project.[509] No such advertisement or approach to donors was ever shared and there is no indication why any donor would wish to fund the work of Blackhead or Diamond Hill which are commercial enterprises.

650. However, within weeks Mr Mokhesi had approached Mr Zulu, Director-General in the National Department of Human Settlements, seeking approval for funds to be reallocated from the Provincial budget for this new and unplanned project, because to find the funds for this Asbestos Eradication Project proposed by the Joint Venture, changes would have to be made to the existing and approved business plan and budget of the Free State Department of Human Settlements.[510]

651. For some reason, Mr Mokhesi wrote to the Free State Provincial Treasury on 11 September 2014 informing Treasury of the intention of the Department of Human Settlements to procure a contract currently secured by the Gauteng Department of Human Settlements. The only request made of Treasury was that "your guidance and approval is hereby sought to ensure that the Free State Department of Human Settlements has observed all Treasury Regulations before it enters into service level agreement with the company, Blackhead Consulting Pty Ltd JV".[511] No information was

[508] Exhibit TT18, p 169.
[509] Exhibit TT2.1, p 10.
[510] Exhibit 5.2, p 48-49.
[511] Exhibit TT18, p 184.

provided or questions asked regarding funds or budgets and no financial issues were raised.

652. The response from Treasury was no more than a handwritten note dated 19 August 2014 that "the accounting officer has the power of approval provided that he has satisfied himself/herself that the Service Level Agreement processes were duly followed and they comply with the legislation". Since the accounting officer, Mr Mokhesi, had made no substantive request there was no substantive answer which Treasury could give.

653. Accordingly, by the time the Letter of Appointment dated 1 October 2014[512] was sent to the Joint Venture, there was no mention of any need for the Joint Venture to find funding or for the Joint Venture to commence the project "at risk". The Letter of Appointment referred to the need to sign a Service Level Agreement and that the Joint Venture would be issued with an Instruction to Perform Work.

654. The Service Level Agreement required the Department to "pay for the services of the service provider in accordance with the costs breakdown as agreed and the approved Instruction to Perform Work; and /or upon signing of the appointment letter".[513] Again, there is no mention of any "at risk" contract – the budget had been re-allocated and funds were available.

655. While the Proposal had been at risk, no time was ever spent on this issue. It died a somewhat natural death as Mr Mokhesi had gone straight to Mr Zulu who agreed to the reallocation of the Departmental budget without further ado.

[512] Exhibit TT18, p 188.
[513] Exhibit TT18, p 191-197.

656. The entire rationale for the Asbestos Eradication Project was the danger to health and life should asbestos be found and remain in roofs of human dwellings. Both the Joint Venture in the proposal and Mr Mokhesi in his motivation to Mr Zulu expounded on this.

657. Nonetheless, it is striking that, on receipt of this proposal, no one stopped to think whether or not this project was deserving of implementation, what the value would be, who would act upon the results and to what effect; whether this work should be done sooner or later or within another budgetary cycle or financial year, what the scope of the task would be, how many municipalities/houses/ units would be involved and where, what distances would be travelled, what records already existed indicating the extent or otherwise of the problem of asbestos; where the funds would come from; which projects which had already been approved and granted budgets would be abandoned or only partially completed; how and the balancing act between already approved and budgeted projects and this new proposal should be weighed; what other similar projects had been undertaken in any other provinces, at what cost and with what result? There is no evidence of any meetings, discussions, Departmental or Provincial assessments, liaison with other Provinces on similar projects. This proposal existed in a total vacuum as to need, cost, outcome and value.

658. What is most irregular and of great concern is the complete absence of any due diligence on the part of the Head of Department or any of the officials in the Free State Department when it came to appointing the service provider to this contract. Mr Mokhesi partially attempted to blame his staff "in government things are largely standardised… there are 11 people who report to me…I do not have to tell them because it is not the first time we are dealing with asbestos".[514]

[514] Transcript 28 September 2020, p 66.

659. This lack of scrutiny and care is somewhat surprising when one has regard to the irregular state of affairs and finances in the Department found by Mr Mokhesi when he was appointed as Head of Department and on which topic he had already given evidence to the Commission. In response to the proposition that it could have been expected of him to be scrupulous in making sure that processes were followed, Mr Mokhesi answered that he had gone through a period of introspection but that he had trusted individuals[515] – which seems to suggest that it was those individuals whom he had trusted who had failed to follow processes.

660. There can be no doubt that there was complete disregard for essential processes in evaluating the Proposal from the Blackhead/Diamond Hill Joint Venture. This lack of professionalism began with the failure to apply any minds at all to the identity of the party proposing to become a service provider to the Free State Department of Human Settlements.

661. At the end of the day the Joint Venture had proposed itself to perform skilled and dangerous work in dealing with a life threatening substance, asbestos. The Department had appointed the Joint Venture to handle and remove and dispose of the asbestos without any care or concern for skill, experience, training or qualification.

662. It cannot now be argued that neither the Joint Venture nor the Department intended to perform the phase 2 portion of the Asbestos Eradication Project. This was what was offered and accepted. Either funds did not become available or the questions asked about lack of competitive bidding processes and flawed procurement procedures were what put a halt to this project. The Joint Venture had offered to do asbestos removal

[515] Transcript 28 September 2020, p 66.

and disposal and were appointed so to do by the Department in the Service Level Agreement.

663. The cost per unit fluctuated. Sometimes it was R1 350 plus VAT per unit and sometimes it was R880 for the audit and assessment only or R850 for both the audit and assessment. The lack of care in ensuring the cost of the Asbestos Eradication Project suggests that cost per unit was not that important and, furthermore, that it was the transfer of funds on any basis which was the purpose of the enterprise. The costing given from time to time was merely a moving target of "opportunity".

664. No one appears to have scrutinised the costing at all whether it appeared in the Proposal, or the letter of appointment or the Instruction to Perform Work. In the motivation for the revised business plan submitted by Mr Mokhesi to Mr Zulu in late November 2014, there was no information on the total cost to the Province for this project. The only costing given was the price per unit.

665. This complete disregard for the identity, expertise and capacity of the service provider coupled with lack of concern about the task which the service provider was to implement plus the haphazard costing suggests that this entire Asbestos Eradication Project was a mere façade to provide a conduit for funds to be transferred from the taxpayer and the Department of Human Settlements to Mr Sodi and Mr Mpambani.

666. Since there was obviously no provision in the Provincial Budget for the R255 million (two hundred and fifty five million Rand) which this project would cost the fiscus, the first stratagem adopted was for the Joint Venture to propose that it would undertake the Asbestos Eradication Project on "risk" basis and Mr Mokhesi furthered this pretension in immediately confirming his interest in appointing the Joint Venture on condition that the Joint Venture would take responsibility for sourcing funds and covering the costs of the project. No one was capable of explaining why or how or from whom the Joint

Venture would source funds for a Provincial project. It would appear that on risk were no more than two useful words to provide cover for the absence of an allocated and approved and official budget until such time as Mr Mokhesi had been able to secure deviation from that budget and simply transferred funds from one project to this new Asbestos Eradication project. The money was always going to be found.

667. The fault line running throughout the conception, negotiation, grant (and eventually implementation) of this contract is the avoidance of a competitive bidding process. This Asbestos Eradication Project was conceived and arranged in secrecy. There was no widespread and considered evaluation of the need for such an Asbestos Eradication Project involving research, discussion, comparisons, engagement and debate. There was similar secrecy in the allocation of the contract. There was no publication of the details of the project and request for quotations. Businesses and entities involved in this type of work had no knowledge of the existence of the project. As the subcontractors told the Commission, they had no opportunity to put in competing bids. Similarly, the Department avoided any opportunity to test the market to ascertain the variations in costing of such a project.

668. What the Joint Venture did was to act as middleman and add its "mark-up" as Mr Sodi described it. The project was always going to cost more than it should have because the Joint Venture could add no value but existed to take a cut out of tax-payers money. Mr Mpambani of Diamond Hill offered no capacity, expertise or ability to contribute to asbestos eradication. As Mr Sodi says, his contribution was to engage with officials and unlock opportunities. His reward was to extract half the profits from this venture. Mr Sodi saw himself as a project manager who found others to do the work and who then added his "mark-up" which was 50% of the inflated profits.

669. From beginning to end, the Asbestos Eradication Project in the Free State was inimical to and designed to avoid and subvert the provisions of Section 217 of the Constitution.

Execution of the Asbestos Eradication Project

670. The Joint Venture itself did not perform any of the work on the Asbestos Eradication Project but outsourced to subcontractors. Mastertrade appears to have been the main subcontractor which, in turn, subcontracted, the Ori Group (Pty) Ltd. Another entity, Zenawe, provided some technical services.

671. Disagreements between subcontractors has resulted in litigation between Mastertrade and Ori Group (Pty) Ltd with the result that, notwithstanding affidavits from Mr Radebe of Mastertrade, the Commission only heard evidence in person from Mr Manyike of the Ori Group (Pty) Ltd.

672. The evidence of those who actually did work that was carried out is instructive because it reveals the true costs of this Asbestos project, the extent to which there was no interrogation of costing by the officials in the Free State Department of Human Settlements, the use of 'middlemen' and 'project managers' to increase the cost of taxpayer funded projects which are carried out under the supposed authority of state officials. This evidence also pertains to the need for and the value of any work actually done in this Asbestos Eradication Project.

<u>Subcontractors</u>

673. By August 2014 the Joint Venture was in discussions with Mastertrade for "Appointment of a Professional Resource Team for Asbestos Audit in the Free State Province". The quotation of Mastertrade dated 10 August 2014 for assessment of 300 000 housing

units was accepted by the Joint Venture on 25 October 2014.[516] Mastertrade then engaged with the Ori Group (Pty) Ltd in respect of "Professional Services: Free State Eradication of Asbestos Audit" for audit of 300 000 housing units and confirmed Ori Groups appointment on 31 October 2014.[517]

674. All documents including the Service Level Agreement are silent on the fact that the Joint Venture always intended and did use subcontractors to perform the work on this Asbestos Eradication Project.

675. Mr Sodi told the Commission that it was Mr Mpambani, "my late partner"[518] who would negotiate with the client which is why he was unable to answer whether or not the Joint Venture had disclosed the appointment of and the cost of subcontractors on this Asbestos Eradication Project.

676. Mr Sodi had not been party to the earlier discussions between the Mr Mpambani (on behalf of the Joint Venture) and Mastertrade. He listened to a presentation from Mr Radebe and Mr Manyike and "I was convinced that they could do the work".[519] Mr Sodi said he brought in Mr Martin Zwane "to be my eyes and ears, I want you to oversee this project. I want you to be there and monitor".[520] Mr Sodi told the Commission that the Joint Venture had subcontracted Mastertrade who then subsequently contracted the Ori Group (Pty) Ltd but "I was under the impression that it was Mastertrade that was doing the actual work".[521] In fact, said Mr Sodi, he only discovered later that Mr Manyike was from Ori Group (Pty) Ltd which had been subcontracted by Mastertrade.[522]

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[516] Exhibit TT18, p 199- and Exhibit TT14.2, p 11 (which incorrectly referred to the date as 20/08/14 at para 5.2.10.1 of Public Protector Report) and Exhibit TT14.2.
[517] Exhibit TT14.2, p 12 and TT14.2, p 91.
[518] Transcript 7 August 2020, p 138.
[519] Transcript 7 August 2020, p 195.
[520] Transcript 7 August 2020, p 196.
[521] Transcript 7 August 2020, p 103.
[522] Exhibit TT8.1, p 16.

677. As far as Mr Sodi knew, the Department was not informed "that we were going to subcontract". He said that there is "certainly no obligation that you ought to disclose to the client that we are going to subcontract the work"[523] although, if it was made very clear that the Joint Venture was expected to do the work and it was specified, then the Joint Venture would have to abide by such instructions.

678. Mr Sodi explained that "most of the projects we were appointed on we did most of the work"[524] but there are instances "where you require a specialist".[525] However, since Mr Sodi maintained that the Joint Venture was only working on Phase 1 – the audit and assessment phase of the project, this detail as to the need for specialists was not helpful.

679. Mr Mokhesi claimed that he had never heard of Mastertrade and had no knowledge that the Joint Venture had subcontracted work to it.[526] Mr Makepe only dealt with Mr Manyike and Mr Martin Zwane whom he believed to represent the Joint Venture[527] and stated that it was Mr Manyike who led the Blackhead/Diamond Hill Joint Venture in discussions with the Department. According to Mr Makepe, Mr Sodi never attended any of the meetings between Blackhead /Diamond Hill Joint Venture and the Procurement Management Unit.[528]

680. Mr Manyike says that he heard from Mr Radebe of Mastertrade that something was "cooking" which meant that there was the potential of work in the Free State. Mr Manyike explained: "I see Mastertrade as a broker as a middleman"[529] because on other projects "he has been working as a social facilitator – go to the ward counsellors,

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[523] Transcript 19 August 2020, p 104.
[524] Transcript 29 September 2020, p 45.
[525] Transcript 29 September 2020, p 45.
[526] Exhibit TT2.1, p 25.
[527] Exhibit TT12, p 7.
[528] Exhibit TT12, p 9.
[529] Transcript 7 August 2020, p 71.

the politicians, the people and speak of social issues and taking care of the politics".[530] Radebe stated that he was approached by people representing the Joint Venture.

681. Both Mr Radebe and Manyike are in agreement that a presentation was given regarding the asbestos audit which was attended by Mr Sodi, Mr Mpambani, Mr Martin Zwane and Mr Manyike (whom Radebe described as the Project Manager of Mastertrade).[531]

682. Although there are disputes between Mr Radebe and Mr Manyike regarding job titles, contractual relationships and funding, what they are in agreement about is that there were quotations, discussions about profits and documents drawn up. At the end of the day Mr Radebe states that Mastertrade quoted R44 208 567,90 (forty-four million, two hundred and eight thousand, five hundred and sixty seven Rand and ninety cents) to the Joint Venture on 10 August 2014 which was accepted on 25 October 2014.[532] Mr Manyike states that it was he who drafted this quote.[533]

683. Mr Radebe claims that he was to pay Mr Manyike R 5 million (five million Rand) as a Project Manager fee plus all expenses[534]. Mr Manyike claims that the fees due to Ori Group (Pty) Ltd were finally contracted for with Mastertrade in an amount of R21 319 489.30 (twenty one million, three hundred and nineteen thousand, four hundred and eighty nine Rand and thirty cents),[535] as set out in the letter of appointment from Mastertrade of 31 October 2014.[536]

684. Mr Manyike gave evidence that he was satisfied with the sum of just over R21 million which he had agreed with Mastertrade as his expenses would be in the region of

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[530] Transcript 7 August 2020, p 72.
[531] Exhibit TT7, p 7 and Transcript 7 August 2020, p 9-10.
[532] Exhibit TT7, p 8.
[533] Exhibit TT4, p 10.
[534] Exhibit TT7, p 9.
[535] Exhibit TT4, p 11.
[536] Exhibit TT14.2, p 91.

R9 million to R10 million with some R11 million remaining as fees.[537] Mr Radebe stated that his expenses totalled in the region of about R27 million.[538] This would result in a profit of some R17 million on this sub-contract to the Asbestos Eradication Project in the Free State.

Work Done

685. Both Mr Radebe[539] and Mr Manyike[540] set out in detail what work was involved when an Asbestos Audit and assessment and an Asbestos removal process was conducted. Mr Radebe made it clear that the remedial work involved in the asbestos removal process required the "expertise of an engineer" and other specialists. Mr Manyike detailed the work which was done to conduct the assessment on this particular project.

686. Mr Radebe said: "I am however not aware of any asbestos that have ever been removed as a result of any asbestos audits in South Africa".[541] He said he wished to make it clear that "Mastertrade has never been involved in nor [is he] aware of any asbestos eradication process in South Africa that progressed into a second and/or third stage".[542] Mr Manyike told the Commission merely that "we know that in this project not a single asbestos roof has been removed".[543]

687. From the point of view of Mr Manyike, his organisation did all the work in the field (except for some work done by professionals employed by the Joint Venture the details of which were unknown to him.[544] From the point of view of Mr Radebe, he worked with municipal councillors and making certain payments. Mr Radebe seems to have conceded that his

[537] Transcript 7 August 2020, p 70, line 7.
[538] Exhibit TT7, p 10.
[539] Exhibit TT7, p 5-8.
[540] Exhibit TT4, p 14-21.
[541] Exhibit TT7, p .5
[542] Exhibit TT7, p 5.
[543] Transcript 7 August 2020, p 51, lines 11-12.
[544] Exhibit TT4, p 16.

role was to "inform and engage with the local municipality (the Councillors, Speakers etc.)",[545] oversee the project, arrange finances and report to the Joint Venture.

688. The details of the work done in this Free State Asbestos Eradication Project are set out in the affidavit of Mr Manyike and discussed further in his evidence. It may be briefly summarised. Aerial photographs of relevant areas in the Free State were viewed in order to identity areas where asbestos roofed houses were located; thereafter, on site verification was needed to verify this desktop analysis. One hundred and eighty-four fieldworkers were hired from local communities to do physical inspections of houses; more senior staff such as quality assurers, assistant, district and senior project managers and a Geographic Information Systems (GIS) specialist were hired. The fieldworkers were trained over a period of four hours on how to identify asbestos, how to identify cracks, type of material used to build walls, if a house was plastered, type of roofs, type of house. Fieldworkers were supplied with Samsung or Huawei tablets to enable them to take pictures, geo-reference and fill in questionnaires.

689. Mr Manyike detailed the equipment accessed or purchased to enable the work to proceed. He specifically made mention of a software programme, ArcGis, for which a licence was obtained by Mastertrade for Ori Group (Pty) Ltd to utilise several applications for management and business purposes. One application used by Ori Group (Pty) Ltd assisted the field workforce to improve accuracy and currency of spatial data.

690. According to Mr Manyike, fieldworkers audited 302 644 houses over the period of November 2014 to February 2015 taking images and completing questionnaires. These were all then synchronised and processed and quality controlled. Individual reports

[545] Exhibit TT7, p 3.

were processed for each house. GPS coordinates for houses containing or suspected of containing asbestos were logged.

691. In the course of his evidence,[546] Mr Manyike explained that fieldworkers did not enter a house suspected of being roofed with asbestos but recorded, from outside the house, observations on the physical condition of the house whether linked to asbestos or otherwise. He said that the audit was not to identify houses which might contain asbestos inside (fascia boards, pipes etc.) because that is the responsibility of the Municipality and not of the Department.

692. Mr Manyike commented that the fieldworkers were matriculants who could read and write and could "demonstrate understanding" and concluded that "anyone with competency can do an assessment".[547] Mr Manyike said that it was estimated that these fieldworkers would take no more than five minutes to audit one house and each would be paid R6,50 per house.

693. Mr Radebe's understanding of the audit, as set out in his affidavit, confirms the evidence of Mr Manyike in that process of the audit was for the fieldworkers to take a photograph of the house, record the GPS coordinates, record the structural damage to the house and upload the information to the Cloud via their iPad. This information was then to be analysed by project managers and incorporated into a report for the Department.[548]

694. Mr Martin Zwane of Zenawe was identified by Radebe as being "Project Manager of Blackhead"[549] and by Mr Manyike as having been described to him by Mr Mpambani as "Mr Sodi's right hand man."[550] Mr Martin Zwane made a statement confirming that he

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[546] Transcript 7 August 2021, p 65–67.
[547] Transcript 7 August 2020, p 67, lines 3-5.
[548] Exhibit TT7, p 6.
[549] Exhibit TT7, p 7.
[550] Exhibit TT4, p 6; para 27.

checked in with the fieldworkers and assessed the reports produced by Mastertrade and thereafter provided feedback to Blackhead Consulting/Diamond Hill Trading.[551]

695. Mr Sodi stated that "Ori Group (Pty) Ltd carried out virtually all of the work on the ground."[552] He understood that the work was conducted by Mr Manyike, Mr Martin Zwane and Mr Steve Modau[553]. According to Mr Sodi, it was these three who were responsible for drafting the Final Report and that he and Mr Mpambani only perused portions of that report.[554] In fact, Mr Sodi stated that he did not know how many reports were actually prepared or issued to the Free State Department of Human Settlements on behalf of the Blackhead/Diamond Hill Joint Venture.[555]

696. The Final Report presented by Mr Mpambani on behalf of Blackhead Consulting dated either 3 or 15 February 2014[556] contains many annexures (photographs and maps) and the value thereof will be discussed in a later section of this Report.

Competitive Bidding and Cost

697. Fundamental to this Free State Asbestos Eradication Project from the outset was the need to avoid any open or transparent process to conclude the contract and implement same. This impact of this fundamental flaw in the entire project is to be found in the evidence of both Mr Radebe (affidavit and interview) and Mr Manyike (affidavit and evidence to the Commission).

698. Mr Radebe deposed to an affidavit in which he described how Mastertrade had acted as a sub-contractor for another company performing asbestos audits. At the time, 2012/2013 Mr Radebe said that Mastertrade had "audited about 280,000

[551] Exhibit TT13, p 9.
[552] Exhibit TT8, p 17.
[553] Exhibit TT8, p 18.
[554] Exhibit TT8, p 18.
[555] Exhibit TT8, p 19.
[556] Exhibit TT14.2, p 200.

houses/units".[557] Mastertrade never received contracts from Government and, as a general rule, Mastertrade "normally act as a sub-contractor on Government contracts."[558]

699. Mr Manyike told the Commission that this was the third or fourth such project in which he had been involved.[559] Had the Department of Human Settlements invited open bids he would have tendered for the job but, as a medium size company, he would have had to have "partnered with someone with financial muscle"[560] because Government looks at the financial position of those who tender and Ori Group (Pty) Ltd could meet every requirement "but the down payment and guarantee".[561] His experience is that medium sized companies "like us" "somehow we get squeezed out".[562]

700. Mr Manyike said that, although he was aware of how much "consultants charge to get this"[563] and he "was aware of the rate which was offered by Gauteng",[564] he would "always charge ten per cent of their amount – for me it is fair and then it is profitable".[565] Mr Manyike said that he could charge "between ten to fifty percent of what Gauteng paid or the Free State I will still make a profit".[566] He told the Commission that he was paid R147,36 per house to conduct the audit and assessment and "I was comfortable with that R21 million".[567]

701. Avoidance of an open competitive bidding process enables exactly that which appears from this Asbestos Contract between the Blackhead/Diamond Hill Joint Venture and the Free State Department of Human Settlements. Not only is no careful consideration

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[557] Exhibit TT7, p 2.
[558] Exhibit TT7, p 3.
[559] Transcript 7 August 2020, p 26, line 17.
[560] Transcript 7 August 2020, p 30, line 21.
[561] Transcript 7 August 2020, p 32, lines 8-10.
[562] Transcript 7 August 2020, p 31, lines 17-18.
[563] Transcript 7 August 2020, p 27, lines 11-12.
[564] Transcript 7 August 2020, p 28, lines 6-7.
[565] Transcript 7 August 2020, p 27, line 19.
[566] Transcript 7 August 2020, p 33, lines 15-17.
[567] Transcript 7 August 2020, p 80, line 9.

given to the need, outcomes or value of such a project. The cost to the tax payer balloons to the greatest extent possible without regard to any real expense or value.

702. The concessions of both Mr Mokhesi and Mr Sodi that the use of "middlemen" who added their "mark-up" added no value and only increased the cost of the project have already been discussed. The evidence of those who were actually engaged in execution of the Asbestos Eradication Project illustrates this extraordinary charge on the fiscus.

703. The figures offered by each party are subject to criticism and fail to satisfy arithmetical or common sense scrutiny. However, the sums given by witnesses are revealing.

704. Mr Manyike believed the actual work which he did, cost him about R10 000 000 or R11 000 000(ten or eleven million Rand). He was to be paid R21 000 000 (twenty-one million Rand) which left him with what he considered to be a "fair" profit of about R11 000 000 (eleven million Rand). Mr Radebe was paid R44 000 000 (forty-four million Rand) from which he says his expenses were R27 000 000 (twenty-seven million Rand) leaving him with a profit of R17 000 000 (seventeen million Rand). It would seem that Mr Radebe included the cost of Mr Manyike in his calculations which means that the total expended between the two of them, Mr Manyike and Mr Radebe (via Ori Group (Pty) Ltd and Mastertrade), is claimed to be a total of about R27 million.

705. The Blackhead/Diamond Hill Joint Venture was to be paid R255 000 000 (two hundred and fifty-five million Rand) by the Department from which it paid the subcontractors approximately R44 000 000 (forty-four million Rand) to execute the project. Mr Martin Zwane was allegedly paid R600 000 and Mr Steve Motau R1.2 million. Mr Motau on occasion would provide technical engineering input. He was appointed by Blackhead precisely for this purpose. Once reports had been completed by Mr Motau, they would be handed to either Mr Mpambani or Mr Sodi. The total profit of the Joint Venture would be in the region of R210 million (two hundred and ten million Rand).

706. When it was pointed out to Mr Mokhesi that the company which tenders for government work and then subcontracts it out at a much lower price makes a huge profit merely for intervening as the contracting party, even he, Mr Mokhesi, was constrained to admit to the Commission that "contractors are becoming very creative".[568]

Oversight

707. The Commission was told of certain of the procedures which are required to be followed. They involve inspections, approvals, invoices, verification of such invoices, payments. It does not appear that all, or any, were followed as required.

708. Mr Matlakala stated that it was the Chief Financial Officer (CFO) who approved the invoices from the Joint Venture but that he was not the one who certified that the work had in fact been performed. He stated "the end-users for e.g. Project Management Unit are the ones who must confirm as to whether the work has been done"[569] and stated that he thought the person involved in the Asbestos Audit was Mr Makepe.

709. Mr Makepe stated that the "Procurement Management Unit staff monitors projects undertaken by the Department of Human Settlements. These are mainly the construction of houses (RDP houses) and installation of water and sewer networks etc. The Procurement Management Unit handles the execution of projects by reviewing/inspecting the work done by service providers for compliance with technical standards and specifications as well as programme (delivery times) and budgets."[570] Each project had a project manager and he recalled that the project manager for the Asbestos project was Mr Thasi Phomane who reported to Mr Makepe.

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[568] Transcript 28 September 2020, p 52, lines 1-2.
[569] Exhibit TT3, p 14.
[570] Exhibit TT12, p 4.

710. A representative of the Procurement Management Unit should conduct spot checks of the work being done. It appears that these were done only visually and there was no testing of or on the asbestos itself. It cannot, therefore, ever be stated that any or no asbestos was ever found on those units identified as being roofed with asbestos.

711. According to Mr Makepe, there were some four or five feedback meetings with Mr Manyike and Mr Martin Zwane, identified as "the project managers" and whom he understood represented the Joint Venture.[571]

712. Mr Makepe referred to the inauguration of this Asbestos Audit on 6 November 2014 when there was a "kick-off meeting" at which Mr Makepe, Reverend Ngkome represented the Department while Mr Manyike, Mr Martin Zwane and Mr Mpambani as well as another man all represented the Joint Venture.[572] At this meeting, the Procurement Management Unit accepted the programme of works prepared by the Joint Venture. There was discussion about recruitment of fieldworkers and interaction with communities.

713. Mr Makepe stated that Mr L Moekoa, an employee of the Department, would "visit the houses that were inspected by the JV." He emphasised that "this was not on a regular basis". Mr Moekoa was trained by ESRI which is a GIS company but "he is not an expert on asbestos." According to Makepe, "on a sample basis we would also make sure that a house identified by the Joint Venture as containing asbestos material, indeed contained such asbestos material".[573] Mr Makepe made it clear that "the identification of Asbestos was visually based and no testing was performed on the Asbestos itself. The Procurement Management Unit used the photographs and the GPS coordinates as

[571] Exhibit TT12, p 7.
[572] Exhibit TT12, p 8.
[573] Exhibit TT12, p 14.

supplied by the Joint Venture to identify the existence of Asbestos along with random spot checks".[574]

714. Mr Makepe believed that there may have been four or five feedback meetings with project managers from the Joint Venture.

715. The dates, times, attendances, documentation submitted, discussions which ensued are not apparently recorded in any minutes.

716. According to Mr Matlakala, Mr Makepe, the Chief Engineer for the Project Management Unit, was required to confirm whether or not the work had been done.[575] There is no documentation certifying what work had been done and to what standard. Absent, physical check on units, inspection and oversight of the work as it was done, testing for the presence or absence of asbestos, minutes of meetings, production of detailed and full progress reports, such confirmation is clearly impossible to make.

Schedule of Payments

717. The Instruction to Perform Work dated 2 December 2014 from Mr Mokhesi to the Joint Venture set out the period of appointment as 1 December 2014 to 31 March 2015, the requirement for a completion report and details as to when and in what amount the percentages of the total project cost would be payable: 40% of the 50% of the total project cost (R51 000 000 excluding VAT) (fifty one million Rand) payable on commencement (1 December 2014) (subject to submission of a valid tax invoice and valid tax clearance certificate); 60% of the 50% of the total project cost (R76 500 000 excluding VAT) (seventy six million five hundred thousand Rand) was going to be payable upon the issuance of VAT progress certificate no 2 on or before 1 March 2015;

[574] Exhibit TT12, p 15.
[575] Exhibit TT3, p 14-15.

40% of the 50% of the total project cost (R51 000 000 excluding VAT) (fifty one million Rand) was going to be payable upon the issuance of progress certificate no 3 on or before 1 May 2015; 60% of the 50% of the total project cost (R76 500 000 excluding VAT (seventy six million five hundred thousand Rand) was going to be payable upon the issuance of progress certificate no 4 subject to the submission of the final project report on or before 1 June 2015.[576]

718. Mr Makepe confirmed that the Finance Unit would not pay an invoice if there had been no verification of such work by the Procurement Management Unit.[577] The Procurement Management Unit had to certify or verify the work for compliance and milestones achieved. Only then would the Finance unit consider effecting payment.

719. Every claim for payment had to be accompanied by a report and detailed verification of the reason why amounts were charged.

720. The Joint Venture relied upon the documentation submitted to it by the Ori Group (Pty) Ltd to Mastertrade which then passed it on to the Joint Venture. However, the documentation does not always tally. In fact, the costing by Mastertrade of expenses of some R27 million has not been substantiated. VAT returns have not been furnished.

721. Reports were seldom, if ever, prepared and presented; when they were prepared, they provided insufficient detail to establish the justification for payment; the information contained therein did not always correlate with the amounts claimed; there is doubt as to the veracity of the work claimed to have been done and the cost thereof.

722. The response of Mr Mokhesi to the office of the Public Protector was merely to state "being not responsible for the accounting side of things it should surely have been the

[576] Exhibit TT14.2, p 195.
[577] Exhibit TT12, p 5.

responsibility of the Finance Department to identify the irregularity in the invoices".[578] It would appear that Mr Mokhesi was either completely ignorant of his duties as Head of Department or chose to deliberately ignore his responsibilities as Accounting Officer thereof.

The Prepayment of R51 00 000 (fifty-one million Rand)

723. Treasury Regulation 15.10.1.2(c) provides:

> "sound cash management includes – (c) avoiding prepayments for goods or services (i.e. payments in advance of the receipt of the goods or services) unless required by the contractual arrangements with the supplier."

724. The issue of payments was not addressed by Mr Mokhesi at all. There is no indication why it was ever necessary or considered advisable to make an advance payment in any amount at all, let alone R51 million, to the Joint Venture before they had even supposedly commenced work on the project.

725. Mr Mokhesi told the Commission that there were no prepayments and that "all payments made were effected after services had been rendered in the project. This also applies to the initial payments that were made to the JV."[579] His view was that where a contract authorised payment in advance of work being done, then that payment was not an advance payment[580] but compliance with the terms of the contract.

726. Thus there were invoices in the amount of R92 500 000 against which the payments in the following year, 2016, could be correlated.

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[578] Exhibit TT14.1, p 55.
[579] Exhibit TT2.1, p 21.
[580] Exhibit TT2.1, p 21.

727. In all, the contract was in the total amount of R255 million, invoices totalling R142.5 million were certified and a total of R230 million was paid over by the Department of Human Settlements over the period 22 December 2014 to 4 August 2016.

728. The documentation and supporting documentation maintained and provided by the Free State Department of Human Settlements indicate that the invoices submitted by the Joint Venture made no provision for VAT (not in accordance with the costing provisions of the original proposal, the revised business plan or the Instruction to Perform Work; the invoices are not numbered in a proper sequence and contain only one line descriptions with no evidence of detailed cost breakdowns or any other support justifying submission of the invoice or payment thereof; payments were made without any evidence of the existence of a progress report.

729. Notwithstanding that, Mr Makepe stated that payments would not be made by the Finance Department without the Project Management Unit having certified "compliance" and "milestones achieved", Mr Makepe only certified some R142.5 million of the R230 million paid. However, in respect of even those payments which were certified by Mr Makepe, there is inadequate documentation indicating the basis for such certification. In fact, in one instance documents were included in support of entries which do not pertain to the work purportedly performed by the Joint Venture.[581]

730. The Free State Department of Human Settlements paid to Blackhead/Diamond Hill Joint Venture's FNB bank account the total sum of R230 million.

731. From the bank account of the Joint Venture funds were then transferred as follows[582]:

[581] Exhibit TT18, p 34.
[582] Table found at Exhibit TT18, p 38-39.

731.1. Over the period 2014 to 2016, funds in the amount of R70 863 000,00 were transferred to Blackhead's ABSA bank account;

731.2. Funds in the amount of R112 956 500,00 were transferred to 605 Consulting's FNB bank, an entity owned by Mr Mpambani; and

731.3. Funds in the amount of R 36 483 597,90 were transferred to Mastertrade's FNB bank account.

Value of work done

732. Mr Manyike claimed that four reports were submitted to the Free State Department of Human Settlements - a preliminary report dated 4 December 204, Final Audit Report dated 2 February 2015[583], Report of Houses to be prioritised dated 25 February 2015, Remedial Report dated 2 September 2016[584] as well as a presentation made to the department on 23 June 2015 giving an overview of the project.

The Final Report

733. The Final Audit Report was submitted by the Joint Venture to the Free State Department of Human Settlements on 2 February 2015 with a later version of the same report dated 13 February 2015. This latter report of 13 February claims to have been prepared by Mr Mpambani.

734. The Final Report of 2 February 2014[585] is some 55 pages and is replete with illustrative photographs of houses and maps.

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[583] Exhibit TT14.2, p 198-302.
[584] Exhibit TT4, p 16.
[585] Exhibit TT14.2, p 310.

735. The purpose of the Report is stated to be to make information available to the Free State Provincial Government regarding the number of houses that contain asbestos roof sheeting and to give an indication of the structural status of the units per stand.

736. The area of works identifies five district municipalities in the Free State with 617 093 stands "walked" and 36 344 asbestos roofed houses identified.

737. The deliverables are outlined as the submission to the Department of an overall summary report for the entire District or Local municipality, a table of findings per township, overall quantification of the extent of the problem in the municipality, a structural integrity report of each house, details of the existing roof supports, an accurate dimensional sketch of a typical house exterior walls, a photograph of each house, drawings for new work, a bill of quantities for new work, construction monitoring.

738. Much space is devoted to a discussion of software development and the marvels of Mobile GIS, GPS accuracy, Web Based mapping.

739. Costs of replacing asbestos roofed houses with concrete tiles or with IBR are given budget allocations per district municipality. The Report concludes with advice where it will be best to commence implementation which would take place over a period of four financial years. It concludes that "the project has been welcome with open hands by members of the community and they are eager to know when will implementation be rolled out."[586]

740. This Final Report comprises Annexure A - "initial data form" consisting of some ten pages being a schedule of "structural assessment" of about 15 units per page; Annexure B – "actual report per stand" consisting of some 13 pages with photographs of a house, a structural assessment report indicating the type of roof material, the roof

[586] Exhibit TT14.2, p 353.

type, the house type, finishes on walls, visible wall cracks, house extended and solar geyser; an untitled annexure with some 40 diagrams of townships in the Free State indicating "asbestos units" in green; Annexure E- ""Fieldworkers Training Manual" consisting of 6 pages of photographs and instructions to take photographs; Annexure F "Labour Statistics" consisting of five pages of the name of the town, fieldworkers employed and name; Annexure H – "Team Photos" consisting of photos of young people wearing red protection jackets.

741. The Final Report of 25 February 2014 purported to report on the foundations of housing structures, defects on walls and roofing. This Report then continues with the advice on the construction of foundations, the differential settlement and excessive movement of foundations, the danger of walls collapsing, structural cracks and the number of houses presenting a possible danger to occupants. Unsurprisingly, the recommendation which follows is to remove asbestos sheeting, demolish certain houses and replace them with structures of a certain quality.

742. The Joint Venture quoted in the region of some R3.8 billion excluding VAT (three billion eight hundred million Rand) for removal of asbestos roofs, demolition and reconstruction of houses, renovation of houses.

743. Absent any actual removal and disposal of asbestos from homes in the Free State, it is necessary to examine the audit and assessment carried out in this R255 million (two hundred and fifty-five million) Asbestos Eradication Project to determine whether value is to be found in various reports presented to the Free State Department of Human Settlements.

744. The details of Mr Roets' critique cannot be repeated in full in this Report but are summarised:

744.1. First, asbestos containing materials can only be positively identified by means of destructive testing which involves taking a sample from the suspected material and sent for analysis to a laboratory. This is because newer types of fibrous materials which include wood, paper, man-made fibre glass etc. are now used to manufacture the same type and style / profile building materials, and they can appear very similar to asbestos containing products. This can make it difficult for even a trained eye to differentiate;

744.2. Second, to Mr Roet's knowledge, there is no handheld instrument that can be pressed against an asbestos sheet to provide identification. Various analytical methods can be employed for the analysis of asbestos in a laboratory. Two of these methods which are commonly used include light microscopy and Fourier-transform infrared spectroscopy;

744.3. Third, a person with a lot of experience in asbestos identification may make a good, educated guess as to whether a substance contains asbestos by close visual inspection. However, visual inspection is not a fully reliable method, and a sample of the suspected material must still be taken and analysed to confirm if the material indeed contains asbestos;

744.4. Fourth, inspectors who do not possess sound knowledge and experience in the field of recognising asbestos containing materials will certainly not be able to give a sound account of asbestos and/or asbestos containing materials with only a visual inspection. This method could easily lead to an underestimation, overestimation or wrong identification of asbestos containing materials, and will not lead to a reliable asbestos assessment;

744.5. Fifth, on reading the training materials provided to the field inspectors working for Ori Group/Mastertrade/the Joint Venture, Mr Roets noted that nothing was

said about what asbestos looks like, or what to look at on asbestos, or anything about alternative materials which may contain asbestos like window sills, fascia boards etc.;

744.6. Sixth, Mr Roets took the view that the identification of the asbestos is not the only task in an asbestos audit or assessment. A risk rating also needs to be assigned to the asbestos depending on the state of the materials and what controls are in place at the time of the assessment. A risk rating is used to assist the owner in identifying higher risk of fibre release and human exposure so that the asbestos can be prioritised for removal. The lower risk materials can then be scheduled for later removal when funds become available. An example of low risk asbestos containing materials is if the asbestos is painted, sealed and labelled, without any drilling having taken place in the materials. In this case the risk of asbestos fibre release for inhalation is minimised, the risk is controlled, and the removal of the asbestos can be delayed until after the higher risk asbestos containing materials have been removed. Mr Roets said that this is crucial information for an asbestos audit process where an entity is developing a plan to remove the asbestos;

744.7. Seventh, if renovation, demolition and/or removal is planned on asbestos containing materials, the law requires that a Registered Asbestos Contractor be contracted to do the asbestos work. An RAC must remove asbestos in accordance with the Regulations and in line with an Approved Plan of Work. A competent person must provide awareness training to all asbestos workers about the legislative requirements, work practices, control measures, use of personal protective equipment, decontamination procedures and waste disposal; and

744.8. Eighth, asbestos waste generated from the removal site must be removed with controls to minimise the risk of generating airborne fibres. An Approved Inspection Authority must be involved with air monitoring and have oversight of any asbestos maintenance or removal activities. Because most asbestos workers perform their duties on buildings and often at great heights, it is also an activity which must be managed under the Construction Regulations. These regulations require strict safety controls e.g. working at height training, fall protection, and fall rescue plans etc.

744.9. Mr Roets was requested to comment on specific aspects pertaining to the Asbestos Audit in the Free State. He did so as follows:

744.10. The output from the whole project is a report which indicates that there are a lot of informal houses in the province with asbestos roofs. This would not assist in any way as a Bill of Quantities. In fact, another project will be required to quantify the risk and provide a Bill of Quantities that can be used in case of a tender for the eradication of the asbestos. Furthermore, nothing is said about the potential risk of exposure to the residents living in the houses identified as having asbestos-containing roofs in the meantime;

744.11. As to whether or not counting houses with asbestos roofs justifies the cost of R850 excluding VAT per house, Mr Roets responded by way of a question. He asked what the value is of knowing how many houses have asbestos roofs, without knowing the condition of the roof of each house, nor how many residences may be at high risk of potential exposure to asbestos, nor what houses should be prioritised for eradication, nor the specific information that a Bill of Quantities would provide in planning for the eradication process? A

proper audit and assessment as described above would have provided this information;

744.12. As to the price of R32 760,00 mentioned in the Joint Venture's proposal for the removal and disposal of the asbestos, Mr Roets provided his own brief costing 5 x 4m = $20m^2$ asbestos roof. Labour cost = R125/m^2 to remove so 125 x 20 = R2 500,00. Personal Protective Equipment and site cost R100 for team of 4 workers per day (4 workers who can remove at least 5 roofs per day with ease (disposable overall R150 + respirator R50 x 4 workers divide by 5 houses. Add R30 for gloves, safety boots, hard hat, goggles which is used over project duration). Waste generated: $20m^2$ x 17kg/m^2 = 340kg let's call it 500kg @ R1000/ton = R500,00. Transport of waste to Gauteng from Bloemfontein example for disposal = R22/km and a truck can take 24 Tons distance return = 900km total truck trip cost R19 800,00. Thus waste for 1 house is R19 800,00 divide by 48 houses (at 500kg /house and 24T per truck) = R413,00. (Variable depending on the type of transport) Total: Labour = R2 500,00. PPE = R100.00. Waste = R500,00. Transport = R413,00. Estimated labour and asbestos cost per roof of $20m^2$ = R3 513,00. One-day accommodation and food per person per day (R700 + R150 + R85 + R85) = R1 020,00 times 4 people divide by 5 houses = R816,00. Therefore, Mr Roets estimated asbestos roof removal cost per house is R4 329,00.

745. As to the quality of the work performed by the contractors, Mr Roets considered the Final Report dated 2 February 2015 and five examples of the houses assessed. He then commented as follows:

745.1. The law requires that a competent person do the assessment. This means someone who has knowledge and experience in identifying asbestos, who can

quantify the potential risk, and who knows what the potential impact of asbestos - containing materials can have on the employee/ residents as well as identify controls implemented to mitigate the risk. As there is a difference in composition of asbestos containing materials and other materials such as Nutec materials, but the materials can look the same, a sample analysis from each house would have been required to properly execute this project – even to give an accurate figure in the report of the number of houses containing asbestos. Mr Roets did not see evidence of any type of sample analysis in the report to confirm any asbestos, type of asbestos, quantity of asbestos fibres and where the asbestos was located in the unit (for example, 54% asbestos in old panels, higher risk and newer panels 14% - lower risk).

745.2. The final report provided that 155 field workers were used during the project. The report is to the effect that one of the challenges to the project was that there were some delays and some problems with workers not pitching up for work. With this in mind 300 000 houses assessed and the reported work time is 31 days. This calculates to approximately 9 678 houses per day to be inspected, 63 houses per person per day, 8 houses per hour and finally 7,5 minutes per house. Then you have to walk between houses and arrange access and log data on a tablet. So, what quality work can one deliver if you are only allowed 2 to 5 minutes per house, let alone identify asbestos.

746. As to whether or not the Final Report dated 2 February 2015 which included details of houses assessed and to the subject of asbestos removal and eradication stage of the project, Mr Roets stated:

> "In my opinion, the report dated 2 February 2015 could not have been of assistance in the removal or eradication phase of the project. As mentioned, one would need a Bill of Quantities to estimate the amount of asbestos to be removed per square

> meter and per weight. Furthermore, in order to manage the project responsibly, the report would need to identify the priority areas, such as the roofs in the worst condition, in order for them to be removed first. This needs to be done in order for the Department to put out a tender to appoint a Registered Asbestos Contractor to complete the work. The size of each house is also important in order for the appropriate quantity of new roofing materials to be sourced, such that the roof may be replaced as soon as the asbestos roof is removed. It would be highly problematic for the asbestos roof to be removed and for the residents of the house to be left without a new roof for any period of time."[587]

747. As to whether or not the Free State Department of Human Settlements received value for money, Mr Roets stated that the only value that the project report added is that it had included a photograph of each house. He said that the sizes given in each report were probably inaccurate as it gave the size of the stand and not the size of the roof. The aerial photographs are available on Google Maps. The size of the stand is available from municipal information. No details were provided on the condition of the asbestos and potential risk of exposure. No accurate information was given on how much asbestos is in each dwelling or in total.

748. In short, the Department did not receive value for the amount paid for this project. The work done by the contractors did not constitute a valuable audit and assessment of asbestos containing materials in the Free State province. In order to proceed to the eradication phase of the project, the audit and assessment process will need to start again from scratch. In this regard, even R20 million for the work conducted would not have given the Department value for money.

749. Mr Roets commented that, if he had to conduct an assessment of about 300 000 houses, he would allocate 15 to 20 minutes per house of this size to enter, inspect and record the relevant information and take a photograph. A team of 7 inspectors (available competent employees) would work 1 700 days at an estimated R20 million to R30

[587] Exhibit TT1, p 15.

million for the entire project and it would probably take Mr Roets' company about 1700 days to complete the work. He said that the biggest Approved Inspection Authority in South Africa is Gijima, who have around 35 inspectors and even for a company as large as Gijima, it would still take 1,5 to 2 years to complete a proper assessment if all inspectors were employed for this project. By contrast, the contractor claims it took 35 physical days to complete its assessment in this case.

750. Mr Manyike told the Commission that he had seen Mr Roets giving evidence on television and was not in agreement with what he had heard. He understood that Mr Roets was "narrating what happens in phase two of the project". Mr Manyike explained that "Phase two is the implementation. Phase one is the inception, conceptualisation, detailed preliminary."[588] Mr Manyike took the view that there is no legislation or regulation concerning phase one – which he said is the phase of the Asbestos project with which he was concerned.

751. It was agreed that Mr Manyike be given the opportunity to study the report prepared by Mr Roets and then return to respond thereto. However, this has not happened. Mr Manyike never returned to the Commission. It must be inferred that, for whatever reason, he decided not to contest Mr Roets' evidence further. He must have realised that he could not challenge Mr Roets' evidence in any credible way.

752. Essentially, Mr Manyike's preliminary comments were that Mr Roets was talking about his experience in implementation whereas the assessment done by Manyike "is one before construction. He said "there is one given at planning stage, that is the one we did".[589] Mr Manyike distinguished between an assessment carried out by an expert whereas "our assessment, as I understand it, is about the – looking at the house to say

[588] Transcript 7 August 2020, p 51, lines 2-3.
[589] Transcript 7 August 2020, p 53.

was there a crack on the house, can this house still stand – if they lift the roof".[590] He explained: "we are not assessing the asbestos, we are purely identify[ing] the asbestos and you reference it as to where it is, how many are there, asbestos, where are they, what size and so forth and how far are they from the landfill sites where they must be disposed of."[591]

753. Mr Manyike disagreed that it was necessary to go inside a house to carry out an assessment. He said that, after all his group was not testing the asbestos but identifying it. He said that his fieldworkers looked at the shape and the colour of the roof to find asbestos. He said that the assessment part of the process pertained to the "structure, the integrity of the house".[592]

754. This contract between the Joint Venture and the Free State Department of Human Settlements was concluded without any competitive bidding process. The outcome in the implementation of the contract is that the service providers, the scope of work, the execution, the cost and the payments are all equally and fatally compromised.

755. Neither member of the Joint Contract was scrutinised at all to ascertain their suitability or capacity to enter into such a contract. No one in the Department had heard of Diamond Hill and no investigation was conducted into the existence, registration, VAT compliance, expertise, capacity or suitability to enter into this project. Blackhead was known as a service provider in Gauteng, but again no consideration was given to the skills or expertise of Blackhead.

756. Interestingly, there was no attempt to inquire into the success or otherwise of the Gauteng Asbestos Audit and whether or not Blackhead had performed well on the

[590] Transcript 7 August 2020, p 54.
[591] Transcript 7 August 2020, p 55, lines 4-10.
[592] Transcript 7 August 2020, p 58-59.

project and had produced value for money. There is no evidence that thought was ever given to any evaluation of the Gauteng project and its outcomes.

757. Not only was no enquiry made as to the outcomes in the Gauteng project but, as already pointed out, the Commission has not been referred to any meetings, discussions, research of the Free State Department of Human Settlements or consultations with experts in this field of asbestos. This was a project entered into in secret. It was also a contract concluded and implemented in great haste. There was thus no deliberation on the purpose of, the need for or the outcomes wanted from such an Asbestos project. There was no regard for the identity, skills and capacity of the service provider. There was no real interest in or care for the terms of the contract whether the actual work to be done or the cost thereof. There was no oversight of the implementation of the work purported to be done.

758. The result is that Diamond Hill had no background which would have qualified that entity to be part of any contract with the Free State Department of Human Settlements, let alone an asbestos eradication project. Neither Diamond Hill nor Blackhead was qualified or accredited to work with asbestos in the manner which they had proposed and which was the basis upon which they were appointed.

759. The answer to the question what the contract was for depended on who asked. Sometimes it would be said that the contract was for the audit and assessment of asbestos and for the removal and disposal of that asbestos. Sometimes it would be said that it was only for the audit and assessment of asbestos. Sometimes the service provider was to be paid one amount and sometimes another amount. Interestingly, the sum to be paid, an amount per house, did not depend on the nature of the work to be done. It could be R850 (eight hundred and fifty Rand) per house to audit and assess

that house and remove and dispose of asbestos from that house, or it could be R850 (eight hundred and fifty Rand) per house only to audit and assess a house.

760. This disregard for the most important substance of the contract - the need and purpose, the work to be done, the cost of the work - all suggests that there was no real interest in any outcomes to be gained by the Free State Department of Human Settlements from this contract.

761. The Joint Venture never disclosed that all work would be done by one or more subcontractors and the Free State Department of Human Settlements never enquired who would do the work and never noticed who was doing the work. The use of subcontractors may indeed be standard practice in government work, as stated by Mr Manyike, but none have disagreed that this increases costs exponentially as the middleman or negotiator or project manager, adds on a percentage for his services.

762. With such lack of interest in the contract and lack of oversight of the implementation of the contract, it is unsurprising that the Free State Department of Human Settlements failed to enquire or chose not to notice the arithmetical disparities in the actual cost of the work and the various amounts paid to all those who came to feed at the trough.

763. The work appears to have cost no more than about R15 million (fifteen million Rand) if one allows for some expenses incurred by Zenawe and Mastertrade. The figure of R44 million was paid to Radebe (Mastertrade) who paid R21 million to Mr Manyike (Ori Group (Pty) Ltd). There may have been some expenditure to justify Radebe claiming to have spent R27 million in total. Perhaps some funds were spent by Mr Martin Zwane of Zenawe who received R1.5 million. Possibly Blackhead spent money on Mr Modau for as yet unknown services.[593] Thus, for actual costs of perhaps R15 million on the

[593] Mr Martin Zwane stated that occasionally engineering input was provided by Mr Steve Modau, whom Martin Zwane believes was appointed by Blackhead (Martin Zwane affidavit dated 28 October 2019 para 26, FS2 226).

Asbestos project, the Department handed over R230 million of taxpayer's money and was prepared to pay R255 million.

764. Profits were pocketed by all concerned. Ori Group (Pty) Ltd claimed to have received R21 million and made a profit of about R11 million; Mastertrade was paid R44 million and claimed to have expended R27 million on Ori Group (Pty) Ltd and itself, leaving a profit of R17 million. Mr Martin Zwane received R1.5 million but has not disclosed his profit. Blackhead and Diamond Hill (in the guise of their Joint Venture) would have made an estimated profit of some R211 million but only received some R186 million in profit.

765. That these calculations are approximations is an indictment of the Free State Department of Human Settlements. Full records of all estimated costings and budgets do not apparently exist for any party – the Joint Venture, or the subcontractors Ori Group (Pty) Ltd of Mastertrade. There is apparently neither documentation nor proof of all expenditure from or by any party. The invoices reveal nothing. This suggests that this project was, from beginning to end, not intended to be one for proof of value and expenditure in production of value but merely a project for extraction of and payment of money to the Joint Venture by the Free State Department of Human Settlements.

766. It should be mentioned that the demise of Mr Mpambani and his inability to assist the Commission either with documents or personal testimony is not the source of the problem. Mr Mpambani was only one individual in a Joint Venture comprising a registered company Diamond Hill, doing billions of Rands in business. The Joint Venture and all its constituent parts had a duty and obligation to keep full and proper records of all business dealings and financial transactions.

767. Mr Sodi's protestations of reliance upon Mr Mpambani and ignorance about detail are unconvincing. His explanations are unconvincing and his excuses do not ring true. Mr Sodi lacked credibility and was dishonest in his evidence in a number of respects.

768. The Free State Department of Human Settlements continued upon its pursuit of failure when there was no regular and documented inspection of work done, no scrutiny of reports presented, no demand for information when incomplete invoices were presented. Instead, payments were made almost upon demand.

769. That payments continued to be made months after the office of the Auditor-General had flagged this Asbestos project on 1 July 2015 and had attempted to curtail further expenditure of taxpayers' money thereon speaks to more than just lack of care and incompetence. It is a clear expression of deliberate disregard for instruction by the office of the Auditor-General.

770. Such conscious and calculated avoidance and flouting of all legislation, regulations, protocols and procedures from the moment of receipt of the Proposal to these final payments made to the Joint Venture suggests malfeasance on the part of officials in the Free State Department of Human Settlements in collusion with the Joint Venture.

"COST OF BUSINESS" SCHEDULE - SECRET BENEFICIARIES

771. A spreadsheet[594] entitled "Cost of Business" contains a schedule of payments to various entities or persons some of which or whom are identified only by initials. Against each name is recorded a sum of money in Rands ranging from R1 million to R10 million. The "Total Cost of Business" is added up to the sum of R82 608 567,90 (eighty-two million, six hundred and eight thousand, five hundred and sixty-seven Rand and ninety cents). The Project Value is recorded as R255 million (with R127.5 million to be paid to the Joint Venture over 2 financial years, that is 2013-2014 and 2014 to 2015). Against the R255 million the Total Cost of Business amount, as scheduled, is set off (R82 608 567.90) resulting in a "Project Value-Cost of Business" of R172 391 432,10 (One hundred and seventy-two million, three hundred and ninety-one thousand, four hundred and thirty-two Rand and ten cents). From this "Project Value" amount it is itemised that R86 195 716,05 (eighty-six million, one hundred and ninety-five thousand, seven hundred and sixteen Rand and five cents) each is allocated to Blackhead and Diamond Hill.

772. The schedule also contains three columns entitled "1st payment", "2nd payment" and "3rd payment". Sums are identified against all but one of the names, under one or more of those columns.

773. Mr Sodi explained that he and Mr Mpambani had a discussion about the preparation of this document which was to set out the costs of the project. Mr Sodi said that after the discussion he left his office for another meeting in the boardroom and, in his absence, Mr Mpambani prepared this "Costs of Business" schedule on Mr Sodi's own computer.[595] The purpose of the spreadsheets, said Mr Sodi, was to indicate "how much

[594] Exhibit TT8, p 123.
[595] Transcript 19 August 2020, p 133, lines 18 -22.

the project is going to bring in revenue".[596] Mr Mpambani then told Mr Sodi that he had emailed the spreadsheet from Mr Sodi's computer to his own because he had further work to do on the document.

774. On 28 March 2015 Mr Mpambani sent an email to Mr Sodi[597] addressing him as Eddie and asking him to note that the payments highlighted in yellow were the ones for Mr Sodi to "take care of" and the rest would be dealt with "as discussed". He, that is Mr Mpambani, said that he had "effected the payments in two batches." In his evidence Mr Sodi said that he recalled receiving this email.[598]

775. Mr Sodi told the Commission that he had first seen the "Cost of Business" schedule in the course of discussions with investigators of the Commission. Mr Sodi said that he was surprised to see that he was only getting the sum of R86 million when he had expected to receive R103.5 million.[599] However, as noted above, Mr Sodi also stated that he was aware that Mr Mpambani had prepared the spreadsheet on his (Mr Sodi's) computer in his officer.[600]

776. The "Cost of Business" spreadsheet indicates payments made to "Mastertrade" (R44 298 567,90), "Martin" (R1.5 million), "Steve" (R1.2 million).

777. Mr Sodi told the Commission that he "did not look at the spreadsheets"[601] and denied emphatically any knowledge of any of the other payments reflected on this "Cost of Business" schedule. He stated that "no money should have gone to any other person" and that there was "no one else who was paid from the funds that went into our account

[596] Transcript, 19 August 2020, p 136, lines 13-25.
[597] Exhibit TT8, p 283.
[598] Transcript 19 August 2020, p 138, lines 1-4.
[599] Transcript 19 August 2020, p144, lines 18-23.
[600] Transcript 19 August 2020, p 133.
[601] Transcript 19 August 2020, p195-196.

not a single individual" and "there's no payments that were paid from the J(oint) V(enture) because…I was the signatory to the account".[602]

778. Since the schedule contained those payments which were made to persons or entities openly and legitimately identified with the Asbestos Audit, it was unusual to find payments made to other entities or individuals which or who were only identified by initials such as "TZ", "TM", "AM", "JT" and others.

779. It was put to Mr Sodi that a businessman such as himself would have been interested in the costs incurred by the business and he merely responded "I didn't pay attention".[603]

780. It has always been common cause that the Joint Venture Agreement[604] provided for all profits to be shared equally. At paragraphs 2 to 4 of the Joint Venture Agreement it was recorded that the works were to be "split on a 50/50 basis" and at paragraph 5 that "All the costs, (direct and indirect as agreed by both parties) incurred by either party prior and/or during the duration of the contract will first be deducted before any disbursement of funds or profit sharing". As Mr Sodi confirmed in his evidence, "we knew what the costs were going to be … what then would have remained was an amount that would be shared equally between the two parties".[605]

781. When asked why those payments were not paid out of the bank account of the Joint Venture if such payments related to the cost of the business, Mr Sodi could only respond "I didn't pay attention".[606] He was unable to answer the question that a legitimate cost of the business would be paid out of the joint account merely responding "I did not pay

[602] Transcript 19 August 2020, p 149, lines 9-20.
[603] Transcript 19 August 2020, p 150, lines 7-8.
[604] Exhibit TT8.1, p 80.
[605] Transcript 19 August 2020, p 146.
[606] Transcript 19 August 2020, p 150, lines 7 and 24.

attention to that email...I did not see the part where he says the one highlighted in yellow must be paid by you".[607]

782. Mr Mpambani's email indicated that he had discussed this issue with Mr Sodi who confirmed that there had been discussions. When it was pointed out that a businessman would want to see that Mr Mpambani had correctly recorded the position, Mr Sodi had no answer.

783. Mr Sodi told the Commission that he knew of no person with a legitimate claim to any payment.[608] Unfortunately, his business partner appeared to have known a number of people who were to be paid more than R25 million from their Joint Venture business about whom Mr Sodi knew nothing.[609]

784. It was pointed out to Mr Sodi that the only persons whom he knew were those persons whose payments appear to be legitimate business expenses but that he did not know even one of those whose payments were suspect. Mr Sodi responded that "maybe this guy had his own arrangements which he did not disclose to me".[610]

785. The difficulty with this response, as pointed out to Mr Sodi, is that it appears that Mr Mpambani did not intend to conceal these other payments from Mr Sodi. After all, Mr Mpambani had discussed the schedule with him, prepared the document on Mr Sodi's computer, returned the completed schedule to Mr Sodi and an accompanying email with advice regarding responsibility for the payments. Mr Sodi agreed that it would seem that there was no attempt at concealment by Mr Mpambani.[611]

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[607] Transcript 19 August 2020, p 150, lines 24 and p 151 lines 4-7.
[608] Transcript 19 August 2020, p 197, lines 11-12.
[609] Transcript 19 August 2020, p 199, lines 1-13.
[610] Transcript 19 August 2020, p 206, lines 8-9.
[611] Transcript 19 August 2020, p 206, lines 16-25.

786. In his evidence Mr Sodi agreed with the proposition that there was an intention on the part of Mr Mpambani to conceal the identity of persons to whom payments were being made. He also admitted that it was reasonable to conclude that Mr Mpambani contemplated illegitimate payments to at least some of the people.

Conclusion on the Cost of Business to the Joint Venture

787. The Commission concludes that Mr Mpambani, representing one party to the Joint Venture, prepared the schedule setting out the Costs of Business to the Joint Venture and that this schedule was sent to, received by and known and understood by Mr Sodi, representing the other party to the Joint Venture.

Beneficiary - "TZ"

788. One set of initials is that of "TZ". The schedule records the sum of R10 million in the "cost of business column". Under the "Year 1" column an amount of R5 million is reflected. The sum of R1 million is recorded under each of the three payment columns (i.e. R1 million – "1st Payment"; R1 million – "2nd Payment"; R1 million – "3rd Payment"): The "3rd Payment" of R1 million is highlighted in yellow, which according to Mr Mpambani's email of 28 March 2015 meant that Mr Sodi was to "take care of" that payment.

<u>The Range Rover – R600 000 (six hundred thousand Rand)</u>

789. On 21 December 2015 a sum of R600 000 (six hundred thousand Rand) was transferred from the personal bank account of Mr Sodi held at FNB to the ABSA bank

account of SMD Trading Group CC (SMD), which is held in the name of Ballito Ford. The credit description of the recipient is referenced as "TZ".[612]

790. Mr SM Duminy, a member of the SMD, confirmed that Mr Zulu was a customer of SMD and that, on 23 March 2016 SMD invoiced a Range Rover 2013 model to Mr Zulu. The SMD invoice indicates the price of the vehicle to be a total of R1 385 964 (including VAT of R194 035,09). A cash deposit of R690 000 was paid towards this purchase price and the balance was financed by Wesbank.[613]

The Explanation

791. Initially, Mr Sodi gave no explanation to investigators for this payment of R600 000 (six hundred thousand Rand) telling the Commission that "the question was not posed to me"[614] and that he did not want to "speculate on initials".[615]

792. In his second affidavit to the Commission,[616] Mr Sodi confirmed that this payment was made by himself to SMD dealership in Ballito, Kwa-Zulu Natal. He explained that he and Mr Zulu had met in about 2011 and had developed a friendship. From time to time he would visit the social venue, known as "TZ Lounge" situated in Pietermaritzburg and, when he did so, it was convenient for him "to also replenish the stock of my bar at my Zimbali home with liquor and soft drinks".[617] During 2015, Mr Zulu's lounge did not have credit card facilities and Mr Zulu extended "a running tab to me because I do not always carry cash with me". At the end of 2015 Mr Zulu informed Mr Sodi that "I had accumulated a bill in the region of R600 000 (six hundred thousand Rand) at TZ Lounge"[618] and enquired when Mr Sodi intended to settle his bill as he, Mr Zulu, was

[612] Exhibit TT6, p 20.
[613] Exhibit TT6, p 21.
[614] Transcript 19 August 2020, p 185, lines 23-24.
[615] Transcript 19 August 2020, p 181, lines 20-23.
[616] Exhibit TT8, p 140.
[617] Exhibit TT8, p 140.
[618] Exhibit TT8, p 140-141.

about to purchase a vehicle. Mr Zulu requested that Mr Sodi make the payment to SMD.[619]

793. Mr Sodi gave a similar explanation in his evidence before the Commission adding that he had bought this alcohol over a period of about six months or so[620] once or twice a month[621] and that it was always in my car; I always took the stuff with me.[622]He did not recall Mr Zulu bringing him a delivery in Zimbali. Initially, he stated in his evidence that Mr Zulu "does not have credit card facilities"[623] and later qualified that "I say that on the number of occasions that I was there, there were no credit card facilities".[624] When pressed on the sum of money involved for the purchase of alcohol over a period of about six months for his holiday home in Zimbali, he told the Commission that "certain types of alcohol are pricey" detailing that champagne costs between R4 000 and R5 000 per bottle and that he is "an avid collector of whiskies".[625]

794. In an interview with the Commission Investigators,[626] Mr Zulu responded that "Sodi made such payment to SMD on my instructions in discharge of a debt due by him to one of my businesses, TZ Lounge, for goods sold and delivered and services rendered during 2015".[627] He stated "supporting documentation and details of all sales to Mr Sodi and other customers are not in my possession. This is due to the nature of the informal business that TZ Lounge has been operating under since its inception. The running of this business does not keep documents as far back as the period under question".[628] Mr Zulu stated that the close corporation has an account with FNB which had provided a credit card machine but he "speculated" that "there may have been instances where

[619] Exhibit TT8, p 141.
[620] Transcript 19 August 2020, p 212, lines 11-13.
[621] Transcript 19 August 2020, p 217, lines 2-6.
[622] Transcript 19 August 2020, p 212, line 11.
[623] Transcript 19 August 2020, p 209, line 8.
[624] Transcript 19 August 2020, p 223, lines 14-16.
[625] Transcript 19 August 2020, p 217-218.
[626] Exhibit TT5.2, p 54.
[627] Exhibit TT5.3, p 6.
[628] Exhibit TT5.3, p 6.

the machine may not have worked as this does happen from time to time but I cannot recall specific instances".[629] "Various ad-hoc third parties would have been used from time to time" to make deliveries but Mr Zulu told the investigators that documentation, details, dates, addresses, vehicles making deliveries were also "not in his possession" by reason of the informal nature of the business.[630] Records of Mr Sodi's debt would have been kept "in writing and by mental note"[631] but no documentation thereof was available.

795. Mr Zulu told the Commission that he had known Mr Sodi before 2014 and that he had been a customer of his business[632] for about three years[633] During this time, he would place "orders of liquor in particular" at the TZ Lounge where food and liquor is sold in Sobantu Township. He said that there "will be diaries where the order is written down and the amounts of money" which "I think it will be about R604 000" and Mr Zulu then went on to offer to the Commission "I could check the diaries".[634] Mr Zulu responded to the question why he had asked Mr Sodi to make payment of this sum for his personal benefit and not to the business by simply stating that he was a sole owner with his wife and saying that "when you run a business for your monies to be paid to you that are owed to you, you use different methodologies".[635] He then complained at some length that the Commission Investigators had failed to ask for documentation which was why he had not provided banking and other information.

796. That Mr Sodi had made payment of the sum of R600 000 out of his own banking account to SMD Trading CC to enable Mr Zulu to purchase the Range Rover was not initially revealed by either Mr Sodi or Mr Zulu in their affidavits or statements to the Commission

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[629] Exhibit TT5.3, p 6.
[630] Exhibit TT5.3, p 7-8.
[631] Exhibit TT5.3, p 7.
[632] Transcript 6 August 2020, p 217.
[633] Transcript 6 August 2020, p 186.
[634] Transcript 6 August 2020, p 187-190.
[635] Transcript 6 August 2020, p 206.

Investigators and only emerged once both were questioned about what had been discovered from Mr Sodi's bank statements and SMD.

797. The explanation offered by Mr Sodi and Mr Zulu is simply false and dishonest. Mr Sodi never bought liquor of that amount from Mr Zulu's business:

797.1. First, TZ Lounge is described by Mr Zulu as a "sports bar" in Sobantu township outside Pietermaritzburg where food and alcohol are sold. Yet, Mr Sodi would have the Commission believe that this is an outlet where he purchases bottles of champagne costing some R4 000 or R5 000 and where "an avid whisky collector" finds products. It is scarcely credible that such premises would stock what can only be imported champagnes and whiskies at all, let alone in sufficient quantities for one such as Mr Sodi to make purchases from stock on hand since there is no suggestion that special orders were placed in advance which would involve the creation of documentation;

797.2. Second, Mr Sodi claimed that he went to the sports bar himself and took the liquor and "it was always in my car" that he transported the boxes of alcohol. These regular visits over the period to TZ Lounge to purchase alcohol were supposedly because he would visit his son in a nearby boarding school or go to his holiday home in Zimbali. Yet, Mr Zulu's written statement to the Commission Investigators specifically stated that the payment for the Range Rover was in discharge of a debt "for goods sold and delivered and services rendered". In fact, Mr Zulu referred in his statement to "orders he will place". However, Mr Zulu was unable to provide any details to the Investigators of vehicles used by TZ Lounge for making deliveries;

797.3. Third, Mr Sodi claims that over a period of about six months he expended some R600 000 or more on alcohol without using a credit card or making a bank

transfer to the close corporation which owned the business. In fact, Mr Sodi told the Commission that "[Zulu] does not have credit card facilities" which was not the version of Mr Zulu who stated that TZ Lounge did have a credit card machine provided by FNB. He could not state when or how often that machine failed to work or which FNB apparently failed to ensure was in working order;

797.4. Fourth, it is unlikely that two businessmen – one operating a large commercial enterprise, Blackhead and the other occupying the high-level of appointment of Director-General in the civil service - would be so informal in regulating their commercial relationship. The one built up a debt of over half a million Rand over a period of some six months. Yet, Mr Sodi and Mr Zulu were supposedly happy to operate on a somewhat casual cash basis;

797.5. Fifth, the amount of that debt is nowhere recorded – at least not for presentation to the Commission. Mr Zulu said that the tally of what was sold and taken by Mr Sodi was kept "in writing and by mental note" and even suggested he was in possession of "diaries" recording same which he never produced. It begs belief that any business would allow such a debt to increase to such an amount with no proof thereof or would dispose of liquor without any stocktaking records. It is noted that business and accounting records for the close corporation operating as TZ Lounge would be expected to be prepared for tax purposes;

797.6. Sixth, the absence of any documentation is supposedly justified on the grounds that the TZ Lounge was operating "on an informal basis... since its inception" stands in contrast to its ability to source and make available bottles costing thousands of Rands and whisky to delight a collector. Given the monetary value of Mr Sodi's custom alone, this was a substantial business;

797.7. Seventh, it is somewhat surprising that Mr Zulu allowed this debt to increase month by month and be rolled over month by month without demand for payment. When, according to Mr Sodi, request for payment was made by Mr Zulu, there was apparently no discussion about the amount involved; Mr Sodi offered immediate payment; Mr Zulu instead asked for payment to be made to a dealership as a deposit on the purchase of the Range Rover. In other words, immediate payment to Mr Zulu was neither needed by Mr Zulu nor made to him personally;

797.8. Eight, the close corporation which owns TZ Lounge, Morow Investments 371 CC, was deprived of over half a million Rand as this was the entity which purchased and sold stock and intended to make a profit. Payment for these goods was never received by the close corporation of which Mr Zulu and his wife are the owners. Mr Zulu claimed that his business at the Lounge was conducted on a very informal basis yet the legal incorporation of the close corporation suggests a sophisticated businessman who was happy to have a sophisticated clientele with expensive tastes;

797.9. Nine, Mr Zulu was indignant throughout the investigation of his affairs and questioning of himself that he was being subjected to his process. This is evidenced at some length in his written responses to the Commission. He was vexed that the Investigators had not themselves pursued documentation even going to so far as to state to the Commission "I would have expected the Commission to have investigated my bank accounts by virtue of the subpoena powers or summons powers that they have at their disposal".[636] Yet, as was

[636] Exhibit TT5.1, p 5.

pointed out to him when he gave evidence, his bank statements would have been silent on this payment made on his behalf to SMD Trading CC;

797.10. Ten, Mr Zulu repeated that he had made a full disclosure of all financial interests and dealings and that the Commission Investigators had failed to ask relevant questions or read relevant documentation. When specifically asked in a letter of 28 August 2020 to provide the relevant documentation in his possession that he had told the Commission hearing that he had not been requested to furnish, he responded "Please find the attached declaration in relation to the payment of the vehicle under question in which the R600 000 is inherently declared. The insinuation that this was an attempt to hide the declared funds is therefore incorrect".[637] The document attached by Mr Zulu to this response is titled "Financial Disclosure Form - Annexure A"[638] for the Financial Year 2016 to 2017 and appears to be a form prepared for his employer since it requires information such as a PERSAL number which is a Government employee reference number and also asks for the name of the Department and salary level. In that document, Mr Zulu has indicated shareholdings in three entities including 100 shares of nil value in TZ Lounge and his ownership of four motor vehicles.[639] Nowhere in this document is there any indication that Mr Sodi or anyone else made any payment to Mr Zulu or on his behalf to any other entity in respect of any asset including any motor vehicle. In short, records pertaining to Mr Zulu remain silent in respect of himself and Mr Sodi and payments made to him or on his behalf;

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[637] Exhibit TT5.3, p 5.
[638] Exhibit TT5.3, p 9-11.
[639] BMW 6 series purchased for R1 600 000 with R500 000 outstanding; Range Rover purchased for R1 212 000 with R500 000 outstanding; Range Rover Lumma purchased for R1 100 000 with R900 000 outstanding; BMW 7 series purchased for R1 100 000 with nil Rands outstanding.

797.11. It is important to reflect the investigation done into the business of TZ lounge, which was carried out after the hearings. The investigation revealed the background into ownership of the tavern, and the existence of the credit card machine. The report also deals with the nature of the business of TZ. The bank statements of Morrow Investments show that it is unlikely that one customer could have accumulated a debt of R600 000 at that time. No proof of stock purchase to support Mr Sodi's orders could be found; and

797.12. The evidence of Mr Sodi and Mr Zulu on the reason for the payment of R600 000 to SMD should be rejected.

Conclusion about the Cost of Business with "TZ"

798. The only conclusion which the Commission can reach is that the story of the indebtedness of Mr Sodi to Mr Zulu in the amount of R604 000 (six hundred and four thousand Rand) by reason of purchases of alcohol at the TZ Lounge is pure fabrication. That fabrication is tendered on a haphazard and facile basis to attempt to explain the payment by Mr Sodi of R600 000 to the motor dealers on behalf of Mr Zulu. The need for justification of such payment is to remove this payment from the ambit of the granting of the Asbestos contract in the Free State between the Blackhead /Diamond Hill Joint Venture and the Free State Department of Human Settlements.

799. Mr Sodi agreed with the proposition put to him that the involvement of Mr Zulu in the Asbestos contract was necessary because he needed to approve the budget adjustment[640] and that he knew that the role of Mr Zulu was to make sure that the contract obtained approval and that the funding for the contract became available.[641] In short, Mr Sodi concurs that the approval of Mr Zulu was essential for the Joint Venture

[640] Transcript 19 August 2020, p 177-180.
[641] Transcript 19 August 2020, p 179.

to obtain both the Asbestos contract and the R255 million (two hundred and fifty five million Rand) the Joint Venture was to be paid.

800. Both Mr Sodi and Mr Zulu admitted that they had each known each other for several years before the contract of Blackhead in a Joint Venture with Diamond Hill was ever mooted. They had not only met but both said they had become friends.

801. It is notable that on his version Mr Zulu saw no impropriety in agreeing to Mr Mokhesi's proposals concerning Blackhead notwithstanding that he was both a supplier of alcohol to Mr Sodi and considered they were friends. Yet, when questioned by the Commission Investigators, Mr Sodi disavowed any knowledge as to any person with the initials "TZ" although at the Commission hearing he agreed that he knew someone with those initials, who had been involved in facilitating the Asbestos project and to whom he had made payment.[642]

802. The payment of some R600 000 supposedly to settle a debt for alcohol is without doubt a fiction.

803. As discussed in some detail above, Mr Sodi and Mr Zulu are asking this Commission to accept that Mr Sodi purchased alcohol of a superior quality and price from a township lounge which in the next breadth is stated to operate on an informal basis.

804. Although there was a credit card machine available furnished by FNB this was not used by Mr Sodi to make payments. Instead no record was ever kept of Mr Sodi's indebtedness save that of "memory" and diary records which do not apparently exist. Two businessmen, both of whom have incorporated their businesses, fail to keep records and allow such indebtedness to accrue over a period of time.

[642] Transcript 19 August 2020, p 185-186.

805. The goods were either delivered by Mr Zulu or taken away by Mr Sodi – depending on who gave evidence but there is no indication of the nature of alcohol, brands, cartons or bottles or any evidence that such purchases were ever made.

806. This purchase and consumption of alcohol allegedly occurred because Mr Sodi was on his way to or from his holiday home in Zimbali or visiting his son at boarding school in the vicinity of Pietermaritzburg. These travels are used to explain Mr Sodi's travelling vast distances to purchase alcohol from a township tavern which just happens to be owned by the man who is Director-General of the Department from whom Mr Sodi hopes to achieve assistance in obtaining a contract.

807. No explanation is ever offered as to why the Director-General of the Department of Housing, based in Pretoria, always managed to be at the TZ Lounge in a Pietermaritzburg township when Mr Sodi passed by and wanted to purchase alcohol.

<u>The Maserati - R1 000 000 (one million Rand)</u>

808. On 26 May 2015 the sum of R1 million was transferred from Blackhead's ABSA bank account to SMD's ABSA bank account, the same motor vehicle dealership in Ballito, Kwa-Zulu Natal where the Range Rover was purchased. The credit description of the recipient is referenced as "Thabani Zulu".

809. In an affidavit Mr Duminy of SMD confirmed that the payment was applied towards the "sale of a Maserati to a Mr Mabheleni Ntuli …"[643] SMD had purchased this Maserati for the sum of R1 554 419.51 (one million five hundred and fifty four thousand, four hundred and nineteen Rand and fifty one cents) and then sold this vehicle to Mr Mabheleni Ntuli (Mr Ntuli) for the sum of R1 888 740.90. SMD accepted a Jaguar vehicle from Mr Ntuli at R1 000 000 (one million Rand) as a trade-in towards the value

[643] Exhibit TT6, p 11.

of the Maserati. Mr Duminy explains that "the R1 million payment made by Blackhead on 26 May 2015 went towards the settlement of the R890 000 on the Maserati that was owed to Mr Ntuli. The excess of R110 000 was retained as Mr Ntuli owed SMD monies under other transactions. In other words, the whole R1 000 000 was credited as indebtedness of Mr Ntuli to SMD."[644]

810. Mr Sodi dealt with the issue of the R1 million payment in his second affidavit. He said that he had loaned Mr Ntuli R1 million in order to further his business. Unfortunately, this was not dealt with in his oral evidence but his version of a loan cannot be accepted without further investigation. Why was there a reference of Mr Zulu in the records of Mr Sodi's company in relation to this payment? Why was it not paid directly to Mr Ntuli?

811. Mr Zulu appeared provoked and somewhat irate in his affidavits and his testimony maintaining "The one million I have no clue about that".[645] However, when pressed with the reference in the payment from the bank account of Blackhead[646] to SMD – "description as per our bank statement: Thabani Zulu" – Mr Zulu explained the connection between himself and this Mr Ntuli who had received the benefit of R1 million from Blackhead under his name.

812. Mr Zulu told the Commission: "I can only speculate that it could be that Mr Ntuli was introduced to [Mr] Sodi by myself"[647] and went on to detail that he knew a person, Mr Mabheleni Ntuli, in "my business that I do in Pietermaritzburg"[648] and that he had known Mr Ntuli as a businessman and "I introduced Ntuli to Sodi"[649] which introduction he said had happened in Gauteng in an unknown year.

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[644] Exhibit TT6, p 14.
[645] Transcript 6 August 2020, p 165, line 19.
[646] Exhibit TT6, p 11.
[647] Transcript 6 August 2020, p 167, lines 4-5.
[648] Transcript 6 August 2020, p 167, line 7.
[649] Transcript 6 August 2020, p170-171.

813. This chain of connections was slowly and reluctantly revealed to the Commission by Mr Zulu. Initially, Mr Zulu was indignant at any suggestion that he, TZ, had any connection with the R1 million recorded on the "Cost of Business" schedule as having been paid or was to be paid to himself as either the first or second or third payment. Then, he denied all knowledge of the payment of the R1 million paid by Blackhead to SMD. However, that payment from Blackhead to SMD was clearly identified as pertaining to himself – "Thabani Zulu" – although the payment directly benefitted Mr Ntuli as part payment for the Maserati. Only then, did Mr Zulu admit that he knew Mr Ntuli. In fact, when it was put to him at the Commission hearing that Mr Sodi's explanation for this is that he just "associated you with Mr Ntuli",[650] he responded: "I can only speculate that it could be that Mr Ntuli was introduced to Mr Sodi by myself" and he then went on to disclose the personal link between all three persons – Mr Zulu, Mr Ntuli and Mr Sodi.

814. Regrettably, neither Mr Sodi nor Mr Zulu revealed more about their connections with Mr Ntuli and why Mr Ntuli received the benefit of R1 million under the rubric of a payment involving Mr Zulu. One cannot help but strongly suspect that this may well have been another kickback for Mr Zulu's benefit but further investigation will be necessary. The Commission's investigators tried to locate this Mr Ntuli over a long period without success.

Beneficiary - "TM"

815. Another set of initials is that of "TM". The schedule records the sum of R5 million in the "cost of business column". Under the "Year 1" column an amount of R2.5 million is reflected. The sum of R1 million is recorded under two of the three payment columns (i.e. R1 million – "1st Payment"; R1 million – "2nd Payment") and R500 000 is recorded

[650] Transcript 6 August 2020, p 166.

in the third column, that is "3rd Payment": The "3rd Payment" of R500 000 is highlighted in yellow, which according to Mr Mpambani's email of 28 March 2015 meant that Mr Sodi was to "take care of" that payment.

Blackhead Consulting pays for Mr Mokhesi's property

816. On 2 April 2015 the sum of R650 000 (six hundred and fifty thousand Rand) was transferred from Blackhead's ABSA bank account to "Kramer Weihmann and Joubert Attorneys" trust account held at FNB. The entity is a firm of attorneys in Bloemfontein carrying out conveyancing work. Ms Aniche Heine from the firm acted as conveyancer in the transfer of a residential property situated at No 5 Wild Olive Heights, Bloemfontein, to the Likemo Family Trust.[651] That transfer was registered on 29 January 2016.[652]The purchase price of the property was R1 640 000 (one million six hundred and forty thousand Rand). The sum of R650 000 from Blackhead was paid as the deposit and the balance was funded by a mortgage registered over the property in favour of ABSA for the sum of R1 million.

817. Mr Mokhesi is the founder, a Trustee and a beneficiary of Likemo Family Trust. This Trust was formed on 4 May 2015.[653] Letters of Authority were issued by the Master of the High Court to Mr Mokhesi and two others on 27 October 2017.[654] Mr Mokhesi signed the offer to purchase the property and all conveyancing documents on behalf of the Family Trust.

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[651] Exhibit TT11, p 1.
[652] Exhibit TT2.2, p 28.
[653] Exhibit TT2.2, p 5.
[654] The delays in the Master's Office are so notorious that no inference can be drawn from the lapse of just over two years in procuring the issue of Letters of Authority from that Office.

818. In the first affidavit Mr Mokhesi furnished to the Commission, he stated "I have never received kickback from anyone in relation to this project, whether through payment of my property bond, children school fees etc."[655]

819. When he was confronted with the documentation in the hands of the Commission Investigators, Mr Mokhesi deposed to a second affidavit with prepared responses to specific questions on this topic. Mr Mokhesi stated:

> "During the time of the Asbestos Audit I became acquainted with Mr Edwin Sodi ("Sodi"). We became friends. As a result of my appreciation of Sodi's business skills and my impression that he enjoyed wealth, I resolved to approach Sodi to join me in the investment in a property transaction, referring to the acquisition of the property referred to in paragraph 6 [residential property situated at No 5 Wild Olive Heights, Bloemfontein]. Sodi was interested whereafter the Likemo Family Trust, represented by myself concluded a commercial transaction . . . It needs to be recorded that at this juncture the Asbestos Audit which was conducted by Blackhead Consulting (Pty) Ltd was already finalized at the time that the transaction was entered into. Sodi, in terms of the provisions of our agreement caused payment of the amount of R650 000 to the trust account of Kramer Weihmann and Joubert Attorneys, in order to settle Sodi's portion of the purchase consideration in respect of the property investment."[656]

820. The agreement entered into between the Likemo Family Trust and Blackhead[657] record reflected that the property had been identified as a potential investment opportunity in which the parties could be interested, that Blackhead would contribute R650 000 (six hundred and fifty thousand Rand) to the acquisition of the property while Likemo Family Trust would raise the balance of R1 000 000 (one million Rand) of the purchase price. The property would be registered in the name of Likemo Family Trust and Likemo Family Trust would be entitled to rent out the property and would manage the rental enterprise with the parties sharing in rental income proportionately. On the sale of the property, each party would receive their initial investment and the capital appreciation

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[655] Exhibit TT2.1, p 26.
[656] Exhibit TT2.2, p 2-3.
[657] Exhibit TT2.2, p 32.

proportionate to their initial investment. There were also arrangements for Likemo Family Trust to pay certain sums to Blackhead should the property not be sold within seven years from the date of the agreement.

821. Mr Sodi's evidence was that he had not initially mentioned this payment by Blackhead to contribute to the purchase of the immovable property registered in the name of the Likemo Family Trust of which Mr Mokhesi and other family members were beneficiaries because he "dealt specifically with the questions that were posed to me." and he "responded to those questions".[658] Mr Sodi now told the Commission that he was a property investor and responded to Mr Mokhesi's proposal of the development. This, said Mr Sodi, was "a perfectly legitimate and above-board transaction".[659]

822. Mr Mokhesi confirmed that this property had not been rented out and was the property in which he himself resided at the time when he testified before the Commission.

823. The explanation offered by both Mr Mokhesi and Mr Sodi for the payment of this sum of money is so incomprehensible that it must be rejected as false:

823.1. The immovable property is registered in the name of only the Likemo Family Trust. The property is registered in the Deeds Office in the name of Likemo Family Trust with a mortgage Bond in favour of ABSA Bank in the amount of R1 million (one million Rand) registered against the property.[660] Blackhead has no interest registered in this property nor claim on this property. Both Mr Mokhesi[661] and Mr Sodi claim to understand and agree with this legal and commercial state of affairs.[662] However, when Mr Mokhesi was questioned why neither Blackhead nor Mr Sodi had rights in this property or any security for the

[658] Transcript 19 August 2020, p 187.
[659] Transcript 19 August 2020, p 228, line 2.
[660] Exhibit TT11, p 15.
[661] Transcript 28 September 2020, p 70.
[662] Transcript 7 August 2020, p 235.

supposed investment and it was pointed out that, should Mr Mokhesi die or the Trust could not pay instalments on the mortgage bond registered over the property, then the property could be attached and sold in execution by the bank as mortgage bond holder, he was incoherent in his inability to explain this bizarre "commercial transaction". Mr Mokhesi could not provide any explanation or answer and meandered on and on apparently lost in this morass of improbability;[663]

823.2. Mr Sodi claims to be "a property investor, commercial and residential" "also looking at a partner who can invest with me".[664] However, it was not Mr Sodi but Blackhead which made the investment. This was an enterprise supposedly entered into by a registered commercial entity – Blackhead. Blackhead had, at that time, annual income in the millions and indeed billions of Rands.[665] It strains credulity to even contemplate that Blackhead would seek a commercial and investment partner to purchase immovable property valued at no more than R1 650 000 (one million six hundred and fifty thousand Rand). The partner with whom he claims to have made the investment, Mr Mokhesi, was only able to raise funds through a mortgage bond against the property;

823.3. Neither Mr Mokhesi nor Mr Sodi have given any indication why there was or could ever be "potential investment opportunity" to be found in this property. The purported recordal of same in the investment agreement of 1 April 2015 offers no assistance in this regard;

823.4. To the extent that Blackhead is claimed to be an investor in this property, it should be noted that there has been no production of a resolution of directors

[663] Transcript 28 September 2020, p 84-91.
[664] Transcript 19 August 2020, p 252, line 8.
[665] See Exhibit TT18, p 52. See also Exhibit TT18, p 111.

to make such purchase, no record of any minutes where the company determined upon this investment, no provision of any company records or financial statements recording payment of the monies as an investment or the acquisition of an asset in the company register;

823.5. Blackhead has gone to the trouble of registering itself as a company in terms of South African legislation while Mr Mokhesi went to the trouble of registering the Likemo Family Trust. Yet neither entity, Blackhead or Likemo Family Trust, went to the trouble of ensuring that their investment agreement was drafted by an attorney or even properly recorded and witnessed. Mr Sodi himself told the Commission that he has property investments in "pretty much trusts"[666] and that he could be "talking about in the region of maybe twenty or so properties".[667] Instead, both Mr Sodi and Mr Mokhesi claim that their agreement[668] was a product of their combined efforts. Mr Sodi said: "I got the template from the internet and changed it to suit our needs and I provided a copy to Mr Mokhesi to make his comments and inputs into the agreement which he did and we finalised it" and "it was really a layman's agreement that was drafted by the two of us".[669] Mr Mokhesi c said "I made an input to this agreement and I gave it to Mr Sodi to finalise";[670]

823.6. The Deed of Trust was signed on the 4th May 2015. The agreement supposedly signed by Mr Sodi on behalf of Blackhead and Mr Mokhesi on behalf of the Likemo Family Trust was signed on 1 April 2015 which was prior to the establishment of the Trust on 4 May 2015. Thus, the "commercial agreement" between Mr Sodi and Mr Mokhesi was entered into on behalf of a Trust which

[666] Transcript 29 September 2020, p 21, line 7.
[667] Transcript 29 September 2020, p 22, line 1.
[668] Exhibit TT2.2, p 32.
[669] Transcript 29 September 2020, p 16-17.
[670] Transcript 29 September 2020, p 114.

did not yet exist. Accordingly, it was impossible for the Trust to have been issued with a registration number prior to its establishment and registration at the time of signing this agreement. Yet, this purported investment transaction agreement between Mr Sodi and Mr Mokhesi contains the registration number of a Trust which did not yet exist and which had not yet been allocated a registration number by the Master of the High Court. Quite obviously, this document could not have been and was not signed on 1 April 2015. When this uncomfortable incongruity was put to Mr Mokhesi, he responded that "the trust number was put there later" "we already had an agreement even though the trust was registered later".[671] Mr Mokhesi appears to be suggesting that there was a verbal agreement reached on 1st April 2015 prior to formation of the Trust which agreement was then reduced to writing after establishment of the Trust and the date inserted thereon was not the date of typing or signature. Whichever the explanation – if there is one – the document presented to 'prove' the "commercial transaction" of the investment opportunity in which both Blackhead and Likemo Family Trust participated is clearly a deceit and is fraudulent;

823.7. There is no possibility of checking the date of drafting of or any amendments to the document since, according to Mr Sodi, he no longer had the laptop on which the contract was drafted;[672]

823.8. The Deed of Transfer dated 29 January 2016 records that the property was being transferred into the name of "The Trustees for the time being of LIKEMO FAMILY TRUST Registration Number IT444/2015".[673] The Commission has not been furnished with the original Letters of Authority issued by the Master of the

[671] Transcript 28 September 2020, p 73-74.
[672] Transcript 29 September 2020, p 17-18.
[673] Exhibit TT11, p 15-18.

High Court prior to the transfer of the property into the name of the Trust but clearly Mr Mokhesi was the founder and one of the original trustees. The Commission has been furnished with two Letters of Authority issued by the Master of the High Court. One is dated 20 May 2015.[674] The other is dated 27 October 2017[675] when Mr Mokhesi ceased to be a trustee. This is a somewhat surprising course of action since Mr Mokhesi was clearly the mind behind the formation of the Trust and the initiator of the purchase of the property in which he resided. However, resignation from the Trust as a trustee and issue of new Letters of Authority which do not have his name thereon ensures that he and his name and identity were therefore removed from the database of the Master of the High Court as a trustee;

823.9. The "commercial transaction" document deals at length with the rental and income possibilities for this investment opportunity. However, it is common cause that there is no income obtained from this investment. The property has not been rented out. Mr Sodi told the Commission that Mr Mokhesi was occupying the property since it was acquired – there was no rental at that time.[676] Mr Sodi said that "eventually, we settled on him staying in the property and I was comfortable with that".[677] Mr Mokhesi explained that "it is not my primary residential property. I am staying in that property because I work in Bloemfontein".[678] Mr Mokhesi also confirmed that he did not pay rent;[679]

823.10. Notwithstanding their claimed desire to enter into investment opportunities together, neither Mr Sodi nor Mr Mokhesi nor Blackhead nor the Likemo Family Trust have entered into any further investments or business opportunities. The

[674] Exhibit TT11, p 52.
[675] Exhibit TT2.2, p 4.
[676] Transcript 19 August 2020, p 241, lines 18-24.
[677] Transcript 29 September 2020, p 28, lines 24-25.
[678] Transcript 29 September 2020, p 78, lines 1-3.
[679] Transcript 29 September 2020, p 99, lines 6.

only such investment is the one which provides a subsidised residence for Mr Mokhesi.[680] Mr Sodi agreed that this was a "once-off partnership" explaining that he could go on his own in property investment but that this was a geographical area with which he was not familiar and he felt that because Mr Mokhesi lived in the area and he was able to identify potential for growth in this investment;[681]

823.11. Mr Mokhesi told the Commission that both the bond and the property were needed to provide him with a residence. It was established in the next breath that, by reason of a court judgment against him, Mr Mokhesi was not in a position to obtain a 100% (one hundred percent) bond to finance the purchase of this specific property.[682] As this revelation was made and the implications thereof perhaps became apparent even to Mr Mokhesi, his story became longer and longer and more and more discursive as he volunteered more and more information finally telling the Commission that he needed a house in which to live but could not obtain a bond and so he "needed assistance".[683] That assistance came from Mr Sodi from the coffers of Blackhead's bank account;

823.12. Neither Mr Sodi nor Mr Mokhesi was able to explain the need for the confidentiality clause contained in the agreement supposedly recording their commercial transaction but perhaps not much should be made of this because such clauses are common in all contracts and laymen and women may not realise that there is really no purpose in having such a clause inserted in an agreement. Of course, the effect of that clause is that both parties wanted this agreement to be kept confidential;

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[680] Transcript 29 September 2020, p 84.
[681] Transcript 29 September 2020, p 24.
[682] Transcript 28 September 2020, p 78-79.
[683] Transcript 28 September 2020, p 84, lines 1-4.

823.13. The improbability of the advantages of this "investment" for Mr Sodi and Blackheath were pointed out to Mr Mokhesi. It was Mr Mokhesi who appeared to gain all the advantage. Mr Mokhesi agreed that it was he alone who resided in the property rent free and enjoyed the benefit of what he thought to be potentially profitable investment. He could never have accessed these benefits if Mr Sodi had not invested in this property. Mr Mokhesi told the Commission that he could never have purchased a property valued in excess of R1 million because of lack of funds and the inability to obtain sufficient mortgage bond finance by reason of the judgment against him.[684] Mr Sodi, however, did not concede that this financial transaction advantaged Mr Mokhesi. – He said: "I would not say it was to his benefit";[685]

823.14. Both Mr Sodi and Mr Mokhesi were very clear in their evidence to the Commission that there was nothing untoward in their partnering in such a property transaction since this was 2015 and the Asbestos contract had not only been concluded but also it had been carried out. Both Mr Sodi and Mr Mokhesi chose to ignore that there were two significant outstanding matters Mr Sodi wanted and which Mr Mokhesi could provide. The first was payment of the outstanding tranches on the Asbestos Audit contract and the second was the commencement of the Asbestos Removal portion of the contract;

823.15. When Mr Mokhesi was questioned whether or not it was appropriate for him, as Head of Department Free State Human Settlements, to have entered into this arrangement with Mr Sodi while Mr Mokhesi was still paying money to Blackhead and Mr Sodi and Mr Mpambani were still hoping to perform the Asbestos Removal portion of their contract, Mr Mokhesi could only weakly

[684] Transcript 28 September 2020, p 91.
[685] Transcript 29 September 2020, p 30, line 15.

answer: "this was a commercial transaction".[686] He was referring to the subsidising of his home by Mr Sodi and Blackhead;

823.16. Mr Mokhesi told the Commission that from their point of view the Asbestos contract was ended and not continued.[687] He, therefore, tried to suggest that it was not improper for himself and Mr Sodi to have their own private "commercial transaction". However, he explained that the reason why he saw the Asbestos contract as being at an end was because of "the differences in prices, the irregularity...already flagged".[688] This led to a concession that, at the time he and Mr Sodi entered into this arrangement for Blackhead to provide funds for him to purchase a home in the name of his family trust, he had already come to the conclusion that the Asbestos contract was irregular and that the balance of the contract was not going to be implemented by the Blackhead/Diamond Hill Joint Venture. A very flustered witness, Mr Mokhesi, told the Commission "on hindsight ... maybe I should not have"[689] and he appeared to agree that in hindsight[690] it was not ethically appropriate;

823.17. It was suggested to Mr Sodi that it was irregular to have transferred funds for the benefit of the Likemo Family Trust while the Asbestos contract was still being administered by Mr Mokhesi as Head of Department Free State Department of Human Settlements. He said that the question did arise whether it would be appropriate to make this payment of R650 000 in circumstances where his company had just done part of the job but was still going on to do another part. In fact Mr Sodi said: "I raised it".[691] Mr Sodi recollected that he had a discussion with Mr Mokhesi asking whether it was appropriate and

[686] Transcript 28 September 2020, p 103, line 10.
[687] Transcript 28 September 2020, p 104.
[688] Transcript 28 September 2020, p 104, lines 8-9.
[689] Transcript 28 September 2020, p 105, lines 24-25.
[690] Transcript 28 September 2020, p 106.
[691] Transcript 29 September 2020, p 61, line 7.

Mr Mokhesi responded in effect by saying it was appropriate because at that point in time that Blackhead Consulting had completed what they had been appointed to do;[692]

823.18. Then Mr Sodi went on to explain that this investment arrangement would not be inappropriate since nothing further was to be obtained through Mr Mokhesi because Mr Mpambani had told him to forget about the second phase of the contract;

823.19. Mr Sodi continued in his admissions to the Commission that at the time of the transaction relating to the property the Blackhead/Diamond Hill Joint Venture had been paid only "some of the money that was due to us, but there were certainly more payments that were still outstanding";[693]

823.20. Mr Mokhesi insisted that he "had no intention of hiding that transaction"[694] for the purchase of his house with Mr Sodi/Blackhead but of course, there was every indication that the transaction was concealed. Only Likemo Family Trust owns the property, Mr Mokhesi himself is no longer a Trustee of that Trust, the names of neither Mr Sodi nor Blackhead appear in the Deeds Office in respect of this property; and

823.21. Mr Mokhesi attempted to maintain even to the end of his evidence that this was a "commercial transaction". He pointed out that: "I contributed substantially more in that particular transaction as well" which ignores the fact that he lived in the property and paid the bond instalments and services while Sodi/Blackhead gained nothing at all after paying R650 000 (six hundred and

[692] Transcript 29 September 2020, p 64, lines 6-8.
[693] Transcript 29 September 2020, p 61, lines 20-22.
[694] Transcript 28 September 2020, p 109, line 19.

fifty thousand Rand) against no security. Eventually Mr Mokhesi weakly conceded that "maybe on hindsight I should not have"[695] but when asked what he would have advised any junior official or member of staff if his advice had been sought, he still refused to make a full concession of wrongdoing, weakly insisting "it has never happened"[696] that he was asked to give an opinion or advice on such a subsidy.

Conclusion about the Cost of Business with "TM"

824. Notwithstanding the sworn statements of both Mr Sodi and Mr Mokhesi that they had neither procured nor received any benefit or advantage for Mr Mokhesi as Head of Department of Human Settlements by reason of or in any way linked to the grant of the Asbestos contract, there can only be the inevitable conclusion that Mr Mokhesi is the "TM" identified in the "Cost of Business" schedule prepared by Mr Mpambani and to which Mr Sodi was a party.

825. Mr Mokhesi was unable to purchase his home in Bloemfontein without financial assistance and Mr Sodi, on behalf of Blackhead, made available the sum of R650 000 (six hundred and fifty thousand rand) for that purpose. Every effort was made to conceal this transaction because it so clearly constitutes a benefit given by Mr Sodi to Mr Mokhesi. The efforts at concealment ranged from the formation of the family trust, departure of Mr Mokhesi from the Trust as a trustee, preparation of a fake document pretending to be a record of a commercial investment opportunity rather than merely a gift to a senior government official.

826. That both Mr Sodi and Mr Mokhesi knew that what was being done was irregular and unlawful is found in their initial denials of exchange of any financial benefit to

[695] Transcript 28 September 2020, p 109, line 1.
[696] Transcript 28 September 2020, p 112, line 11.

Mr Mokhesi. When confronted with the documentation made available to the Commission they hastily fabricated a story about an investment opportunity document.

827. Mr Sodi had to agree that Mr Mokhesi was an essential cog in the Blackhead/Diamond Hill project[697] while Mr Mokhesi conceded that he had made no disclosure of this benefit.[698]

The "Cost of Business" Schedule – Further Secret Beneficiaries

828. Included in the payments identified as a "cost of doing business" are further persons whose identities are sometimes concealed and who do not, on the face of it, appear to be persons or entities who provided goods or services pursuant to or as part of this Asbestos Eradication Project.

829. Questions immediately arise in respect of the motivation of Mr Sodi or Mr Mpambani in making payment to these individuals or entities and the motivation of such persons in receiving these funds. There are also questions as to any reciprocal contribution made by each one of these individuals or entities to either Mr Mpambani or Mr Sodi in relation to this Asbestos project or any other commercial endeavour.

830. The Commission has not heard evidence from any one of these beneficiaries. No finding can be made in respect of their receipt of the funds, the reason for receiving such funds, whether or not any obligation was created by reason of such payments and such receipts, whether or not any services were ever rendered by the recipients to either Mr Mpambani or Mr Sodi or any one of their commercial ventures. The Commission has

[697] Transcript 19 August 2020, p 187.
[698] Transcript 28 September 2020, p 116.

not made any enquiry as to whether or not disclosure has been made by those persons to the South African Revenue Services in respect of such receipts.

831. The Commission can only have regard to the stated position of Mr Mpambani and Mr Sodi as businessmen who, it is common cause, believed it was necessary to "unlock opportunity" by going "to the decision makers". The Commission has to examine the evidence of Mr Sodi and others to ascertain why such payments were made by Mr Sodi and Mr Mpambani to these persons.

832. These payments can only be examined and evaluated from the perspective of Mr Sodi and Mr Mpambani since the recipients of these funds have not had the opportunity to confirm receipt, the purpose they each had in receiving such payments, their understanding of the reason for the transfer of funds to them, whether or not they did or did not consider themselves indebted to Mr Mpambani or Mr Sodi in any way, whether or not they reciprocated before, during or after the lifetime of the Asbestos contract by providing services to Mr Mpambani or Mr Sodi in any manner.

833. With regard to other implicated persons who did not give evidence, it should be recorded that all implicated persons were given Rule 3.3 notices and were given an opportunity to give their version, a Rule 3.3 notice was a notice issued by the Commission to a person implicated in the statement or affidavit of a witness which told him or her that such witness implicated him or her in wrongdoing and explained and explained his rights including the right to apply to the Chairperson of the Commission for leave to testify and to cross-examine that witness. Most of them did not deliver response.

834. The Commission obtained the version of Mr Thulas Nxesi in an affidavit, wherein he denied receiving money from Mr Sodi. He admitted having approached Mr Sodi for donations for the family of the late Mr Mbuyiselo Ngwenya, former General Secretary of the South African Communist Party. He stated that Mr Sodi heeded the call and paid

directly to the school for the children of the late Mr Mbuyiselo Ngwenya and their accommodation.

Beneficiary "AM"

835. Another set of initials that is contained in the schedule is that of "AM". The schedule records the sum of R10 million in the "cost of business column". Under the "Year 1" column an amount of R5 million is reflected. The sum of R1 million is recorded under each of the three payment columns (i.e. R1 million – "1st Payment"; R1 million – "2nd Payment"; R1 million – "3rd Payment"):

836. Mr Mxolisi Dukoana (Mr Dukoana) testified that Mr Mpambani was in constant communication with persons in the office of Mr Elias Sekgobelo "Ace" Magashule (Mr Magashule) and that each time payment was advanced to the Blackhead/Diamond Hill Joint Venture, requests were forwarded to Mr Mpambani "resulting in the latter making payments as requested or instructed by Mr Magashule".[699]

837. Mr Sodi told the Commission that he was unable to confirm these payments and he stated that he could not have "guessed" who the person identified only as "AM" was and that he would not speculate that the initials "AM" referred to the former Premier of the Free State, Mr Magashule.[700]

838. Specifically, Mr Dukoana identified payments made at the request of one Ms Refiloe Mokoena (Ms Mokoena) was an attorney that acted as Judge in the High Court in the Free State province at some stage.

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[699] Exhibit X5, p 14, para 46.
[700] Transcript 19 August 2020, p 187, lines 23-24.

839. Ms Mokoena confirmed in an affidavit that she had made a request by email to Mr Magashule during July 2015 for assistance (in the amount of USD12 149) with the payment of student fees on behalf of her daughter who was studying in the United States of America.

840. Ms Moroadi Cholota (Ms Cholota), Mr Magashule's personal assistant requested Mr Mpambani to pay the sum of USD12 000 (twelve thousand US dollars).[701] On 17 August 2015 Mr Mpambani sent proof that payment of R54 000 had been made on 13 August 2015 to Ms Cholota and further proof that payment of R50 000 by Bombanero Investment had been made on 14 August 2015 directly to the bank account of Ms Mokoena for student fees of Ms Kagiso Msiza.[702]

841. Ms Mokoena confirmed she made both requests for financial assistance to Mr Magashule personally and that she received the funds; that she was an Acting Judge during certain periods when she sent an email regarding the funding on 30 July 2015 and when the payments of 13 August 2015 were received from Mr Mpambani and on 14 August 2015 from Bombanero Investment.

Beneficiary "MEC"

842. The initials or title "MEC" was found in the "Cost of Business" schedule. There is no indication which of several positions of Member of the Executive Council (MEC) in the Free State province may or may not be associated with this reference in the schedule prepared by Mr Mpambani and approved by Mr Sodi.

[701] Exhibit TT18, p 923.
[702] Exhibit TT18, p 925.

843. While the Commission's investigators have identified certain payments made by Mr Sodi's and Mr Mpambani's companies which may be linked to an MEC, this evidence was inconclusive.

Beneficiary – "JT"

844. The initials "JT" appear on the schedule. The schedule records the sum of R3 million in the "cost of business column". Under the "Year 1" column an amount of R1.5 million is reflected. There are payments recorded in respect of entities or an individual with such initials and Mr Sodi gave evidence to the Commission that payments were indeed made to Mr Jimmy Tau (Mr Tau).

845. The total sum of R3 858 159,70 was paid to Jimmy Tau Investments (Pty) Ltd (Jimmy Tau Investments), El Jefe Construction (Pty) Ltd (El Jefe), Nomnotho Communications and Events Management CC (Nomnotho Communications), identified as payment for Mr Tau, and Mercedes Benz Sandton (identified as payments for Mr Tau) from Blackhead's ABSA bank account into which the Blackhead/Diamond Hill had paid payments and a further ABSA bank account).

846. From 605 Consulting's bank account, held at FNB, payments in the total amount of R1.8 million were made to El Jefe's FNB bank account, over the period January 2015 to August 2015 in respect of "Payment from field worker audits" and "Consulting Services". On 9 November 2015 the sum of R1 million was transferred from NJR Projects (Pty) Ltd's FNB bank account to El Jefe's' Construction (Pty) Ltd FNB bank account. Mr Sodi confirmed that he has a 50% interest in NJR Projects (Pty) Ltd.[703]

847. Mr Sodi presented the Commission with a number of scenarios.

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[703] Exhibit TT52, p 52.

847.1. First, he told the Commission that he had appointed Mr Tau, who had played soccer for Kaizer Chiefs, as a business development manager to source new opportunities. Specifically, Mr Sodi told the Commission that payments to Mr Tau were made to him as a "business development consultant" and that "the payment...only got paid to him once we received funds from the asbestos...[B]ut that payment is not related to...his involvement in the Asbestos Project because he was never involved";[704]

847.2. Second, Mr Sodi confirmed to the Commission that Mr Tau was not employed by Blackhead[705] but then qualified that information by saying that there was a "sub-consulting agreement between Blackhead and one of Mr Tau's entities... so the contract was between the two entities".[706] He did not furnish the Commission with copies of these contracts or documentation pertaining to such agreements; and

847.3. The third scenario presented by Mr Sodi was that "I cannot with absolute conviction say that those initials refer to Jimmy Tau".[707]

848. With regard to the payments to Mr Tau or entities controlled by Mr Tau or made on behalf or for the benefit of Mr Tau, Mr Sodi variously remembered the sums of money paid over. In his affidavit,[708] Mr Sodi stated that Mr Tau was paid an amount of some R3 million from the proceeds of the Asbestos Audit but then stated that the sum paid over was some R10 million.

[704] Transcript 19 August 2020, p 153, lines 10-11 and 13-15.
[705] Transcript 29 September 2020, p 15, lines 19-23.
[706] Transcript 29 September 2020, p 16, lines 4-6.
[707] Transcript 19 August 2020, p 154, lines 17-18.
[708] Exhibit TT8, p 25.

849. The difficulties in accepting the explanation given by Mr Sodi for any payments made to Mr Tau which were included in the "cost of business" expenses of the Asbestos Audit are several:

849.1. Firstly, according to Mr Sodi, Mr Tau was not involved in the Asbestos Audit at all. Mr Sodi denied any connection between Mr Tau and the Asbestos Audit and claimed that Mr Tau was working on another project. That Mr Tau had no connection with the Asbestos Audit fits with the evidence that it was Mr Mpambani who utilised his networking skills and then presented the proposal to the Director-General in the Free State Department of Human Settlements. There is no evidence or even suggestion that the former soccer star had carried out any "business development" on behalf of the Blackhead/Diamond Hill Joint Venture in relation to this Asbestos Audit;

849.2. Secondly, it is then inexplicable that the payments to Mr Tau would be so clearly linked to the Asbestos Audit contract. According to Mr Sodi, payment to Mr Tau was only made by the Blackhead/Diamond Hill Joint Venture once payment had been made by the Free State Department to Blackhead. Both Mr Mpambani and Mr Sodi made payments to Mr Tau or his entities from their Joint Venture or from their own companies. Clearly there was a link between the payments to Mr Tau and the Asbestos Audit since Mr Sodi and Mr Mpambani were only connected to each other through this Joint Venture. Of course, Mr Mpambani had identified Mr Tau as one of the costs of the Blackhead/Diamond Hill Joint Venture in doing business on the Asbestos Audit. Clearly, there was, indeed, a link between income received from the Department and outgoing payments. On Mr Sodi's evidence, the outgoing payment depended on the incoming revenue;

849.3. The question immediately arises as to why Mr Tau should have received funds from the Asbestos project particularly when Mr Sodi denied that Mr Tau had performed any work or rendered any services on behalf of the Blackhead/Diamond Hill Joint Venture;

849.4. Thirdly, Mr Mpambani did identity the payments as business expenses pertaining to the Asbestos Eradication Project when he earmarked some payments to the Tau entities as "Payment from field worker audits" and "Consulting Services". Not only does this contradict the evidence of Mr Sodi but there is no documentation to substantiate this purported reason or justification for such payments;

849.5. Fourthly, it is somewhat surprising that the soccer star turned business development consultant should receive payments through no less than four juristic entities or corporate vehicles namely to Jimmy Tau Investments, El Jefe Construction (Pty) Ltd, Nomnotho Communications, El Jefe Construction (Pty) Ltd. No paper trail exists to indicate which entity did what work or provided what services, which entities had contracted with any one of the Sodi or Mpambani controlled entities, the basis upon which such payments were calculated; and

849.6. Fifthly, payments were then made by Blackhead (not the Joint Venture) to a motor car dealer – Mercedes Benz Sandton - being a payment for Mr Tau. No explanation was given why Mr Sodi would wish, through his own company, to contribute towards the purchase of a motor vehicle for or on behalf of Mr Tau or why this would not be paid to one of the entities controlled by Mr Tau.

850. Three factors, namely, that payments were made through a number of corporate entities controlled by Mr Tau; that such payments were identified by Mr Sodi and Mr Mpambani as a cost of the business of the Asbestos Audit but that every effort was being made to

conceal the connection between Mr Tau and the Asbestos Audit; and even before the Commission, Mr Sodi was still determined to distance Mr Tau from the Asbestos Audit suggests that both Mr Tau and those entities were no more than conduits for payments to an entity or individual with a real connection to the Asbestos Audit. The column below reflects such payments to various individuals and entities:

	NAME OF PAYEE	AMOUNT (R)	DATE	NAME OF PAYER
1	Kingdom Impact Gen. Trading	1,000,000.00	23 12 2014	605 Consulting
2	Kingdom Impact Gen. Trading	990,000.00	24 08 2016	605 Consulting
2	Colin Pitso	200,000.00	07 03 2014	Blackhead
3	Colin Pitso	200,000.00	22 03 2014	Blackhead
4	Colin Pitso	600,000.00	21 06 2014	Blackhead
5	Colin Pitso	1,000,000.00	12 07 2014	Blackhead
6	Colin Pitso	750,000.00	07 09 2014	Blackhead
7	Colin Pitso	750,000.00	07 09 2014	Blackhead
8	Colin Pitso	500,000.00	19 12 2014	Blackhead
9	Colin Pitso	500,000.00	10 03 2015	Blackhead
10	Colin Pitso	500,000.00	28 05 2015	Blackhead
11	Colin Pitso	4,250.00	13 06 2015	Blackhead
12	Colin Pitso	300,000.00	23 10 2015	Blackhead
13	Colin Pitso	200,000.00	30 10 2015	Blackhead
14	Colin Pitso	1,000,000.00	24 12 2015	Blackhead
15	Bongani More	25,000.00	19 07 2013	Blackhead
16	Bongani More	6,600,000.00	28 08 2014	Blackhead
17	Bongani More	233,124.93	10 12 2014	Blackhead
18	Bongani More	50,000.00	13 01 2015	Blackhead
19	Bongani More	150,000.00	16 01 2015	Blackhead
20	Bongani More	250,000.00	24 03 2015	Blackhead
21	Bongani More	50,000.00	14 04 2015	Blackhead
22	Bongani More	100,000.00	22 02 2017	Blackhead
23	Bongani More	34,681.20	08 03 2018	Blackhead

	NAME OF PAYEE	AMOUNT (R)	DATE	NAME OF PAYER
24	Diane / Anoj Singh	10,000.00	30 06 2015	Blackhead
25	Paul Mashatile	10,000.00	25 02 2015	Blackhead
26	Paul Mashatile	10,000.00	01 04 2015	Blackhead
27	Paul Mashatile	10,000.00	10 05 2015	Blackhead
28	Paul Mashatile	112,118.37	24 05 2015	Blackhead
29	Paul Mashatile	10,000.00	01 06 2015	Blackhead
30	Paul Mashatile	10,000.00	30 06 2015	Blackhead
31	Paul Mashatile	10,000.00	29 07 2015	Blackhead
32	Paul Mashatile	10,000.00	02 09 2015	Blackhead
33	Paul Mashatile	30,000.00	15 09 2015	Blackhead
34	Paul Mashatile	10,000.00	30 09 2015	Blackhead
35	Paul Mashatile	10,000.00	30 10 2015	Blackhead
36	Paul Mashatile	10,000.00	03 12 2015	Blackhead
37	Paul Mashatile	10,000.00	25 12 2015	Blackhead
38	Paul Mashatile	10,000.00	01 02 2016	Blackhead
39	Paul Mashatile	50,000.00	23 09 2016	Blackhead
40	Paul Mashatile	59,435.50	13 09 2018	Blackhead
41	Linda Ngcobo	250,000.00	05 02 2014	Blackhead
42	Linda Ngcobo	500,000.00	14 03 2014	Blackhead
43	Linda Ngcobo	1,000,000.00	03 09 2014	Blackhead
44	Linda Ngcobo	250,000.00	04 08 2016	Blackhead
45	Linda Ngcobo	79,627.00	04 08 2017	Blackhead
46	Thulas Nxesi	30,000.00	04 03 2017	Blackhead
47	Thulas Nxesi	15,000.00	04 03 2017	Blackhead
48	Pinky Kekana	140,000.00	29 08 2015	Blackhead
49	Pinky Kekana	30,000.00	28 03 2017	Blackhead
50	Zizi Kodwa	15,000.00	02 12 2015	Blackhead
51	Zizi Kodwa	15,000.00	02 03 2016	Blackhead
52	Zizi Kodwa	15,000.00	24 03 2016	Blackhead
53	Zizi Kodwa	10,000.00	23 08 2016	Blackhead
54	Zizi Kodwa	84,760.00	23 09 2016	Blackhead
55	Zizi Kodwa	10,000.00	04 11 2016	Blackhead
56	Zizi Kodwa	5,000.00	12 11 2016	Blackhead

	NAME OF PAYEE	AMOUNT (R)	DATE	NAME OF PAYER
57	Zizi Kodwa	20,000.00	10 02 2017	Blackhead
58	Zweli Mkhize	2,997,000.00	28 02 2014	Blackhead
59	Zweli Mkhize	3,500,000.00	03 04 2014	Blackhead

Further Payments – Secret Beneficiaries – Politically Connected Persons – Not Public Participants in the Asbestos Audit

851. Investigations revealed that there were further persons or entities who were recorded in the financial records of Blackhead/Diamond Hill Joint Venture and in the records of Blackhead and Diamond Hill as having been paid monies during the financial years under investigation and who do not, on the face of it, appear to be persons or entities who provided goods or services pursuant to or as part of this Asbestos Eradication Project or where the motivation for or reasons for such payments are surprising.

852. Amongst the many individuals or entities to whom such payments were made or whose names are recorded against certain payments are those contained in the table below. The identity of the payee or the notation in financial records indicating reference to such person was recorded by Mr Sodi or Mr Mpambani through Blackhead or 605 Consulting.

853. The Commission was unable to investigate all bank accounts, all payments which appear to be inadequately substantiated or unsubstantiated, or pursue all payments which may have been to third party intermediaries or to politically connected persons.

854. Mr Sodi was asked to explain some of these payments and he did so while giving evidence. As already indicated, those persons have not had the opportunity to explain to the Commission whether or not they know of their receipt of the funds, why they

received such funds, their understanding of their relationship between themselves and Mr Sodi and whether or not there were any obligations placed upon them attendant upon their receipt of the funds.

855. Questions immediately arise in respect of the motivation of Mr Sodi or Mr Mpambani in making payments to these individuals or entities and the motivation of such persons in receiving these funds. There are also questions about whether any reciprocal contributions were made by each one of these individuals or entities to either Mr Mpambani or Mr Sodi or their business enterprises in relation to the Asbestos project or any other commercial endeavour connected with Mr Sodi or Mr Mpambani or their entities.

856. The Commission did not hear evidence from any one of these beneficiaries. No finding can be made in respect of their receipt of the funds, the reason for receiving such funds, whether or not any obligation was created by reason of such payments and such receipts, whether or not any services were ever rendered by the recipients to either Mr Mpambani or Mr Sodi or any one of their commercial ventures. The Commission has not made any enquiry as whether or not disclosure has been made by those persons to the South African Revenue Services in respect of such receipts.

857. The Commission can only have regard to the stated position of Mr Mpambani and Mr Sodi as businessmen who, it is common cause, believed it was necessary to "unlock opportunity" by going "to the decision makers". The Commission has to examine the evidence of Mr Sodi and others to ascertain why such payments were made by Mr Sodi and Mr Mpambani to these persons.

858. Some of these persons to whom payments were made or whose names were identified by Mr Sodi or Mr Mpambani as being connected with such payments are "politically exposed persons or entities" or government officials.

859. Notwithstanding the information contained in the "Cost of Business" schedule, it cannot be said with certainty that the full extent of payments made to third parties has been established in the course of the investigation. These individuals were given notices in terms of Rule 3.3 to respond to these concerns but the Commission has received few responses in connection therewith.[709] Many of these persons have therefore not explained to the Commission whether or not they know of their receipt of the funds, why they received such funds, why their names were recorded by Mr Sodi or Mr Mpambani in connection with such payments, their understanding of their relationship between themselves and Mr Sodi and whether or not there were any obligations placed upon them attendant upon their receipt of the funds. They have elected not to furnish the Commission with their side of the story.

860. Mr Sodi was asked to explain some of these payments and he did so while giving evidence.

861. Accordingly, these payments and the identities of the recipients are dealt with only from the point of view of Mr Sodi as the person who facilitated the payment to each of these persons.

Colin Pitso

862. Payment was made to Mr Colin Pitso, former Chief of Staff to Gauteng MEC Housing, in the amount of R6 504 250,00 (six million, five hundred and four thousand, two hundred and fifty Rands) on various dates ranging from 7 March 2014 to 24 December 2015 as shown in the table above.

[709] Responses were received from Messrs Thulas Nxesi and Zwell Mkhize, who both confirmed Mr Sodi's version of events.

863. Mr Sodi explained to the Commission that Mr Pitso is "someone I got to know very well". He then proceeded to explain that Mr Pitso's father ran an entity known as Kepi Construction. Eventually Mr Sodi confirmed that Mr Pitso was indeed Chief of Staff to the former Gauteng MEC for Human Settlements, Ms Mokonyane and then to Minister Mokonyane but was quick to add that "that is not the case anymore".[710]

864. Mr Sodi disputed that the payment of R6.5 million (six and a half million Rand) was made to Mr Pitso himself and said that: "the payment was not to him, I used his name as a reference". According to Mr Sodi, the payment was "to Kepi Construction which is an entity that is owned by his father that I did business with".[711]

865. Mr Sodi was uncertain of several of the details of payment to Mr Pitso and said: "I have to check" but, though given the opportunity, failed to provide any further details.

866. Mr Sodi gave no explanation why he or his company engaged in a commercial transaction with a business known as "KP Construction" but then used the full name of an unconnected individual to identity the reason for such a payment. That Mr Pitso is the son of the owner of a building company is hardly the reason for linking the payment to the son.

867. What may be more relevant is that Mr Sodi made payments of a great deal of money to the Chief of Staff of the MEC for Human Settlements in Gauteng whose department enabled Mr Sodi to enter into an Asbestos Audit in that province.

[710] Transcript 29 September 2020, p 37, lines 19-20.
[711] Transcript 29 September 2020, p 38, lines 4-5.

Bongani More

868. In his evidence Mr Sodi said that Mr Bongani More, Deputy Director-General Gauteng Human Settlements (2015 to 2018), is a "business associate" of his.[712] Mr Sodi explained that, after Mr More had resigned from the Gauteng Department of Human Settlements, "[w]hen he left government, we agreed on getting into business together".[713] Mr Sodi claimed that there was going to be a hotel development in Cape Town and an acquisition of a stake in Melrose Arch funded by the PIC.

869. Mr Sodi avoided answering the question why payment of R7.5 million was made and vaguely affirmed that the payments were made to him when he [Mr More] was no longer in government and then fumbled on suggesting that he would need to look thoroughly at the dates on which some of those payments were made[714] but he was unable to state the nature of the actual business in which they were both engaged, the business purpose for which payment was made and how the funds were utilised for the business partnership. All Mr Sodi could say was that Mr More was currently a business partner of his and to insist that payment was made after Mr More had left government service. He made this last point as if it mattered much. Just like he and Mr Mokhesi initially emphasised that when they concluded the property transaction referred to earlier, Blackhead had completed the work it had been appointed to do. Of course, that point collapsed at the end because there was still the removal of asbestos that was left and, in any event Mr Mokhesi's department still owed Blackhead a lot of money.

[712] Transcript 29 September 2020, p 38, line 18.
[713] Transcript 29 September 2020, p 36, lines 1-2.
[714] Transcript 29 September 2020, p 36, lines 18-21.

Diane/Anoj Singh

870. Mr Sodi told the Commission that he had "no idea" why any payment, let alone the R10 000, had been made to Mr Anoj Singh, the former Chief Financial Officer of Eskom between 2015 and 2018.

Linda Ngcobo

871. Mr Sodi explained that payment of R2 079 627.00 was made to Ms Linda Ngcobo, Regional Manager: Gauteng Housing and Chief Director: Gauteng Department of Human Settlements 2014 to 2016 on the basis that she was a friend of his. He said that she used to be employed in the Gauteng Department of Housing but was no longer in the employ of that Department. He explained to the Commission that this was "a loan to Linda...[a]fter she left she was struggling". Not only was she a friend but they were "exploring business opportunities together".[715]

872. Mr Sodi did not give any details of the loan, whether or not it was secured by a loan agreement or any security or the terms of repayment of such loan.

Paul Mashatile

873. Mr Sodi told the Commission that these payments, totalling R371 553,87 (three hundred and seventy one thousand, five hundred and fifty three Rands and eighty seven Cents) and paid out to Mr Paul Mashatile) were "made directly" to the ANC[716] and speculated that this could be "to pay maybe for a venue . . . to assist with payment for salaries".[717]

[715] Transcript 29 September 2020, p 40.
[716] Transcript 29 September 2020, p 41, lines 1-2.
[717] Transcript 29 September 2020, p 41, lines 14-16.

Mr Mashatile was the Minister of Arts and Culture between 2010 and 2014 and MEC: Human Settlements, Gauteng between 2014 and 2017.

874. Mr Sodi offered no explanation why donations to a political party were not made through the official channels and administrative structures of the party. The African National Congress (ANC) has an office of the Treasurer-General, bank accounts, offices and staff who would receive donations, provide receipts in respect thereof, record such donations in the accounts of the organisation and deposit the funds in the appropriate bank account of the organisation. He did not suggest any reason why payment had been made to one specific individual.

Pinky Kekana

875. Ms Pinky Kekana is the Deputy Minister of Communications. Payments in the amount of R170 000 were made to her.

876. Mr Sodi described Ms Kekana as someone he considered "a sister"[718] but offered no reason why he should be making payments to her.

Thembelani "Thulas" Nxesi

877. Mr Sodi told the Commission that were two payments totalling R45 000 to Mr Thembelani "Thulas" Nxesi , former Minister of Public Works and incumbent Minister of Employment and Labour, one of which was paid to a school and one was for accommodation "for underprivileged kids".[719] Shortly after Mr Sodi's testimony, Mr Nxesi submitted an affidavit to the Commission where he gave further detail regarding these payments. Mr Nxesi confirmed Mr Sodi's version and added that, while his name was

[718] Transcript 29 September 2020, p 41, line 1.
[719] Transcript 29 September 2020, p 42, lines 17-23.

used as a reference, payments were made directly to the school and not to Mr Nxesi himself.

Zizi Kodwa

878. Mr Sodi informed the Commission that "Zizi is a friend that I have known for a number of years" and acknowledged that "he is currently the Deputy Minister of Intelligence". The explanation given by Mr Sodi was that this was "payment that I made to him as a friend where he requested for assistance on a number of times . . . he will say we have not been paid on time this month from Luthuli House or there is delays in payment . . . he would ask for some assistance because maybe he has got debit orders that have to go through".[720]

879. Mr Zizi Kodwa is the former Deputy Minister of State Security and a former Spokesperson of the ANC. Mr Sodi made payments to him totalling R174 760.

Zweli Mkhize

880. Payments totalling R6 497 000 were made to Dr Zweli Mkhize (Dr Mkhize), former Minister of Health and Treasurer-General of the ANC.

881. Mr Sodi told the Commission that these were payments to the ANC and, according to Mr Sodi, "went directly to the ANC account".[721] He went on to say that the "particular individual there was the Treasurer General of the ANC at the time" and the Treasurer General was the one who approached him "at the time to ask for assistance and that is

[720] Transcript 29 September 2020, p 44, lines 4-16.
[721] Transcript 29 September 2020, p 44, lines 21-22.

why his name is used as a reference".[722] Again, the question arises: why is the name of the ANC not the one that is recorded?

Other payments: R3 523 200,00: [723]

#	Category	Account Name	Processing Date	Abridged Description	Debit Acc Ref	Credit Acc Ref	Amount
46	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	02 10 2013		ANC Funding	ANC Event	19,200.00
47	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	04 10 2013		ANC Fundraising	ANC Function	38,000.00
48	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	28 11 2013		ANC Truck	Blackhead Consulting	1,083,000.00
49	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	21 02 2014	ANC	ANC Tshirts	Edwin Sodi	250,000.00
50	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	28 02 2014		ANC	Blackhead Consulting	3,000.00
51	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	03 04 2014	ANC	ANC Gauteng	Blackhead Consulting	1,000,000.00
52	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	23 04 2014	ANC	ANC Ekurhuleni	Blackhead Consulting	100,000.00
53	Other (e.g. ANC T-Shirts,	BLACKHEAD CONS	02 05 2014	ANC	ANC Gauteng	Blackhead Don	500,000.00

[722] Transcript 29 September 2020, p 44-45.
[723] Exhibit TT18, p 53.

#	Category	Account Name	Processing Date	Abridged Description	Debit Acc Ref	Credit Acc Ref	Amount
	Volunteers etc.)	ULTING				ation	
54	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	31 01 2015	ANC	ANC Volunteer	Allowance	10,000.00
55	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	25 02 2015		ANC Volunteer	Allowance	5,000.00
56	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	25 02 2015		ANC Volunteer	Allowance	5,000.00
57	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	01 04 2015		ANC Volunteer	Allowance	5,000.00
58	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	01 04 2015		ANC Volunteer	Allowance	5,000.00
59	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	10 05 2015		ANC Volunteer	Allowance	5,000.00
60	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	10 05 2015		ANC Volunteer	Allowance	5,000.00
61	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	01 06 2015		ANC Volunteer	Allowance	5,000.00
62	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	01 06 2015		ANC Volunteer	Allowance	5,000.00
63	Other (e.g. ANC T-Shirts,	BLACKHEAD CONS	30 06 2015		ANC Volunteer	Allowance	5,000.00

#	Category	Account Name	Processing Date	Abridged Description	Debit Acc Ref	Credit Acc Ref	Amount
	Volunteers etc.)	ULTING					
64	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	30 06 2015		ANC Volunteer	Allowance	5,000.00
65	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	29 07 2015		ANC Volunteer	Allowance	5,000.00
66	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	29 07 2015		ANC Volunteer	Allowance	5,000.00
67	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	29 07 2015	ANC		Allowance	10,000.00
68	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	02 09 2015		ANC Volunteer	Allowance	5,000.00
69	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	02 09 2015		ANC Volunteer	Allowance	5,000.00
70	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	30 09 2015		ANC Volunteer	Allowance	5,000.00
71	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	30 09 2015		ANC Volunteer	Allowance	5,000.00
72	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	30 10 2015		ANC Volunteer	Allowance	5,000.00
73	Other (e.g. ANC T-Shirts,	BLACKHEAD CONS	30 10 2015		ANC Volunteer	Allowance	5,000.00

#	Category	Account Name	Processing Date	Abridged Description	Debit Acc Ref	Credit Acc Ref	Amount
	Volunteers etc.)	ULTING					
74	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	03 12 2015		ANC Volunteer	Allowance	5,000.00
75	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	03 12 2015		ANC Volunteer	Allowance	5,000.00
76	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	01 02 2016		ANC Volunteer	Allowance	5,000.00
77	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	01 02 2016		ANC Volunteer	Allowance	5,000.00
78	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	09 03 2018		ANC Gauteng	Blackhead Consulting	100,000.00
79	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	12 04 2018		ANC Gauteng	Funeral Catering	100,000.00
80	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	06 07 2018		ANC Gauteng	Edwin Sodi	100,000.00
81	Other (e.g. ANC T-Shirts, Volunteers etc.)	BLACKHEAD CONSULTING	15 03 2019		ANC Collections	2019-5285 Blackhead	100,000.00
TOTAL AMOUNT							**3,523,200.00**

882. Mr Sodi told the Commission that some R3.5 million was paid for and on behalf of the ANC with some "payments made directly to the ruling party" and some to service providers.[724] He said that the payments were used to purchase ANC T-shirts or to pay volunteers and other such expenses.

883. Mr Sodi elaborated that from time to time he had made donations to the ANC[725] and that these were "substantial amounts".[726]

884. Shortly after Mr Sodi's testimony, Dr Zweli Mkhize submitted an affidavit to the Commission in which he confirmed that Mr Sodi had made payments in excess of R6.5 million in the period 2014-2015 as donations to the ANC. Dr Mkhize further stated that he had never received any funds from Mr Sodi that were intended for his personal benefit.

Doing Business or Concealed Business with Politically Connected Persons

885. Mr Sodi informed the Commission that, during 2014, Blackhead had a turnover of over a billion Rand[727] and agreed that this company had received payments from the Department of Human Settlements in excess of a billion Rand over the eighteen year period up to 2019.[728]

886. On Mr Sodi's own version Blackhead is heavily invested in conducting business with government at provincial level. The Commission has no information of Blackhead's business interaction with government at a municipal level.

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[724] Transcript 29 September 2020, p 41, lines 1-3.
[725] Exhibit TT8, p 30, para 48.
[726] Exhibit TT8, p 131, para 17.
[727] Transcript 29 September 2020, p 32, line 19.
[728] Transcript 29 September 2020, p 32-33.

887. Mr Sodi asserted his loyalty to the ANC and justified his purported generosity to that political organisation whether his donations were made to the organisation's official and administrative structures or to individuals or in cash.

888. There are many difficulties in comprehending the nature of the assistance given by Mr Sodi to the ANC. For example, he does not identify the funds as going to the political party but to individuals who are members or office bearers thereof or who occupy government positions.

889. Mr Sodi's method of book keeping and financial records thus means that Mr Mashatile (some R370 000), Mr Nxesi (some R45 000) and Dr Mkhize (some R6.5 million) are all tarred with the possibility that they received funds not intended for themselves, failed to obtain full records from the ANC or the schools and failed to furnish these to Mr Sodi. Alternately, Mr Sodi's method of record keeping exposes Mr Mashatile, Mr Nxesi and Dr Mkhize to the suspicion that they may have received these funds in their personal capacity and that could lead to the question what each may have offered Mr Sodi in return.

890. Mr Sodi's generosity to friends is also problematic. These payments were made from business accounts in the name of business entities controlled by Mr Sodi. Where he made payments to his alleged friends such as Mr More (some R7.5 million), Ms Ngcobo (some R2 million), Ms Pinky Kekana (some R170 000), Mr Kodwa (some R174 000), they are not distinguished as personal loans to friends which cannot be deducted from business income as business expenses. These payments fall into personal income of Mr Sodi himself which he can freely dispose of as loans to friends.

891. Furthermore, where Mr Sodi has acquired his great wealth and ability to make such loans or donations to "friends" by reason of his business interests which include extremely lucrative contracts with government departments, there can only but be great

concern over such "loans" or assistance given to "friends" who occupy influential positions in government or in the ruling party.

892. These payments were made to persons who were sometimes directly involved in the geographical area, the political domain and the business arena in which Blackhead and Mr Sodi and Mr Mpambani were operating. Mr More (housing in Gauteng), Ms Ngcobo (housing in Gauteng), Ms Kekana (Limpopo roads) are amongst those who had and may still have great influence over the award or facilitation of contracts especially when fair and transparent processes are not followed.

893. The issue is not merely one of tax compliance.

894. The difficulty is that no reliance whatsoever can be placed upon Mr Sodi's business records. He has no records worth the paper on which they may have been written. Accordingly, Mr Sodi was unable (despite being given the opportunity by way of postponements) to produce written agreements, invoices, schedules of payments or other financial documentation which would even begin to explain any of the payments made to any of the beneficiaries named above.

895. Such accounting and administrative disarray has a number of results. Not only is there great possibility for mismanagement of the businesses and even greater likelihood of being unable to be tax compliant, there is also every opportunity to conceal payments or payments whether legitimate or not.

896. The payments supposedly made to Mr Jimmy Tau are one example. The Tau entities received monies from the payments made by the Department of Human Settlements and transfers to the Tau entities were supposedly dependent upon the Asbestos Audit. The transfers to the Tau entities were identified by Mr Mpambani as being a "cost" of the Asbestos Eradication Project and Mr Sodi has not only seen that cost of business

schedule but also authorised payments from the bank accounts of his businesses to the Tau entities. There can be no doubt that there is a connection between these transfers to the Tau entities and the Asbestos Audit.

897. Yet Mr Sodi is determined to distance Mr Tau from the Asbestos Audit. He claimed that Mr Tau was retained as a business consultant but can produce no agreement to that effect. He claims that Mr Tau provided services on another project but was unable to identify that project, provide any invoices from Mr Tau or explain why the transfers were made out of the Asbestos Audit and not the other project.

898. Ms Mokonyane might have questions to answer. The Commission did not have enough time to investigate her possible involvement and the benefit she received from the asbestos contract, if any. A further investigation into her involvement should still be pursued.

899. Furthermore, payments identified as being connected to Mr Pitso, former Chief of Staff to Ms Mokonyane, are rather desperately sought by Mr Sodi to be in respect of payments to a construction company. Questions arise whether or not the construction company is a cut-out or intermediary between payments between Mr Sodi and Mr Pitso or between Mr Sodi and Mr Pitso and another unidentified person.

900. Again, neither Mr Pitso nor Ms Mokonyane have had the opportunity to respond to any of these suspicions. Further, the Commission has not examined the banking records of either Mr Pitso or Ms Mokonyane or of their relatives to ascertain whether or not any of Mr Sodi or Mr Mpambani's generosity was received by them. However, Mr Sodi's business methods and accounting records may have exposed irregular or corrupt business practices but may also have unfairly raised suspicions about innocent and uninvolved persons. At the very least.

901. Similarly, Mr Sodi's attempts to explain away transfers of funds to persons such as Mr Bongani More (some R7.5 million) because Mr More is a business partner but fails to indicate the identity of or the nature of the business, the reason for the transfer of funds to Mr More, what business purpose was achieved by such payments. No partnership agreement or corporate documentation was forthcoming, no business plan, no budget, no record or business activity.

902. When Mr Sodi identified funds as being linked to Mr Pitso (R6.5 million) and then said that he was using the services of a construction company with quite another name, it is unlikely that there is a business relationship with that construction company. No invoices, contracts, receipts were produced indicating any lawful cause for payment to the construction company. Instead, Mr Sodi placed Mr Pitso at the centre of a, payment to a third party. This suggests that Mr Sodi understood that the funds were going to Mr Pitso through the conduit of the third party company.

903. Both Mr More (Housing in Gauteng) and Mr Pitso (Housing in Gauteng) may have influence over policy and administrative processes and decisions. There is every possibility that payments of funds directly to such persons or through third parties would lead to allegations of improper relationships between a businessman such as Mr Sodi and government employees such as Mr More and Mr Pitso.

904. Mr Pitso and Mr More have not had the opportunity to explain how they viewed their relationship with Mr Sodi. This Commission can only examine the evidence on transfer of funds in the light of the explanations offered by Mr Sodi. These explanations are singularly unconvincing and, in the absence of any supporting evidence, cannot be believed.

905. The result is that the Commission is left with the view that Mr Sodi made generous payments through his business bank accounts to obtain access, secure influence, retain

connections with a number of individuals at provincial and national level of government. Whether or not such payments were intended by Mr Sodi to obtain an immediate direct benefit in return or create obligations for the future this would unquestionably indicate an appetite on the part of Mr Sodi for some form of state capture. Such consistent course of action would indicate that a business person made payments to persons who occupied political leadership positions or were employed as government officials with both the intention and the result of obtaining private benefit for himself or his businesses from persons who were financially obliged to him or those businesses.

Mr Edwin Sodi and Mr Thabani Zulu: The payment of R600 000

906. The evidence presented before the Commission is such that Mr Edwin Sodi and Mr Thabani Zulu, who was the Director-General of the National Department of Human Settlements, may well be guilty of corruption in that the amount of R600 000 that Mr Sodi or his company, Blackhead Consulting, gave to Mr Zulu by paying for his motor vehicle at SMD Trading Group in Ballito on 21 December 2021 may well have been a bribe or a reward to Mr Zulu for his role in facilitating the award of the asbestos contract by the Free State Department of Human Settlements to his company or to the Blackhead/ Diamond Hill Joint Venture. In this regard it is emphasised that the Commission completely rejects the story put forward by both Mr Zulu and Mr Sodi that Blackhead Consulting or Mr Sodi made the payment of R600 000 Mr Thabani Zulu or to SMD Trading Group for the benefit of Mr Zulu because it or he owed Mr Zulu or his business TZ Lounge money for liquor he had purchased from Mr Zulu or his business. It is therefore, recommended that the National Prosecuting Authority should seriously consider proffering charges of corruption and/or bribery against Mr Edwin, Blackhead Consulting and Mr Thabani Zulu.

Blackhead /Mr Edwin Sodi and Mr Thabani Zulu/Mr Mabheleni Ntuli: The Maserati

907. It is recommended that the law enforcement agencies should conduct further investigations into whether or not the payment made by Mr Sodi or his company, Blackhead Consulting to SMD Trading Group in connection with the purchase of a Maserati was not a bribe or reward for Mr Zulu through Mr Mabheleni Ntuli for Mr Zulu's role in the facilitation of the award of the Asbestos contract to Blackhead/ Diamond Hill Joint Venture.

Blackhead /Mr Edwin Sodi and Mr Timothy Mokhesi: The payment of R650 000 for the property at Olive Heights, Bloemfontein for the benefit of Mr Timothy Mokhesi

908. It is recommended that the National Prosecuting Authority seriously considers preferring criminal charges of corruption or bribery against one or both Mr Sodi and his company Blackhead and Mr Timothy Mokhesi, who was the Head of the Department of Human Settlements in the Free State Province in connection with the payment by Blackhead or Mr Sodi of an amount of R650 000 towards the purchase of the property situated at NO45 Wild Olive Heights, Bloemfontein. The Commission is satisfied that this payment was made as a reward or inducement or both to Mr Mokhesi in connection with his role in the facilitation of the award of the Asbestos contract to Blackhead/Diamond Hill Joint Venture or as a reward for or inducement for the payment by Mr Mokhesi's department to the Joint Venture.

909. From what has been explained above it is quite clear that the Head of the Department of the Human Settlements in the Free State in 2014/2015 namely, Mr Timothy Mokhesi was central to the awarding of the Asbestos contract to the Blackhead Consulting Diamond / Hill Joint Venture. However, the investigation did focus simply on the accounting officer and did not also focus on the MEC for Human Settlements in the Free State in 2014/2015. The investigation did not look into the question of why it was that

the MEC for Human Settlements at the time did not realise that there was a problem with this project and intervene to prevent millions of taxpayers' money being thrown down the drain.

910. What is clear is that there was no effective intervention that was made by either the MEC or the Premier. Elsewhere in this report the Commission deals with the Free State R1 Billion Housing Project Debacle in regard to which the same Department - the Free State Department of Human Settlements paid over R500 million for the building of low cost houses for poor people and yet no houses were built even though so much money had been paid. The Free State Asbestos Project Debacle happened in the same department. Again the Premier, Mr Ace Magashula, does not appear to have intervened to prevent this debacle – just as he had also not intervened in the Free State R1 Billion Housing Project Debacle. There is also no indication that the majority party in the Free State, the African National Congress, or the relevant structure of the ANC held the Premier to account for these dismal failures of vitally important projects.

RECOMMENDATIONS

911. It is recommended that law enforcement agencies should conduct such further investigations as may be necessary with a view to the possible prosecution of Mr Mokhesi by the National Prosecuting Authority for possible corruption arising out of his decision to enter into the agreement that he concluded with Blackhead Consulting/Diamond Hill Joint Venture and/or with a view to Mr Mokhesi's possible criminal prosecution for his possible contravention of sections 38(1)(a)(iii), 38(1)(b) and 38(1)(c)(ii) of the Public Finance Management Act 1 of 1999 in concluding the agreement that he concluded with Blackhead Consulting and Diamond Hill Joint Venture.

912. It is recommended that the Government seek a legal opinion with a view to possibly taking all necessary legal steps to recover from Mr T Mokhesi and any other Government Officials who were involved in the conclusion and implementation of the agreement between the Department of Human Settlements, Free State Province, and Blackhead Consulting Joint Venture all monies paid by the Free State Department of Human Settlements to Blackhead Consulting and Diamond Hill Joint Venture for which the Department did not receive appropriate value.

913. It is recommended that the law enforcement agencies conduct such further investigations against Mr Timothy Mokhesi as may be considered with a view to his possible prosecution by the National Prosecuting Authority for a breach of any provisions of the Public Finance Management Act (PFMA) in the role he played in connection with the Asbestos Eradication Project.

914. It is recommended that every tender or contract between a government department and/or government entity and a service provider or a provider of goods or services should contain a prominent clause to the effect that no service provider may sub-contract or cede its/her/his right to provide the services or the goods to another person or entity or company unless the intended sub-contractor was disclosed in the bid documents as an entity to which the bidder would sub-contract. Consideration may also be given to whether there should not be a statutory provision to this effect that will apply to all tenders in the public service.

915. It is recommended that the Government obtains a legal opinion aimed at establishing whether it would not be able to successfully recover the moneys it paid to Blackhead Consulting and Diamond Hill Joint Venture in regard to the Asbestos Eradication Project for which it received no value or because Blackhead Consulting and Diamond Hill Joint Venture made a misrepresentation to the Department of Human Settlements that it had

the qualifications or expertise or skills or experience necessary for the performance of the job when it had no such experience, qualifications, expertise or skills.

916. It is recommended that the National Prosecuting Authority gives serious consideration to instituting a charge of corruption or any other applicable crime or offense against Mr Edwin Sodi and his company, Blackhead Consulting (Pty) Ltd for their roles in paying an amount of R600 000,00 (Six hundred thousand Rand) to a car dealer based in Ballito, KwaZulu-Natal, for the benefit of Mr Thabani Zulu as a reward for Mr Zulu's role in the Asbestos Project or as a bribe to Mr Thabani Zulu so that he could do certain favours for Blackhead Consulting or Diamond Hill or the Joint Venture or Mr Edwin Sodi.

917. is recommended that the National Prosecuting Authority gives serious consideration to instituting a criminal charge or criminal charges relating to corruption or any other applicable crime or offence against Mr Thabani Zulu for his arrangement with Mr Edwin Sodi and/or Blackhead Consulting (Pty) Ltd to be paid an amount of about R600 000,00 (Six hundred thousand Rand) by Mr Edwin Sodi and/or Blackhead Consulting (Pty) Ltd.

918. It is recommended that the National Prosecuting Authority should give serious consideration to instituting criminal charges of corruption or any other applicable crime or offence against Mr Edwin Sodi and/or Blackhead Consulting ~~(Pty) Ltd~~ arising out of the arrangement or agreement that was entered into between Mr Edwin Sodi and Blackhead Consulting ~~(Pty) Ltd~~ and Mr Timothy Mokhetsi for the payment of about R600 000,00 to a firm of attorneys in the Free State to enable Mr Mokhetsi or his family Trust to pay for a property in which he would live.

919. It is recommended that the National Prosecuting Authority should give serious consideration to instituting a charge of corruption or other applicable offences against Mr Timothy Mokhesi arising out of his role in the payment by Mr Edwin Sodi and/or Blackhead Consulting of an amount of about R600 000.00 into the trust account of a

firm of attorneys in Bloemfontein to enable a property to be bought in which Mr Mokhesi was going to live.

920. It is recommended that to the extent that current legislation or government policies of state owned entities or companies do not prohibit the awarding of a tender or the concluding of a contract for the provision of services or delivery of goods by a person or entity or service provider that does not produce proof that it has the requisite educational qualifications, knowledge or skills and experience for the job awarded to it, consideration should be given to ensuring that legislation and policies of government departments or of state-owned entities require that no entity or person or service provider may be awarded a tender or may conclude any contract with a government department or a state-owned entity or company unless it has produced proof of relevant qualifications, skills experience or expertise required to perform the work.

921. It is recommended that consideration be given to the enactment of legislation that will make it a criminal offence for any official or office-bearer of a government department or of a state-owned entity or company to award a tender to or conclude a contract for the provision of services goods or with any person or entity unless he or she has satisfied himself or herself or itself that such person or entity has produced proof of possession of the minimum academic qualifications or experience or expertise.

922. It is recommended that the National Prosecuting Authority should give serious consideration to instituting criminal proceedings against Mr Edwin Sodi and/or Blackhead Consulting for fraud or other applicable crimes arising out of the fact that, in order to obtain work from the Department of Human Settlements in the Free State, Mr Sodi and/or Blackhead Consulting (Pty) Ltd made a false representation to the Department of Human Settlements, Free State, that he or it had the knowledge, qualifications and/or experience, skills and expertise for the removal of asbestos when,

to the knowledge of Mr Edwin Sodi, Blackhead Consulting, Mr Mpambani and Diamond Hill, neither of them had the qualifications, knowledge, expertise and experience needed for the removal of asbestos.

Judicial Commission

of

Inquiry into Allegations

of

State Capture, Corruption and Fraud in the Public Sector Including Organs of State

Report: Part IV

Vol. 2: The Free State R1 Billion Housing Project Debacle

Chairperson: Justice R.M.M Zondo

Chief Justice of the Republic of South Africa

FREE STATE R1 BILLION HOUSING DEBACLE

TABLE OF CONTENTS

THE FREE STATE R1 BILLION HOUSING PROJECT DEBACLE

INTRODUCTION

923. This Chapter of the Report deals with a project that the Commission has called during the investigation "The Free State R1 Billion Housing Project". After the investigation and the hearing of evidence and as this part of the Report was being prepared, it has become crystal clear that this project was a debacle, hence the title of this Chapter: "The Free State R1 Billion Housing Project Debacle" because of the manner in which the Free State Provincial Government, through its Department of Human Settlements, handled the project. It was a dismal failure: a debacle.

924. The Free State R1 Billion Housing Project was not mentioned in the Public Protector's Report called "State of Capture". However, it falls within the terms of reference of the Commission. In particular, reference can be made to term of reference 1.4 of the Commission's terms of reference. In terms of that term of reference the Commission was required to investigate and inquire into "whether any public official or employee of any state owned entity breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with Government or any organ of state".

925. On 25 March 2010 the Department of Cooperative Governance, Traditional Affairs and Human Settlements, Free State issued a media statement that read as follows in part:

> "The Free State government has allocated R1.3 billion for the construction of housing units towards addressing the 200 000 housing backlog.

Speaking during the provincial Human Settlements budget vote speech, MEC Mosebenzi Zwane said the funds will also be used for the installation of municipal services, development of social amenities and acquire land.

'Creating sustainable human settlements remains our main focus in the 2010/11 financial year. As a commitment to the achievement of the millennium development goals, our aim is to provide 10 000 units towards reducing the backlog of people living in informal settlements,' he said.

In line with government's commitment to provide decent accommodation closer to places of work, he said his department will in partnership with the private sector and the Housing Development Agency explore different ways and means to provide mixed housing options.

'We were able to pilot and display better and different typologies such as designs and plans of houses in various towns. Our aim is to move away from the drab of Reconstruction and Development Programme (RDP) uniformity,' he added.

Improvement in this area of work, he said included exploring alternative building methods, using mass based approach in construction, to create jobs and develop skills.

He said the department had also explored the use of alternative building materials in housing delivery, in selected towns. These options, he added will include rental units closer to places of employment in Bloemfontein, Bethlehem, Sasolburg and Welkom as pilot projects.

In partnership with the Department of Land Affairs, the department had acquired ten land parcels in various localities as identified by different local municipalities, for future establishment of human settlements.

'Through our programme of planning and surveying we had initially planned to develop 8 000 sites, but have achieved more than 12 000 sites' he said.

A further hundred million has been allocated for the process of building decent homes for Military Veterans and restitution beneficiaries."

926. As can been seen from the media statement, in 2010/2011 the Free State Province was meant to build thousands of low cost houses. However, most of these houses were never built.

927. When the Free State Department of Human Settlements under-spent the funding allocated to it, the National Department of Human Settlements threatened to transfer some of the housing budget to "better performing provinces".

928. A scheme was quickly devised for the money to be spent, which led to the province spending over R500 million by giving more than 100 contractors advance payments before any work was done. The Free State Department of Human Settlements made payments to the contractors without any written agreement or any proof that houses had been built. No procurement process was followed in respect of the contractors and the parties who supplied materials. The Free State Department of Human Settlements lost over R400 million in this way.

929. The funds for the Free State R1 Billion Housing Project were an allocation from what is referred to loosely as DORA Funding. DORA is an abbreviation for legislation called the Division of Revenue Act 1 of 2010. DORA funding is, therefore, funding allocated by the National Treasury in terms of that Act. Seeing that the whole project was based on DORA funding, it is necessary to explain at the outset what process was followed at the time to trigger DORA funding for the building of low-cost houses in the various provinces.

DORA funding and low cost housing

930. This matter takes place in the context of funding allocated to the Free State Department of Human Settlements for the purposes of building low cost housing ("RDP" housing) in terms of the Division of Revenue Act 1 of 2010 (DORA).

931. The DORA-funding application for building low-cost housing (also known as the business plan) is submitted to the National Department of Human Settlements in October/November every year.[729]

932. The business plan originates from municipalities who have to identify their low-cost housing needs for the next financial year commencing in March, and apply to the Free State Department of Human Settlements for funding to build and provide such housing.[730] The Free State Department of Human Settlements compiles a housing allocation list from the municipal submissions, which housing allocation list forms the basis of its business plan.[731]

933. This business plan is finally approved by the National Department of Human Settlements and consolidated with all other provincial plans into one for approval during February of the following year by National Treasury.[732]

934. Organs of state involved in government housing projects are obliged to feed information about their housing projects into the Housing Subsidy System (HSS), and to use the HSS as a project management tool to record milestones against which contractors are entitled to receive part payment (based on certain milestones) of the agreed contract price.[733]

935. The predefined milestones for payment in terms of government housing projects are:

935.1. Phase 1 – completion of the foundations;

935.2. Phase 2 – completion of the wall plate; and

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[729] Exhibit UU2, p 11, para 31.
[730] Exhibit UU2, p 11, para 33.
[731] Exhibit UU2, p 11-12, para 34-35.
[732] Exhibit UU2, p 11, para 32.
[733] Exhibit UU2, p 12, para 37; Transcript 21 September 2020, p 118.

935.3. Phase 3 – completion of the housing unit.[734]

936. These milestones correspond with the agreed payment plan in terms of the standard building contract which was used by Free State Department of Human Settlements at the time.[735] In terms of this standard contract, materials to complete the milestones had to be provided by the appointed building contractor.[736] According to Mr Nthimotse "Tim" Mokhesi who became Head of Department (HOD) for the Free State Department of Human Settlements in 2012, the building materials need to be incorporated into construction work before the milestone is met.[737]

937. In the normal course of events, a contractor's work is inspected by Free State Department of Human Settlements officials and certified as complete before the Free State Department of Human Settlements feeds that information into the HSS to trigger an interim payment obligation.[738]

938. In the Free State at the time, there was no provision for advance payments.[739] Mr Mokhesi further confirmed in his oral evidence that in the normal course of events, money would only be paid by the Department on completion of each of the set milestones.[740]

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[734] Exhibit UU2, p 12-13, paras 38-38.3; Transcript 21 September 2020, p 59.
[735] Exhibit UU2, p 13, para 40.
[736] Exhibit UU2, p 13, para 41; Exhibit UU3, p 6, para 13.
[737] Transcript 21 September 2020, p 119.
[738] Exhibit UU2, p 13, para 42; Transcript 23 September 2020, p 52.
[739] Exhibit UU3, p 6, para 13.
[740] Transcript 21 September 2020, p 60.

Bigger and better houses

939. The national norm at the time was for 40m² RDP houses to be built by the Department of Human Settlements, the design and specifications for which were prepared by the National Home Builders Registration Council (NHBRC).[741]

940. The fixed contract price for such 40m² houses was around R50,000.00 at the time, while the Free State's norm at that stage was 45m² houses for the same price.[742]

941. Mr Kaizer Maxatshwa, former Deputy Director-General (DDG) of the Free State Department of Human Settlements, confirmed that contracts for the 2010/2011 financial year had already been allocated on the basis of a 45m² house at a fixed price of around R50,000.00 per house within the allocated DORA funding by early 2010.[743] Then Mr Ace Magashule (Mr Magashule, who was Premier at the time) announced in his State of the Province Address on 26 February 2010 that the size of low-cost houses in the Free State would increase to 50 to 60 square metres.[744] Mr Magashule stated in this address that the minimum size of an RDP house from then on would be 50-60²m.[745] In his speech Mr Magashule said:

> "I must indicate Honourable Speaker and members, that the minimum size of a Reconstruction and Development Programme (RDP) house will from now on be 50 to 60 square metres, as we have already done some last year."

942. Mr Moses Mpho "Gift" Mokoena (Mr Mokoena) was HOD in the Free State Department of Human Settlements at the time. On Mr Mokoena's version, Mr Magashule promised 50m² houses and more houses to communities (as part of his Operation Hlasela

[741] Exhibit UU2, p 14, para 46-46.1.
[742] Exhibit UU2, p 14, para 46.2-47.
[743] Exhibit UU2, p 15, para 50.
[744] Exhibit UU2, p 15, para 49.
[745] Mr Magashule's State of the Province Address dated 26 February 2010, attached as IR1 to the Investigator's report at p15, FS20 049.

Outreach Program) despite the fact that the Department had informed him that there was no budget to do so.[746] Mr Magashule had indicated that the Provincial Infrastructure Grant would fund the shortfall of R22,000.00 per house.[747]

943. This change caused disputes with the already-appointed building contractors who were now required to build 50m² houses.[748] In order to settle this dispute, it was decided that the Free State Department of Human Settlements would go out to tender for contractors who were prepared to build the larger houses at approximately R72,000.00 per house, while the previously-appointed building contractors would automatically be reappointed if they were interested.[749]

Problems in procurement

The collapsed tender process

944. Following Mr Magashule's address, the Free State Department of Human Settlements advertised tender LGH B01/10/11 "For construction of BNG Houses in the Free State through project linked" ("the tender"), which tender closed on 16 April 2010. Thereafter the Free State Department of Human Settlement's Supply Chain Management Directorate and Bid Evaluation Committee (BEC) prepared a report to the Bid Adjudication Committee (BAC) in respect of compliant and non-compliant tenders.[750] Of the 361 bids received, the BEC recommended that 109 qualifying bids must be adjudicated on price by the BAC.[751]

[746] Exhibit UU3, p 2, para 5.
[747] Exhibit UU2, p 15, para 52.
[748] Exhibit UU2, p 15, para 50.
[749] Exhibit UU2, p 15, para 51.
[750] Exhibit UU2, p 16, para 55.
[751] Exhibit UU2, p 17, para 56; Transcript 21 September 2020, p 97.

945. This is confirmed by the record of the meeting of the BEC, which appears to have met on 2 July 2010.[752]

946. The BAC then met on 28 July 2010.[753] At this meeting it was realised that the tender validity period had expired. The Committee then resolved to rather cancel the tender and establish a database of service providers.[754] This database included all of the bidders who submitted tenders, whether compliant or non-compliant, even those who were disqualified.[755] Mr Mokoena approved this resolution of the BAC on 30 July 2010.[756]

947. In his oral testimony, Mr Mokhesi stated that he did not know why the BAC delayed their meeting until 28 July 2010.[757] Mr Mokhesi also confirmed that the 90 day bid validity period is prescribed by National Treasury Regulations,[758] but the BAC had the option to cancel the tender or to regularise the process by confirming with the tenderers whether their prices would remain the same.[759] Mr Mokhesi confirms that the tender process could also have been cancelled and restarted, but the Department could not just forget about the process and establish a database at the discretion of officials.[760]

The establishment of a "database"

948. This decision by the BAC to put all those who tendered on a database caused some confusion during oral evidence.

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[752] Para 3 and 6 of IR2 attached to the Investigator's Report at Exhibit UU15, p 61 and 70. See timeline above.
[753] IR3 attached to the Investigator's Report at Exhibit UU15, p 79ff. See timeline above.
[754] Item 7.1. of IR3 attached to the Investigator's Report at Exhibit UU 15, p 81.
[755] Exhibit UU2, p 17, para 57.
[756] Ex para 59 at FS12 199, IR3 attached to the Investigator's Report at Exhibit UU15, p 79 is the resolution of the BAC, which appears to have been signed by Mr Mokoena as accounting officer. See timeline above.
[757] Transcript 21 September 2020, p 98.
[758] Transcript 21 September 2020, p 99.
[759] Transcript 21 September 2020, p 101-102.
[760] Transcript 21 September 2020, p 105.

949. When I asked whether Mr Mokhesi's impression from the affidavits is that the BAC decided that the way to achieve what they want is to cancel the tender process, put everyone on a database and choose the people who will get the job from the database, Mr Mokhesi confirmed this impression.[761]

950. Mr Mokhesi's impression is further confirmed in his affidavit which states as follows:

> *"The department thus decided to award contracts to contractors on various databases as well as to the contractors who had bid for the tender notwithstanding that 105 of the bidders were disqualified for basic bid compliance reasons and that a further 147 were disqualified because they did not meet the minimum functionality threshold."*[762]

951. A comparison between the record of the BEC and the list of respondents to the 2016 High Court application shows that some contractors who later received contracts in this matter indeed were deemed to be disqualified by the BEC. For example, Jore Construction CC was disqualified because its NHBRC registration had expired, but was clearly awarded contracts as it is listed as the 2nd Respondent,[763] as well as in National Urban Reconstruction and Housing Agency (NURCHA) reports mentioned below.

Mr Zwane's versions

952. On his first appearance at the Commission, Mr Mosebenzi Joseph Zwane (Mr Zwane), who was MEC for Human Settlements in the Free State at the time put forward the following version regarding the collapsed tender process and the establishment of the database:

952.1. After the tender process in 2010, Mr Zwane was expecting a final report on the final outcome of the tender process because that would determine the date on

[761] Transcript 21 September 2020, p 107-108.
[762] Exhibit UU11 p 116, Mr Mokhesi affidavit dated 21 December 2016 para 76.
[763] Exhibit UU15 p 62, Para 3.2. of IR2 attached to the Investigator's Report, Exhibit UU15 p 85 Para 2 of IR5 attached to the Investigator's Report.

which they could start building houses.[764] Mr Zwane claims to have asked for a report on a way forward after the tender process collapsed. This was when the database issue was raised.[765]

952.2. On this version, officials suggested to Mr Zwane that they create a database.[766] Mr Zwane alleges that officials did not report to him on how they exercised their discretion on the database, and no-one told him they couldn't create a database.[767] Mr Zwane allegedly then gave permission to Mr Mokoena to develop the database.[768]

953. Later on in his first appearance, Mr Zwane also claimed to have been unaware of the BAC's resolution to establish the database (that it had to do so). He was not aware of the BAC minutes.[769] On this version, Mr Zwane claims to have known that the tender had been abandoned because it had expired.[770] He did not query the process (of cancelling the tender) because it would have been "interfering within administration."[771]

954. Mr Zwane's understanding was that, once on the database, contractors could be given work, subject to the department "capacitating" them where necessary.[772] Mr Zwane expected officials to know the law and bring the final product to him.[773] According to Mr Zwane, he was told that the database was "pretty legal",[774] and that they were following

[764] Transcript 25 September 2020, p 13.
[765] Transcript 25 September 2020, p 29.
[766] Transcript 25 September 2020, p 19.
[767] Transcript 25 September 2020, p 18.
[768] Transcript 25 September 2020, p 31.
[769] Transcript 25 September 2020, p 63.
[770] Transcript 25 September 2020, p 79.
[771] Transcript 25 September 2020, p 80.
[772] Transcript 25 September 2020, p 32.
[773] Transcript 25 September 2020, p 26.
[774] Transcript 25 September 2020, p 24.

the Housing Act.[775] On Mr Zwane's initial version, his only duty was to receive reports, while the accounting officer was responsible for expenditure.[776]

955. Mr Zwane initially stated that he had been told that the Housing Act gives certain responsibilities to the MEC, but he had not seen it himself.[777] Mr Zwane understood his responsibility in terms of the Housing Act to be the final approval of the allocation list.[778] Mr Zwane claims to have familiarised himself with the Constitution and the PFMA, but not the Housing Act. However, he said that he thought he had gathered sufficient information to enable him to "lead effectively".[779]

956. When specific provisions of the Housing Act were put to Mr Zwane, specifically that the Act does not contain exceptions to a fair and transparent bidding process, i.e. does not provide for a database, and that the MEC has certain duties,[780] Mr Zwane responded that he was not aware of this.[781] Mr Zwane initially claimed that the first time he had been informed of the Housing Act was after the tender abandonment.[782] On Mr Zwane's version, he had expected a welcoming handover process when he became MEC, led by the HOD, to draw his attention to relevant legislation and there should have been a handover report by the previous MEC. This process took place, but no-one drew his attention to the Housing Act.[783] But he did receive a pack of relevant policies.[784]

957. In a version put forward in Mr Zwane's second appearance before the Commission, he confirmed that there were previously contractors appointed to a database. Then the dispute with the contractors arose, and they began the processes that would give them

[775] Transcript 25 September 2020, p 30.
[776] Transcript 25 September 2020, p 33.
[777] Transcript 25 September 2020, p 53.
[778] Transcript 25 September 2020, p 54.
[779] Transcript 25 September 2020, p 76.
[780] Transcript 25 September 2020, p 96.
[781] Transcript 25 September 2020, p 105.
[782] Transcript 25 September 2020, p 109.
[783] Transcript 25 September 2020, p 111-112.
[784] Transcript 25 September 2020, p 113.

a new list. Mr Zwane confirmed that that new process was the same process as what gave them 361 bids (according to the minutes).[785] He also confirmed the sequence of events that led to a consolidated list of qualified and disqualified bidders and those from other databases (together over 300 contractors) and that the tender process continued until 28 July when it was finally abandoned.[786]

958. In other words, Mr Zwane's version on his second appearance was that the tender process described above which ran from April to July 2010 would have been for the creation of a database, and not for specific work to be allocated. On this version, the open tender process that took place in April-July 2010 was meant to facilitate a new database that could be used by Mr Zwane for the following 5 years.[787] Mr Zwane's version on this appearance was that officials had assured him that it was lawful to award contracts to those on the database after the tender process had collapsed.[788]

959. Given the confusion created on this issue during Mr Zwane's first two appearances, Commission investigators put further questions to Mr Mokoena for clarity. Mr Mokoena responded to those questions via a supplementary statement, which is detailed below. That statement was then put to Mr Zwane on his third appearance before the Commission on 11 December 2020.

Mr Mokoena's supplementary statement

960. According to Mr Mokoena, during his time as HOD, the Free State Department of Human Settlements kept a database of contractors who would be eligible to receive work from the Department. This database comprised of contractors who had previously performed work for the Department as well as those who responded to Expression of

[785] Transcript 25 September 2020, pp 14-15.
[786] Transcript 25 September 2020, pp 16-18.
[787] Transcript 25 September 2020, pp 46-47 and p 52.
[788] Transcript 25 September 2020, pp 49-50.

Interest advertisements put out by the Department.[789] According to Mr Mmuso Tsoametsi (Mr Tsoametsi), former Deputy Director General in the Free State Department of Traditional Affairs and alleged former Advisor to the MEC, PWC had previously assisted the Department in creating a database.[790]

961. According to Mr Mokoena, the purpose of the database from the Department's perspective was to keep a list of qualified contractors who may be alerted to relevant tender advertisements as and when they appeared.[791] Tenders were advertised around four weeks prior to the closing date, and there was a risk that the Department would not receive bids from qualified contractors. The database was introduced to alert qualified contractors when tenders were open in order to ensure high quality bids were received from qualified contractors.[792]

962. The benefit to a contractor of being on the database was therefore that they would receive communication from the Department when a tender relevant to their skills was advertised, but those contractors would still need to submit a bid and have that bid evaluated against all other bids to be eligible to have the work allocated to them.[793] According to Mr Mokoena, it would have been irregular for a contractor on the Department's database to be allocated projects without going through the further tender process which involved submitting a bid for a specific housing project.[794]

963. According to Mr Mokoena, all of the tenders for specific projects would be advertised in the local press and would be open to bidders on the database as well as those who were not.[795] The tender titled "LGH B01/10/11 for construction of BNG Houses in the

[789] Exhibit UU3, p 42 Mr Mokoena supplementary statement para 12. An example is attached as Document 4 at Exhibit UU3, p 60.
[790] Mr Transcript 28 September 2020, pp 146-147.
[791] Exhibit UU3, p 42 para 13 Mr Mokoena supplementary statement para 13.
[792] Exhibit UU3, p 43, para 13 Mr Mokoena supplementary statement.
[793] Exhibit UU3, p 43, para 14 Mr Mokoena supplementary statement.
[794] Exhibit UU3, p 43, para 14 Mr Mokoena supplementary statement.
[795] Exhibit UU3, p 43 para 15 Mr Mokoena supplementary statement.

Free State through project linked" which was evaluated by the BEC on 2 July 2010[796] was a tender for the construction of specific housing projects in the 2010/2011 financial year. This tender was not for inclusion in the departmental database,[797] as Mr Zwane alleged. According to Mr Mokoena, advertisements for inclusion in the database would start with the letters "EOI",[798] while the "LGH" in this tender stands for "Local Government Housing."[799]

964. Mr Mokoena's supplementary statement was put to Mr Zwane in his third appearance at the Commission. Mr Zwane responded that he has read the statement but he says he was told that parties tender to be on the database, and that that database is valid for 5 years.[800]

965. In response to questions for clarity, Mr Zwane said that his understanding is that a list/database is compiled after a competitive bidding process, and that list would be used until it expires.[801] The list expires after 5 years. Mr Zwane claims that he questioned this process when he arrived in the Department, and he was told that this process is used to save time.[802] Further discussion on the use of databases by the Department appears in the section 18 below.

[796] Exhibit UU11, p 273 Minutes attached to Mr Mokhesi affidavit dated 21 December 2016 and also appearing as Document 5 attached to Mr Mokoena supplementary statement at exhibit UU3, p 61. See timeline above.
[797] Exhibit UU3, p 44 Mr Mokoena supplementary statement para 16 at.
[798] "Expression of Interest".
[799] Exhibit UU3, p 44 Mr Mokoena supplementary statement para 16 at FS12 372.7.
[800] Transcript 11 December 2020, p 116.
[801] Transcript 11 December 2020, p 120.
[802] Transcript 11 December 2020, p121.

Outcome of procurement irregularities

966. In his third appearance before the Commission, Mr Zwane conceded that the tender process had been abandoned and that there was no other competitive bidding process in the 2010/2011 financial year.[803] This accords with the evidence of other witnesses.

967. Therefore, despite confusion surrounding the role of databases in the Free State Department of Human Settlements, what is clear from the evidence is that there was only one tender process which took place in 2010: that being "LGH B01/10/11 For construction of BNG Houses in the Free State through project linked" which took place between April and July 2010. This tender process was then cancelled on 30 July 2010. The result is that none of the contractors who were subsequently appointed to build RDP houses in the 2010/2011 financial year in the Free State were appointed as a result of a competitive bidding process.

Consequences of the unspent ALLOCATION

968. National Treasury had allocated approximately R1.42 billion of DORA-funding to the Free State Department of Human Settlements for the specific purpose of constructing low-cost housing in the province in the 2010/11 financial year.[804]

969. As a result of the dispute with previously appointed contractors as well as the collapsed tender process, the Free State Department of Human Settlements had built no houses from its DORA allocation by halfway through the 2010/11 financial year.[805] Mr Mokhesi

[803] Transcript 11 December 2020, p98.
[804] Exhibit UU2, p 11, para 30.
[805] Transcript 22 September 2020, p171.

confirms that by October 2010, the Free State Department of Human Settlements had only spent 10% of its allocation,[806] as does Mr Mokoena[807] and Mr Maxatshwa.[808]

970. If the allocated DORA-funding is not spent by a province during a financial year then, to meet the delivery target, the National Department notifies the defaulting province that it is going to withhold further transfers and re-allocate the funds to compliant provinces.[809] This reallocation of unspent monies would occur during the mid-term budget.[810] Having to pay back money to National Government in this way could also reduce the new budget allocation for the Province for the following financial year.[811]

971. According to Mr Maxatshwa, in late October to beginning of November 2010, the National Department of Human Settlements criticised the Free State Department of Human Settlements for underspending its DORA funds allocated for low-cost housing.[812]

972. This concern came in the form of a notice from the then Minister of Human Settlements, Mr Tokyo Sexwale (Mr Sexwale), which recorded that the Free State Department of Human Settlements had spent less than 10% of what it was meant to have spent by the start of the third quarter of the financial year, and that the Free State Department of Human Settlements was required to submit a recovery plan showing how it intended to improve its expenditure and delivery of low-cost housing.[813]

[806] Transcript 21 September 2020, p143.
[807] Transcript 22 September 2020, p101-102.
[808] Transcript 23 September 2020, p62.
[809] Exhibit UU2, p10, para 28.
[810] Exhibit UU2, p10, para 29.
[811] Exhibit UU3, p 3, para 7.
[812] Exhibit UU2, p18, para 61.
[813] Exhibit UU2, p 18, para 63.

973. This is confirmed by Mr Zwane who stated that there was a meeting on 18 October 2010 where Mr Sexwale first asked for the Expenditure Recovery Plan. This was a MinMec meeting[814] at which all MECs were present.[815]

974. According to Mr Mokoena, the 10% of the budget that had been spent may have gone to foundations or would have been spent on title deeds, surveys and basic services, but not one house had been built by October 2010.[816] Therefore, the Free State Department of Human Settlements had built no houses in the 2010/2011 financial year by the time Mr Sexwale requested that the Free State Department of Human Settlements lay out its plan for spending its DORA-allocated funds in the form of an ERP. It seems that round about October / November 2010 Mr Zwane and his Department began to panic arising out of the situation in which they were with regard to the failure to build any house halfway through the financial year in circumstances where the Department had been given money to build houses. This was a disaster in waiting.

The Expenditure Recovery Plan[817]

Formulation of the plan

975. As a result of queries from the National Department the Free State Department of Human Settlements designed and implemented its "Expenditure Recovery Plan" (the ERP). The Director-General and the Minister had written to the Free State Human Settlement Department demanding that action be taken to deal with the Department's failure to spend its Budget.

[814] Transcript 25 September 2020, p94.
[815] Transcript 25 September 2020, p93.
[816] Transcript 22 September 2020, p103-106.
[817] Exhibit UU2, p 239.

976. A group of high level officials held meetings regularly to monitor progress in the construction of houses and the spending of the budget. From the explanation given to the Commission they met in a project office and referred to that office as the "War Room" either in general or whenever they met in it.

977. It appears that the ERP was developed from the War Room. The group of officials would identify where blockages were in the building of houses and decide on what needed to be done in order to ensure that the blockages were removed.

978. According to Mr Maxatshwa, the "War Room" is a common concept in government, used to monitor the implementation of a plan.[818] This is confirmed by Mr Zwane who stated that "The war room was not a result of the recovery plan. It was a structure that was there to ensure that we do what we are supposed to do."[819]

979. Mr Mokoena confirms that the ERP came to exist after they had started working through their "War Room".[820] On Mr Tsoametsi's version, "War Room" meetings were held on a weekly basis and the MEC attended these meetings every second week.[821] According to Mr Zwane, he requested the HOD and his officials to develop the recovery plan,[822] and Mr Zwane himself had not been part of the development of the ERP.[823]

980. The ERP itself took the form of projected expenditure for the remainder of the financial year, and projected how many houses the Free State Department of Human Settlements intended to build. The ERP does not in itself propose any advance payments, and uses the established payment milestones in the Department in its

[818] Transcript 23 September 2020, p58.
[819] Transcript 25 September 2020, p87.
[820] Transcript 22 September 2020, p 161.
[821] Transcript 28 September 2020, p 138.
[822] Transcript 25 September 2020, p 83.
[823] Transcript 25 September 2020, p 86.

formulation.[824] This can be seen from the ERP presentation.[825] This plan has some bold ambitions to complete 12,800 houses from start to finish between November 2010 and March 2011, but the standard 3 payment milestones are listed in the presentation's "Cashflow Projections."

981. Overall, the ERP projected that Free State Department of Human Settlements would spend R1 billion before the end of the 2010/11 financial year. Mr Mokoena admitted that Free State Department of Human Settlements did not have the capacity to reach this target, and thinks the amount was arrived at by looking at the allocated amount and working backwards from there.[826]

982. Mr Maxatshwa goes further and admits that the cash flow projections in the ERP were not possible, particularly because of the builder's holiday in December of that year.[827] Mr Maxatshwa says that he knew from experience that the ERP could not be achieved, and he thinks the majority of people in the "War Room" knew that Free State Department of Human Settlements did not have the capacity to achieve the ERP, but he cannot remember who pushed strongly for the plan.[828]

983. Mr Zwane also confirmed that in hindsight he could see that the ERP had "loopholes": in other words, it was ambitious.[829] Mr Zwane claims to have asked officials if the plan was realistic and whether he could hold them accountable for it, and they agreed. He did not ask HOW it would be achieved, only for their assurance THAT it would be

[824] Exhibit UU2, p 19, para 65.
[825] Transcript 25 September 2020, p 164.
[826] Transcript 22 September 2020, pp 162-163.
[827] Transcript 23 September 2020, p 63.
[828] Transcript 23 September 2020, p 64-65.
[829] Transcript 25 September 2020, p 166-167.

achieved.[830] Mr Zwane saw the ERP document as pushing officials and everybody harder to achieve.[831]

Nature of the plan

984. Given the ambitious nature of the ERP, advance payments appear to have been necessary in order to achieve the projected expenditure. Because advance payments would not be compliant with the HSS system and the normal departmental procurement processes, certain other measures needed to be taken in order for those advance payments to be effected.

Material Supply and Cession Agreements

985. The first of these is that the contract for appointment of a contractor was accompanied by two additional contracts: a material supply contract and a material supply cession contract.[832]

986. The process in terms of which the two additional contracts were signed and the HSS system manipulated to trigger the advance payment appears to have become known as the Advance Payment System (APS). Mr Mokoena confirmed that the agreements of cession were used as documentation to justify these payments.[833]

987. Interestingly, despite the three agreements purporting to support payments in terms of the APS, Mr Mokhesi conceded that all three agreements contradicted each other.[834] This is because the cession agreements were entered into before any foundations had

[830] Transcript 25 September 2020, p 170.
[831] Transcript 25 September 2020, p 168.
[832] Exhibit UU2, p 205-206, para 88.
[833] Transcript 22 September 2020, p 157.
[834] Transcript 21 September 2020, p 61.

been built, meaning no claim on the part of the building contractors had arisen at that point that could be ceded to the supplier in terms of the agreement.[835]

988. In his evidence, Mr Maxatshwa agrees that the contracts were a mess and cannot live together,[836] but he was under the impression that they were drafted by the state law advisors on the 4th floor, i.e. the Premier's Office.[837] However, Mr Venter from the state law advisors in the Office of the Premier alleges that the Office of the Premier was not consulted at all on this project.[838]

989. Mr Mokhesi further confirmed his conclusion in evidence that the cession agreements were used as part of the documentation that was used to convince National Treasury to make payment, and Free State Department of Human Settlements paid out in excess of R500 million prior to the claim of the contractors arising.[839] However, despite this, Mr Mokhesi confirmed that the National Department of Human Settlements was not informed about these problematic cession agreements.[840]

Manipulation of the HSS System

990. Secondly, it was necessary for the HSS system to be manipulated by indicating that certain payment milestones had been met when they were not met in order to trigger the advance payment. The nature of the HSS system necessitates that the advance payment would then have had to have been recorded against one of the established milestones without there having been completion of that milestone.[841]

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[835] Transcript 21 September 2020, p 62 and 65.
[836] Transcript 23 September 2020, p 109.
[837] Transcript 23 September 2020, p 107.
[838] Transcript 23 September 2020, p 119.
[839] Transcript 21 September 2020, p 63.
[840] Transcript 21 September 2020, p 66.
[841] Exhibit UU2 p 28, para 108.

991. Mr Mokhesi confirms that officials manipulated the HSS system to make it look as though construction work had been executed and that payments were due when in truth that was not the case. Mr Mokhesi confirms that the system was manipulated to insert a milestone into the agreement that did not exist.[842] In this regard, Mr Mokhesi confirmed that the roofing material was the most expensive milestone, so manipulating the system to allow for the roofing material to be paid up front was a way of distributing money quickly.[843]

The "War Room" used to circumvent proper procedures

992. According to Mr Maxatshwa, the process that took place at the "War Room" meetings after the ERP was developed was that the MEC would allocate units to a contractor of his choice in a specific municipal area, then a contract would be signed between that building contractor and Free State Department of Human Settlements, and another contract would be signed by the building contractor, material supplier and Free State Department of Human Settlements together with a supply cession agreement between the building contractor and material supplier.[844] These signed documents, together with the invoice from the supplier to the contractor would be handed to the New Material Cession Milestone Management branch of the Free State Department of Human Settlements who would capture the beneficiaries, site number contractor and suite of documents.[845] The suite of documents would then be handed to the financial branch for payment.[846]

993. Mr Mokoena confirms that the documents required to verify a payment such as a certification of receipt by the contractor were not always present. Mr Mokoena says the

[842] Transcript 21 September 2020, p 67.
[843] Transcript 22 September 2020, p 74.
[844] Exhibit UU2, p 27, para 104.
[845] Exhibit UU2, p 27, para 105.
[846] Exhibit UU2, p 27, para 106.

department was still new and didn't have capacity, so this kind of arrangement overwhelmed them.[847]

994. Mr Zwane however denied the allegation that he would make allocations during the "War Room" meetings.[848] In his third appearance before the Commission, Mr Zwane also conceded that that it would be irregular for the MEC to have been involved in the appointment of contractors.[849]

995. Another problematic aspect of the APS is that suppliers were nominated by building contractors, and therefore no open tender or bidding process took place preceding their appointment.[850] According to Mr Maxatshwa, building contractors were required to approach material suppliers.[851] There was also no agreed price with the material suppliers, only the hope that they will give the Department the best price.[852] Mr Mokoena admitted that he was suspicious that the invoices the Department was receiving from the material suppliers may have been inflated.[853]

The Advance Payment System

Responsibility for the APS

996. On Mr Maxatshwa's version, the APS emanated from Mr Zwane, was designed by Mr Tsoametsi and was approved by Mr Mokoena.[854]

997. In his first affidavit, Mr Zwane shies away from taking any responsibility for the APS by referencing the so-called legal opinion of Mr Tsoametsi, and by referring to "Department

[847] Transcript 22 September 2020, p 158.
[848] Transcript 11 December 2020, p 107.
[849] Transcript 11 December 2020, p 110.
[850] Transcript 21 September 2020, p 79.
[851] Transcript 23 September 2020, p 107.
[852] Transcript 21 September 2020, p 174.
[853] Transcript 22 September 2020, p 154.
[854] Exhibit UU2, p 25, para 96.

officials" who "entered into material supplier cession agreements with various suppliers" and that he requested the "Head of Department (HOD) and Head of Legal to ensure that all protocols are observed".[855]

998. However, even on Mr Zwane's own version, the APS itself seems to have emanated from one of the "War Room" meetings held in October 2010.[856] This meeting would have been chaired by Mr Zwane and attended by Mr Mokoena, Ms Seipati Dlamini, Ms Mamiki Mokhele (Ms Mokhele), Mr Tsoametsi, Mr Kabelo Kaloi (Mr Kaloi) and Ms Innocentia Motaung,[857] and occurred after a meeting that took place in Welkom.

The Welkom Meeting

999. It would appear that as a result of the previous "War Room" meeting where the ERP was discussed, a meeting was held in Welkom with appointed contractors in October 2010 in order to get their buy-in for the ERP.[858] This meeting was chaired by Mr Zwane.[859]

1000. At this meeting the contractors complained about how much work would need to be done in such a short space of time. On Mr Tsoametsi's version, these concerns were threefold: availability of material over the Festive Season, access to finance and increased labour costs over the Festive Season.[860]

1001. On Mr Zwane's version, it is at this Welkom meeting that the contractors requested assistance from Free State Department of Human Settlements in order to meet the ambitious deadlines of the ERP.[861] According to Mr Zwane, the APS was one possible

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[855] Exhibit UU9, p 35, para 92.
[856] Transcript 25 September 2020, p88; Transcript 13 October 2020, p 6.
[857] Exhibit UU2, p 22, para 79.
[858] Transcript 28 September 2020, p142. Transcript 25 September 2020, p 92.
[859] Transcript 13 October 2020, p 98.
[860] Transcript 28 September 2020, p 145.
[861] Transcript 25 September 2020, pp 88-89; Transcript13 October 2020, p 98.

solution discussed in Bloemfontein after the Welkom meeting.[862] According to Mr Zwane, It was the contractors who said that the Free State Department of Human Settlements cannot expect them to work weekends/holidays without giving them some assistance.[863] Also, with the new entrants including women, youth and disabled contractors, they would not have had the capacity to buy material to last them the entire builder's holiday period.[864]

The "War Room" meeting

1002. Mr Zwane testified that, given the concerns raised by the contractors in Welkom, he called the October War Room meeting and asked the question: why can the Department not assist the contractors by purchasing the building material for them?[865]

1003. This version is supported by Mr Tsoametsi who said that on their return from the Welkom meeting, a "War Room" meeting was held, attended by the MEC, CFO, HOD and executive management. This was late October or early November 2010. It was at this meeting that the MEC asked why they could not support the contractors by purchasing material for them.[866]

1004. In his third appearance before the Commission, Mr Zwane conceded that this question may have come across as indicating that he thought the APS was the way to go, even though it was not in the form of a proposal.[867]

1005. This would accord with Mr Mokoena's version that in October 2010 there was a special meeting called by Mr Zwane who called the meeting because he had a solution to the

[862] Transcript 25 September 2020, p 89.
[863] Transcript 13 October 2020, p 99.
[864] Transcript 13 October 2020, p 100.
[865] Transcript 13 October 2020, pp 103-104.
[866] Transcript 28 September 2020, pp 152-154.
[867] Transcript 11 December 2020, p 65.

problem of non-spending on the grant.[868] However, according to Mr Mokoena, rather than simply making a suggestion, Mr Zwane informed the meeting that he had a solution to the problem of the unspent budget.[869] This meeting was attended by Ms Dlamini, Ms Mokhele, Mr Tsoametsi, Mr Maxatshwa, Mr Koloi and Mr Motaung, and was held in the MEC's boardroom in Bloemfontein.[870] It was at this meeting that Mr Zwane allegedly first proposed the APS in that the Department would start buying material from material suppliers and paying for such materials in advance.[871] Payment to material suppliers would be made based on invoices which the contractors would obtain from the suppliers.[872] When this version was put to Mr Zwane in oral evidence, Mr Zwane disagreed, and insisted that he simply asked the question.[873]

1006. According to Mr Mokoena, his reaction at the meeting was that the suggested approach was illegal and that the Free State Department of Human Settlements policies[874] do not provide for advance payments.[875] According to Mr Maxatshwa, this was the response of the meeting as a whole, because the milestones do not allow for advance payments.[876] Mr Mokoena had said that everyone else in the meeting was quiet, but on Mr Maxatshwa's version the people in attendance were actually quite vocal and the majority were not in agreement with the MEC.[877] According to Mr Zwane, he did not recall Mr Mokoena raising his concerns in the meeting. But he did remember the legality of the process being raised in the meeting.[878]

1007. On Mr Mokoena's version, when he informed Mr Zwane at the meeting that the plan did not appear lawful, Mr Zwane stated that he was advised of the legitimacy of the plan,

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[868] Transcript 22 September 2020, p 108.
[869] Exhibit UU3, p 4, para 9.
[870] Exhibit UU3, p 4, para 10.
[871] Exhibit UU2, p 22, para 80-81; Transcript 23 September 2020, p 78.
[872] Exhibit UU3, p 5, para 11; Transcript 22 September 2020, p 113.
[873] Transcript 13 October 2020, pp 108-110.
[874] Neither do DORA nor the PFMA provide for advance payments. See discussion below.
[875] Exhibit UU3, p 6, para 12.
[876] Transcript 23 September 2020, p 78.
[877] Transcript 23 September 2020, p 78-80.
[878] Transcript 11 December 2020, p 66.

and that other provinces were doing the same.[879] This is confirmed by Mr Maxatshwa.[880] In oral testimony, Mr Mokoena went further to say that Mr Zwane had said he got expert advice but would not say who gave him the advice.[881]

1008. According to Mr Tsoametsi, however, it was raised at the meeting that the Department had previously bought material in advance in cooperation with NURCHA, and it was in light of this that he (Mr Tsoametsi) was tasked to go out and research the matter.[882] Mr Tsoametsi says that when Mr Zwane says he was advised of the legality of the plan, it could have been by Gauteng officials. This is because Mr Tsoametsi discovered during his research that Gauteng had tried advance payments.[883]

1009. It was decided at this meeting that Mr Zwane's "advisor" (Mr Tsoametsi) would do some research regarding the legitimacy of the plan and draft a document for discussion (see below).[884] On Mr Mokoena's version, Mr Tsoametsi was sent to research the plan because Mr Mokoena was adamant that the plan was illegal.[885]

Mr Zwane's alleged threat to Mr Mokoena

1010. According to Mr Mokoena, after this "War Room" meeting Mr Mokoena requested to have a meeting with Mr Zwane in private in the same boardroom..[886] According to Mr Mokoena, Mr Zwane responded by threatening that Mr Mokoena should tender his resignation if he refused to implement his plan, and he threatened him using the Sotho expression that he will "walk next to his shoes", which the Commission was told meant

[879] Exhibit UU3, p 7, para 14.
[880] Exhibit UU2, p 23, para 85.
[881] Transcript 22 September 2020, p 110.
[882] Transcript 28 September 2020, p 154.
[883] Transcript 28 September 2020, p 220.
[884] Exhibit UU3, p 7, para 15.
[885] Transcript 22 September 2020, p 112.
[886] Transcript 22 September 2020, p 114.

that he would be poor.[887] Mr Mokoena interpreted this as a threat, even though Mr Zwane did not say he would be dismissed.[888]

1011. When this was put to Mr Zwane, he said he found Mr Mokoena's assertion "amazing" and unfounded given that Mr Mokoena took leave in December 2010 despite being instructed by Mr Zwane not to do so, and he was not forced to resign.[889] Mr Zwane also denies that there was an informal meeting between him and Mr Mokoena after the formal meeting,[890] and he denies threatening Mr Mokoena that he will "walk next to his shoes".[891]

Receipt of Mr Tsoametsi's Document

1012. According to Mr Mokoena, when Mr Tsoametsi's document was received on 25 November 2010, Mr Zwane decided that the document should be used and the plan should be implemented.[892] Mr Mokoena claims he signed the document for fear of losing his job.[893]

1013. According to Mr Mokoena, he did try to report his dissatisfaction with the APS to the Premier, but he could not get an appointment. After 2 weeks of waiting outside the Premier's office, he gave up.[894]

1014. According to Mr Mokoena, Mr Tsoametsi's document did not convince him that the plan was legal.[895] On Mr Mokoena's version, he told Mr Tsoametsi that he would not sign the document.[896] It was only later when Mr Zwane called Mr Mokoena to his office and

[887] Exhibit UU3, p 7, para 16.
[888] Transcript 22 September 2020, p 125.
[889] Transcript 13 October 2020, pp 124-125.
[890] Transcript 11 December 2020, p 67.
[891] Transcript 11 December 2020 p 68.
[892] Exhibit UU3, p 8, para 17.
[893] Exhibit UU3, p 9, para 18.
[894] Transcript 23 September 2020, p 21-22.
[895] Transcript 22 September 2020, p 126.
[896] Transcript 22 September 2020, p 128.

asked him why he refused to sign that Mr Mokoena felt backed into a corner, so he signed in Mr Zwane's office. Mr Mokoena alleges that Mr Zwane reminded him that he had asked for his resignation letter if he refused to sign, and this is why he signed the document.[897]

1015. On Mr Tsoametsi's version, he gave the document to Mr Mokoena without any discussion. Mr Mokoena simply said that he would look at it and get back to him, but did not raise the issue of illegality.[898] Mr Mokoena then called Mr Tsoametsi at around 5:30pm to say that the document had been signed.[899] Mr Tsoametsi denies that he went to see the MEC after giving the document to Mr Mokoena, or that he discussed the document with the MEC.[900]

1016. On Mr Zwane's version, he received Mr Tsoametsi's document after the 25th of November and by that stage it had already been signed and approved by Mr Mokoena as accounting officer.[901] Mr Zwane said that, as a lay person, he did not see fit to question the document that had been signed by a legally-trained person and the accounting officer.[902]

1017. Mr Zwane further denied that Mr Mokoena signed Mr Tsoametsi's document because he feared losing his job, because if Mr Mokoena was so scared of Mr Zwane, he would not have taken leave that December when Mr Zwane had specifically told him not to.[903]

1018. Mr Zwane alleges that Mr Mokoena was still signing cession agreements in February 2011 after Mr Zwane had left the Department, and this is confirmed by Open Water.[904]

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[897] Transcript 22 September 2020, pp 131-132.
[898] Transcript 28 September 2020, p 194.
[899] Transcript 28 September 2020, p 195.
[900] Transcript 28 September 2020, p 224.
[901] Transcript 13 October 2020, p 115.
[902] Transcript 13 October 2020, p 116.
[903] Transcript 11 December 2020, pp 77-78.
[904] Open Water examined a number of agreements, the details of which appear in its report from p 99 thereof at FS15 541ff. One example is para 8.18.7 which mentions a cession agreement entered into on 26 October 2011 at FS15 592.

Mr Zwane draws attention to this fact as evidence that he was not the one who was adamant to choose the APS scheme.[905]

Mr Tsoametsi's document

The document as a purported legal opinion

1019. According to Mr Mokoena, Mr Tsoametsi was advisor to the MEC, and the MEC instructed him to research the legitimacy of the plan.[906] Mr Tsoametsi maintains he was not the MEC's advisor because all officials in the Department advise the MEC.[907] Mr Tsoametsi was not from the Legal Department. Mr Tsoametsi further admits that he was never involved in housing, and the first time he was involved in housing was when he was called to the first "War Room" meeting with Mr Zwane.[908]

1020. According to Mr Zwane, at the "War Room" meeting in Bloemfontein after the Welkom meeting, he requested two officials (Messrs Mokoena and Tsoametsi) to develop an opinion document. Mr Tsoametsi was at the Welkom meeting and he has a legal background. Zwane instructed that it should be a "legally sound" document.[909]

1021. According to Mr Tsoametsi, his mandate after the "War Room" meeting where the APS was discussed was to research whether the APS could be done and how it could be done. It was not Mr Tsoametsi's mandate to investigate whether or not the plan was right.[910] Mr Tsoametsi acknowledged that Mr Mokoena spoke on the issue of legality in the meeting with Mr Zwane where the APS was proposed.[911] However, while Mr Mokoena's version is that Mr Tsoametsi was mandated to research the legality of the

[905] Transcript 13 October 2020, p 126.
[906] Transcript 22 September 2020, p 115.
[907] Exhibit UU6, p 431, para 40.1.
[908] Transcript 28 September 2020, p 166.
[909] Transcript 25 September 2020, p 90.
[910] Transcript 28 September 2020, p 155.
[911] Transcript 28 September 2020, p 215.

plan, Mr Tsoametsi did not understand it that way. He thought Mr Mokoena raised the issue more generally.[912]

1022. As to the method of his research, Mr Tsoametsi says that he started with parliamentary records dealing with challenges facing contractors, looked at departmental policy, spoke to Gauteng officials and spoke to NURCHA.[913] Mr Tsoametsi further admits that his document was not a technical legal opinion and he did not consult legislation.[914]

1023. Mr Tsoametsi does however maintain that the memorandum was discussed with Mr Gordon Taka, the Legal Advisor to the Free State Department of Human Settlements.[915] According to Mr Tsoametsi, the only legal question he asked in preparing his memo was whether it would be lawful to create an addendum to the contract that would allow contractors to be supported, and the legal advisor allegedly said it would be allowed.[916]

1024. This document, however, simply lays out the nature of the tripartite agreements and does not comment on the legitimacy of the plan itself.[917] Mr Mokoena confirmed that Mr Tsoametsi's document of 25 November 2010 was a result of research conducted after the meeting,[918] but this document is not an opinion on the legality of the plan. Rather, the legality of the plan is assumed in the document.[919] Mr Maxatshwa also confirmed that the 25 November document does not amount to legal advice.[920]

1025. When it was put to Mr Tsoametsi that Mr Zwane had clarified on 25 September 2020 that the legal opinion he was referring to was Tsoametsi's 25 November 2010

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[912] Transcript 28 September 2020, p 216.
[913] Transcript 28 September 2020, pp 159-161.
[914] Transcript 28 September 2020, p 162.
[915] Exhibit UU6, p 426, para 27.
[916] Transcript 28 September 2020, p 190.
[917] A copy of this memo appears as IR6 attached to the Investigator's Report at exhibit UU15, p 116 -121.
[918] Transcript 22 September 2020, p 117.
[919] Transcript 22 September 2020, p 118.
[920] Transcript 23 September 2020, p 84.

document, Mr Tsoametsi confirmed that it was not a legal opinion, and he does not know why Mr Zwane would say that.[921]

1026. Mr Zwane on the other hand stated in oral evidence that the document was prepared by people with a legal background and had gone through the processes so he assumed that they could use it.[922] When Mr Tsoametsi's evidence that it was not a legal opinion was put to Mr Zwane, Mr Zwane responded to say that Mr Tsoametsi said he had a broad mandate, and on Mr Zwane's interpretation that would include the soundness of the document legally.[923]

1027. When I asked why Mr Tsoametsi did not see the legality of the APS as part of his mandate given that it had been raised at the meeting, Mr Tsoametsi responded that the HOD had access to the head of legal as well as the provincial legal advisor in the Premier's office who would be better placed to advise on the legalities than him.[924] However, Mr Tsoametsi did accept that that in the context of his mandate it was fair to expect him to research the legality.[925]

1028. To Mr Mokoena's knowledge, Mr Tsoametsi's 25 November 2010 document was the only document prepared in respect of the plan proposed by Mr Zwane.[926] Mr Tsoametsi confirmed in oral evidence that despite the fact that the issue of legality was raised in the presence of the MEC, no legal opinion was obtained. He further confirmed that had Messrs Zwane or Mokoena wanted a legal opinion it could have been properly researched and given by Mr Venter in the Premier's Office.[927]

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[921] Transcript 28 September 2020, p 222.
[922] Transcript 13 October 2020, p 115.
[923] Transcript 13 October 2020, p 116.
[924] Transcript 28 September 2020, p 192.
[925] Transcript 28 September 2020, p 193.
[926] Transcript 22 September 2020, p 118.
[927] Transcript 28 September 2020. P 200.

1029. Mr Zwane's response to this allegation was that it was not his task as MEC to get into the finer details: he simply said go and research and he assumed that the task would be done.[928] It did not come to his mind at the time that he should have referred it to Mr Venter's office,[929] and Mr Venter confirmed that his office was never requested for a legal opinion on this issue.[930]

The theory behind the document

1030. Mr Tsoametsi explained that the ideal functioning of the APS in practice would be that contractors and suppliers would agree on a price and how the materials would be stored before approaching the Department for the advance payment. The Department would then monitor the material as it went out.[931]

1031. Mr Tsoametsi further confirmed that the APS was developed to respond to an abnormal situation where 1. There were not sufficient established contractors who could bear the financial burden, and 2. They had a short period of time in which to perform. The advance payments were meant to "support the contractors" so that they could implement the ERP.[932]

1032. Mr Zwane testified that, in his view, when the Department paying for material from suppliers is not an advance payment because the material then belongs to the Department.[933] He thought helping contractors was a sensible question to ask. It was not an instruction, and he was at a meeting of officials who are competent in terms of procurement, who would be capable of telling him if they cannot help in this way.[934]

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[928] Transcript 13 October 2020, p 117.
[929] Transcript 13 October 2020, p 119.
[930] Exhibit UU8, p 3, para 7.
[931] Transcript 28 September 2020, p 201-202.
[932] Transcript 28 September 2020, pp 203-204.
[933] Transcript 13 October 2020, pp 103.
[934] Transcript 13 October 2020, pp 103-104.

1033. When I pointed out that the Department would not store the material and therefore money would have to be paid for the material in advance of that material being delivered, Mr Zwane responded that he did not properly process what it would mean at the time he put the question to the meeting.[935]

1034. What can be seen from the evidence placed before the Commission regarding the origin of the APS is that none of the witnesses took any responsibility for the birth of the APS as a concept. According to Messrs Maxatshwa and Mokoena, the APS was forced upon them by Mr Zwane. According to Mr Zwane, he asked his officials to consider the APS and he relied on their guidance as to whether or not it would be legal. According to Mr Tsoametsi, he was called upon to draft an opinion as to how the APS could be implemented, but not whether or not the plan would be legal. It also appears to be common cause that no formal legal opinion was sought by any of the witnesses as to whether or not the APS would be legal. As to the question of legality of the APS and the ERP, these are dealt with below.

Response to the ERP and APS from MinMec and TechMinMec

1035. The ERP was presented at the October Technical Ministerial Member Executive Council meeting ("TechMinMec" meeting) on 29 October 2010.[936] Mr Maxatshwa was tasked with presenting to the TechMinMech meetings. Mr Zwane did not attend and Mr Mokoena also tendered his apologies.[937] According to Mr Maxatshwa, they were with the National Council of Provinces (NCOP) in QwaQwa, Free State.[938] Mr Zwane

[935] Transcript 13 October 2020, p 106.
[936] Exhibit UU2, p 19, paras 67-8.
[937] Exhibit UU2, p 26, para 101.
[938] Transcript 23 September 2020, p 71.

however acknowledged that he was aware that the ERP was presented at TechMinMec that day.[939]

1036. According to Mr Maxatshwa, after presenting the ERP at the October 2010 TechMinMec and MinMec meetings, he was told to bring a revised plan for the November 2010 meetings.[940] Mr Maxatshwa confirmed that the version of the ERP in the file is the revised version presented in November.[941] The version of the ERP presented to TechMinMec in October 2010 was therefore rejected.

1037. Mr Zwane claims that the October 2010 meeting's rejection of the plan was not reported back to him and he also claimed that he was not a recipient of TechMinMec minutes.[942] When Mr Zwane was referred to the minutes at FS12 300, Mr Zwane claimed he had not seen these minutes before he came to the Commission.[943]

1038. Mr Maxatshwa then presented the revised ERP to the next TechMinMec meeting on 18 November 2010 and mentioned that the Free State Department of Human Settlements was looking to use the tripartite agreements and cession to make advance payments.[944] Mr Maxatshwa also confirmed that the view of the October 2010 TechMinMec meeting was that the prepayment scheme would be illegal,[945] but later changed his evidence to say that the details of the APS were only conveyed to TechMinMec in November 2010 and not in October 2010.[946]

1039. He said that the revised version of the ERP was again rejected by TechMinMec in November 2010.[947] The minutes of the TechMinMec meeting held on 18 November

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[939] Transcript 25 September 2020, p 170-171.
[940] Transcript 23 September 2020, p 67.
[941] Transcript 23 September 2020, p 85.
[942] Transcript 25 September 2020, p 172-174.
[943] Transcript 11 December 2020, p 83.
[944] Exhibit UU2, p 20, paras 69-70; Transcript 23 September 2020, p 68.
[945] Transcript 23 September 2020, p 76.
[946] Transcript 23 September 2020, p 98-99.
[947] Transcript 23 September 2020, p 86.

2010 show that the meeting was concerned about the Free State Province's recovery plan as presented by Mr Maxatshwa. The meeting expressed that the plan did not demonstrate the ability of the Province to spend the R1.42 billion from then until the end of March 2011,[948] and "the Province was advised not to enter into a tripartite agreement with beneficiaries and suppliers since suppliers would have to supply materials in bulk without the necessary support to ensure quality and proper procurement proceedings. Also there are lots of risks involved with this arrangement."[949] Mr Maxatshwa further confirmed that Gauteng representatives at the 18 November 2010 meeting advised him that the scheme does not work.[950]

1040. Mr Mokhesi's affidavit confirms that Mr Neville Chainee (Mr Chainee), who was the Chief of Operations of the National Department at the time[951] made it clear to Mr Maxatshwa in the TechMinMec meeting that the payments were unlawful and impermissible.[952] In his oral testimony, Mr Mokhesi confirmed that the payments being referred to here were the advance payments for the purchase of material.[953]

1041. On hearing the view of the TechMinMec meeting, Mr Maxatshwa immediately phoned Mr Mokoena in QwaQwa and asked him to discuss it with Mr Tsoametsi and Mr Zwane.[954] He also shared the feedback from the Gauteng representatives at the meeting during this phonecall.[955] Mr Zwane however claims that he does not recall being at an NCOP meeting in QwaQwa and being reported to by Mr Mokoena.[956]

1042. A report from the TechMinMec meeting regarding provincial expenditure was heard at the MinMec meeting the following day, where the meeting agreed with the

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[948] Exhibit UU15 p 133 Para 3.2.2 of IR8 of the Investigator's Report.
[949] Exhibit UU15 p 133 Para 3.2.3 of IR8 attached to the Investigator's Report.
[950] Transcript 23 September 2020, p 97.
[951] Exhibit U11, p 106 para 44.2 Per Mr Mokhesi's affidavit.
[952] Exhibit UU11, p 107 Mr Mokhesi's affidavit.
[953] Transcript 21 September 2020, p 156.
[954] Exhibit UU2, p 25, para 98; Transcript 23 September 2020, p 73 and p 99.
[955] Transcript 23 September 2020, p 97.
[956] Transcript 11 December 2020, p 84.

recommendations of the TechMinMec meeting and the ERP was rejected.[957] The meeting also agreed with TechMinMec regarding the shifting of funds from non-performing provinces in the interests of service delivery, and that provinces must invest more on planning.[958] Mr Mokoena was also not present at this meeting,[959] but the meeting was attended by Mr Sexwale as well as all relevant MECs.[960]

1043. Mr Zwane did, however, receive a report from the MinMec meeting on 19 November 2010. This report came from Mr Maxatshwa via Mr Mokoena, who reported to Mr Zwane that the ERP "needed adjustment".[961] Later in oral testimony, Mr Zwane did however admit that at some stage he was aware that the proposal was fraught with risk,[962] but then later he again reiterated that the report received from Mr Mokoena from MinMec was that the ERP needed to be "corrected."[963]

1044. On Mr Mokhesi's interpretation, the ERP was rejected because it did not demonstrate the ability to spend the allocation in the remaining months, and the proposed tripartite agreements were rejected because suppliers would have to supply materials in bulk without the necessary support to ensure quality and proper procurement proceedings.[964]

1045. Mr Mokoena was not present at the TechMinMec meetings,[965] but according to Mr Maxatshwa, Mr Mokoena was nonetheless fully informed that the view of National Department of Human Settlements was that the advance payments were unlawful, but he approved the system anyway.[966] On Mr Mokhesi's version (which is based on the findings of the disciplinary committee), Mr Mokoena instructed Mr Maxatshwa to

[957] Transcript 23 September 2020, p 70.
[958] Exhibit UU15, p 143 3.2.1 and 3.2.2 of IR9 attached to the Investigator's Report.
[959] Exhibit UU15 p 139 2.2.1 of IR9 attached to the Investigator's Report.
[960] Transcript 23 September 2020, p 69.
[961] Transcript 25 September 2020, pp 174-175.
[962] Transcript 13 October 2020, pp 111-112.
[963] Transcript 11 December 2020, p 83.
[964] Transcript 21 September 2020, p 161-162.
[965] Para 2.2.1 of IR8 attached to the Investigator's Report at FS20 134.
[966] Exhibit UU2, p 208, para 102.

proceed with the plan despite the warnings.[967] This instruction was later formalised in the memo written by Mr Tsoametsi and signed by Mr Mokoena on 25 November 2010.[968]

1046. Mr Mokoena, however, disagrees with the finding of the disciplinary committee on this issue because on his version it was Mr Zwane who insisted that the project proceed.[969]

1047. Mr Mokoena did however admit in oral testimony that he knew that National had also rejected the APS when the ERP was presented to them.[970] It is common cause that the Free State Department of Human Settlements proceeded with the ERP and the APS despite the warnings given and the rejection of the plan by TechMinMec and MinMec meetings.

Illegalities of the ERP and APS

1048. It is clear from the evidence led before the Commission that an ERP is not in itself unlawful. The Free State Department of Human Settlements was in fact requested to draft an ERP by National in order for National to decide whether or not the Province's remaining DORA allocation should be redistributed. The illegality of the ERP lies in the misrepresentations made to National as part of the ERP, and in the manner of the ERP's execution – namely the APS.

1049. In his oral testimony, Mr Mokhesi confirmed that the ERP presented to TechMinMec and MinMec represented that the Free State Department of Human Settlements would spend more that R1 billion in 3 months and actually build those houses. Mr Mokhesi conceded that it would have been obvious that the Free State Department of Human

[967] Transcript 21 September 2020, p 163.
[968] Exhibit UU11, p 111, para 60 Mr Mokhesi affidavit dated 21 December 2016; Transcript 21 September 2020, p 164-165.
[969] Transcript 23 September 2020, p 23.
[970] Transcript 22 September 2020, p 177.

Settlements could never have achieved the ERP as presented at these meetings.[971] Furthermore, Mr Mokhesi confirmed that the ERP presentation presented to these meetings contained very little information about the actual construction to be done.[972]

1050. Mr Mokoena also admitted in oral evidence that his Department was misrepresenting to National that they could legitimately spend R1 billion in a few months because they knew it was not possible.[973] He in fact went further to admit that this was wrong and that he was sorry for misrepresenting the facts.[974] One may ask if all they could spend from April to October (seven months) was 10% of the budget, how could they possibly spend 90% of the budget or so in five months? Accordingly, the ERP presented to the MinMec and TechMinMec meetings in October and November 2010 by the FSDHS constituted a fraud on the National Department.

1051. As to the APS as part of the ERP, advance payments are unlawful both in terms of DORA and in terms of the PFMA. Section 15 of the Division of Revenue Act, 2010reads as follows:

> "(1) Despite anything to the contrary contained in any law, an allocation referred to in Schedule 4, 5, 6, 7 or 8 may only be utilised for the purpose stipulated in the Schedule concerned and in accordance with the framework published in terms of section 14.
>
> (2) A receiving officer may not transfer any Schedule 5 or 6 allocation or a portion of such an allocation to any other entity or other sphere of government for the performance of a function envisaged in terms of the allocation, unless the receiving officer has entered into a payment schedule with the entity or other sphere of government that will be performing the function, that has been approved by the National Treasury, and—

[971] Transcript 21 September 2020, p 136-139.
[972] Transcript 21 September 2020, p 146-149.
[973] Transcript 22 September 2020, p 166.
[974] Transcript 22 September 2020, p 167.

(a) it is a transfer that is approved in the budget of the receiving province or municipality or a framework published in terms of section 14;

(b) it is a payment for services rendered or goods received, which services or goods were procured in accordance with the supply chain management policy or procurement policy of the relevant province or municipality and for which adequate documentation for payment has been received; or

(c) in the case of an advance payment or a transfer which is not consistent with the budget of the receiving province or municipality—

(i) the receiving officer has certified to the National Treasury that the transfer is not an attempt to artificially inflate its spending estimates and that there are good reasons for the advance payment or transfer; and

(ii) the National Treasury has approved the advance payment or transfer." (own emphasis)

1052. In his evidence before the Disciplinary Committee, Mr Chainee confirmed that this section of DORA means that advance payments are not allowed.[975] It is also common cause that National Treasury's approval was not given prior to advance payments having been made in this case. Therefore, these advance payments were therefore impermissible.

1053. In terms of the Public Finance Management Act, 1999 (PFMA) advance payments or prepayments are governed by the Treasury Regulations for departments, trading entities, constitutional institutions and public entities, issued in terms of the Public Finance Management Act 1999 by National Treasury, March 2005 (the Treasury Regulations). Reg 15.10.1.2 thereof provides as follows:

[975] Exhibit UU14, p 1007 the "Chainee Disciplinary Committee" transcript p67. This full transcript is contained in the bundle and was identified as such in evidence.

> "For purposes of this regulation, sound cash management includes–
>
> ...
>
> (c) avoiding prepayments for goods or services (i.e. payments in advance of the receipt of the goods or services), unless required by the contractual arrangements with the supplier;"

1054. According to Mr Venter, this regulation presupposes that there was a process compliant with the relevant legal prescripts on which the agreement was premised. In this instance, there was not.[976]

1055. In his reasons for his decision in disciplinary proceedings, Adv Van Graan also found that prepayment was not required by the contractual arrangements in this case. He said that by making the prepayment, the contractor's right to payment was extinguished, which meant that there was no right that could be ceded to the suppliers (the basis on which the suppliers had been paid in advance).[977]

1056. In other words, while prepayments may technically be feasible in terms of Reg 15.10.1.2 of the Treasury Regulations in certain circumstances, they were not permitted in this case because of the irregularities inherent in the contractual relationship between the Free State Department of Human Settlements, contractors and suppliers.

Execution of the ERP and APS

1057. Despite concern having been raised by officials in the Free State Department of Human Settlements, TechMinMec and MinMec meetings, the ERP and APS were proceeded with by the Free State Department of Human Settlements. Mr Mokoena admitted that the Free State Department of Human Settlements did not indicate to National that despite their rejection of the plan they would proceed nonetheless.[978] Mr Tsoametsi

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[976] Exhibit UU8, p 445, para 9.
[977] Exhibit UU14 2960, para 152 Adv. Van Graan para 152.
[978] Transcript 22 September 2020, p 177.

indicated in oral testimony that he at least was under the impression that MinMec and TechMinMec had not rejected the ERP because the Department had proceeded with the plan.[979]

1058. According to Mr Mokhesi, by October 2010 the Free State Department of Human Settlements had already started making unlawful payments.[980] These payments were unlawful because they were made to persuade National Treasury that the money had been properly spent; there had been no proper procurement process; and they were advance payments which had not been processed in terms of DORA.[981]

1059. Mr Mokoena stated that the signing of the contracts with the contractors mainly took place after the signing of the document of 25 November 2010. On his version, thereafter contracts were signed with the material suppliers (cessions) and they started delivering material to the contractors on site. The Department then paid the material suppliers when claims were made by the contractors because the material had been supplied.[982] For example:

1059.1. on 30 September 2010, Mr Mokoena signed a contract with Inzuzo Trading 516 CC for 150 houses to be built in Tswelopele Municipality[983]; and

1059.2. a tripartite contract entered into with Inzuzo Trading 516 CC and Scenic Route Trading 802 CC which also appears to have been signed by Mr Mokoena, this time on 31 January 2011.[984]

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[979] Transcript 28 September 2020, p 171. This however differs from Mr Tsoametsi's version in the interview with investigators at FS13 529 where he said that Mr Maxatshwa and Mr Mokoena indicated to him that the plan had been approved. In oral evidence Mr Tsoametsi however clarified that he actually just assumed that the plan had been approved. Transcript 28 September 2020, pp 177-178.
[980] Transcript 21 September 2020, p 124.
[981] Transcript 21 September 2020, p 125.
[982] Transcript 22 September 2020, p 153.
[983] Exhibit UU15 p 161 – 181 IR11 attached to the Investigator's Report.
[984] Exhibit UU15 p 182 - 194 IR12 attached to the Investigator's Report.

1060. According to Mr Mokhesi's December 2016 affidavit, the Free State Department of Human Settlements entered into 125 standard building contractor agreements.[985] This differs by 19 contractors from the 106 contractors Mr Mokhesi mentioned in his June 2014 affidavit.[986] According to Mr Mokhesi's December 2016 affidavit, the 125 contractors were appointed to construct 14,769 RDP houses in 6 District Municipalities. This differs by 6,281 RDP houses from the 21,050 RDP houses Mr Mokhesi mentioned in his June 2014 affidavit.[987]

1061. According to Mr Mokhesi's December 2016 affidavit, the average cost per unit was R 72,000.00. The Free State Department of Human Settlements entered into 112 tripartite agreements with the contractors and suppliers,[988] and between 2009 and 2011, Free State Department of Human Settlements made payments in excess of R500m to 21 building suppliers. This again differs from the 33 suppliers mentioned in Mr Mokhesi's June 2014 affidavit. A list provided to the Commission in February 2020 by the Free State Department of Human Settlements indicates yet again a different number of suppliers at a total of 23 (excluding duplicates).[989]

1062. What therefore emerged from the evidence before the Commission is that there appears to be no accurate records for the number of houses built, where and by whom, as well as the payments made for this financial year.

1063. Regarding some of the individual contractors, the Commission has gathered the following evidence:

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[985] Transcript 21 September 2020, p 54.
[986] Exhibit UU15 p 15 Investigator's Report para 8.7.
[987] Exhibit UU15 p 15 Investigator's Report para 8.7. However, Mr Mokhesi does mention 21,050 RDP houses later in his December 2016 affidavit as the total number between the 2010/2011 and 2011/2012 financial years. Per a schedule attached as "NM4" to the mentioned affidavit, 20,950 RDP houses were to be built for the 2010/2011 financial year which, if subtracted from the total, leaves 100 RDP houses for the 2011/2012 year.
[988] Transcript 21 September 2020, p 57.
[989] Exhibit UU15, p 16, IR13 attached to the Investigator's Report and referenced in para 8.8.

1063.1. Large sums of money were paid to Dumansi by the Free State Department of Human Settlements from 10 December 2010 onward.[990]

1063.2. On 20 December 2010, an amount of R7 million was paid to Rob's Bricks by the Free State Department of Human Settlements, R4 million payment to Hardware Mecca on 22 December 2010.[991] According to the Auditor General (AG) payment data, the Free State Department of Human Settlements paid Robs Bricks a total of R7 million. Mr Isaac "Blacky" Seoe (Mr Seoe) confirmed that the R7 million was for the supply of material to the Free State Department of Human Settlements. He further confirmed that this payment was paid in full, 2 years in advance, as Rob's Bricks only commenced with the work in 2012. Although Rob's Investments is reflected in the charge sheet relevant to the disciplinary hearing as the recipient of R7 million, it was noted by the Commission investigators that neither Rob's Investments nor Rob's Bricks (the entity that was in fact paid the R7 million) were respondents in the Free State Department of Human Settlements application. Rob's Investments (and not Robs Bricks) is further reflected as a supplier in a list provided to the Commission in February 2020 by Free State Department of Human Settlements but is however not mentioned in the list(s) as attached to Mr Mokhesi's December 2016 affidavit. However on 22 December 2010 the bank account of Rob's Bricks at Hardware Mecca shows a payment of R4 million into the account[992].

1064. The following payments were reflected as being paid by the Free State Department of Human Settlements into the bank account of Rich Rewards:

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[990] Exhibit UU15, p 195 – 199 IR14 attached to the Investigator's Report.
[991] Exhibit UU15, p 200 – 202.
[992] Exhibit UU15 p 203 – 207 IR15 of the Investigator's Report.

1064.1. on 23 December 2010 an amount of around R6.7 million and a further payment of just under R2.2 million on 24 December 2010[993].

1064.2. on 3 January 2011 payments of around R35.8 million and 9.5 million on 4 January 2011[994].

1065. Mr David Eduard Valks (Mr Valks), owner of Hardware Mecca *inter alia* confirmed to Commission investigators that Hardware Mecca was required to sign two types of agreements, building supply agreements and cession agreements. Mr Valks was approached by Mr Kabelo Koloi (Mr Koloi) to come to Bloemfontein to sign these agreements.[995] Various contractors requested quotations from Hardware Mecca for the supply of material in relation to their appointments at Free State Department of Human Settlements (e.g. "GT Molefe"). In this regard, "pro forma" invoices were required. As Hardware Mecca's financial system did not allow for "pro forma" invoices, he provided quotations.[996] After the quotations were issued and after the agreements were signed, Hardware Mecca received advance payments from the Free State Department of Human Settlements in respect of Group Two Business Enterprise, GT Molefe Construction (GT Molefe) and Mgiftana Trading.[997] Hardware Mecca quoted for the first two phases of the RDP houses in most instances, and in some cases building contractors needed to source materials from other suppliers for phase 3.[998] In certain instances (e.g. GT Molefe), where material was not supplied, payments for the difference were made by Hardware Mecca to either the contractors themselves or to their appointed suppliers. These payments were always based on the request of the contractors.[999]

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[993] Exhibit UU15 p 208 – 215 IR16 and IR17 of the Investigator's Report.
[994] Exhibit UU 15 p 216 – 219 IR18 and IR19 of the Investigator's Report.
[995] Exhibit UU7, p 438, para 8.4.
[996] Exhibit UU7, p 438, para 8.3.
[997] Exhibit UU7, p 439, para 8.6.
[998] Exhibit UU7, p 439, para 9.
[999] Exhibit UU7, p 440, para 10.

1066. Ms Nkabinde (owner of GT Molefe) *inter alia* confirmed that GT Molefe was a trusted contractor, under her late father, in the Free State and was historically appointed for large projects. In 2009, after a tender process, GT Molefe was initially appointed for the delivery of 500 units in QwaQwa. The appointment letter in this regard included a list of beneficiaries. When the new MEC, Mr Zwane, was appointed, various meetings with contractors took place, the main focus of which was to establish when the contractors were able to start with the projects. Subsequently, GT Molefe's appointment was changed to 300 units in QwaQwa and 200 units in Harrismith respectively. The appointment letter in this regard did not, at that stage, include a list of beneficiaries as same was communicated afterwards. Ms Nkabinde subsequently received a call from Mr Maxatshwa who inter alia explained that Free State Department of Human Settlements would be making advance payments to suppliers for the delivery of material and requested GT Molefe to obtain a pro forma invoice from a supplier to that effect. When Ms Nkabinde and Mr Valks from Hardware Mecca, as GT Molefe's supplier, produced the required invoice(s) at Free State Department of Human Settlements, they were required to sign a contract. Ms Nkabinde confirmed that she requested Mr Valks to pay certain of GT Molefe's suppliers on her behalf with the advance payments received by Hardware Mecca.[1000]

1067. During November/December 2010, contractors came to Free State Department of Human Settlements and signed contracts. Then the contractors visited the municipalities to obtain details of where to construct the houses. Then the building contractors provided Free State Department of Human Settlements with invoices/quotes from the material suppliers, and the Free State Department of Human Settlements paid on these documents for the materials in advance.[1001] According to

[1000] Exhibit UU15, p 18 Investigator's Report para 8.12.
[1001] Exhibit UU3, p 11, para 23.

the AG, Free State Department of Human Settlements paid around R500 million between November 2010 and February 2011 in this way.[1002]

1068. Mr Mokoena had booked a holiday on a cruise ship in December 2010, and Mr Maxatshwa and Ms Mokhele were appointed together as acting HODs in his absence (Ms Mokhele was appointed on the instruction of Mr Zwane).[1003] The bulk of the payments made to the contractors were made in Mr Mokoena's absence and approved by Ms Mokhele.[1004] Mr Maxatshwa confirms that he did not sign any of the contracts that formed part of the APS, nor did he place them on the HSS System,[1005] nor did he hand any invoices to the finance department for processing and payment.[1006]

1069. Mr Mokoena confirmed that Free State Department of Human Settlements would often pay the material suppliers without checking whether the material had been delivered and whether the material and the invoice were consistent.[1007] This in itself would have contributed to the poor record keeping and accountability seen during this period.

The List of 106 Contractors

1070. As mentioned above, all contractors appointed to build RDP houses in the Free State in the 2010/2011 financial year were appointed without a competitive biddings process. This is because the tender process which ran between April and July 2010 was cancelled, and no other tender process commenced thereafter.

1071. Mr Mokhesi states that he does not know who selected the contractors who were given contracts in 2010.[1008] Mr Maxatshwa on the other hand alleges that Mr Zwane chose the

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[1002] Exhibit UU3, p 11, para 23.
[1003] Exhibit UU3, p 11-12, para 24-5; Transcript 22 September 2020, p 170.
[1004] Exhibit UU3, p 12, para 25; Transcript 22 September 2020, p 171.
[1005] Transcript 23 September 2020, p 109.
[1006] Transcript 23 September 2020, p 110.
[1007] Transcript 22 September 2020, p 156.
[1008] Transcript 21 September 2020, p 114.

building contractors and this irregularity should have been raised with him by Mr Mokoena.[1009]

1072. According to Mr Mokoena, Mr Zwane approached him shortly after the "War Room" meeting where the APS was discussed with a list of about 106 contractors and instructed him to appoint those contractors.[1010]

1073. During oral evidence, Mr Maxatshwa identified "NM14" attached to Mr Mokhesi's affidavit as the list of 106 contractors signed off by Mr Zwane, and identified Mr Zwane's signature thereon, signed on 10 September 2010.[1011] In his oral evidence Mr Zwane also admitted to signing this document.[1012] In his further statement, Mr Mokoena identified the same list as the list that Mr Zwane gave to him and instructed him to appoint those contractors in that list.[1013]

1074. On Mr Mokoena's version, he was concerned that he did not recognise the first 6 contractors on the list as contractors that the Free State Department of Human Settlements had used before. Mr Mokoena also noted the names of three contractors: Allitory, Koena Property Developers and Raloto Properties. Mr Mokoena believes that these contractors are close to Mr Zwane because Mr Zwane called Mr Mokoena personally to expedite their payments.[1014]

1075. In his evidence, Mr Mokoena went further and alleged that these contractors were close to Mr Zwane because:

1075.1. they were from Mpumelelo where he comes from,

[1009] Transcript 23 September 2020, p 103.
[1010] Exhibit UU3, p 9-10, para 20; Transcript 22 September 2020, p 133.
[1011] Transcript 23 September 2020, p 105, p 112 and p 113.
[1012] Transcript 25 September 2020, pp 144-145.
[1013] Exhibit UU3, p 40, para 6 Mr Mokoena supplementary statement.
[1014] Exhibit UU3, p 9-10, para 20; Transcript 22 September 2020, p 150-151.

1075.2. when the Premier would sporadically announce allocations for Operation Hlasela they would be allocated to these 3 contractors, for example in Harrismith, Senekal and Vrede, and

1075.3. he thinks these 3 contractors were also allocated the restitution housing project.[1015]

1076. On the evidence before the Commission it would seem that none of these three contractors submitted bids for this tender.[1016] According to Mr Mokoena, building contractors were appointed on the instruction of Mr Zwane, and also on the instruction of Mr Zwane, the Free State Department of Human Settlements did not go out on tender.[1017] Also, while the Department's usual practice was to grade its contractors in terms of competency/performance and award larger allocations to the better contractors, the MEC's instructions resulted in large allocations being awarded to contractors with no experience.[1018]

1077. According to Mr Mokoena, he and his team did not know most of the contractors on Mr Zwane's 106 list.[1019] He confirmed further that there were 40-45 names on the list that he had never seen before,[1020] and some contractors who had been judged as incompetent in the bidding process.[1021] When he raised his concerns with Mr Zwane, Mr Zwane allegedly told Mr Mokoena that he would go to ground to speed up the process. He was not amenable to changing names on the list.[1022]

[1015] Transcript 22 September 2020, p 148.
[1016] Exhibit UU15, p 60 – 80 R2 attached to Investigator's Report.
[1017] Exhibit UU3, p10, para 21.
[1018] Exhibit UU3, p10, para 22; Transcript 22 September 2020, pp 134-135.
[1019] Transcript 22 September 2020, p 139.
[1020] Transcript 22 September 2020, p 143.
[1021] Transcript 22 September 2020, p 146.
[1022] Transcript 22 September 2020, p 142.

1078. In response to Mr Mokoena's assertion, Mr Mokhesi states that an accounting officer should confirm the instructions in writing with the instructing authority where he thinks they may be unlawful.[1023]

1079. Mr Zwane, however, denies Mr Mokoena's version that he gave the 106 list to him and instructed him to appoint those contractors.[1024] Mr Zwane claims that the list was brought to him, so he approved it. Mr Zwane claims he did not know that the list he signed on 10 September 2010 contained at least 15 bidders who had been disqualified during the tender process because he only checked the list to see that it included disabled persons and women.[1025]

1080. The question of who exactly appointed the contractors on the list of 106 entities signed on 10 September 2010 therefore remains unclear. Adding to the lack of clarity, further allegations later emerged that Exco may have played a role in the allocation.

The Role played by Provincial Exco and Mr Zwane

Mr Zwane's powers to allocate projects

1081. Mr Mokoena stated in oral testimony that while Mr Zwane had the power to allocate projects to contractors as MEC, traditionally the Department would make recommendations to the MEC and the MEC would sign those off.[1026] When it was pointed out that this system would be inconsistent with a competitive bidding process, Mr Mokoena clarified that it was the practice, but not the law.[1027] In his second affidavit, Mr Mokoena clarified to say that "the MEC's power is only to approve projects in terms

[1023] Transcript 22 September 2020, pp 21-22.
[1024] Transcript 11 December 2020, p 102.
[1025] Transcript 13 October 2020, p 32.
[1026] Transcript 22 September 2020, pp 135-136.
[1027] Transcript 22 September 2020, p 137.

of s7(3)(a) of the Housing Act. It would be highly irregular for the MEC to make housing/contractor allocations him/herself."[1028]

1082. Mr Maxatshwa said that when he arrived at the Department he noticed that allocation lists were generally signed off by the MEC – then Mr Mafareka.[1029] Mr Mokoena confirmed that it was customary for the MEC to sign the final housing allocation list, but that list would be compiled by the Department and the MEC did not take part in the allocation process.[1030]

Exco's alleged role in the appointment of contractors

1083. During his first and second appearances before the Commission, Mr Zwane put forward several versions of the role played by Provincial Exco in the appointment of contractors, and on the origins of the 106 list (discussed above). In his final appearance before the Commission, Mr Zwane acknowledged this,[1031] and, after Mr Mokoena's supplementary statement was put to him, his response seemed more settled. Nonetheless, these versions, insofar as Exco was allegedly involved, are summarised below.

<u>Mr Zwane's first appearance</u>

1084. During Mr Zwane's first appearance, he stated that prior to April 2010 there was an instruction given by Exco to Free State Department of Human Settlements to populate a database according to certain named criteria.[1032] This was said in contradiction to his first version given that the database arose after the collapse of the tender process.[1033] Mr Zwane then qualified his answer to say that Exco did not prescribe the process

[1028] Exhibit UU3 p 41, para 10 Mr Mokoena supplementary statement.
[1029] Transcript 23 September 2020, p 104.
[1030] Exhibit UU3 p 40, para 7 Mr Mokoena supplementary statement.
[1031] Transcript 11 December 2020, pp 104-105.
[1032] Transcript 25 September 2020, p 40.
[1033] Transcript 25 September 2020, p 42.

(tender or database), only the types of entities to be appointed,[1034] and that Exco was not interested in the process, only in the final product.[1035]

1085. He then updated his response to say that the only time Exco gave an instruction to proceed with the database was after the tender process had collapsed.[1036] After the collapse of the tender process, Mr Zwane asked his officials for a way forward, he was told to proceed with the database process. He reported this to Exco and Exco agreed.[1037]

1086. Therefore, on this version, Exco knew that the tender process had collapsed and the database was established because Mr Zwane had reported this to them.[1038] Exco had given an instruction that the Department should prioritise women, youth and people with disabilities, but on this version Exco was not actively involved in the allocation process.

Exco approved the 106 list on 30 June 2010

1087. Early on in his second appearance, Mr Zwane identified the list of 106 contractors appearing at FS14 223 as a document emanating from around 30 June 2010, "when Exco approved it and even requested that building of houses should start in earnest."[1039] While difficult to see, the way Mr Zwane signed on p223 is different from the way he signed on p225. According to Mr Zwane, the document was needed for official reasons in September so he signed. But the document was taken to Exco earlier than that.[1040] Mr Zwane confirmed that this document was presented to Exco on 30 June 2010. After presentation, Exco approved the list.[1041]

[1034] Transcript 25 September 2020, p 43.
[1035] Transcript 25 September 2020, p 48.
[1036] Transcript 25 September 2020, p 51.
[1037] Transcript 25 September 2020, p 49; Transcript 25 September 2020, pp 121-122.
[1038] Transcript 25 September 2020, p 58.
[1039] Transcript 13 October 2020, p 9.
[1040] Transcript 13 October 2020, p 10.
[1041] Transcript 13 October 2020, p 10.

1088. This version would appear to accord with Mr Mokoena's version that the 106 list signed in September 2010 was approved by Exco and given to him by Mr Zwane.

The list considered by Exco on 30 June 2010 was not the 106 list

1089. Later on in his testimony, Mr Zwane then stated that the list that was considered on 30 June 2010 was not the same list as emerged from the BEC/BAC process, which was ongoing at the time.[1042] When shown Mr Mokhesi's affidavit para 75.3 as a summary of BEC and BAC proceedings, Mr Zwane agreed that over 300 bids were received in the tender process, and Mr Zwane could not explain how 106 contractors were then appointed from this process.[1043]

1090. On this version, the list that was signed in September 2010 was a different list to the one considered by Exco on 30 June 2010. However, Mr Zwane appears to be unsure of how contractors were appointed to the 106 list.

The list considered by Exco on 30 June 2010 resulted from the dispute with contractors

1091. Another version put forward by Mr Zwane was that the list considered by Exco on 30 June 2010 was the list that was impacted by the dispute with contractors when the size of the houses was increased, and the list signed in September 2010 was established after the dispute raised by contractors and they had to start afresh.[1044] Mr Zwane then confirmed that they decided to embark upon a fresh tender process AFTER the dispute with contractors over the bigger houses.[1045]

[1042] Transcript 13 October 2020, p 12.
[1043] Transcript 13 October 2020, p 11.
[1044] Transcript 13 October 2020, pp 12-13.
[1045] Transcript 13 October 2020, p 13.

1092. This version would seem unlikely, given that it is common cause that the tender closed in April 2010 and was still being evaluated by the BEC and BAC at the time that Exco met on 30 June 2010.

The list came from a database of previously appointed contractors

1093. In another version put forward by Mr Zwane, the list taken to Exco on 30 June 2010 was drawn from a database of contractors which existed in 2009.[1046] The list he signed in September 2010 was a different list because there were disputes around the list sent to Exco and the decision was taken to formulate a new database. This process was followed up until 30 July 2010.[1047]

1094. When it was put to him that between 16 April and 28 July 2010 there was an open tender process underway, taking place on Zwane's instruction, but he presented a different list to Exco, Mr Zwane's explanation was that the tender process that was underway would not have affected the list he presented, which was of the previously appointed contractors.[1048]

1095. This version also appears to be inconsistent with the common cause events listed in the timeline above.

The list considered by Exco on 30 June 2010 was a list of contractors completing work from previous years

1096. When it was put to Mr Zwane that Exco knew that they were making allocations without any formal tender process,[1049] Mr Zwane's response was that there was overlap between the financial years' building projects because previous years' projects were

[1046] Transcript 13 October 2020, p 34.
[1047] Transcript 13 October 2020, p 31.
[1048] Transcript October 2020, p 45.
[1049] Transcript 13 October 2020, pp 73-74.

not yet finished, and there was a lull in building in early 2010. Hence there were 2 lists.[1050] On this version, the list he took to Exco on 30 June 2010 was a list of contractors who were completing projects from the previous financial year.

1097. When it was put to him that allocations for 2009/2010 were cancelled, and the new system was initiated by way of open tender, Mr Zwane responded by saying that that is correct, but not complete. According to him, when the contracts were cancelled, there were milestones that were incomplete. Therefore, there were not 2 parallel processes. There was the allocation to complete the work in 2010, and there was the open tender process for new work.[1051]

1098. This version also seems unlikely, given that contracts would have been in place with contractors from previous years, and Exco's approval would not have been necessary for those contractors to complete their work.

Response to Exco Resolution 144/2010

1099. Exco Resolution 144/2010 of 30 June 2010[1052] was put to Mr Zwane in his second appearance before the Commission. That resolution of the executive Council of the Free State Provincial Government read as follows:

> "CABINET MEETING: 30.06.2010 RESOLUTION NO. 144/2010
>
> SUBJECT: REPORT ON COMPANIES INVOLVED IN THE CONSTRUCTION OF HOUSING PROJECTS IN THE PROVINCE
>
> (Department of Co-operative Governance, Traditional Affairs and Human Settlements)

[1050] Transcript 13 October 2020, pp 74-75.
[1051] Transcript 13 October 2020, pp 79-80.
[1052] Exhibit UU17 p 437.

a) The Member of the Executive Council for Co-operative Governance, Traditional Affairs and Human Settlements briefed the Executive Council with regard to the vetting and profiles of all companies listed in the report involved in housing projects in the province.

b) The Executive Council noted and agreed to the information given to the Executive Council by the department on housing allocations.

i) It further directed that the 1 August 2010 should see the implementation of the construction of houses by these companies.

ii) That companies on Youth and Women formations should also make the list."

1100. Mr Zwane conceded that the Resolution shows that he reported to Exco by giving them a list of companies and information with regard to their profiles and vetting process.[1053] Mr Zwane further conceded that the list must have included the allocations given to the contractors.[1054]

1101. It was then put to him that what the report proposes and what Exco decided was to approve a list of companies and allocate houses for building by those companies, and on that basis construction would start on 1 August 2010.[1055] Mr Zwane agreed, and stated that he thinks he would have reported to Exco about the parallel tender process, and they should have known.[1056] Mr Zwane further admitted that while the open tender process was ongoing, Mr Zwane asked Exco to approve a list of contractors who must construct houses.[1057]

1102. Therefore, despite his varying versions, Mr Zwane has acknowledged in his oral testimony that he took a list of contractors to Exco on 30 June 2010 and sought Exco's approval for that list, despite the fact that an open tender process was ongoing at the time.

[1053] Transcript 13 October 2020, pp 58-59.
[1054] Transcript 13 October 2020, pp 58-59.
[1055] Transcript 13 October 2020, pp 58-59.
[1056] Transcript 13 October 2020, p 60.
[1057] Transcript 13 October 2020, p 61.

Mr Mokoena's response to Exco Resolution 144/2010

1103. When Mr Mokoena was shown Exco Resolution 144/2010 of 30 June 2010 by the Commission's investigators, he commented that it was the first time he had seen this document.[1058] According to Mr Mokoena, he was not invited to the Exco meeting on 30 June 2010.[1059]

1104. Furthermore, Mr Mokoena says that he finds this resolution very strange because it refers to a report submitted to Exco from his Department, and any report submitted by the Department would have been signed off by Mr Mokoena, but Mr Mokoena does not know of any such report.[1060] Furthermore, should such a report be submitted to Exco from Free State Department of Human Settlements, Mr Mokoena would have been invited to attend Exco to present the report, but Mr Mokoena was not invited.[1061]

1105. Mr Mokoena also finds the resolution itself quite strange. On the one hand, Exco is noting a report, but on the other hand Exco appears to be directing that certain companies be allocated projects and begin building by 1 August 2010.[1062] However, Exco would not have been involved in the allocation process at all, and by 30 June 2010, no allocation list (whether for new projects or completion of existing projects), had been sent to the MEC Mr Zwane for signature in 2010.[1063]

1106. Mr Mokoena further said that "due to the delays and complications that arose in the Department in 2010, no allocation list for incomplete housing projects was sent to Mr Zwane for signature in 2010."[1064]

[1058] Exhibit UU3, p 44 para 17 Mr Mokoena supplementary statement.
[1059] Exhibit UU3, p 44 para 17 Mr Mokoena supplementary statement para 17.
[1060] Exhibit UU3, p 45, para 18.
[1061] Exhibit UU3, p 45, para 18.
[1062] Exhibit UU3, p 45, para 19.
[1063] Exhibit UU3, p 45, para 19.
[1064] Exhibit UU3, p 41, para 9.

Mr Zwane's final version

1107. When Mr Mokoena's supplementary statement was put to Mr Zwane in his third appearance before the Commission, Mr Zwane confirmed that the Department's report to Exco would normally have been signed off by the HOD (Mr Mokoena). He further confirmed that the HOD would have been invited to the Exco meeting.[1065] When asked to confirm whether Mr Mokoena had signed off on a report or was invited to Exco, Mr Zwane said that at the very least Mr Mokoena would have known about the Exco meeting and agenda via the Forum of HODs.[1066]

1108. When it was put to Mr Zwane that Mr Mokoena says he did not know of any list sent to Mr Zwane and/or to Exco, whether for new or existing projects, Mr Zwane said Mr Mokoena knew about all of the lists. Mr Zwane said that Mr Mokoena had participated by drawing up contracts for all of the lists.[1067]

1109. Mr Zwane admitted to making a presentation to Exco on 30 June 2010, and the presentation was about how the Department had vetted all participants on the list. Mr Zwane says he could not have made this presentation without the assistance of the Department because he does not vet participants himself.[1068]

1110. What is significant about Mr Zwane's final evidence on this issue is that he no longer presents a clear version of events. His responses to questions following Mr Mokoena's second affidavit are non-committal, and he defers to his reliance on officials for ensuring that proper procedures were followed.

[1065] Transcript 11 December 2020, pp 127-128.
[1066] Transcript 11 December 2020, pp 128-129.
[1067] Transcript 11 December 2020, pp 129-130.
[1068] Transcript 11 December 2020, p 130.

1111. Once more, it bears mention that the absence of minutes and a clear documentary record has prevented the establishment of the true facts. In addition, the true facts have been obscured by a veil of contradictory and confused versions.

Response from the National Department of Human Settlements

1112. Despite the APS and the large-scale spending that took place in late 2010, the National Department of Human Settlements nevertheless reallocated an amount of R263 million in funding taken from the allocation to the Free State Department of Human Settlements. On Mr Maxatshwa's version, the National Department of Human Settlements did not accept the ERP and took R230 million away anyway.[1069]

1113. A letter from Mr Sexwale dated 9 December 2010 confirms this.[1070] When this letter was put to Mr Zwane, he did not confirm receiving this letter.[1071] The letter instructs the Department to make written representations to National, but Mr Zwane cannot recall seeing such a response.[1072]

1114. On 12 January 2011 Mr Thabane Zulu (Mr Zulu) as Director General (DG) in the National Department of Human Settlements sent a letter informing the Free State Department of Human Settlements of the reallocation[1073].

1115. On 18 January 2011 the Ministry of Human Settlements released a media statement confirming this reallocation.[1074]. In response, the Free State Department of Human Settlements released its own media statement on 20 January 2011 in which it alleged that it had spent 78% of its budget and was on track to spend 100% of its budget by the

[1069] Transcript 23 September 2020, p 101.
[1070] Exhibit UU2, p 73 – 75.
[1071] Transcript 25 September 2020, pp 178-179.
[1072] Transcript 25 September 2020, pp 182-184.
[1073] Exhibit UU15 224 – 225 IR20 attached to the Investigator's Report.
[1074] Exhibit UU15, p 226 - 229 IR21 attached to the Investigator's Report.

end of the financial year.[1075] This media statement also alleges that the reallocation of R263 million would result in the Department being unable to honour its financial commitments, and about 3600 families will not get their houses.[1076]

1116. Furthermore, despite the fact that the Free State Department of Human Settlements did not inform the National Department of Human Settlements of the unlawfulness of the payments, National Treasury picked up the flurry of payments on the HSS system.[1077]

1117. During February 2011, then Minister of Human Settlements (Mr Sexwale) and DG of Human Settlements (Mr Zulu) called the Free State Department of Human Settlements to a meeting to explain why the advance payments were made. The meeting was attended by Mr Zwane, Mr Mokoena, Mr Tsoametsi and the new CFO, the late Ms Debbie Hattingh.[1078]

1118. At this meeting, the Minister advised that he had just been made aware of the advance payments in January, and he instructed the Department to stop making advance payments from February month end.[1079] Mr Mokoena admits that Mr Sexwale found out about the prepayments and was not informed of them by the Department.[1080]

1119. Mr Zwane allegedly attempted to persuade the Minister that the payments were legal, but the Minister insisted that the payments be stopped.[1081] As the accounting officer, Mr Mokoena gave an undertaking that the advance payments would stop, and he did put a stop to them by end February 2011.[1082]

[1075] Exhibit UU15, p230 – 231 IR22 attached to the Investigator's Report.
[1076] Exhibit UU15, p 230 – 231 Para 6 of IR22 attached to the Investigator's Report.
[1077] Transcript 21 September 2020, p 126.
[1078] Exhibit UU3, p 13, para 27.
[1079] Transcript 22 September 2020, p 176.
[1080] Transcript 22 September 2020 p 179.
[1081] Transcript 22 September 2020, p 177-178.
[1082] Exhibit UU3, p 13, para 27; Transcript 22 September 2020, pp 180-181.

1120. Mr Maxatshwa and Mr Koloi, however, testified that the advance payment system continued thereafter, even after Mr Mokhesi joined the Department.[1083] When this was put to Mr Mokoena, his response was that he had material suppliers coming to his office after February but he told them he will not sign anything.[1084] Mr Maxatshwa however responded that he knew that the advance payments continued after this meeting because he could see the payments made on the HSS System (Mr Maxatshwa had viewing rights on the HSS).[1085] Furthermore, Mr Maxatshwa says that suppliers would still come knocking on his door and asking when the contractors were coming to collect material which had been paid for, after the meeting with the Minister.[1086] Mr Maxatshwa acknowledges that there was a delay in capturing contracts and payments on the system,

1121. Mr Mokoena testified that on their return to Bloemfontein from the meeting with the National Department of Human Settlements, Mr Zwane insisted that he continue with the advance payments.[1087] Mr Mokoena's view is that Mr Zwane had made promises to contractors that were close to him and that he was expecting kickbacks from these contractors.[1088]

1122. During oral evidence, Mr Mokoena corrected himself to say that Mr Zwane approached him about 14 days after the meeting with the Minister to tell him that the advance payments must continue.[1089] According to Mr Mokoena, this meeting ended on a sour note because Mr Mokoena said he refused to sign any further agreements to advance

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[1083] Exhibit UU2, p 39, para 117; Exhibit UU1, p 10, para 33.
[1084] Transcript 22 September 2020, p 180-181.
[1085] Transcript 23 September 2020, p 115.
[1086] Transcript 23 September 2020, p 115.
[1087] Exhibit UU3, p 14, para 28.
[1088] Exhibit UU3, p 14, para 29.
[1089] Transcript 23 September 2020, p 5-6.

money to material suppliers. Mr Zwane was unhappy with this response, but he did not mention the resignation letter again.[1090]

1123. In his third appearance before the Commission, Mr Zwane stated that he could not recall attending a meeting with the Minister in February 2011 regarding the advance payments. He had moved to the Department of Agriculture by then.[1091]

1124. It was then put to him that Mr Mokoena gave the Minister an undertaking that the advance payments would stop by end of February 2011, but when they returned to Bloemfontein Mr Zwane instructed him to continue. Mr Zwane denied this strongly, and pointed out that he left the Department in the 2nd week of February 2011, so he would not have been in the way if the Department chose to stop making advance payments.[1092]

1125. On Mr Mokoena's version, regular payments continued after the meeting with the Minister, but he did not agree to any new contract after February 2011.[1093] When the Open Water investigation report finding that payments continued was put to him, Mr Mokoena stated that he was unaware of this fact.[1094] Mr Mokoena admitted that it is possible that someone else in the Department could have authorised payments after February 2011 without his knowledge.[1095]

1126. On Mr Zwane's version, he was concerned that the figures being told to the public were different to his understanding of the progress.[1096] After meeting with officials in February 2011, a roster was drawn up for Mr Zwane to inspect and verify the numbers, but Mr Zwane could not proceed as he "had to go to another department" in March that year.[1097]

[1090] Transcript 23 September 2020, p 7.
[1091] Transcript 11 December 2020, p 88.
[1092] Transcript 11 December 2020, pp 90-91.
[1093] Transcript 22 September 2020, p 183-184.
[1094] Transcript 23 September 2020, p 4-5.
[1095] Transcript 23 September 2020, p 31.
[1096] Transcript 25 September 2020, p 156.
[1097] Transcript 25 September 2020, pp 157-158.

ACTION AND LACK OF ACTION

Consequences for Departmental Officials

1127. Following the events outlined above, certain of the officials in the Free State Department of Human Settlements were investigated and dismissed whilst other people such as Mr Zwane, were transferred to other positions. Mr Zwane was transferred to the position of MEC for Agriculture. [1098] Mr Tsoametsi was transferred to the Free State Department of Agriculture. Mr Mokoena was subsequently appointed to some position in the Mangaung Metropolitan Municipality.

Those who were not disciplined

1128. On Mr Mokoena's version, he resigned as HOD in December 2011 due to pressure he felt, particularly from Mr Magashule.[1099] According to Mr Mokoena, Mr Magashule would make promises to communities in Operation Hlasela and make allocations where the Department would not necessarily have the budget.[1100]

1129. On Mr Tsoametsi's version, he received a letter transferring him to Agriculture in December 2010, but there was already someone else in the position at the time as a result of which there was some confusion.[1101] The letter of transfer was signed by Mr Kopung Ralikontsane who was HOD of Local Government and Housing at the time,[1102] or Co-operative Governance and Traditional Affairs, where Mr Tsoametsi was DDG.[1103] Mr Tsoametsi had therefore always been in a different department from Human

[1098] Transcript 22 September 2020, p 45.
[1099] Transcript 22 September 2020, p 98.
[1100] Transcript 22 September 2020, p 99.
[1101] Transcript 28 September 2020, p 179-180.
[1102] Transcript 28 September 2020, p 182.
[1103] Transcript 28 September 2020, pp 184-185.

Settlements. Mr Tsoametsi had ostensibly been assisting the Free State Department of Human Settlements because he was waiting to be transferred at the time.[1104]

1130. Despite the fact that the APS was largely justified on the basis of Mr Tsoametsi's document, Mr Tsoametsi was never charged with misconduct. He testified at the disciplinary hearings of his colleagues, and there he also asked why he was not charged.[1105]

1131. Mr Mokoena also testified at the disciplinary hearings, but he had been moved to Mangaung Municipality by the time the hearings took place.[1106] Mr Mokhesi further confirmed that Mr Mokoena was not disciplined because he did not report to Mr Mokhesi at the time of the investigations.[1107] Mr Tsoametsi was also not charged because he was no longer in the Department.[1108]

1132. Mr Mokhesi conceded that it was strange that Messrs Tsoametsi and Mokoena were not held to account in any way.[1109] As to Mr Zwane's role in the APS, Mr Mokhesi did not see it as his role to inform the Premier thereof.[1110]

Those who were disciplined

1133. The following managers were disciplined: Mamiki Mokhele, Kaiser Maxatshwa, Kabelo Koloi, Loyiso Ndenze, Corny Twala and Nokufa Mokhaotse (deceased).[1111] Prior to being dismissed, these managers and several others were placed on suspension in 2012, before being formally charged with misconduct on 21 January 2013.[1112] The

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[1104] Transcript 28 September 2020, p 187.
[1105] Exhibit UU6, para 37-8.
[1106] Exhibit UU6, para 38; Transcript 23 September 2020, p 9.
[1107] Transcript 22 September 2020, p 30.
[1108] Transcript 22 September 2020, p 44.
[1109] Transcript 22 September 2020, p 58.
[1110] Transcript 22 September 2020, p 60.
[1111] Exhibit UU3, p 16-17, para 34.3.
[1112] Exhibit UU14 p 232, IR23 attached to the Investigator's Report is the charge sheet for these individuals.

Commission has obtained the letters of suspension, the charge sheet, transcripts from the disciplinary hearings as well as records and outcome. These are contained in a separate bundle of Disciplinary Proceedings.[1113]

1134. Mr Maxatshwa stated that he and his colleagues were "made to take the blame for the design and implementation of the Advance Payment System."[1114] Mr Maxatshwa was dismissed as a result of the finding of the disciplinary inquiry, which he maintains was unfair.[1115] The charges against these employees were based on a preliminary Open Water report to, which Mr Maxatshwa said the accused employees were denied access.[1116]

1135. According to the disciplinary records, these senior officials were dismissed for participating in the "War Room" meetings,[1117] even though it was common cause in the disciplinary proceedings that the employees charged had not participated in the decision to create and implement the plan.[1118]

1136. When the findings of the Disciplinary Committee were put to Mr Zwane during his third appearance before the Commission, Mr Zwane stated that he agreed with the finding that the act of paying on cession was introduced through the decision of himself, Mr Mokoena and Ms Dlamini (although on Mr Zwane's version it was after a decision of the executive committee).[1119] Mr Zwane admitted that it was unfair that the 5 junior officials were blamed when the accounting officer approved the scheme.[1120] Mr Zwane claims that he himself did not knowingly participate in any wrongdoing.[1121]

[1113] Exhibit UU14, p 15.
[1114] Exhibit UU2, p 3, para 5.
[1115] Exhibit UU2, p 3, para 6.
[1116] Transcript 23 September 2020, p 45.
[1117] Transcript 22 September 2020, p 55.
[1118] Transcript 22 September 2020, p 57.
[1119] Transcript 11 December 2020, p 98.
[1120] Transcript 11 December 2020, pp 99-100.
[1121] Transcript 11 December 2020, p 101.

1137. Curiously, the charge sheet alleges misconduct on the part of the six managers by alleging that they actively supported and/or irregularly ratified the process of the facilitation of advance payments to material suppliers in excess of R531 million, but it only lists 10 of the suppliers to whom advance payments were made.[1122]

Court proceedings

1138. The Free State Department of Human Settlements instituted action against several defendants in the Bloemfontein High Court under case number 4917/2013, in which case Hardware Mecca is one of the Defendants.[1123] Hardware Mecca is also the 28th respondent in an application brought by Free State Department of Human Settlements in the Bloemfontein High Court under case number A241/2016.[1124] In the latter case, the application was brought by the MEC against 106 respondents, and Mr Mokhesi signed the founding affidavit in support of the application.

1139. Mr Mokhesi, the HOD who followed Mr Mokoena, confirmed in oral evidence that he was instrumental in doing necessary investigation and research to prepare the relevant papers.[1125] Mr Mokhesi however admits that in the course of his investigations he did not question Mr Mokoena.[1126]

1140. Mr Mokhesi also confirmed that, while the application was initiated in 2013, it was only brought in 2016.[1127] The founding affidavit in this matter was signed by Mr Mokhesi in his capacity as HOD in the Free State Department of Human Settlements at the time.

[1122] Exhibit UU15 p 233-234.
[1123] Exhibit UU7, p 436, para 6.
[1124] Exhibit UU7, p 436, para 6.
[1125] Transcript 21 September 2020, p 30.
[1126] Transcript 22 September 2020, p 8.
[1127] Transcript 21 September 2020, p 35.

Mr Mokhesi confirmed that he relied on disciplinary records, findings in the disciplinary proceedings and the findings of SIU in drafting this affidavit.[1128]

1141. Mr Mokhesi further confirmed his statement that the agreements with suppliers that the Department sought to set aside were "part of a fraudulent scheme which was conceived by the department to disburse very substantial sums of money mainly to the suppliers in order to avoid the funds becoming a so-called unspent conditional allocation and therefore reverting to the National Revenue Fund."[1129] However, Mr Mokhesi then qualified his statement by saying "not everything that looks like fraud is fraud" and the purpose of the application was to recover the money.[1130]

1142. Later on in his testimony, Mr Mokhesi then conceded that representations were made to the National Department that were not true and correct in order to prevent the reallocation of funds, and the process was unlawful.[1131] Mr Mokoena conceded during oral evidence that the purpose of the plan was to ensure that money was not withheld by National Department of Human Settlements.[1132]

1143. In the judgment of Pohl AJ emanating from this case, it was found that the Free State Department of Human Settlements "conceived an illegal scheme to facilitate the advance payment of very substantial amounts of money mainly to suppliers within the fiscal year so that funds would not revert back to National Treasury Fund."[1133]

1144. Pohl AJ further found that the agreements which form the subject matter of the application were a key part of the illegal scheme. These agreements were illegal because 1. They were concluded without any proper procurement process and 2. The

[1128] Transcript 21 September 2020, p 36.
[1129] Transcript 21 September 2020, pp 38-39.
[1130] Transcript 21 September 2020, p 39.
[1131] Transcript 21 September 2020, p 48.
[1132] Transcript 21 September 2020, p 160.
[1133] Exhibit UU11, p 599 para 9.

agreements and payments under them form part of a fraudulent scheme to avoid the consequences of DORA. Mr Mokhesi confirmed in oral evidence that these findings mirrored the allegations he made in his affidavit.[1134]

1145. Mr Mokhesi said that, to his knowledge, legal action was taken against all contractors and suppliers.[1135]

Forensic Reports

Auditor-General

1146. The Auditor General found that the Department had made advance payments to contractors amounting to R481 466 806. In making such findings, the following observations were made:

> "12.These payments were made to material suppliers with which the contractors entered into session (sic) agreements and significant uncertainty exists over the recovery of the balance of R300 018 518 at year-end. The uncertainty originates for the fact that most of the contractors would not be able to complete their projects or refund the advances to the department if anything happens to the material supplier."
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> ...
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> 17. Furthermore, as reported in paragraph 12, money spent on houses resulted in fruitless and wasteful expenditure. Houses paid for amounting to R597 364 could not be physically verified, while an amount of R217 399 was paid for housing units not completed.
>
> 18. As also indicated in paragraph 12, there is an uncertainty whether an amount of R300 018 518 would result in the building of houses." [1136]

[1134] Transcript 21 September 2020, p 53.
[1135] Transcript 22 September 2020, p 76.
[1136] Exhibit MMM1 p 354, paras 12, 17 and 18.

Open Water Investigations

1147. According to Mr Mokhesi, it was extremely difficult to examine every contract after the fact so the Department appointed investigators.[1137]

1148. The Free State Department of Human Settlements approached Open Water Advanced Risk Solutions (Pty) Ltd (Open Water) in 2012 to conduct forensic investigations into its housing contracts. The Service Level Agreement was signed on 19 June 2012, with the Free State Department of Human Settlements being represented by Mr Mokhesi[1138].

1149. The second draft of the Open Water report is included in bundle FS15 from p441, and is dated 14 September 2015.

1150. The report is extensive, and seems to cover various matters in the Department over a number of years. The following finding appears to be of significance:

> "Cessions signed during 2010/2011. During this financial year material sessions (sic) were signed between contractors and material suppliers. This created overpayments as the full contract amount and material cost were paid for the same site. The claim would be processed and negative payments made against the beneficiary and milestone where the overpayment took place."[1139]

> "The cession agreements resulted in bulk payments being made to Material Suppliers without goods or services being supplied and required manipulation of several administrative, financial and procurement processes."[1140]

[1137] Transcript 21 September 2020, p 69.
[1138] Exhibit UU13, p 257 – 264. IR25 attached to the Investigator's Report.
[1139] Exhibit UU12, p 227 Open Waters Report.
[1140] Exhibit UU13, p 311 Open Waters Report para 4.5.4.2.

Special Investigating Unit (SIU)

1151. SIU conducted an investigation into the irregularities in respect of advance payments made during the 2010/2011 and 2011/2012 financial years by Free State Department of Human Settlements, and published their report in 2015.[1141] According to Mr Mokhesi, SIU commenced their investigation in 2013/2014, and struggled to get information.[1142]

1152. Most notably, the SIU found as follows:

1152.1. There was R831 836 048.51 in advance payments made to suppliers by the Department during the 2010/2011 and 2011/2012 financial years, and this constituted unauthorised expenditure. These advance payments were made in contravention of sections 15(2), 16(2)(c) and 33(1)(a) of DORA.[1143]

1152.2. The Accounting Officer acceded to the cancellation of Tender LGHB01/10/11 by the Chief Finance Officer on 30 July 2010 and entered into agreements with service providers in contravention of the provisions of section 217 of the Constitution and section 38(1)(a)(iii) of the PFMA.[1144]

1152.3. Mr Mokoena as the Accounting Officer had committed a criminal offence in terms of s86(1) of the PFMA for the contravention of sections 38(1)(a)(iii), 38(1)(c)(ii), 38(1)(g) and 38(1)(i) of the PFMA, and recommended that the matter be referred to the NPA.[1145]

[1141] Appearing at Exhibit UU13 p 215ff.
[1142] Transcript 22 September 2020, pp 90-91.
[1143] Exhibit UU13 p 255 at Para 8.1.
[1144] Exhibit UU13 p 255 at Para 8.2.
[1145] Exhibit UU13 p 248 at Para 8.4.2.

NURCHA

1153. The Free State Department of Human Settlements approached NURCHA Finance Company (Pty) Ltd (NURCHA) to investigate and analyse the Free State's housing projects and the performance of contractors. The Service Level Agreement,[1146] signed on 4 April 2011 with the Free State Department of Human Settlements represented by Mr Mokoena.

1154. According to Mr Mokoena, NURCHA was appointed because the Department did not have monitoring capacity. After the SLA was signed they started working very closely in the Department's "War Room".[1147]

1155. The NURCHA Report dated 2 May 2013[1148] categorises contractors according to their performance. Of the listed categories, Category C represents contractors who have performed poorly, while Category D represents contractors who have vacated their sites without completing their work.

1156. Notable inclusions in the Category C table include Friedshelf/Ubuhlebethu JV, Jore Construction, Raloto CC, Rob's Construction and Thotelo Bogolo.

1157. Notable contractors included in the Category D table include Mob Business, Allitori, Koena Property Developers (Allitory), Thotela Bogolo Enterprise and Koena Construction.

[1146] Exhibit UU15, p 265 – 346, IR26 attached to the Investigator's Report.
[1147] Transcript 22 September 2020, p174.
[1148] Exhibit UU13, p 195-196.

1158. Mr Mokhesi confirmed in his oral evidence that NURCHA had also found that some of the material suppliers had been advancing money to building contractors from the advance payments received.[1149]

Outcome

Houses built and monies paid

1159. According to Mr Mokhesi, unlawful transfers made by the Department amounted to around R631 million.[1150] Mr Mokoena confirms that the Department spent around R500 million between November 2010 and February 2011 in pursuance of the plan.[1151]

1160. Mr Mokoena's assessment is that despite the large payments for materials, no houses were completed. There were many foundations in different areas in the province, but the province didn't achieve anything in terms of completed projects, and paying for officials to do inspections was costly.[1152]

1161. However, according to Mr Maxatshwa, although the payments were made in advance, materials were never supplied, to the detriment and prejudice of the Free State Department of Human Settlements and the housing beneficiaries.[1153]

1162. According to Mr Mokhesi, substantial amounts were paid out often without invoice or with a patently false invoice, and these were not certified.[1154]

[1149] Transcript 22 September 2020, p70.
[1150] Exhibit UU11, p 113 para 74 Mr Mokhesi affidavit dated 21 December 2016; Transcript 21 September 2020, p 172.
[1151] Transcript 22 September 2020, p160.
[1152] Transcript 22 September 2020, p171.
[1153] Exhibit UU2, p 29, para 110.
[1154] Transcript 21 September 2020, pp 176-177.

1163. Although only a certain percentage, which he does not recall, Mr Zwane confirmed overseeing the construction of houses in December 2010 and that he opened around 50 completed houses during this time.[1155] During his second appearance, Mr Zwane was adamant that the purpose of the APS was not just to ensure that the DORA allocation was spent. According to him, his priority was to get houses built, not just to spend the money, and if the aim was to inflate expenditure, then he would not have forfeited his holiday.[1156]

1164. Mr Zwane referred the Commission to a media statement from January 2011 issued by the Free State Department of Human Settlements.[1157] The media statement states that between 400-1250 houses were completed – far more than the 50 houses estimated by Mr Zwane.[1158] Mr Zwane confessed in oral testimony that he did not know how many houses were completed by the time they stopped in January 2011,[1159] and that the media statement would have been approved by the HOD in terms of the PFMA.[1160] Mr Zwane further accepted that the media statement from the Department lacks objectivity.[1161] Furthermore, the press statement indicates that the Department were on track to build a number of houses which is only around half of the allocation.[1162] This press statement was released despite the letter from the Director General on 12 January 2011 which indicated that the Department would not receive their allocations for February and March that year.[1163]

1165. IR29 attached to the Investigator's Report shows that, as at 23 April 2012, a very large portion of the advance payments had not been converted to certified progress. Of

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[1155] Exhibit UU9, p 36, para 93; Transcript 25 September 2020, p 125.
[1156] Transcript 13 October 2020, pp 101-102.
[1157] Transcript 25 September 2020, p 126.
[1158] Transcript 25 September 2020, p 133.
[1159] Transcript 25 September 2020, p 137 and p 153.
[1160] Transcript 25 September 2020, p 140.
[1161] Transcript 25 September 2020, p 142.
[1162] Transcript 25 September 2020, p 146.
[1163] Transcript 25 September 2020, pp 148-149.

particular note, this document shows that Rob's Bricks has received R7 million, while only R1,922,922,52 or 27.5% of the value had been converted into certified progress[1164].

1166. Similarly, Dumansi Trading CC had received R77,320,286.94, while only 54.9% of the value had been converted into certified progress.

1167. Rich Reward (Pty) Ltd had received R72,876,947.95 while only 41.7% had been converted into certified progress, and Hardware Mecca (Pty) Ltd had received R 46,237,855.48 while only 56.5% had been converted into certified progress.

1168. Overall, the Department had paid R531,552,897.22 to suppliers, while only 64.8% of this had been converted to certified progress.

1169. Some examples from the NURCHA Report of 2 May 2013 show that Mob Business had left the site with 301 of 400 units completed in Bloemfontein, Allitori had left the site with 80 of 135 units completed in Senekal, Koena Property Developers had left the site with only 200 of 500 units completed, while Koena Construction had left the site in Warden with none of its 94 units completed. Contracts with Makana Women Construction for over 600 units had been terminated without replacement contractors being appointed.

1170. The Department obtained a quotation from Mafuri Infrastructure (Pty) Ltd[1165] which indicates the cost to complete work in 2013 which was started in Heilbron by Rob's Investments.

1171. Mr Mokhesi confirmed in oral testimony that by 2016 not all houses were built.[1166] Mokhesi confirms that over half a billion rand was spent before any work had been

[1164] IR29 to the Investigator's Report.
[1165] Exhibit UU15, p 419 IR30 attached to the Investigator's Report.
[1166] Transcript 21 September 2020, p 70.

done,[1167] and his best estimate at the time was that the loss to the Department was R400 866 000.[1168]

1172. Therefore, some houses were built, and the Department obtained some value for the money spent. However, Mr Mokhesi confirmed in oral testimony that a further 8000 houses could have been built for the amount of money lost in this year.[1169]

Monies recovered

1173. A total of R631,447,607.19 of some 22 defendants had been reclaimed by the Department. Rob's Bricks is not on the list.[1170]

1174. The Commission does not have information on how much has actually been recovered from the contractors as a result of these proceedings.

1175. According to Mr Mokhesi, there are instances where some contractors went into liquidation or were sequestrated. Mr Mokhesi thinks it unlikely that the Free State Department of Human Settlements will recover much from the contractors.[1171]

1176. Mr Mokhesi confirmed the Free State Department of Human Settlements has not sued officials in the Department who may have caused the loss.[1172]

Beneficiaries

1177. From the information gathered, it appears that a number of material suppliers and building contractors may have received payments from the Free State Department of

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[1167] Transcript 21 September 2020, p 72.
[1168] Transcript 21 September 2020 p 71.
[1169] Transcript 21 September 2020, p 77.
[1170] Exhibit UU15 p 420-422 IR31 attached to the Investigator's Report at FS20 423-425 and NM2 of Mr Mokhesi's affidavit.
[1171] Transcript 22 September 2020, p 77.
[1172] Transcript 22 September 2020, p 79.

Human Settlements without delivering materials or having completed houses. As such, these contractors can be seen to have been the beneficiaries of the scheme.

1178. Some of the material suppliers and building contractor beneficiaries have also been alleged to have been linked to politically exposed persons, particularly Mr Zwane and Mr Magashule. These allegations are summarised as follows:

Frans Mokoena and Koena Property Developers

1179. It is alleged that Mr France Mokoena (Mr Mokoena) from Koena Property Developers is very close to Mr Zwane. Both Mr Mokoena and Mr Zwane are from Phumelela.[1173] Koena Property Developers also received a contract (unrelated to this matter) from Free State Department of Human Settlements to construct 500 houses in Matjabeng.[1174]

1180. Mr Tsoametsi's family trust (Kopana Family Trust) once "bought" a contract from Koena (see more below). What this means is that Kopana Family Trust acted as a sub-contractor to build 500 RDP houses for Koena, and Koena would make a profit of R2,000 per house.[1175] Mr Tsoametsi's trust only built 20-30 houses out of the possible 500.[1176]

1181. Mr Tsoametsi and Mr Mokoena are both members of the ANC. Mr Tsoametsi never saw the above transaction as a conflict of interest.[1177]

Rachelle Els and Thutela Bogolo

1182. Mr Mokoena also believes that Rachelle Els (Ms Els), who received a number of contracts to build houses in Kroonstad was close to Mr Magashule. This is because Mr

[1173] Exhibit UU3, p 14, para 29.
[1174] Exhibit UU6, 431, para 39.2.
[1175] Exhibit UU6, 431, para 39.4.
[1176] Exhibit UU6, 431, para 39.5.
[1177] Exhibit UU6, 431, para 39.3 and 39.6.

Zwane used to tell Mr Mokoena that Mr Magashule said that they should appoint Ms Els and that her claims should be expedited.[1178]

1183. When Mr Mokoena was asked whether he knew Ms Els, he confirmed that he knew that she built houses for the Free State Department of Human Settlements. He also alleged that Mr Zwane told him to ensure that Ms Els gets contracts to build houses in Kroonstad because the Premier has instructed so, and the Premier also instructs that her claims be expedited.[1179]

1184. According to Commission investigators, Ms Els is an active member of Thutela Bogolo Trading Enterprise CC and it has been trading since 2006.[1180]

Blacky Seoe and Rob's Bricks / Rob's Contraction / Rob's Investment Holdings

1185. Mr Blacky Seoe (Mr Seoe) of Rob's Bricks/Investments/Properties is also alleged to be connected to Mr Magashule in that they were both directors of Sambal Investments.[1181]

1186. According to Commission Investigators, Mr Seoe was an active director of Rob's Investment Holdings and Rob's Bricks at the time.[1182] According to the investigators, "Rob's Construction" was a trading name for Rob's Investment Holdings (Pty) Ltd, and Mr Seoe was sole director at the time.[1183]

1187. During his third appearance before the Commission, the connection between Rob's Construction / Investment Holdings / Bricks was put to Mr Zwane. Mr Zwane admitted he knew Mr Seoe, but did not know his connection to Rob's Investment Holdings.[1184] It

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[1178] Exhibit UU3, p 17, para 35.
[1179] Transcript 23 September 2020, p 9-10.
[1180] Exhibit UU17, p 764 para 2.3 Supplementary Investigator's Report.
[1181] Exhibit UU11 p 386-387 Mr Seoe interview transcript.
[1182] Exhibit UU17 p 760 para 3.3 Supplementary Investigator's Report.
[1183] Exhibit UU17 p 760 para 3.10 Supplementary Investigator's Report.
[1184] Transcript 11 December 2020, p111.

was further put to him that Rob's did not go through the tender process. It was also put to him that Mr Seoe and Mr Magashule were co-directors of Sambal Investments. Mr Zwane claimed he did not know this.[1185]

1188. It was further put to Mr Zwane that Rob's Investment Holdings (represented by Mr Kenny Mtwentula "Mr Mtwentula") made a payment to SedTrade, and the Premier's Office (Ms Cholota) was sent proof of payment.[1186] Mr Zwane responded saying he knows nothing about that, and that he does not know Mr Mtwentula.[1187] Mr Mtwentula, on the other hand, confirmed that he made the payment, and that the late Mr Ramokhula Seoe (son of Mr Blacky Seoe) had provided him with Ms Cholota's e-mail address.[1188]

Allocations made to mentioned contractors

1189. Allocations were made as follows[1189]:

1189.1. Koena Properties (represented by Mr France Oupa Mokoena) was contracted to build 1400 houses.

1189.2. Raloto 763 CC (represented by Ms Esther Elizabeth Mokoena) was contracted to build 500 houses.

1189.3. Alinta Trading (Pty) Ltd (represented by Mr Dipuo Daphne Chipfupa) were contracted to build 100 houses.

1190. Furthermore, the under-mentioned contractors received the following allocations[1190]:

[1185] Transcript 11 December 2020, p 113.
[1186] Exhibit UU4, p 16-17, para 16.3.
[1187] Transcript 11 December 2020, p 114. (Transcript 11 December 2020, p 127).
[1188] Exhibit UU4, p 16-17, para 16.3.
[1189] Exhibit UU15, p 423-433 IR32 to the Investigator's Report.
[1190] Exhibit UU15 p 434-436 IR33 to the Investigator's Report.

1190.1. Rob's Construction was allocated 300 houses in QwaQwa and 100 houses in Kestel.

1190.2. Tuthela Bogolo was allocated 350 houses in Koppies.

1190.3. Koena Property Developers was allocated 500 houses in Sasolburg.

1190.4. Friedshelf was allocated 500 houses in Parys.

1190.5. Kentha Construction was allocated 200 houses in Boshoff and Kentha Developers was allocated 350 houses in Botshabelo (See Free State Bursary Scheme evidence).

1190.6. Raloto CC was allocated 350 houses in Petrus Steyn.

1190.7. Alinta was allocated 100 houses in Wesselbron.

1191. It was put to Mr Zwane that the list has been analysed, and Open Water confirms that the 106 list contained contractors who had not bid and some who had been disqualified in the tender process. Examples include Thuthela Bogolo and Rob's Construction. In response, Mr Zwane denied knowledge of these entities, as well as Allitory, Koena and Raloto as mentioned by Mr Mokoena.[1191] Mr Zwane further denies instructing Mr Mokoena to expedite payments to these companies.[1192]

1192. Mr Zwane however admitted that he has met Ms Els. It was put to him that on Mr Mokoena's version, Mr Zwane instructed him to expedite Ms Els' claims on Mr Magashule's instruction. Mr Zwane claimed that Mr Mokoena is closer to Mr Magashule

[1191] Transcript 11 December 2020, pp 107-109.
[1192] Transcript 11 December 2020, p 109.

than he is.[1193] Mr Zwane stated that he did not have anything to do with Ms Els nor Mr Seoe, and he did not take any instruction from anyone.[1194]

1193. At the end of the day there has been a total failure of proper administration in the Free State Human Settlements Department.

1194. That Mr Zwane should ever have been selected to serve in the position of MEC in a provincial department of such importance is both surprising and unfortunate. When he gave his evidence his evidence one could just tell that he had no real intention of understanding his role, learning his duties, becoming informed of the full nature of his responsibilities. He was unashamed of his ignorance and brazen in his determination to allocate full responsibilities to those educated persons by whom he believed himself to be surrounded.

1195. Some of the personnel employed in senior positions in the Free State Department of Human Settlements at the time of this project held qualifications which should have enabled competency to emerge. Instead, from the top downwards, from the Head of Department to those Deputy Directors General who gave evidence, there has been no indication of professionalism.

1196. The Head of the Department failed in every respect. From the initial failure to build houses and expend funds, the abandonment of the tender process, the introduction and then implementation of the Advance Payment Scheme, his performance was abysmal. He was the senior civil servant who could not give direction to his Department. He did not even try to take any of several available steps to avert disaster. He could have contacted the Director General in the National Department, he could have contacted

[1193] Transcript 11 December 2020, p 115.
[1194] Transcript 11 December 2020, p 134.

National Treasury, and he could have sought and obtained a written legal opinion but he did not.

1196.1. The substratum to all evidence before the Commission has been the announcement by the Premier of the Free State Province that the Department of Human Settlements would build bigger houses which decision resulted in increased costs of building, adjustments to Departmental budgets, rendering nugatory the specifications of the tenders which had been advertised and in respect of which applications by contractors had been made. The result was that the work of the Bid Evaluation and Bid Adjudication Committees could not properly proceed as, *inter alia*, the tenders had expired.

1196.2. The MEC and the officials within the Department appeared incapable of taking the decision to publicly extend the validity of the period of the tenders or of the tenders themselves, of informing the National Department and the Minister of the situation and seeking agreement for an extension of the time period within which funds allocated to the Free State Department could be expended. The MEC and the Head of Department and all officials appear to have been taken by surprise by the announcement of the Premier and then flummoxed by the response of the contractors.

1196.3. Absent strong leadership by the MEC and firm management by the HOD, the process of open and public tenders, creation of a properly assessed database and allocation of contracts to qualified and experienced contractors was simply abandoned. Instead, a process was created of a database of disqualified, non-compliant, incompetent entities was utilized to implement the advance payment scheme.

1196.4. Responsibility for the conception of the advance payment scheme must lie with both the political head of the Department, the MEC, Mr Zwane, and the administrative head of the Department, the HOD, Mr Mokoena.

1196.5. Mr Zwane claims total ignorance of procedures and process and reliance upon others for all functions entrusted to himself as MEC. He exhibited no shame or embarrassment in presenting himself to the Commission as a person ignorant of the basic responsibilities of an MEC. Mr Mokoena claimed subservience to the will of the MEC, Mr Zwane, and inability to take management responsibility or action when appropriate.

1197. Both Mr Zwane and Mr Mokoena were incompetent and showed themselves to be utterly without concern for relevant legislative and policy provisions as well as fundamental management practices, as further supported by the following conclusions:

1197.1. there was a marked absence of accurate minutes of meetings, of clear written instructions, and documentary record keeping.

1197.2. during the 2010/2011 financial year, contractors were appointed without a prior and lawful procurement process having taken place.

1197.3. there was a wholly inadequate number of houses built or completed.

1197.4. funds were solicited from National Treasury based on intentional misrepresentations made to it.

1197.5. there was ultimately a significant loss and wastage of public funds to the detriment of the poor sector of the Free State community meant to benefit from those funds.

1197.6. It bears mention that there was no timeous intervention on the part of the authorities of the Free State government including the Premier to prevent or curtail such misappropriation and wastage of funds. There should have been an intervention.

1197.7. there appears to have been an absence of complete accountability, particularly on the part of senior office bearers and senior officials, especially Messrs Zwane and Mokoena.

1198. Mr Venter confirmed during an interview that from the outset, this was a fraudulent scheme.[1195] Mr Mokhesi confirmed his view in oral testimony that the scheme was a fraud on the public and the state, and the purpose was to defraud the fiscus.[1196] This is consistent with Mr Tsoametsi's testimony where he said that the whole thing was happening because the Department did not want to have money taken away.[1197]

1199. As to the specifics of the fraud, Mr Mokhesi accepts that the cession agreements were used as part of the documentation to create the farce of legitimacy to make the payments look regular (as per his affidavit). Mr Mokhesi confirms that the claim the agreements purport to cede would only have arisen when the milestones were completed – which had not occurred.[1198]

(a) **Pressure exerted on officials**

1200. On Mr Mokoena's version, he felt as though he was in a trap forced to do something illegal, and that he didn't have the power to resist the plan because he was the only voice against it. Mr Mokoena expressed the view that many individuals have been in

[1195] Exhibit UU11, p 599 Mr Venter transcript.
[1196] Transcript 22 September 2020, p 86.
[1197] Transcript 28 September 2020, p 205.
[1198] Transcript 22 September 2020, p 66.

this type of situation, and if there was some form of intervention that could be requested by them or on their behalf, South Africa could be saved a lot of money.[1199] He also suggested that there needs to be a better whistleblowing programme in place.[1200] Mr Mokoena said he felt strangled and that the MEC was meddling in areas of work that belonged to him as HOD.[1201]

1201. Mr Mokoena admitted that in hindsight it would have been better to forfeit the money to other provinces so that houses could have been built, because the Free State had in the past also benefited from money forfeited by other provinces,[1202] but this was not the decision that was ultimately made.

A creative interpretation is taken of procurement prescripts

1202. When it was put to Mr Zwane that we know with hindsight that the APS was illegal, Mr Zwane responded that advance payment for contractors is not illegal. He referred to Treasury Regulations para 8.2.3 and the PFMA, and said that advance payments are allowed if there is a contract specifically indicating an advance payment. When it was put to him that there was no such contract, Mr Zwane's response was that it would be unfair of the Commission to expect him as a layman politician to take responsibility when there is an accounting officer who signed the document. [1203]

1203. In his third appearance before the Commission it was put to Mr Zwane that Mr Sisha had confirmed in the disciplinary proceedings that s50 of DORA and the Treasury Regulations prohibit advance payments for goods prior to delivery and that fully informed officials and MEC should know that. Mr Zwane responded by saying that he

[1199] Transcript 23 September 2020, p 28.
[1200] Transcript 23 September 2020, p 29.
[1201] Transcript 23 September 2020, p 37-38.
[1202] Transcript 22 September 2020, p 168.
[1203] Transcript 13 October 2020, pp 119-120.

believed that it was not illegal if there was a clear contract, but loopholes made it risky.[1204]

1204. Regarding the use of databases in procurement: In response to Mr Mokoena's second affidavit, Mr Zwane also said that he is aware that time pressure is not sufficient for departure from normal procurement processes. Mr Zwane confirmed that he is aware that the Treasury Regulations specify that for contracts over R500,000 presence on a database is insufficient and there must be a competitive bidding process.[1205] Mr Zwane further said that he accepts that at particular times there were processes that were not followed properly.[1206]

Lack of accountability between the MEC and the accounting officer

1205. Mr Zwane admitted that he performed oversight over the accounting officer. I asked him how he could perform oversight over the accounting officer if he deferred to the accounting officer on issues of legality.[1207] Mr Zwane's response was that similarly, if he were to make sure that a 3rd party confirms the work of the accounting officer every time he would be accused of wasting government money. The HOD must provide him with reports so that he can verify the work done.[1208]

1206. When I asked Mr Zwane if he believed he possessed what was required to perform oversight over the HOD of Human Settlements at the time, his response was that he was adequately equipped and he gave it his best shot.[1209]

[1204] Transcript 11 December 2020, pp 95-96.
[1205] Transcript 11 December 2020, p 123.
[1206] Transcript 11 December 2020, p 125.
[1207] Transcript 13 October 2020, pp 119-120.
[1208] Transcript 13 October 2020, p 121.
[1209] Transcript 13 October 2020, p 122-123.

CONCLUSION

1207. There is only one way to describe the Free State R1 Billion Housing Project of the 2010/2011 Financial Year: dismal failure – a debacle! By the end of that financial year, after the Free State Department of Human Settlement had spent more than R500 Million, there were either no houses that had been built for the poor people for whom the Provincial Department was required to build low cost houses or there were so few houses built compared to those that were supposed to have been built that they are not worth mentioning.

1208. It seems to me that this whole debacle occurred as a result of a number of factors. First, the Premier, Mr Ace Magashule, announced in February 2010 that in the Free State bigger RDP houses would be built in circumstances where it seems there may not have been proper consultation with the Department of Human Settlements with the result that contractors who had been appointed to build 40^2 low-cost RDP houses at a certain price were now required to build bigger houses for the same price which was a difficulty for them. This led to the initiation of a tender process in April 2010 that was abandoned on 28 July 2010 – firstly because officials incomprehensively failed to keep an eye on the expiry date of the tender validity period and secondly because they either did not know that they could restart the tender process or because they knew but it was not convenient for them to do so and, once again, incomprehensively, they thought it was a good idea to have no competitive process and simply to have a list of contractors – irrespective of whether or not they were qualified and irrespective of whether or not they had ever built just a single house before – from which contractors who would build the houses would be appointed. They and their MEC, Mr Zwane, decided that there should be an advance payment scheme implemented – which they implemented even when they had been advised that it was illegal.

1209. Mr Zwane testified in effect that he informed the Provincial Government Executive Council what the Provincial Department of Human Settlement was doing. This included him taking a certain list of contractors to the Executive Council so that it could approve the list which he said they did.

1210. Mr Mosebenzi Zwane failed dismally to provide proper leadership in the Provincial Department of Human Settlements in 2010 with regard to the R1 Billion Housing Project and the Premier should have made sure that there were consequences for Mr Zwane. However, the Premier simply shifted him to another portfolio where he continued to occupy the position of MEC. After such dismal failure, Mr Mosebenzi Zwane should not have simply been shifted to another Department as an MEC. The Premier should not have allowed him to continue as MEC.

1211. As it turned out, in the portfolio to which the Premier shifted Mr Zwane – which was the Department of Agriculture and Rural Development – Mr Zwane continued his dismal performance which resulted in the Estina / Vrede Dairy Farm debacle that is now well – known and which is to be dealt with in a later part of the Commission's Report. Even after that further debacle, the Premier still did not ensure that there were consequences for Mr Zwane. The Premier, Mr Ace Magashule, must have been aware of what was going on in the Provincial Department of Human Settlements in 2010 to early 2011 and yet he did not make any interventions to ensure that the disaster that ultimately happened did not happen. It is totally unacceptable that the Premier made no effective intervention. One expects that he would have been receiving monthly written reports from Mr Zwane - as he was supposed to have been receiving from all other MECs so as to keep him updated about what was happening in the various departments of the Provincial Government. He is supposed to have requested such reports from his MECs so that he could see whether each one of his MECs was doing their jobs. If he did not

call for such reports, he risked finding out about problems in the various departments when it was too late to do anything.

1212. If the Premier did not know what was happening in the Provincial Department of Human Settlements, this would mean that he did not monitor and supervise his MEC – Mr Zwane, so as to be able to intervene when his MEC was failing. That would be very serious as it would mean a serious dereliction of duty on his part because effectively a Premier occupies the role of a supervisor in relation to his or her MECs. The Premier should have been held accountable for his role in failing to take appropriate and effective measures which would have ensured that Mr Zwane and his Department performed their jobs properly and ensured that the houses the Department was required to build in the 2010/2011 financial year were built and that taxpayers' money was not wasted. It would seem that Mr Magashule was not held accountable at all nor was Mr Zwane.

1213. A Premier is elected by members of the Provincial Legislature. He may also be removed from office by the same body. However, since in respect of the National Assembly the African National Congress is known to have adopted the attitude that ANC members of the National Assembly should never vote with opposition parties when there is a motion of no confidence in the President, the ANC would have adopted the same attitude if in the Free State Provincial Legislature an opposition party had tabled a motion of no confidence in the Premier, Mr Ace Magashule. It is, therefore, realistic to say that there would have been no chance of Mr Ace Magashule being removed as Premier through a vote of no confidence.

1214. The only organisation that would have been able to remove Mr Magashule as Premier on the grounds that he had failed to show leadership as Premier and to monitor and supervise effectively the performance of Mr Zwane, would have been that of the African

National Congress which was responsible for his election by the majority of members of the Legislature as Premier. However, there is no indication whatsoever that the African National Congress was itself effectively monitoring and supervising Mr Magashule's performance as the Premier because, despite not only the Free State R1 Billion Housing Project Debacle but also despite the Free State Asbestos Project Debacle and the Vrede Dairy Farm Debacle all which were projects meant to assist the poorest of the poor in the Free State – which were all dismal failures – the ANC allowed Mr Magashule to serve two full terms as Premier of the Free State.

1215. This suggests that the ANC and its leadership were either not monitoring and supervising the performance of its premiers or at least, the Premier of the Free State which should be astonishing or they were monitoring and supervising their or his performance and they were aware of all these failures in service delivery but, for one reason or another, decided not to intervene. It may well be that the ANC simply did not have any mechanisms for monitoring and supervising its Premiers. Of course, there is not much point in monitoring and supervising anybody's performance if, due to certain internal dynamics, the party would not have been able to take any action against the Premier.

1216. If the ANC had monitored and supervised the performance of the Free State Provincial Government in general and the Premier in particular during the 2010/2011 financial year – which is when the Free State R1 Billion Housing Project Debacle happened where more than R500m was paid out by the Free State Department of Human Settlements and yet there were no houses which it could be said the money had been used to build for poor people – either Mr Ace Magashule would not have remained Premier or Mr Zwane would have been fired as MEC and would not have been transferred to the position of MEC for Agriculture and Rural Development where his new Department created the Vrede Dairy Farm Project Debacle. The ANC did not take any effective

measures to deal with the dismal failure to deliver services to the poor in the Free State and the hundreds of millions of Rands that were thrown down the drain by its own Provincial Government and its own deployees in the Free State.

1217. Why is it necessary to focus on the ANC in this regard? It is necessary because effectively it is the ANC which gave the people of the Free State Mr Zwane and it is the ANC which gave them the Premier who failed to intervene when Mr Zwane and his Department wasted more than R500m of taxpayer's money which was meant to be used to build low-cost houses for poor people in the Free State. It is also necessary to focus on the ANC because it is the ANC which would have prevented the Provincial Legislature from removing the Free State Premier even if some members of the Legislature would have thought of tabling a motion of no confidence in him. In these circumstances it is justified to focus on the role of the ANC in the failures of the Free State Provincial Government in delivering services to the people of that province and in failing to use taxpayer's money properly.

Recommendations

1218. It is recommended that law enforcement agencies should conduct such further investigations as may be necessary with a view to a possible prosecution by the National Prosecuting Authority of Mr Moses Mpho "Gift" Mokoena who was the Head of the Department of Human Settlements in the Free State in 2010 and early in 2011 for a possible contravention of sections 38(1)(a)(iii), (b), (c)(ii) and (g) of the Public Finance Management Act 1 of 1999 as amended arising out of the abandonment of the competitive tender process and the decision to implement and the actual implementation of the advance payment scheme.

1219. Section 38 of the Public Finance Management Act provides:

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

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

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

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

(c) must take effective and appropriate steps to—

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

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

1220. Section 86 of the PFMA provides:

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

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

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

1221. To the extent that money paid out by the Free State Department of Human Settlements for which the Department did not receive any value or that was paid out unlawfully in the implementation of the advance payment scheme has not been recovered, it is

recommended that all steps that may lawfully be taken to recover such monies be taken against, among others, Mr Moses Mpho "Gift" Mokoena and Mr Mosebenzi Zwane for their respective roles in the approval and implementation of the advance payment scheme.

1222. It is recommended that the law enforcement agencies should conduct such further investigations as may be necessary to enable the National Prosecuting Authority to determine whether it should not charge Mr Moses Mpho "Gift" Mokoena, former Head of the Free State Department of Human Settlements, Mr Mosebenzi Zwane and other officials in the Free State Department of Human Settlements with fraud arising out of the misrepresentation on which the advance payment scheme was based with regard to the number of houses that that Department said it could build between November/December 2010 and the end of March 2011 which was known to the Department not to be true and not to be achievable but was done in order to prevent the National Department of Human Settlements from taking part of their allocated funds and giving them to better performing provinces.